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*Nov. 19, 20.

THE MONTREAL STREET RAILWAY COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

WILLIAM FREDERICK RITCHIE, (DEFENDANT)..... } RESPONDENT.

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

Injunction—41 Vic., ch. 14, sec. 4, P. Q.—Action for damages—Want of probable cause—Damages other than costs.

Where a registered shareholder of a company finding the annual reports of the company misleading applies after notice for a writ of injunction to restrain the company from paying a dividend, and upon such application the company do not deny even generally the statements and charges contained in the plaintiff's affidavit and petition, there is sufficient probable cause for the issue of such writ, and consequently the defendant, who upon the merits has succeeded in gettingthe injunction dissolved, has no right of action for damages resulting from the issue of the injunction.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) which confirmed a judgment of the Superior Court dismissing the plaintiffs' action.

The plaintiffs (now appellants) sued the defendant for damages, alleged to have been suffered by them in consequence of a writ of injunction issued against them, at his instance, to restrain them from declaring their yearly dividend. The declaration set forth, that on the 7th October, 1886, the defendant presented a petition supported by his affidavit, to the Superior Court at Montreal, alleging that the capital of the Montreal Street Railway Company was impaired, that their financial statement for the preceding year (1885) was at variance with the true state of the company's affairs,

PRESENT :—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

exhibiting grossly exaggerated values of the company's property in the attempt to make the capital appear intact, and containing large items of assets which were wholly fictitious, and calculated to deceive the stockholders ; that the directors intended to declare a dividend wholly unjustified by the condition of the company's affairs, and only based on the expectation of future profits ; and praying that the company and its directors should be restrained from declaring and paying any dividend or bonus for the financial year 1886, or any other dividend or bonus, so long as their capital remained impaired. The declaration further set forth that on the 9th October, 1886, His Honor Mr. Justice H. T. Taschereau, after hearing the parties by their respective counsel, ordered a writ of injunction to issue as prayed, provided the petitioner gave security to the extent of $10,000 ; that security was duly lodged, and a writ issued against the company ; that after issue joined on said petition the parties went to trial, and the same judge eventually dismissed the said petition, and dissolved the temporary injunction previously granted by him, holding that the company's capital was not impaired, and that the directors were justified in declaring a dividend for the year 1886. The plaintiffs further charged that the defendant only became the holder of shares in the plaintiffs' company shortly before the institution of said proceedings, and for the sole purpose of taking them ; that the said proceedings were unfounded and vexatory, malicious, and taken without probable cause, and that the defendant acted in collusion with other parties interested in the depreciation of the company's assets, with intent to injure its credit and financial reputation. Damages were laid at the sum of $20,000 for injury to credit, and for various sums alleged to have been paid to counsel,

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accountants, and other experts, in order to obtain the dissolution of the injunction.

The affidavit filed by the manager Mr. Lusher in answer to the affidavit and petition for the issue of the writ of injunction was as follows:—

"That the said petitioner only became as hareholder in said company of respondents on the fourteenth day of September, now last past, by having twenty-three shares of the capital stock of said company transferred to his name on that day, and that he, Petitioner, was never previous to that date a registered holder of shares in said company.

"That the statement of account for the past financial year of the said company, which the directors have to consider and examine before deciding whether or not a dividend shall be declared, have not yet been prepared, nor have the directors been informed of the probable results of said year's business."

The proceedings were based on the following financial statement of 1885:

"General statement of the affairs of the Montreal City Passenger Railway Company on 30th September, 1885.

ASSETS.

Construction account of railway	$297,320 60	
Real estate and buildings (as valued in 1877)	159,290 37	
Rails and track material, stores, &c.	31,046 56	
Equipments—Cars, sleighs, horses, &c	133,081 49	
Cash on hand and in bank	1,298 45	
This amount charged off assets left in suspense since 1877	165,216 77	
		$787,254 24

LIABILITIES.

