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*Nov. 3.
*Dec. 13.

DAVID ARCHIBALD (DEFENDANT).....APPELLANT.

AND

DAVID McLAREN AND MARGARET McLAREN (PLAINTIFFS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Malicious prosecution—Reasonable and probable cause—Belief of prosecutor—Duty to make inquiry—Questions for jury.

In an action for malicious prosecution the existence or non-existence of reasonable and probable cause must be determined by the court. The jury may be asked to find on the facts from which reasonable and probable cause may be inferred but the inference must be drawn by the judge. *Lister* v. *Perryman* (L. R. 4 H. L. 521) followed; *Abrath* v. *North Eastern Railway Co.* (11 Q.B. D. 79, 440; 11 App. Cas. 247) considered.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court by which a non-suit at the trial was set aside and a new trial granted.

The defendant is inspector of police for the city of Toronto who caused plaintiffs to be arrested on a charge of keeping a house of ill-fame. The information was laid by a woman named Dale who had boarded with the plaintiffs for a time and plaintiffs claimed that she did so with a view of regaining possession of her trunks which had been held by plaintiffs for payment of her bill for board. The case was tried three times, resulting each time in a non-suit which was afterwards set aside and a new trial ordered. From the last order defendant appealed to the Court of Appeal, and the judges of that court being equally divided the order stood confirmed. Defendant then appealed to this court.

*PRESENT:—Strong, Fournier, Taschereau, Gwynne, and Patterson JJ.

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The principal question raised on the appeal is whether or not the trial judge should have submitted to the jury questions as to the defendant's belief in the truth of the information and as to whether or not he had made proper inquiries before causing the warrant to issue.

MacLaren Q.C. for the appellant. The question of want of reasonable and probable cause is for the court alone, and there were no facts in dispute on which the jury should have passed. See *Lister* v. *Perryman* (1); *Abrath* v. *North Eastern Railway Company* (2); *Brown* v. *Hawkes* (3).

Tytler for the respondents cited *Hamilton* v. *Cousineau* (4) and authorities there collected by Hagarty C. J. O.

STRONG J.—This is an action for malicious prosecution brought by the respondents against the appellant for having caused their prosecution and arrest on a warrant issued by the police magistrate of the city of Toronto, on the information of the appellant, on a charge of keeping a house of ill-fame. The charge was founded on the information of one Alice Dale, who had been an inmate of the respondents' house, and who, on the 11th of October, 1889, furnished to the appellant, who is staff inspector in the Toronto police force, and as such specially charged with the suppression of houses of ill-fame, a statement in writing signed by him in the following words:—

POLICE DEPARTMENT, Toronto, Oct. 11th, 1889.

Mrs. John Dale, at present rooming on Victoria Street, between Queen and Shuter, west side, with a woman who takes in washing, "Laundry" over door, vs. Mrs. McLaren, of 292 Adelaide Street West, with whom she (Mrs. Dale) has been rooming for about five

(1) L.R. 4 H.L. 521.
(2) 11 Q.B.D. 440; 11 App. Cas. 247.
(3) [1891] 2 Q.B. 718.
(4) 19 Ont. App. R. 203.

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weeks, from 2nd September to 8th October, keeping an house of assignation, allowing, and, in fact, soliciting, the complainant to bring men into the house and pay her fifty cents for use of room with each man. This she (Mrs. Dale) did on several occasions, giving Mrs. McLaren fifty cents each time; in addition to this, Mrs. McLaren made arrangements with Mrs. Dale to go with another man, from whom she received twenty dollars on four different occasions, and gave Mrs. McLaren five dollars on three different occasions; and on Mrs. Dale refusing to give the five dollars on the fourth occasion, she was ordered by Mrs. McLaren to pack up and leave the house; and she now refuses to give up Mrs. Dale's two trunks.

I have had the foregoing read over to me by Staff Inspector Archibald, and I subscribe to it as being correct.

(Signed) ALICE DALE.

