NOTES ON MALICIOUS PROSECUTION

To institute or maintain an unsuccessful criminal prosecution maliciously and without reasonable and probable cause, whereby the person prosecuted suffers damage, is a wrong for which the action of Malicious Prosecution will lie.

Elements.

To constitute this tort five factors are essential. The plaintiff must prove—

1. The institution by the defendant of criminal proceedings against the plaintiff before a tribunal into whose proceedings the civil courts are competent to inquire.

2. That the proceedings terminated in his favour, if from their nature they were capable of so determining.

3. That there was an absence of reasonable and probable cause for such proceedings.

4. That the defendant instituted or carried on such proceedings maliciously.

5. That the plaintiff has suffered damage.[1]

These elements are cumulative and concurrent and the onus of proving each one of them lies on the plaintiff.[2]

It may be argued that there is really another element, that is to say, that the prosecution must be a legal one for an offence known to the law. Thus it has been held in Ontario[3] that a complainant who in good faith laid an information for an offence unknown to the criminal law before a magistrate, who thereupon without jurisdiction convicted and committed the accused to gaol, was not liable for malicious prosecution, the essential ground for such an action being the carrying on maliciously and without probable cause of a legal prosecution. On the other hand, it has been held[4] that an action lies where the procedure was criminal in form but the charge was bad in law; it being sufficient that the defendant set in motion the criminal law against the plaintiff.

[1] 19 Halsbury, 677.
[2] *Abrath* v. *North Eastern Ry.* (1883), 11 Q. B. D. 440; *Archibald* v. *McLaren* (1892), 21 S. C. R. 588.
[3] *Grimes* v. *Miller* (1896), 23 Ont. App. R. 764.
[4] *Powell* v. *Hiltgen* (1900), 5 Terr. L. R. 16; see *Anderson* v. *Wilson* (1895), 25 O. R. 91; *Flora* v. *Shandro* (1908), 8 W. L. R. 426.

Malicious Prosecution and False Imprisonment Distinguished.

1. In false imprisonment the act is that of a private person who causes the tort of false imprisonment by setting the law in motion through a ministerial officer, whereas in malicious prosecution the law is set in motion through a judicial officer.

2. In false imprisonment the onus is on the *defendant* of pleading and proving affirmatively that there was reasonable and probable cause for the criminal proceedings. This is because once it appears that the plaintiff's liberty has been unlawfully restricted, prima facie a tort has been committed and therefore the defendant must show that at least he had reasonable and probable cause for so acting. In malicious prosecution the onus of showing an absence of reasonable and probable cause is on the *plaintiff*, for the whole gist of his case is that he has been wronged by an unreasonable and malicious legal criminal proceeding instituted by the defendant without legal justification.[5]

Corporations.

It may now be regarded as settled that an action of malicious prosecution will lie against a corporation.[6]

What Is a Criminal Charge?

In considering the scope of the first essential, that the defendant must have instituted criminal proceedings against the plaintiff, it should be noted that the term "criminal charge" has been declared to include "all indictments involving either scandal to reputation or the possible loss of liberty to a person."[7] This action, however, does not lie for the institution of every charge which is in form criminal, but only as to those charges which are scandalous in their nature and necessarily affect the plaintiff's reputation or person. There are many proceedings which are criminal in form but which cannot be termed scandalous. Thus, no imputation of criminality will rest on a person convicted and fined under a municipal regulation for failing to clear the sidewalk of snow. Such a provision merely imposes a penalty for the infringement of a civil duty, and a conviction under

[5] *Austin* v. *Dowling* (1870), L. R. 5 C. P. at 540; *Loch* v. *Ashton* (1848), 12 Q. B. 871; *Hicks* v. *Faulkner* (1878), 8 Q. B. D. 167; *Sinclair* v. *Ruddell* (1906), 3 W. L. R. 532

[6] See 19 *Halsbury*, 674-675; *Cornford* v. *Carlton Bank* (1899), 1 Q. B. D. 392; (1900), 1 Q. B. 22; *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423; *Wilson* v. *City of Winnipeg* (1887), 4 Man. R. 193; *Miller* v. *Man. Lumber and Fuel Co.* (1890), 6 Man. R. 487.

