Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Bank of British North America v. *Samuel Strong, from the Supreme Court of Nova Scotia; delivered* 10*th February* 1876.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE Defendants in this case are the Appellants. They appeal against a rule discharging a rule nisi obtained by them to set aside a verdict for the Plaintiff and for a new trial. The action was brought by Samuel Strong against the Bank of British North America. The declaration contains six counts.

The first three counts of the declaration charged the Defendants with falsely and maliciously writing and publishing concerning the Plaintiff the words following; that is to say, "Insolvent Act of 1869. To Samuel Strong "(meaning the Plaintiff) of Arichat, in the "county of Richmond, in the province of Nova "Scotia, merchant and trader, you (meaning "the Plaintiff) are hereby required, to wit, by "John F. Crowe and Harlin Fulton, doing "business under the name and firm of J. F. "Crowe and Company, creditors for the sum of "$247. 40., the same being for the amount of a "certain promissory note bearing date the 6th "day of September, A.D. 1873, whereby you "(meaning the Plaintiff) promised to pay A. B. "Bligh & Co., or order, the said sum of "$247. 40., three months after date. And the

" said A. B. Bligh & Co. endorsed the said note " to the said J. F. Crowe & Co., which said " note is unpaid, and is and has been overdue " since the 9th December instant, and, by the " Bank of British North America (meaning the " Defendants), creditors for the sum of $463. 46., " the same being for the amount of a certain " promissory note bearing date the 8th Decem- " ber 1873, whereby you (meaning the Plaintiff), " promised to pay to A. B. Bligh & Co., or order, " the said sum of $463. 46. three months after " date. And the said A. B. Bligh & Co. " endorsed the said note to James Crawford & " Co., who endorsed the same to the Bank of " British North America aforesaid, which said " note is unpaid, and is and has been overdue " since the 11th day of December instant, and " by William C. Moir, doing business under the " name and firm of Moir & Co., a creditor for " the sum of $289. 14., the same being for the " amount of a certain promissory note bearing " date the 12th day of September 1873, whereby " you (meaning the Plaintiff) promised to pay " A. B. Bligh & Co., or order, the said sum of " $289. 14. three months after date. And the " said A. B. Bligh & Co. endorsed the said note " to the said Moir & Co., which said note is " unpaid, and is and has been overdue since the " 15th December instant, to make an assign- " ment of your estate and effects under the " above Act, for the benefit of your (meaning " Plaintiff's) creditors."

The fourth count alleged "that the Defen- " dants falsely and maliciously, and without " reasonable or probable cause, joined with " others in making and did make a demand " upon the Plaintiffs in the form referred " to in section 14 of 'The Insolvent Act of " 1869,' requiring the Plaintiff to make an " assignment of his estate and effects for the

" benefit of his creditors, merely as a means of " enforcing payment of the amount alleged in " said demand to be due to the Defendants, " under colour of proceeding under the said 'In- " solvent Act of 1869,' and that the Defendants, " though said demand was served on the Plain- " tiff in the year 1873, have never since taken " any further proceedings thereon."

The fifth count alleged that the Defendant maliciously and without reasonable or probable cause obtained an order authorising them to issue a capias to hold the Plaintiff to bail for the sum of seven hundred and sixty-three dollars and forty-six cents, by falsely and maliciously representing by a false affidavit that the Plaintiff was then about to leave Nova Scotia unless forthwith arrested; and that thereupon in pursuance of the said order the Defendants caused a writ of capias to be sued out and the Plaintiff to be arrested thereon, and to be detained in custody until he gave bail; and that afterwards the order to hold to bail and the writ of capias, and all proceedings thereunder, were set aside by a Judge on the ground that the Plaintiff was not about to leave Nova Scotia.

The sixth count was for assault and imprisonment.

The Defendants, in their pleas, say, "As " to the first count of the said declaration, that " the Plaintiff being indebted to them upon " notes long over due, and being also indebted to " other persons upon notes also over due, they, " the said Defendants, together with sundry other " creditors of the said Plaintiff," that was Messrs. Crowe & Co. and another creditor, " caused the notice set out in the Plaintiff's " writ to be served upon him, which is the " grievance complained of in the Plaintiff's " writ." If the notice was so published as to

amount to a libel if false, this plea amounted to a justification of it. The Defendants say in substance "We stated that you were indebted; "it is true that you were indebted, and we "served this notice under the provisions of the "Insolvent Act."

