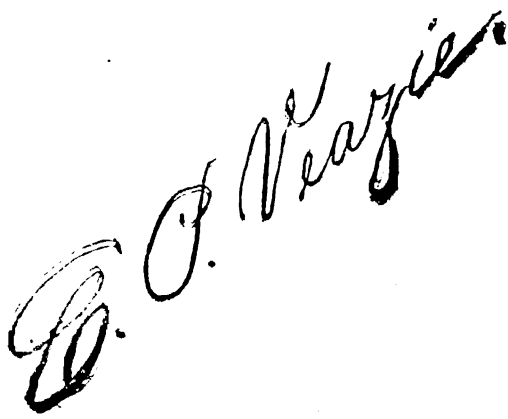

A TREATISE

ON THE LAW OF

MALICIOUS PROSECUTION,

FALSE IMPRISONMENT,

AND THE

ABUSE OF LEGAL PROCESS,

AS

ADMINISTERED IN THE COURTS OF THE UNITED STATES OF AMERICA,

INCLUDING

A DISCUSSION OF THE LAW OF MALICE AND WANT OF PROBABLE CAUSE, ADVICE OF COUNSEL, END OF THE PROSECUTION, ETC.

BY

MARTIN L. NEWELL,

COUNSELOR AT LAW,

AUTHOR OF "SACKETT'S REVISED INSTRUCTIONS TO JURIES," "THE LAW OF LIBEL AND SLANDER," ETC.

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PREFACE.

In the preparation of this work it has been the design of the author to glean from the courts of last resort in the United States the leading adjudications upon the law of malicious prosecution, false imprisonment and the abuse of legal process. In the work it is hoped that everything needed by the practical lawyer, both in the prosecution and defense of actions for the wrongs under consideration, will be found satisfactorily discussed and amply illustrated by adjudicated cases.

In the first chapter the action for malicious prosecutions, both in civil and criminal cases, its essential elements, the nature of the wrong and where the action lies, is fully and exhaustively discussed, with illustrations of the law as applied by the American courts in adjudicated cases.

Next the wrong known as false imprisonment is discussed, involving the law of arrest in civil cases and in criminal cases with and without process, amply illustrated by adjudicated cases from the American courts. As arrests without process frequently depend upon the nature of the offense committed, a brief but satisfactory discussion of felonies and misdemeanors, both at common law and under statutes, will be found in chapter five. Following this will be found a discussion of the liabilities of persons, both natural and artificial, to respond in damages for violations of personal liberty rights, and of the action to redress such wrongs in general.

Malice in law and malice in fact, the question of the existence of probable cause, advice of counsel and the end of the prosecution as applicable to actions for malicious prosecution, false imprisonment and the abuse of legal process, are discussed at large and illustrated by applications of the rules of law upon these subjects taken from the latest decisions of the American courts of last resort.

Parties, plaintiff and defendant, infants and adults, attorneys and clients, husbands and wives, master and servant,

principal and agent, and corporations public and private, personal representatives of deceased persons, including the right of survivorship and other kindred subjects, the law of defenses and many practical suggestions, are presented in chapters devoted to these questions.

Although in many of the states of our Union the common-law system of pleading does not prevail, it must, we think, be conceded that it is the foundation of all codes. No member of the legal profession can be a successful pleader without some knowledge of the old system. The author has therefore presented an analysis of the declaration at common law in an action for malicious prosecution, with appropriate comments upon its component parts, illustrating the subject by a collection of precedents both under the common law and the codes.

In the chapter upon evidence the law has been given, both as to the plaintiff's proofs under the general issue and special pleas of justification, with and without proof of special damages, as well as the defendant's proofs in all cases.

On the subject of damages will be found an exhaustive treatise upon the elements of compensatory damages, the right to recover exemplary or vindictive damages, and matters in mitigation thereof. The subject of excessive damages has been illustrated by numerous applications from adjudicated cases.

As there is, perhaps, no branch of the law in which the practitioner, especially the younger member of the profession, feels the need of assistance so much as in the preparation of his instructions in those jurisdictions where they are required to be in writing, or in the preparation of requests for special charges where the charge is given orally, a chapter has been devoted to this subject, in which will be found numerous illustrations and precedents of instructions and requests for special charges applicable to the trial of cases in which the wrongs treated of in this work are in litigation.

In many states laws have recently been enacted providing for the submission to juries of interrogatories for special findings on the matters in controversy. These laws apply with peculiar force to actions for malicious prosecution, false imprisonment and the abuse of legal process. A chapter has therefore been devoted to the discussion of this subject, in

which the existing law will be found fully stated, with numerous precedents for the submission of special interrogatories amply sufficient to guide the practitioner.

The increasing importance of actions for malicious prosecution, false imprisonment and the abuse of legal process, and the absence of any work especially devoted to their discussion, has induced the author to submit this treatise to the legal profession.

MARTIN L. NEWELL.

CHICAGO, 1892.

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ABBREVIATIONS.	NAME OF WORK, ETC.
A. & E.	Adolphus & Ellis' Reports, King's Bench.
Aberc. on Intell. Pow.	Abercrombie on the Intellectual Powers.
Adam's Ant.	Adam's Roman Antiquities.
Addis.	Addison's Reports, Pennsylvania, 1791–1799.
Add.	Addams' Ecclesiastical Reports.
Aik.	Aiken's Reports, Vermont, 1826, 1827.
A. K. Marsh.	A. K. Marshall's Rep., Kentucky, 1817–1821.
Ala.	Alabama Reports.
Alc. & Nap.	Alcock & Napier's Reports, King's Bench, Ireland.
Alcia. de Præs.	Alciatus de Præsumptione. Alciati Opera, Basileæ. 1852.
Alison, Cr. L.	Alison's Principles of the Criminal Law of Scotland.
Alison, Pract. of Cr. L.	Alison's Practice of the Criminal Law of Scotland.
Am. Ed.	American Edition.
Am. & Eng. Ency. L.	American and English Cyclopædia of Law.
Am. Jur.	American Jurist.
And.	Anderson's Reports. Common Pleas.
Andr.	Andrew's Reports, King's Bench.
Anstr.	Anstruther's Reports, Exchequer.
Anthon, N. P.	Anthon's Nisi Prius Rep., New York, 1808–1818.
Applet.	Appleton's Reports, Maine, 1841.
Arch. Cr. Pl.	Archbold's Criminal Pleading.
Ari.	Arizona Reports.
Ark.	Arkansas Reports.
Arm., M. & O.	Armstrong, Macartney & Ogle's Rep., Nisi Pri. Irel.
Arm. & T.	Armstrong & Trevor's Rep. of R. v. O'Connell, Dub., 1844.
Atl. Rep.	Atlantic Reporter.
Att. Gen.	Attorney-General.
Ayliffe Par.	Ayliffe's Paragon, 2d edition, 1734.
B. & A.	Barnewall & Alderson's Reports, King's Bench.
B. & Ad.	Barnewall & Adolphus' Reports, King's Bench.
B. & B.	Broderip & Bingham's Reports, Common Pleas.
B. & C.	Barnewall & Cresswell's Reports, King's Bench.
B. & P.	Bosanquet & Fuller's Reports, Common Pleas.
B. & S.	Best & Smith's Queen's Bench Reports.
Bac. Ab.	Bacon's Abridgment.
Bail.	Bailey's Reports, South Carolina, 1828–1832.
Bail. Ct. Cas.	Lowndes & Maxwell's Bail Court Cases, 1852.
Barnes	Barnes' Notes of Practice Cases in Common Pleas.
Batty	Batty's Reports, King's Bench, Ireland.
Bay	Bay's Reports, South Carolina, 1783–1804.
Beav.	Beavan's Reports, Rolls Court.
Bell, C. C.	Bell's Crown Cases Reserved, 1859.
Bell, Dig.	Bell's Digest of the Laws of Scotland.
Bibb.	Bibb's Reports, Kentucky, 1808–1817.

ABBREVIATIONS.	NAME OF WORK, ETC.
Bing.	Bingham's Reports, Common Pleas.
Bing. N. S.	Bingham's Reports, New Series, Common Pleas.
Binn.	Binney's Reports, Pennsylvania, 1799–1814.
Bl. Com.	Blackstone's Commentaries.
H. Bl.	Henry Blackstone's Reports, Common Pleas.
W. Bl.	Sir William Blackstone's Reports (K. B. & C. P.).
Bland, Ch.	Bland's Chancery Rep.. Maryland, 1811–1830.
Blackf.	Blackford's Reports, Indiana, 1817–1838. 4 vols.
Bligh	Bligh's Reports, House of Lords.
Bligh, N. S.	Bligh's Reports, New Series, House of Lords.
B. N. P.	Buller's Law of Nisi Prius.
Bouv. L. D.	Bouvier's Law Dictionary.
Bouv. Inst.	Bouvier's Institutes.
Bott	Bott's Poor Laws.
Br. P. C.	Brown's Parliamentary Cases.
Bridg.	Sir O. Bridgman's Judgments in Common Pleas.
Bro. Ab.	Brooke's Abridgment.
Broom, Max.	Broom's Legal Maxims.
Browne	Browne's Reports. Pennsylvania, 1806–1814.
Brownl.	Brownlow's Reports, Common Pleas.
Bulst.	Bulstrode's Reports, King's Bench.
Bunb.	Bunbury's Reports, Exchequer.
Burge, Com. on Col. & For. L.	Burge's Commentaries on Colonial and Foreign Law. London, 1838.
Burn, Ec. L.	Burn's Ecclesiastical Law.
Burn, Just.	Burn's Justice of the Peace, by Chitty. 29th ed. 1845.
Burnet, Cr. L.	Burnet on Criminal Law of Scotland.
Burr.	Burrow's Reports, King's Bench.
Burr. S. C.	Burrow's Settlement Cases, King's Bench.
Bynk. Obs. Jur. Rom.	Bynkershoek, Libri Observationum Juris Romani.
C. & J.	Crompton & Jervis' Reports, Exchequer.
C. & Kir.	Carrington & Kirwan's Nisi Prius Reports.
C. & M.	Crompton & Meeson's Reports, Exchequer.
C., M. & R.	Crompton, Meeson & Roscoe's Rep., Exchequer.
C. & Marsh.	Carrington & Marshman's Nisi Prius Reports.
C. & P.	Carrington & Payne's Nisi Prius Reports.
Cab. & El.	Cababé & Ellis' Nisi Prius Reports, 1883, 1884.
Caines' Rep.	Caines' Reports, New York, 1803–1805.
Cai. Cas.	Caines Cases. New York.
Cal.	California Reports.
Calv. Lex.	Calvini Lexicon Juridicum Juris Cæsarii. Gen., 1645.
Camp.	Campbell's Nisi Prius Reports.
Canc. Leb. barb. ant.	Canciani. Leges barbarorum antiquæ. Venetiis, 1781–1785.
Carpz. Pract. Rer. Cr.	Carpzovii. Practicæ Rerum Criminalium. Francof. ad Mænum, 1758.
Car. Cr. L.	Carrington's Supplement of Treatises on Criminal Law.
Carth.	Carthew's Reports, King's Bench.
Cas. temp. Hard.	Cases in the time of Lord Hardwicke.
Cas. temp. Lee.	Ecclesiastical Reports in the time of Sir G. Lee.
Channing	Channing's Works.
Chit. Cr. L.	Chitty's Criminal Law.
Chit. Forms	Chitty's Forms of Practical Proceedings in Common Law Courts.
Chit. Pract.	Chitty's Practice.
Chit. on Pl.	Chitty on Pleading.
Chit. R.	Chitty's Reports, King's Bench.
Cic. Fam. Ep.	Ciceronis Familiares Epistolæ.
City Hall Rec.	New York Recorder, containing Reports of Cases in City Courts from 1816 to 1821.

ABBREVIATIONS.	NAME OF WORK, ETC.
Cl. & Fin.....	Clark & Finnelly's Reports, House of Lords.
Co.....	Lord Coke's Reports. London, 1826.
Co. Lit.....	Coke on Littleton.
Cod. Lib.....	Codex Theodosianus, Jacobi Gothofredi.
Code do Proc. Civ....	Code Napoleon de Procedure Civile.
Col	Colorado Reports.
Com.....	Commonwealth.
Com. B.....	Manning, Granger & Scott's Common Bench Rep.
Com. B., N. S.....	New Series of Common Bench Rep. John Scott.
Com. Dig	Comyn's Digest.
Com. J.....	Journals of the House of Commons.
Com. Rep.....	Comyn's Reports.
Comb.....	Comberbach's Reports, King's Bench.
Conklin's Pr.....	Conklin's Practice of Courts of United States, New York, 1842.
Conn.	Connecticut Reports, by T. Day, 1814–1848.
Cons. R.....	Haggard's Consistory Reports.
Const. R.....	Constitutional Rep., S. Carolina. 1812–1816.
Const. & Can.....	Constitutions and Canons, Ecclesiastical.
Const. U. S.....	Constitution of the United States.
Cooke & Alc.....	Cooke & Alcock's Rep., King's Bench, Ireland.
Cooke	Cooke's Reports, Tennessee, 1811–1814.
Corner, Cr. Pr.....	Corner's Crown Practice in Queen's Bench, London, 1844.
Cowell's Ind. App....	Cowell's Indian Appeals.
Cow.....	Cowen's Reports, New York, 1823–1828.
Cowp.....	Cowper's Reports, King's Bench.
Cox	Cox's Criminal Law Cases.
Coxe	Coxe's Reports. New Jersey, 1790–1795.
Cranch	Cranch's Rep., Sup. Ct. of U. S., 1800–1815.
Crawf. & D., Abr. C..	Crawford & Dix's Abridged Cases in Ireland.
Crawf. & D., C. C....	Crawford & Dix, Irish Circuit Reports.
Cro. Car.	Croke's Reports in the Reign of King Charles I.
Cro. Eliz.....	Croke's Reports in the Reign of Queen Elizabeth.
Cro. Jac.....	Croke's Reports in the Reign of King James.
Cujac. Op. Posth.....	Cujaccii Opera Posthuma.
Cush.	Cushing's Rep. Supreme Court of Massachusetts.
D. & M.....	Davison & Merivale's Reports, Queen's Bench.
D. & R.....	Dowling & Ryland's Reports, King's Bench.
D. & R. Mag. Ca.....	Dowling & Ryland's Magistrates' Cases.
D. & R. N. P. C.....	Dowling & Ryland's Nisi Prius Cases.
Dalison.....	Benloe & Dalison's Reports, Com. Pl.
Dall	Dallas' Reports. Supreme Courts of United States and Pennsylvania, 1790–1806.
Dalt.....	Dalton's Country Justice, Ed. 1697.
Dane, Abr.....	Dane's Abridgment, United States.
Danty	Traité de la Preuve. Paris, 1697.
Day	Day's Reports, Connecticut, 1802–1810.
Dea. & C.....	Deacon & Chitty's Reports.
Deane, Verm. R.....	Deane's Reports. Supreme Court of Vermont.
Dear. & Bell	Dearsley & Bell's Crown Cases Reserved.
Del	Delaware Reports.
Den	Denison's Crown Cases Reserved.
Den	Denio's N. Y. Reports.
Dev.....	Devereux's Rep., North Carolina, 1826–1834.
Dev. & B.....	Devereux & Battle's Rep., North Carolina, 1834–1840.
Dickson, Ev.....	Dickson on Evidence in Scotland.
Dig. Lib.....	Digest of Civil Law.
D. C.....	District Columbia.
Doct. & Stu.....	Doctor and Student.
Dom. Proc. H. of L...	House of Lords.
Doug	Douglas' Reports, King's Bench.

ABBREVIATIONS.	NAME OF WORK, ETC.
Dow	Dow's Reports, House of Lords.
Dowl.	Dowling's Practice Cases, Old. Ser. Com. Law Cts.
Dowl. N. S.	Dowling's Practice Cases, New Series.
Dowl. & L.	Dowling & Lowndes' Practice Cases.
Drew. & Sm.	Drewry & Smale's Rep.
Dyer	Dyer's Reports, King's Bench.
E. & B.	Ellis & Blackburn's Queen's Bench Reports.
E., B. & E	Ellis, Blackburn & Ellis' Queen's Bench Rep.
E. & E.	Ellis & Ellis' Queen's Bench Reports.
East.	East's Reports, King's Bench.
East, P. C.	East's Pleas of the Crown.
Edinb. Rev.	Edinburg Review.
Ersk. Inst.	Erskine's Institutes of the Law of Scotland.
Esp.	Espinasse's Nisi Prius Reports.
Everh. Conc.	Everhardi Concilia. Antwerp, 1643.
Ex. R.	Exch. Rep., Welsby, Hurlstone & Gordon.
Fairf.	Fairfield's Reports, Maine, 1833-1835.
Farin. Op.	Farinacii Opera. Francof. ad Mænum, 1684.
Ff	Pandecta Juris Civilis.
Fitzg.	Fitzgibbon's Reports.
Fla., Flor.	Florida Reports.
Forrest	Forrest's Reports, Exchequer.
Fost. C. L.	Sir M. Foster's Crown Law, 3d ed., 1792.
Fost. & Fin.	Foster & Finlason's Nisi Prius Reports.
Fox & Sm.	Fox & Smith's Reports, King's Bench, Ireland.
Freem.	Freeman's Reports.
G. & D.	Gale & Davidson's Reports, Queen's Bench.
Gale	Gale's Reports, Exchequer.
Gall.	Gallison's Reports, United States, 1st Circuit Court, 1812-1815. Judge Story's Decisions.
Ga.	Georgia Reports.
Gilb. Ev.	Gilbert on Evidence, by Lofft.
Gill & J.	Gill & Johnson's Rep., Maryland, 1829-1840.
Glassf. Ev.	Glassford on Evidence. Edinburg, 1820.
Godb.	Godbolt's Reports.
Gow.	Gow's Nisi Prius Reports.
Greenl. Ev.	Greenleaf on Evidence.
Gratt.	Grattan's Reports. Virginia.
Gray	Gray's Reports, Supreme Court of Massachusetts.
Greene	Greene's Iowa Reports.
Greenl.	Greenleaf's Reports, Maine, 1820-1832.
H. Bl.	Henry Blackstone's Reports, Common Pleas.
H. & C.	Hurlstone & Coltman's Reports, Exchequer.
H. of L. Cas.	House of Lords Cases, Clark.
H. & N.	Hurlstone & Norman's Reports, Exchequer.
H. & R.	Harrison & Rutherford's Rep., Common Pleas.
Hale, P. C.	Hale's Pleas of the Crown.
Hale de Jur. Mar.	Lord Hale's Treatise de Jure Maris.
Halst.	Halstead's Reports, New Jersey, 1821-1831.
Har. & G.	Harris & Gill's Rep., Maryland, 1826-1829.
Har. & M'Hen.	Harris & M'Henry's Rep., Maryland, 1790-1799.
Har. & W.	Harrison & Wollaston's Reports, King's Bench.
Hardin.	Hardin's Reports, Kentucky, 1805-1808.
Hardr	Hardres' Reports, Exchequer.
Harg. L. T.	Hargrave's Law Tracts.
Harg. St. Tr.	Hargrave's State Trials.
Harr. & J.	Harris & Johnson's Reports, Maryland, 1800-1826.
Hawk	Hawkin's Pleas of the Crown.
Hawks.	Hawks' Reports, North Carolina, 1820-1826.
Hayes	Hayes' Reports, Exchequer, Ireland.
Hayes & Jon.	Hayes & Jones' Reports, Exchequer, Ireland.
Hayw.	Haywood's Reports, North Carolina, 1789-1806.
Hein. & Pand.	Heineccius ad Pandectas. 5th tom. of his Works.