[7] *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. at 692; *Mortimer* v. *Fisher* (1913), 11 D. L. R. 77.

it would not imply any injury to the fair fame of the offender. Conversely, proceedings may be criminal, although the statute does not subject the offender to imprisonment, but merely imposes a fine. An English statute provided that any person travelling in a tram-car and evading payment of a fare was subject to a penalty of forty shillings. Plaintiff had been arrested on a charge of violating this provision and was acquitted. He brought an action for malicious prosecution. It was contended that the charge in question was not a criminal charge, but merely something in the nature of an action to recover penalties. But this statute enabled the company's officers to detain an offender. The charge was an "offence" and involved a serious reflection upon the plaintiff's character. For these reasons the plaintiff succeeded in his action for malicious prosecution.[8] Even where proceedings are instituted in the nature of a complaint charging a violation of one of the provisions of a statute, unless such proceedings necessarily and naturally involve damage to a person's "fair fame," or put him in peril of losing his liberty, such proceedings would not be sufficient to support a subsequent action for malicious prosecution, in the event of the complaint having been preferred maliciously and without reasonable and probable cause.[9]

It is immaterial whether the proceedings complained of are for an offence punishable summarily only, or for an indictable offence, so long as the charge necessarily imports damage to the plaintiff's "fair fame" or person.

The criminal proceedings must have been instituted *by the defendant,* that is to say, he must be the person who put the law in motion against the plaintiff. It is not necessary, however, that he should be a party to the proceedings. The defendant's solicitor may be held liable.[10] The gist of the plaintiff's case is that he has been wronged by means of a judicial act caused by the defendant.

When Does a Criminal Prosecution Begin?

Merely giving information to a magistrate is not a malicious prosecution, because the magistrate, even where an information is laid, may refuse to issue a warrant or summons, and, if so, the prosecution never began. A person who makes a candid statement of facts to a magistrate without formulating any charge is not responsible for the consequences of any step which the magistrate may thereupon take in

[8] *Rayson* v. *London Tram. Co.*, [1893] 2 Q. B. D. 304.
[9] *Whiffen* v. *Bailey*, [1915] 1 K. B. 600. (Prosecution for breach of by-law prohibiting cattle from straying on a highway).
[10] *Johnson* v. *Emerson* (1871), L. R. 6 Ex. 329.

the exercise of his official discretion.[11] But if an actual charge be made the prosecutor is answerable and cannot plead mistake or indiscretion of the magistrate. Where the defendant definitely formulates or makes a specific charge of a criminal offence against the plaintiff to a magistrate, or other judicial officer, and the magistrate issues a warrant or summons, the defendant has instituted a criminal prosecution.

If a person institutes criminal proceedings in good faith and with reasonable cause, and subsequently discovers that the accused is innocent and that the charge was unfounded and nevertheless continues maintaining the prosecution, an action for malicious prosecution is maintainable against such person.[12]

Termination of Criminal Proceedings.

The criminal proceedings must have terminated in favour of the party maintaining the subsequent action for malicious prosecution. If this were not an essential element almost every case would have to be re-tried on its merits, and the civil court would be in effect, acting as a court of appeal from the criminal court.[13] The gist of the plaintiff's civil action is that he was wrongly prosecuted and he must therefore show that the original prosecution terminated in his favour. This he cannot do as long as that prosecution is pending. "It is a rule of law that no one shall be allowed to allege of a still defending suit that it is unjust."[14] The fact that a convicted person had no opportunity of appealing is immaterial. So long as the conviction stands no action for malicious prosecution will lie even if he could absolutely prove his innocence.[15]

Although the prosecution must have terminated, it is not necessary that the plaintiff had been clearly vindicated or that the end of the prosecution was a final and conclusive one in his favour. It is sufficient that the prosecution has had a "legal end" and terminated in his favour in that it did not result in an adjudication of his guilt. If the particular prosecution complained of comes to this end it is immaterial that a fresh prosecution might be instituted for the same offence.

