1884
*Mar. 11.
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*Jan'y 12.

THE MAYOR *et al.*, OF THE CITY OF MONTREAL (DEFENDANTS)..... } APPELLANTS;

AND

DAME M. E. HALL *et al.* (PLAINTIFFS PAR REPRISE D'INSTANCE)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Malicious prosecution—Action for libel—Slander—Prescription—Arts. 2262 and 2267 C. C.—Proceedings instituted to remove plaintiff

* PRESENT—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry and Gwynne JJ.

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from position of Commissioner of Expropriations—Cross appeal —Application to hear although principal appeal not filed.

On the 14th April, 1868, S. and two others, B. and M., were named joint commissioners to name the amount which should be accorded for expropriation of property required for widening one of the streets in the city of Montreal.

On the 7th August, 1868, the appellants, in consequence of an award made by S. in reference to said property, passed a resolution charging him with fraud and partiality, and an application was made on their behalf to the Superior Court to have him removed from the office of commissioner.

On the 17th September, 1870, the conclusions of the petition were granted on the ground that the commissioners had committed an error of judgment in the execution of their duty as commissioners, and had proceeded on a wrong principle in estimating the amount payable for the expropriation. The charges of fraud and partiality were held unfounded.

On the 20th of September, 1873, the Court of Queen's Bench for Lower Canada (appeal side) re-instated the said S. and B. in their position as commissioners.

On the 4th November, 1876, this judgment was confirmed by the Privy Council.

In May, 1871, S. brought an action against the defendants for damages which he alleged he had suffered in consequence of his having been unjustly removed by the appellants from the position of commissioner. The respondents, widow and daughters of the late S., became plaintiffs *par reprise d'instance.*

The appellants pleaded that the action was barred under Arts. 2262 and 2267 C. C. (P.Q.)

The Superior Court dismissed the action on the 31st May, 1880, but the Court of Queen's Bench (appeal side) reversed the judgment and allowed $3,000 damages to the respondents.

Held, on appeal to the Supreme Court of Canada, affirming the judgment of the Court of Queen's Bench, Fournier J. dissenting, that the action was not an action merely for the libel contained in the resolution of the 7th August, 1868, but for a malicious prosecution in following up that resolution by proceedings instituted in the courts, maliciously and without any just cause, and prescription did not begin to run until the termination of such proceedings. The action, therefore, and judgment for damages should be sustained, no objection having been raised that the action was prematurely brought.

Per Strong, J.—Following the practice adopted in the Court of

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Queen's Bench for Lower Canada, where they either increase or lessen the amount of damages according to their appreciation of the facts, the damages in this case should be increased to $10,000.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court which had dismissed the plaintiffs action, and awarding $3,000 damages to the present respondents (1).

From this judgment the appellants appealed and the respondents filed a cross appeal claiming a larger amount.

The facts and pleadings sufficiently appear in the head note and judgments hereinafter given.

Roy Q.C. and *Doutre* Q.C. for appellants, contended:

1st. That the plaintiff's action was barred by the prescription of one year.

2nd. That the expressions used in the resolution and in the petition above mentioned were not in themselves libellous and actionable.

3rd. That no malice could be attributed to the city, whilst there existed a probable and reasonable cause for their proceedings in August, 1868.

4th. That it had not been shown that the original plaintiff was entitled to damages at the hands of the city, and that, in reality, it was not proved that he suffered any.

On the question of prescription the learned counsel cited and relied on Arts. 2262, 2267 C. C.; Dunod, Prescription (2); Mangin, Action Publique (3); Grellet Dumazeau (4); Merlin, Repertoire (5); Laurent (6); Aubry & Rau (7); Troplong (8); Marcadé (9); Demo-

(1) 6 Legal News 155.
(2) P. 114.
(3) 2 Vol. No. 330.
(4) 2 Vol. p. 169, No. 853.
(5) Vo. Prescription, sec. 1, vii. Quest. xv., p. 547.
(6) 32 Vol. No. 16.
(7) 2 Vol. p. 328 No. 213.
(8) Vo. Prescription No. 700.
(9) Prescription p. 236.

lombe (1); Rolland de Villargues (2); Cass. Nau. Sirey (3); Vazelle—Prescription (4); Journal du Palais (5); Code d'Inst. Crim. (French) (6); Case of *Pigeon* v. *Le Maire & Al.* (7).

On the second point they cited:—

Grellet-Dumazeau (8); Broom, Legal Maxims (9); Folkard's Law of Slander and Libel (10); Cooley, Torts (11); Odgers', Libel and Slander (12); Bigelow's leading cases on Torts (13); *Gauthier* v. *St. Pierre* and authorities quoted (14); C. C. P. Art. 426.

On probable cause: *Ravenga* v. *Mackintosh* (15).

The respondent's counsel on the cross appeal contended that the cross appellants were not entitled to an increase of the damages as allowed by the Court of Queen's Bench, appeal side, for the reasons given on the principal appeal.

Barnard Q.C. and *Laflamme* Q.C. for the respondents.

As to prescription:

(*a*) The prescription applicable is not that of article 2262 in case of slander but that of article 2261, par. 2, in cases of *délits* and *quasi-délits* (16).

Cooley on Torts (17). Definition of action for malicious prosecution.

(*b*) Prescription besides is interrupted while the principal suit is pending.

(1) 8 Vol., Contrats, p. 598 & 809.
(2) Dict. Vo. Delit. No. 70, 90.
(3) 1841-1-787.
(4) 2 vol. p. 178. Nos. 583-586.
(5) Vo. Diffamation, p. 395, No. 738.
(6) Art. 2, 3, 637, 640.
(7) 3 L. C. Jur. p. 64, & 9 L. C. R. 334, in Appeal.
(8) 2 Vol., p. 191, Nos. 834, 887 & 900.
(9) 7th Amer. Ed., No. 319.
(10) 4th Ed., pp. 33 in fine, 34, 35, 36, 173, 305.
(11) P. 183-195.
(12) P. 186.
(13) P. 170, note *e*.
(14) 7 Legal news, 44.
(15) 2 B. & C. 693-698.
(16) 1 Am. L. C. (H. & W.) p. 17.
(17) P. 180.

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Dalloz, Jur. Gén. (1); Larombière (2).

The judgment of Judge Berthelot so far as it dismissed the accusations of improper conduct, was treated by both parties as a final judgment and no exception was taken to the present action as being premature. Art. 119 and 120 C. C. P.

As to the liability of appellants under the French law the learned counsel cited and relied on:—

Pacaud v. *Price* (3); Merlin (4); French Code of Procedure, art. 314, and authorities cited by Carré & Chauveau (5); Laurent (6); Sourdat (7); Sourdat (8); Dalloz, Jur. Gén. (9);

As to the Liability of Corporations acting in bad faith (10).

As to their Liability for the Acts of their Officers (11); Dalloz, Jur. Gén. (12); 1 Larombiere (13); Dalloz, Rec. Pér. (14); Demolombe, Contrats (15); C. C. P. art. 9 and corresponding art. 1036 of French Code and Commentators, particularly Carré and Chauveau. Dareau Traité des Injures (16).

As to malice:

Odger on Libel (17); Bigelow Leading Cases on Torts (18); See 4 Legal News, 224 and 1 Legal News 267 as to collateral motive.

As to *quantum* of damages.

Lambkin v. *South Eastern Railway Co.* (19); *Phillips* v. *South Western Railway* (20); Laurent (21); Dalloz, Jur.

