

MIDDLETON, J.

NOVEMBER 17TH, 1914.

*McMULLEN v. WETLAUFER.

Malicious Prosecution—Reasonable and Probable Cause—Advice of Counsel—Approval of Crown Attorney—Malice—Finding of Jury—Dismissal of Action—Costs.

An action for malicious prosecution, tried before MIDDLETON, J., and a jury, at Toronto.

The plaintiff was arrested at the instance of the defendant upon informations for forgery and perjury, and was tried and acquitted.

The action was tried before MIDDLETON, J., and a jury at Toronto.

H. H. Dewart, K.C., and R. T. Harding, for the plaintiff.

T. N. Phelan, for the defendant.

MIDDLETON, J.:—I reserved my judgment upon the question of reasonable and probable cause, and allowed the case in the meantime to go to the jury for the purpose of determining the responsibility of the defendant for the prosecution, the question of malice, and to have the damages assessed. (There was no question as to the result of the prosecution.) The jury has found for the plaintiff, with \$4,000 damages; and I must, therefore, determine the question reserved. . . .

[The learned Judge then set out the facts and circumstances of the case; the prosecution having arisen from certain letters alleged to have been written by the plaintiff, the authorship of which he denied on oath in a civil action, *Davis v. Wetlaufer*.]

The jury . . . were well warranted in finding that actual malice existed. The object of the arrest of the plaintiff was, no doubt, to influence the conduct of an action for conspiracy, which was then about to come on for trial, and in which it was known that McMullen (the present plaintiff) would be a witness.

The existence of malice does not warrant a finding of the lack of reasonable and probable cause; but where malice exists a careful scrutiny of the circumstances is rendered necessary, as the lack of good faith removes any presumption that might otherwise exist in favour of the defendant.

Before the information was laid, two experts had given an unqualified opinion that the same hand which had written a certain subpoena had written the letters. McMullen had ad-

*To be reported in the Ontario Law Reports.