APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

THE TOWN MUNICIPALITY OF JAMBUSAR AND OTHERS (ORIGINAL DEFENDANTS 1, 4 and 5), APPELLANTS, *v.* GIRJASHANKER NARSIRAM (ORIGINAL PLAINTIFF), RESPONDENT.*

1905. *July* 17.

Suit for damages for malicious prosecution—Commencement of prosecution bonâ fide*—Continuance* malo animo*—Reasonable and probable cause—Question of fact.*

The plaintiff was a member of a joint Hindu family to which a house in Jambusar belonged. The tax in respect of this house fell into arrears. Summary proceedings before a Magistrate were instituted by the Municipality under the District Municipal Act. The amount was paid after the institution of the proceedings and the prosecution ended without a decision on the merits. The plaintiff brought this suit for damages for malicious prosecution against 5 defendants, namely (1) the Municipality of Jambusar, (2) and (3) the members of its Managing Committee, (4) its Secretary, and (5) its *Daroga*. The first Court dismissed the suit. The lower appellate Court passed a decree against defendants 1, 4 and 5 and awarded Rs. 55 as damages against them. On appeal to the High Court—

Held, that the suit should have been dismissed as against these defendants also, that the object of the Municipal Secretary being "to teach a minatory lesson to other defaulters on the disadvantages of non-payment of the tax", that could not be regarded as an indirect motive or as malice for the purposes of such a suit, it being a legitimate end of punishment to deter other evil-doers from offending in the same way.

Query:—Whether in such circumstances the Municipality could in any case be held liable for the malice imputed to its Secretary.

Held further that the Secretary was no party to the proceedings which were instituted by or on behalf of the Municipality. It was not in his power to determine whether proceedings should be instituted nor did he institute them in fact.

Held: as to the *Daroga* that the facts failed to establish a sufficient ground for legal liability. Though a suit will lie for malicious continuation of proceedings, it was not shown that the *Daroga* took any active step after the payment or that he persevered *malo animo* in the prosecution or that he had the intention of procuring *per nefas* the conviction of the accused.

Fitzjohn v. *Mackinder* (1) followed.

* Second appeal No. 669 of 1904.

(1) (1861) 30 L. J. (C. P.) 257 at p. 264.

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SECOND appeal from the decision of H. S. Phadnis, Assistant Judge of Broach with full powers, setting aside the decree of M. N. Choksi, Subordinate Judge of Jambusar.

The plaintiff sued to recover from all or any of the five defendants Rs. 601 as damages for malicious prosecution under the following allegations:—

Plaintiff's father, who was the member of an undivided Hindu family, had seven houses standing in his name in the House-Tax Assessment Book of the Town Municipality of Jambusar. He died in the year 1892 and since then the houses were owned by the joint family, consisting of the plaintiff, the plaintiff's uncle and the latter's sons. No mutation of names was made in the Municipal Assessment Books and the houses continued to stand in the name of plaintiff's deceased father. On the evening of the 31st May 1900, the Managing Committee of the Municipality, defendant 1, with a view to set an example to others, maliciously and without reasonable and probable cause illegally sanctioned plaintiff's prosecution for arrears of house-tax, though he was not liable to pay it. Defendants 1—3, that is, the Town Municipality of Jambusar, defendant 1, and the members of the Managing Committee, defendants 2 and 3, were, therefore, liable for damages for malicious prosecution, and also defendant 4, the Secretary of the Municipality, in that he submitted a false report for the sanction. Though the plaintiff's cousin paid the tax in the morning of the 1st June following, the Municipal *Daroga* (Inspector), defendant 5, maliciously instituted the prosecution in the Magistrate's Court the same day. As the payment had been made, defendants 4 and 5 were bound to inform the Magistrate of the same and to withdraw the complaint, but they maliciously allowed the prosecution to continue.