(1) Vo. Dénonciation Calomnieuse No. 70; See also same number in fine.
(2) 5 Vol. Art. 1382-1383, No. 45.
(3) 15 L. C. Jur. 286.
(4) Rep. Vo. Réparation Civile, sec. 2, No. 2.
(5) 2nd Vol. Belgian Ed., pp. 619 & 620.
(6) Nos. 412 & 413.
(7) No. 664, also No. 439.
(8) No. 1086.
(9) Vo. Responsabilité No. 112.
(10) Ibidem, Nos. 255 & 261.
(11) Ibidem, No. 607.
(12) Vo. Dénoncation Calomnieuse, Nos. 5, 6 & 14.
(13) Art. 1382-1383, Nos. 15 & 16.
(14) 1858, 1, 106; 1861, 1, 75; 1864, 1, 135.
(15) Vol. 8, Nos. 519 & 557.
(16) 1 Vol. p.p. 15, 20, 23.
(17) Pp. 280, 281 and 185, (Am. Edition).
(18) P. 179.
(19) 5 App. Cases 361.
(20) 2 Legal News 105.
(21) 20 Vol. No. 413, p. 483.

Gen. (1).

The learned counsel also referred to the transcript *re The Mayor et al.* v. *Brown* prepared for the Privy Council.

The appellant's counsel on the cross appeal contended that under the state of things fully argued, both as to the law and the facts, on the principal appeal, the amount of damages awarded by the Court of Queen's Bench to the present appellants on cross appeal was inadequate. That under the general circumstances of the case, and the evidence of special damage, more should have been allowed them than was done.

Sir W. J. RITCHIE C.J.—The action in this case is not an action for libel, but the complaint is that the defendants caused a resolution to be passed, whereby they instructed the attorney of the corporation to apply by summary petition to the Superior Court to stay the proceedings of the defendant and his co-commissioners appointed in the matter of expropriation for the widening of St. Joseph street in front of the property of the Honorable Charles Wilson, and to remove and replace the said two commissioners, who, in their opinion, forfeited their obligations as such commissioners; that the resolution was calumnious, libellous and injurious to the fair name and reputation of the plaintiff, and that they did file and present to Mr. Justice Berthelot, on the 10th August, 1868, a petition reciting the resolution, and averring certain proceedings, intentionally, maliciously ommitting to mention certain subsequent proceedings of defendant and his co-commissioners, and alleging other matters inconsistent with the proper discharge of the duty by the co-commissioners, and that they had not fulfilled the duties in a faithful, diligent and impartial manner, and prayed that the proceedings of the commis-

(1) Vo. Responsabilité, Nos. 236, 7, 8.

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sioners should be stayed, and defendant and J. Brown should be removed from the office of commissioners, as having violated and forfeited their obligations. The declaration then alleged that "the said resolution and the said petition were false, malicious and libellous, and that the allegations therein contained are false, and were made only with a view to injure the character and good name of the plaintiff, and to conceal the negligence of the defendants, throughout the said herein above-recited proceedings before the said commissioners."

And after alleging specifically the falsity of certain statements it alleges :—That all the allegations in the said petition referring to the proceedinge of the sixth day of August, one thousand eight hundred and sixty-eight, were and are injurious, insulting, libellous and calumnious.

And after specifying on their falsities the declaration averred :

"And it is absolutely false that the plaintiff has been at any period of time, or was under pecuniary obligations to the said Charles Wilson, as falsely alleged in the said petition, and it is false that the plaintiff did not fulfil his duties of commissioner, in a faithful and impartial manner, and without fear or favor.

"That the said defendants never had any probable or reasonable cause for adopting the said resolution, or for filing the said calumnious, wicked and malicious petition against the plaintiff in this cause, and that they never had any trust-worthy or positive informations of any kind to justify them in so doing.

"That the said defendants did not prove any of the accusations in the said petition or resolution contained, and that they even did not bring a single witness to substantiate the same, and did not and could not make them good, such accusations being utterly false and calumnious as aforesaid.

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"That by a judgment rendered on the said petition, by the honorable Judge Berthelot, on the seventeenth day of September last, past (1870), the said accusations and charges so brought by the defendants against the plaintiffs, were in fact declared false without foundation or probable cause, and were rejected in fact as such by the said judge.

"That the plaintiff is an honest and respectable citizen and has always enjoyed a high character of respectability and the confidence of his fellow citizens; that in his capacity of civil engineer and architect he has often been and is yet entrusted with the management of many important affairs; that he has often been invested with the office of trust, honor and profit, both in his capacity of engineer and that of architect aforesaid.

"That the said false and calumnious accusations and charges were of a nature to injure, and did in fact gravely injure the high character, good fame and reputation of the plaintiff, and put in danger the confidence hitherto reposed in the plaintiff by the public and his friends, and have also greatly hurt the feelings of the plaintiff, and during more than two years kept him in suspense and anguish, under the said accusations and charges, pending the said petition; that, moreover, the said plaintiff has lost a great deal of time and expended large sums of money in defending himself against the said accusations and charges, and has suffered damage to the amount of twenty thousand dollars for all the causes and reasons aforesaid, which sum he has right to claim and deserves to have from the defendants.

"Wherefore the said plaintiff prays that the said defendants may be adjudged and condemned to pay to the plaintiff the sum of twenty thousand dollars currency as damages for the reasons above-mentioned with interest and costs, distraits to the undersigned."

This, then, is not an action of libel, but it is an action

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for falsely, maliciously and without any reasonable or probable cause instituting certain proceedings against plaintiff calculated to injure the plaintiff, and which accusations and charges the defendants failed to prove, or even to bring a single witness to substantiate, and which by the judgment of Mr. Justice Berthelot on 17th September, 1870, were declared false and without foundation or probable cause, and were rejected in fact as such by the said judge and subsequently by the Court of Appeal, and finally by the Privy Council.

Judge Berthelot, on 17th September, 1870, held that plaintiff and Brown had committed an error of judgment in adopting a wrong principle as to the damages; but held that there was no proof of fraud or partiality or want of diligence and fidelity, and dismissed the commissioners for want of diligence. The Court of Appeal, 20th February, 1873, negatived fraud and reversed the judgment as to dismissing the commissioners. On the 11th November the Privy Council confirmed the judgment of the Court of Appeal, holding there was no proof of fraud, &c, and that the principle adopted by the two commissioners was not erroneous, and therefore the inference of want of diligence failed.

The complaint is simply that the defendants maliciously and without any reasonable or probable cause instituted legal proceedings with a view to the dismissal of the plaintiff and his co-commissioners from the office of commissioners on false charges of partiality, corruption and improper conduct in the discharge of their duties as such commissioners, by means of which improper proceedings and false charges the plaintiff was damnified.

Until the termination of the legal proceedings how could it be established whether the complaints of the defendants were well or ill-founded, whether the allegations could be proved or not? The defendants had

the right to go on and prove them if they could.

The court of first instance treated this case as an action for libel, and held it prescribed after one year from the day when the knowledge of the alleged libel came to the plaintiff under arts. 2262 and 2267 of the Civil Code.

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The Court of Appeal considered that as the matter was still in course of litigation the arts. 2262 and 2267 did not apply, and the action was not prescribed. The matter complained of continuing up to the rendering of the judgment, 17th March, 1870, and, the courts having found that there was no proof of the frauds and misconduct alleged, necessarily found that the proceedings were without reasonable or probable cause, and therefore properly inferred malice, but which until the termination of the suit remained an open question.

No objection has been taken that the present action has been prematurely brought, and as to prescription as regards the charges of fraud they were not disposed of and terminated till the decision of the Court of Appeal of 20th of September, 1873, their appeal to the Privy Council, decided in November, 1876, being only on the ground of the assessment having been made on a wrong principle.

I think the judgment of the court below should be affirmed and the present appeal dismissed with costs.