There is a sufficient termination of the prosecution if the magistrate refuses to commit for trial or dismisses the charge or if the

[11] *Pandit* v. *Sardar* (1908), 24 T. L. R. 884.
[12] *Fancourt* v. *Heaven*, 14 O. W. R. 230; 18 O. L. R. 492; *Carruthers* v. *Beisiegel* (1908), 1 Alta. L. R. 390; 8 W. L. R. 255; *Weston* v. *Beeman* (1857), 27 L. J. Ex. 57.
[13] *Castrique* v. *Behrens* (1860), 30 L. J. Q. B. 163 at 168; *Bynoe* v. *Bank of England*, [1902] 1 K. B. 467.
[14] *Gilding* v. *Eyre* (1861), 10 C. B. N. S. at p. 604. Cf. *Huffer* v. *Allen* (1866) L. R. 2 Ex. 15.
[15] *Basebe* v. *Mathews* (1867), L. R. 2 C. P. 684.

Grand Jury finds "No Bill" or ignores the indictment or if the prosecution has been abandoned or discontinued by the Crown,[16] or if the conviction or indictment has been quashed or the plaintiff acquitted upon some technical defect,[17] or the judge withdrew the case from jury and discharged him.[18] The termination of a prosecution by dismissal or withdrawal of a charge may be proved as a fact without any formal minute, record or certificate as a basis for the action of malicious prosecution.[19]

But if the dismissal of the prosecution is due to a compromise or agreement to withdraw, it cannot be regarded as a termination in favour of the plaintiff in an action for malicious prosecution. The plaintiff must in some cases show something more than the record of dismissal. This would be sufficient *prima facie,* but it is open to the defendant to show that the proceedings did not in fact terminate in favour of the accused but that the prosecution was withdrawn as a matter of compromise or agreement.[20] The proceedings need not be shown to have terminated in plaintiff's favour if from their nature they could not so terminate.[21] In one exceptional case it is impossible that the proceedings can be considered as determined in plaintiff's favour, yet he would have a right of action if there be malice and no reasonable and probable cause. If a person's house be searched under a search warrant and nothing is found there to incriminate him and the matter goes no further, he would have a right of action.[22] It is not a sufficient proof of the termination of a prosecution before two justices to show that they were equally divided where no dismissal was made or other proceeding taken, but if the disagreeing justices make an order of dismissal that is sufficient.[23]

[16] *Mortimer* v. *Fisher* (1913), 11 D. L. R. 77; *Tamblyn* v. *Westcott* (1914), 20 D. L. R. 131; *Beemer* v. *Beemer* (1905), 9 O. L. R. 69; *Fancourt* v. *Heaven* (1909), 18 O. L. R. 492.

[17] *Johnson* v. *Emerson* (1871), L. R. 6 Ex. 394; *Pippett* v. *Hearn* (1882), 5 B. & Ald. 634.

[18] *Cunningham* v. *Evans,* [1920] 1 W. W. P. 289.

[19] *Tamblyn* v. *Westcott, supra; Rudyk* v. *Shandro* (1914), 18 D. L. R. 641, (1915), 24 D. L. R. 330; *Wood* v. *Newby* (1912), 5 D. L. R. 486 (as to magistrate's record of dismissal).

[20] *Cockburn* v. *Kettle* (1913), 12 D. L. R. 512; *Baxter* v. *Gordon* (1907), 13 O. L. R. 598.

[21] 19 Halsbury, p. 679, note (K). It has been held in Ontario that where the proceedings were *ex parte* and the accused had no opportunity of being heard, the termination in his favour need not be proved. *Bush* v. *Park* (1912), 12 O. L. R. at 183.

[22] *Renton* v. *Gallagher* (1910), 19 Man. L. R. 478; see *Willinsky* v. *Anderson* (1909), O. L. R. 437.

[23] *Bagg* v. *Colquhoun.* [1904] 1 K.B. 556; *Kinnis* v. *Graves* (1898), 67 L. J. Q. B. 583; Cf. *Durrand* v. *Forrester* (1909), 10 W. L. R. 289, 15 Can. Cr. Cas. 125.

Absence of Reasonable and Probable Cause.[24]

The plaintiff must prove that the prosecution was instituted or maintained by the defendant without reasonable or probable cause.[25]

In *Hicks* v. *Faulkner*[26] Hawkins, J., said: "I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead an ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be first an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conviction; thirdly, such secondly mentioned belief must be based upon reasonable grounds—by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused."