Defendant 1, the Town Municipality of Jambusar, answered that the Municipality derived its chief income from the house-tax. In the year 1900 a very small amount of tax was realized in the first two months, therefore, after the expiry of the prescribed period of sixty days, the Secretary and the Managing Committee took legal steps to recover the tax and the *Daroga* lodged complaints against the defaulters, including the plaintiff, whose prosecution had been sanctioned. Test complaints were

lodged against the plaintiff and others, as in that year several well-to-do persons even did not pay the tax through obstinacy. The action of the Municipal servants was thus clearly legal. As owner, occupier, and manager of the houses, the plaintiff was liable for the tax, and being fully aware of his liability, he had been paying the same. The plaintiff did not file any objection before the Managing Committee after the publication of the assessment list as required by the Municipal rules. He ought to have applied to the Municipality if he wanted to have his name entered in the Assessment Book. The Municipality did not know what expenses the plaintiff had incurred on account of his prosecution. He did not suffer in reputation and damages cannot be claimed for mental sufferings.

Defendants 2 and 3, members of the Managing Committee, added that as members of the Managing Committee they had to take the necessary steps to recover the house-tax, and during the year 1900 people having failed to pay the tax although demands were made, it became necessary in the interests of the Municipality to sanction the prosecution of the defaulters, including the plaintiff. The sanction was issued against the plaintiff on reasonable grounds but not through malice.

Defendant 4, the Secretary to the Municipality, answered further that the prosecutions were instituted with a view to save the defaulters from the payment of the penalty, and it was neither his duty nor that of the *Daroga* to withdraw the complaints.

Defendant 5, the Municipal *Daroga*, stated in addition to the above that he instituted complaints against those whose prosecutions were sanctioned by the Managing Committee in the morning of the 1st June 1900, and similarly a complaint was lodged against the plaintiff at that time. The tax was paid at about 1 p. m., but it was not paid before the complaint was filed, and it was not his duty to withdraw the complaint. When the Magistrate questioned the plaintiff with respect to the payment of the tax, he answered in the affirmative, and the plaintiff was, thereupon, acquitted. He was not enimical with the plaintiff, and he filed a complaint against the plaintiff under the orders of the Managing Committee for a reasonable cause consisting in the

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failure of the plaintiff to pay the tax. He was not actuated by malice towards the plaintiff.

The Subordinate Judge found, *inter alia,* that the plaintiff was liable to pay the tax, that the sanction for plaintiff's prosecution was not illegal, that the plaintiff had neither proved want of reasonable and probable cause nor malice against any defendant separately, or all defendants jointly, and that the plaintiff had neither suffered any loss or injury in mind, or body, or reputation and was not entitled to damages. He, therefore, dismissed the suit.

On appeal by the plaintiff the Judge held that by reason of its Secretary's illegal act, the defendant Municipality instituted false and illegal criminal proceedings against the plaintiff maliciously and without reasonable and probable cause, that defendant 4 did the same, that the prosecution was continued by defendants 1, 4 and 5 maliciously and without reasonable and probable cause, that the plaintiff suffered damages to the extent of Rs. 55 in consequence, and that defendants 1, 4 and 5 were liable to pay the damages and not defendants 2 and 3. He, therefore, passed a decree in the following terms:—

The decree of the lower Court set aside and the following passed in its stead:—Defendants 1, 4 and 5 to pay Rs. 55 and his costs in both Courts to plaintiff, except pleader's fee in both Courts, which is awarded on the decreed amount only, as damages seem to me to be needlessly over-valued; defendants to bear their respective costs.

The following are extracts from the judgment of the Judge:—

In the written statements it is affirmed that though the houses stood in plaintiff's father's name, it was plaintiff who was all along paying the tax after the father's demise. But not a single scrap of paper or an iota of some other reliable evidence is produced in support of the assertion. On the other hand the plaintiff had produced three receipts which show that in 1897 the tax was paid by the uncle's son Pranshankar and in 1898 and 1899 by the uncle himself. The legitimate conclusion from this evidence on one side and the absence of evidence on the other is that the tax has been during the preceding years paid by and accepted from the uncle or his sons and at no time by or from plaintiff. I therefore hold that in 1900 plaintiff was not the owner nor was considered by the Municipality until the sanction affair as owner liable to pay the tax under the rule.