STRONG J.—Springle, now represented in this case by the respondent, his widow, and the tutrix of his minor children, was a statutory officer, appointed under a statute of the Province of Quebec providing for an expropriation of lands in the city of Montreal for the purpose of widening streets, and he was charged with a judicial duty as a valuator of the lands so required to be expropriated. Whilst in the exercise of this duty he was accused of corruption and venality in

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office, in an application made to a judge of the Superior Court who had, by the statute, power to remove him. Upon investigation, and after hearing evidence and argument, it appeared that the only ground for this charge put forward by the present appellant, was, that there was a general feeling on the part of the public that the award was for too large an amount. The judge before whom the complaint was heard, the late Mr. Justice Berthelot, on the 17th of September, 1870, decided this charge of venality in favor of Springle, holding that the evidence disclosed no ground for the accusation of the city council. This concluded the proceedings so far as it was sought to remove Springle on the ground of corruption and venality. Mr. Justice Berthelot, however, on another ground, did pronounce judgment of amotion; his decision on this other ground was appealed against by Springle, but no appeal was taken by the present appellants from the learned judge's decision, dismissing the charge on the ground of corruption. On the hearing of the appeal it was allowed by the Court of Queen's Bench, and from that decision the city appealed to the Privy Council, without, however, including in their appeal the charge of corruption originally made, but confining it to the same grounds as those which were dealt with in the judgment of the Court of Queen's Bench.

The present action was instituted by Springle on the 4th of May, 1871. I am of opinion that this was in sufficient time, and that no prescription operated to bar the action. No action could have been maintained until after the judgment of Mr. Justice Berthelot dismissing the application to remove so far as it was based on charges of corruption. In saying this I do not consider that I am acting merely on a technical rule of English law, but on one which, for conclusive reasons, must be of universal application. These reasons

are well stated in a recent case (1) in the House of Lords by Lord Selborne L.C., as follows:

An action for a malicious prosecution cannot be maintained until the result of the prosecution has shown there was no ground for it. And it is manifestly a matter of high public policy that it should be so; otherwise, the most solemn proceedings of all our courts of justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety might be challenged by actions of this kind.

The gross nature of these charges, the fact that not the least evidence was advanced in support of them, and the conclusion of the proceedings in Springle's favor, are sufficient to warrant a presumption of malice, and the action being in the nature of an action for malicious prosecution I am of opinion that it was sufficiently proved; and nothing being shown on behalf of the appellants to rebut the inference of malice, and to show that there was any probable cause for the charge made, the plaintiff was entitled to recover. The Court of Appeal were, therefore, quite right in allowing the appeal, and their judgment must be affirmed with costs.

FOURNIER J.—Les Intimés par reprise d'instance représentent James Key Springle qui avait poursuivi la cité de Montréal en dommages pour l'adoption de procédés dans le conseil de la dite cité et dans la cour Supérieure du district de Montréal pour le faire destituer comme commissaire en expropriation, pour cause de fraude et de partialité dans l'exercice des fonctions de sa charge.

La déclaration après avoir allégué la nomination du dit Springle comme commissaire conjointement avec Thomas Storrow Brown, pour déterminer la compensation à accorder à l'honorable Charles Wilson pour certains terrains requis pour l'élargissement de la rue

(1) *Metropolitan Bank* v. *Pooley* 10 App. Cas. 210.

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St. Joseph, expose les procédés qui eurent lieu devant les dits commissaires pour en arriver à une décision. C'est sur ces procédés que le conseil de ville se fonda pour adopter à l'unanimité la résolution suivante :

That their attention had been called to the extraordinary award recently declared by two of the Commissioners, (meaning the Plaintiff in this cause and the said Thomas S. Brown) appointed in the matter of expropriation for the widening of St. Joseph Street, in front of the property of the Honorable Charles Wilson; and that the exorbitant amount, awarded by the majority of the commissioners in that case, was such as to require in their opinion that steps should be adopted immediately to stay the proceedings in the interest of the public, and they therefore instructed the attorney of the Corporation to apply by summary petition to the Superior Court, or to a judge thereof, to stay the proceedings and to remove and replace the two Commissioners whose award is complained of, and who, in their opinion, forfeited their obligations as such commissioners.

Conformément à cette résolution, des procédés furent pris le 10 août 1868 devant l'honorable juge Berthelot au moyen d'une pétition contenant la résolution ci-dessus et d'autres graves accusations pour demander la destitution du dit Springle comme commissaire. Après quelques autres allégations expliquant la conduite des dits commissaires, la déclaration continue comme suit :

That the said resolution and the said petition were false, malicious, and libellous, and that the allegations therein contained are false and were made only with a view to injure the character and good names of the Plaintiff and to conceal the negligence of the Defendants, throughout the said herein above recited proceedings before the said commissioners.

Cette dénégation générale des accusations portées dans la résolution et la pétition est suivie d'une dénégation spéciale de chacune des accusations spécifiées dans la résolution et la pétition, avec l'addition qu'elles sont injurieuses, outrageantes et calomnieuses.

La déclaration contient en outre la dénégation de l'existence de cause raisonnable ou probable pour l'adoption de la dite résolution et la présentation de la dite

pétition :

That the said defendants never had any probable or reasonable cause for adopting the said resolution, or for fyling the said calumnious, wicked and malicious petition against the Plaintiff in this cause, and that they never had any trustworthy or positive informations of any kind to justify them in so doing.

Il est ensuite allégué que, par le jugement rendu le 17 septembre 1870 par l'honorable juge Berthelot, toutes les accusations portées contre les dits commissaires furent déclarées fausses et sans aucune cause raisonnable ou probable.

J'ai cru devoir citer quelques parties de la déclaration, afin de faire voir, d'après la nature de ces allégations, quel doit être le véritable caractère de l'action de l'Intimé. Est-elle, comme le dit l'honorable juge Caron dans ses notes dans la cour du Banc de la Reine : " une demande par Springle pour $20,000 de dommages " soufferts, en conséquence de son injuste destitution " comme commissaire en expropriation " ? Ou bien n'est-ce pas, comme le prétend l'Appelante, une action fondée sur le libelle contenu dans la résolution et la pétition du conseil de ville, pour réparation du dommage causé par les expressions injurieuses de ce libelle.

Il est évident que si les accusations contenues dans la résolution étaient fausses, elles constituaient un libelle ; et que si le conseil de ville n'eut donné aucune suite au projet de demander la destitution des commissaires, l'offense commise par l'adoption de cette résolution aurait été prescrite par le laps d'une année, suivant l'art. 2262. Mais cette résolution étant nécessaire pour autoriser la poursuite, doit, en réalité, être considérée comme la première procédure dans cette action ; les deux doivent être considérées comme un seul et même acte. Bien que la résolution et la pétition contiennent un libelle—ce n'est pas la punition de ce libelle que Springle a demandée par son action—c'est la réparation des dommages pour une poursuite malicieuse deman-

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dant sa destitution en invoquant le libelle comme base de cette demande. Ceci me paraît clairement résulter des parties ci-dessus citées de la déclaration et surtout de la suivante :

That the said defendants never had any probable or reasonable cause for adopting the said resolution, or for fyling the said calumnious, wicked and malicious petition against the Plaintiff in this cause, and that they never had any trustworthy or positive informations of any kind to justify them in so doing.

En conséquence, je considère l'action en cette cause comme ayant pour but d'obtenir le montant des dommages causés à Springle par la poursuite malicieuse en destitution intentée par l'Appelante au moyen de sa pétition à cet effet.

Si cette manière d'apprécier la nature de l'action est correcte, il s'en suit que la prescription à opposer à la présente action n'est pas celle de l'art. 2262, C. C., contre les injures verbales ou écrites, mais bien celle de l'art. 2261 C. C., limitant à deux ans la prescription " pour " dommages résultant de délits et quasi délits, à défaut " d'autres dispositions applicables."

