1909.
May 11.

IN THE PRIVY COUNCIL.

On appeal from the Supreme Court of Ceylon.

Present: Lord Macnaghten, Lord Atkinson, Lord Collins, and Sir Arthur Wilson.

COREA *v.* PEIRIS.

D. C., Kurunegala, 2,740.

Malicious prosecution—Requisites of proof—Charge based on information—Belief in the truth of the charge—Conduct of a reasonable man of ordinary prudence—Animus injuriæ—*Reasonable and probable cause—Burden of proof—Competency of counsel to give evidence on behalf of his client—Making out a new case on the hearing in review—Roman-Dutch Law—English Law.*

The principles of the Roman-Dutch Law and the English Law on the subject of malicious prosecution are practically identical, and the onus of proving the existence of *animus injuriæ* or malice rests on the plaintiff under both systems of law.

Where a person makes a criminal charge against another on information received by him from others, the motives of his informants, or the truth in fact of the story they tell, are to a great extent beside the point. The crucial questions for consideration are: Did the prosecutor believe the story upon which he acted? Was his conduct in believing it, and acting on it, that of a reasonable man of ordinary prudence? Had he any indirect motive in making the charge?

An advocate is competent to give evidence on behalf of the client for whom he appears.

A party to a suit should not be allowed to make out a new case on the hearing in review.

APPEAL by the plaintiff from the judgments of the Supreme Court reported in *9 N. L. R. 276* and *10 N. L. R. 321*, where the facts are fully set out.

Messrs. De Gruyther, K.C., R. W. Lee, and *E. W. Perera*, for the plaintiff, appellant.

Messrs. Simon, K.C., Dornhorst (*K.C.*, of the Ceylon Bar), *James Peiris*, and *Geoffrey Lawrence*, for the defendant, respondent.

May 11, 1909. LORD ATKINSON—

This is an appeal from a judgment of the Supreme Court of Ceylon (in review) dated October 2, 1907, affirming its judgment on appeal dated August 27, 1906, whereby a judgment pronounced by the District Court of Kurunegala on April 20, 1906, in the plaintiff's favour was reversed.

1909.
May 11.
LORD ATKINSON.

The action, which was instituted by the appellant in the District Court, was one for malicious prosecution on a charge of criminal trespass and theft.

As their Lordships understand the judgment appealed from, the Supreme Court held that a prosecution instituted without malice, and with reasonable and probable cause, cannot, under the Roman-Dutch Law, be held to amount to an act of aggression; that an *animus injuriæ* in the prosecutor cannot, therefore, be inferred from the mere fact that the prosecution has failed and the accused been acquitted; that the burden of proving the existence of this *animus injuriæ* (*i.e.*, malice) rests, under the Roman-Dutch Law as under the English Law, on the plaintiff in such an action; and that the principles of the two systems of law on the subject are practically identical. The various authorities to which their Lordships have been referred fully sustain, in their opinion, the several conclusions at which the Supreme Court has arrived on these points.

The appellant and respondent have conflicting claims to an undivided half of certain land called Madugasagare, situate in the above-mentioned district. The respondent claims as the assignee of the donee of a lady named Gunemal Etana, and the appellant as the assignee of a subsequent donee of the same lady, she having revoked her first deed of gift and made a second. The appellant is an advocate of the Supreme Court of Ceylon. He resides at Chilaw in that Island, and practises his profession in the District Court which sits there. He is a member of a respectable family, and is possessed of considerable lands in the neighbourhood of Chilaw. Notwithstanding this, he has, as the District Judge finds, appeared three times in a Criminal Court of Justice charged with criminal trespass. In one of these cases he made countercharges against his accuser, and both charges were withdrawn. In the two others the charges were dismissed. In the first-mentioned instance the charge was made by one Usubu Lebbe, acting on behalf of the respondent, in respect of an alleged forcible trespass on some other land of the respondent situate in the same district as that in which Madugasagare is situate. The prosecution was withdrawn on the terms that the appellant should bring an action in a Civil Court to try, as between him and the respondent, the question of title to the lands, in default of which the respondent was to be at liberty to institute fresh criminal proceedings. The appellant accordingly instituted a suit apparently for that purpose, not, however, in the Court of the district in which the lands were situate, which would have had jurisdiction to entertain the suit, nor yet in the Court of Colombo, where the respondent resided, but in the Chilaw District Court, which had no jurisdiction to entertain the suit. This was not only a breach of the arrangement to which the parties had come, but looks rather like an unworthy and somewhat contemptible trick on the appellant's part, since it is impossible to suppose that