Capital stock	$600,000 00	
Unclaimed dividends	2,296 17	
Mortgages	1,050 00	
Reserved for law, &c.	5,550 00	
Due sundry creditors	19,432 50	
Reconstruction reserve account	89,600 15	
Profit and loss account	69,325 42	
		$787,254 24

Verified,

JNO. McDONALD, *Auditor.*

Profit and loss account, 30th September, 1885.

By balance at credit 30th September, 1884...		$63,632 43	
Less, 6th November, 1884, Dividend of $1¾ per share		21,000 00	$42,632 43
By earnings of the road for the year ended 30th September, 1885		61,758 78	
By sales of manure		623 53	
By advertising in cars		135 50	
		62,517 81	
Less—Paid Auditor	$ 150 00		
Vote to directors	3,000 00		
Interest account	1,579 59		
Loss an horses	2,071 00		
Credited reconstruction reserve account	7,024 23		
Credited law account	1,000 00		
		14,824 82	
			47,692 99
			90,325 42
Less dividend 6th May, 1885			21,000 00
Balance at credit 30th September, 1885			$69,325 42

Verified,

JOHN McDONALD, *Auditor.*

E. LUSHER, *Manager and Sec'g.*

The two items of assets alleged to have been misleading were, the 1st, the construction account of 30 miles of street railway at $297,320.60, and the last item of $165,216.17.

The defendant (now respondent) pleaded to this action that he had taken the proceedings referred to in good faith and without malice, believing the same to be in the interest of the shareholders generally, and without any intent to injure the credit or financial reputation of the company, but in the hope of improving the same, and placing it on a more stable basis; that the defendant shared the widespread suspicion existing among business men in the city of Montreal at the time of said proceedings as to the soundness of the company's affairs, and believed that a thorough investigation thereof would be beneficial to the share-

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holders; that all the allegations made by him in his petition for a writ of injunction were made with reasonable and probable cause, and were based on public records, and more especially on the financial statement submitted by the directors of the said company to their shareholders, at the annual meeting in 1885, which statement was misleading, and justified the defendant in taking his proceedings; that the plaintiffs themselves admitted the misleading and incorrect nature of said statement, by publishing a new and altered statement of their affairs during the pendency of the injunction proceedings; that the injunction in question was obtained by defendant after due notice to the company, after an exhaustive argument by their counsel, and upon his making out a *primâ facie* case to the satisfaction of the judge who afterwards dissolved the injunction. The defendant further averred that the company had suffered no damage in consequence of his proceedings, but that on the contrary the result had been to establish its financial credit and standing on a more secure basis than before.

The issues were closed in the usual way, and the case was tried before Mr. Justice Johnston who, immediately after hearing the proof, dismissed the action with costs.

On appeal to the Court of Queen's Bench for Lower Canada (appeal side), the judgment of the Superior Court was unanimously confirmed.

Geoffrion Q. C. and *H. Abbott* Q. C. for appellants contended that the allegations contained in respondent's petition for an injunction constituted a libel upon the company, and cited Morawetz on Private Corporations (1); *Williams* v. *Beaumont* (2); *Trenton Mutual Ins. Co.* v. *Perrin* (3); *Metropolitan Omnibus Co.* v. *Hawkins* (4);

(1) 2 Ed. 358.
(2) 10 Bing. N. C. 26.
(3) 3 Zabriskie 403.
(4) 4 H. & N. 87.

Knickerbocker Ins. Co. v. *Ecahesine* (1) ; 2nd, that courts England while not refusing the right of action to a in person who buys stock for the purpose of taking an injunction, have always looked most unfavorably and animadverted strongly upon such proceedings as were taken by the respondent in the present case, and referred to *Seaton* v. *Grant* (2) ; *Bloxam* v. *Metropolitan Ry. Co.* (3) ; *Robson* v. *Dobbs* (4); *Forest* v. *Manchester Ry. Co.* (5) ; 3rd, that the reports issued by the company were not misleading and that as there was want of reasonable and probable cause, the present action was sustainable under the civil law of the Province of Quebec ; 4th, that under the Provincial statute, 41 Vic., ch. 14, sec. 4, P. Q., the respondent was responsible for any extra expense the appellants were put to by reason of the issue of the writ of injunction.