Pour décider la question de prescription il faut d'abord établir à quelle époque remonte le droit d'action, car la prescription a dû commencer avec la naissance de ce droit, à moins que la loi n'ait fait une exception au cas actuel. C'est précisément ce que prétend l'Intimé en alléguant que la litispendence sur la pétition demandant la destitution des commissaires a eu l'effet d'interrompre la prescription. Dans ses notes sur cette cause, l'honorable juge Caron pose ainsi la question :

Quand Springle devait-il poursuivre?

Du moment qu'il pouvait établir qu'ils avaient agi par malice. Il lui fallait donc attendre le résultat du procès engagé sur leur requête.

C'est ce qu'il a fait et je crois qu'il a eu raison.

Avant le jugement en dernier ressort sur cette requête le demandeur Springle aurait été dans l'impossibilité de prouver aucun dommage.

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Car ce jugement rendu le 17 septembre 1870, a réellement constaté d'une manière irréfutable que les accusations contenues dans la la requête des Intimés étaient calomnieuses puisque les requérants n'avaient pas réussi à les prouver.

Le droit des demandeurs d'obtenir des dommages a donc été en réalité suspendu, jusqu'à ce jugement qui a établi d'une manière définitive que M. Springle n'avait pas forfait (forfeited) à ses obligations comme commissaire évaluateur et qu'il avait été un employé fidèle des Intimés.

La prescription annale de l'art. 2262 de notre Code Civil ne pouvait donc courir que de ce jour-là contre Springle.

Cette proposition de l'honorable juge que le droit d'action en dommage, pour réparation d'un délit, comme dans le cas actuel, est suspendu jusqu'au jugement définitif et sur la poursuite malicieuse qui donne lieu à l'action en dommage est-elle conforme au droit de la province de Québec? Je ne le pense pas. Les autorités que l'honorable juge a citées à l'appui de cette proposition sont tirées d'auteurs qui traitent de cette action telle qu'elle est réglée par le code d'instruction criminelle français qui n'a ici aucune application.

En France l'action civile en réparation du dommage causé par un délit est unie à l'action publique et se poursuit devant le tribunal lui-même saisi de l'action publique. On ne trouve dans le code Napoléon aucune disposition concernant la prescription de cette action. Cette matière est réglée par le code d'instruction criminelle qui établit la prescription contre les crimes et délits et les actions civiles qui en résultent. Les autorités citées par l'honorable juge Caron sont fondées sur les articles suivants du Code Criminel, art 637:

L'action publique et l'action civile, résultant d'un crime de nature à entraîner la peine de mort, ou des peines afflictives perpétuelles ou de tout autre crime emportant une peine afflictive ou infâmante, se prescriront après dix années révolues, à compter du jour où le crime aura été commis, si, dans cet intervalle, il n'a été fait aucun acte d'instruction ni de poursuite. S'il a été fait dans cet intervalle des actes d'instruction ou de poursuite non suivis du jugement, l'action publique et l'action civile ne se prescriront qu'après dix années révolues, à compter du dernier acte, à l'égard même des personnes

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qui ne seraient pas impliquées dans cet acte d'instruction ou de poursuite.

Art. 638 :

Dans les deux cas exprimés en l'article précédent et suivant les distinctions d'époque qui y sont établies, la durée de la prescription sera réduite à trois années révolues, s'il s'agit d'un délit de nature à être puni correctionnellement.

L'article 640 réduit à un an ces prescription en matière de contravention

Ainsi, d'après le code d'instruction criminelle, le délai de la prescription est fixé par les articles 637, 638 et 640, à dix ans, trois ans ou un an, suivant la nature du fait incriminé.

Mais lorsqu'il s'agit d'un délit civil ou d'un quasi délit, (dit Laurent) (1) la prescription est de trente ans, d'après le droit commun, auquel il n'est pas dérogé pour les faits dommageables (2). Si le fait constitue un délit criminel, on suit les règles spéciales qui régissent l'action civile.

Sourdat dit la même chose (3) :

Or nous avons vu que l'action civile, qui naît des délits incriminés par la loi pénale, est soumise quant à la prescription, à des règles spéciales. Mais quand l'action naît d'un *délit purement* civil, elle n'est régie par aucune loi particulière, elle tombe sous l'application de l'article 2262— et ne se prescrit, par conséquent, que par trente ans, à dater du jour où le fait dommageable s'est accompli. Tant que le dommage causé peut être constaté, et qu'il n'a pas été mis à couvert de l'action en réparation par ce laps de temps, celui qui l'a souffert peut en poursuivre l'indemnité, quelque long qu'ait été son silence.

Toutefois je dois dire que cette doctrine est contestée et qu'il y a des décisions qui la répudie. Mais, pour les fins de cette cause, il n'est pas nécessaire de faire plus que de mentionner la contrariété d'opinions, et la différence entre le droit français et le nôtre sur cette question. Cette question de prescription en matière de délits et quasi délits se trouve ainsi réglée en France, bien différemment de notre code. Lorsqu'il s'agit d'un fait incriminé, c'est aux articles 637, 638 et 640 du

(1) Vol. 20, n° 544.

(2) Cour de Cassation de Belgique, 12 juin 1845, (Pasicrésie, 1845, 1).

(3) Au n° 636, 1er vol.

code d'instruction criminelle qu'il faut avoir recours; si au contraire c'est un fait dommageable mais non incriminé, c'est alors le cas d'appliquer l'art. 2262.

Peut-on sous le Code Civil de la province de Québec faire application au cas actuel de l'une ou de l'autre de ces prescriptions du code français? Il est clair que non. Aucune disposition du code d'instruction criminelle de France ne peut avoir force de loi chez nous Quant à la prescription de 30 ans on ne peut l'invoquer non plus parce que notre code a, sur ce sujet, une disposition formelle, qui n'existe pas en France. Il y a à ce sujet dans le Code Napoléon une lacune qui n'existe pas dans le nôtre. Elle a été comblée par l'art. 2261 décrétant que "l'action se prescrit par deux ans dans les cas sui-"vants: parag. 2. Pour dommages résultant de délits et "quasi délits, à défaut d'autres dispositions applicables." Il n'y a pas dans le Code Napoléon d'article correspondant à celui-ci qui a introduit un droit nouveau. Cet article ne faisant aucune distinction entre les délits incriminés et ceux qui ne le sont pas doit recevoir son application dans tous les cas où il s'agit de dommages résultant de délits ou quasi délits quelle que soit leur nature.

L'action en dommage naissant du fait de poursuite malicieuse dont se plaint l'Intimé est évidemment comprise dans cet article et soumise à la prescription qu'il introduit, parce que les termes en sont généraux et absolus et qu'il n'existe aucune prescription contre cette action.

Mais on a prétendu en cour inférieure que la prescription dans le cas actuel était suspendue pour deux raisons, la première, parce que la poursuite qualifiée de malicieuse n'étant pas terminée, la prescription se trouvait suspendue; la deuxième, parce que le fait dommageable constituait un délit successif.

Quant au premier de ces motifs, il est évidemment contraire au principe que la prescription commence à

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courir du moment que l'action est née. Laurent dit à ce sujet : (1)

La prescription des actions personnelles commence du moment où les actions naissent, parce que c'est à raison de la durée de l'action que la loi la déclare éteinte ; donc, dès qu'il y a action, il y a lieu à prescription, parce que la raison de la prescription existe. L'action c'est le droit exercé en justice ; et le créancier peut agir en justice du moment que l'obligation est formée.