Upon this information received from Alice Dale the respondent laid and swore to the following information and complaint:—

CANADA,
Province of Ontario,
County of York,
City of Toronto,
To Wit:

The information and complaint of David Archibald, of the City of Toronto, staff inspector, taken on oath before me, George Taylor Denison, Esquire, police magistrate in and for the said city, the fourteenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

The said informant, upon his oath, saith he is informed and believes that Mr. and Mrs. Duncan and Margaret McLaren within the past three months, to wit: on the fifteenth day of July, in the year of our Lord one thousand eight hundred and eighty-nine, and on divers other days and times between that day and the day of the laying of this information, at the City of Toronto, in the County of York, unlawfully did keep a certain house of ill-fame at 292 Adelaide Street West, in the said City of Toronto, contrary to the form of the statute in such cases made and provided.

Complainant prays that a warrant may issue, and justice be done in the premises.

(Signed) D. ARCHIBALD.

Sworn before me, this fourteenth day of October, 1889.

(Sgd.) G. T. DENISON, *P.M.*

The prisoners plead not guilty.

Discharged.

(Sgd.) G. T. DENISON, *P. M.*

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The respondents having been arrested on the warrant issued on this complaint the charge was heard before the police magistrate and by him dismissed.

Subsequently to the laying of the information and before the hearing of the case the appellant was informed by another inspector of the Toronto force—Inspector Johnston—that he did not think there was much in Alice Dale's charge, and also what he had learned upon a visit to the house, viz., that disturbances which had occurred there and which had called for the interference of police had been occasioned by quarrels between the respondents themselves. It is, however, distinctly proven that this ultimate report from Inspector Johnston was made after the information had been sworn to.

The action was first tried before Mr. Justice Street, who gave judgment dismissing the action. This judgment was set aside by the Common Pleas Division and a new trial was ordered. The second trial took place before Mr. Justice McMahon, who again non-suited the plaintiffs. This second judgment having been also set aside by the Common Pleas Division, a third trial was had before the learned Chief Justice of the Queen's Bench, at the Toronto autumn assizes of 1890, who held that the plaintiffs had failed to prove a want of reasonable and probable cause, and dismissed the action. From this judgment the respondents again appealed to the Common Pleas Division who ordered a third new trial. The appellant then appealed to the Court of Appeal, and the judges of that court being equally divided in opinion the appeal was dismissed.

From this latter judgment the present appeal has been taken.

The well known case of *Lister* v. *Perryman* (1) had,

(1) L.R. 4 H.L. 521.

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as I have always supposed, settled the law as regards this class of action, to be that the question of reasonable and probable cause was, although a question of fact, one to be determined by the court and not by the jury. That in such cases the respective functions of the trial judge and jury were these, that whilst the jury were to find all the facts from which the inference was to be drawn, yet that the inference itself, deducible from those facts, was one to be drawn, not by the jury, but by the judge.

This is certainly most clearly laid down in the case of *Lister* v. *Perryman* (1), and the apparent anomaly and exceptional character of the rule by which a question of fact was thus withdrawn from the jury, who, generally speaking, were judges of the facts, and left to be decided by the court, occasioned expressions of surprise from some of the law lords, who, having been trained in courts of equity, or in the Scottish tribunals, had not been practically familiar with such questions. It has, however, been suggested in a little book written by Mr. Stephens, on the law of Malicious Prosecutions, that this rule of *Lister* v. *Perryman* (1) was displaced by the decision in the case of *Abrath* v. *The North Eastern Railway Company* (2). Having repeatedly read this last mentioned case, and having also read Mr. Stephens's book, I am clearly of opinion that there is no warrant for this proposition. The judge is entitled, no doubt, to the utmost assistance from the jury in finding the facts, and he is entitled for this purpose to put questions to them in any form which his ingenuity may suggest, but he, and not the jury, is to make the deduction, and if he shifts the burden of doing so upon them the case is not properly tried.

In the late case of *Brown* v. *Hawkes* (3) decided in

(1) L. R. 4 H. L. 521.
(2) 11 Q.B. D. 79, 440; 11 App. Cas. 247.
(3) [1891] 2 Q.B. 718.