Lafleur and *Lonergan* for respondent contended that the rule which has always been recognized under the French Law, as applicable to actions of damages for vexatory proceedings, whether civil or criminal, is that it is not enough to establish that the proceedings complained of were unsuccessful, but that they were rashly and maliciously instituted.

Ancien Denizart (6) ; Nouveau Denizart (7) ; Guyot, Répertoire (8) ; Merlin, Répertoire (9) ; Ferrière Dict. de Droit (10) ; Dalloz, Répertoire (11) ; Pigeau, Procédure (12); Domat (13); Carré et Chauveau (14); Bédarride (15).

(1) 34 N. Y. S. C. 76.
(2) L. R. 2 Ch. 459.
(3) L. R. 3 Ch. 337.
(4) L. R. 8 Eq. 301.
(5) 7 Jur. N. S. 887.
(6) Vo Dommages et Intérêts, No. 4.
(7) Vo. Dommages et Intérêts, No. 9.
(8) Vo. Accusateur, vol. 1, p. 115.
(9) Vo. Accusation, vol. 1, p. 44.
(10) Vo. Calomniateur, vol. 1, p. 223.
(11) Vo. Dénonciation Calomnieuse, No. 142.
(12) T. I. pp. 421 et seq., Liv. 2, part 3, Tit. 2, ch. 4.
(13) Liv. 3, Tit. 5, Sect. 2, No. 14, p. 271.
(14) T. I, p. 641, sur. art. 128, quest. 544.
(15) Dol et Fraude, vol. 1, p. 316, No. 319.

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The learned counsel then reviewed the evidence, contending that there were misleading statements published in the annual statements of 1888 which were sufficient and probable cause for a shareholder applying for a writ of injunction to restrain the company from paying a dividend until these statements were explained.

They referred more particularly to items showing, as alleged, an over-valuation of the property and to an item entered merely for the purpose of book-keeping.

They contended further that, as a matter of fact, the application for the injunction was made upon notice and no answer or explanation was given by the company. Joyce on Injunctions (1). Moreover, that the appellants recognized and admitted the justice of the respondent's principle ground of complaint, by altering their financial statements during the pendency of the injunction suit, so as to accord with his pretensions.

That as to extra expenses, the bill of costs paid by the respondent included all that the appellants had a right to recover by law: *Quartz Hill Gold Mining Co.* v. *Eyre* (2); *Cox* v. *Turner* (3).

Sir W. J. RITCHIE C. J.—I have listened very attentively to this case, and I was impressed very much with the able argument of Mr. Geoffrion and Mr. Abbott on behalf of the appellant, but since hearing the counsel for the respondent I have come to the conclusion that there is no evidence in this case that any damage was occasioned to the appellant company by reason of the issue of the writ of injunction.

I think that where a party has notice of an application for the issue of a writ of injunction and does not choose to avail himself of the opportunity to repudiate

(1) Vol. 2, p. 1309. (2) 11 Q. B. D. 682.
(3) M. L. R. 2 Q. B. 278.

the statements in the petition and affidavits but leaves them all unanswered, if he afterwards suffers damage by the issuing of a writ he brings it on himself. As regards the other count of the action, viz., damages resulting from the statement and charges contained in the petition, assuming that a party has a right to bring an action of damages against another for having taken civil proceedings, in such a case appellant's counsel admits it is necessary to show malice and want of reasonable and probable cause and I should be very sorry to come to a different conclusion from that of the judges of all the courts below; and I am not constrained to do so, as, so far as I can judge of this case, there was ample cause for the respondent, a registered shareholder of the company, to seek an investigation into all the matters connected with the affairs of the company. The overvaluation of the property and the item of $165,000 in the statement entered, as it is admitted, for the purpose of book-keeping, challenged enquiry. If parties choose to make such entries in their books surely any shareholder has a right to ask for an explanation. I think, therefore, there is ample evidence to sustain the finding of the courts below that there was no want of reasonable and probable cause. Upon both branches of the case the respondent must succeed, and the appeal will therefore be dismissed with costs.

