

FIRST DIVISIONAL COURT.

OCTOBER 10TH, 1918

*JEWHRST v. UNITED CIGAR STORES LIMITED.

Malicious Prosecution—Functions of Judge and Jury Respectively—Reasonable and Probable Cause—Judicature Act, sec. 62—Finding of Trial Judge—Findings of Jury—Malice—Damages—Judge's Charge—Misdirection—No Miscarriage of Justice.

Appeal by the defendants from the judgment of BRITTON, J., in favour of the plaintiffs, upon the verdict of a jury, in an action for malicious prosecution. The jury assessed the plaintiffs' damages at \$1,700, and for that sum and costs judgment was directed to be entered.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

W. A. Henderson, for the appellants.

George Lynch-Staunton, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., in a written judgment, said that the plaintiff was the manager of a cigar-store of the defendants at Dunnville. The defendants charged him with the theft of \$423.11. The charge was dismissed by a magistrate. The information was laid by one Tilston, the defendants' secretary-treasurer.

At the trial of this action there was evidence which, if believed, warranted a finding that the plaintiff was always ready and willing to pay what on a proper accounting was owing to the defendants. He contended all along that the shortage, if any existed, was not due to any fault of his, and said that he was unable to understand how there could be such a shortage as was alleged to exist. All this was known to the defendants' agents.

Mr. McArrell, the County Crown Attorney, who was examined as a witness at the trial, testified that if the facts as they appeared in the prosecutor's case before the magistrate had been disclosed to him he would not have advised the laying of an information.

Tilston frankly admitted, in answer to a question by the defendants' counsel, that his object in taking criminal proceedings was to collect the debt which the plaintiff owed to the defendants.

The trial Judge ruled that the plaintiff had established want of reasonable and probable cause, and no objection was made to the Judge's charge to the jury.

To constitute the crime of theft, in such a case as this, there must be a fraudulent and without colour of right conversion of

* This case and all others so marked to be reported in the Ontario Law Reports.