Aubry et Rau, Troplong, Marcadé et tous les autres auteurs cités par l'appelante dans la liste supplémentaire d'autorités qu'elle a fournie soutiennent la même doctrine, sur laquelle on peut dire qu'il n'y a pas de différence d'opinion. De droit commun le point de départ de la prescription étant la naissance du droit d'action, il faut, pour en adopter un autre s'appuyer sur un texte de loi. C'est la disposition de l'art. 2232 C. C., qui décrète comme droit nouveau

La prescription court contre toutes personnes, à moins qu'elles ne soient dans quelque exception établie par ce code, ou dans l'impossibilité absolue en droit ou en fait d'agir par elles-mêmes ou en se faisant représenter par d'autres.

L'Appelante n'a ni allégué ni démontré qu'elle était dans le cas d'une exception.

L'Intimé prétend que pour prouver la malice qui animait l'Appelante dans ses procédés, il était nécessaire d'attendre le résultat du procès engagé sur la requête en destitution. Cet argument peut-il créer une exception au principe général, et est-il vrai que la malice ne pouvait être prouvée qu'après ce jugement ? S'il y a eu malice, elle a existé au moment de l'adoption de la résolution du 27 juillet 1868 et de la présentation de la pétition, et nécessairement avant le jugement du 7 septembre 1870 par lequel Springle, quoique exonéré des imputations calomnieuses, était cependant destitué de ses fonctions comme commissaire. Ce jugement ne retranchait ni n'ajoutait à la nature des faits imputés ; il ne faisait que les constater. Cette constatation pou-

(1) 32 Vol., p. 27, No. 16.

vait être tout aussi bien faite dans l'action en dommage si elle avait été prise aussitôt après la signification de la requête qui constituait le délit de poursuite malicieuse. Aucune circonstance ne pouvait modifier ces deux faits, et ce sont les deux seuls qui forment la base de sa demande Il n'y avait donc aucune impossibilité d'agir, ni en fait, ni en droit La preuve eut été aussi facile à faire dans un cas que dans l'autre. En conséquence, la nécessité d'attendre le résultat du premier procès me paraît, avec raison, insuffisante pour faire admettre une exception que la loi n'a pas établie. Springle devait donc prendre son action en dommage du moment que le délit dont il se plaignait avait été commis, car la prescription courait à dater de ce moment.

Avant le Code Civil, dans la province de Québec, il a toujours été considéré que cette espèce d'action n'était pas suspendue par la litispendence de celle qui y avait donné origine, même en matière criminelle. Il en était de même aussi des poursuites en dommage pour arrestation et saisie-arrêts malicieuses. Les deux poursuites étaient et sont encore indépendantes l'une de l'autre ; elles peuvent se faire en même temps, ou l'une après l'autre, indifféremment.

Cette doctrine de la suspension du droit d'action en pareil cas, me paraît toute nouvelle et n'a pas, que je sache, été sanctionnée par aucune décision—tandis qu'au contraire, depuis un temps considérable, la jurisprudence des tribunaux a reconnu à une partie lésée soit par une arrestation, soit par une saisie malicieuse ou même par les conséquences d'un délit ou quasi délit, le droit de porter son action en réparation civile, sans attendre le résultat des procédés qui ont occasionné l'action en dommage Cette question a été décidée dans la cause de *Lamothe* et *Chevalier* et al., en appel, le 17 janvier 1854, par les honorables juges Rolland, Panet et Ayl-

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win, qui ont maintenu: "1° Que dans l'espèce, les termes énonciatifs d'un assaut grave sur le Demandeur ne comportait pas une accusation de félonie. 2° Que dans le cas même où cet assaut aurait le caractère de félonie, le Demandeur peut réclamer des dommages sans avoir préalablement poursuivi au criminel, pour l'assaut dont il se plaint."

En cour d'Appel l'honorable juge Rolland motiva son jugement dans les termes suivants:

La Cour Inférieure a maintenu que les faits allégués dans la demande de l'appelant constituaient une félonie, et qu'on ne pouvait se pourvoir en dommages en semblable cas, avant qu'au préalable cette félonie n'eut été poursuivie criminellement. La Cour ici confirme cette décision tant en droit qu'en fait. Nous sommes d'avis que les faits allégués ne constituent pas une félonie, et que dans un cas de cette espèce, il n'était pas nécessaire d'un procès criminel avant que l'appelant pût recouvrer des dommages pour les injures corporelles qu'il avait reçues. Le jugement de la Cour Inférieure doit en conséquence être renversé.

Dans ses observations sur cette cause, l'honorable juge Aylwin fait au sujet de la suspension de la poursuite civile, la remarque suivante:

Quant à l'exception aux fins de suspendre l'action civile, elle n'existe pas sous la loi qui nous régit.

A l'époque de cette décision comme aujourd'hui, la règle était différente en Angleterre; la poursuite criminelle doit précéder le recours civil. De même dans les actions pour poursuite, saisies ou arrestations malicieuses, il est nécessaire dans l'action en réparation civile d'alléguer le résultat final de la procédure dont on se plaint. Il n'en a jamais été de même ici, que je sache. Je ne trouve point de décision qui ait fait de cette allégation une condition nécessaire pour porter l'action en dommage. Je trouve des décisions remontant à une époque éloignée qui ont maintenu le contraire. Dans les *Stuarts Reports*, (1) on voit que la question a été décidée dans le cas de saisie-arrêt simple malicieuse, comme suit:

(1) P. 40.

That it is not necessary to set forth on the declaration, that the action in which the arrest was made has been terminated.

Dans le *Robertson's Digest* on trouve qu'il a été décidé dans la cause de *Dagenay* vs *Hunter* (1),

That a plaintiff may, for an assault, proceed against the defendant by action and by indictment.

Dans le même, aux mots *malicious arrest*, dans la cause de *Boyle* vs *Arnold*, (2) il a été décidé :

That, in an action for a malicious arrest upon a *capias ad respondendum*, on the ground that the Defendant was about to leave the province, it is not necessary to allege in the declaration, that the action in which he was so arrested has been decided.

La cause de *Pacaud* vs *Price*, décidée le 18 juin 1870, en appel est parfaitement analogue à la présente. Le Demandeur Pacaud réclamait des dommages résultant des écritures calomnieuses et diffamatoires que l'Intimé Price et son frère avaient faites sur le caractère, la réputation et l'honneur de l'Appelant, dans une cause devant la cour Supérieure, pour le district d'Arthabaska, dans laquelle ils étaient Demandeurs contre Théophile Coté, secrétaire trésorier de la municipalité du comté d'Arthabaska, la corporation du township de Chester-Ouest et l'Appelant,—Défendeurs. Par cette action, les Price demandaient la nullité de l'acte de vente que le dit Théophile Côté avait consenti à l'Appelant, le 3 avril 1860, du lot de terre n° 12, rang Craig-Sud, dans le township de Chester-Ouest.

Pacaud, l'Appelant, intente de suite contre l'Intimé Price une action en dommage dans laquelle il déclarait que toutes les accusations de fraude proférées contre lui étaient mensongères et obtint, le 26 novembre 1867, devant la cour Supérieure une condamnation de $800 de dommages contre Price Le jugement fut renversé en cour de Revision, mais réintégré par la cour d'Appel à l'unanimité. Dans cette cause l'Intimé Price avait soulevé par exception temporaire la question de la sus-

(1) 1 Rev. de Lég. 346, K. B. (1812).

(2) 1 Rev. de Lég. 503, K. B. (1821).