June, 1891, and therefore, long since the judgment of Armour C.J. in the present action which is now under appeal was pronounced, Lord Esher M.R. thus states the law:

> The question whether there is an absence of reasonable and probable cause is for the judge and not for the jury, and if the facts on which that depends are not in dispute there is nothing for him to ask the jury, and he should decide the matter himself. If there are facts in dispute upon which it is necessary he should be informed in order to arrive at a conclusion on this point, these facts must be left specifically to the jury, and when they have been determined in that way the judge must decide as to the absence of reasonable and probable cause.

Now it appears to me that if the learned Chief Justice had had this clear enunciation of the law as to the respective functions of judge and jury in these cases of malicious prosecution before him at the trial and had expressly adopted it for his guide, he could not have followed the rule laid down by the Master of the Rolls more exactly than he actually did.

There were no disputed facts. The only question of fact could have been whether Alice Dale signed the written statement which she gave to the appellant, a fact which was not disputed. It was not and could not have been in dispute that Inspector Johnston's report was not handed to the appellant until after the charge was laid and the warrant issued.

There were then no facts in dispute to leave to the jury, and the learned judge could not have left any question material to be decided in the case to them without abdicating the functions which the law had delegated to himself.

Then it only remains to inquire whether the statement of the woman Dale warranted the appellant, as a police officer, in adopting the course he pursued. This is the inference from the facts which it was for the learned judge to draw, and his finding in respect to it

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is, I take it, open to review on appeal. As to this I entirely agree with the remarks of both the Chief Justice at the trial and of Mr. Justice Burton in the Court of Appeal. If a police officer in the position of the appellant is not warranted in acting without further inquiry on such information as he receives from a woman who had been an inmate of a suspected house, as Alice Dale had been, his efforts to perform his duty in the suppression of such places would obviously be fruitless. There was ample evidence of probable cause deducible from the undeniable facts of the case, and the conclusion of the Chief Justice at the trial was, in my judgment, altogether right.

I may add that it would not have made the slightest difference in my conclusion if the second report of Inspector Johnston had been communicated to the appellant before he swore to the complaint before the police magistrate. The charge made by Alice Dale was not that the respondents kept a disorderly house, but that they kept a house of ill-fame, a house of assignation as she calls it, which was resorted to for purposes of prostitution. The facts communicated by Inspector Johnston would only apply to contradict a charge of a disorderly house which was not the charge which led to the prosecution.

On the whole I do not see how the appellant, if he had omitted to act as he did on the statement of Alice Dale, could have justified himself before his superior officer if he had been charged with neglect of duty.

Upon this question of probable cause the cases of *Lea* v. *Charrington* (1); *Hope* v. *Evered* (2); and *Brougton* v. *Jackson* (3) seem to me to be authorities for the appellant in the present case and to support the conclusion I have arrived at. In the case last

(1) 16 Cox C.C. 705, affd. in appeal. (2) 17 Q.B.D. 338.
(3) 18 Q.B. 378.

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cited Lord Campbell C.J., says the defendant must show facts which would create a reasonable suspicion in the mind of a reasonable man.

Applying this test the evidence before us was amply sufficient to show probable cause.

The appeal must be allowed, and the judgment of the Chief Justice of the Queen's Bench Division pronounced at the trial restored with costs to the appellant in all the courts.

FOURNIER J. concurred.

TASCHEREAU J.—I dissent. I would dismiss this appeal. For the reasons given by Mr. Justice Rose in the Divisional Court, I think that a new trial should be ordered. Upon the evidence, the judge presiding at the trial should have left it to the jury to say if the defendant believed the story of Alice Dale and if he took such precautions as a reasonable man should have done to satisfy himself if her story was at least plausible. The character of that woman, which he well knew, should have made him more cautious.

