1906
November 17.

MOSS *v.* WILSON.

D. C., Kandy, 17,023.

Issue of search warrant—Malicious prosecution—Proof—Dolus malus—Onus of proof—Benefit of the doubt.

WOOD-RENTON, J.—Strictly speaking, an action grounded on the mere issue of a search warrant is not an action for malicious prosecution, but both in England and in Ceylon such actions are treated as proceedings of a character similar to and as being governed by the same legal considerations as, actions for malicious prosecution. The plaintiff in such an action must prove that a charge was made to a judicial officer; that the charge was false; that the charge was made without reasonable cause; and that the defendant did not honestly believe the charge to be true.

The mere absence of reasonable or probable cause or even the presence of positive recklessness in the defendant's conduct is not sufficient to establish *dolus malus*, unless these elements show conclusively that the defendant acted in bad faith.

The burden of proof, in an action of this kind, rests at all stages on the plaintiff, and the defendant is entitled to the benefit of any reasonable doubt which the balance of the evidence may disclose.

THE facts are fully set out in the judgment of Wood Renton, J.

Van Langenberg, A.S.-G., for appellant.

H. J. C. Pereira, for respondent.

17th November, 1905. WOOD RENTON, J.—

This is an action for malicious prosecution. Two causes of action are assigned. Of these, the first related to a charge of mischief under section 409 of the Penal Code brought by Mr. Wilson, the respondent, against Mr. Moss, the appellant, in the Police Court of Matale, while the second is based on the issue, at Mr. Wilson's instances, of a search warrant for the purpose of searching Mr. Moss's

house for some stolen articles of furniture, alleged to have been missing, and to have been the property of the North Matale estate, of which Mr. Wilson is superintendent and Mr. Moss was formerly dispenser.

Strictly speaking, an action grounded on the mere issue of a search warrant is not an action for malicious prosecution, but both in England (*Elsee v. Smith* (1822), 1 *D. and R.* 97; *Wyatt v. White* (1860), 29 *L. J., Q. B.* 193; *Jones v. German* (1897), 1 *Q. B.* 374) and in Ceylon (*Meedin v. Mohideen* (1897), 3 *N. L. R.* 27) such actions are treated as proceedings of a character similar to and as being governed by the same legal considerations as, actions for malicious prosecution. There is no doubt as to what the essential elements of the action for malicious prosecution are. The plaintiff must prove that a charge was made to a judicial officer, that the charge was false—its falsity being demonstrated, where prosecution has followed, by the plaintiff's acquittal—that the charge was made without reasonable cause, and that the defendant himself did not honestly believe it to be true. The mere absence of reasonable or probable cause or even the presence of positive recklessness in the conduct of the defendant is not sufficient to establish *dolus malus*, unless these elements show conclusively that he must have acted in bad faith. Moreover, as the burden of proof rests at all stages on the plaintiff, the defendant is entitled to the benefit of any reasonable doubt which the balance of the evidence may disclose. In support of these propositions, I may refer to the cases of *Meedin v. Mohideen* (*ubi sup.*) and *Christiana v. Andiappapulle* (1898), 1 *Balasingham*, 58.

Now, in regard to all the constituent elements in the action for malicious prosecution, except one, Mr. Moss has unquestionably made out his case. Briefly stated, the facts were these. Mr. Moss had been dispenser on the North Matale estate since 1898. In 1901, on the occasion of his wife coming to live with him, he had put up at his own expense some trelliswork on the verandah of his bungalow belonging to the estate, but Mr. Moss occupied it rent free as part of his salary. There was conflict in the evidence as to whether the trelliswork was attached to the verandah in such a manner as to make it a fixture in law. It appeared that in June, 1904, Mr. Moss's wife purchased from Mr. Proctor Ariyanayagam eight acres of land held by him on a Crown grant, but situated within the bounds of the estate. In July, 1904, Mr. Wilson came to the estate as superintendent. He made several unsuccessful attempts to induce Mr. Moss to sell the land, and in an interview between them on the subject early in September he threatened to dismiss Mr. Moss unless the land was sold. Mr. Wilson stated in his evidence that this threat was merely " bluff."