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pension de cette action pour attendre le résultat de l'action dans laquelle il s'était rendu coupable des calomnies reprochées. La cour Supérieure avait rejeté cette prétention par le considérant suivant :

Considérant que du moment que les dites injures et imputation de fraude ont été faites par le défendeur en la présente cause et par le dit Richard Price par leur déclaration et leur factum—le Demandeur en la présente cause, sans être obligé d'attendre qu'il y eut un jugement final sur l'action intentée devant cette cour en ce district, par le Défendeur en la présente cause et le dit Richard Price, contre le Demandeur en la présente cause, le dit Théophile Coté, et la dite corporation du township de Chester-Ouest, et qu'ainsi l'exception plaidée par le Défendeur en la présente cause intitulé exception temporaire péremptoire en droit, est mal fondée.

Ce motif fut adopté par la cour du Banc de la Reine.

L'analogie entre les deux causes est parfaite Les faits reprochés et servant de bâse à ces actions ont été dans les deux cas, commis dans des procédés judiciaires, et sont absolument de même nature. La seule différence qu'il y a et elle n'est guère en faveur de l'Intimée, c'est que dans cette cause, au lieu de prendre une action pour diffamation conforme à la nature des accusations dont on se plaint, on a sans doute, pour éviter la difficulté de la prescription annale, qualifié l'action en cette cause d'action en dommage résultant de poursuite malicieuse. La qualification donnée n'y fait rien, c'est par la nature des faits allégués que l'on doit juger du caractère de l'action.

Au fond ce n'est qu'une action pour libelle, et Springle n'avait pas d'autre sujet de reproche contre l'Appelante. On ne pouvait lui contester son droit de demander la destitution pour cause d'incompétence, par exemple, si la requête n'eût contenue que ce motif, est-ce que Springle aurait eu droit de se plaindre? Il est évident que non ; le seul grief qu'il ait, ce sont les imputations faites contre son caractère. Elles constituent un libelle pour lequel il aurait dû poursuivre. Mais ayant laissé passer les délais de la prescription, il espère en éviter

la conséquence en présentant son action sous un autre aspect. Si on la considère comme une action pour libelle, elle est prescrite par un an en vertu de l'art. 2262 ; si, au contraire, on la considère comme demandant la réparation du dommage causé par une poursuite malicieuse, elle est alors prescrite par l'art 2261 Cette prescription, quoique n'ayant pas été plaidée, est une de celle que le juge doit suppléer en vertu de l'art. 2267. C'est ce qui a été fait par le jugement de la Cour Supérieure qui a renvoyé cette action.

Il reste maintenant à considérer le deuxième moyen invoqué pour empêcher la prescription de courir, savoir, que les faits reprochés constituent un délit successif. Il est reconnu qu'en cas de délit de cette nature, la prescription ne commence à courir que du moment que le délit a cessé. Mais qu'est ce qu'un délit successif ? Masson (1) le définit ainsi :

> On appelle délits successifs ceux qui se renouvellent et se perpétuent par une série d'actes ou dans une série d'instants. On les appellent ainsi par opposition aux autres délits qui s'accomplissent par un seul fait et qui se consomment dans un seul instant.

Il ajoute qu'il n'est pas toujours facile dans la pratique de savoir ce qu'il faut considérer comme délit successif. Il en donne pour exemple le fait de ne pas faire la déclaration exigée par la loi pour la publication d'un journal. On a jugé que l'infraction à cette obligation constitue un délit successif, parce que l'infraction existe et se répète tant que la déclaration exigée n'a pas été produite. Sourdat (2) en donne comme exemple la détention arbitraire, le délit dure aussi longtemps que subsiste la détention La Cour du Banc de la Reine a déclaré, dans la cause de *Grenier* vs. *La cité de Montréal* (3), que des travaux qui font affluer l'eau sur le terrain d'un voisin constitue un délit successif.

Il est évident qu'il n'y a aucune analogie entre ces

(1) Vol. 2, p. 83. (2) Vol. 1er, nº 384.
(3) 21 L. C. Jur. 215.

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faits reconnus comme constituant des délits successifs et celui de prendre une action qui s'accomplit à l'instant de l'émanation de l'action. S'il y a délit, il est alors complet et aucune procédure ni aucun fait postérieur n'ajoute à sa gravité ou ne la diminue. On ne peut pas dire que l'Appelante prenait une nouvelle action, ou commettait un nouveau délit chaque fois qu'il était fait un procédé dans son action. Si cet argument avait quelque force, la cour du Banc de la Reine l'aurait admis dans la cause de *Pacaud* vs *Price* en déclarant que le délit dont se plaignait l'Appelant ne pouvait être considéré comme accompli qu'à la fin du procès, et que le Demandeur n'avait aucun droit d'action lorsqu'il a intenté la demande,—mais elle a au contraire déclaré que le délit était complet et que l'exercice du droit d'action ne pouvait être suspendu. La conséquence de cette doctrine est que la prescription avait commencé à courir du moment de la production du document incriminé. Il est assez extraordinaire que l'on ne trouve pas une seule décision dans nos rapports qui soutienne la doctrine de la suspension du droit d'action. Mais on en trouve au contraire un nombre assez considérable, celles entre autres citées plus haut, qui la répudie. Ces décisions admettant que le droit d'action peut être exercé indépendamment du sort de la première action, reconnaissent par là même que le droit d'action est complet, et que partant il est sujet à la prescription.

Pour ces raisons je suis d'opinion que l'appel devrait être accordé— et le jugement de la cour Supérieur réintégré.

HENRY J.—This suit was commenced in May, 1871, by James Key Springle, the original plaintiff herein, who died in January, 1877, and the suit has been continued by the present respondents, Mary E. Hall, his widow, and Anna Augusta Springle, one of his daughters.

It is substantially an action for a false and malicious complaint made by the appellants through which the original plaintiff alleged he had suffered and sustained serious and heavy damages and losses as complained of in his declaration. It was contended on the part of the appellants that it was but an action for libel and that the time limited by the Civil Code for bringing such an action had expired before the commencement of the action. The declaration, no doubt, charges the appellants with having published a libel against the plaintiff, but it also charges them for a malicious prosecution in the shape of a petition addressed to one of the judges of the Superior Court in the Province of Quebec, in 1868, alleging, amongst other things, dereliction of duty and dishonest and improper conduct on the part of the said plaintiff and one Thomas S. Brown, whilst acting as two out of three of a permanent board of commissioners, duly appointed for the appraisement of damages to parties whose lands and premises might be from time to time appropriated for city purposes, and for which services the said commissioners were provided to be paid; and praying that certain proceedings referred to in the petition might be stayed and the said commissioners removed from office and replaced.

After a general and specific denial of the charges contained in the petition, the plaintiff, in his declaration, alleges:

That the said defendants never had any probable or reasonable cause for adopting the said resolution (meaning a resolution passed by the defendants on the subject referred to in the petition) or for filing the said calumnious, wicked and malicious petition against the plaintiff in this cause, and that they never had any trustworthy or positive information of any kind to justify them in so doing.

I think the foregoing charges the defendants as for a malicious prosecution, and alleges the want of reasonable or probable cause. The matter of the petition came to a hearing before Mr. Justice Berthelot, and in

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September, 1870, he gave his judgment thereon, acquitting the two commissioners complained against of all the charges contained in the petition, but removed them from office for, as he says, error of judgment only resulting from an erroneous impression of the law as to expropriation.

From that decision the plaintiff appealed to the Court of Queen's Bench, and the latter court by its judgment in September, 1873, reversed the judgment of the Superior Court given by Mr. Justice Berthelot as before mentioned.

From the judgment of the Court of Queen's Bench the appellants took the case by appeal to the Privy Council, and by a judgment of the latter in November, 1876, the appeal was dismissed and the judgment appealed from affirmed.

