DOUGLAS A. CASEY (*Plaintiff*) .....APPELLANT;

AND

AUTOMOBILES RENAULT CANADA LIMITED (*Defendant*) ..... RESPONDENT;

AND

GEORGE COLEMAN and MAURICE MYRAND (*Defendants*).....

1964

*Nov. 13, 16, 17

1965

*Jan. 27

1965

May 17

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Malicious prosecution—Defendant laying information and withdrawing same at later date—Nothing done during interval by magistrate before whom information sworn—Whether a prosecution commenced so as to entitle plaintiff to claim against defendant for malicious prosecution.

One C, the general sales manager of the defendant company, was instructed to lay a charge of theft against the plaintiff. In the information it was stated that the informant had reasonable and probable

*PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

[1] [1916] 2 A.C. 356. [2] (1920), 25 C.R.C. 379.

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grounds to believe that the plaintiff did unlawfully steal twenty-six Renault Dauphine automobiles of a value exceeding fifty dollars, the property of the defendant company, contrary to the provisions of s. 280(a) of the *Criminal Code*. Following the laying of the information, on November 19, 1960, it remained in the office of the magistrate before whom it was sworn, and nothing further was done about it until December 13, when the magistrate received a letter, dated December 7, from C. In this letter C requested that the charge be withdrawn. The magistrate then wrote on the face of the information, "Withdrawn Dec. 13/60 at request of informant".

In an action for damages for malicious prosecution, judgment was given in favour of the plaintiff. On appeal, this decision was reversed. The Supreme Court of Nova Scotia, *in banco,* allowed the appeal after hearing argument on only one of the points raised by the defendant company, namely, that, in law, the prosecution upon which the action was based was never instituted or commenced. From this judgment the plaintiff appealed to this Court.

Held (Judson J. dissenting): The appeal should be allowed.

Per Cartwright, Martland, Ritchie and Spence JJ.: The mere presentation of a false complaint would not necessarily be a basis for a suit for malicious prosecution, but, if a complaint was made which disclosed an offence with which the magistrate had jurisdiction to deal and he took cognizance of it, that was a sufficient foundation for the action. *Mohamed Amin v. Bannerjee,* [1947] A.C. 322, followed.

Under s. 439 (1) of the *Criminal Code,* the magistrate could only receive the information provided it alleged those matters which would bring it within his jurisdiction, but, if it did, he was obligated to receive it. Having received the information, the magistrate was obliged to carry out the duties imposed upon him by s. 440(1) of the Code. In the present case, the magistrate received the information. It was obvious that he must have heard and considered the allegations made by the informant. He proceeded no further because the informant asked to withdraw the information. As in *Mohamed Amin v. Bannerjee, supra,* the essence of the matter here was the filing of an information to deal with which was within the magistrate's jurisdiction. At that point, in each case, the informant had done all he could do to launch criminal proceedings against the accused.

As the defendant had caused everything to be done which could be done unlawfully to set the law in motion against the plaintiff on a criminal charge, an action for malicious prosecution lay against the defendant, the other required elements of that tort having been established.

Yates v. The Queen (1885), 14 Q.B.D. 648; *Thorpe v. Priestnall,* [1897] 1 Q.B. 159, distinguished; *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1833), 11 Q.B.D. 674, referred to.

Per Judson J., *dissenting:* For the reasons given by the Court below, the appeal should be dismissed.

APPEAL from a judgment of the Supreme Court of Nova Scotia, *in banco*[1], allowing an appeal from a judgment given by Coffin J., following a trial by jury, whereby

[1] (1964), 49 M.P.R. 154, [1964] 3 C.C.C. 208.

damages were awarded to the plaintiff for malicious prosecution. Appeal allowed, Judson J. dissenting.