he was so ignorant of the powers and procedure of the Court in which he practised as to believe that such a suit could be entertained by it. Subsequently the respondent instituted a possessory action against the appellant in respect of the same lands, and an appeal to the Supreme Court in that action was pending at the time the prosecution complained of was instituted. Such being the character and conduct of the appellant, it was not at all unnatural or unreasonable, in one who knew him as the respondent did, to conclude that he was a man perfectly capable, when occasion arose, of attempting to assert his title to land by the method of deliberate and forcible trespass. Nor, indeed, could the idea that he might remove by force from land claimed by him any property of the rival claimant which he might find upon it, for the purpose of asserting his claim, though not for the purpose of ultimately appropriating the property to his own use, be regarded as wild or extravagant.

The respondent resides in Colombo, which is some considerable distance from the Madugasagare estate. He is possessed of considerable household property, which he manages himself, as well as of coconut plantations and other lands situated in the Districts of Kurunegala and Chilaw. These latter, which he visited generally once a year, though sometimes only once in two years, were managed for him by his cousin Joseph Peiris, under a power of attorney, enabling the latter not only to manage the lands in the ordinary course, but, in addition, to purchase other land and compromise disputes concerning it.

Joseph Peiris lives at a place called Nattandiya, about 15 miles from Madugasagare. He is a man between fifty and sixty years of age, and has been an invalid for many months, suffering from dropsy, for which he has been operated on several times. He had, as the respondent's agent, purchased the lands of Madugasagare bit by bit on his principal's behalf. They were on October 13, 1898, formally conveyed to the respondent, and had remained in his undisturbed possession for a period of ten or twelve years. Joseph Peiris, who had been in the employ of the respondent and his father for many years, was assisted in the management by Ismail Meera Lebbe, described as the conductor of Madugasagare, who had been in the service of the respondent and his family for thirty years, and also by one Usubu Lebbe, a Moorman, who had been in the same service for twenty-seven years. The respondent swore that he trusted these three men and relied on their veracity. In the month of September, 1902, he received a letter, dated the 3rd of that month, purporting to have been written, on the instructions of the appellant, by his Proctor, Mr. Martin, in which the respondent was asked if he was willing to give up to the appellant possession of the portion of Madugasagare in dispute, on receiving compensation for any improvements he might have made thereon, and threatened that, in the event of refusal, an action for the recovery of possession

1909.
May 11.
LORD ATKINSON.

would be brought against him. The respondent forwarded this letter to Joseph Peiris, who, on receiving it, entered into negotiations with Martin for the settlement by arbitration of the appellant's claim. Nothing came of the negotiations, but Joseph Peiris swore at the trial that, fearing that the respondent would, on finding this litigation threatened, be annoyed with him for having purchased lands with a defective title, he concealed from the latter everything connected with the negotiations. And the respondent swore that from the time he forwarded Martin's letter to his cousin he heard nothing more about the appellant's claim, or about any negotiations concerning it. The evidence of both these witnesses is uncontradicted on these points. This was the condition of things which existed before, and at the time when, the events leading up to the prosecution complained of occurred.