Assuming he was such owner, that alone is, under the rules, insufficient to justify his prosecution for non-payment. This conclusion arises from the wording of rule 129 read with rule 125. The former runs:—"If in any case the

assessment due is not paid within the prescribed period of time, proceedings for the recovery of the arrears shall be taken against the defaulter under section 84, &c., &c." Who is meant by "the defaulter" may be gathered from rule 125: "With the aid of the assessment book the Secretary shall prepare an assessment list and post copies of it at the Municipal and other public offices and at all conspicuous places throughout the town on or before 31st March each year. *In the list shall be shown the name of every person liable to the tax*, the year for which it is payable, &c. &c." The words italicized plainly indicate that for the purposes of a prosecution under rule 129 a defaulter is only he whose name has been shown in the list as liable to pay the tax and who has not so paid within the prescribed time. And the reason is obvious. Instituting criminal proceedings against a man being always a serious matter, the framers of the rule wisely and naturally enough provided that tax-payers should have a clear and definite knowledge of their liability, and if with such knowledge they fail to pay they do so at their own risk. The publication of the list is in this sense no more than a written public intimation to and demand on the tax-payers to take note of their liability and to pay in due time. I therefore think that the defaulter contemplated in rule 129 is he and only he whose name appears in the list as liable to pay the tax and who has failed to pay it within the prescribed time and that the rule sanctions and directs the prosecution of such defaulter only and of no other person. It will be argued that supposing a wrong name or a deceased person's name is erroneously inserted in the list, should the Municipality forego the tax standing against that name? The answer is that the Municipality need make no such sacrifice; it is at liberty to recover the arrears by having recourse to the Civil Court, but it is not at liberty to run up to the Magistrate because the erroneous entry being the result of its own officials bars it from the latter and simpler mode of realizing its dues. Rules 122—24 impose on the General Committee and the Secretary the duty of preparing and revising the assessment book each year, and if neither of them performs that duty carefully and regularly the Municipality must be prepared to suffer the consequences of such non-performance.

* * * * * * *

Now to proceed. From the above resumé of facts it is evident that the originator of this prosecution was the Secretary, defendant 4. He has admitted that much in his written statement (Exhibit 13), though in his deposition (Exhibit 229) he has turned round and made a feeble and futile attempt to throw the blame on the two members of the Managing Committee who sanctioned the prosecution. In the written statement he says: "During the first two months there were very small collections; the chief source of income is the house-tax; hence as Secretary I felt myself bound to bring this matter to the notice of the Managing Committee and I did so. Many persons (who could have paid very easily) did not pay up their tax ..... thinking it necessary that steps should be taken for recovery of house-tax, I submitted a report before the Managing Committee as usual, giving names of a few persons from different communities and asked for a sanction to prosecute, which being granted complaints were legally lodged."

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I have shown above that plaintiff was not a defaulter and consequently not liable to prosecution under rule 129. The further question here arises, namely, whether the Secretary had that knowledge at the time he applied for sanction and had the prosecution instituted. If he really *bonâ fide* and reasonably believed that plaintiff was a defaulter, howsoever erroneous that belief, he is protected by the rule of reasonable and probable cause. It is possible and may be conceded that, being a layman, he could not have concluded on *a priori* and legal reasoning that plaintiff was not a defaulter. But elementary common sense, ordinary regard for the rights of other and also perhaps the practice of his own office would have advised him, if he was open to such advice, that he could not fairly consider the plaintiff, from a practical and businesslike point of view, a defaulter so as to justify the prosecution. In preparing his list of defaulters selected for prosecution he seemed to have acted in a most careless and negligent way so as to preclude himself from the benefit of the rule of just and lawful cause. The degree of care devoted to the preparation of the list may fairly be measured by the fact that the names of two persons (Kila Kahandas and Girdhar Bajibhai) who were dead were entered up in the list. On this point the Secretary says: I knew both were dead, still the sanction for prosecution was given against them, the explanation being that we were in haste and it was growing evening and so the fact might have escaped memory.