ABBREVIATIONS.	NAME OF WORK, ETC.
Heisk.	Heiskell's Reports, Tennessee.
Hem. & M.	Hemming & Miller's Rep., in V.-C. Wood's Court.
Hen. & Munf.	Henning & Munford's Rep., Virginia, 1806–1809.
Hertius de Coll. Leg.	Hertius de Collisione Legum.
Hill, S. C.	Hill s Reports, South Carolina, 1833–1835.
Hill.	Hill's Reports, New York, 1841–1842.
Hob.	Hobart's Reports, King's Bench.
Hoffman on Leg. Study	Hoffman's Course of Legal Study, 2d ed., 1836.
Holt.	Lord Holt's Reports.
Holt, N. P. R.	Holt's Nisi Prius Reports.
Hop. & Colt.	Hopwood & Coltman's Registration Cases.
How. St. Tr.	Howell's State Trials.
How. S. Ct. R.	Howard's Rep., United States Sup. Ct., 1843.
Hubb. Ev. of Suc.	Hubback on Evidence of Succession. London.
Hume, Com.	Hume's Commentaries on Criminal Law of Scotland.
Humph.	Humphrey's Reports, Tennessee, 1839–1841.
Hutt.	Hutton's Reports, Common Pleas.
Inst.	Coke's Institutes.
I. R., C. L.	The Irish Reports, Common Law Series, Dublin, 1867–1878.
Ida.	Idaho Reports.
Ill.	Illinois Reports.
Ill. App.	Illinois Appellate Court Reports.
Ind.	Indiana Reports.
Ind. Ter.	Indian Territory.
Iowa.	Iowa Reports.
Ir.	Irish.
Ir. Cir. R.	Irish Circuit Reports.
Ir. Law R.	Irish Law Reports.
Ir. Law R., N. S.	Irish Common Law Reports, New Series, 1850.
Iredell.	Iredell's Reports, North Carolina, 1840–1841.
J. J. Marsh.	J. J. Marshall's Rep., Kentucky, 1829–1832.
J. Kel.	Sir John Kelynge's Reports, King's Bench.
Jacobsen's Sea L.	Jacobsen's Sea Laws.
Jebb, C. C.	Jebb's Crown Cases Reserved, Ireland.
Jebb & B.	Jebb & Bourke's Rep., Queen's Bench, Ireland.
Jebb & Sy.	Jebb & Symes' Rep., Queen's Bench, Ireland.
Johns.	Johnson's Reports, New York, 1823.
Johns. & Hem.	Johnson & Hemming's Rep. in Ct. of Wood, V.-C.
Jones.	Jones, Exchequer Reports, Ireland.
T. Jones.	Sir Thomas Jones' Reports.
W. Jones.	Sir William Jones' Reports.
Joy on Conf.	Joy on Confession in Criminal Cases, Dublin, 1842.
Jur.	Jurist Reports.
Jur., N. S.	Jurist Reports, New Series.
Just.	Justinian.
Kans.	Kansas Reports.
Keb.	Keble's Reports, King's Bench.
Kel.	Sir John Kelynge's Reports.
Kent, Com.	Kent's Commentaries, Boston.
Ky.	Kentucky Reports.
Kirby.	Kirby's Reports, Connecticut, 1785–1788.
Knapp, P. C. R.	Knapp's Privy Council Reports.
L. & Cave.	Leigh & Cave's Crown Cases Reserved.
L. J., H. L.	Law Journal (New Series), House of Lords.
L. J., P. C.	Law Journal (New Series), Privy Council.
L. J., Q. B.	Law Journal (New Series), Queen's Bench.
L. J., C. P.	Law Journal (New Series), Common Pleas.
L. J., Ex.	Law Journal (New Series), Exchequer.
L. J., M. C.	Law Journal (New Series), Magistrates' Cases.
L. J., Ec. C.	Law Journal (New Series), Ecclesiastical Cases.
L. J. (O. S.)	Law Journal (Old Series).

ABBREVIATIONS.	NAME OF WORK, ETC.
L., M. & P.....	Lowndes, Maxwell and Pollock's Practice Cases.
L. R., Q. B. D.....	Law Reports, Queen's Bench Division, from 1st Jan., 1876.
L. R., C. P. D.....	Law Reports, Common Pleas Division, from 1st Jan., 1876.
L. R., Ex. D.....	Law Reports, Exchequer Division, from 1st Jan., 1876.
L. R., App. Cas... ...	Law Reports, Appeal Cases, from 1st Jan., 1876.
L. R., P. D.....	Law Reports, Probate Division, from 1st Jan., 1876.
L. R., Ir.....	Law Reports, Ireland, from Jan. 1, 1878.
LL., U. S.....	Laws of the United States.
Law Mag.....	Law Magazine.
Law Mag., N. S.....	Law Magazine, New Series.
Law R.....	Law Review.
Law Rec., 1st Ser. *or* 2d Ser.....	Law Recorder, 1st and 2d Series. Irish.
Law Rep., H. L	Law Reports, House of Lords.
Law Rep., H. L. Sc...	Law Reports, Scotch Appeals in House of Lords.
Law Rep., P. C.....	Law Reports, Privy Council.
Law Rep., Q. B.....	Law Reports, Queen's Bench.
Law Rep., C. P.....	Law Reports, Common Pleas.
Law Rep., Ex.....	Law Reports, Exchequer.
Law Rep., C. C.....	Law Reports, Crown Cases Reserved.
Lea.....	Leach's Crown Cases. 4th ed., London, 1815.
Leg. Obs.....	Legal Observer.
Leigh.....	Leigh's Reports, Virginia, 1829–1839.
Leon.....	Leonard's Reports, King's Bench.
Lev....	Levinc's Reports, King's Bench.
Lew. C. C.....	Lewin's Crown Cases on Northern Circuit.
Lit. R.....	Littleton's Reports.
Lofft.....	Lofft's Reports, King's Bench. 1 vol.
Long. & T	Longfield and Townsend's Rep. Exchequer, Ireland. 1 vol.
Lords' J., *or* L. J.....	Journal of the House of Lords.
Ld. Ray.....	Lord Raymond's Rep., King's Bench & Com. Pleas.
Lou...	Reports of Louisiana, 1830–1840.
La. Ann.....	Louisiana Annual Reports.
Lutw.....	Lutwyche's Reports, Common Pleas.
M.....	Sir F. Moore's Reports.
M. A.....	Missouri Appellate Court Reports.
M. & Gr.....	Manning & Granger's Reports. Common Pleas.
M. & M	Moody & Malkin's Nisi Prius Reports.
M. & P.....	Moore & Payne's Reports, Common Pleas.
M. & R....	Manning & Ryland's Reports, King's Bench.
M. & Rob	Moody & Robinson's Nisi Prius Reports.
M. & Sc.....	Moore & Scott's Reports, Common Pleas.
M. & Sel	Moore & Selwyn's Reports, King's Bench.
M. & W.....	Meeson & Welsby's Reports, Exchequer.
McC.....	McCord's Rep. South Carolina, 1820–1828.
McC., Ch. R.....	McCord's Chancery Reports, South Carolina, 1825–1827.
McClel.....	McCleland's Reports, Exchequer.
McClel. & Y.....	McCleland & Young's Reports, Exchequer.
Macq. Pr. in H. of L..	Macqueen's Practice in the House of Lords and Privy Council.
Macq. Sc. Cas. H. of L.	Macqueen's Scotch Cases in the House of Lords, 1852.
McDouall, Inst.....	McDouall's (Ld. Bankton) Institutes of Law of Scotland.
McNagh. Elem. of Hindoo L.....	McNaghten's Elements of Hindoo Law.
Mann. Dig. N. P.....	Manning's Digested Index to the Nisi Prius Reports.

ABBREVIATIONS.	NAME OF WORK, ETC.
Marsh	Marshall's Reports, Common Pleas. 2 vols.
A. K. Marsh	A. K. Marshall's Rep. Kentucky, 1817–1821.
J. J. Marsh	J. J. Marshall's Rep., Kentucky, 1829–1832.
Mart	Martin's Reports, Louisiana, 1809–1823.
Mart., N. S.	Martin's Reports, New Series, Louisiana, 1823–1830.
Mart., N. C. R.	Martin's North Carolina Reports.
Mart. & Y.	Martin & Yerger's Rep., Tennessee, 1825–1828.
Mason	Mason's Reports, United States, 1st Circuit Court, 1816–1830. Judge Story's Decisions.
Mass	Reports of Massachusetts, 1804–1822.
Math. Pres. Ev.	Mathews' Treatise on Presumptive Evidence. Lond. 1827.
May, L. of Parl.	May's Law of Parliament, 5th ed. London, 1868.
Md.	Maryland Reports.
Me.	Maine Reports.
Menoch. de Præs	Menochius de Præsumptionibus, Genevæ, 1670.
Metc	Metcalf's Reports, Massachusetts, 1840–1846.
Mich	Michigan Reports.
Milw. Ec. Ir. R.	Milward's Eccles. Irish Rep., Dr. Radcliffe.
Minn	Minnesota Reports.
Miss.	Mississippi Reports.
Mo.	Missouri Reports.
Mo. App.	Missouri Appellate Courts Reports.
Mont.	Montana Reports.
Mod.	Modern Reports.
B. Mon.	B. Monroe's Kentucky Reports.
Mon.	Monroe's Reports, Kentucky, 1824–1828.
Moo. C. C.	Moody's Crown Cases Reserved. 2 vols.
Moo. Ind. App. C.	Moore's Indian Appeals to Privy Council.
Moo. P. C. R.	Moore's Privy Council Reports.
Moo. P. C., N. S.	Moore's Privy Council Reports, New Series.
Moore	John Bayly Moore's Reports, Common Pleas.
Morison	Morison's Scotch Reports.
Munf.	Munford's Reports, Virginia, 1810–1820.
Murph	Murphy's Reports, North Carolina, 1804–1819.
N. & M.	Nevile & Manning's Reports, King's Bench.
N. & P.	Nevile & Perry's Reports, Queen's Bench.
N. R.	Bosanquet & Puller's New Rep., Common Pleas.
N. Y. Sup.	New York Supplement, West Publishing Co., St. Paul. Minn.
N. Y. Sup. Ct.	New York Superior Court.
Neb.	Nebraska Reports.
Nev.	Nevada Reports.
N. J.	New Jersey Reports.
N. Y.	New York Reports.
N. M.	New Mexico Reports.
N. C.	North Carolina Reports.
N. D.	North Dakota Reports.
N. W. Rep.	Northwestern Reporter.
N. York Civ. Code	The Code of Civil Procedure of New York, 1850.
N. York Cr. Code	The Code of Criminal Procedure of New York, 1850.
N. H.	Reports of New Hampshire, 1816–1843.
New R.	The New Reports in all the Courts. London, 1862.
New Sess. Cas.	New Session Cases, by Carrow, Hammerton & Allen.
Nott & M'C.	Nott & M'Cord's Rep., South Carolina, 1817–1820. 2 vols.
Noy	Noy's Reports, King's Bench.
Ohio R.	Hammond's Ohio Reports, Ohio, 1821–1839.
Ohio St.	Ohio State Reports.
Ore.	Oregon Reports.
Ought.	Oughton's Ordo Judicorum.

ABBREVIATIONS.	NAME OF WORK, ETC.
Owen	Owen's Reports, King's Bench and Common Pleas.
P. & D.	Perry & Davison's Reports, Queen's Bench.
P. Voet. de Stat.	Paul Voet de Statutis.
Pac. Rep.	Pacific Reporter.
Paine	Paine's Rep., United States, 2d Cir. Ct., 1810–1826.
Paine & D. Pr.	Paine & Duer's Practice Courts of the United States, New York, 1830.
Paley, Conv.	Paley on Convictions.
Palm.	Palmer's Reports, King's Bench.
Parl. Deb.	Parliamentary Debates.
Pa. St.	Pennsylvania State Reports.
Pea. Add. Cas.	Peake's Additional Nisi Prius Cases.
Pea. Ev.	Peake on Evidence, 5th ed., 1822.
Pea. R.	Peake's Nisi Prius Rep., 3d ed., 1820.
Pearce & D.	Pearce & Dearsley's Crown Cases Reserved.
Pears. Chit. Pl.	Pearson's Chitty, Prec. in Plead., 1847.
Peck	Peck's Reports, Tennessee, 1822–1824.
Penning.	Pennington's Rep., New Jersey, 1806–1813.
Penn.	Reports of Pennsylvania, 1829–1832.
Pet.	Peters' Rep., Supreme Court of United States, 1827–1843.
Pet. C. C. R.	Peters' Circuit Court Reports, United States, 3d Circuit Court, 1803–1818.
Petersd. Abr.	Petersdorff's Abridgment.
Ph. Ev.	Phillips on Evidence.
Phil.	Philadelphia Reports.
Pick.	Pickering's Rep., Massachusetts, 1823–1840.
Pickle	Tennessee Reports.
Poph.	Popham's Reports, King's Bench.
Porter.	Porter's Reports, Alabama, 1834–1839.
Poth. Œuv. Posth.	Pothier, Œuvres Posthumes.
Price.	Price's Reports, Exchequer.
Puff.	Puffendorff's Law of Nations.
Q. B.	Adolphus & Ellis' Rep., New Ser., Queen's Bench.
Q. B. D.	Queen's Bench Division.
Quintil. Inst. Orat.	Quintilianus de Institutione Oratoria.
R.	Rex or Regina.
R. I.	Rhode Island Reports.
R. & R.	Russell & Ryan's Crown Cases Reserved.
Rand.	Randolph's Reports, Virginia, 1821–1828.
Rawle	Rawle's Reports, Pennsylvania, 1828–1835.
Ld. Ray.	Ld. Raymond's Rep., King's Bench & Com. Pleas.
T. Ray.	Sir Thomas Raymond's Rep., Common Law Courts.
Rep.	Lord Coke's Reports.
Rep. of Cri. Law Com.	Reports of Criminal Law Commissioners.
Rep. temp. Finch.	Reports in the time of Lord Chancellor Finch.
Rep. temp. Hardw.	Reports in the time of Lord Hardwicke.
Res.	Respublica.
Rev. Code.	Revised Code.
Rev. St.	Revised Statutes.
Ridg., L. & S.	Ridgway, Lapp & Schoale's Rep., King's Bench, Ireland.
Riley	Riley's Law Cases, South Carolina, 1836–1837.
Rob. on Frauds.	Roberts on Frauds.
Roll. Abr.	Rolle's Abridgment.
Roll. R.	Rolle's Reports, King's Bench.
Roscoe, Ev.	Roscoe on Evidence at Nisi Prius.
Russ. on Cr.	Russell on Crimes and Misdemeanors.
Ry. & M.	Ryan & Moody's Nisi Prius Reports.
S. C.	Same Case.
S. C.	South Carolina Reports.
S. D.	South Dakota Reports.

ABBREVIATIONS.	NAME OF WORK, ETC.
S. P.	Same Point.
Salk.	Salkeld's Reports, Common Law Courts.
Sawy	Sawyer's Reports (U. S. C. C.).
Say	Sayer's Reports. King's Bench.
Scott	Scott's Reports, Common Pleas.
Scott, N. R.	Scott's New Reports, Common Pleas.
Selw. N. P.	Selwyn's Law of Nisi Prius. 15th ed.,1859–61, London.
Serg. & R.	Sergeant & Rawle's Rep., Pennsylvania, 1818–29.
Sess. Ca.	New Sessions Cases, by Carrow, Hammerton & Allen.
Shepl	Shepley's Reports, Maine, 1836–1841
Shower	Shower's Reports, King's Bench.
Sid.	Siderfin's Reports, King's Bench.
Skinn	Skinner's Reports, King's Bench.
Smith, L. C	Smith's Leading Cases.
South	Southard's Reports, New Jersey, 1816–1820.
S. E. Rep.	Southeastern Reporter.
So. Rep	Southern Reporter.
Stair Inst.	Stair's Institutes of the Law of Scotland.
Stark. Ev.	Starkie on Evidence.
Stark. R.	Starkie's Nisi Prius Reports.
Steph. Pl.	Stephen on Pleading.
Story, Ag.	Story on Agency.
Story, Part.	Story on Partnership.
Story, R.	Story's Reports, United States. 1st Circuit, 1839–1845. Judge Story's Decisions.
Str	Strange's Reports in all Courts.
Sty.	Style's Reports, King's Bench.
Sumn	Sumner's Reports, 1st Circuit Court of United States. Judge Story's Decisions. 1830–1839.
S. W. Rep.	Southwestern Reporter.
Swift, Dig.	Swift's American Digest.
T. Jones.	Sir Thomas Jones' Reports.
T. R.	Durnford & East's Term Reports, King's Bench.
T. Ray	Sir Thomas Raymond's Rep. The Common Law Courts.
Tait, Ev.	Tait on Evidence. Edinburgh, 1834.
Taunt.	Taunton's Reports, Common Pleas.
Tenn.	Tennessee Reports.
Tex	Texas Reports.
Tex. App.	Texas Appellate Court Reports.
Tidd	Tidd's Practice.
Tomlin, L. Dict.	Tomlin's Law Dictionary.
Tyr	Tyrwhitt's Reports, Exchequer.
Tyr. & Gr.	Tyrwhitt & Granger's Reports, Exchequer.
U. S	United States.
Utah	Utah Reports.
Van Leeuw. Comm.	Van Leeuwen's Commentaries.
Vaugh.	Vaughan's Reports, Common Pleas.
Va.	Virginia Reports.
Ventr.	Ventris' Reports, King's Bench and Common Pleas.
Vt	Vermont Reports.
Vin. Abr.	Viner's Abridgment.
Virg. Cas.	Virginia Cases, Virginia, 1789–1826. 2 vols.
W. Bl.	Sir William Blackstone's Reports (K. B. & C. P.).
W. Jon.	Sir William Jones' Reports, King's Bench.
W. N	Weekly Notes, edited by Council of Law Reporting.
W. R	Weekly Reporter.
W., W. & H.	Willmore, Wollaston & Hodges' Reports, Queen's Bench.

ABBREVIATIONS.	NAME OF WORK, ETC.
W. Va.....	West Virginia Reports.
Wash.....	Washington's Reports, Virginia, 1790–1796.
Wash. C. C. R.....	Washington's Circuit Court Reports, United States, 3d Circuit Court, 1803–1827.
Watts.....	Watts' Reports, Pennsylvania, 1832–1840.
Watts & S.....	Watts & Sergeant's Rep. Pennsylvania, 1841, 1842.
Wend.....	Wendall's Reports, New York, 1828–1841.
Whart.....	Wharton's Reports, Pennsylvania, 1835–1840.
Wheat.....	Wheaton's Rep., Sup. Ct. of United States, 1816–1827.
Wheel. C. C.....	Wheeler's Criminal Cases, New York.
Wightw.....	Wightwick's Reports, Exchequer.
Willes.....	Willes' Reports, mostly Common Pleas.
Wils.....	Wilson's Rep., King's Bench and Common Pleas.
Wis.....	Wisconsin Reports.
Wing. Max.....	Wingate's Maxims.
Wms. Saund.....	Saunders' Rep., edited by Williams, J.
Wood, Inst. LL. Eng.	Wood's Institutes of the Laws of England.
Woodb. & M.....	Woodbury & Minot's Reports, United States, 1st Circuit, 1845–1847.
Wright.....	Wright's Reports, Ohio, 1831–1834.
Wyo.....	Wyoming Reports.
Y. & C. Ex. R.....	Younge & Collyer's Reports, Exchequer.
Y. & J.....	Younge & Jervis' Reports, Exchequer.
Yeates.....	Yeates' Reports, Pennsylvania, 1791–1808.
Yelv.....	Yelverton's Reports, King's Bench.
Yerg.....	Yerger's Reports, Tennessee, 1832–1837.

AN ALPHABETICAL INDEX OF CASES,

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MALICIOUS PROSECUTIONS.

CHAPTER I.

THE ACTION FOR MALICIOUS PROSECUTION.

§ 1. The nature of the wrong — The law stated by Cooley.[1] It is the lawful right of every man, who believes he has a just demand against another, to institute a suit and endeavor to obtain the proper redress. If his belief proves to be unfounded, his groundless proceedings may possibly cause a very serious injury to the defendant; the mere assertion of a serious claim at law being capable, in some circumstances, of affecting materially one's standing and credit. But to treat that as a legal wrong which consists merely in asserting a claim which cannot satisfactorily be established would be plainly impolitic and unjust. The failure to sustain it might possibly have come from the death of a witness or other loss of testimony, from false evidence, from a mistake of law in the judge, from misconduct in the jury; from any cause rather than fault in the plaintiff himself. To compel him, as the penalty for instituting a suit he cannot sustain, to pay the costs of the defense, is generally all that is just, and is sufficient to make persons cautious about instituting suits which they have reason to believe are baseless.

It is equally the lawful right of every man to institute or set on foot criminal proceedings wherever he believes a public offense has been committed. Here the injury is likely to be more serious if the proceeding is unwarranted, but here, also, it would be both unjust and impolitic to make the prosecution which fails an actionable wrong. In some cases complainants are required to become responsible for costs, but this is usually the only liability.

Nevertheless it is a duty which every man owes to every other not to institute proceedings maliciously which he has no good reason to believe are justified by the facts and the law.

§ 2. The action at common law.— The action at common law for malicious prosecution was denominated "an action

[1] Cooley on Torts, 180 (1879).

upon the case." It was, however, an action to recover damages for injuries for which the more ancient forms of the common law afforded no remedy.[1]

Case, or, more fully, action upon the case, or trespass on the case, includes in its widest sense *assumpsit* and *trover*, and distinguishes a class of actions in which the writ is framed according to the special circumstances of the case, from the ancient actions, the writs in which, called *brevia formata*, are collected in the Registrum Brevium.

By the common law and by the Statute Westm. 2d,[2] if any cause of action arose for which no remedy had been provided, a new writ was to be formed analogous to those already in existence which were adapted to similar causes of action. The writ of trespass was the original writ most commonly resorted to as a precedent, and in process of time the term trespass seems to have been so extended as to include every species of wrong causing an injury, whether it was *mal*feasance, *mis*feasance or *non*feasance, apparently for the purpose of enabling an action on the case to be brought in the king's bench. It thus includes actions on the case for breach of a parol undertaking, now called *assumpsit*, and actions based upon a finding and subsequent unlawful conversion of property, now called trover, as well as many other actions upon the case which seem to have been derived from other originals than the writ of trespass, as nuisance, deceit, etc.