GWYNNE J.—This appeal must, I think, be allowed and upon the grounds stated by Justices Burton and Maclennan in the Court of Appeal for Ontario. There was no contradiction in the evidence upon any matters of fact upon which the non-existence of reasonable and probable cause necessarily depended. It was for the learned judge who tried the case to determine whether or not there was anything in the evidence or in the manner in which it was given which created a doubt in his mind as to the defendant's belief in the truth of the statement made to him by the woman Dale, or which cast a doubt in his mind as to the *bona fides* of the defendant in laying the charges against the plaintiffs which he did before the police magistrate. It was

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upon the learned judge, and, in the absence of contradictory evidence upon essential facts on which the question of existence or non-existence of probable cause depended, upon him alone, that the duty of determining whether the defendant had or had not reasonable and probable cause for making the charges which he did rested. If he saw in the evidence no grounds to doubt the belief or *bona fides* of the defendant, and was of opinion that the evidence failed to establish a want of reasonable and probable cause or to cast a doubt upon its existence, I do not think that a new trial should be granted because a judge who had not tried the case or heard and seen the witnesses should see something in the evidence which he thinks would have induced him to submit to the jury a question as to the belief of the defendant in the facts stated to him and as to his *bona fides* in laying the charge—or which he thinks would have made it proper for the learned trial judge, though not absolutely necessary,—to have submitted to the jury such a question. For my own part I must say that I do not see anything in the evidence which I can say ought to have created such a doubt in the mind of the learned trial judge that he should have submitted a question to the jury as to the belief of the defendant in the facts stated to him and as to his *bona fides* in laying the charge. In the absence of evidence which manifestly ought to have created a doubt as to such belief and *bona fides* of the defendant, I do not think that a judge who has not presided at the trial should interfere with the judgment of the learned trial judge because he did not submit to the jury a question upon a matter which, by the law, it was his duty to pronounce upon and as to which the evidence had failed to create any doubt in his own mind.

The appeal must, I think, be allowed with costs and the judgment of the learned trial judge sustained.

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PATTERSON J.—This is an action by the respondents, husband and wife, against the appellant for malicious prosecution.

At the trial before Chief Justice Armour the action was dismissed on the ground that the plaintiffs had failed to establish the absence of reasonable and probable cause. A divisional court of the Common Pleas Division set aside that judgment and ordered a new trial on the ground that some question touching the good faith of the defendant ought to have been submitted to the jury.

On the appeal to the Court of Appeal there was a division of opinion, in consequence of which the decision of the divisional court remained undisturbed.

The trial was the third trial of the action. The three trials resulted in the same way, and in each case a new trial was ordered. It appears to have been understood by the divisional court, or at all events by the learned judge who delivered the judgment of the court, that at the last trial the attention of the presiding judge had not been called to the opinions expressed by the court in ordering the new trial. We are told by counsel on both sides that this was a misapprehension, the fact being that the judgment of the divisional court was communicated to the trial judge, which fact would have been stated to the Court of Appeal if the matter had been spoken of during the argument in that court where the learned Chief Justice, in ignorance of the explanation, comments on the statement as contained in the judgment delivered in the divisional court, justly characterizing it as almost incredible.

At the trial of the action the only evidence given was that adduced by the plaintiffs. The facts shown may, therefore, be fairly treated, for all purposes of the present inquiry, as undisputed facts.

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The defendant is a police inspector of the city of Toronto.

A woman called Alice Dale came to the defendant on the eleventh of October, 1889, and gave him information which he wrote down, Alice Dale signing the paper, which reads thus:

POLICE DEPARTMENT,
TORONTO, October 11, 1889.

Mrs. John Dale, at present rooming on Victoria Street, between Queen and Shuter, west side, with a woman who takes in washing, "Laundry" over door, vs. Mrs. McLaren, of 292 Adelaide Street West, with whom she (Mrs. Dale) has been rooming for about five weeks, from 2nd September to 8th October, keeping an house of assignation, allowing, and in fact soliciting, the complainant to bring men into the house and pay her fifty cents for use of room with each man. This she (Mrs. Dale) did on several occasions, giving Mrs. McLaren fifty cents each time; in addition to this, Mrs. McLaren made arrangements with Mrs. Dale to go with another man, from whom she received twenty dollars on four different occasions, and gave Mrs. McLaren five dollars on three different occasions; and on Mrs. Dale refusing to give the five dollars on the fourth occasion, she was ordered by Mrs. McLaren to pack up and leave the house; and she now refuses to give up Mrs. Dale's two trunks.