The District Judge seems to have been fully aware that, in an action for malicious prosecution, the law throws upon the plaintiff the burden of proving the presence of malice in the mind of the prosecutor, and the absence of reasonable cause for the prosecution; but he appears to have been led into error by not keeping steadily before his mind the fact that the pivot upon which almost all such actions turn is the state of mind of the prosecutor at the time he institutes or authorizes the prosecution. If he receives information from others and acts upon it by making a criminal charge against any person, the motives of his informants, or the truth in fact of the story they tell, are to a great extent beside the point. The crucial questions for consideration are: Did the prosecutor believe the story upon which he acted? Was his conduct in believing it, and acting on it, that of a reasonable man of ordinary prudence? Had he any indirect motive in making the charge? The District Judge, it would appear to their Lordships, seems to have confounded the motives and action of Joseph Peiris with the motives and action of the respondent, the truth in fact of the information conveyed to the respondent, and the motives of those who conveyed it, with the respondent's belief in what he heard and his prudence in acting on it; and to have condemned the respondent to pay Rs. 10,000 damages on inferences drawn from the combined result.

The facts other than those already mentioned which were proved in evidence, so far as it is necessary to state them, are as follows. On the afternoon of a certain day, which is said to have been February 4, 1904, a message was brought to Joseph Peiris, who was then ill and confined to bed, by a Moorman by name unknown to him, that the appellant, accompanied by a large number of men, had entered upon the land of Madugasagare, broken into the bungalow erected thereon, broken some of the furniture and effects in it, carried away others, and driven away some goats. On the following day Meera Lebbe arrived at Joseph Peiris's residence and gave a fuller account of the transaction, of which he professed to have

been an eye-witness. Thereupon Joseph Peiris, thinking it was Meera Lebbe's business to institute proceedings, as he was in charge of, and responsible for, the property removed, directed the latter to get a report from the headman, who, Lebbe stated, was a witness of the affair, and, to use his own words, "put in a case." Joseph Peiris also stated that he believed he wrote to the respondent a letter informing him of what had occurred; but the letter was not produced, nor did the respondent admit the receipt of it. Joseph Peiris further stated that he got alarmed lest there should be a recurrence of the disturbance, and sent a telegram to the Government Agent and Assistant Government Agent at Chilaw in reference to the transaction. This telegram is not to be found in the record. The Assistant Government Agent, Mr. Bertram Hill, who was examined as a witness at the trial, purports to state its contents. He said: "I received a telegram from one Peiris complaining that Mr. Victor Corea with some men had got into a land and committed theft, criminal trespass, &c." It is not clear, however, whether these were the precise words of the telegram, or the charge ultimately framed upon it. The telegram which he himself subsequently sent to the Police Magistrate at Chilaw in respect of it suggests the latter. It ran thus: "Any truth in reported riot by Corea on Madugasagare estate belonging to Peiris? Is my presence required?"

On the following day Usubu arrived at Joseph Peiris's house. Meera Lebbe was then about to return to the estate of which he was in charge. Joseph Peiris directed Usubu to accompany Meera and inquire into the transaction. Usubu did so. He saw, he stated, that the door of the bungalow was broken, that the rice box and some cups and plates were also broken, and that the furniture had been removed. Mr. Joseph Peiris stated that Usubu returned to him and confirmed Meera Lebbe's report. Usubu stated that he went to Colombo to see the respondent on February 7 or 8; that he informed him of what had taken place, namely, that "Mr. Corea's people had come and committed this damage," gave him full particulars, and accompanied him to the house of his advocate; that, after the interview with the advocate, he took a message from the respondent for Meera Lebbe to the effect that, as he (Meera) was responsible for the things stolen, he must himself prefer the complaint against the appellant; and that he (Usubu) returned from Colombo to Nattandiya, Mr. Joseph Peiris's residence, on February 9 or 10, only to find that Meera Lebbe had already gone to Kurunegala to institute a prosecution. The respondent stated in his evidence at the trial that he knew nothing of the telegram sent to the Government Agent, nor of the proceedings consequent upon it, till the hearing of the charge against the appellant. On this point his evidence was not contradicted. The advocate to whom the respondent went for advice, accompanied by Usubu Lebbe, was Mr. Schneider, a gentleman apparently of position in his

1909. May 11. LORD ATKINSON.

profession, whose evidence was not impeached. He was tendered as a witness for the respondent at the trial, but the District Judge ruled, on some quite unsustainable ground, that, being the respondent's advocate, his evidence was inadmissible. The Supreme Court most properly, in their Lordships' opinion, permitted him to be examined.