There is abundant evidence, therefore, to establish the allegations in the declaration, and to show that the original plaintiff sustained serious damage by the false charges made against him, which the respondents were unable and did not attempt in the slightest degree to prove.

The suit was brought within the prescribed time after the proceedings under the petition were terminated, and I have no doubt that the plaintiff had a good and available cause of action.

Having considered the amount of damages awarded, I am of opinion that the award of them is not only not excessive, but much less than, under the circumstances, I should have awarded.

I am of opinion the appeal should be dismissed and the judgment of the court below affirmed with costs.

GWYNNE J.—Two points were urged by the learned counsel for the appellants in support of this appeal.

1. That, assuming the action to lie, it was absolutely

barred under the provisions of articles 2262 and 2267 of the civil code of the Province of Quebec, the former of which enacts that actions for slander and libel are prescribed by one year from the day that it came to the knowledge of the party aggrieved, and the latter, that no action can be maintained after the delay for prescription has expired; and

2. That no action at all lies against the defendants, the now appellants, under the circumstances appearing in the case.

If the present action was one for libel merely, and was founded solely upon the matter which is contained in the resolution of the council of the corporation of the 27th July, 1868, assuming an action founded upon that resolution alone to have lain, it must be admitted that it would have been barred by the above articles of the civil code; but this action is not one for libel merely, nor is the resolution of the 27th July the sole foundation upon which it is framed. The action is for following up that resolution by a proceeding instituted in the courts, maliciously, as is alleged, and without any probable cause, wherein the defendants, by certain false and scandalous charges of venality and corruption made by them against the original plaintiff, maliciously and without any probable cause, endeavored to have the said plaintiff removed from a certain office of profit, and employment of a *quasi* judicial nature in the pursuit of his profession, the effect of so falsely and maliciously prosecuting which proceeding, naturally and in fact, was, to deprive the said original plaintiff almost wholly of the benefit of his profession, by branding him as venal and corrupt and unworthy of all trust and confidence, and of being employed in the business of a valuator of real estate which he followed as a profession.

The declaration alleges the appointment, under the

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provisions of the statute 27 and 28 Vic. ch. 60, of the original plaintiff and one Thomas Storrow Brown and one Damase Masson, as commissioners to determine under the statute the price or compensation to be allowed to one Wilson for expropriation of certain property situate in the city of Montreal and required by the corporation for the widening of St. Joseph street, and that after having been duly sworn they proceeded to take the proceedings indicated by the statute for the purpose of valuing the piece of land in question; that the corporation, although applied to by the commissioners, declined to produce any witnesses or evidence to contradict that adduced by Mr. Wilson, until at length, after an adjournment for the express purpose of enabling the corporation to produce evidence, they produced two witnesses who, in so far as they gave any relevant evidence, corroborated the evidence adduced on behalf of Mr. Wilson. The declaration then states the whole of the proceedings of the commissioners, and that the original plaintiff and Mr. Brown arrived at a preliminary appraisement, in which, however, the other commissioner did not concur, and a meeting was called, conformably with the provisions of the statute, of the parties interested, and a notification given to such parties, that the commissioners would hear them, to the end that, after the said parties should be heard, the commissioners should decide whether they should maintain or modify such preliminary appraisement. It then alleges the reception of such evidence as was offered by the parties interested, and the modification of the preliminary appraisement, and a final report of the valuation of the piece of land to be expropriated at the sum of $13,666. It then alléges that, notwithstanding what is before stated, the council of the city passed the resolution of the 27th July, 1868, authorizing and directing proceedings to be instituted for the purpose

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of staying all proceedings of the said commissioners, and of having the said original plaintiff and Mr. Brown removed from being commissioners for valuation of the said piece of land as persons who had forfeited their obligations as such commissioners. It then sets out a petition presented to one of the judges of the Superior Court of the Province of Quebec by the corporation of the city of Montreal, wherein after divers charges of venality and corruption culminating in their having, in violation of their duty as commissioners, made what was charged to be an unjust, excessive and exorbitant valuation in favor of Mr. Wilson under the influence of bribery and corruption, the defendants prayed for an order of the said judge adjudging that the proceedings of the said commissioners should be stayed, and that the said original plaintiff in this action and Thomas S. Brown should be removed from the office of commissioners as having violated and forfeited their obligations. The declaration then proceeds to allege that the said petition and the allegations therein contained are false, malicious and libellous, and were made solely with the view to injure the character and good name of the original plaintiff; and the declaration charges that the several allegations in the petition, charging the said original plaintiff and Thomas S. Brown with partiality, venality and corruption, are false, repeating such charges seriatim, and alleges that the defendants never had any reasonable or probable cause for adopting the said resolution or for filing the said calumnious, wicked and malicious petition against the plaintiff in this cause, and that they never had any trustworthy or positive information of any kind to justify them in so doing; that the said defendants did not prove any of the accusations in the said petition or resolution contained, and that they did not even bring a single witness to substantiate the same, and did not

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and could not make them good, such accusations being utterly false and calumnious as aforesaid. That by a judgment rendered on the said petition by the honorable Judge Berthelot, on the 17th day of September, 1870, the said accusations and charges so brought by the defendants against the plaintiffs were in fact declared false, without foundation or probable cause, and were rejected in fact as such by the said judge. That the said false and calumnious accusations and charges were of a nature to injure, and did in fact gravely injure, the high character, good fame and reputation of the plaintiff, and put in danger the confidence hitherto reposed in the plaintiff by the public and his friends, and have also greatly hurt the feelings of the plaintiff and during more than two years kept him in suspense and anguish under the said accusations and charges pending the said petition; that, moreover, the said plaintiff has lost a great deal of time and expended large sums of money in defending himself against the said accusations and charges, and has suffered damage to the amount of twenty thousand dollars for all the causes and reasons aforesaid.

It is apparent that this declaration discloses what in English jurisprudence is known as an action for malicious prosecution, which consists in the prosecution by the defendant of legal proceedings of a civil or criminal nature against the plaintiff, maliciously and without probable cause, the essential ground of the action being that a prosecution authorized by law, if the grounds which justify its being instituted exist, was carried on without any probable cause, from the absence of which malice may be, and, as said in *Johnstone* v. *Sutton* in error (1), most commonly is, implied. The meaning of a malicious prosecution is that a party, from a malicious motive, and without reasonable or probable cause, sets

(1) 1 T. R. 545.

the law in motion against another; and as the want of probable cause for instituting the legal proceeding complained of is the essential foundation for the action, the termination of such proceeding in favor of the plaintiff must be alleged in the declaration.

Barber v. *Lesiter* (1); *Stewart* v. *Gromett* (2); *Basébé* v. *Matthews* (3).

It is obvious, therefore, that the period when prescription of such an action will begin to run cannot be until such termination. In this case that period did not certainly arrive before, and it is alleged in the declaration to have arrived, upon the delivery of the judgment of Judge Berthelot in the Superior Court upon the 17th September, 1870, whereby the original plaintiff and Thomas S. Brown were acquitted of the calumnious charges which were made the foundation of the petition, and which in effect were pronounced to be false and without foundation or probable cause; and these gentlemen were adjudged by the court to have acted in the discharge of their duty as commissioners with diligence, integrity and impartiality, although they were removed from their office of commissioners for another cause which, upon appeal, was pronounced by the Court of Appeal to have been unfounded and insufficient and illegal, and this judgment of the Court of Appeal, upon an appeal therefrom by the present defendants to the Judicial Committee of the Privy Council, has been maintained. As the objection here urged to the maintenance of the present action is that it has been commenced too late, after being, as is contended, prescribed, not that it has been commenced prematurely, it is unnecessary to enquire whether the cause of action as stated in the declaration, was or not made complete by the judgment of the Superior Court, which, while

(1) 7 C. B. N. S. 186, 190. (2) 7 C. B. N. S. 206.
(3) L. R. 2 C. P. 684.