Similar pleas were pleaded to the second and third counts.

To the fifth count the Defendants pleaded that, having been informed and believing that the Plaintiff was about to leave the Province, they caused proceedings to be taken to recover their debt, which was of long standing.

The evidence was that the Plaintiff being indebted to Messrs. Crowe & Co., and also to the Defendants, the bank, and to other creditors, the Defendants and Messrs. Crowe & Co. joined in serving a notice upon the Plaintiff under the Statute of the Canadian Dominion Parliament of the 32nd and 33rd Victoria, Cap. 16. Section 14 of that Act enacts, "if a debtor ceases to meet "his liabilities generally as they become due, "any one or more claimants upon him for sums "exceeding in the aggregate $500, may make a "demand upon him either personally within the "county or judicial district wherein such insol- "vent has his chief place of business, or at his "domicile, upon some grown person of his "family or in his employ, requiring him to make "an assignment of his estate and effects for the "benefit of his creditors."

The debts of the Defendants and of Messrs. Crowe & Co. exceeded the amount of $500, and the notice or demand served upon the Plaintiff required him to make an assignment of his estate and effects for the benefit of his creditors. That was a legal proceeding taken for the recovery of the debts. It would not have been sufficient in an action for a mali-

cious prosecution to allege that the notice was served maliciously; but it would have been necessary to go further, and state that there was no reasonable or probable cause for serving it. The notice could not amount to a libel unless it was published to a third person. The Defendants could not be sued for serving a notice of that kind upon the Plaintiff personally, unless there was want of reasonable or probable cause; nor could he be treated as having published a false and malicious libel by publishing it to the Plaintiff himself. Such a notice being a legal proceeding would be *primâ facie* privileged, and no action would lie for the delivery of it to a third person for service upon the Plaintiff, unless upon proof of express malice; but if the Defendant, without having any debt due to him, and knowing that there was no debt due to him, chose to put such a notice into the hands of a third person for the purpose of being served, that would be a publication, and might amount to a libel if express malice were proved. In this case no such proof of malice was given, nor was it shown, and indeed it could not be shown, that the debts mentioned in the notice were not due.

Now, with reference to the first three counts, the Chief Justice says :—"I stated to the jury that this " suit had arisen from a demand made upon the " Plaintiff, a trader at Arichat, in December 1873, " by the Defendants and others, as his creditors, " requiring him to make an assignment of " his estate and effects for the benefit of his " creditors, under section 14 of the Insolvent " Act of 1869, and in consequence of the sub- " sequent arrest of the Plaintiff under a writ of " capias, issued against him by the Defendants " for the same debt claimed to be due to them " in that demand. I explained to the jury " what, in point of law, constituted a libel,

" in order that they might consider whether " the matters contained in the three first counts " of the writ were libelous or not, remarking " that, if the Plaintiff had ceased to meet his " liabilities to the Defendants and other per- " sons acting with them, they had a right to " make, and were therefore not chargeable with " libel for making, the demand." He then proceeded to state that the Defendants did not follow up the notice, and that afterwards they abandoned the proceeding, and arrested the Plaintiff upon the notes. He says, subsequently:—" I remarked that in actions ' like the present for a malicious arrest, malice "' was an essential ingredient, and wherever it " was put in issue under a plea of not guilty," that is speaking of the fifth count, " it was the " duty of the Plaintiff to give some evidence of " it, and also evidence of the want of probable " cause for such arrest. Here malice was not " directly put in issue under the plea to the fifth " count, upon which count I told them I " thought the whole of this case rested." It appears, therefore, that the learned Chief Justice, after directing the jury as to the law relating to libel, told them in substance that he thought there was no libel.