J. J. Robinette, Q.C., and *L. O. Clarke*, for the plaintiff, appellant.

J. H. Dickey, Q.C., and *L. J. Hayes*, for the defendant, respondent.

The judgment of Cartwright, Martland, Ritchie and Spence JJ. was delivered by

MARTLAND J.:—This case is concerned with an action for damages for malicious prosecution brought by the appellant against the respondent. It was tried by a judge and jury. On the basis of the answers given by the jury to questions submitted by the learned trial judge, judgment was given in favour of the appellant awarding him damages in the amount of $28,000 and costs. On appeal, this decision was reversed. The Supreme Court of Nova Scotia, *in banco*, allowed the appeal after hearing argument on only one of the points raised by the defendant company, namely, that, in law, the prosecution upon which the action was based was never instituted or commenced.

From this judgment the appellant has appealed to this Court. In argument before us the respondent submitted additional grounds upon which it was submitted the appellant's action ought to have been dismissed, and these points were fully argued.

The facts which gave rise to the action are as follows. Maritime Import Autos Limited (hereinafter referred to as "Maritime"), a Nova Scotia corporation, with its principal place of business in Amherst, in that province, was the distributor for the Maritime Provinces for the respondent, a Canadian corporation, with its head office in Montreal, which is engaged in the sale and distribution of Renault automobiles in Canada. The appellant resides at Amherst and is engaged in the automobile business. He organized various companies which distributed automobiles, including Maritime. At the times material to this action the appellant was the principal shareholder of Maritime, but was not an officer or director of that company.

In the spring of 1960 a meeting was held at Moncton by representatives of the respondent and of Maritime. The latter company was represented by the appellant, and by

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Mr. L. J. Kiley, its president, and Mr. T. A. Giles, its solicitor. At that meeting it was agreed that Maritime would store in Amherst some 120 Renault automobiles provided by the respondent, under a bailee agreement.

That agreement, which is dated June 2, 1960, acknowledges receipt from the respondent in good order and condition for storage at Maritime's premises in Amherst of a number of automobiles each individually described in the agreement.

It concluded with a paragraph reading:

> I/we, as Bailee, agree (a) to hold and store safely the Chattels free of charge for the Company which is the sole and absolute owner thereof (b) on demand of the Company to promptly deliver the Chattels, or any of them as may be specified by the Company to it or to its order, and (c) that the Chattels are not in my/our possession for purpose of sale and that I/we have no authority to encumber sell, operate or in any way dispose the Chattels and (d) to have the cars insured against the risks of fire, theft and damages directly caused by person acting maliciously.

Under the heading "Signature of Bailee" appeared the signature "L. J. Kiley". Below his signature appeared the words "Dealer Name" and beneath that appeared the stamped name "Maritime Import Autos Ltd. Amherst, N.S."

Giles testified at the trial that :

> Maritime Import Autos were told that they could use the cars from the bailee stock provided they notified Montreal Head Office so that they could be invoiced for them. As a matter of fact, I know from my examination of the records of the company, Maritime Import Autos Limited, that cars were taken from the bailee stock, were reported to Montreal, and were paid for by the company prior to the 26 that were taken sometime in October.

It appears that, subsequent to the meeting in Moncton, three cars were removed from storage by Maritime and sold and an invoice was sent by the respondent to Maritime for these. Later, in October, a further 10 cars were removed and sold, and by letter dated October 7, 1960, Maritime requested the respondent to send invoices for the same. Following this, a further 26 cars were removed. Maritime was unable to pay for the cars which had been removed.

Mr. Giles was sent to Montreal in November 1960, armed with a cheque for $3,000 and instructed to discuss arrangements for payment of the balance owing by Maritime to the respondent. On November 16 he met with Mr. LeBouedec, the general manager of the respondent, and with other

officers of that company. He was told that the respondent insisted on the appellant's personal guarantee of payment of the amount owing by Maritime.

Giles testified that at this meeting LeBouedec said to him: "This man Casey is nothing but a common thief and we are going to put him in his place." Giles replied to this by saying that the appellant knew nothing about the sale of the cars until after they were sold and that he was acting in good faith in trying to settle the matter.

Mr. Clement, the secretary-treasurer of the respondent, called as a witness for the defence, heard LeBouedec say that this was a technical theft committed by Casey.