I have had the foregoing read over to me by Staff Inspector Archibald, and I subscribe to it as being correct.

(Signed) ALICE DALE.

The eleventh of October was Friday.

On Monday, the fourteenth of October, the defendant laid an information against the two plaintiffs, Margaret McLaren and her husband, for keeping a house of ill-fame.

The plaintiffs were arrested at an early hour on the morning of Tuesday, the 15th. They were brought before the police magistrate on the forenoon of the same day and were discharged.

The question of reasonable and probable cause, or of the absence of it which is what the plaintiffs had to establish, does not depend on Mrs. Dale's statement alone. There are other things to be presently men-

tioned, but we may first note something of what the plaintiff, Mrs. McLaren, tells in her evidence, though it may only indirectly affect the defendant who was a stranger to her and her history. Her story is that she had entertained Mrs. Dale as a lodger whom she considered respectable for a couple of weeks, and then Mrs. Dale and her husband for some three weeks more; until the evening of Tuesday, the eighth of October, when she discovered, by reading a letter that Mrs. Dale gave to Mr. McLaren to mail but had left open, that Mrs. Dale was a person of bad character, when she promptly made her leave the house, but kept her trunks on account of five dollars due for the two weeks before the husband came. On Wednesday, the 9th, Mrs. Dale had tried ineffectually to get her trunks, and on Thursday, the 10th, she got a lawyer to write a letter which she took to Mrs. McLaren who produced it at the trial. The defendant had, of course, nothing to do with all this, nor is it his concern which is the true version of the relations between the two women, that told him by Mrs. Dale or that given by Mrs. McLaren. But it is evident from the lawyer's letter that his client told him the same story on Thursday that she told on Friday to the defendant, and that the defendant did not misinterpret her statement when he laid the information.

This is what the lawyer wrote:

TORONTO, October 10th, 1889.

DEAR MADAM.—I have had a conference with Miss Dale who has explained to me the difficulty between you, and the relations between you.

You have no right to hold her trunks and clothing. If you do not give them up at once proceedings will be taken. If any exposure occurs the fault will be your own.

Now, what occurred between Friday, when Mrs. Dale made her statement, and Monday when the information was laid?

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The defendant took no immediate action on the statement, but he asked Inspector Johnston, who was the police inspector for division no. 3 which included the plaintiff's house, to procure information as to the character of the house. Johnston learned from other policemen that disturbances occurred in the house which had to be quelled by the police, and he told this to the defendant on the Monday before the information was laid. Johnston's information seems to have been that the disturbances were fights between the husband and wife occasioned by the wife's intemperance. He intimated that to the defendant on the Tuesday morning after the arrest of the plaintiffs, expressing at the same time his own opinion that there was not much in the charge of keeping a house of ill-fame.

It has been regarded as an open question in the courts below whether the information as to the nature of the disturbances was given by Johnston to the defendant before the laying of the information on Monday, or not until Tuesday, and the question has been regarded as almost a crucial test of the good faith of the defendant. I do not attach so much importance to the time when the communication was made, but at the same time I am unable to see that upon any fair reading of the evidence, which, as I have said is all adduced by the plaintiffs, and which, on this topic, is the evidence of Johnston and of the defendant, it can be doubted that the only information conveyed to the defendant on the Monday was the general fact that rows had occurred in the house, or that the character of the rows was only mentioned on Tuesday just before and in reference to the trial of the charge which Johnston thought had not much in it.

Another fact brought out was that, after the defendant had taken Mrs. Dale's statement and before he

had heard from Johnston, his attention was called by the Mayor and by an alderman to the necessity for further police protection in division no. 3, several streets being particularized, but none in the immediate vicinity of the plaintiffs' house. The use made of this incident in argument is in support of the charge of malice rather than that of want of reasonable and probable cause, the suggestion being that the defendant was stimulated into action by imputations on his efficiency as the inspector more particularly assigned to the duty of suppressing houses of ill-fame, and did not act from an honest belief in the truth of Mrs. Dale's information.