1905.
November 17.

WOOD RENTON, J.

On the 15th September however, Mr. Wilson did terminate Mr. Moss's services as dispenser by a month's notice from that date. The ground alleged for this step was Mr. Moss's neglect of his duties as dispenser. Mr. Wilson stated in the witness box that various verbal complaints against Mr. Moss had reached him. He had in fact received a letter from a Mr. Davidson, superintendent of the estate which was associated with the North Matale estate, in regard to the employment of Mr. Moss, suggesting that his services should be dispensed with, as he paid no attention to the estate coolies. Mr. Wilson next wrote to Mr. Moss asking him for a list of the furniture belonging to the dispensary. In reply Mr. Moss stated that when he took charge of the dispensary in 1897 no inventory had been given to him, but he forwarded a list of the articles which he said were there—adding a note at the close that he had a pocket case of instruments which had been presented to him a year before. It appears that there was in fact no estate list of the furniture in question. But the estate books showed that there had been a box of instruments in the dispensary. Mr. Davidson, who had been superintendent of the estate from 1894 to 1898, supplied Mr. Wilson from recollection with a list of the furniture which he thought had been there in his time. Mr. Davidson had not, in fact, seen Mr. Moss when he took charge of the dispensary. He had only seen the goods subsequently in the store. Besides the box of instruments claimed by Mr. Moss as a gift, it would seem that three articles of furniture—a teapoy, a cellaret, and a lounging chair, included in Mr. Davidson's list—did not appear in that of Mr. Moss. Fortified by the imperfect information given to him by Mr. Davidson, Mr. Wilson proceeded to the dispenser's bungalow and asked to see the furniture. Mr. Moss refused, adding that he would give over the furniture on the 15th October, the day on which his services terminated. As to the ground of refusal there was some uncertainty.

Mr. Moss, who is a Tamil, alleged that it was because his wife was living in the house, and that he told Mr. Wilson so. Mr. Wilson did not admit this to be correct. It is tolerably clear on the evidence that both parties had been exasperated by the dispute as to the land. There is nothing, however, to show that Mr. Wilson ever pointed out, or asked for any explanations as to the discrepancies between the two lists of furniture. This observation applies to his conduct in another matter. He became aware that Mr. Moss was removing the trelliswork above referred to. He made no inquiries as to whether this was being done in the exercise of a *bonâ fide* claim of ownership. He went straight to the Police Court, lodged a complaint against Mr. Moss for malicious mischief, and obtained a search warrant with

a view to the recovery of the missing furniture. Mr. Wilson stated that before launching the charge for mischief he had consulted his proctor, Mr. Van Rooyen, who had said that he did not see there would be any harm in the charge. On what materials this somewhat enigmatical opinion was based we have no means of knowing. We have, however, examined the original Police Court proceedings, and it would appear that both the complaint and the affidavit in support of the application for the search warrant are in Mr. Van Rooyen's handwriting. Mr. Moss was convicted on the charge for mischief. But the conviction was promptly and properly set aside by the Supreme Court. There was not a vestige of evidence of malicious intention to support it. The execution of the search warrant yielded no results as to the missing teapoy, cellaret, and lounging chair. It would seem that the box of instruments, although still claimed as a gift, was given up before the warrant was executed. There can be no two opinions as to Mr. Wilson's conduct as disclosed by the evidence in this case. It deserves the severest censure. He was dealing—as he knew or could easily have ascertained—with a servant who had been associated with the North Matale estate for many years, and whose character, for aught that appears to the contrary, was as respectable as his own. That he should have set the criminal law in motion against a man in this position, along two distinct channels, without any adequate inquiry as to the facts, reflects little credit either on his discretion or on his sense of justice. But can we say that he may not have honestly believed in the charges which he preferred ? The District Judge who heard the witnesses and who has carefully sifted the evidence came to the conclusion that, although Mr. Wilson may have been influenced in his proceedings by his dispute with Mr. Moss about the land, he may yet have honestly believed that he was doing what was right. I think that there is a reasonable doubt in Mr. Wilson's favour on this point, and I give him the benefit of it, although the case is certainly on the border line. The appeal must be dismissed.

GRENIER, J.—I agree.