And, as the action had thus lost the peculiar character of a technical trespass, the name was, to a great extent, dropped, and actions of this character came to be known as actions on the case.

As used at the present day, *case* is distinguished from *assumpsit* and *covenant* in that it is not founded upon any contract, express or implied; from *trover*, which lies only for unlawful conversion; from *detinue* and *replevin*, in that it lies only to recover damages, and from *trespass*, in that it lies for injuries committed without force, or for forcible injuries which damage the plaintiff consequentially only, and in other respects.[3]

[1] Stephen on Pleading, 15.
[2] 13 Edw. I., ch. 24.
[3] 3 Reeves, Eng. Law, 84; 1 Spence, Eq. Jur., 237, 243; 1 Chitty, Plead., 123; 3 Blackstone, Comm., 41.

A similar division existed in the civil law, in which, upon nominate contracts, an action distinguished by the name of the contract was given. Upon innominate contracts, however, an action *præscriptis verbis* (which lay where the obligation was one already recognized as existing at law, but to which no name had been given), or *in factum* (which was founded on the equity of the particular case), might be brought.[1]

In many states the forms of actions have been abolished by statutory enactments, and in some the distinctions between trespass and case are also abolished; but in all these jurisdictions the rules of law relating to the cause of action, the parties and the introduction of evidence, remain substantially the same.

§ 3. **When the action lies.**— The common-law action upon the case lies for all torts committed with force, actual or implied, as for a malicious prosecution.[2] It is also the proper remedy for fraud in purchases and sales, for obstructing a private way, for disturbing a person in the use of a pew, for an injury to a franchise, and in a multitude of other cases not necessary to mention here.[3]

§ 4. **Malicious prosecution — Historical.**— By the ancient forms of pleading, all actions for malicious prosecution, where two or more were made defendants, were laid with a charge of conspiracy. This practice is supposed to have had its origin in the phraseology of the 21st Statute of Edward the First, which gave the form of writs in such cases by using the words *de placito conspirationis et transgressionis*.[4] But the charge of conspiracy was never deemed essential to the action; and in modern times this form of allegation has fallen into entire disuse. By the rules of the common law an action of conspiracy, or, to use an equivalent expression, a writ of conspiracy, was never allowed but in two cases: one for conspiring to procure a man to be indicted for treason; and the

[1] 1 Bouvier's Law Dictionary, 244.

[2] Muse, Ex., etc., v. Vidal, 6 Munf. (Va.), 27 (1817); Warfield v. Walter, 11 Gill & J. (Md.), 80 (1839); Hays v. Younglove, 7 B. Mon. (Ky.), 545 (1847); Seay v. Greenwood, 21 Ala., 491 (1852).

[3] 1 Bouvier's Law Dictionary (15th ed.) (1884), title Case, p. 286.

[4] 1 Saunders, 230, note; 33 Edw. I., St. 2; Parker v. Huntington, 68 Mass., 124 (1854); Fitzherbert's Natura Brevium (9th ed., 114 D., London) (1794).

other for a conspiracy to prosecute a man for felony by which life was put in danger. And in these cases the action was confined within very narrow limits, and would lie only when a party was acquitted by a verdict such as would enable him to plead *autrefois acquit* if again indicted for the same crime.[1] This form of action has, however, become obsolete in those cases where it was allowed at common law, having been superseded by the action on the case in the nature of a conspiracy, which furnishes an adequate and more liberal remedy for malicious prosecution of every nature and description.[2] It is no longer necessary for the plaintiff to aver a conspiracy on the part of several defendants, or to allege an agreement on their part to do any act in itself unlawful, or any act lawful in itself but effected by unlawful means. The action can be maintained now by proof of a malicious prosecution by one or all of the defendants.[3]

§ 5. **Malicious prosecution — The action of, defined.**— A judicial proceeding, instituted by one person against another from wrongful or improper motives, and without probable cause to sustain it. It is usually called a malicious prosecution; and an action for damages for being subjected to such a suit is called an action for malicious prosecution. In strictness the prosecution might be malicious, that is, brought from unlawful motives, although founded on good cause. But it is well established that unless want of probable cause and malice concur no damages are recoverable. However blameworthy was the prosecutor's motives, he cannot be cast in damages if there was probable cause for the complaint he made. Hence, the term usually imports a causeless as well as an ill-intended prosecution. It commonly, but not necessarily, means a prosecution on some charge of crime.[4]

Malice, in the rules relative to malicious prosecutions, is not used in the sense of spite or hatred against an individual, but

[1] Selw. Nisi Prius (11th ed.), 1062; Stephen's Mal. Pros., 2 (1889).

[2] Saville v. Roberts, 1 Ld. Raymond, 374 (1678); Parker v. Huntington, 68 Mass., 124 (1854); Smith v. Cranshaw, Sir St. Jones, 93 (1625); Garing v. Fraser, 76 Me., — (1884).

[3] Parker v. Huntington, 68 Mass., 124 (1854): Payson v. Caswell, 22 Me., 226 (1848); Dunlop v. Glidden, 31 Me., 435 (1850); Jones v. Boker, 7 Cow. (N. Y.), 445 (1827).

[4] 2 Abbott's Law Dic., 75 (1879).

of *malice animus*, as denoting that the party is actuated by improper and indirect motives.[1]

§ 6. **The foundation of the action.**— There are two things which are not only indispensable to the support of this action, but lie at the foundation of it. The plaintiff must show that the defendant acted from *malicious motives* in prosecuting him, and that he had *no sufficient reason* to believe him to be guilty. If either of these be wanting the action must fail. A man from *pure malice* may prosecute another who is really guilty, or whom, from sufficient grounds, he believes to be guilty, though in fact innocent, and no action will lie against him.[2]

§ 7. **Distinction between a malicious use and a malicious abuse of process.**— There is a distinction between a malicious use and a malicious abuse of legal process. An abuse of legal process is where the party employs it for some unlawful object, not for the purpose which it is intended by law to effect; in other words, it is a perversion of it. For example, if a man is arrested, or his property seized, in order to extort money from him, even though it be to pay a just claim, other than that in suit, or to compel him to give up possession of a deed or anything of value not the legal object of the process, it is settled there is an action for such malicious abuse of process. It is not necessary to prove that the action in which the process issued has been determined or to aver that it was sued out without probable cause.[3] On the other hand, legal process, civil or criminal, may be maliciously used so as to give rise to a cause of action, where no object is contemplated to be gained by it other than its proper effect and execution. As every man has a legal right to prosecute his claims in a

[1] Harpham v. Whitney, 77 Ill., 32 (1875).

[2] Stone v. Crocker, 41 Mass., 81 (1832); Golding v. Crowle, Sayer, 1 (1753); Farmer v. Darling, 4 Burr., 1974; Jones v. Gwyn, 10 Mod., 214; Johnstone v. Sutton, 1 T. R., 545; 2 Stark. Ev., 911; Lyon v. Fox, 2 Browne (Penn.), App., 69; Mann v. Dupont, 3 Wash. C. C. R., 31 (1811); Kelton v. Bevins, Cooke (Tenn.), 90 (1812); Marshall v. Bussard, Gilmer (Va.), 9 (1820); Bell v. Graham, 1 Nott & McCord, 278 (1818); Vanduzor v. Linderman, 10 Johns., 106 (1813); White v. Dingley, 4 Mass., 435 (1808); Lindsay v. Larned, 17 Mass., 190 (1821).

[3] Mayer v. Walter, 64 Pa. St., 283 (1870); Grainer v. Hill, 4 Bing. N. C., 212.

court of law and justice, no matter by what motives of malice he may be actuated in doing so, it is necessary to aver and prove that he has acted not only maliciously but without reasonable or probable cause. It is clearly settled in this form of action that the proceeding in which it is claimed the process has been maliciously used must have been determined before any action for the injury lies.[1]

COMMON-LAW DISTINCTIONS.— The term false imprisonment though technical, does not appear to convey any sufficiently, definite meaning. It means in law any illegal imprisonment, either without any process whatever, or under color of process wholly illegal, without regard to any question whether any crime has been committed or a debt due, so that the proper civil remedy is *trespass vi et armis* as for a direct injury wholly unwarranted even in its inception. The terms malicious prosecution or malicious arrest always in law suppose regular process and proceedings, but that the facts did not warrant their issuing, and which is to be decided by the result; as where the warrant to imprison a party was perfectly regular and proper, but he was innocent of the supposed crime and ultimately acquitted; or where there has been a sufficient affidavit to hold to bail and a valid writ, but when, in fact, no debt was due, and so established on the trial or other termination of the suit. In the latter cases the remedies are not by *trespass vi et armis* as for a direct injury, but by action on the case for the malicious adoption of the regular proceeding when there was no probable cause or ground for issuing it.

These distinctions are also substantially important, for if the process or the imprisonment were wholly illegal or misapplied as to the person intended to be imprisoned, without regard to any question of fact, or whether guilty or innocent, or the existence of any debt, then the party imprisoned may legally resist the imprisonment and may escape or be rescued, or even break prison; whereas however innocent he might be, yet if the process and imprisonment were in form legal, each of those acts would be highly punishable, for he ought to

[1] Arundell v. Tregano, Yelv., 117; Mayer v. Walter, 64 Pa. St., 283 (1870).

submit to the legal process and obtain his release by due course of law. Even in cases where the imprisonment is manifestly informal and illegal, the party must not, to obtain his release, use any dangerous weapon, and the safest course in all cases is to obtain liberty by *habeas corpus*, or by procuring bail as hereafter fully explained, by which means relief from continued imprisonment may be speedily obtained, and without prejudicing the remedy by action for the intervening illegal imprisonment.[1]

An action will lie against one who has either unlawfully arrested or imprisoned another, or who has falsely, that is unjustly and maliciously, prosecuted him and caused his arrest. But these are different actions, requiring different pleadings and evidence, and governed by different rules. Under the common-law nomenclature an action for unlawfully arresting and imprisoning another is trespass, while for maliciously prosecuting another or causing or procuring his arrest it was an action on the case. The former is the action for false imprisonment; the latter for a malicious prosecution or malicious arrest.[2]

COMPENSATION FOR THESE WRONGS.— Compensation for every illegal imprisonment without process, or under void or misapplied process, may be obtained by action of trespass, in which the recovery of damages in general entitles the plaintiff to full costs,[3] and the wrong-doer may also be indicted.[4]

The compensation for imprisonment, under color of regular criminal or civil process, is by action on the case, and is subjected to certain qualifications. Even if it turn out in the result of a prosecution that the party imprisoned be acquitted, or that in an action he obtained a verdict or nonsuit, it does not necessarily follow that he can recover any compensation for the intervening imprisonment; for there may have been adequate reasonable ground for setting on foot the inquiry, though it may ultimately be established that there was no crime or no debt. It has been considered that if in the event of every acquittal the prosecutor were liable to an action, the

[1] 1 Chitty's Practice, 48; Brown v. Chadsey, 39 Barb. (N. Y.), 253 (1863).

[2] Brown v. Chadsey, 39 Barb. (N. Y.), 253 (1863).

[3] 3 Bla. C., 318; 6 T. R., 11.

[4] 4 Bla. C., 218, 219; 2 Burr., 993.

apprehension of that consequence would deter persons from becoming prosecutors, and crimes would go unpunished; and with regard to actions, it has also been considered that the trial of a private claim in a public court of justice is matter of right, and if the party do not succeed, his payment of the defendant's costs is a sufficient compensation. The presumption, therefore, is in general in favor of the prosecutor and of the plaintiff that they properly instituted the proceeding.[1]

§ 8. **Where the action will lie — Generally.** — An action for malicious prosecution lies in all cases where there is a concurrence of the following elements in the transaction complained of:

(1) The institution of a suit or proceeding without probable cause.[2]

(2) Malice in the institution of the suit or proceeding.[3]

(3) Complete termination of the suit or proceeding.[4]

(1) THE WANT OF PROBABLE CAUSE AS AN ESSENTIAL GROUND OF THE ACTION. — The want of probable cause is the essential ground of the action. Other grounds or essentials may be inferred from this; but this can never be inferred from anything else. It must be established by positive and express proof. It is not enough to show that the plaintiff was acquitted of the charge preferred against him, or that the defendant abandoned the prosecution. But the burden of proof is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no ground for commencing the prosecution.[5]

THE SUBJECT ILLUSTRATED. —

Probable cause — Advice of counsel — Swearing out a warrant upon matters believed to be true.

John W. Jones sued his brother Calvin Jones for a malicious prosecution. The facts upon which the suit was founded are as follows:

Mary Jones, their mother, was an incompetent person, and one Levi

[1] 1 Chitty, Practice, 50.

[2] Cooley on Torts, 180 (1879); Pollock on Torts, 265 (1886).

[3] Cooley on Torts, 180 (1879); Pollock on Torts, 264 (1886).

[4] Cooley on Torts, 180 (1879); Pollock on Torts, 264 (1886).

[5] Stone v. Crocker, 41 Mass., 81 (1832); Purcell v. McNamara, 1 Campb., 199; 9 East, 361; Sykes v. Dunbar, 1 Campb., 202, note; Incledon v. Berry, 1 Campb., 203, note; Wallace v. Alpine, 1 Campb., 204, note; Shack v. McChesney, 4 Yeates (Penn.), 507 (1808).

Nicewonger was guardian of her estate, and as such guardian had procured an order of court authorizing him to sell certain of the personal property belonging to his ward, and had advertised it for sale.

The plaintiff and one Calvin Jones, another brother (or perhaps Calvin Jones alone), came to the county of San Joaquin from the county of Fresno, and stated to the guardian that they desired to take the personal property of Mary Jones to Fresno. They were told by him that they could not take the horses, wagons or cows, as that property was to be sold in a short time. The plaintiff and Calvin Jones then went to the Jones ranch with their mother, and requested of the man who was in charge for said guardian the privilege of using the horses and wagon to convey the household furniture of said Mary Jones to the railroad station at Ripon, offering to return the team to the ranch in the afternoon of the same day. The agent in charge of the property agreed that he would allow them to take the team, and that he would go to Ripon and bring the team back. Under such representations they got possession of the team and started on the road apparently towards Ripon. They did not go to Ripon, but took the first road in a southern direction, going directly away from Ripon. Moll, the agent of the guardian, after making the arrangements with plaintiff and Calvin Jones concerning the team, started for Ripon for the purpose of bringing it back, and after he left the ranch plaintiff and Calvin Jones drove the cows away from the ranch. When Moll arrived at Ripon he found that the team was not there, and upon inquiry ascertained that the plaintiff had been seen driving it up the road leading south. Moll then started for Stockton to inform the district attorney, and when he arrived in Stockton he met the defendant, who was interested in the estate of his mother, Mary Jones. Moll then informed the defendant what had been done by the plaintiff and Calvin Jones, and requested the defendant to see about the matter; at the same time informing him that the guardian (Nicewonger) was absent in San Francisco. The defendant went to the office of the district attorney, and informed him of what had been told him by Moll, and asked what should be done in the matter. The defendant was advised by the district attorney that the crime of grand larceny had been committed, and to have the plaintiff arrested. The district attorney prepared the complaint and the defendant swore to it, a warrant was issued and plaintiff was arrested in the county of Fresno, and brought to Stockton, a distance of say one hundred and thirteen miles, where, upon the following day, he had an examination before a justice and was discharged. He was not confined in jail, or subjected to any indignity beyond that implied by being deprived of his liberty upon the charge of larceny.

The plaintiff recovered $6,500 and the defendant appealed.

In disposing of the appeal, Searls, C., said:

"To maintain an action for malicious prosecution, *malice and want of probable cause* must concur. If either of these be wanting, the action must fail. Anderson v. Coleman, 53 Cal., 188. The primary question to be considered in this class of cases, as was said in Grant v. Moore, 29 Cal., 644, is the want of probable cause for the prosecution complained of, and this must be established before plaintiff can recover; and the burden of proof is upon the plaintiff.

"Nicewonger, as the guardian of Mrs. Jones, was in possession of the property, and had such a special property therein as would support larceny, against one taking with felonious intent. A man may steal his own property, if, by taking it, his intent be to charge a bailee with the property. People v. Thompson, 34 Cal., 671; People v. Stone, 16 Cal., 369.

"1. It seems to us that the facts upon which the defendant acted in procuring the warrant for the arrest of plaintiff showed probable cause for the course he pursued, and negative the idea of malice. We may well suppose, in the light of the present, that the felonious intent on the part of plaintiff, necessary to constitute larceny, was entirely wanting. We must, however, determine the question of *probable cause* from the facts as they existed and appeared to defendant at the time he made the complaint. He had a right to act upon the facts as they were apparent by the acts of plaintiff, independent of any secret intention on the part of the latter to return the property, which was not and could not be known to him. Had the plaintiff been an entire stranger to the parties and to the property, his acts were of such a character that they would have supported a verdict of guilty upon a charge of larceny. If, in the performance of an unlawful act, the plaintiff surrounded the transaction with circumstances of his own creation, real and adventitious, indicating guilt, he should not be heard to complain that others acted upon the hypotheses thus supported by his conduct.

"2. There can be no reasonable doubt from the evidence but that Moll, the agent, correctly narrated the facts as they had transpired at the ranch, and that defendant with equal fidelity detailed them to the district attorney, and that when asked what he should do, they, as the law officers, advised him that the acts of plaintiff and his brother constituted grand larceny and advised their arrest for crime. They then went before the magistrate with a complaint which the district attorney had prepared and defendant had verified, and upon a statement of the facts to that officer, and on the advice of the district attorney, a warrant issued.

"In Leigh v. Webb, 3 Esp., 165, Lord Eldon held that if a party makes a complaint before a justice, which the justice conceives amounts to a felony, and issues his warrant against the party complained against, and the facts do not amount to felony, no action for malicious prosecution will lie against the party who made the complaint. This doctrine is upheld by this court in Hahn v. Schmidt, 64 Cal., 284, where authorities bearing upon the question are cited and approved.

"In Levy v. Brannan, 39 Cal., 485, it was said: 'The *onus* is upon the plaintiff to prove his allegation of the want of probable cause. The defendant may rebut the evidence of the plaintiff on this point by showing that he acted in good faith, under the advice of counsel, and after a full and fair statement to his counsel of the facts of the case,' citing Potter v. Seale, 8 Cal., 224.

"In this case the testimony of the district attorney and of defendant was introduced by plaintiff, and showed, not only the truthful and full statement made by the defendant, the advice of the district attorney thereon, but also that the defendant in good faith believed the statement

to be what in fact it was,— the truth. We think, upon the showing made by plaintiff, there was no want of probable cause for his arrest, and therefore that the motion for a nonsuit should have been granted.

"Judgment reversed." Jones v. Jones, 71 Cal., 89.

(2) MALICE AN ESSENTIAL ELEMENT.— If a man institutes a prosecution against another for a crime of which he has no reason to believe him guilty, surely he cannot be influenced by good motives in doing it. A love of justice will never incite the prosecution of innocence. Nor does friendship to the accused ever show itself in this way. Hatred, revenge, or some other sinister or improper motive, either of which in law is malice, must be its source. The want of probable cause may not be conclusive evidence, but certainly it is not only competent, but very stringent, evidence of malice. It is believed that not a single case can be found in English-speaking countries where this principle is involved in which it is not directly or impliedly admitted.[1]

(3) ACQUITTAL OF THE PLAINTIFF.— An indispensable, though generally easy, step is the proof of the institution of the prosecution and of the acquittal of the plaintiff. This necessarily being a matter which exists on record, if at all, must be proved by the record or by an authenticated copy of the record.[2] One of the means to which the English courts sometimes resort to check the improper use of the action for malicious prosecution is the refusal to the plaintiff of a copy of the record of his acquittal. This, however, is only done when in their opinion there was a probable cause for the prosecution.[3] It is not probable that American courts would undertake to exercise the same control over the records, but would leave this action, like all others, to be settled upon its merits and according to correct principles of law, when regularly before them for trial.[4]

[1] Stone v. Crocker, 41 Mass., 87 (1832); 2 Starkie's Ev., 913; Savill v. Roberts, 1 Salk., 14; 1 Ld. Raym., 374; Metcalf's Yelv., 105, note 2; Johnson v. Sutton, 1 T. R., 545; Purcell v. McNamara, 9 East, 861; Incledon v. Berry, 1 Campb., 203, note; Kerr v. Workman, Addison, 270 (1794).

[2] Stone v. Crocker, 41 Mass., 87 (1832).

[3] Granvelt v. Burrell, 1 Ld. Raym., 253; Jordan v. Lewis, 2 Stra., 1128.

[4] Stone v. Crocker, 41 Mass., 87 (1832).