STRONG J.—I am of the same opinion. I assume all questions of law in favor of the appellants and especially I agree that by the law of the Province of Quebec an action can be maintained by a defendant, who has succeeded in a civil action, against one who maliciously and without reasonable and probable cause, or, in other words, against one who having no real interest has, in bad faith and with the malicious intention of harassing his adversary, unsuccessfully prosecuted the

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action. The law of the Province of Quebec in this respect differs from the law of England, according to which such an action will not lie, unless there has been by means of civil process some unwarrantable interference with the person or property of the party defendant in the original action. Admitting then that the appellants can maintain their action if they can show that the respondent was a *plaideur téméraire* who sued without reasonable cause in bad faith and with malice, the question we have now to decide becomes one of evidence solely. Now, do the appellants establish by their proofs that the injunction proceedings were instituted by the respondent maliciously or without probable cause? I am of opinion that this question of fact, as to which all the learned judges of the courts below, before whom, in its different stages, this cause has come, are of accord, admits of no doubt. That there was reasonable and probable cause for the proceedings in the injunction action is apparent when we read the deposition of the principal witness for the appellants, their manager and secretary, Mr. Lusher, who admits that in the general statement of the affairs of the company appended to the directors' report and, upon the basis of which the directors were about to declare and pay a dividend, a certain amount, which had been previously put in a suspense account as an amount by which the assets had been over-estimated, was included in the list of assets. This amounted to the large sum of $165,216.77. There can be no mistake about this, for besides Mr. Lusher's statement in his deposition we have the accounts which were appended to the report, filed amongst the exhibits, showing distinctly that this large item was included and dealt with as an asset. It is true Mr. Lusher afterwards says it was a mere matter of book-keeping, and that the amount which was thus made to appear

as an asset, was afterwards so charged in the profit and loss account, that it was in reality written off, but all this does not appear on the face of the report made by the directors to the shareholders or in the schedules annexed to it. There remains therefore, notwithstanding the manager's explanation for the respondent's justification the fact that this large sum, previously deducted for over-valuation, was included as an asset in the statement of the affairs of the company made by the directors to the shareholders. There could be no possible mistake about the matter for, not only is it apparent on the face of the directors' report, but the witness Lusher being asked "Do you find in that exhibit B an item of this amount charged of assets left in suspense since 1877 ; $165.216.77 included in the assets?" answers "Yes, I see it there." The witness does indeed add to this explanation as to how this item had been manipulated in the book-keeping, which Mr. Justice Taschereau ultimately considered sufficient ground for dissolving the injunction, but these explanations do not appear in the directors' report and were not even given on the original motion for the injunction. On that motion the appellants did not in the affidavits which they produced and read in opposition to the motion oppose to the allegations of the respondent as much as a general denial of their truth, much less did they then give the explanation now put forward by Mr. Lusher in his deposition in the present cause respecting this item of over-valuation, but they contented themselves with attacking the respondent's qualification as a shareholder and impugning his motives for insituting the action. In the face of such evidence as this the respondent cannot surely be said to have acted vexatiously and without reasonable and probable cause; on the contrary, he had, as a shareholder, a direct and legitimate interest to have the

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appellants restrained from paying dividends based on a false and exaggerated estimation of the assets, as *primâ facie*, and according to the admission of their principal officer it appeared from their report they were about to do.

As regards the status of the plantiff as a shareholder, I am of opinion that as the shares in respect of which he qualified himself to institute the action had been regularly transferred into his name, it matters not whether he held them in his own right or as a trustee or *prête-nom* for others, and his motives in acquiring the shares are not a relevant subject of enquiry. This latter proposition has been frequently affirmed in England, and I see no reason why the same rule of law should not be applied to the province of Quebec. Moreover, the respondent's quality as a shareholder having a sufficient *locus standi* to maintain the action for the injunction is *res judicata*, having been determined in the respondent's favour by Mr. Justice Taschereau in his judgment in the original action.