His evidence is most important. It supplies the explanation of much that occurred. He states that the respondent came to him accompanied by Usubu; that the former then said that Mr. Corea and a number of other men had gone to one of his estates, raided the bungalow, smashed furniture, and removed certain things, including goats; that the respondent consulted him as to what he was to do; that he (Schneider) asked the respondent what evidence was available, to which the latter replied that "coolies, kanganies, and the native headman had been brought to the spot and could give evidence"; that he (Schneider) told the respondent it was well worth considering whether he should bring a criminal action; that the respondent then stated that Usubu was an old servant, that Meera Lebbe had been with him forty years, and that he relied upon them; that he (Schneider) asked the respondent if he thought Corea could be guilty of such a thing, to which the latter replied, that Corea had years before seized 50 acres of one of his (Peiris's) estates, and that "if gentlemen learned in the law behaved so, how can we poor people get on"; that the respondent was very much alarmed when he saw him first, and said that unless he took steps "there was no protection for any of his estates in that district"; that he (Schneider) advised the respondent to bring a charge in the Police Court of Kurunegala; that he did not think he advised him to bring any particular charge, but to lay the facts before the Police Magistrate, who would frame a charge. The respondent and Usubu then left. The respondent paid another visit to Mr. Schneider some days later. But, before dealing with Mr. Schneider's evidence as to what took place at the second interview, it is necessary to refer to what occurred before the Police Magistrate at Kurunegala in the interval. Meera Lebbe had, in pursuance of the directions of Joseph Peiris, obtained a report from the native headman on the occurrence of February 4, which the latter had witnessed. Armed with this report, he went to a gentleman named Markus, a Proctor of the District Court of Kurunegala, who had been in practice for thirty years, and of whom the respondent was a client, to instruct him on his (Meera's) own behalf to institute proceedings against the defendant and others for criminal trespass on the respondent's lands. Mr. Markus, who was examined on behalf of the respondent at the hearing of this action, and whose evidence was not impeached, directed Meera to lodge this report with the clerk of the Police Court, who, according to the practice of the Court, would translate it and lay it before the Police Magistrate. The Magistrate had,

however, left Kurunegala to hold an inquiry elsewhere, and Meera Lebbe, by direction of Mr. Markus, returned on February 16, when his evidence was taken, Mr. Markus appearing for him. No charge was then formulated, and it is clear from the evidence then given by Meera Lebbe that the respondent had made no charge on his own behalf, and that Meera's accusation against the appellant was that which he had already made to Joseph Peiris, namely, that the appellant had come with a number of people, broken into the bungalow, and removed therefrom the defendant's property. What they did with this property, he said, he did not know. The Police Magistrate, however, refused to proceed further without the evidence of the respondent. Mr. Markus thereupon sent Meera Lebbe to the respondent with a letter requesting that Mr. Schneider should appear in the case, together with a report of the proceedings before the Police Magistrate. The respondent stated that, until he saw Meera on this second occasion, he was entirely unaware of the step which had been taken by the latter. He thereupon, accompanied by Meera Lebbe, waited upon Mr. Schneider, and laid before him the report of the proceedings in the Police Court, which he had received from Mr. Markus, together with the latter's letter. Mr. Schneider, in giving evidence, stated that, on this second occasion, he (Schneider) questioned Meera Lebbe, and that he thought he must have asked the respondent if the appellant had any claim upon the estate, and that, if he did, the respondent must in reply have said "none." He added that he appeared for the respondent in the subsequent proceedings before the Police Magistrate, and that, when the latter asked him under what section of the Penal Code he charged the appellant, he believed he "led him as to the substance of the charge." Mr. Schneider, in answer to the Court, added: "I did personally believe that Mr. Corea might have committed theft; that he was likely in execution of his project to allow his followers to carry away anything that came in their way, fowls, &c. I believed his real object was simply to obtain possession of the estate, and he was responsible for taking away the goods, though it was not his primary object to do so."