§ 9. How is the question of probable cause to be tried.— (1) By the jury.— The functions of the court and jury are different and generally distinct; though sometimes in criminal cases they run into each other so that they cannot be clearly distinguished or separated. But in this action and others of the kind there is but little difficulty in drawing the line. If these functions encroach upon each other it will not be because their respective provinces are not separated by plain boundaries. What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court; the latter for the jury. The question must necessarily be submitted to the jury when the facts are in controversy, the court instructing them as to the law.[1]

(2) By the court.— It may happen that this and other mixed questions of law and fact need not and cannot properly be sent to a jury. Where the facts are undisputed, or where all the facts which the plaintiff's evidence conduces to prove do not show a want of probable cause, it becomes a mere question of law which the court must decide, and it would be useless and improper to take the opinion of a jury upon it, for if they found for the plaintiff the court would set aside the verdict, not so much because it was against evidence as because it was against law.[2]

§ 10. An action for malicious prosecution will not lie for merely preferring an accusation — The law stated by Wallace, J.— The gist of the action of malicious prosecution is the putting of legal process in force regularly for the mere purpose of vexation or injury, and the inconvenience or harm resulting naturally or directly from the suit or prosecution is

[1] Stone v. Crocker, 41 Mass. 84 (1832); 2 Starkie, Ev., 912; Johnstone v. Sutton, 1 T. R., 545 (1785); Candell v. London, 1 T. R., 520 (1785); Reynold v. Kennedy, 1 Wils., 232 (1753); Hill v. Yates, 2 Moore, 80; Isaacs v. Brand, 2 Stark. R., 167; Brooks v. Warwick, 2 Stark. R., 389; Reed v. Taylor, 4 Taunt., 616; Leggett v. Blount, 2 Taylor, 123; Munns v. Dufont, 2 Browne (Penn.), App., 42; 3 Wash. C. C. R., 31 (1811); Crabtree v. Horton, 4 Munf., 59 (1813); Kelton v. Bevins, Cooke (Tenn.), 90 (1812); Ulmer v. Lland, 1 Greenl., 135 (1821).

[2] Stone v. Crocker, 41 Mass., 85 (1832); Golding v. Crowle, Sayer, 1 (1751); Buller's Nisi Prius, 14.

the legal damage upon which it is founded. Some of the text-writers state that the action will lie whenever the defendant has made a charge of felony against the plaintiff with a view to induce a magistrate or tribunal to entertain it, whether any warrant or other process was issued or not.[1] Actions have been maintained in the nature of a conspiracy for procuring a false indictment and even for preferring a false charge of crime upon which the grand jury refused to indict. But the only decisions cited in support of the proposition that the action of malicious prosecution will lie although a criminal proceeding has not actually been instituted by the issuing of process, where the point actually arose, are in the *nisi prius* case of *Clarke v. Postan*, 6 Car. & P., 423, and in the case of *Dawson v. Vansandau*, 11 Weekly Rep., 516, in which, although no process was issued, the plaintiff was taken into custody and held for examination upon the charge. On the other hand, it was said by Patteson, J., in *Gregory v. Derby*, 8 Car. & P., 749, where there was a charge of stealing, upon which a warrant was issued against the plaintiff, that, "if the party was never apprehended, no action at all would lie;" and in *O'Driscoll v. McBurney*, 2 Nott & McC., 54, 55, it was said: "There can be no prosecution without an arrest." The only injury sustained by the person accused, when he is not taken into custody and no process has been issued against him, is to his reputation, and for such an injury the action of libel or slander is the appropriate remedy and would seem to be the only remedy. This is the view adopted by Hare & Wallace in their notes to American Leading Cases (vol. 1, p. 173), and the learned commentators state that slander or libel is the only appropriate remedy where a charge of felony has been made and warrant was not thereupon issued, and that malicious prosecution, and not slander or libel, is the remedy whenever a warrant has been issued. The question was fully considered by the supreme court of South Carolina in *Hayward v. Cuthbert*, 4 McCord, 354 — whether an action for malicious prosecution would lie founded on a criminal charge upon which no process was issued against the accused — and it was adjudged that it would not. In that case the charge was in the form

[1] Steph., Mal. Pros., 8; Add., Torts, § 856.

of an information laid before the magistrate to procure a warrant for the arrest of the plaintiff. To the same effect is the case of *Kneeland v. Spitzka*, 42 N. Y. Super. Ct., 470, where the question was decided in an appellate court. In the early case of *Ram v. Lamley*, Hut, 113, it was held that an action of slander could not be maintained for an oral charge of felony made to a justice of the peace upon an application for a warrant against the plaintiff, for the reason that, if words so spoken were to be held actionable, "no other would come to a justice of the peace to inform him of a felony." A defamatory statement spoken or written in a legal proceeding, civil or criminal, which is pertinent and material, is so unqualifiedly privileged that its truth cannot be drawn into question or malice predicated of it in an action for slander or libel.[1] If, upon considerations of public policy, such an action cannot be maintained upon the same considerations, no other action should lie. Without doubt, libel or slander will lie for an accusation to a magistrate when made with no *bona fide* intention of prosecuting it. Unless such facts can be shown by the person accused, or unless he is subjected to the vexation and expense of process against him, upon principle he ought not to be allowed to recover. The more generally approved doctrine is that for the prosecution of a civil action, maliciously and without probable cause, to the injury of the plaintiff, he may maintain an action for damages although there was no interference with his person or property.[2] The cases, however, which sustain this view do not countenance an action when the vexatious suit has not been actually instituted and prosecuted to such effect that the plaintiff has sustained pecuniary loss.[3]

§ 11. **Malice in this connection.**— Many acts derive their character from the temper, spirit and motive with which they

[1] Revis v. Smith, 18 C. B., 126; Lea v. White, 4 Sneed, 111; Garr v. Selden, 4 N. Y., 91; Hawk v. Evans, 76 Iowa, 593; 41 N. W. Rep., 368.

[2] Pangburn v. Bull, 1 Wend., 345; Whipple v. Fuller, 11 Conn., 582; Closson v. Staples, 42 Vt., 209; Eastin v. Bank, 66 Cal., 123; 4 Pac. Rep., 1106; Allen v. Codman, 139 Mass., 136; Marbourg v. Smith, 11 Kan. 554; Woods v. Finnell, 13 Bush, 629; Pope v. Pollock (Ohio), 21 N. E. Rep., 356; McCardle v. McGinley, 86 Ind., 538; McPherson v. Runyon (Minn.), 43 N. W. Rep., 392; Smith v. Smith, 20 Hun, 555; Newell on Slander, 500.

[3] Cooper v. Armour et al., 42 Fed. Rep., 215 (1890).

are done. It is these which give them their force and significance, and render them harmless or injurious, according as the intention with which they were done was innocent or malicious. A man who wounds another by carelessness does much less injury, and would be liable to a very different measure of damage, from one who wilfully inflicts the same or even a smaller wound purposely, and with a design to disgrace the person whom he attacked. In all such cases, it is not merely the act which constitutes the injury and forms the proper subject and basis of damage, but it is also the evil intent and motive with which it is done that wounds the feelings and injures the reputation, and forms a just and in some cases a material ground upon which damages can be properly claimed and given.[1]

§ 12. Evidence of malice — It is sufficient if the action alleged to be malicious is commenced maliciously. — In actions for malicious prosecutions, where malice is an essential element, the burden of proving which is upon the plaintiff, it is, as a general rule, sufficient to prove that the action was commenced maliciously. It is not necessary to sustain the action to show that the suit was maliciously continued,[2] but the fact of such continuance may be shown for the purpose of increasing the damages.

THE RULE ILLUSTRATED.—

An instruction which increased the burden of proof.

Finley brought an action against the St. Louis Refrigerator Company for a malicious prosecution in the St. Louis criminal court for obtaining money under false pretenses. On the trial the court gave, among the instructions at defendants' instance, the following: "Although the plaintiff succeeds in satisfying you from the evidence that the prosecution complained of was commenced by defendants without probable cause, yet you will find your verdict for the defendants unless you further find from the evidence that the defendants commenced and continued the prosecution against the plaintiff maliciously." There was a finding for defendants and judgment accordingly, from which plaintiff appealed.

In reversing the judgment the court say: "An error was made in the instruction for defendants which told the jury to find for them unless they found from the evidence that defendants 'commenced and continued the

[1] Smith v. Hyndman et al., 64 Mass., 554 (1852); Bond v. Chapin, 8 Met., 31 (1844).

[2] Finley v. St. L. Ref. Co., 99 Mo., 559; 13 S. W. Rep., 87 (1890).

prosecution against the plaintiff maliciously.' Malice is an essential fact to be proven to maintain an action for malicious prosecution, though it may often be inferred as a fact from the proofs which establish a want of probable cause; but it was not vital to plaintiff's recovery that he should show that defendants commenced and continued the prosecution maliciously. If he proved that it was either so commenced or continued by them, it would be sufficient to support his case under the pleadings and evidence. The instruction in question required the plaintiff to bear a greater burden of proof than the law in strictness demanded. It is hence necessary to reverse the judgment." Finley v. St. L. Refrigerator Co. et al., 93 Mo., 559; 13 S. W. Rep., 87 (1890).

APPLICATION OF THE LAW.—

(1) *The malice necessary to be shown is not necessarily revenge, etc.— Plaintiff's character.*

In an appeal from a judgment in an action for malicious prosecution, it appeared by the bill of exceptions that the court, after having instructed the jury as to what would constitute probable cause, and that both want of probable cause and malice must concur before the action could be maintained. gave the jury the following instruction: "It is not necessary that there should have been any spite or hatred or bad feeling on the part of the defendant towards the plaintiff to constitute malice, but any wrongful act, done intentionally, tending to injure another, without just cause or excuse, is malicious;" which was excepted to by defendant, and constitutes the main ground of error relied upon for reversal.

In discussing the correctness of this instruction, Lord, J., said: "A recurrence to definition will aid in testing the correctness of this instruction. What is meant by 'malice,' in the sense of the law? 'Malice,' in common acceptation, means ill-will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. Bromage v. Prosser, 4 Barn. & C., 255. Chief Justice Shaw defined it thus: 'Malice, although in its popular sense it means hatred, ill-will or hostility to another, yet, in its legal sense, has a very different meaning, and characterizes all acts done with an evil disposition, a wrong or unlawful motive or purpose; the wilful doing of an injurious act without lawful excuse.' Com. v. York, 9 Metc., 104. Judge Story, thus: 'Malice, in the sense of the law, does not necessarily presuppose in a party personal hatred or revengeful spirit against the party injured. It is sufficient to constitute it a malicious act that it is wrongfully and wilfully done, with a consciousness that it is not according to law or duty.' Wiggin v. Coffin, 3 Story, 7. Hence it is said that the intentional doing of a wrongful act, with knowledge of its character, and without cause or excuse, is malicious. Rounds v. Railroad Co., 3 Hun, 335. It imports nothing more than the wicked and perverse disposition with which the party commits the act. Com. v. York, *supra*. But it need not imply 'malignity' nor even 'corruption' in the appropriate sense of these terms. Any improper motive constitutes malice, in the sense it is here used. Culbertson v. Cabeen, 29 Tex., 256. The malice necessary to be shown in order to maintain this action [malicious prosecution] is not necessarily revenge, or other base and malignant pas-

sion. Whatever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, it is in legal contemplation malicious. That which is done contrary to one's own conviction of duty, or with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or, in the language of the charge, to do a wrong and unlawful act, knowing it to be such, constitutes legal malice. Wills v. Noyes, 12 Pick., 327.

"Malice, then, in the enlarged sense and meaning of the law, is not restricted only to anger, hatred and revenge, but includes every other unlawful and unjustifiable motive; so that it may be said that any motive, other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of a person who acts under the influence of it. So much with reference to definition, or to what is meant by the team 'malice' or 'malicious' in the legal sense.

"But the term 'malice' has, in law, a twofold signification. There is what is known as 'malice in law,' or 'implied malice,' and 'malice in fact,' or 'actual malice.' 'Malice in law' denotes a legal inference of malice from certain facts proved. It is a presumption of malice which the law raises from an act unlawful in itself which is injurious to another, and is declared by the court. 'Malice in fact,' or 'actual malice,' relates to the actual state or condition of the mind of the person who did the act, and is a question of fact, upon the circumstances of each particular case, to be found by the jury. In actions for malicious prosecutions there is no such thing as malice in law, but malice in fact must be proved, and its existence purely a question of fact for the jury. Ritchey *v.* Davis, 11 Iowa, 124. But in this form of action malice is not considered in the sense of spite or hatred against an individual, but of *malice animus*, and as denoting that the party is actuated by improper and indirect motives. Mitchell v. Jenkins, 5 Barn. & Adol., 594. To prove actual malice it is not necessary, therefore, that the prosecution complained of should proceed from hatred or ill-will to the plaintiff, but it may be inferred from any improper and unjustifiable motive which the facts disclose influenced the conduct of the defendant in instituting the prosecution. 'But it is well established,' said Libbey, J., 'that the plaintiff is not required to prove 'express malice,' in the popular signification of the term; as that defendant was prompted by malevolence, or acted from motives of ill-will, resentment, or hatred towards the plaintiff. It is sufficient if he proves it in its enlarged sense.' 'In a legal sense, any act done wilfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious.' Com. v. Snelling, 15 Pick., 327. 'The malice necessary to be shown in order to maintain this action is not necessarily revenge, or other base and malignant passion. Whatever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is, in legal contemplation, 'malicious.' Wills v. Noyes, 12 Pick., 324; Pullen v. Glidden, 66 Me., 202. See, also, Page v. Cushing, 38 Me., 523; Humphries v. Parker, 52 Me., 502; Mitchell v. Wall, 111 Mass., 492.

"While it is true that express or actual malice refers or relates to the mental state or purpose of the party who committed the act, and its existence must be proved, the law does not require direct evidence of such

mental state or purpose; but the character of the act itself, with all its surrounding facts and circumstances, may be inquired into for the purpose of ascertaining the motive or purpose which influenced the mind of the party in committing the act; and if, upon a full consideration of these, that motive is found to be improper and unjustifiable, the law authorizes the jury to find it was malicious. If, for instance, an officer should arrest a party, not out of spite or any spirit of hatred or revenge, but for the purpose of increasing his fees or magnifying his importance and administering to his vanity, the motive which prompted such conduct would be improper and wrongful, and, in a legal sense, malicious. In this form of action, therefore, malice has reference to the mind and judgment of the defendant in the particular act charged, and is one of intent and open to the jury. Barron v. Mason, 31 Vt., 197. It is not the guilt of the prosecuted but the intention of the prosecutor which is the subject of examination in this action. McMahan v. Armstrong, 2 Stew. & P., 154. And what that intention was, whether malicious or justifiable, is for the jury, and not for the court, to infer from the facts and circumstances of the case. In a word, whether the defendant acted with malice is never a legal presumption, whatever may be the facts, but is always a question for the consideration of the jury.

"The appellant upon the trial of the action called as a witness T. H. Hill, and asked him to state 'whether or not he was acquainted with the general reputation of the respondent for honesty and integrity in the community where he resided, on or about the 29th day of December, 1883;' to which question the counsel for the respondent objected on the ground that it was incompetent and irrelevant. The court sustained the objection, and the defendant excepted. This is also assigned as error. After making such ruling the court stated that it would permit the defendant to show what 'the plaintiff's general reputation was as to his being a violator of the law about the time the arrest complained of was made.' This arrest was for embezzlement. The object of the inquiry, as suggested by the question, was apparent and proper. Mr. Sutherland says: 'According to the later authorities, the defendant may prove the general bad reputation of the plaintiff, both to rebut the proof of want of probable cause, and in mitigation of damages.' 'The same facts which would raise a strong suspicion in the mind of a cautious and reasonable man against a person of notoriously bad character for honesty and integrity would make a slighter impression if they tended to throw a charge of guilt upon a man of good reputation.' 3 Suth. Dam., 708, and authorities cited in note. The judgment must be reversed." Gee v. Culver, 12 Oregon, 228; 11 Pac. Rep. (1885). See Gonzales v. Cobliner, 68 Cal., 151; 8 Pac. Rep., 697, and note, 700–705 (1885).

Malice may be inferred from want of probable cause. Heap v. Parish (Ind.), 8 N. E. Rep., 549.

The want of probable cause, without malice, is not sufficient to sustain an action for malicious prosecution, and malice must be proved as a fact; for, while it may be inferred from want of probable cause, its existence is for the jury. It cannot be inferred from mere want of probable cause, when disproved by other circumstances. Emerson v. Cochran, 111 Pa. St., 619; 4 Atl. Rep., 498 (1886).

Maliciously suing out an attachment without probable cause.

John Nelson sued out a writ of attachment and caused it to be levied upon the goods of Sigvart O. Danielson exempt from levy and sale upon an affidavit that Danielson was indebted to him in a certain sum then due, and that he was about to leave the state with the intention of having his effects removed from the state, when, in fact, a part of the indebtedness was evidenced by a promissory note not then due, and Danielson was, at that time, seeking employment, and was making no preparations to leave the state, which facts were known to Nelson when he sued out the writ, and Danielson had offered to give a mortgage to secure the indebtedness, which Nelson had agreed to accept, but sued out the attachment before the time agreed upon for the giving of the mortgage. It was held, in an action for malicious prosecution at the suit of Danielson, that a jury would be authorized to find that the creditor, Nelson, sued out the writ without probable cause, and was actuated by malice, and that a verdict for $750 was not excessive. Nelson v. Danielson, 82 Ill., 545 (1876).

§ 13. The action regarded with jealousy.— Actions for malicious prosecutions are regarded by law with jealousy. Lord Holt said more than two hundred years ago that they "ought not to be favored but managed with great caution." Their tendency is to discourage prosecution for crime, as they expose the prosecutors to civil suits, and the love of justice may not always be strong enough to induce individuals to commence prosecutions, when, if they fail, they may be subjected to the expense of litigation, if they be not muloted in damages. Anciently it was doubted whether such action would lie unless in a case of conspiracy.[1] But it seems the better opinion always was in favor of sustaining them either with or without a conspiracy.[2]

§ 14. The action not favored in law.— In an action for a malicious prosecution against one in the name of the state, the averment on the part of the plaintiff that the complaint was made without reasonable cause lies at the foundation of the suit; and although it is in form a negative proposition, it is incumbent on the plaintiff to establish it by satisfactory proof. Suits by which the complainant in a criminal prose-

[1] Stone v. Crocker, 41 Mass., 81 (1832); Knight v. Germain, Cro. Eliz., 70; Payne v. Rochester, Cro. Eliz., 870; Henry v. Burstal, Ld. Raym., 180.

[2] Fitzherbert, N. B., 114; Daw v. Swaine, Sid., 424; Coxe v. Wirall, Yelv., 105; Cro. Jac., 193; Arundell v. Tregone, Yelv., 117; Saville v. Roberts, 1 Ld. Raym., 374; Stone v. Crocker, 41 Mass., 81 (1832).

cution is made liable to an action for damages, at the suit of the person complained of, are not to be favored in law, as they have a tendency to deter men who know of breaches of the law from prosecuting offenders, thereby endangering the order and peace of the community.[1]

§ 15. The action to be carefully guarded and its true principles strictly adhered to.— Now, nothing is better settled than that, upon proper facts, the action may be maintained. And with the best reason; for what greater private injury can any man suffer than to be arraigned for a felony or other crime, exposed to the danger of a conviction, and subjected to the expense, vexation and ignominy of a public trial; and what act can more deserve the severest animadversion of the law than the prostitution of its process to the gratification of malice at the expense of the innocent? But it should be carefully guarded and its true principles strictly adhered to, that it may not, on the one hand, impede the free course of public justice, nor, on the other, suffer malicious and causeless prosecutions to escape its grasp.[2] While the court should not discourage actions for malicious prosecutions by establishing harsh rules of evidence, or by the rigid principles of law, by force of which a party may be deprived of an important remedy for a real injury, at the same time, all proper guard and protection should be thrown around those who, in obedience to the mandates of duty, may be compelled to originate and carry on a criminal prosecution which may from any cause terminate in favor of the accused.[3]

§ 16. Rights of persons to institute civil suits or criminal prosecutions.—

(1) IN CRIMINAL MATTERS every person, being interested in the public order, has the right by law, upon probable cause, to make a complaint against an offender.[4]

(2) IN CIVIL MATTERS every person believing himself to have a claim against another, having probable cause for such belief, has a right by law to sue therefor; subject only, if his claim be adjudged false, to pay the costs of suit.[5]

[1] Cloon v. Gerry, 79 Mass., 201 (1859).

[2] Stone v. Crocker, 41 Mass., 81 (1832).

[3] Hurd v. Shaw, 20 Ill., 354 (1858).

[4] Cooley on Torts, 180 (1879).

[5] Cooley on Torts, 180 (1879).

(3) IN BANKRUPTCY MATTERS any person, being a creditor or having probable cause to believe himself such, may institute proceedings against his debtor if he have probable cause to believe that his debtor has committed an act of bankruptcy.[1]

§ 17. Who are liable to respond in damages for malicious prosecution.— The general rules of law governing the liability of persons for injuries committed against the person and property of others apply, of course, equally to the wrongs called malicious prosecutions.