The question is not whether reasonable and probable cause actually did exist but rather as to whether the defendant had a *bona fide* belief in the existence of such facts as would justify a prosecution.[27]

It is impossible to state with absolute precision the proper degree of care which the prosecutor should exercise in informing himself of the facts, but it has been held that it is not necessary in every case that the prosecutor should make inquiries of the suspected person.[28] The plaintiff is required only to exercise reasonable and proper care and judgment with reference to the facts known to him in determining whether a prosecution would be justified.[29] Mere suspicion is not sufficient to constitute reasonable and probable cause, but on the other hand, it is not necessary to have evidence which must lead to a conviction. One may be justified in prosecuting provided he has sufficient evidence to establish a *prima facie* case against the defendant. The fact that some of this evidence is inadmissible or based

[24] See valuable article by C. B. Labatt in 35 Can. Law Journal, 545.

[25] *Abrath* v. *North East Ry.* (1883), 11 Q. B. D. 440; 11 A. C. 247.

[26] (1878), 8 Q. B. D. at 171.

[27] *McMullen* v. *Wetlaufer* (1915), 21 D. L. R. 750, 33 O. L. R. 177; *Duguay* v. *Myles* (1913), 15 D. L. R. 388; 42 N. B. R. 265; *Broad* v. *Ham* (1839), 5 Bing. N. C. 722; *Turner* v. *Ambler* (1847), 10 Q. B. 252.

[28] *Renton* v. *Gallagher* (1910), 19 Man. L. R. 478. "To call for explanations would be a safe and proper course in many cases, but I cannot think that the failure of the prosecutor so to do would (of itself) show an absence of reasonable care upon his part in ascertaining the true facts of the case."

[29] *Delegal* v. *Highley* (1837), 3 Bing. N. C. 950; *Turner* v. *Ambler* (1847), 10 Q. B. 252.

on mere hearsay is not fatal, provided the prosecutor acted in good faith and honestly believed in the guilt of the accused after reasonable inquiry.[30]

An honest and real belief in the probable guilt of the accused is absolutely essential.[31] As was said in *Corea* v. *Perris*[32] the crucial questions for consideration (as to the absence of reasonable and probable cause and the presence of malice) are: Did the prosecutor believe the story upon which he acted? Was his conduct in believing it and acting on it that of a reasonable man of ordinary prudence? Had he any indirect motive in making the charge? If the facts known to the prosecutor amounted to a *prima facie* case, but he actually did not believe in the guilt of the accused, the lack of such belief may be cogent evidence of the absence of reasonable and probable cause for the prosecution.[33]

It is sufficient if a prosecutor proceeds on such information as a prudent man might reasonably accept in the ordinary affairs of life, and it is for the plaintiff to prove that there was a want of proper care in testing that information.[34] The belief in the probable guilt of the accused must be based on reasonable grounds. It is the belief of the defendant in the existence of facts justifying a prosecution, and not their actual existence, which constitutes reasonable and probable grounds.[35] The genuineness and reasonableness of the defendant's belief are to be ascertained by reference to the facts actually known to the defendant at the time of the institution of the action.[36] Want of reasonable and probable cause cannot be implied from the existence of malice.[37]

Advice of Counsel as Evidence of Reasonable and Probable Cause.[38]

The effect upon the issue of reasonable and probable cause of the fact that, before initiating the prosecution the prosecutor laid the facts before counsel and acted in accordance with advice of counsel,

[30] *Hicks* v. *Faulkner, supra; Lister* v. *Perryman* (1870), L. R. 4 H. L. 521; *Lyone* v. *Long* (1917), 36 D. L. R. 76; 19 Hals. 682.

[31] "It would be a monstrous proposition that a party who did not believe the guilt of the accused should be said to have reasonable and probable cause for making the charge." *Broad* v. *Ham* (1839), 5 Bing. N. C. at 727; Cf. *Bank of New South Wales* v. *Piper*, [1897] A. C. 383.

[32] (1909) A. C. at 555; Cf. *Harris* v. *Hickey* (1912), 2 D. L. R. 356; *Geers* v. *Nestman* (1912), 1 D. L. R. 312; *Foley* v. *Harrison* (1915), 49 N. S. R. 135.

[33] 19 Hals. at 686; *Dudyk* v. *Shandro* (1915), 24 D. L. R. 330; *Shrosbery* v. *Osmaston* (1877), 37 L. T. 792.