This witness said that after Giles' departure, the meeting continued with LeBouedec and himself present and Mr. MacKay, the respondent's solicitor. They discussed the matter of payment for the 26 missing cars, and Clement said, in evidence:

> And, according to the discussion that had just happened with Mr. Giles, we had the impression that we will never get paid, and Mr. MacKay immediately suggested that an information be laid immediately against Mr. D. A. Casey.

Neither LeBouedec nor MacKay gave evidence at the trial.

Following this, George Coleman, the general sales manager of the respondent, was instructed to proceed to Amherst to lay a charge of theft against the appellant, which he did. He attended upon a stipendiary magistrate there, Mr. Alfred C. Milner. Apparently upon the basis of what Coleman told him the magistrate drafted the information, which was signed by Coleman and sworn before the magistrate. That information was as follows:

> CANADA
> PROVINCE OF NOVA SCOTIA
> MAGISTERIAL DISTRICT OF THE
> PROVINCE OF NOVA SCOTIA
> COUNTY OF CUMBERLAND
>
> This is the information and complaint of George F. Coleman of Montreal in the Province of Quebec, General Sales Manager, hereinafter called the Informant.
>
> The informant says that he has reasonable and probable grounds to believe and does believe that D. A. Casey of Amherst in the County of Cumberland at or near Amherst in the County of Cumberland in the Magisterial District of the Province of Nova Scotia between the 8th day of October, A.D. 1960 and the 25th day of October, A.D. 1960,

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did unlawfully steal twenty-six Renault Dauphine automobiles of a value exceeding fifty dollars, the property of Automobiles Renault Canada Limited, contrary to the provisions of Section 280(a) of the Criminal Code.

Sworn before me this 19th day of November, A.D. 1960, at Amherst in the County of Cumberland

(Sgd.) *Alfred C. Milner*
A Stipendiary Magistrate in and for the County of Cumberland.

(Sgd.) *Geo. F. Coleman*
Informant

The magistrate testified that he did not instruct Coleman to lay the information. Following the laying of the information, on November 19, 1960, it remained in his office, and nothing further was done about it until December 13, when the magistrate received a letter, dated December 7, from Coleman, reading as follows:

> I wish to inform you that it is my desire to withdraw the charge which was against D. A. Casey on November 19th, 1960.
>
> When the charge was laid, the evidence, on the basis of facts then known, appeared to be sufficient. However the information now available and the correspondence have been carefully reviewed and, on advice of counsel, it appears that at the present time there is insufficient evidence available to proceed with the complaint against Mr. Casey.
>
> I request therefore that the charge be withdrawn.

The magistrate then wrote, on the face of the information, "Withdrawn Dec. 13/60 at request of informant".

Prior to the withdrawal of the information, on November 23, Giles was visited by Mr. Myrand, the administrative secretary of the Toronto branch of the respondent. Giles' evidence as to his meeting with Myrand is as follows:

I then asked him if he was authorized to act for Automobiles Renault Canada Limited in settling this problem over the payment for the cars. He said that he was. I asked him if he was in a position to withdraw the information if we would pay—by "we" I mean Mr. Casey—would pay them a certain number of dollars, and I said to him again "If we will pay you X number of dollars—10—$20,000.00, or thereabouts, you will withdraw the information?" and he said "Yes". I then said to him, "It is true, is it not, that the only reason you laid this information against Casey was to try and extract from him a certain amount of money?" and his answer was "Yes, just a little more pressure. Ha! Ha!". I then asked him if he would confirm by telephone with Montreal that he was actually authorized to act. A phone call was put through to Montreal, and, as a result of the phone call, or following it, he again reiterated he was in a position to act and that if we would pay him for the cars, or a certain amount of money, and $20,000.00 was a figure that was used quite a lot, that he would then withdraw the information immediately.

There was evidence that, following the laying of the information, the fact that the appellant had been charged with theft became widely known among people in the automobile business in Nova Scotia. Three witnesses testified that they had been advised that Casey had been charged with theft by persons employed by the respondent.

The learned trial judge submitted questions to the jury, in two series, the jury being charged in relation to the second set of questions after they had answered the first ones. The relevant questions and answers are as follows:

(1) Did the Defendants during 1960 look to the Plaintiff, D. A. Casey, as the person with whom they dealt in matters of importance in their dealings with Maritime Import Autos Ltd.? "No".