§ 18. Attorneys personally liable when.— The rule by which attorneys may be held liable for malicious prosecutions is clearly laid down by Tindal, C. J., in *Stockley v. Harnidge*, 34 Eng. C. L. R., 276. It was there held that if the attorneys who commenced the suit alleged to be malicious knew that there was no cause of action, and, knowing this, "dishonestly and with some sinister view, for some purpose of their own, or for some other ill purpose which the law calls malicious, caused the plaintiff to be arrested and imprisoned," they were liable. To protect attorneys beyond this would be authorizing those who are the most capable of mischief to commit the grossest wrong and oppression. It is true that when the attorney acts in good faith in prosecuting a claim which his client believes to be just, and is actuated only by motives of fidelity to his trust, he ought not to be held liable, although he may have entertained a different opinion as to the justice or legality of the claim. When the client will assume to dictate a prosecution upon his own responsibility, the attorney may well be justified in representing him so long as he believes his client to be asserting what he supposes are his rights, and is not making use of him to satisfy his malice. But where an attorney submits to be made the instrument of prosecuting and imprisoning a party against whom he knows his client has no just claim, or cause of arrest, and that the plaintiff is actuated by illegal or malicious motives, he is morally and legally just as much liable as if he were prompted by his own malice against the injured party. If he will knowingly sell himself to work out the malicious purposes of another, he is a partaker of that malice as much as if it originated in his own

[1] Stewart v. Sonneborn, 98 U. S., 187 (1878).

bosom. The attorney, then, cannot always justify himself under the instructions of his client, no matter how positive they may be. Nor is it always necessary to show a conspiracy between the attorney and client, although some courts have treated that as necessary. An attorney may so act under his general employment to enforce a legal claim as to render himself alone liable for a malicious prosecution or arrest. In most of the states, it is only under particular circumstances that a debtor is liable to be arrested; and if an attorney in the course of the prosecution of a just claim, and without the instruction or knowledge of his client, and without any reasonable or probable cause for so doing, maliciously causes the debtor to be arrested, it would be monstrous to hold that he might shield himself from liability because his client had not conspired with him to commit the wrong. Where the attorney chooses to act upon his own responsibility under his general retainer, and without specific instructions, and caused the debtor to be arrested, the act becomes his own rather than his client's, and he must see to it that he does not proceed without reasonable or probable cause, and especially where he is prompted by his malice. It will not do to turn the injured party round to seek his remedy against the client, who may be a thousand miles off and in a foreign country or distant jurisdiction, and who may not have directed the arrest, and may be entirely innocent of any wrong.[1]

APPLICATIONS OF THE LAW.—

Liability of attorneys for suing out a writ of ne exeat.

Jacob Alberts and others, of Baltimore, Md., had a claim against Francis Dunlap, and they put it into the hands of Marsh & Wright, as attorneys, for collection. Upon their own responsibility, and without any special instructions from their clients, the attorneys falsely and maliciously, and without having any reasonable or probable cause for so doing, sued out a writ of *ne exeat*, and falsely and maliciously caused the arrest of Dunlap. After his release, Dunlap brought an action for malicious prosecution against the attorneys for suing out the writ, etc. On demurrer to the declaration they were held liable.

Caton, J.: "It cannot and ought not to be said, if it be established by proof that the defendants sued out the writ without a cause which would

[1] Burnap v. Marsh et al., 13 Ill., App., 244 (1886); Peck v. Choteau, 535 (1852); Staley v. Turner, 21 Mo. 91 Mo., 138 (1886).

justify them in so doing, and from motives of malice, and for the purpose of vexing and harassing the plaintiff, and caused him to be arrested thereon, the defendants are not liable for the injury thus wantonly inflicted. It must be a just reproach of the law to hold that attorneys could thus act with impunity." Burnap v. Marsh et al., 13 Ill., 535 (1852).

§ 19. The malice of the client does not render the attorney liable.— The fact that the client is actuated by malice, and the attorney knows it, cannot make the attorney liable; for malice alone would not even make out a case against the client. If there is probable cause for the prosecution, then the suit for malicious prosecution must fail, though malice be clearly shown; and it must follow that knowledge on the part of the attorney that the client is actuated by malicious motives is not sufficient to make the attorney liable. But if the attorney knows that the client is actuated by malice, and also knows that there is no cause for the prosecution, the dictates of common honesty require that he also should be made accountable. As said in an Illinois case:[1] "Where the client will assume to dictate a prosecution upon his own responsibility, the attorney may well be justified in representing him so long as he believes his client to be asserting what he supposes are his rights, and is not making use of him to satisfy his malice. But when an attorney submits to be made the instrument of prosecuting and imprisoning a party against whom he knows his client has no just claim or cause of arrest, and that the plaintiff is actuated by illegal or malicious motives, he is morally and legally just as much liable as if he were prompted by his own malice against the injured party." The rule is more favorably stated for the defendant in Massachusetts,[2] where the following conclusion is reached: "In order, therefore, to charge an attorney upon this ground [a conspiracy to bring a groundless suit], it must not only appear that there was an agreement to bring an action which was in fact groundless, and which the attorney supposed to be groundless, but that it was agreed to bring an action understood by both parties to be groundless, and brought as such." We are not prepared to go further than is indicated in the extract from the Illinois case, and think it asserts a salutary and reasonable rule.[3]

[1] Burnap v. Marsh, 13 Ill., 538.
[2] Bicknell v. Dorion, 16 Pick., 478.
[3] Peck v. Chouteau, 91 Mo., 138; 3 S. W. Rep., 77 (1887).

APPLICATION OF THE LAW.—

Attorney's liability for malicious prosecution.

In an action for malicious prosecution, in which Charles P. Chouteau and John M. Glover were defendants, judgment was for the defendants, and the plaintiff appealed. The substantial averments were that on the 18th July, 1882, the plaintiff was indicted upon a charge of fraudulent conspiracy with others to defraud Alice Livingston and others interested in a corporation known as the Windsor Hotel Company; that he was arrested on the 26th July, 1882, and tried and acquitted on the 21st December, 1882, in the court of criminal correction of St. Louis; that Chouteau was a member of the grand jury which returned the indictment, and Glover assisted in its procurement; that the defendants maliciously and without probable cause procured the indictment, and caused the plaintiff to be arrested and prosecuted thereunder. The answer of Chouteau was a general denial, with the averment that at and prior to the alleged grievances the general reputation of the plaintiff for honesty and integrity was bad. Glover made a like answer, with the additional averment that whatever he did was done as a duly enrolled and practicing attorney, and not otherwise.

In affirming the judgment the court say: "In this case it is to be observed that, in so far as it can be said, in any view of the case, that Mr. Glover acted outside of or beyond his professional capacity, the instructions given are full and favorable to the plaintiff, and no other instruction should have been given upon that branch of the case. The [refused] instructions do not predicate a right to recover upon the fact that Mr. Glover knew that the action was groundless, and that he knew that Chouteau acted in the matter from malicious motives, but they say that if he knew, 'or by the exercise of reasonable diligence might have known, that there were no facts sufficient to constitute probable cause,' etc. The attorney has a right to advise and act upon the facts which he gets from his client, and it is not his duty to go elsewhere for information. According to these instructions an attorney could not with safety advise the arrest of any criminal until he had exhausted reasonable diligence in the search for information as to whether a crime had been committed. He would stand on no other or different ground from that of the client. The statement of such a proposition is enough to condemn it. We state again that the attorney has a right to advise and act upon such information as the client reveals to him. Nothing short of complete knowledge on the part of the attorney that the action is groundless, and that the client is acting solely through illegal or malicious motives, should make him liable in these actions. As said by Mr. Justice Bradley in Campbell v. Brown, 2 Woods, 350: 'If attorneys cannot act and advise freely without constant fear of being harassed by suits and actions at law, parties could not obtain their legal rights.'" Peck v. Chouteau, 91 Mo., 138; 3 S. W. Rep., 577 (1887).

§ 20. Materiality of malice in actions for prosecuting suits in the name of third persons without their authority.— It is undoubtedly true that actions for arresting and

imprisoning a person without authority from the party in whose name and favor the action is brought may well be maintained without proof that the defendant was actuated by malice. The gist of the action in such cases is not malice, but the want of authority. It has therefore been held that, though a party supposed he had authority, and acted upon that supposition, still, if the defendant suffers injury from the prosecution of the unauthorized suit against him, he may maintain an action for his actual damages, but for nothing more. And this constitutes the distinction between an action for commencing a suit without authority and an ordinary action for malicious prosecution. The former will lie upon proof of want of authority alone, in the absence of malice, and even where a good cause of action existed, for the amount of damages actually incurred; but the latter cannot be maintained without proof of malice and want of probable cause.[1] But it by no means follows that evidence of actual malice is incompetent in an action for commencing and prosecuting a suit without authority. To exclude such evidence would be equivalent to saying that an act done innocently and without evil design inflicted no less injury upon a party than the same act committed wickedly and with a deliberate purpose to insult and degrade him.[2]

§ 21. Criminal informants protected — Honest belief or strong grounds of suspicion.— A citizen having reason to believe, or entertain a strong suspicion, upon information or popular report, that a crime has been committed, must be permitted to appear and direct the attention of the grand jury toward its investigation, without exposure to the peril — in case of a failure of conviction, or it turning out that the information upon which he acted was not founded in fact — of being held liable for malicious prosecution, and of being mulcted in ruinous damages. The criminal law does not enforce itself. It requires the agency of some informant to put it in execution. There would be little of efficiency of execution of much of our criminal law, as, for instance, the law for the suppression of gambling, the unlawful sale of intoxi-

[1] Bond v. Chopin, 8 Met., 31 (1844); Smith v. Hyndman, 64 Mass., 554 (1852).

[2] Smith v. Hyndman, 64 Mass., 554 (1853).

cating liquors, the keeping of houses of ill-fame, and the like, if those only might move with impunity in the matter of their enforcement who had actual cognizance of the infraction of the law. Such persons, from motives of one kind or another, are rarely found to be voluntary helpers in the administration of such laws. Whatever aid comes from that source is, for the most part, an enforced one, under the compulsory power of legal process, to appear and testify. All that is required is an honest belief, or strong ground of suspicion, of the plaintiff's guilt, and a reasonable ground of the belief or suspicion, and that may be upon information from others as well as from personal knowledge.[1]

APPLICATION OF THE LAW.—

(1) *Prosecution for felony — Prisoner discharged — Action for malicious prosecution not sustained.*

In Burlingame v. Burlingame, to maintain his action the plaintiff proved that March 7, 1825, the defendant caused a warrant against the plaintiff to be issued on the defendant's oath by a justice, upon which, the plaintiff being arrested and brought before the justice, the defendant was sworn and testified circumstantially to the commission of the crime. The plaintiff then went into his defense, which consisted of proof to show that the defendant was very infirm at the time he alleged the offense to have been committed; that he was weak and nearly blind, forgetful, and his mind very much impaired by age, so that he was liable to be deceived, and could not distinguish as to what he had sworn at the distance he represented himself as standing. The defense occupied three or four hours, and counsel summed up on the part of the accused, who was then discharged by the justice.

The plaintiff also proved that after the acquittal the defendant insisted to several persons who were present at the hearing before the magistrate, that though the plaintiff had been acquitted, the charge and what he had sworn were true, and threatened further proceedings.

The judge decided that calling witnesses and going fully into the defense was an admission of probable cause, and that the count for a malicious prosecution was not sustained. And he nonsuited the plaintiff.

Woodworth, J.: On the count for malicious prosecution (there was a count for slander), I think the action cannot be sustained. We cannot say there was a want of probable cause, although it may satisfactorily appear that the defendant, owing to defective sight, advanced age and bodily infirmity, was mistaken. There is no sufficient reason for believing that he

[1] Harpham et al. v. Whitney, 77 Ill., 32 (1875); Murray v. Long, 1 Wend., 140 (1828); Bacon v. Towne et al., 4 Cush., 217 (1849); Foshay v. Ferguson, 2 Denio, 617 (1846).

was not persuaded of the truth of the facts related by him under oath; and though the plaintiff was acquitted, it is possible the defendant may have been correct. At any rate his statement may be considered as probable cause. Burlingame v. Burlingame, 8 Cow., 141 (1828), *cited* in 9 N. H., 34; 31 Am. Dec., 221; 6 T. & C., 667; 3 T. & C., 265; 2 Wend., 426; 56 N. Y., 456; 4 Hun, 391; 48 Barb., 42; 9 L. C. P. Co., 339.

(2) *Prosecutor liable where complaint states no offense.*

Jesse Ryan and Annie, his wife, sued George Crawford for damages for malicious prosecution.

Defendant was the owner of premises on North Eleventh street, and plaintiff was the lessee of the adjoining premises. The trouble between the parties arose over a clothes-line and a clinging vine. Defendant threw the line and vine off the lattice work on top of the division fence, and Mrs. Ryan put them back again. Crawford then went to Magistrate Myers' office, and made affidavit "that one Annie Ryan has destroyed part of my property, and further deponent saith not." The magistrate thereupon issued his warrant against Annie Ryan for "M. mischief," and she was arrested and held to bail to answer at court. Not obtaining bail, she remained in custody part of one afternoon, the whole of the night, and part of the following day. The bill was ignored by the grand jury.

Upon the trial the court declined to charge, as requested by defendant's counsel, "that, no crime or misdemeanor having been charged in the affidavit, the fault was that of the magistrate, and the verdict should be for the defendant." In the course of the general charge the court said: "If there was no probable cause, you can infer malice. . . . I see myself no probable cause to justify an arrest for malicious mischief."

Judgment for $1,000; defendant took a writ of error.

PER CURIAM. The law was correctly declared. The facts were properly submitted to the jury. Judgment affirmed. Crawford v. Ryan, 7 Atl. Rep., 745 (1887).

§ 22. The sufficiency of the complaint or indictment in a criminal prosecution as a basis in an action for malicious prosecution.— There are authorities to the effect that an action for malicious prosecution will not lie for instituting a prosecution before a court or magistrate having no jurisdiction to entertain it.[1] Other authorities hold that in such case the action will lie.[2]

There is some authority for the proposition that, to serve as a basis for the action, the prosecution must be by a suffi-

[1] Bixby v. Brundige, 2 Gray, 129; Marshall v. Betner, 17 Ala., 832.

[2] Morris v. Scott, 21 Wend., 281; Hays v. Younglove, 7 B. Mon., 545; the former of the cases relying upon and citing from Smith v. Cattle, 2 Wils., 376, that "the sting of all these kinds of actions is malice and falsehood, and the injury done in pursuance thereof."

cient indictment or complaint.[1] The weight of the authorities is, however, the other way, and good sense and reason are with these authorities; for when one maliciously, and without probable cause, subjects another to a criminal prosecution, the injury is the same whether it is instituted on a false statement of facts or a false conclusion of law. If the reason for the action lay solely in the danger of punishment in which the man is put, it might be otherwise.[2] But the action lies because of the disgraceful imputation put upon him, the injury caused by his arrest, and the trouble and expense he is put to in defending himself. Of course the complainant will not be liable if he does not procure the criminal process to issue; as, if he files a complaint in a civil action, and the magistrate thereupon, of his own suggestion, and without being moved to it by the complainant, issues a criminal process on the complaint, the complainant will not be liable, for the act is that of the magistrate alone. But, if the complainant procure the process to issue, he ought to be responsible for all the consequences, even though the facts stated in his complaint do not justify it.[3]

APPLICATION OF THE LAW.—

(1) *Complaint showing no offense punishable by law.*

On the trial of an action for malicious prosecution in procuring plaintiff to be arrested for a criminal offense, a motion was made by the defendant for judgment on the pleading. It was denied, and this is alleged as error. The answer sets forth a copy of the complaint made by this defendant in the criminal prosecution, and the reply admits it to be a copy. That complaint, made to the municipal court of Minneapolis, in terms charged this plaintiff with having wilfully, unlawfully, wrongfully and with intent to defraud this defendant, and without his consent, carried away and con-

[1] Leigh v. Webb, 3 Esp., 165, in which case the information contained no direct charge, in terms, of a crime, and the facts stated in it showed only a cause of action in trover.

[2] Chambers v. Robinson, 2 Strange, 691; Jones v. Gwynn, 10 Mod., 148; Pippet v. Hearn, 5 Barn. & Ald., 634, the court in this case saying: "For in either case, whether the indictment be good or bad, the plaintiff is equally subjected to the disgrace of it, and put to the same expense in defending himself against it." Wicks v. Fentham, 4 Term R., 247; Collins v. Love, 7 Blackf., 416; Ewing v. Sanford, 19 Ala., 605; Forrest v. Collier, 20 Ala., 175.

[3] Potter v. Gjertsen, 37 Minn., 386; 34 N. W. Rep., 746 (1887).

cealed certain personal property, having previously conveyed the same to this defendant and another by his deed of chattel mortgage, which was attached to and made part of that complaint, the mortgage being in full force and the debt unpaid, contrary to the statute, etc. What was called a mortgage in, and attached to, the complaint, was not a mortgage, but a contract for a conditional sale by this defendant and his partner to this plaintiff; the title to remain in the former till the price should be paid, and the possession to be in the latter till default in payment, or till the property should be removed from a certain place without the consent of the former. Taking the complaint and the instrument attached to it together, they showed no act punishable as a crime. The defendant, in support of his claim that the court erred in denying his motion for judgment on the pleadings, insists on this proposition: that an action for malicious prosecution will not lie for instituting a criminal prosecution by a complaint which does not show an offense committed. On appeal Gilfillan, C. J., held that the trial court was right in denying the motion. Potter v. Gjertsen, 37 Minn., 386; 34 N. W. Rep., 746.

(2) *The action lies when the complaint upon which the prosecution was commenced did not state a criminal offense.*

Bell sold Keepers a tract of land and a barn, which Keepers was to move on the land, and occupy and maintain as a canning factory, and was to pay, as the purchase price therefor, $40 per month until the premises were paid for. Keepers made default in the payments, and desired to remove from the property. The contract provided that upon a failure to make payments the contract might be terminated, Keepers to forfeit all payments made as liquidated damages. The contract was terminated, and Keepers moved from the premises all the machinery and fixtures placed thereon by him, and also partitions and sheds attached to and made a part of the barn. While this removal was going on, Bell filed a complaint, and procured his arrest, and afterwards failed to appear and prosecute the action. Keepers was discharged. He then brought an action for malicious prosecution. Verdict in favor of Keepers for $500. Bell prosecuted a writ of error.

Clogston, C.: The prosecution in question was commenced by Bell upon the following complaint:

"*State of Kansas, County of Wyandotte — ss.:* Simeon B. Bell, of lawful age, being first duly sworn, says that at the county of Wyandotte and state of Kansas, and on or about the 24th day of March, 1885, one Keepers did unlawfully and wilfully enter into and destroy personal property, and trespass upon the premises of the affiant, contrary to statute in such case made and provided. S. B. BELL."

Upon which a warrant was issued substantially following the complaint, and it is now claimed that this complaint does not state a criminal offense, and for this reason plaintiff insists that no action for malicious prosecution can be maintained for the arrest made thereunder. This is no longer an unsettled question in this state. This court has repeatedly held that it could not permit a complainant, after procuring a warrant to issue on his

complaint, to say, in answer to a charge of malicious prosecution, that the complaint charges no crime. A void process procured through malice, and without probable cause, is even more reprehensible, if possible, than if it charged a criminal offense. The wrong is not in the charge alone, but more in the object and purposes to be gained, and the intention and motive in procuring the complaint and arrest. The contents of the complaint, when maliciously made without good cause, are of but little consequence, and can give no protection. Parli v. Reed, 30 Kan., 534; 2 Pac. Rep., 635; Shaul v. Brown, 28 Iowa, 37; Bauer v. Clay, 8 Kan., 580; Bell v. Keepers, 37 Kan., 64; 14 Pac. Rep., 543 (1887).

§ 23. Will the action lie for maliciously, etc., prosecuting a civil suit? — Here the decisions of American courts are not in unison, but the more generally approved doctrine seems to be that, for the prosecution of a civil action maliciously and without reasonable or probable cause, to the injury of a party, he may maintain an action for damages, though there was no interference with his person or property.[1]

§ 24. Will the action lie? — The subject continued — A conclusion from all the authorities. — Mr. John D. Lawson, in an able article on this subject in the American Law Register,[2] says: "We have now reviewed all the American cases *pro* and *con*, and the weight of authority appears to be against the right of action for the unfounded and malicious prosecution of an ordinary civil action. With the majority are all but one of the text-writers. We have cited Swift, Townsend, Addison and the editors of the American Leading Cases, who follow the English adjudications; Mr. Weeks, who limits the right to 'extremely vexatious suits where special damage has been actually suffered;' and Judge Cooley, who discourages the remedy without positively denying the right. On the other side is Mr. Hilliard, who evidently favors the action, but unfortunately relies upon cases which do not sustain it at all. Of the thirteen cases we have just examined, three — *Taylor*

[1] Cooper v. Armour, 42 Fed. Rep., 215 (1890); Pangburn v. Bull, 1 Wend. (N. Y.), 345 (1828); Whipple v. Fuller, 11 Conn., 582 (1836); Closson v. Staples, 42 Vt., 209 (1869); Eastin v. Bank, 66 Cal., 123; 4 Pac. Rep., 1106 (1884); Allen v. Codman, 139 Mass., 136 (1885); Marbourg v. Smith, 11 Kan., 554 (1873); Woods v. Fennell, 13 Bush (Ky.), 629 (1878); Pope v. Pollock, 46 Ohio St., 367; 21 N. E. Rep., 356 (1889); McGardle v. McGinley, 86 Ind., 538 (1882); McPherson v. Runyon, 41 Minn., 524; 43 N. W. Rep., 392 (1889); Smith v. Smith, 20 Hun (N. Y.), 555.