This is, however, only argument and suggestion. The evidence which connects in any way the two incidents is, as far as it goes, affirmative evidence of the defendant's belief in Mrs. Dale's story, and it certainly implies no doubt of the truth of what she had stated.

I shall read the passage:

47. Q.—Tell me, Inspector, had the information that you received from the Mayor and Alderman Verral anything to do with your laying this information against the McLarens? A.—It certainly had, for in making the report to the Chief that this complaint had been made by the Mayor and Alderman, and the request for special police protection in No. 3 Division, I stated that I had positive information about a house in this neighborhood.

48. Q.—Stated to whom? A.—To the Chief.

49. Q.—What house had you in your mind? A.—I had the McLaren's house in my mind, and he said: "Then if you have evidence, why not bring it up?"

50. Q.—When you had McLaren's house in your mind, it was from the information that you had received from Inspector Johnston and Alice Dale—that put it in your mind? A. It was the information I had received from Alice Dale.

51. Q.—And Inspector Johnston? A.—I had not yet received the information from Inspector Johnston.

52. Q.—Then, the Chief told you if you had any positive evidence why not bring them up? A.—Yes; to which I replied: "I will make

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further inquiries of the inspector of the division, and if that information is corroborated, I will do so."

53. Q.—You did make further inquiries from the inspector of the division, who is Inspector Johnston? A.—Yes.

54. Q.—You got his report, and with that report and the evidence from Alice Dale you took these proceedings? A.—Yes.

A number of decisions on the subject of the respective functions of the court and the jury in dealing with the question of reasonable and probable cause have been cited and commented on at the bar, as well as by learned judges in the courts below. I do not think it necessary to discuss those cases, because the law as settled by them is to be found fully and correctly stated in several treatises of recognized learning and accuracy.

I shall quote from two of those treatises, viz., Taylor on Evidence (1) and Pollock on Torts.

Judge Taylor, after discussing the general nature of the class of cases termed "mixed cases," gives the following summary of the decisions that had been reported on the subject down to the year 1884:—

§28. First: It is now clearly established, albeit the wisdom of the rule has been stoutly disputed, that the question of *probable* cause must be decided exclusively by the judge, and that the jury can only be permitted to find whether the facts alleged in support of the presence or absence of probability, and the inference to be drawn therefrom, really exist. For instance, in an action for malicious prosecution the jury, provided the evidence on the subject be conflicting, may be asked whether or not the defendant, at the time when he prosecuted, *knew* of the existence of those circumstances which tend to show probable cause, or *believed* that they amounted to the offence which he charged; and if they negative either of these facts the judge will decide, as a point of law, that the defendant had no probable cause for instituting the prosecution. This rule, which is based on the assumption that judges are far more competent than juries to determine the question how far it may have been proper for a person to have instituted a prosecution, is equally binding however numerous and complicated the facts and inferences may be; for although in some cases

(1) 8 ed. ss. 26, 27, 28.

it would doubtless be attended with great difficulty to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts and inferences from facts are made out to their satisfaction, yet the task is not impracticable; and it would obviously savour of gross inconsistency to hold that a rule which is undisputed in a simple case should not equally apply when the facts were complicated. For where could the line be drawn, and who should determine what degree of complexity would transfer the burden of decision from the judge to the jury. The difficulty, too, is more apparent than real, for it rarely happens but that some leading facts exist in each case, which present a broad distinction to the view without having recourse to the less important circumstances; and as the judge has a right to act upon all the uncontradicted facts, it is only when some doubt is thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that he is called upon to submit any question to the jury.

I read from Mr. Pollock's work, which was published, I think, in 1887, the concluding passage of the section that treats of false imprisonment (1).