The respondent appeared before the Police Magistrate on March 18. He detailed what he had heard from Usubu and Meera Lebbe. He stated that the appellant had no claim to the lands, and did not advance any claim to them; that he had cases with the appellant about other lands, in one of which an appeal was pending; and that he thought the appellant had done what he was accused of on account of this appeal. He then added: "I charge Mr. Corea with the criminal offence of theft of the furniture of the house and the property of the estate and the goats, amounting in all to about Rs. 800. I charge Mr. Corea with having committed criminal trespass by entering into my estate, and with having removed therefrom my property." Upon this evidence being given, the Magistrate

1909.
May 11.
LORD ATKINSON.

made the following order:—"Issue summons to the accused named in the Headman's Report, Sections 369, 433, 437, Ceylon Penal Code."

It is clear upon the above evidence that the real charge which the prosecutor wished to have preferred against the appellant was that of criminal trespass, since he looked upon the trespass as an act directed against his title to, and ownership of, these, and possibly other, lands in the district. The conversion of the charge of the removal of the goods into the charge of the theft of them was very much due to Mr. Schneider's having "led" the Magistrate, as he called it, into throwing the charge into that shape. And from one passage in the respondent's evidence on cross-examination it is plain that an idea something like that which ran through Mr. Schneider's head—namely, that the appellant should be held responsible for the thefts of those who accompanied him, though he himself was personally incapable of thieving—ran through his head also. The passage runs: "I did not think Mr. Corea capable of committing theft. Personally I am not capable of such an offence."

In the result, therefore, the respondent proved that he believed the story his old and trusted servants had told him; that he consulted his legal advisers at every step; and that he took action in defence of his title to his property, in the *bona fide* belief that the appellant had trespassed on his land and forcibly removed his goods. The case made against him is that he could not have believed, or should not have believed, without much stronger proof, that Mr. Corea was capable of committing a theft, and that he acted recklessly in accusing him of having committed it.

Their Lordships think that, having regard to all that occurred, and to the way in which it came about that that charge of theft was formulated, there was nothing reckless in the respondent's conduct with regard to it, nor, upon the evidence already dealt with, is there any proof of indirect motive or malice of any kind on the respondent's part. The District Judge, however, discovered proof of malice in two incidents not hitherto referred to: first, the fact that the charge was made pending the hearing of the appeal in the civil suit; and second, the statement made by the respondent that the appellant had no claim to the lands. The charge was made, he concludes, to prejudice the minds of the Judges who were to hear the appeal against the appellant—a wild and far-fetched suggestion, which there is nothing in the case to justify—and the denial of the appellant's claim was, he thought, intended to blacken the appellant in the eyes of the Police Magistrate. Their Lordships are unable to understand how the fact of the appellant having a claim to the lands could lessen in any way the moral or legal culpability of the conduct of which he was accused. Their Lordships think it unnecessary to consider the question of the alleged *mala fides* of Joseph Peiris in sending the accusing telegram, or Usubu's alleged dishonest

efforts to bring about a settlement of the claim to the land, or of the prosecution or the withdrawal of the charge against Joseph Peiris, whichever it be, though the District Judge seems to think them relevant and worthy of consideration. They are outside this case, as the respondent was no party to them, and knew nothing of them. Their Lordships are further of opinion that the Supreme Court acted quite rightly in refusing to permit a new case to be made on the hearing in review on the supposed analogy of *Cornford v. Carlton Bank*.[1] As above pointed out, the District Judge had not the advantage of hearing Mr. Schneider's evidence, which no doubt produced a great impression on the Supreme Court. On the whole, therefore, their Lordships concur with the Supreme Court in holding that there is not sufficient proof that the respondent was actuated by malice, or that there was not reasonable and probable cause for the prosecution. They will therefore humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

1909.
May 11.
LORD ATKINSON.

Appeal dismissed.