[2] New Series, vol. 21, p. 368 (1882).

v. Wilson (Coxe, 362), in New Jersey; *Thomas v. Rouse* (2 Brev., 75), in South Carolina; and *McNamee v. Minke* (49 Md. 122) (1878), in Maryland — hold that the action is not sustainable *because* it is not; three — *Woodmansie v. Logan* (1 Penn., 68) and *Potts v. Imlay* (1 South., 330), in New Jersey, and *Ray v. Law* (1 Pet. C. C., 207), in the federal court — that it will not lie because the defendant has his costs, which in England is considered a sufficient remedy. In the New York case of *Vanduzer v. Linderman* (10 Johns., 106), the opinion of the court is *obiter*, and at the same time far from clear; and in the Kentucky case of *Coxe v. Taylor* (10 B. Mon., 17), the defendant complained of the malicious issuing of an injunction which had caused him special damage. In but five cases — *Pangburn v. Bull* (1 Wend., 345), in New York; *Whipple v. Fuller* (11 Conn., 582), in Connecticut; *Closson v. Staples* (42 Vt., 209), in Vermont; *Marburg v. Smith* (11 Kan., 354), in Kansas, and *Woods v. Finnell* (13 Bush, 629), in Kentucky — do the courts recognize that here there is a wrong for which there should be a remedy. But while the weight of authority denies the action the weight of reason allows it. We have set out at length the argument of the courts *pro* and *con*, and no one can read them without being struck with the weakness of the position assumed by the majority of the American courts that have been called upon to deal with this question, and of the writers who have stated the law as they understood the decisions. Take away the reason upon which the English cases stand, viz., that the defendant's damages are assessed to him by his judgment for costs, and what remains to stand in the way of a remedy by action? Nothing at all. The English cases admit the wrong; they do not deny that, for any substantial and special damage outside of the costs of the defense, the defendant may recover in this form. Therefore if his goods have been attached, or his person has been imprisoned, they allow a recovery; but when nothing of this kind has occurred they say to the debtor, 'the law does not fail to recognize that you should be recompensed for the damages you have suffered in resisting a malicious and unfounded suit, and that your prosecutor should be made to reimburse you. If you have been damaged beyond the ordinary costs of a

law-suit, this is the tribunal to which you may appeal; but if you have been damaged to that extent and no more, you cannot come here, for parliament has declared that these costs shall be assessed to you at the time you obtain your verdict, and in the form of a judgment against the plaintiff in the same suit.' But there are few, if any, American courts that can address the suitor in these terms. In England the allowance of costs is, in the majority of cases, and as effectually as can be accomplished under a general rule, a complete satisfaction to a successful defendant. The costs taxed to him include his attorney's charges for preparing the case for trial in all its parts, the fees of the witnesses and the court officials, and even the *honorarium* of the barrister who conducted the case in court. The American system, as carried on in most of the states, gives to the defendant little or nothing beyond the costs of the suit. The English decisions have, therefore, no applicability here, and can only be followed by our courts to a ridiculous result. Two further arguments against the action remain, neither of which can stand an examination. It is said that, if such suits are generally allowed, litigation will become interminable, for every unsuccessful action will be followed by another, alleging malice in the prosecution of the former; and, secondly, that if the defendant may sue for damages sustained by an unfounded prosecution, the plaintiff may equally bring an action when the defendant makes a groundless defense. *Waterer v. Freeman*, Hobart, 205 (1640); *Potts v. Imlay*, *supra*. In answer to the first objection it is enough to say that the action will never lie for an unsuccessful prosecution unless begun and carried on *with malice and without reasonable cause*. With the burden of this difficult proof upon him the litigant will need a very clear case before he will be willing to begin a suit of this character. The second argument fails to distinguish between the position of the parties plaintiff and defendant in an action at law. The plaintiff sets the law in motion. If he does so groundlessly and maliciously he is the cause of the defendant's damage. But the defendant stands only on his legal rights. The plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the

judge or jury, and he is guilty of no wrong in exercising this privilege."[1]

§ 25. Distinction between actions for criminal prosecutions and civil suits.— Strong, J.: "It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice or some improper or sinister motive. Malice is essential to the maintenance of any such action, and not merely to the recovery of exemplary damages. Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecutions and civil suits, both classes at the present day require substantially the same essentials. Certainly an action for instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding."[2]

§ 26. The action lies for maliciously and without probable cause instituting and prosecuting civil suits.— Will the prosecution of a civil suit which results in a verdict for the defendant, where the same is prosecuted maliciously and without probable cause, afford ground for an action in the nature of a suit for malicious prosecution? The more common causes for actions for malicious prosecution are groundless and malicious prosecutions of criminal charges. But that actions of this kind can be maintained where there has been an unjustifiable and malicious seizure of the property of the complaining party, as well as of the person, there is no question. Whether or not such an action may be maintained where there has been no deprivation of liberty, or of the possession, use or enjoyment of property, has been the subject of much discussion and of contrary holdings. It appears that in England, by the common law, prior to the statute of Marlbridge, 52 Hen. III. (1259), actions of this character were allowed, but since the passage of that statute, which gave the successful defendant judgment for costs against the plaintiff, the right to maintain such actions has been uniformly denied, it

[1] John D. Lawson in American Law Register, N. S., vol. 21, 368 (1882).

[2] Nicholas v. Coghill, 4 Barn. & C., 21; Stewart v. Sonneborn, 98 U. S., 187 (1878); Webb v. Hill, 3 Carr. & P., 485; Burhans v. Sanford, 19 Wend. (N. Y.), 417 (1838); Cotton v. Huidekoper, 2 Pa. (P. & W.) St., 149 (1830).

being held that if one prosecutes an ordinary civil action against another maliciously, and without reasonable or probable cause, an action for the resulting damage is not maintainable. So, too, in this country, many decisions of like tenor have been made. The courts have said that courts of law are open to every citizen, and that the costs which the defendant gets are a compensation for the wrong. If every suit may be retried on an allegation of malice, the evil would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first; and that, if a defendant ought to have damages upon a false claim, then the plaintiff ought to have damages on a false plea, which would make litigation interminable.[1]

§ 27. **Upon what ground the right to maintain such suits is placed.**— Where such suits have been maintained, the right has been placed upon the ground that taxable costs, including, as in most states, but the fees of witnesses and officers of court, afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit, and no remedy at all to repair the injury received. It is upon this principle, in part, that actions have even been sustained for malicious criminal prosecutions, in which no costs are taxed in favor of the accused. Where an action is brought and prosecuted maliciously, and without probable cause, it is an abuse of legal process, and the plaintiff asserts no claim in respect to which he has any right to invoke the aid of the law. It is a wrong to disturb one's property or peace; and to prosecute one maliciously and without probable cause is to do that person a wrong. The common law declares that for every injury there is a remedy, and to deny remedy in

[1] Pope v. Pollock, 46 Ohio, 367; 21 N. E. Rep., 356 (1889); Beauchampe v. Croft, Keilw., 26; Fitzh. Nat. Brev., 429; 1 Bac. Abr., 141; Savil v. Roberts, 1 Salk., 14; Bull. N. P., 11; Parker v. Langley, Gilb. K. B., 163; Goslin v. Wilcock, 2 Wils., 305; 1 Amer. Lead. Cas., 261, note; Cooley, Torts, 189; Taylor v. Wilson, 1 N. J. Law, 362; Woodmansie v. Logan, 2 N. J. Law, 68; Kramer v. Stock, 10 Watts, 115; Thomas v. Rouse, 2 Brev., 75; Ray v. Law, Pet. C. C., 207; Potts v. Imlay, 4 N. J. Law, 330; McNamee v. Minke, 49 Md., 122; Muldoon v. Rickey, 103 Pa. St., 110; Wetmore v. Mellinger, 64 Iowa, 751; 18 N. W. Rep. 870; Bitz v. Meyer, 40 N. J. Law, 252; Mayer v. Walter, 64 Pa. St. 283; Pope v. Pollock, Am. Dig., 1889-2393.

such case would violate this wholesome principle. The burden of establishing both malice and want of probable cause will prove a sufficient check to reckless suits of this character. When the plaintiff sets the law in motion, he is the cause, if it be done groundlessly and maliciously, of defendant's damage, and the defendant but stands upon his legal rights when he calls upon the plaintiff to prove his case to the satisfaction of judge and jury.[1]

§ 28. The doctrine that the action will lie — The law stated by Ross, J.[2] (California).—"The weight of the authorities, American as well as English, is against the maintenance of an action for the malicious prosecution of a civil action in which no process other than the summons was issued, and so are most of the text-writers. The question has never been determined in this state, and we are therefore at liberty to adopt the rule that we think is founded on the better reason. The point was made in the case of *Smith v. George*, reported in 52 Cal., 344, but was not decided; the court holding that it was unnecessary to decide it, but remarking that 'the adjudged cases in England and America are conflicting upon the question, and depending to a considerable degree, it would seem, upon the prevailing statutory provisions as to the recovery of costs by the defendant upon the determination of a civil action in his favor.' The English cases which deny the right to maintain the action stand upon the ground that the successful defendant is adequately compensated for the damages he sustains by the costs allowed him by the statute. Those costs, it seems, include the attorney's charges for preparing the case for trial in all its parts, the fees of the witnesses and the court officials, and even the *honorarium* of the barrister who conducted the case

[1] Pope v. Pollock, 46 Ohio, 367; 21 N. E. Rep., 356 (1889); Am. Dig., 1889-2393; Vanduzor v. Linderman, 10 Johns., 106; Pangburn v. Bull, 1 Wend., 345; Whipple v. Fuller, 11 Conn., 582; Closson v. Staples, 42 Vt., 209; Marbourg v. Smith, 11 Kan., 554; Bigelow, Torts (2d ed.), 71; Smith v. Smith, 56 How. Pr., 316; Bump v. Betts, 19 Wend., 421; Woods v. Finnell, 13 Bush, 628; Hoyt v. Macon, 2 Colo., 113; Payne v. Donegan, 9 Ill. App., 566; McCardle v. McGinley, 86 Ind., 538; Juchter v. Boehm, 67 Ga., 524; Lawrence v. Hagerman, 56 Ill., 68; Atwood v. Monger, Style, 378. See, also, an able review of the subject by John D. Lawson, Esq., of the St. Louis bar. 21 Amer. Law Reg., 281.

[2] Eastin v. Bank of Stockton, 66 Cal., 123; 4 Pac. Rep., 1106 (1884).

in court. The reason upon which the English rule rests would not, therefore, seem to apply here, where the costs recoverable under the statute are confined to much narrower limits. Under our system the defendant may be subjected, or he may subject himself, to expenses not recoverable, even if the suit terminated in his favor; but of this he has no legal ground to complain when the suit is brought and prosecuted in good faith, because, as said in *Closson v. Staples*, 42 Vt., 209:

"'It is the ordinary and natural consequence of a uniform and well-regulated system to which all parties in civil actions are required to conform. But when the action is brought and prosecuted maliciously, and without reasonable or probable cause, the plaintiff asserts no claim in respect to which he had any right to invoke the aid of the law. In such cases the plaintiff, by an abuse of legal process, unjustly subjects the defendant to damages which are not fully compensated by the costs he recovers. The plaintiff, in such case, has no legal or equitable right to claim that the rule of law which allows a suit to be brought and prosecuted in good faith without liability of the plaintiff to pay the defendant damages, except by way and to the extent of the taxable costs, if judgment be rendered in his favor, should extend to a case where the suit was maliciously prosecuted without probable cause. But where the damages sustained by the defendant in defending a suit maliciously prosecuted, without reasonable or probable cause, exceed the costs obtained by him, he has, and of right should have, a remedy by action in the case.'

"Two other objections are made to the maintenance of the action: *First*, the claim that if such suits are allowed litigation will become interminable, because every unsuccessful action will be followed by another, alleging malice in the prosecution of the former; and *second*, that if the defendant may sue for damages sustained by an unfounded prosecution, the plaintiff may equally bring an action when the defendant makes a groundless defense; and are well answered in the article already alluded to:

"'To the first objection it is enough to say that the action will never lie for an unsuccessful prosecution unless begun and carried on *with malice and without probable cause*. With the burden of this difficult proof upon him, the litigant will need a very clear case before he will be willing to begin a suit of this character. The second argument fails to distinguish between the position of the parties plaintiff and defendant in an action at law. The plaintiff sets the law in motion; if he does so groundlessly and maliciously, he is the cause of the defendant's damage. But the defendant stands only on his legal rights,— the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege.'"

§ 29. Rules of law governing the action.— The action of malicious prosecution to recover damages for a private wrong — that is, for the institution of a civil suit with malice and without probable cause — is governed by the same rules of law as the action where the prosecution complained of is of a criminal character.[1]

§ 30. An arrest and holding to bail not indispensably necessary.— From an examination of the leading authorities in England and America it appears that an arrest and holding to bail are not indispensably necessary in order to maintain an action for malicious prosecution. The action has been sustained in cases where there was neither an arrest nor bail; and, when it is considered that malice and the want of probable cause are the foundation of the action, it would seem on principle to reach cases where the injury would be equally great although the proceeding did not require an arrest or bail.[2]

§ 31. Express malice to be averred and proved.— The express malice and grievance must be laid in the declaration and proved. And it seems that it is not enough to allege that the defendant brought an action against the plaintiff with malice and without cause, by which he put the plaintiff to great charges.[3] It is to be inferred from this rule that something more than a mere allegation that a suit was commenced maliciously and without probable cause must be stated, as the gist of this action arises from some evil practice, as the abuse of legal process or malice in him who so prosecutes.[4]

APPLICATION OF THE LAW.—

An arrest and bail not indispensably necessary to maintain the action.

Pangburn sued Bull for a malicious prosecution. He declared that Bull, on March 30, 1826, not having any reasonable or probable cause of action whatever against the plaintiff, which he, the defendant, well knew, procured a summons from a justice, under the $50 act, against the plaintiff, returnable April 8th, then next, to answer the defendant in a plea of tres-

[1] Collins et al. v. Hayte, 50 Ill., 353 (1869).

[2] Pangburn v. Bull, 1 Wend., 345 (1828); Vanduzor v. Linderman, 10 John., 106 (1813).

[3] Brown v. Chapman, 1 Bl., 427; Reynolds v. Kennedy, 1 Wils., 232; Pangburn v. Bull, 1 Wend., 345 (1828).

[4] Pangburn v. Bull, 1 Wend., 345 (1828); Waterman v. Freeman, Hob., 206.

pass on the case; that the same was delivered to a constable, who, March 15th, in the year aforesaid, served it on the plaintiff; that the parties appeared; that Pangburn declared on a pretended claim for money, demanding $10, to which Bull pleaded the general issue; that the case was adjourned, on application of Pangburn, until April 18th, when the parties appeared and Pangburn discontinued the suit; that on the same day, Pangburn procured another summons from the same justice in his favor against Bull, returnable April 28th, which was served; that on the day of the return the parties appeared, issue was joined, a trial had, and judgment rendered against Pangburn for the costs of this suit; by means of which the plaintiff hath been greatly damnified, etc. To which declaration the defendant pleaded *non cul.* In December, 1826, the cause was tried. The facts alleged in the declaration were shown by the production of a written stipulation signed by the parties, and from which it further appeared that on the adjournment, April 8th, Bull took out subpœnas for witnesses, but Pangburn did not; nor did he produce any witnesses on the day that he discontinued the first suit. The plaintiff further proved that he told the defendant that all the dealings he ever had with him was that he, the plaintiff, had boarded the defendant and received twelve shillings for it, which the defendant did not deny; that the only evidence offered by Pangburn, when the cause was tried before the justice, was a declaration made by Bull that Pangburn had boarded with him, and had paid him $1.50 for the same. The place of trial appointed by the justice was fourteen miles from Albany, where Bull resided. The plaintiff further proved a declaration of Pangburn that he would bring Bull four times to Guilderland, and he would get no advantage of him; that Bull had taken too much for his board; that he had overcharged him, and charged him more than he did others, or more than he agreed to. On being told that he could not make an action lie, as he had settled with Bull and taken a receipt, he replied that he would bring him out four times. The witness who was called by Pangburn, on the trial before the justice, testified in the court below that he was the constable who served the summonses, which were regularly served six days before their return; that previous to his being sworn on the trial before the justice, he had not been asked by Pangburn what he could testify to; that he was desired, on that trial, to state what Bull told him when he served the first summons; that he testified that Bull told him that Pangburn had boarded with him in the February term, and that he had received for the same, of Pangburn, twelve shillings, for which he had taken a receipt, and that was the only dealing he ever had with Pangburn; that Pangburn, at the time he paid him, complained of being overcharged, and threatened to bring him (Bull) up to Guilderland; that Pangburn did not pay him until after he had been written to, to come and pay. The plaintiff proved that the defendant boarded with him a part of two weeks; the witness stated that he was there more than one day each week, and as long as between three and four days; that witness, who boarded with the plaintiff at the same time, paid three shillings a day for his board. The plaintiff rested.

The defendant moved that the plaintiff be nonsuited on the following grounds: 1. That in the suit before the justice, complained of as mali-

cious, the plaintiff in this case had neither been arrested nor held to bail. 2. That a want of probable cause for instituting the suits had not been shown nor had malice been proved. The court refused to nonsuit the plaintiff, and decided that the several matters offered in evidence by the plaintiff ought to be submitted to the jury, and that it was their province to determine whether the absence of probable cause and malice had been sufficiently proved. To which opinion the defendant excepted and then introduced a witness on his part, who testified that Pangburn boarded with Bull a part of two weeks, but he thought that he was not there more than three days, and that Bull had agreed to charge not more than three shillings per day for board.

The court charged the jury, if, from the testimony before them, they they should be of opinion that the prosecution before the justice was malicious and without probable cause, and that the defendant knew the facts to be so before and at the time of such prosecution, they ought to find damages for the plaintiff; otherwise they should find the defendant not guilty. The defendant excepted to the charge. The jury found a verdict for the plaintiff for $725 damages, on which judgment was entered. On an appeal the supreme court affirmed the judgment, holding that an arrest and holding to bail are not indispensably necessary to the maintenance of an action for a malicious prosecution. It is, however, not enough to state in a declaration that a suit was commenced maliciously and without cause, but the particular grievance must be alleged, the gist of this sort of actions arising from some evil practice or malice in him who sues or prosecutes. When a party, with full knowledge of all the circumstances, pays a sum of money, and afterwards maliciously commences a prosecution to recover back part on the ground of an over-payment, although the fact may be that the party received more than he was entitled to, such fact will not support the defense of probable cause in an action for a malicious prosecution. Pangburn v. Bull, 1 Wend., 345 (1828), *citing* Vandusor v. Linderman, 10 Johns., 106; Brown v. Chapman, 1 Bl., 427; Reynolds v. Kennedy, 1 Wils., 232; Waterman v. Freeman, Hob., 206, 266, cited in 57 Ind., 365, 378; 26 Am. Rep., 61; 42 Vt., 209; 1 Am. Rep., 324; 29 Cal., 648, 650; 34 Am. Dec., 247; 11 Kan., 564; 48 Mo., 535; 6 Barb., 87; 6 N. Y., 387; 21 Wend., 333; 9 L. C. P. Co., 943.

§ 32. The contrary doctrine — The action will not lie — Stated by Beck, J. (Iowa).— We think the doctrine is well established by the great preponderance of authority that no action will lie for the institution and prosecution of a civil action with malice and without probable cause, when there has been no arrest of the person or seizure of the property of defendant, and no special injury sustained, which would not necessarily result in all suits prosecuted to recover for like causes of action. This doctrine is supported by the following con-

sideration: The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor through fear of liability resulting from failure in his action, which would keep him from the courts. He ought not, in ordinary cases, to be subject to a suit for bringing an action, and be required to defend against the charge of malice and the want of probable cause. If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice? The doctrine surely tends to discourage vexatious litigation, rather than to promote it.