What is reasonable cause of suspicion to justify arrest is, paradoxical as the statement may look, neither a question of law nor of fact. Not of fact, because it is for the judge and not for the jury; not of law, because "no definite rule can be laid down for the exercise of the judge's judgment." It is a matter of judicial discretion such as is familiar enough in the classes of cases which are disposed of by a judge sitting alone; but this sort of discretion does not find a natural place in a system which assigns the decision of facts to the jury and the determination of the law to the judge. The anomalous character of the rule has been more than once pointed out and regretted by the highest judicial authority, but it is too well settled to be disturbed unless by legislation. The only thing which can be certainly affirmed in general terms about the meaning of "reasonable cause" in this connection is that on the one hand a belief honestly entertained is not of itself enough; on the other hand a man is not bound to wait until he is in possession of such evidence as would be admissible and sufficient for prosecuting the offence to conviction, or even of the best evidence which he might obtain by further inquiry. It does not follow that because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so. It is obvious also that the exist-

(1) Pollock on Torts, p. 192.

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ence or non-existence of reasonable cause must be judged, not by the event, but by the party's means of knowledge at the time.

The numerous cases cited by Judge Taylor as authority for the propositions he lays down include all those cited to us down to the date of *Abrath* v. *N. E. Railway Co.* in which the decision of the Court of Appeal (1) pronounced in 1883, was affirmed in 1886 by the House of Lords (2).

That case is not cited by Mr. Pollock in connection with the passage I have read from his treatise, but he cites it when dealing with actions for malicious prosecution (3) and gives the following extract from the judgment of Lord Justice Bowen (4):—

> In an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be, in the eyes of the judge, inconsistent with the existence of reasonable and probable cause; and lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is from an indirect and improper motive, and not in furtherance of justice.

In the present case there is no conflicting evidence. The facts on which the defendant acted are uncontradicted facts. The main fact is that Mrs. Dale made the statement, but this must, of course, be taken along with the fact that it was made to the defendant in his official character as police inspector and as the officer whose special duty it was to look after houses such as Alice Dale described. She had been referred to the defendant by the lawyer already mentioned, and the defendant's special line of duty appears from his examination.

(1) 11 Q.B.D. 440.
(2) 11 App. Cas. 247.
(3) 11 Q.B.D. at p. 455.
(4) Pollock on Torts, p. 264.

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If these were all the facts, that is to say, if the defendant had laid the information immediately after taking Alice Dale's statement, I could not say that a judge who held that there was reasonable and probable cause for making the charge was wrong in so holding. The facts stated by Alice Dale respecting her tenancy of the room she had in the plaintiff's house, are of the same character as those on which in *Reg.* v. *Rice* (1) a conviction for keeping a disorderly house was sustained by the Court of Criminal Appeal although there was no evidence of indecency or disorderly conduct perceptible from outside the house.

The great contention is that the jury should have been asked to say if the defendant believed what Alice Dale told him. But there is not a word in the evidence on which to found a suggestion of bad faith, and it is, in my judgment, impossible to say that the Chief Justice gave too much effect to the fact that the defendant acted throughout in his official character.

The other facts, the inquiry made through Inspector Johnson and the report of disturbances at the house, certainly do not aid the plaintiffs in their attempt to negative the existence of reasonable and probable cause for laying the information, nor do I see that even if Johnston's full intelligence had been given at once, and the defendant had, therefore, laid the information understanding that the female plaintiff was addicted to excessive drinking which led to quarrels with her husband by which the peace of the neighbourhood was disturbed, the gravamen of Alice Dale's imputations against the female plaintiff, and by consequence against the husband who would naturally be credited with complicity in the purposes for which it was alleged his house was used, was at all done away with.

(1) L.R. 1 C.C.R. 22.

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ARCHIBALD v. MCLAREN.

Patterson J.

I agree with the learned judges of appeal who considered that the non-suit ought not to have been set aside and I am of opinion that we should allow the appeal (1).

Appeal allowed with costs.

Solicitor for appellant: *C. R. W. Biggar.*

Solicitors for respondents: *Murdoch & Tytler.*

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(1) As to whether or not there was anything to leave to the jury see *Kimber* v. *Press Association* [1893] 1 Q.B. 65.