(2) Did the Defendants believe that Maritime Import Autos Ltd. had no right to sell any of the cars listed in the Bailee Receipt? "No".

(1) Was there a prosecution of the Plaintiff, Douglas A. Casey, by the Defendants? "Yes".

(2)(a) Did the Defendant, Automobile Renault (Canada) Ltd., act maliciously? "Yes".

.....

(3) What damages did the Plaintiff, Douglas A. Casey, suffer? "Twenty-eight thousand dollars ($28,000.00)".

On the basis of the answers given to the first series of questions the learned trial judge found that there was not reasonable and probable cause for the prosecution. On the basis of the answers given to the second series of questions he gave judgment in favour of the appellant.

I have not reviewed the evidence in great detail, and have set out mainly the evidence which was favourable to the appellant. The reason for this is that, apart from the main issue of law on which the appeal was allowed by the Court below, nearly all of the points urged by the respondent were on the basis of there being no evidence to support the findings of the jury. On the issue of law dealt with in the reasons below, there is no conflict as to the evidence.

In my opinion there was evidence upon which the jury could give the answers which it made to the questions put to it, and, on the basis of the first two answers given, the learned trial judge properly found lack of reasonable and probable cause for the laying of the information.

The instruction given to the jury by the learned trial judge regarding the respondent's contention that the respondent had acted on the advice of counsel in laying the

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charge and that this was strong evidence that it did not act maliciously, was sufficient. As has already been pointed out, the respondent's officer chiefly responsible in the matter of laying the information, LeBouedec, and the solicitor who was consulted, MacKay, did not give evidence.

I would not be prepared, in the circumstances of this case, to interfere with the jury's assessment of damages.

It was not contended before us that there had been no termination of the proceedings in favour of the appellant. In this connection we were referred to the proposition stated in Salmond on Torts, 13th ed., p. 726:

> If the prosecution has actually determined in any manner in favour of the plaintiff it matters nothing in what way this has taken place. There need not have been any acquittal on the merits. What the plaintiff requires for his action is not a judicial determination of his innocence but merely the absence of any judicial determination of his guilt. Thus it is enough if the prosecution has been discontinued, or if the accused has been acquitted by reason of some formal defect in the indictment, or if a conviction has been quashed, even if for some technical defect in the proceedings.

The important issue of law raised in this appeal is that which was decided in the respondent's favour in the Court below, as to whether a prosecution had been commenced against the appellant so as to entitle him to claim against the respondent for malicious prosecution.

The question thus raised is a difficult one. There is certainly authority in support of the position taken by the Court below, which is well summarized in para. 654 of vol. III of Restatement of the Law of Torts promulgated by the American Law Institute. That paragraph states, in relation to the tort of wrongful prosecution, that criminal proceedings are instituted when

> process is issued for the purpose of bringing the person accused of a criminal offense before an official or tribunal whose function is to determine whether the accused
> (i) shall be held for later determination of his guilt or innocence, or
> (ii) is guilty of the offense charged.

MacDonald J. in the Court below quotes an excerpt from Stephen on Malicious Prosecution (published in 1888), at p. 5:

> In order to be liable to an action for malicious prosecution a defendant must have prosecuted the plaintiff, and it therefore becomes necessary to determine what constitutes a prosecution.
>
> The only definition which, so far as I know, has been explicitly suggested, is that given by Mr. Justice Lopes in *Danby v. Beardsley*, 43 L.T.

603 (1881):—". . . this might be a definition of a prosecutor—a man actively instrumental in putting the criminal law in force." (This, however, requires to be qualified by the observation, that not merely the ministerial but the judicial functions of the criminal law must be put in motion, that is, some judicial officer must be made to act in his judicial capacity.)