It will be observed that the statement of the doctrine we have made extends it no further than to cases prosecuted in the usual manner, where defendants suffer no special damages or grievance other than is induced by all defendants in suits brought upon like causes of action. If the bringing of the action operates to disturb the peace, to impose care and expense, or even to cast discredit and suspicion upon the defendant, the same results follow all actions of like character, whether they be meritorious or prosecuted maliciously and without probable cause. They are incidents of litigation. But if an action is so prosecuted as to entail unusual hardship upon the defendant and subject him to special loss of property or of reputation, he ought to be compensated. So if his property be seized, or if he be subjected to arrest by an action maliciously prosecuted, the law secures to him a remedy. No action could be prosecuted to recover money fraudulently obtained, in which the defendant would not suffer the very things for which plaintiff seeks compensation in damages.[1]

[1] Beck, J., in Wetmore v. Mellinger, 64 Iowa, 741; 18 N. W. Rep., 870 (1884), overruling Wetmore v. Mellinger, 14 N. W. Rep., 722. See 1 Amer. Lead. Cas., 218, note to Munns v. Dupont. and cases there cited; Meyer v. Walter, 64 Pa. St., 289; Kramer v. Stock, 10 Watts, 115; Bitz v. Meyer, 11 Vroom, 252; S. C., 29 Amer. Rep., 233; Eberly v. Rupp, 90 Pa. St., 259; Gorton v. Brown, 27 Ill., 489; Woodmansie v. Logan, 2 N. J. Law, 93 (1 Penn.); Parker's Adm'rs v. Frambes, id., 156; Potts v. Imlay, 4 N. J. Law, 330 (1 Suth.).

APPLICATIONS OF THE LAW.—

(1) *Where the action will lie for maliciously and without probable cause prosecuting a civil suit.*

(a) *Malicious institution of proceedings in bankruptcy — End of prosecution — Probable cause—Advice of counsel.*— Meyer Sonneborn brought an action against A. T. Stewart & Co. for maliciously instituting proceedings in bankruptcy against him. The record shows that in the years 1865 and 1866 Sonneborn was a member of the firm of E. Lipzeiger & Co., in New York, and that while he was thus a member of the firm bought goods on credit from A. T. Stewart & Co. Sometime in 1866 he withdrew from the firm; but no notice of his withdrawal was published, and the firm continued business in its old name without any apparent change. In the winter and spring of 1867 the defendants sold other goods on credit to E. Lipzeiger & Co., as they allege, without any notice that Sonneborn had previously withdrawn from the firm. On the other hand, he alleges that he did give personal notice of his withdrawal to one of the clerks of the defendants' store before the purchases of 1867 were made. No payment for these latter purchases have been made. The defendants in 1869 sued the plaintiff to recover the debt in the circuit court for Barbour county, Alabama, and after trial a verdict and judgment was given against them. This was at the August term, 1871. From the verdict and judgment the defendants prosecuted an appeal to the supreme court of the state, where the judgment was reversed and a new trial ordered. On the 12th of May, 1873, before the case came on for a second trial, one Jonas Sonneborn, a brother of the plaintiff, brought suit against him in the Eufaula city court, and one month afterwards recovered a judgment by default for $6,944.43 (the present plaintiff having made no resistance), and thereupon an execution was issued and levied. This proceeding having come to the notice of A. T. Stewart & Co. (and they having been advised by legal counsel that an act of bankruptcy had thereby been committed by Sonneborn), on the 15th of August, 1873, they filed their petition in the district court praying that he might be declared a bankrupt, and that a warrant might issue to take possession of his estate. The petitioners represented themselves to be creditors for a sale made to E. Lipzeiger & Co. in 1867, of which firm they alleged Sonneborn was a member; and the act of bankruptcy alleged was that on the 12th of June, 1873, he suffered and permitted a judgment to be recovered against him by default in favor of Jonas Sonneborn, in the city court of Eufaula, upon which an execution had issued, whereon a levy had been made.

Upon this petition a rule to show cause, etc., was granted, an injunction and warrant for provisional seizure was granted, and on the 19th of August, 1873, the warrant was executed. Such was the situation when the case of the defendants against the plaintiff came on for the second trial in the Barbour county circuit court. The result of that trial in November, 1873, was a verdict and judgment for Sonneborn, which was subsequently affirmed by the supreme court of the state at its June term, 1874. It thus having been determined that the defendants were not creditors of Sonne-

born, the proceedings in bankruptcy were dismissed and the present suit was brought, which alleged that they had been prosecuted maliciously and without probable cause. On the trial the court instructed the jury, among other things, as follows: "But if they (the defendants) had no legal claim or demand against the complainant (Sonneborn), then, whether they had probable cause or not, they had no right to institute the proceedings (in bankruptcy). They cannot go back and allege that, though they had no legal claim against him, they thought they had; in other words, that they had probable cause to believe that they had such a demand. Unless they had a debt, they cannot allege probable cause for proceeding in bankruptcy at all. Their defense cannot stand on two probable causes, one on top of the other. . . . As it has been adjudicated by the circuit court of Barbour county and affirmed by the state supreme court, that the defendants never had a legal claim against the plaintiff, and, therefore, had no right to institute proceedings in bankruptcy against him, the plaintiff is entitled to recover in this action the damages he has sustained by those unlawful proceedings. The court, therefore, rules that the defense in this case cannot be sustained by proving that the defendants had probable cause to believe that the plaintiff had committed any act of bankruptcy; but it being shown by judicial determination that they had no legal claim or debt against the plaintiff, and had, therefore, no right to institute bankruptcy proceedings, they are liable for the damages sustained by the plaintiff thereby, and the only question for the jury will be the amount of the damages under the circumstances of the case. . . . We charge you, therefore, that the plaintiff is entitled to recover his actual damages or the loss he has actually sustained in all events." . . . And again, "The actual damages sustained by the complainant, that, you will give him a verdict for at all events."

The plaintiff recovered and the defendants took the case to the supreme court of the United States. Justice Strong, holding the instruction to be erroneous, said: "It ignores totally the question whether the conduct of the defendants had been attended by malice, though it charged malice, and it denied all importance to the necessary inquiry whether they had probable cause for this action. If the charge was correct, then every man who brings a suit against another, with the most firm and reasonable belief that he has a just claim and a lawful right to resort to the courts, is responsible in damages for the consequences of his actions if he happens to fail in his suit. His intentions may have been most honest; his purpose only to secure his own, in the only way in which the law permits it to be secured; he may have had no ill-feeling against his supposed debtor, and may have done nothing which the law forbids. Such is not the law. It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor unless it is shown affirmatively that he was actuated in his conduct by malice or some improper or sinister motive. Malice is essential to the maintenance of any such action, and not merely (as the circuit court thought) to the recovery of exemplary damages. Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecution and civil suits, both classes at the present day require substantially the same essentials. Certainly an action for instituting

a civil suit requires not less for its maintenance than any action for malicious prosecution of a criminal proceeding." Stewart v. Sonneborn, 98 U. S., 187 (1878), *citing* Nicholson v. Coghill, 4 Barn. & C., 21; Webb v. Hill, 3 Carr. & P., 485; Burhans v. Sanford, 19 Wend., 417 (1838); Cotton v. Huidekoper, 2 Pa. (Penrose & Watts), 149 (1830).

(*b*) *Probable cause in civil prosecutions.*— There was also error in the charge in so far as it took away from the defendants the protection of probable cause for their instituting the proceedings in bankruptcy. The court ruled that the defense could not be sustained by proving they had probable cause for believing the plaintiffs had committed an act of bankruptcy, because, it turned out, after the proceedings were commenced, that a verdict of a jury and judgment thereon had established the plaintiff as not indebted to them, and, consequently, that they had no right to institute bankruptcy proceedings against him. It was further charged that: "If they had no legal claim or demand against the plaintiff, then whether they had probable cause or not, they had no right to institute the proceedings. They cannot go back and allege that though they had no legal claim or debt against him, they thought they had; or that they had probable cause to believe they had such a demand. Unless they had a debt they cannot allege probable cause for proceedings in bankruptcy at all." To this we cannot assent. The existence of a want of probable cause is, as we have seen, essential to every suit for a malicious prosecution. Both that and malice must concur. Malice, it is admitted, may be inferred by the jury from want of probable cause, and the want of that cannot be inferred from any degree of even express malice. Stewart v. Sonneborn, 98 U. S., 187 (1878), *citing* Sutton v. Johnstone, 1 T. R., 493; Foshay v. Ferguson, 2 Denio, 617 (1846); Murray v. Long, 1 Wend., 140 1828); Wood v. Weir, 5 B. Mon., 544 (1845).

(*c*) *Failure of the prosecution.*— In every action for malicious prosecution it must be averred and found that the prosecution has failed, but its failure has never been held to be evidence of either malice or want of probable cause for its institution, much less that it is conclusive of those things. The final judgment of the circuit court of Barbour county did not therefore justify the court in charging that there was no probable cause for the bankruptcy proceedings, or that present or absence of such cause was immaterial. Stewart v. Sonneborn, 98 U. S., 187 (1878), *citing* Bell v. Pearcy, 11 Ired. (N. C.), 233; Cloon v. Gerry, 13 Gray, 201.

(*d*) *Advice of counsel.*— It was proved that before they commenced this suit in the circuit court of Barbour county the defendants were advised by an eminent lawyer of Alabama respecting their legal right to recover the debt of plaintiff, that in his opinion the plaintiff was liable therefor. It was further proved that the same lawyer advised them that in his opinion the plaintiff had rendered himself liable to involuntary bankruptcy proceedings by suffering his brother's judgment to go against him by default and by advertising his entire stock of goods for sale at and below cost. It was not until after this advice that the petition in bankruptcy was prepared and filed. Upon this evidence "the court below erred in refusing to charge that if the defendants acted upon the advice of counsel in prosecuting this claim, and upon such an advice had the honest belief in the

validity of their debt and their right to recover in the action; and in the institution of the proceedings in bankruptcy acted likewise on the advice of counsel, and under an honest belief that they were taking and using only such remedies as the law provided for the collection of what they believed to be a *bona fide* debt, they having first given a full statement of the facts of the case to counsel, then there was not such malice in the wrongful use of legal process by them as will entitle the plaintiff to recover in this form of action." The judgment was reversed. Stewart v. Sonneborn, 98 U. S., 187 (1878), *citing* Snow v. Allen, 1 Stark., 502; Ravenga v. Mackintosh, 2 Barn. & C., 693; Walter v. Sample, 25 Pa., 275; Cooper v. Utterback, 37 Md., 282; Olmstead v. Partridge, 16 Gray, 381.

(*e*) *The action lies for maliciously suing out an injunction.* — Mitchell was a mill owner at Americus, Georgia. He had a license to overflow the lands of the Southwestern Railroad Company, and for many years had enjoyed the same without let or hindrance from the railroad company. Finally the railroad company without notice instituted a suit against him, obtained an interlocutory injunction which operated harshly upon him in depriving him of the use of his property for three years, and by reason of which he sustained special damage. The defendant, while suffering no injury, but possibly receiving benefit from the privilege enjoyed by Mitchell, sought to divert the water from the mill-pond of Mitchell and to employ it for other uses; and that, while the railroad company alleged that its suit was brought in good faith to protect its own rights, it appeared that the city of Americus, "behind the scenes," was urging the suit to be brought, which, if successful, would benefit the city. Upon these and other facts the jury found damages, and that the suit was without probable cause and malicious, and the defendant excepted. In overruling the exceptions and affirming the judgment of the court below, Roney, J., said: "True, the defendant offered evidence to show good faith and the absence of malicious intent, yet it was for the jury to settle the conflicts in the testimony; and having found against the defendant, we will not disturb the verdict. We will only add that malice will be inferred from want of probable cause; and to show its existence, it was not necessary to prove that the suit was instituted by ill-will, resentment or hatred towards the owner of the property; it was sufficient to prove it in its enlarged legal sense. In a legal sense, any act done wilfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious. In confirmation of this view, we cite Com. v. Snelling, 15 Pick., 337; 12 Amer. Dec., 268, note." Southwestern R. Co. v. Mitchell, 80 Ga., 438; 5 S. E. Rep., 490 (1888).

(*f*) *Malicious prosecution may be maintained for maliciously, and without probable cause, instituting and prosecuting an action in forcible entry and detainer.* — An action was commenced July 3, 1885, by the filing in the court of common pleas of a petition which charged in substance that in March, 1885, the plaintiff, by written agreement, leased of a Mrs. Brayton, through defendant, as her agent, for a term to expire April 1, 1886, a lot in the county of Hamilton, on which was a dwelling-house and other buildings; that the plaintiff immediately entered into possession, which has since continued, except that during a portion of the time the

defendant unlawfully kept plaintiff out of a portion of the premises. On the 11th of May, 1885, defendant, in her own name, instituted a suit in forcible entry and detainer, before a justice of the peace of Cincinnati township, said county, for the recovery of possession of said premises, which suit terminated in a verdict for the plaintiff of "not guilty." Afterwards, on the 17th of June, 1885, defendant instituted another like suit before a justice of the peace of Springfield township, said county, which also terminated in a verdict for this plaintiff of "not guilty." Each of said actions was prosecuted maliciously and without probable cause. The plaintiff, by reason thereof, was greatly harassed and annoyed, much worried and troubled in mind, was injured in reputation among his neighbors, was caused great inconvenience and much loss of time, and put to considerable money outlay, in defending said actions. Then follows a prayer for judgment. To this petition a general demurrer was filed, which was sustained by the court of common pleas, which judgment was affirmed in the circuit court. To procure a reversal of these judgments, this error proceeding is prosecuted.

Spear, J.: "There seems abundant authority in other states of the Union to support the proposition that a suit may be maintained for damages arising from the prosecution of an ordinary civil action when the same is done maliciously and without probable cause, but without disturbance to person or property. The precise question has not been made in Ohio, though in two cases (Tomlinson v. Warner, 9 Ohio, 104, and Fortman v. Rottier, 8 Ohio St., 548) this court has held that an action may be maintained for maliciously and without probable cause suing out and levying a writ of attachment. So, where one has been wrongfully deprived of the use of his land by the prosecution, maliciously and without probable cause, of an injunction proceeding, the court held (Coal Co. v. Upson, 40 Ohio St., 17) that an action for malicious prosecution will lie. The language of the opinion is: 'It may now be considered the approved doctrine that an action for the malicious prosecution of a civil suit may be maintained whenever, by virtue of any order or writ issued in the malicious suit, the defendant in that suit has been deprived of his personal liberty or of the possession, use or enjoyment of property of value.' It will be noted that where damages for the prosecution, maliciously and without probable cause, of an ordinary civil action are refused, one of the principal reasons given is that the allowance of taxed costs is regarded as sufficient punishment to the plaintiff for prosecuting and recompense to the defendant for defending such an action. In England the taxed costs which may be awarded to a successful defendant include not only fees of court officers and witness, but attorney's charges for preparing the case for trial and the *honorarium* of the barrister who tries it, and in a number of American states a like taxation of costs prevails. But in Ohio the successful party in an ordinary action recovers only the fees of witnesses and court officers, leaving his own personal expenses in preparing the case, in attending the trial, and his attorney's fees for preparation and for trial, to be paid without reimbursement. Taxed costs are not here regarded as affording full compensation for expenses incurred, for in cases where damages may be recovered for malicious injury, fees of counsel, as well as court costs, are

included in compensatory, and not punitive, damages. The reason for the rule having failed there is much ground for saying that the rule itself fails. But there is no necessity in the present case for a determination of the question whether or not an action will lie for malicious prosecution of an ordinary civil action without probable cause, where there is no arrest or seizure, for the petition of the plaintiff makes a different case. In many of its aspects an action in forcible entry and detainer is an extraordinary proceeding. It is summary in its character, and may become, when prosecuted wrongfully, excessively annoying and harassing. Having given three days' notice in writing to leave the premises, the plaintiff may commence his action by filing a complaint with a justice of the peace, and in three days more the trial may take place. Rev. St. Ohio, sec. 6599 *et seq.*

"The complaint need not be sworn to. If a continuance is asked by defendant for more than eight days, security for payment of rent is required. The action may involve the possession by a defendant of a home for himself and a dependent family. A failure to answer or an unsuccessful defense may result in an immediate and forcible ouster, and this without reference to the condition of the family, or the weather, or other surrounding circumstances. No appeal is allowed, nor is one action a bar to subsequent actions. The contingency of preparing a bill of exceptions must be anticipated, and counsel procured for that; or else a review of erroneous holdings cannot be had. Error can be prosecuted only by leave of a judge, and such proceeding raises questions relating to competency of evidence only, and not questions touching the weight or sufficiency of the evidence. The justice is not even bound to sign a bill where the objection is only that the judgment is not sustained by sufficient evidence. If petition in error is allowed to be filed, the party must be ready with security, if exacted, to stay execution of the judgment against him. Then, too, the plaintiff may select from several concurrent jurisdictions within the county. He may commence his action, if he so desire, in the township furthest removed from the residence of the defendant, or the one most inaccessible, thus requiring, it may be, his adversary to travel long distances, and to transport his witnesses at large expense. Failing in one action thus brought, he may continue prosecutions until his pocket-book or his malice, or both, become exhausted. Plainly, in the hands of an unscrupulous prosecutor, possessed of abundant means, this kind of action may become grievously oppressive; and it is idle to say that the small bill of costs before a justice is either a sufficient punishment to inflict upon a malicious prosecutor or constitutes any recompense to a wronged defendant. The statute gives to such plaintiff the right to resort to his action as often as he may choose, and to bring it before any justice within the county, but this implies no right to prosecute maliciously and without probable cause. A groundless action, prosecuted with malice, is never justifiable, and a wrong suffered by such prosecution in forcible entry and detainer should not be without remedy. Nor is there force in the objection, as applied to this case, that intolerable evils would arise from a multiplicity of suits thus encouraged. The law-making power has seen fit to provide by this statute that a judgment shall not be a bar to any after action. We have, in this provision, legislative declaration to the effect that evils may not be expected to fol-

low repeated trials of issues under this statute. In consonance with this policy it may be reasonable to conclude that, if repeated actions to determine the right to possession will not work intolerable evils, a review of the facts by a suit for malicious prosecution will not have that effect. At all events, the right to so review will naturally tend to check any evils that might flow from a misuse of the statutory right to repeated trials." Judgment reversed. Pope v. Pollock, 46 Ohio St., 367; 21 N. E. Rep., 357 (1889).

(g) *An action will lie for maliciously, and without probable cause, instituting a suit in replevin.*— McPherson brought an action against Runyon for maliciously, and without probable cause, prosecuting against him a suit in replevin. A general demurrer to the complaint was sustained. McPherson appealed. In delivering the opinion of the court, Dickinson, J., said: "The cause of action for which a recovery is sought is the malicious prosecution of an action in replevin in a justice's court, and the malicious seizure of the plaintiff's property by writ of replevin. It is not claimed that the complaint does not set forth facts showing a right of recovery, if a separate action may be maintained for such cause. The demurrer rests upon the propositions contended for, that the cause of action asserted was a mere incident of the original action of replevin; that whatever damages the plaintiff might have been entitled to recover for the cause here alleged were recoverable only in that action; and that the judgment therein in favor of this plaintiff is a bar to the recovery now sought. Sylte v. Nelson, 26 Minn., 105, and Ward v. Anderburg, 36 Minn., 300, are relied upon in support of this contention. The respondent does not claim that for the prosecution of a civil action, maliciously and without probable cause, a defendant may not in general maintain an action for damages. We have recognized such rights of action in cases where the defendant's property was attached (Burton v. Railway Co., 33 Minn., 189, and Cochrane v. Quackenbush, 29 Minn., 376), and if there were peculiar reasons, based upon the fact of the attachment, justifying an action in such cases, it is not perceived why they are not equally applicable where, as in this case, the defendant's property was seized under a writ of replevin.

"That an action will lie in such a case was held in Wills v. Noyes, 12 Pick., 324; and this was also recognized in Magmer v. Renk, 65 Wis., 364; 27 N. W. Rep., 26. We do not, however, place our decision upon this limited ground, but upon the broader proposition that for the prosecution of a civil action maliciously and without probable cause, to the injury of the defendant, he may maintain an action for damages, although there was no interference with his person or property. Paugburn v. Bull, 1 Wend., 356; Whipple v. Fuller, 11 Conn., 582; Closson v. Staples, 42 Vt., 209; Eastin v. Bank, 66 Cal., 123; 4 Pac. Rep., 1106; Allen v. Codman, 139 Mass., 136; Marbourg v. Smith, 11 Kan., 554; Woods v. Finnell, 13 Bush, 629; Pope v. Pollock (Ohio), 21 N. E. Rep., 356; McCardle v. McGinley, 86 Ind., 538. The reasons for this conclusion are well set forth in Whipple v. Fuller and in Closson v. Staples, *supra*. See, also, 21 Amer. Law Reg., 281, 353.