Rashness in making a charge, which is in fact believed, is not of itself actionable. But where there is a ready and obvious mode of ascertaining the truth of the charge and the opportunity of so doing is neglected by the defendant, the absence of inquiry is an element in determining the question of the presence or absence of probable cause (Mayne Criminal Law, p. 595).

Here not only was the mode of ascertaining the truth available to the Secretary, but most of the material facts were apparently known to him. He knew that the rules required the names of the persons liable for the tax should be entered in the assessment list, that the list purported to show such names for all the houses comprised in it and that in the column of these names the name entered against the houses in question was that of plaintiff's father and not plaintiff's. He further knew that the most senior member and so presumably the head of plaintiff's family was plaintiff's uncle Gavrishankar, that that uncle was Municipal Councillor, that the tax on these houses was upto then paid by the uncle and his sons and that it was never paid, at least in recent years, by the plaintiff. These facts should have left no doubt in his mind as to the person liable to pay and on default to be prosecuted. If per chance he had any doubts he could have easily cleared them up by reference to the said uncle. Instead of following this obvious course, what does he do? He coolly put down plaintiff's name as one of the defaulting persons to be prosecuted, though the whole weight of his official information weighed against that view. I can only say that this action of the Secretary was wholly unwarranted and arbitrary, was not a use but a wilful abuse of official authority.

In so acting the Secretary was not, I think, actuated by any personal grudge or malice; plaintiff admits that there is no enmity between them. What precise

motives influenced him the record does not disclose, neither need we care to know them. Personal or express malice is not an essential element in an action for malicious prosecution. It is sufficient if plaintiff shows that the defendant acted maliciously, that is, from some indirect motive (*Pestonji v. The Queen Insurance Company*, 25 Bom., 332-335). What the law means by indirect motive is indicated and illustrated in the above cited passage from Addison, namely, any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice (Addison on Torts, 6th Edition, p. 225). The written statement and the Secretary's report plainly show that the object of these prosecutions was to teach a minatory lesson to the other defaulters on the disadvantages of non-payment of the tax—a motive precisely similar to that instanced in the said passage as improper and therefore malicious.

* * * * * * *

Here the payment was made the very day the proceedings against the plaintiff were instituted. The Secretary had due notice—as the Magistrate's proceedings show—of the several days of the hearing. But he did not instruct the Daroga to withdraw from the prosecution or send an intimation to the Magistrate of the fact of receipt of the tax. Nay, more, the Magistrate visited the Municipal Office to attend meetings on 7th, 9th and 20th June, as the proceedings book shows (it may be noted in passing that this book is neither paged nor sealed, and a leaf seems to have been taken away from it), and at the meetings of the 9th and 20th sanction for prosecution was obtained. But on those occasions neither the Secretary nor the Daroga whispered a single word into the ear of the Magistrate regarding this payment or payments made by the other prosecuted defaulters. The result was that, as far as this case is concerned, the plaintiff had to attend the Magistrate's Court with his pleader in the district, pass a bail bond and answer to a notice why the bond should not be forfeited. *Malo animo* required by the above rule may fairly be inferred from this gross negligence and carelessness on the part of the Secretary.

I therefore hold that defendant 4 is liable to plaintiff in damages.

As regards the Daroga, defendant 5, there is no definite or reliable evidence that he took any active part in the preparation of the list of defaulters to be prosecuted, though he was present at the meeting of the 31st May and suggested with the Secretary—so he says in his deposition (Exhibit 209)—that the complaints should be filed in the Court of a particular Magistrate, on the ground that a number of Municipal prosecutions for house-tax were pending before the other Magistrates. In instituting the prosecution he merely carried out the behests of the Managing Committee and the Secretary without using his own judgment and discretion in the matter. Without positive evidence (which is absent) to that effect it cannot be assumed that he had knowledge, as the Secretary had, that plaintiff was not a defaulter. It was not part of his duty to recommend and obtain sanction for prosecution. I therefore hold him not liable for the institution of the prosecution, though it was his hand which put the signature and affirmation to the complaint.