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acquitting the parties accused of the accusations preferred against them as unjust and unfounded, nevertheless removed them from their office of commissioners to adjudicate upon the special matter submitted to them, but for a different cause which was, upon appeal, finally pronounced to have been insufficient, illegal and equally unfounded.

It is not pretended that an action will not lie under the French law, which prevails in the Province of Quebec, under the like circumstances as an action for malicious prosecution will lie by the law of England; indeed it is contended that the French law is more liberal that the English in giving redress to a party injured by calumnious accusations, inasmuch as it is contended that in virtue of an ordinance of Francis the First, made in 1539, for either a plaintiff or defendant to allege anything in any pleading, false and calumnious of the opposite party, is actionable as a libel, and this wholly irrespective of the termination of the action or proceeding in which such calumnious matter is alleged, and even though it be alleged in assertion of a legal right which the party alleging it succeeds in establishing; the sole test of the calumnious matter being or not being actionable, consisting in its being, or not being, proved to be true; and in support of this contention divers passages from the works of Domat, Dumazeau, Dareau, Merlin and others, and a judgment of the Court of Appeals of the Province of Quebec in *Pacaud* v. *Price* (1) are cited.

The authority of this latter case is disputed by the learned counsel for the appellants, who contended that it was not well decided and that it should not be followed, but I do not think we are called upon in this case to determine whether it was well or ill decided, for even if the judgment of the Court of Revision in

(1) 15 L. C. Jur. 281.

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that case had prevailed, which held that the action in that case did not lie because, in the opinion of that court, although the defendant therein did not, in the action which had been brought by him, prove the calumnious matter alleged by him, he had probable cause for making the allegations complained of, still the present action would be maintainable, as it cannot be, and indeed, in this action, has not been, contended that the defendants had any probable cause for making the calumnious accusations, which they did make, for the purpose of having the original plaintiff and Mr. Brown removed from their office. Although they repeat in their plea to the present action the substance of the charges, they appear to have offered no evidence in support of them. Despairing it may be of being able to establish the truth of the charges in the face of the judgments of the Superior Court and of the Court of Appeals for the Province and of the Privy Council upon the matter of their petition, they rather rest their defence to the present action upon an allegation that they filed the petition, which contained the charges, in the exercise of what they call their legislative and judicial functions, and in the interest of public justice, having no interest whatever in the matter themselves, and upon the advice of their counsel, and without malice, and the evidence which they have adduced seems to have been confined wholly to the question of damages.

What is meant by the contention that a legal prosecution founded upon calumnious charges made without any probable cause for making them, is a thing done in the exercise of legislative and judicial functions, I find it difficult to understand. Neither can I appreciate the force of the contention that parties having no interest whatever in a matter brought by them before the courts for adjudication, but who intervene as prosecutors in the interest, as they say, of public justice, can have a

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right to demand that the courts wherein justice, whether public or private, should be dispensed with an equal measure, should, in the interest of public justice, pronounce to be justifiable a prosecution against individuals based upon scandalous, false and calumnious charges made without any foundation in fact or any probable cause for believing them to be true. The defendants, if they could shelter themselves under the plea that what they did was done by them under the advice of their counsel, have failed to offer any evidence of such advice. It may be assumed that counsel may have advised, and very probably did advise them, that the charges stated in the petition, if proved, would require the court to grant the prayer of the petition for the stay of all proceedings and the removal of the commissioners who were accused of partiality and corruption, but further than this we cannot go; nor can we read the plea of the defendants as alleging that counsel advised them that they would be justified in making the charges if they knew them to be false or had no reasonable or probable cause for believing them to be true. For the truth or falsity of such very grave accusations, and for their probable and reasonable cause for making them, the defendants must have known, or, at least, must be regarded as having known, that they themselves must be alone responsible.

There remains only to be considered the question of malice, and upon this point it is unnecessary to enquire whether the falsity of the charges in itself alone, or coupled with the absence of probable cause, is sufficient conclusively to establish malice. Malice may be, and frequently is, implied from the absence of probable cause, but there is not wanting in this case, I think, other evidence from which it may be inferred. A plea of justification of the imputation of calumnious matter upon the ground of the truth of the

calumnious matter, may be taken into consideration on the question of malice. *Wilson* v. *Robinson* (1.) Now, the defendants in their plea allege:

That the said plaintiff and the said Thomas Storrow Brown refused to concur in the opinion of the said Damase Masson, or in his valuation, and that in consequence thereof the defendants, well knowing that the proposed award of the said plaintiffs and the said Thomas S. Brown was excessive, exorbitant and unjust, and would entail grievous loss upon the property owners to be assessed for its payment in the event of the said proposed award being homologated, protested against the said proposed award of nineteen thousand five hundred dollars; and although no part of said amount, if made payable, could be exacted from the said defendants (the whole being assessable upon the properties of the persons interested in the said improvements), nevertheless the defendants being by law constituted the civic guardians of the rights of the citizens of Montreal in all such matters, felt constrained to, and did, institute and cause to be instituted, legal proceedings as by their attorney and counsel they were advised would be necessary and proper to prevent the said proposed award from taking effect and from being ratified or homologated by any legal tribunal.

Now, here it is to be observed that the defendants profess to justify their filing the petition for the removal of the commissioners upon the ground of charges of partiality and venality preferred against them as their motive for awarding to Mr. Wilson an amount which the defendants pronounce upon their own knowledge to be unjust, excessive and exorbitant. Yet, despairing, as it would seem, of establishing the truth of the allegation, they offer no evidence in support of it; moreover, it is not unworthy of observation, as pointed out by the learned counsel for the respondents, that the defendants here persist in stating the proposed award to be nineteen thousand five hundred dollars, although it appears that this sum was a preliminary appraisement subject to review upon evidence being adduced by the parties interested, and which was in fact reduced to thirteen thousand six hundred and sixty-six dollars before ever

(1) 7 Q. B. 68.

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the petition was served and presented to the court, and notwithstanding the finding of the court to which the petition was presented, that the accused commissioners were not guilty of the accusations upon which the petition was founded; nor upon the question of malice, do I think that we can overlook the fact that after the Superior Court had acquitted the accused commissioners of the charges of partiality and venality made against them, but had pronounced a judgment removing them from their office for another cause; and after the Court of Appeal had reversed that judgment of removal and had reinstated the commissioners, the defendants persisted in their prosecution by appealing from that judgment to the Privy Council for the express purpose of endeavoring to have the judgment of removal reinstated, although the sole grounds upon which the statute authorized them to interfere had been adjudged against them, from which adjudication no appeal was ever taken.

Under all these circumstances, I think that the Court of Appeal of the Province of Quebec, which is the only court that has adjudicated upon the merits of the case, was justified in concluding that the proceeding against the accused commissioners was instituted maliciously. Upon the question of damages I do not think that a court of appeal should interfere with damages as awarded by a judgment under consideration in appeal, unless they appear to have been calculated upon a wrong principle or arrived at without regard to the considerations which ought to govern a tribunal in awarding damages—neither of which imputations have been or can be suggested here. It is not sufficient that we, if sitting as judges of first instance, might have given, as some of the judges of the court below were disposed to give, much larger damages.

Our judgment, in my opinion, should be to dismiss

the appeal of the defendants with costs, and the cross appeal as to damages without costs, as the costs which have been incurred in the case do not appear to have been appreciably increased by the cross appeal.

Appeal dismissed with costs and cross-appeal dismissed without costs.

Solicitor for appellants: *Rouer Roy.*

Solicitors for respondents: *Barnard & Beauchamp.*