

rowing which it is admitted the plaintiff was guilty of constituted any serious offence or one which justified dismissal. The question is, 'Has the servant so conducted himself that it would be manifestly injurious to the interests of the master to retain him?' None of the witnesses called for the defendants said that the borrowing had affected them in the least.

"The next matter complained of is more serious, namely, the fact that the plaintiff permitted the property of his master to be seized by his landlord for his rent, thereby occasioning loss and annoyance to the defendants. Irrespective of the peculiar law of master and servant at the common law, the breach by one party to an agreement does not justify the other in treating the contract as at an end unless the breach goes to the root of the contract, and the same law exists in the employment of a nature not unlike that now under consideration. As at present advised, I think that a wilful disregard of this agreement would have justified the master in discharging the plaintiff, but the act, or rather, the omission, was not intentional. The failure to look after the samples properly was due to the illness of the plaintiff. I do not think, therefore, that this involuntary default upon this single occasion justified dismissal. There should be a declaration that the plaintiff was wrongfully dismissed, and a reference upon both branches of the case.

*R. McKay*, for plaintiff. *George Kerr*, for defendants.

Divisional Court.] *FANCOURT v. HEAVEN.*

[June 14.

*Malicious prosecution — Reasonable and probable cause — Continuation after — Question for jury — Favourable termination of proceedings — Withdrawal of charge.*

This was an appeal by the plaintiff from the judgment of Clute, J., dismissing an action for false imprisonment and malicious prosecution. The plaintiff, an expressman, plying his trade in the city of Toronto, was arrested on a charge of obtaining a roll of sole leather by false pretences, at the instance of defendant, but was released on bail, and the charge was subsequently withdrawn. The plaintiff was employed by the real thief, who, by an ingenious scheme, obtained possession of the roll of leather from a firm of leather dealers of which defendant was a member, and sold it to one Brodie. The plaintiff was an innocent instrument in the hands of the real offender, who was subsequently