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I feel, however, that the starting point in considering this issue must be the leading case of *Mohamed Amin v. Bannerjee*[1], a decision of the Privy Council, on appeal from the High Court of Calcutta. In that case the respondents, who had been involved in a dispute of a civil character with the appellant, caused a petition of complaint to be filed against the appellant in a Police Magistrate's Court, which was registered as a charge of cheating under s. 420 of the *Indian Penal Code*. The magistrate, having taken cognizance of the case, subsequently held an inquiry, in open court, pursuant to s. 202 of the *Code of Criminal Procedure*, of which notice was given to the appellant, who attended and who was represented by counsel. After completion of the inquiry, the magistrate dismissed the complaint under s. 203 of that Code.

The relevant sections of the *Code of Criminal Procedure* provided as follows:

Section 200. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the magistrate:

Section 202. (1.) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance, or which has been transferred to him under s. 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint:

Provided that, save where the complaint has been made by a court, no such direction shall be made unless the complainant has been examined on oath under the provisions of s. 200.

(2a.) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.

Section 203. The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the result of the investigation or inquiry (if any) under s. 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.

[1] [1947] A.C. 322.

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These sections were contained in Chapter 16, headed "Of complaints to Magistrates". Chapter 17, which followed, was headed "Of the commencement of Proceedings before Magistrates" and laid down the procedure when the magistrate decided to issue process on the complaint.

The appellant sued for damages for malicious prosecution. The respondents contended that the stage of prosecution had not been reached, and that it would not be reached until the magistrate said he was satisfied that there was a *prima facie* case and that a summons would issue for the attendance of the accused. They relied upon *Yates v. The Queen*[1].

The appeal was allowed by the Privy Council, holding that the proceedings had reached a stage sufficient to found an action for malicious prosecution.

In the judgment, there were reviewed two conflicting lines of authority, one of which commenced with the case of *Golap Jan v. Bholanath Khettry*[2], in which, in an action for malicious prosecution, it appeared that a complaint before a magistrate had been referred by him to the police for inquiry, and had been dismissed by the magistrate following receipt of the police report. It was held that no prosecution had been commenced and that the action failed. Reliance was placed on *Yates v. The Queen, supra.* The other line of authority included the case of *Bishun Persad Narain Singh v. Phulman Singh*[3], which stated the proposition that the prosecution commenced when the prosecutor had taken the initial step; namely, making the complaint to the magistrate.

The judgment then proceeds as follows:

> The action for damages for malicious prosecution is part of the common law of England, administered by the High Court at Calcutta under its letters patent. The foundation of the action lies in abuse of the process of the court by wrongfully setting the law in motion, and it is designed to discourage the perversion of the machinery of justice for an improper purpose. The plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, that they terminated in his favour (if that be possible), and that he has suffered damage. As long ago as 1698 it was held by Holt C.J. in *Savile v. Roberts,* (1698) 1 Ld. Raym. 374, that damages might be claimed in an action under three heads, (1.) damage to the person, (2.) damage to property, and (3.) damage to reputation, and that rule has prevailed ever

[1] (1885), 14 Q.B.D. 648. [2] (1911), I.L.R. 38 C. 880.
[3] (1914), 19 C.W.N. 935.

since. That the word "prosecution" in the title of the action is not used in the technical sense which it bears in criminal law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings, for instance, falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company (*Quartz Hill Consolidated Gold Mining Co. v. Eyre,* (1883) 11 Q.B.D. 674). The reason why the action does not lie for falsely and maliciously prosecuting an ordinary civil action is, as explained by Bowen L.J. in the last mentioned case, that such a case does not necessarily and naturally involve damage to the party sued. A civil action which is false will be dismissed at the hearing. The defendant's reputation will be cleared of any imputations made against him, and he will be indemnified against his expenses by the award of costs against his opponent. The law does not award damages for mental anxiety, or for extra costs incurred beyond those imposed on the unsuccessful party. But a criminal charge involving scandal to reputation or the possible loss of life or liberty to the party charged does necessarily and naturally involve damage, and in such a case damage to reputation will be presumed.