[34] *Longdon* v. *Belsky* (1910), 22 O. L. R. 4.

[35] *Hicks* v. *Faulkner* (1878), 8 Q. B. D. 173. 10 Q. B. 252.

[36] *Johnson* v. *Emerson* (1871), L. R. 6 Ex. 352; *Turner* v. *Ambler* (1847),

[37] *Johnstone* v. *Sutton* (1786), 1 T. R. at 543, 544; *Crawford* v. *McLaren* (1859), 9 U. C. C. P. 215.

[38] See 35 *Can. Law Journal*, pp. 603 ff.

has been variously stated. It has been held that "if a party lays all the facts of his case fairly before counsel and acts *bona fide* upon the opinion given by that counsel (however erroneous that opinion might be) he is not liable to an action."[39] But it has also been held that the fact that a defendant acted upon the advice of counsel in instituting the prosecution is not necessarily a complete answer to an allegation of lack of reasonable and probable cause but that the defendant must go further and show that he took proper care to inform himself of the facts and made full disclosure thereof and acted *bona fide* on such advice.[40] It would seem that the true rule is that though the fact that the prosecution was instituted after consulting with counsel is always evidence on the question of reasonable and probable cause it will only afford an absolute defence when it is shown that the defendant believed in the guilt of the accused, and that such advice was sought *bona fide* and not as a mere cloak for malice, and that the defendant took reasonable care to ascertain the facts and made full and fair disclosure to his counsel and acted *bona fide* on the opinion given on such facts.[41] But the advice of counsel is no defence if in fact the defendant did not himself believe in the accused's guilt[42] or where the defendant tried to rely on his solicitor without taking care to form any personal opinion as to the guilt of the accused.[43]

Malice.

If there be reasonable and probable cause for the prosecution the plaintiff in the civil action cannot succeed, and the motive of the prosecutor is immaterial. If, on the other hand, there is an absence of reasonable and probable cause, there must also be a finding of the jury that the proceedings were instituted or carried on by defendant maliciously.[44]

[39] *Ravenga* v. *MacKintosh*, 2 B. & C. 693; *Martin* v. *Hutchinson* (1891), 21 O. R. 388; *Ibbotson* v. *Berkley* (1918), 26 B. C. R. 156; *Corea* v. *Peiris*, [1909] A. C. 549.

[40] *Harris* v. *Hickey* (1912), 17 B. C. R. 21, 2 D. L. R. 356; *Olds* v. *Paris* (1918), 25 B. C. R. 453; *Crocker* v. *Storey*, 43 N. B. R. 69; Cf. *Hewlett* v. *Cruchley*, 5 Taunton, 277.

[41] *St. Denis* v. *Shoultz* (1898), 25 O. A. R. 131; *Wilson* v. *City of Winnipeg* (1887), 4 Man. L. R. 193; *McMullen* v. *Wetlaufer* (1915), 32 O. L. R. 178; *Rogers* v. *Clark* (1900), 13 Man. L. R. 189; *Momsen* v. *Rudolph* (1913), 18 B. C. R. 631; *Schaal* v. *Reeves*, [1918] 2 W. W. R. 442 (consultation with police); *Cunningham* v. *Evans*, [1920] 1 W. W. R. 289; *Prentiss* v. *Anderson* (1911), 18 W. L. R. 340, 16 B. C. R. 289.

[42] *McMullen* v. *Wetlaufer* (1915) 21 D. L. R. 750, 33 O. L. R. 177; *Connors* v. *Reid* (1911), 25 O. L. R. 44.

[43] *Harris* v. *Hickey* (1912), 2 D. L. R. 356, 17 B. C R. 21. Where the agent of a company had laid before counsel all facts known to the agent, it was held that this did not give to the defendant company the protection in question unless the company could show that other material facts known to the company but unknown to the agent were also disclosed. *Jewhurst* v. *United Cigar Stores Ltd.* (1919), 46 O. L. R. 180. In *Seary* v. *Saxton* (1896), 28 N. S. R. 278, it was said that the taking of legal advice was evidence for the jury as tending to repel malice.

[44] *Duguay* v. *Myles* (1913), 15 D. L. R. 388, 42 N. B. R. 265; *Willans* v. *Taylor* (1829), 6 Bing. at 186.