But I hold him responsible for the continuation of the proceedings after payment. It was he that was in immediate charge of the prosecution. He

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accepted that task with all its privileges and with all its liabilities. One of the liabilities was to take steps for dropping the proceedings on payment, but he took no steps of the kind, and it was only on being specially sent for that he appeared before the Magistrate to admit payment. The remarks made about the Secretary in this connection apply *mutatis mutandis* to this defendant also. He seems to have private grudge also against plaintiff's family. * * At any rate, he is thus unfriendly to the plaintiff and under the circumstances it is not unreasonable to infer that that feeling partly contributed to the prolongation of the proceedings.

As regards defendant 1, the Municipality, in view of doubts expressed by text-writers, it is somewhat difficult to say whether an action for the malicious prosecution will lie against a Municipality. Pollock says:—As in the case of deceipt, and for similar reasons, it has been doubted whether an action for malicious prosecution will lie, against a corporation. It seems on principle that such an action will lie if the wrongful act was done by a servant of the corporation in the course of his employment and in the company's supposed interest, and it has been so held, but there are dicta to the contrary (p. 264, 1887 Edition).

The ordinary rule is that a master is liable for wrong done to third parties by his servant, even though it be a wilful wrong, provided the act was done on his behalf and with the intention of serving his purpose (30 Cal. 207). No Indian case was cited in argument, none is given in Ratanlal's Torts (p. 234), nor have I been able to find any bearing on the point, whether the rule applies to a Municipality. Corporations are liable to be sued for torts of all kinds committed by their agents, provided the act was done within the scope of the agent's employment and that the employment was within the scope of the corporate powers (Ratanlal, p. 24); a corporation is liable for a libel published by its authority, although the Corporation, as distinct from its members, cannot be guilty of malice in the ordinary sense of the word (*ibid*, 162). If so, there is no reason why it should not be amenable to an action for malicious prosecution, or why the opinion of Pollock should not be accepted as expressing the correct rule. Though differently constituted from an ordinary corporation in regard to its government, duties and privileges, a Municipality stands, in my opinion, on the same footing as a corporation in regard to wrongful acts of its servants, unless the statute creating it provides exemptions from liabilities for any of such acts, and there is no such exemption provided in the Municipal Acts in regard to malicious prosecutions. I therefore hold that the above rule applies to a Municipality also.

The Secretary in this case was a properly appointed officer of the Municipality and started criminal proceedings against the plaintiff in the course of his official duties in the supposed interests of the Municipality, defendant 1, which is therefore liable.

Apart from the rule it is, I think, not liable. It, *i.e.*, its constituent part the Managing Committee, sanctioned the prosecution on the information supplied by the Secretary. It *bonâ fide* believed in that information, and had

no reason to doubt its accuracy. The Managing Committee is not to be blamed for the continuance of the prosecution after payment, because it is not shown that the payment was reported to it.

Defendants 1, 4 and 5 preferred a second appeal.

Gokuldas K. Parekh appeared for the appellants (defendants 1, 4 and 5). He relied on the following authorities:—*Stevens* v. *Midland Counties Railway Co.*(1); *Abrath* v. *North Eastern Railway Co.*(2); *Fitzjohn* v. *Mackinder*(3); Addison on Torts, p. 226, 7th edition.

G. S. Rao appeared for the respondent (plaintiff). He relied on the following authorities:—*Pestonji M. Mody* v. *The Queen Insurance Company*(4); *Citizens' Life Assurance Company* v. *Brown*(5); *Fitzjohn* v. *Mackinder*(3).