From this consideration of the nature of an action for damages for malicious prosecution emerges the answer to the problem before the Board. To found an action for damages for malicious prosecution based on criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results. Their Lordships are not prepared to go as far as some of the courts in India in saying that the mere presentation of a false complaint which first seeks to set the criminal law in motion will per se found an action for damages for malicious prosecution. If the magistrate dismisses the complaint as disclosing no offence with which he can deal, it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff results. But in this case the magistrate took cognizance of the complaint, examined the complainant on oath, held an inquiry in open court under s. 202 which the plaintiff attended, and at which, as the learned judge has found, he incurred costs in defending himself. The plaint alleged the institution of criminal proceedings of a character necessarily involving damage to reputation and gave particulars of special damage alleged to have been suffered by the plaintiff. Their Lordships think that the action was well founded, and on the findings at the trial the plaintiff is entitled to judgment.

Before dealing with the effect of this judgment, MacDonald J., in the Court below, made reference to *Yates v. The Queen, supra,* and, in particular, the following extracts from the judgments in that case:

> For my own part I consider that laying the information before the magistrate would not be the commencement of the prosecution, because the magistrate might refuse to grant a summons, and if no summons, how could it be said that a prosecution against any one ever commenced? (Per Brett M.R., at p. 657.)
>
> On behalf of the plaintiff in error it has been said that the first application for the rule nisi is such commencement, but how can it be said that a prosecution is commenced before a person is summoned to answer a complaint. (Per Cotton L.J. at p. 661.)

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However, as is pointed out in the *Mohamed Amin* case, *Yates v. The Queen* was not concerned with an action for malicious prosecution, but with the question as to whether the fiat of the Director of Public Prosecutions was required before commencing a prosecution by information for libel in a newspaper by virtue of s. 3 of the *Newspaper Libel and Registration Act, 1881.*

Reference was then made to, and considerable reliance placed upon, *Thorpe v. Priestnall*[1], and, in particular, a passage from the judgment of Wills J., at p. 162. I quote from the reasons for judgment of MacDonald J., including his quotation from that case. The insertion of the capital letters and of the italics was made by MacDonald J., for greater ease of reference.

> (A) On looking at the words of the (Statute) it is clear that the institution of a prosecution is something which may be done by the chief constable as well as with his consent. The chief constable cannot grant a summons, nor when a summons is once granted has he any discretion to exercise as to whether it shall be served or not. Neither of those things, therefore, is the institution of the prosecution, which is a matter within his discretion. The institution of the prosecution must, therefore, be the laying of the information . . . (B) The passages in the judgment in *Yates v. Reg., supra,* only amount to *dicta,* . . . (C) *It may be that the magistrate does not act upon the information, and in that case no prosecution follows,* and there is nothing to which the phrase "commencement of a prosecution" is applicable. (D) *But where there is a prosecution, I cannot see any reason why the laying of the information (which started it) is not the commencement of the prosecution;* and I certainly think this has been the meaning of the phrase commonly accepted in the profession.

Concerning these passages four points are important in this case. Passage (A) holds that for the purposes of the statute in question the laying of the information was the institution of the prosecution which resulted in the conviction; for the reason specified in passage (D). As to passage (B), it is to be noted that though the passages quoted earlier from *Yates v. Reg.* are referred to correctly as amounting only to *dicta,* they do form the substance of proposition (C) relating to a case which stopped at the information stage (as did the case before us); and that a distinctly different proposition (D) was enunciated as to the commencement of a prosecution which continued beyond that stage, as it had in the case itself.

It would appear, therefore, that many of the decisions, relating to limitation and other statutes, have been in error in the uncritical acceptance of *Thorpe v. Priestnall* as implying that in all cases the institution of a prosecution is to be equated with the laying of the information, whereas cases in which nothing followed from that bare fact are to be excepted from that broad proposition.

[1] [1897] 1 Q.B. 159.

In my view the distinction drawn therein is one upon which this case may well turn. That distinction is (D) that when there has been a prosecution (beyond the information) the laying of the information, which started that prosecution, is to be held to be "the commencement of the prosecution" and that this is the meaning commonly accepted by the profession as to this most common situation; but (C), if the magistrate does not act upon the information there has been no such commencement.