He also stated that he thought the charge under the fifth count was the one upon which the whole case rested. Then he summed up to the jury upon that count. He said, " The Defendant having merely pleaded to that " count, that having been informed and believing " that the Plaintiff was about to leave the " province, they caused proceedings to be taken " to recover their debt, long overdue, leaving it " to be inferred from the facts stated in the " plea, that there was no malice, though the " plea itself did not deny it. Whether there " was or was not reasonable and probable cause

" for instituting the suit complained of by the " Plaintiff was a question I had on motion for " a nonsuit refused to decide, considering it a " question that in this case ought properly to be " decided by them upon the evidence adduced. " They were aware that the suit brought by De- " fendants against the Plaintiff was upon two pro- " missory notes made by the Plaintiff to A. B. " Bligh & Co., endorsed by that firm and also by " the firm of James Crawford & Co., and dis- " counted by the Defendants, as Mr. Penfold " had stated, on the strength and credit of the " endorsers only, the maker being considered by " him as a person of no means or credit, whose " name upon any paper upon which it appeared " he thought would be prejudicial to it; they " were also aware that no recourse was had by " the Defendants against the endorsers who, " though they had met with some reverses in " their business, were yet solvent. Now these " were the facts upon which the Plaintiff relied " as evidence: first of all, to show that there was " malice and want of probable cause on the part " of the Defendants in issuing a writ of capias " against him and causing him to be arrested, " and, in the next place, stating in their affidavit " a belief that he was about to leave the pro- " vince, and falsely stating that they feared the " debt would be lost unless he was forthwith " arrested." Then he says, "Mr. Penfold," that is the agent of the bank, "states that he " received information from Emerson Bligh, a " partner in the firm of A. B. Bligh & Co., " whose interest it was, as he must have known, " that the notes made by the Plaintiff and held " by Defendants with the endorsement of his " firm should be collected; but having some " doubt as to the propriety of proceeding against " him in the manner suggested by Emerson " Bligh, he consulted his solicitor, who told him " he could safely arrest the Plaintiff on the

" information he had received. Whether the " advice given was such as I, having heard the " facts approved of, I would not say; but I " felt it to be my duty to say, that if they " believed that Mr. Penfold, after having laid all " the facts fully and fairly before his solicitor, " acted *bonâ fide* on his opinion, and solely " with the view of protecting the interests of the " Defendants, whose servant he was, believing " the debt would be lost unless the Plaintiff was " arrested, then it was evidence of probable " cause, and then the verdict ought to be for the " Defendants; but if they could not come to that " conclusion, and thought that he acted more " with a view of protecting the interests of the " endorsers than that of the Defendants, and did " not himself believe, and could not have be- " lieved from the opinion he had expressed as to " the Plaintiff's credit, that the debt would be " lost unless he was arrested, then it was evi- " dence of the want of reasonable and probable " cause for making the arrest, which would " entitle the Plaintiff to a verdict for such " damages as they considered right, though the " fact of the writ of capias having been set " aside would not amount to evidence of that " character."

The Respondent did not appear before their Lordships at the hearing of the Appeal, but the Colonial Act for abolishing arrest for debt on mesne process was brought to their notice.

Their Lordships are of opinion that the Act, in requiring an affidavit from a creditor that he fears the debt will be lost unless the debtor is immediately arrested, has reference to a loss of the debt, so far as the debtor himself and any security which he may have given for the debt are concerned. In the present case, the Plaintiff, as the maker of the notes, was the debtor; the debts were not debts due from the Plaintiff and

the indorsers jointly; the indorsers were not sureties provided by the Plaintiff for securing the debt; and although the Defendants might have sued the indorsers upon the notes if due notice of dishonour were given, they were not bound to adopt that remedy, or to look to them for payment, but were entitled to treat the Plaintiff as the sole debtor, and to adopt the same remedy against him as they would have adopted if they had been payees of the notes, or as the indorsers would have had if they had taken up the notes and sued the Plaintiff upon them. The false and malicious representation charged in the fifth count was the representation that the Plaintiff was about to leave Nova Scotia, when, in fact, he was not about to leave it; and it was upon the ground that he was not about to leave, and upon that ground alone, that the writ of capias and the proceedings thereunder were set aside. There was no allegation that the representation by the Defendants that they feared the debt would be lost if the Defendant was not forthwith arrested, was false or malicious. Their Lordships are of opinion that, if the Defendants had reasonable and probable cause for believing and did believe that the Plaintiff was about to leave Nova Scotia, and that their remedy against him would be lost, and that they would be prevented from recovering their debt from him, if he were not forthwith arrested, there was reasonable and probable cause for the arrest, notwithstanding they might have believed that they could recover the amount of the note from the endorsers, and in endeavouring to recover their debt from the Plaintiff acted with a view of protecting the interests of the endorsers.