JENKINS, C. J.:—The plaintiff has brought this suit to recover Rs. 601 as damages for malicious prosecution against five defendants, of whom the first is the Municipality of Jambusar, the second and third members of the Municipality's Managing Committee, the fourth its Secretary, and the fifth its Daroga. The first Court dismissed the suit with costs, but the lower appellate Court reversed the decree as to defendants 1, 4 and 5, and awarded Rs. 55 as damages against them. From that decree these defendants have preferred the present appeal. The plaintiff is a member of a joint Hindu family, to which a house in Jambusar belongs. The tax in respect of this house having fallen into arrear, proceedings were taken by the Municipality against the plaintiff for the recovery of the amount by summary proceeding before a Magistrate under the District Municipal Act. As the amount was paid after the institution of the proceedings, the prosecution ended without a decision on the merits. It is on these proceedings that the plaintiff bases his present claim. The first Court thought proceedings were properly taken against the plaintiff; that there was reasonable and probable cause; and that there was no malice. The lower appellate

(1) (1854) 10 Exch. 352.
(2) (1886) 11 App. Cas. 247.
(3) (1861) 9 C. B., N. S., 505 at 531.
(4) (1900) 25 Bom. 332 at 336.
(5) [1904] A. C. 423.

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Court took the opposite view on each of these points as against the present appellants. With its findings of fact, we cannot interfere except so far as they may be vitiated by any error of law. For the sake of argument too we will assume that the lower appellate Court has rightly decided that the non-appearance of the plaintiff's name in the assessment list furnished an answer to the proceedings against him, and we will deal with the case on that footing.

First we will take the case of the Secretary: we are clear that as against him the suit is misconceived; he was no party to the proceedings, for they were instituted by, or on behalf of, the Municipality. He is simply the servant of the Municipality to whom he reported the arrears and made a suggestion as to the steps to be taken. It was not for him to determine whether the plaintiff should be prosecuted, and neither was it in his power to institute, nor did he in fact institute the proceedings: so that as the case is framed the first essential element of a suit of this class against him is absent.

We next come to the case of defendant No. 5: he too is a servant of the Municipality, and as to him the lower appellate Court has found that he was not liable for the institution of the prosecution; it has held against him on the ground that he had continued the proceedings after the payment of the amount. Now what are the facts as to this? The plaintiff attempted to make out that the arrears were paid up before the prosecution was commenced, but both Courts have negatived this. The Judge of the lower appellate Court, however, considers that as defendant 5 failed to stop the proceedings as soon as the payment was made he acted maliciously. The Judge of the lower appellate Court seems to have condemned the fact that the Daroga on the occasions when the Magistrate attended the Municipal office on other matters, never "whispered a single word in the ear of the Magistrate regarding this payment or payments made by the other prosecuted defaulters." It is a novel doctrine that Magistrates are thus to be informed in private conversation of matters that concern judicial proceedings pending before them, and that failure in this respect is to excite criticism and even be regarded as a circumstance of adverse significance.

We notice that the Judge of the lower appellate Court for some reason, which is not apparent, refuses to accept the first Court's appreciation of the oral evidence, and holds that "the Daroga is unfriendly to the plaintiff." We are bound by this finding, but still we think that the facts found do not constitute a sufficient ground for legal liability against the 5th defendant.

Suits like the present are ordinarily brought for the malicious *institution* of proceedings, but they no doubt also lie for their malicious continuation.

The conditions then necessary are thus indicated by Cockburn, C. J., in *Fitzjohn* v. *Mackinder* (1), where he says "a prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or if spontaneous from having been commenced under a *bonâ fide* belief in the guilt of the accused, may, nevertheless, become malicious in any of the stages through which it has to pass if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction of the accused."

The facts of this case fall wholly short of this.

After the payment was made the Daroga took no active step, he in no sense persevered *malo animo* in the prosecution, nor is it shown that he had the intention of procuring *per nefas* a conviction of the accused; and we hold that there is nothing in the facts found to bring the case within the grounds of liability laid down by Cockburn, C. J.

It only now remains for us to consider the case against the Municipality.