Again it is pertinent to observe that this case was not concerned with an action for malicious prosecution. The question in issue was as to when a prosecution had been instituted within the meaning of the *Sunday Observance Prosecution Act, 1871,* which provided that no prosecution should be instituted for any offence under the *Sunday Observance Act, 1676,* except with the written consent of the chief officer of police of the police district in which the offence was committed. The appellant had been convicted under the *Sunday Observance Act,* but the written consent had not been given until after the information was laid. The case held that the prosecution was instituted when the information was laid and therefore the conviction was bad. The argument in support of the conviction relied upon *Yates v. The Queen.*

With great respect, I cannot regard the passages from the judgment of Wills J., marked by MacDonald J. as (C) and (D), as being anything more than an attempt to reconcile the *dicta* in the *Yates* case with the conclusion he himself had reached on the issue involved in the case before him. Both cases involved the interpretation of specific statutes, and the judgments were not directed to the point in issue here.

MacDonald J. suggests that the Privy Council, in *Mohamed Amin,* inferentially adopted passage (C) from the judgment of Wills J. when it was said:

> Their Lordships are not prepared to go as far as some of the courts in India in saying that the mere presentation of a false complaint which first seeks to set the criminal law in motion will per se found an action for damages for malicious prosecution.

With respect, I do not agree that this is so. In *Mohamed Amin* the complaint was dismissed by the magistrate, and no prosecution followed the making of the complaint. It is true that the magistrate made an inquiry under s. 202 of the *Code of Criminal Procedure,* but the result of that was the dismissal of the complaint. No process was ever issued to bring the accused before the magistrate.

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I think it is important to read the passage from the Privy Council, just quoted, together with the sentence which immediately follows it:

> If the magistrate dismisses the complaint *as disclosing no offence with which he can deal,* it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff results.

(The italics are mine.)

Read together, they would appear to mean that the mere presentation of a false complaint will not necessarily be a basis for a suit for malicious prosecution, but that, if a complaint is made disclosing an offence with which the magistrate has jurisdiction to deal and he takes cognizance of it, that is a sufficient foundation for the action.

I turn now to consider s. 439(1) of the *Criminal Code*. It provides as follows:

> 439. (1) Any one who, upon reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information where it is alleged that
>
> (a) the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person
>
> (i) is or is believed to be, or
>
> (ii) resides or is believed to reside, within the territorial jurisdiction of the justice;
>
> (b) the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;
>
> (c) the person has anywhere unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or
>
> (d) the person has in his possession stolen property within the territorial jurisdiction of the justice.

The magistrate could only receive the information provided it alleged those matters which would bring it within his jurisdiction, but, if it did, he was obligated to receive it.

Having received the information, the magistrate is obliged to carry out the duties imposed upon him by s. 440(1) of the *Code*:

> 440. (1) A justice who receives an information shall
>
> (a) hear and consider, *ex parte,*
>
> (i) the allegations of the informant, and
>
> (ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and
>
> (b) issue, where he considers that a case for so doing is made out, a summons or warrant, as the case may be, to compel the accused to attend before him.

In the present case, the magistrate received the information. He obviously must have heard and considered the allegations which had been made by Coleman. According to his own evidence, he had not taken any further steps before he received the letter which requested the withdrawal of the information, following which he made a notation upon the information to the effect that it had been withdrawn at the request of the informant. It is clear that he had not taken any further steps thereafter because of the request made in the informant's letter asking for such withdrawal.

In *Mohamed Amin,* the magistrate postponed the issue of process until he had made an inquiry, following which he dismissed the complaint. MacDonald J. distinguishes the *Mohamed Amin* case from the present one on the basis that, in the former, the magistrate had performed a judicial function, comparable to what would have occurred, in the present case, if the magistrate had elected to hear evidence under s. 440(1) (a) (ii), but it is significant that the inquiry to be conducted under s. 202 of the *Code of Criminal Procedure* could, on the direction of the magistrate, have been made by a police officer.