As regards the expense to which the appellants were put in having their accounts investigated by expert accountants, that by itself would constitute no independent ground of action if there was probable cause, and any claim on this head is also conclusively answered by the consideration that the appellants ought to have recorded their transactions and kept their books of account in such clear and regular form as to have enabled them at once and without any prolonged investigation to give any information which a shareholder might reasonably ask for.

The appeal appears to be entirely without foundation and must be dismissed with costs.

TASCHEREAU J.—I concur. The general rule is "*Les frais sont la peine, et la seule peine du plaideur*

téméraire." But if any one institutes or carries on legal proceedings in bad faith, vexatiously and maliciously he is liable to an action of damages. *Brown* v. *Gugy*, (1) reported on another incident, is an authority upon this point. There Gugy's action had been dismissed on demurrer by the Superior Court, but on appeal this judgment was reversed and the right of action recognized. I refer also to *Cayer* v. *Labrecque* (2); *Poutré* v. *Lazure* (3); Laurent (4); Bédarride (5); Sirey (6); and Dalloz (7) citing *Compagnie d'Assurance c. Cochet.*

In the present case, however, as a matter of fact found by the two courts below, and upon which there can be no doubt, there is no evidence of bad faith or malice in Ritchie's proceedings against the company. But it has been strenuously contended on the part of the appellant that a party taking an injunction does it at his risk, and that if the injunction is eventually dissolved he is liable to the damages ensuing therefrom, whether he acted maliciously or in bad faith or not. There is certainly ample ground for that contention as a general principle, and the security for damages required by the statute supports it. But in the present case we find that the company's own acts and returns justified Ritchie's demand for an injunction.

The company brought on these proceedings by its course of dealings. There are no damages proved resulting from the injunction, and upon that ground the appeal must be dismissed, but, were there any, the company itself is the primary cause of them.

GWYNNE J.—I am of opinion that the plaintiff's action is devoid of any foundation, notwithstanding the very able argument of the learned counsel for the

(1) 16 L. C. Jur. 265.
(2) 15 L. C. R. 130.
(3) 12 R. L.405.
(4) 20 Vol., par. 412 et seq.
(5) Dol et Fraude Nos. 319 et seq.
(6) 1883, vol. 1st, part p. 147; reporter's note & p. 92 2nd part same vol.; and 85, 1, 61, 209.
(7) 1888, 5th part, page 286.

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appellant which, I must confess, was leading my mind to take the worse to be the better part.

As to any damages having been sustained which could be recoverable under the statute 41 Vic., ch. 14, as sustained by reason of the issue of the writ of injunction no evidence was, in my opinion, offered; and as to the action for malicious institution of the injunction action which, in the unanimous opinion of all the judges before whom this case has been, is unsustainable by reason of the failure of the plaintiff to prove malice in the defendant and want of probable cause, it is impossible for us, consistently with the principles upon which we proceed in such a case to pronounce such a judgment upon a mere matter of fact to be erroneous even if we differed from it. For my part I entirely concur in it. It is unnecessary, therefore, to inquire whether the law of the Province of Quebec authorises such an action in a case like the present if the plaintiffs could have succeeded in establishing malice and want of probable cause in the defendant for having taken the proceedings which he did take in the injunction suit. The defendant has already suffered so much by the impounding in court of the $10,000.00 lodged by him in lieu of bail on the writ of injunction issuing that we should not add to his loss by delaying the delivery of judgment on this appeal, which in my opinion should be dismissed with costs.

PATTERSON J.—Concurred in dismissing the appeal and mentioned the case of *Williams* v. *Crow* (1) decided in Ontario, where in an action upon a replevin bond, the plaintiff claimed, as part of his damages by reason of the issue of the writ of replevin, his costs between solicitor and client over and above the costs taxed to him in the action of replevin, but the claim was dis-

(1) 10 Ont. App. R. 301.

allowed. The case was not cited as directly applicable to proceedings in the Province of Quebec, but as containing a reference to English cases which might be found to proceed on principles applicable to the construction of the statute 41 Vict. ch. 14.

Appeal dismissed with costs.

Solicitors for appellants: *Abbotts, Campbell & Meredith.*

Solicitor for respondent: *M. S. Lonergan.*