The term "malice" when applicable to the actionable tort of malicious prosecution is broad enough in its meaning to include any wrong or indirect motive,[45] or "some other motive than a desire to bring to justice a person whom he (the prosecutor) honestly believes to be guilty."[46] "Malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive, and malice can be proved either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor.[47]

The plaintiff must prove that the proceedings of which he complains were initiated in a malicious spirit, that is to say, from an indirect or improper motive, and not in furtherance of justice.[48] For example, that the prosecutor used the criminal law for some private purpose of his own, as the extortion of money[49] or to recover loss or property rather than to punish a crime[50] or to establish a merely civil right[51] or to prevent the accused participating in an election[52] or to collect a debt.[53]

The absence of reasonable and probable cause may sometimes be evidence of malice to go to the jury. "There may be such plain want of reasonable and probable cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made, and in that case want of reasonable and probable cause is evidence of malice."[54] The absence of reasonable and probable cause, though it may lead to an inference of malice, is not conclusive on the question,[55] particularly where there is a *bona fide* belief in the guilt of the accused. "If there were an honest belief that the prosecution was justified the defendant will not be liable for malicious prosecution unless there is some independent evidence of malice."[56]

[45] See *Scott* v. *Harris* (1919), 44 D. L. R. 737; *Pratt* v *British Medical Association* (1919), 88 L. J. K. B. 643.

[46] *Brown* v. *Hawkes*, [1891] 2 Q. B. D. at p. 723.

[47] *Brown* v. *Hawkes*, *supra*, at 722; *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. at 595; *Currie* v. *Calof* (1911), 1 W. W. R. 233; *Hawkins* v. *Snow* (1895), 27 N. S. R. 408, 28 N. S. R. 259.

[48] *Abrath* v. *North Est. Ry.* (1883), 11 Q. B. D. 455; 11 App. Cas. 247.

[49] *Pratt* v. *British Medical Assoc.*, [1919] 1 K. B. 244.

[50] *Markel* v. *Hinck* (1920), 3 W. W. R. 191; *Foley* v. *Harrison* (1915), 49 N. S. R. 135.

[51] *Ibbotson* v. *Berkley* (1918), 3 W. W. R. 1018, 26 B. C. R. 156.

[52] *Rudyk* v. *Shandro* (1915), 24 D. L. R. 330.

[53] *Olds* v. *Paris* (1918), 2 W. W. R. 682.

[54] *Brown* v. *Hawkes* (1891), 2 Q. B. 718; *C. P. R.* v. *Waller* (1912), 1 D. L. R. 47.

[55] *Winfield* v. *Kean* (1882), 1 O. R. 193; *Grant* v. *Booth* (1893), 25 N. S. R. 266.

[56] *Brown* v. *Hawkes*, *supra* at 723; *Hawkins* v. *Snow* (1894), 27 N. S. R. 408, 28 N. S. R. 259; Cf. *Seary* v. *Saxton* (1894), 28 N. S. R. 278.

Functions of Judge and Jury.

The question of malice or no malice is entirely for the jury and should be distinctly left to them.[57]

The existence or absence of reasonable and probable cause is a question solely for the judge and not for the jury. The jury may be asked to find on facts from which reasonable and probable cause may be inferred, but the inference must be drawn by the judge in whose hands must always remain the decision as to whether these facts so found do or do not constitute reasonable and probable cause.[58] "The question whether there is an absence of reasonable and probable cause is for the judge and not for the jury, and if the facts on which that depends are not in dispute, there is nothing for him to ask the jury and he should decide the matter himself. If there are facts in dispute, upon which it is necessary he should be informed in order to arrive at a conclusion on this point, these facts must be left specifically to the jury, and when they have been determined in that way the judge must decide as to the absence of reasonable and probable cause." [59]/[60]

Damages.

The plaintiff must show any one of these following heads of damage in order to support his action:—

(a) Damage to his fame, as where the matter of which he is accused is scandalous.

(b) Damage to his person, as where his life, limb or liberty is endangered, or

(c) Damage to his property, as where he is put to the expense of acquitting himself of the crime with which he is charged.[61]

Malicious Civil Proceedings.