With respect, though recognizing the factual difference between the two cases, I do not see any valid distinction in principle. In neither case did the matter proceed to the stage of issuing process to compel the attendance of the accused. In the one case, the matter stopped before that point because the magistrate, after an inquiry as to the truth or falsehood of the complaint, dismissed it. In the other, if he was fulfilling his duty, which in the absence of evidence to the contrary we must assume he did, the magistrate considered the allegations of the informant, and proceeded no further, not because he considered no case had been made out, but because the informant asked to withdraw the information.

In my opinion, the essence of the matter, in each case, was the filing of an information to deal with which was within the magistrate's jurisdiction. At that point, in each case, the informant had done all he could do to launch criminal proceedings against the accused.

I do not interpret the *Mohamed Amin* case as authority for the proposition that a case of malicious prosecution can never be founded on the laying of an information, but rather

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as establishing that the information must be one which discloses an offense with which the magistrate can deal. The essence of the matter, in that case, was not that the magistrate acted "judicially" by conducting an inquiry, but that, on the evidence, the magistrate had taken cognizance of the complaint. The proceedings in the present case had progressed just as far, so far as the accused was concerned, as they had in the case of *Mohamed Amin*.

I find support for the view which I have taken in the case of *Quartz Hill Consolidated Gold Mining Company v. Eyre*[1], which is referred to in the judgment in *Mohamed Amin*, but which was not discussed in the Court below. The issue in that case was as to whether the presentation, falsely and maliciously, of a petition to wind up a trading company would justify an action for damages by the company. The Court of Appeal held that it would. In that case, the petition had been presented, and the required advertising done, but it had never been served upon the company prior to its withdrawal by the petitioner. One of the judgments is written by Brett, M.R., who sat in the *Yates* case, two years later.

It is true that, in determining whether the proceedings instituted by the petitioner were akin to ordinary civil proceedings (in respect of which, though malicious, no action would lie) or to a bankruptcy petition, stress was laid upon the publicity attendant upon the petition because of the requirement of public advertising before the petition was heard. This, however, only went to the issue of whether an action would lie at all in relation to malicious proceedings for winding up. The important feature of the case is that it was the institution of proceedings which were never served which gave rise to the action.

The real principle involved in the case was stated by Bowen L.J., at p. 692:

> In the present instance we have to consider whether a petition to wind up a company falls upon the one side of the line or the other—whether, as the Master of the Rolls has said, it is more like an action which does not necessarily involve damage, and therefore will not, however maliciously and wrongfully brought, justify an action for malicious prosecution, or whether it is more like a bankruptcy petition. I do not see how a petition to wind up a company can be presented and advertised in the newspapers without striking a blow at its credit. I suppose that most of the lawyers of the present day have seen a great increase of

[1] (1833), 11 Q.B.D. 674.

three kinds of abuses, all of which are indulged in for the purpose of extorting the payment of some debt, which ought to be the subject of some civil redress. There is the abuse of the police courts when their process is used to extort money; there is the abuse of the bankruptcy law; and there is the abuse of the provisions in the Companies Act, 1862, for winding up companies. In all these three forms of abuse the aim is to wreck credit, and I should be sorry to think that since they all involve a blow at the credit of those against whom they are instituted, the law did not afterwards place in the hands of the injured and aggrieved persons who have been wrongfully assailed, a means of righting themselves and recouping themselves, as far as can be, for the mischief done to them.

That publicity attended the laying of the information in this case is clear. The evidence established that employees of the respondent were not only aware of it, but passed the information on to others.

I am therefore of the opinion, with great respect to the views expressed in the Court below, that, as the respondent had caused everything to be done which could be done wrongfully to set the law in motion against the appellant on a criminal charge, an action for malicious prosecution lay against the respondent, the other required elements of that tort being established.

In my opinion the appeal should be allowed and the judgment at trial restored, with costs to the appellant in this Court and in the Court below.

JUDSON J. (*dissenting*):—I would dismiss this appeal. I agree completely with the reasons delivered by the Nova Scotia Supreme Court, *in banco*[1].

Appeal allowed, judgment at trial restored, with costs, Judson J. dissenting.

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[1] 49 M.P.R. 154, [1964] 3 C.C.C. 208.