On the issue "Did the defendant Municipality institute false and illegal proceedings against the plaintiff maliciously and without reasonable and probable cause?" the finding recorded is, "Yes, by the reason of the Secretary's illegal act." The precise meaning of this finding is made clearer in the judgment, from which it is apparent that the Judge of the lower appellate Court exonerated the Managing Committee from all malice and also the Municipality, except so far as the malice of the Secretary was imputable to it. Then what is the malice of the Secretary?

(1) (1861) 30 L. J. (C. P.) 257 at p. 264.

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The Judge holds that the Secretary was not "actuated by any personal grudge or malice"; he thinks, however, that there was an indirect motive; that the prosecution was not merely for the purpose of bringing a person to justice, but also "to teach a minatory lesson to the other defaulters on the disadvantages of non-payment of the tax." But here, we think, the learned Judge has gone astray. We have always understood it to be recognized as the legitimate end of punishment to deter other evil-doers from offending in the same way "*ut pœna ad paucos metus ad omnes perveniat.*"

"The immediate principal end of punishment," it is said, "is to control action. This action is that of the offender or of others..... that of others it can influence no otherwise than by its influence over their wills, in which case it is said to operate in the way of example" (Bentham's Principles of Morals and Legislation, page 70). This seems to correspond with the "minatory lesson" which the learned Judge condemns. We have no doubt that the learned Judge has erred in law in regarding the Secretary's desire to impart this "minatory lesson" as malice for the purposes of the present suit. Apart from this, we much doubt whether in the circumstances of this case the Municipality could be held liable for malice imputed to its Secretary: but in the view we take it is unnecessary to elaborate this point.

We have not dealt with the Judge's finding as to reasonable and probable cause, for though in the leading case of *Panton* v. *Williams* [1] the Court of Exchequer Chamber in a considered judgment laid down that "where the question of reasonable and probable cause depends entirely on the proof of the facts and circumstances, which gave rise to and attended the prosecution, no doubt has ever existed from the time of the earliest authorities, but that such question is purely a question of law to be decided by the Judge;" still here regard must be had to the concluding words of the judgment in *Pestonji M. Mody* v. *The Queen Insurance Company* [2].

(1) (1841) 10 L. J. (Ex.) 545 at p. 553.

(2) (1900) 25 Bom. 332, at p. 336; 2 Bom. L. R. 939.

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But we cannot help noticing that what the lower appellate Court took as a sign of the want of reasonable and probable cause was a mistake—if mistake it was—on a difficult question of law which the first Court in a careful judgment held to be no mistake.

And in this connection the latest pronouncement of the Privy Council is important, where it was laid down by Lord Davey in delivering the judgment in *Cox* v. *English, Scottish, and Australian Bank*, (1) that, "The plaintiff has also to prove 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." We doubt whether this was observed by the Judge of the lower appellate Court.

But apart from this the decree of the lower appellate Court against defendants Nos. 1, 4 and 5 must be reversed and that of the first Court restored with costs throughout.

Decree reversed.

G. B. R.

(1) [1905] A. C. 168 at p. 171.

CRIMINAL REVISION.

Before Mr. Justice Russell and Mr. Justice Batty.

EMPEROR *v.* DATTO HANMANT SHAHAPURKAR.*

1905. *July* 19.

Criminal Procedure Code (Act V of 1898), sections 222, 239—Successive breaches of trust—Joinder of charges—Joint trial—Same transaction—'Transaction' meaning of.

Where the accused persons were jointly in charge of trust funds, so that one could not act without the connivance of the other, and each of them misappropriated sums of money from the trust funds to his own use, thus evidently carrying through their object in concert, the fact that they carried out their scheme by successive acts done at intervals, alternately taking the benefits, did not prevent the unity of the project from constituting the series of acts one transaction, *i.e.*, the carrying through of the same object which both had from the first act to the last: and there was no objection to their being tried jointly at one trial.

* Criminal Application for Revision No. 77 of 1905.