It appears, therefore, to their Lordships that the learned Judge misdirected the jury with regard to the fifth count, and that the direction as to that count would of itself justify a new trial.

The grounds upon which the new trial was moved for were,—first, "That the learned Judge "did not submit the question of malice to the "jury; secondly, that evidence of damages "under the counts for libel was improperly "received; third, that the verdict was general; "and, fourth, that the learned Judge left the "question of want of reasonable or probable "cause to the jury instead of deciding it "himself."

The learned Judge who delivered the judgment of the Court upon the rule for a new trial, said:— "On the first point I think it is a mistake to "assume that nothing was submitted to the "jury upon the question of malice, as the "learned Judge reported that he had explained "to them what constituted libel, and that he "remarked that in an action for malicious "arrest malice was an essential ingredient, and "that whenever it was put in issue it was the "duty of the Plaintiff to give some evidence of "it. We are not now called upon to decide "under a demurrer, as in the case of *Strong* v. "*Crowe*, whether the counts for libel do or do "not disclose a good cause of action. The "Defendants have not met the three first counts "either by demurrer upon the question of law or "by plea denying the material allegations which "they contain of publication, falsity, and malice, "and, therefore, as has been said at the argu- "ment, the question at the trial was one of "damages. The question now is, whether or "not the verdict can be upheld under the "pleadings as they stand? And I fail to see "why evidence of damages could not be re- "ceived under these counts for libel, unan- "swered as they are. If so, and if the jury "were justified in giving damages also under "the fifth count for the arrest, the fourth being "for the same cause of action as the first, "second, and third, and the sixth having been

" withdrawn from the consideration of the jury " I can see no valid objection to the general " verdict."

The general verdict, including damages in respect of the first three counts, therefore, was justified upon the ground that the pleas of the Defendants to those counts did not deny the material allegations which they contain of publication, falsity, and malice. But the pleas to those counts were, "That the Plain- " tiff being indebted to the Defendants upon " notes long overdue, and being also indebted to " other persons upon notes also overdue, they, " the said Defendants, together with sundry " other creditors of the said Plaintiff, caused the " notice set out in the Plaintiff's writ to be " served upon him, which is the grievance " complained of in the Plaintiff's writ." They contain an argumentative denial that the notice was published to any other person than to the Plaintiff himself, in which case it would not be a libel. But whether this was or was not a denial of the publication, the pleas certainly contained a denial of the falsity of the charge, for the Defendants say that it was true that the Plaintiff was indebted to them upon notes long overdue, and that he was also indebted to other creditors. That was an allegation that the notice contained a true statement of facts, and therefore it did deny the falsity, and denied it in the proper manner. When the Defendants justified the publication by alleging that the facts stated were true, it was not necessary for them to deny malice. Truth is a justification. Therefore, even if there were not an argumentative denial of publication, there was a denial of the falsity, and there was no necessity to deny the malice.

It appears, therefore, to their Lordships, that the Court came to a wrong conclusion in holding that the Defendants admitted the publication,

the falsity, and the malice charged in the first three counts of the declaration, and that, therefore, the jury were justified in giving a general verdict, including damages upon those counts.

For these reasons their Lordships think that the Defendants were entitled to a new trial, and that the Court, instead of discharging the rule nisi, ought to have made it absolute. They will, therefore, humbly recommend Her Majesty that the rule discharging the rule nisi for a new trial be set aside, and that the rule nisi be made absolute. Their Lordships think that the Respondent ought to pay the costs of this Appeal. The costs of the new trial will be directed by the Court below in the ordinary way.