

Full Court.]

ORWITZ v. MCKAY.

[May 23.

*Trespass to person—Causing arrest under capias—Malice negatived—Sufficiency of affidavit—Matter for magistrate—Evidence required—Form of writ—Effect of adjudication by magistrate—Party causing arrest not liable though writ set aside—Directions to jury—Discretion of judge.*

The plaintiff H. O. was arrested under a capias issued in a suit brought against him by defendant under the name of C. O. for goods sold and delivered. After his arrest plaintiff took the objection that the capias being against C. O. he could not be dealt with under it, and the magistrate before whom he was brought thereupon dismissed the proceeding. In an action by plaintiff for false arrest the evidence showed that plaintiff rendered his account to plaintiff under the name of C. O., and that while plaintiff objected to certain charges, and requested time for payment, he made no objection to the manner in which the account was made out.

*Held*, that the jury were justified under the circumstances in negating malice on the part of defendant.

The affidavit upon which the capias issued showed that plaintiff had been absent from his place of business for some weeks, and was said to have been in the United States, and that the person from whom he purchased his stock was in possession during his absence, and was still so, apparently, at the time the affidavit was made.

*Held*, (1) These facts would indicate to the magistrate that the business of plaintiff was at an end, and that there was nothing to detain him in the county. (2) Much less evidence would be required to authorize the issue of a capias by a justice of the peace, than would be required to authorize the issue of such a writ in this court. (3) The sufficiency of the grounds set forth in the affidavit was a matter for the magistrate.

The capias being correct in point of form, and the magistrate having jurisdiction over the subject matter, and the defect if any being at most one which would render the writ voidable,

*Held*, (1) It was competent to defendant to rely upon the adjudication of the magistrate as an answer to the plaintiff's claim of trespass. (2) If the capias was issued through an error of the magistrate the person who directed its issue would not be liable even though the capias were set aside.

The facts as to malice were left to the jury, who were told that absence of reasonable and probable cause was evidence of malice, but they were not directed as to whether in the opinion of the trial judge there was or was not reasonable and probable cause. The judge being submitted to the jury with proper directions all the facts upon which the question of reasonable and probable cause depended, and having determined upon their findings that there was reasonable and probable cause,

*Held*, that it was in the discretion of the judge to determine the best method of dealing with that aspect of the case, and that plaintiff had suffered no prejudice from the course pursued.

*F. B. Wade, Q. C.*, and *V. Paton*, for appellant. *W. B. A. Ritchie, Q. C.*, for respondent.