It is the policy of the law to permit every one to resort to legal process in order to assert his right without subjecting him to liability, provided he does not act maliciously and without reasonable and

[57] *Hicks* v. *Faulkner* (1878), 8 Q. B. D. 167; *Jewhurst* v. *United Cigar Stores* (1919), 49 D. L. R. 649, 46 O. L. R. 180; *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588.

[58] *Panton* v. *Williams* (1841), 2 Q. B. 168; *Lister* v. *Perryman* (1870), L. R. 4 H. L. 521; *Abrath* v. *N. E. Ry.* (1883), 11 Q. B. D. 458; *Archibald* v. *McLaren* (1892), 21 Can. S. C. R. 588; *Still* v. *Hastings* (1907), 13 O. L. R. 322; 14 O. L. R. 638; *Cox* v. *English Bank.* [1905] A. C. 169; *Ford* v. *Canada Express* (1910), 21 O. L. R. 585, 24 O. L. R. 462; *Meany* v. *Reid Nfld. Co.* (1906), 39 N. S. R. 407; *Rudyk* v. *Shandro* (1915), 24 D. L. R. 330.

[59] *Brown* v. *Hawkes* (1891), 2 Q. B. at page 726.

[60] As to the province of Judge and jury generally, see 35 *Can. Law Journal* at 574 ff; and for the principles upon which preliminary questions may be left to the jury, see *Morrison* v. *Wilson* (1914), 14 D. L. R. 815 and annotation 14 D. L. R. 817, and Salmond, 6th ed., p. 592, note (a).

[61] *Saville* v. *Roberts* (1698), Ld. Raymond, 374, and see Bowen, L.J., in *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. at 688 ff.

probable cause. No action will lie at the suit of a person against whom a civil proceeding has been instituted unless that person can prove that he has thereby suffered some actual damage within the rule of the law, and the difficulty of proving such actual damage is increased by the further rule that the plaintiff cannot allege as proof of actual damage any legal expenses he incurred for counsel fees, as such would not be treated as damages. The law only recognizes the party and party costs allowed by the court and will not concern itself with solicitor and client costs.[62] It is a result of these rules as to damages that the bringing of an ordinary civil action (not resulting in an arrest or seizure of property) maliciously, and without reasonable and probable cause, does not give a cause of action to the person so sued, as his suit would not give rise to damages under any of the heads of damage stated by Holt, C.J., in *Saville* v. *Roberts*,[63] for the reason that such an action does not necessarily and as a natural consequence involve injury to a man's fair fame, or person or property.[64] Therefore, as Bowen, L.J., has said: "According to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution.[65].

But while no action will ordinarily lie for the institution of civil proceedings, nevertheless an action will lie for the taking of certain civil proceedings maliciously and without reasonable and probable cause. Thus it is an actionable tort to begin proceedings maliciously to have a trader declared a bankrupt or to have a company wound up and put into liquidation, as such proceedings necessarily involve damage to credit or reputation.[66] It is also an actionable abuse of civil process to interfere maliciously with a person's liberty or property by causing his arrest or imprisonment or the detention of his property, as by a wrongful or excessive levy under execution, or the wrongful issue of a search warrant[67] or a false affidavit that the defendant was about to leave the province[68] or was an absconding debtor.[69]

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[62] *Cotterell* v. *Jones* (1851), 11 C. B. 713.
[63] (1698), 1 Ld. Raymond, 374.
[64] *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 688-691.
[65] *Quartz Hill Gold Mining Co.* v. *Eyre*, *supra*.
[66] *McMullen* v. *Bradshaw* (1916), 50 Irish L. T. 205; *Hennessey* v. *Farquhar* (1902), 35 N. S. R. 22; *Churchill* v. *Siggers* (1854), 3 E. & B. 929.
[67] *Fichet* v. *Walton* (1910), 22 O. L. R. 40, 23 O. L. R. 260.
[68] *Harris* v. *Bickerton* (1911), 24 O. L. R. 41.
[69] *Johnson* v. *Emerson* (1871), L. R. 6 Ex. 329; *Quartz Hill Gold Mining Co.* v. *Eyre*, *supra*; *Chapman* v. *Pickersgill* (1762), 2 Wilson 145; see 19 Hals. pp. 696, 697.