"The decision in Sylte v. Nelson, followed in Ward v. Anderburg, has not the effect ascribed to it by the respondent. It was there decided that a defendant's assertion in an action of replevin of the right to a return of

the property taken from him, and to damages for the taking and detention, did not constitute a counter-claim in such action. It was said also in the opinion that this was not a cause of action in itself upon which the defendant could maintain an action. This decision, and the language of the court, relating merely to the ordinary claim of a defendant in replevin to have his property restored to him, with damages for the taking and detention, as an incident in that action, had no bearing upon the question as to whether an action will lie for the malicious prosecution of an action of replevin. For such a cause, indeed, no action could be maintained, or recovery had, until the replevin action should have terminated in favor of the defendant (O'Brien v. Barry, 106 Mass., 300), and of course the right of recovery for the malicious prosecution could not be asserted as a counter-claim in that same action. It is of course true that but one recovery can be allowed for the same cause; and the damages for the taking and detention once awarded to the defendant in the original action cannot be again assessed in an action for malicious prosecution. But the measure of recovery in the latter action is not confined to the injury from the taking or detention of the property." Order reversed. McPherson v. Runyon, 41 Minn., 524; 43 N. W. Rep., 392 (1889).

(*h*) *Attachment of personal property for a larger sum than was due — Implied malice.*— George Savage and others were merchants in Boston and had had dealings with Brewer, who lived in the state of Maine. They purchased a ship of him and had prepared her for sea, when he commenced an action of *assumpsit* against them for the sum of $1,500; by the writ the officer was directed to attach property to the amount of $2,000, and, the Boston merchants having no other property in Maine, he attached the ship, which was worth three or four times that sum. Notice was immediately sent to Boston, and one of the firm proceeded to Maine and settled the action by paying the sum of $124.84 and the costs, amounting to the sum of $22.84. For these sums Brewer gave a receipt stating that the payments were in discharge of his suit, and the ship was released from attachment. Then Savage *et al.* sued Brewer for a malicious prosecution. On the trial the plaintiffs contended they owed the defendant nothing at the time of the attachment, because although he had advanced money for them to the amount of about $120, yet it was upon an agreement that it should be repaid in Boston, and therefore it was not then due, and that whether this sum was due or not, the commencement of an action for a sum so much larger than the sum due, and attaching property to so large an amount, was evidence of implied malice, and afforded good ground for this action. The case went by default, but was subsequently submitted to a jury for the assessment of damages. The question reserved for the consideration of the court was "Whether, if the defendant had a good cause of action to that extent only, the present action could be maintained, in consequence of that action having been brought for a much larger sum, and of the excessive attachment."

Wilde, J.: "No reason is given why an attachment was made to an amount so much exceeding the debt, or why in the writ the sum of $1,500 is demanded, when, if anything was due, it was only the sum of $124. If it was an innocent mistake, this should have been shown; or if the defend-

ant had another doubtful claim, which he waived at the time of the settlement of the action, that also should have been shown. It was competent for him to rebut the presumption of malice by showing a probable cause or an innocent mistake; but there is no such proof. On the contrary the want of probable cause plainly appears. It is no answer to say that the same property must have been attached if the real debt only had been demanded; for the master of the vessel might have paid that without orders, or, if not, the plaintiffs might have remitted the amount without being put to the trouble and expense of a journey into Maine to procure the release of their property. Upon the evidence, therefore, as reported, we are of the opinion that the action is well maintained, and that the plaintiffs are entitled to judgment." Savage et al. v. Brown, 16 Pick. (33 Mass.), 453 (1835).

(2) *Contrary doctrine — Where the action will not lie.*

Malicious prosecution will not lie for the institution of a civil suit where there has been no arrest of the person or seizure of the property, and no special injury sustained.— Wetmore brought an action to recover damages sustained by reason of the malicious prosecution of a civil action by Mellinger and others against him.

In his petition he alleged that defendants brought an action against him and his wife, charging that they had conspired and confederated together to defraud them by representing to them, under the assumed name of Baker, that they were the owners of certain lands in Poweshiek county, which they were induced to purchase, and who, in such assumed name, executed and delivered to them a warranty deed therefor. In an action by one Woodward, a deed purporting to be executed by him to the Bakers, under which they claimed title to the lands, was declared to be void for the reason that it was forged and fraudulent, and that Wetmore and his wife well knew the condition of the title, and represented that they were the owners thereof for the purpose of cheating Mellinger and others, and of obtaining money by false and fraudulent pretenses, and did in that manner obtain the sum of $3,000 from them. It was further alleged that defendants herein sued out a writ of attachment in the suit brought by them, which was levied upon real estate owned by plaintiff's wife, and that defendants for a time prosecuted their action, but finally dismissed it at their own costs. Plaintiff, in his petition in this case, alleged that he was not indebted to defendants in any sum at the time their action was brought against him; that he was not guilty of the frauds therein charged, and that the action was commenced and prosecuted by defendants maliciously and without probable cause. The defendants admitted the commencement of the suit, the issuing of the attachment, and that it was levied upon real estate owned by plaintiff's wife. There was no evidence showing or tending to show that the writ of attachment was levied upon any property owned by plaintiff. The wife of plaintiff did not join in the action.

There was a verdict for defendants, etc. Plaintiff appealed.

Beck, J.: Counsel for plaintiff, in support of their position that the action may be maintained though no arrest of defendant or seizure of property be had in the proceeding alleged to have been maliciously prosecuted,

cite Green v. Cochran, 43 Iowa, 544, and Moffatt v. Fisher, 47 Iowa, 473. In the first case, the action alleged to be malicious was a proceeding for bastardy, which, under the statute, operated as a lien upon defendant's lands from its commencement. In the other case, the action which was the foundation of plaintiff's claim was forcible entry and detainer, and, before final disposition thereof, the defendant was ousted of possession of the land, whereon was a coal mine. In both instances the property of the respective defendants was reached by the proceedings. The facts of these cases do not support counsel's position. . . . The action will not lie for the institution of a civil action with malice and without probable cause, when there has been no arrest of the person or seizure of the property of the defendant, and no special injury sustained." Judgment affirmed. Wetmore v. Mellinger, 64 Iowa, 741; 18 N. W. Rep., 870 (1884).

§ 33. Malicious prosecution for suing out an attachment. No doubt can be entertained that this action lies for maliciously suing out an attachment and seizing the goods of a debtor, even though there may be at the time some indebtedness, and especially so in cases where the levy is grossly excessive and the object is extortion and oppression attempted to be sustained by fraud and perjury.[1] The injured party is not restricted to a suit on the bond. In many cases the amount of the bond is not sufficient to compensate for the wrong, the loss of property, the destruction of business, the deprivation of profits and the injury to feelings and reputation. In cases where exemplary or vindictive damages may be awarded, the bond would be no security at all. Numerous authorities may be found to sustain the action.[2] It has been uniformly held in the United States that the action lies against a person for attaching another's property maliciously and without probable cause. The remedy in this case is not at all interfered with by the person suing out the process having, at the institution of his suit, given a bond, conditioned to pay all damages the person whose property is attached might sustain by reason of the attachment having been wrongfully sued out.[3]

[1] Spaids v. Barrett et al., 57 Ill., 289 (1870).

[2] Savage v. Brewer, 16 Pick., 456 (1835); Bump v. Betts, 19 Wend., 421 (1838); Donnel v. Jones, 13 Ala., 490; 17 Ala., 689 (1850); Linsay v. Larned, 17 Mass., 190 (1821); Whipple v. Fuller, 11 Conn., 582 (1836); Tomlinson et al. v. Warner, 9 Ohio, 103 (1839); Weaver v. Page, 6 Cal., 681 (1858); Lawrence v. Hagerman, 56 Ill., 69 (1870); Spaids v. Barrett et al., 57 Ill., 289 (1870).

[3] Robinson v. Kellum, 6 Cal., 399 (1856); Lawrence v. Hagerman, 56 Ill., 77 (1870); Sanders v. Hughes, 2 Brevard (S. C.), 495 (1811); Donald v. Jones, 13 Ala., 490 (1848); Smith v.

§ 34. The law stated by Nelson, C. J.—In an action for maliciously suing out an attachment Chief Justice Nelson laid down the law as follows: "This action lies against any person who maliciously and without probable cause prosecutes another, whereby the party prosecuted sustains an injury, either in person, property or reputation."[1]

§ 35. Attorney's liability for bringing a civil suit.—In general, it is true that an action cannot be maintained against an attorney on the ground of his instrumentality in bringing a civil action against the plaintiff, unless where he has commenced such suit without the authority of the party in whose name he sues, or, unless there is a conspiracy to bring a groundless suit, knowing and understanding it to be groundless, and without any intent or expectation of maintaining the suit.[2] *The law stated by Shaw, C. J.:* "I am not prepared to say that if a person applies to an attorney, wishing to have a groundless suit commenced, for the purpose of detaining the property or the person of another under the forms of legal process, and the attorney yields to such a request, that they would not render themselves liable to an action at the suit of the party thus injured. It would be very different from the case where a client requests an action to be brought on his responsibility, however groundless the attorney himself may think it to be, and though he explicitly declared to the client that he could not maintain the action. 'Knowing,' 'believing' or 'supposing' it groundless are only expressions indicating different degrees of the attorney's belief; the party may have grounds for proceeding, not known to the attorney, and he has a right to judge for himself.[3]

§ 36. Survival of the action.—The English common law upon this subject, as it exists in nearly all of the states of our

Story, 4 Humph., 168 (1843); Pettit v. Mercer, 8 B. Mon., 51 (1847); Senecal v. Smith, 9 Rob., 418 (1845); Tomlinson v. Warner, 9 Ohio, 103 (1839); Spengler v. Davy, 15 Gratt., 381 (1859); McLaren v. Birdsong, 24 Ga., 265 (1858); Hill v. Paldron, 38 Mo., 258 (1866); Bump v. Betts, 19 Wend., 421 (1838); Pierce v. Thompson, 6 Pick., 192 (1828).

[1] Nelson, C. J., in Bump v. Betts, 19 Wend. (N. Y.), 421 (1838), *citing* 1 Selw., 806; Saund. Pl. & Ev., 651; 2 Chitty, Pl., 248, n. r; 12 Mod., 208; 1 Salk., 12; 1 T. R., 493, 551.

[2] Bicknell v. Dorion, 33 Mass., 478 (1835).

[3] Bicknell v. Dorion, 33 Mass., 478 (1835).

Union, is said by some authors to come to us by the statute 3 Edward III., chapter 8. It enacts that any kind of injury to a person by which his property has been rendered less beneficial gives a right of action which may be assigned or survives to his personal representatives.[1] Hence the rights of a person for mere personal injuries, such as malicious prosecution, cannot be assigned and do not survive to the personal representatives of the injured party;[2] but when the action is brought for an injury to the property of a person, the rule is otherwise and the action does not die with the person.

APPLICATION OF THE LAW.—

Survival of the action for malicious prosecution.

Thomas Conly sued Michael Conly for malicious prosecution. At the trial the jury found for the defendant, and the plaintiff took exceptions to the ruling of the court. The defendant died, and his administrator appeared in the suit and moved to dismiss the action on the ground that it did not survive.

By the Court.— "It is useless to consider the merits of the exceptions, because if they should be sustained the action could not be further prosecuted, having been abated by the defendant's death since the exceptions were allowed." Conly v. Conly, 121 Mass., 550 (1877), *citing* Gen. Stats. Mass., ch. 127, § 1; Nettleton v. Dinehart, 5 Cush., 543; Cummins v. Bird, 115 Mass., 346.

NOTE.— *Statute of Massachusetts — Actions which survive.*— In addition to the actions which survive by the common law, the following shall also survive: Actions of replevin, of tort for assault, battery, imprisonment, or other damage to the person, for goods taken and carried away or converted by the defendant to his own use, or for damage done to real or personal estate, and the actions against sheriffs for malfeasance or nonfeasance of themselves or their deputies. Mass. Gen. Statutes, 1882, 958, § 1.

[1] Hoyt v. Thompson, 5 N. Y., 320 (1851); 1 Chitty's Pleading, 69; Zabriskie v. Smith, 36 Barb. (N. Y.), 270 (1862); 14 Am. & Eng. Enc. Law, 37 (1890). In the London edition of the English statutes at large, published in 1811, no statutes of 3 Edward III. are given. In volume 1, page 448, the following is given as 4 Edward III., caption 7: "Executors shall prove an Action of Trespass for a Wrong done to their testator. Also whereas in Times past Executors have not had Actions for Trespasses done to their Testators, as of the Goods and Chattels of the same Testators carried away in their Life, and no such Trespassers have hitherto remained unpunished; It is accorded, That the Executors in such Cases shall have an action against the Trespassers, to recover Damages, in like Manner, as they, whose Executors, they be should have had if they were in life." 4 Edw. III., ch. 7, A. D. 1330; English Statutes at Large, London, 1811, vol. 1, page 448.

[2] Nettleton v. Dinehart, 5 Cush. (Mass.), 543 (1850); Lawrence v. Martin, 22 Cal., 173 (1863); Comegys v. Vasse, 1 Pet. (U. S.), 193 (1828); 14 Am. & Eng. Ency. Law, 37 (1890).

CHAPTER II.

FALSE IMPRISONMENT.

§ 1. False imprisonment defined by Blackstone.— To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person; and 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.[1] Unlawful or false imprisonment consists in such confinement or detention without sufficient authority, which authority may arise either from some process from the courts of justice or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment;[2] or from some other special cause warranted from the necessity of the thing, either by common law or by act of parliament, such as the arresting of a felon by a private person without warrant, the impress-

[1] 2 Coke's Institutes, 589 (1620); Johnson v. Tompkins, 1 Bald. (U. S. C. C.), 571; Pike v. Hanson, 9 N. H., 491; Smith v. State, 7 Humph. (Tenn.), 43.

[2] 2 Coke's Institutes, 46 (1620).

ing of mariners for the public service or the apprehending of wagoners for misbehavior in the public highways.[1] False imprisonment may also arise by executing a lawful warrant or process at an unlawful time, as on Sunday;[2] for the statute hath declared that such service of process shall be void.[3]

§ 2. **False imprisonment defined by Pollock.**— Freedom of the person includes immunity not only from the actual application of force, but from every kind of detention and restraint not authorized by law. The infliction of such restraint is the wrong or false imprisonment, which, though generally coupled with assault, is nevertheless a distinct wrong; laying on of hands or other actual constraint of the body is not a necessary element, and if "stone walls do not a prison make" for the hero or the poet, the law none the less takes notice that there may be an effectual imprisonment without walls of any kind. Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house,[4] or in the stocks, or even by forcibly detaining one in the public streets; and when a man is lawfully in a house, it is imprisonment to prevent him from leaving the room in which he is.[5] The detainer must be such, however, as to limit the party's freedom of motion in all directions. It is not an imprisonment to obstruct a man's passage in one direction. A prison may have its boundary large or narrow, invisible or tangible, actual or real, or, indeed, in conception only; it may in itself be movable or fixed; but a boundary it must have, and from that boundary the party imprisoned must be prevented from escaping; he must be prevented from leaving that place within the limit of which the party imprisoned could be confined, otherwise every obstruction of the exercise of a right of way may be treated as an imprisonment.[6] A man is not imprisoned who has an escape open to him; that is, we apprehend, a means of escape which a man of ordinary ability can use without peril

[1] Statutes Geo. III., ch. 78.

[2] Statutes Charles II., ch. 7; Salkeld's Reports, 78 (1689); 5 Modern Reports, 95 (1695).

[3] 3 Blackstone's Comm., 127 (1765).

[4] Pollock on Torts, 189 (1886); 3 Black. Comm., 127 (1765).

[5] Warner v. Riddiford, 4 C. B. (N. S.), 180; Grainger v. Hill, 4 Bing. N. C., 212 (1838).

[6] Bird v. Jones, 7 Q. B., 742 (1845); 15 L. J. Q. B., 82.

of life or limb. The verge of a cliff or the foot of an apparently impracticable wall of rock would in law be a sufficient boundary, though, peradventure, not sufficient in fact to restrain an expert diver or mountaineer.[1]

§ 3. The right of personal liberty — Exceptions.— The right of every person to enjoy personal liberty is necessarily subject to some exceptions. Among these is the right to restrain a person who is fighting, or doing mischief, or disturbing a congregation, or has fallen in a fit, or is so sick as to be helpless, or is unconsciously going into great danger, or is drunk, or has *delirium tremens*, or is so insane as to be dangerous to himself or others.[2] Other instances might be given, but these sufficiently illustrate the application of the principle.

APPLICATION OF AN EXCEPTION.—

Restraining an insane person.

In the case of Colby v. Jackson, decided in 1842, the plaintiff offered evidence to prove that the defendant imprisoned him in a cage, and detained him therein for a period exceeding two months. The defendant pleaded the general issue, with a statement that at the time of the imprisonment the plaintiff was insane, and that it was dangerous to permit him to be at large; that his own safety and that of his own family and the public required his confinement. On the trial a judgment was rendered in favor of the plaintiff for one dollar, and the defendant appealed. In discussing the power to apprehend the plaintiff, Gilchrist, J., said: "But it is well settled that a private person, without warrant, may lawfully seize and detain another in certain cases. It will be a justification of a battery if a man hold another to restrain him from mischief. Com. Dig., Battery, H. If two persons be fighting, and there be reason to fear that one of them will be killed by the other, it will be lawful to part and imprison them till their anger shall be cooled. Bac. Abr., Trespass, D.; 2 Roll. Abr., 559. It is lawful for every man to lay hands upon another to preserve public decorum; as to turn him out of church, and prevent him from disturbing the congregation, or a funeral ceremony. Glever v. Hynde, 1 Mod., 168; Hall v. Plumer, 1 Lev., 196. So if a person intend doing a right act, as to assist a drunken man, or prevent him from going along the street without help, and a hurt should ensue, he would not be answerable. Bull. N. P., 16. And private persons may justify breaking and entering the plaintiff's house, and imprisoning his person, to prevent him

[1] Pollock on Torts, 189 (1886).

[2] Look v. Dean, 108 Mass., 116 (1871); Colby v. Jackson, 12 N. H., 526 (1842); Com. Dig., Battery, H.; Bac. Abr., Trespass, D.; 2 Roll. Abr., 559; Glever v. Hynde, 1 Mod., 168; Hall v. Plumer, 1 Lev., 196; Bull. N. P., 16; Hancock v. Baker, 2 B. & P., 260.

from murdering his wife. Hancock v. Baker, 2 B. & P., 260. Upon these authorities, and upon the obvious necessity of the case, if no authorities could be found, the original restraint of the plaintiff was justifiable. Colby v. Jackson, 12 N. H., 526 (1842).

§ 4. **Discussion of the subject.**— The subject of false imprisonment involves, first, the question of arrest and unlawful detention of the person. It will therefore be necessary, before proceeding with the discussion of the subject, to examine somewhat the nature and definition of the term arrest, both in civil and criminal proceedings, and the general rules of law relating thereto; the law of arrest with process and without process, at common law and under the statutory provisions of different states; the powers of officers and the abuse of legal process.

§ 5. **Arrest defined.**— The term arrest is derived, it is said, from the French word *arreta, to stop or stay*, and signifies the restraint of a man's person, obliging him to be obedient to the law. It may be considered as the beginning of an imprisonment. No person may be arrested in a civil action but by virtue of some writ, precept or command issued by a court, judge or justice having lawful authority; but for treason, felony and breach of the peace, at common law, arrests may be and frequently are made without warrant or precept.[1] Arrests, then, are either in civil or criminal cases. The duties of the officer are important in each, while the same liabilities attach to both. To arrest a person is to restrain him of his liberty by some lawful authority. The arrest is usually made by actual seizure of the defendant's person, but any touching, however slight, of the person is sufficient for this purpose. It is not confined to corporal seizure; as, where an officer entered a room where a person was and locked the door, telling him at the same time that he arrested him, it was held to be a sufficient arrest. And if an officer say: "I arrest you," and the party acquiesces or afterwards goes with the officer, it is sufficient.[2]

(1) ARREST IN CIVIL PROCEEDINGS.— The arrest in civil cases is now much more rare than formerly. The principal instances

[1] Allen on Sheriffs, 92 (1845).

[2] Rapalje & L. Law Dict., 78; Arch. Pr., 606; 1 Ex. D., 352.

in which it is allowed are: Where a person is attached for contempt of court; or where he is suspected of intending to leave the country before final judgment; in certain cases where a person has made default in the payment of a sum of money recovered or ordered to be paid by a court or judge; in penal actions sounding in tort; in summary proceedings before justices of the peace; where a person has been guilty of a fraud in contracting a debt sued for, or is a non-resident, or conceals himself to avoid process, and where he has means to pay and refuses to do so.[1] Other instances may be found in the statutory enactments of many states.

(2) ARREST IN CRIMINAL PROCEEDINGS.— In criminal cases arrests are generally made under a writ of *capias* or *venire facias*, or a warrant, but may be made without a warrant in certain cases; as where a person is seen committing an offense or is apparently about to commit an offense.[2]

§ 6. General rules of law relating to arrests.— A legal arrest can only be, in general, where there is an actual touching by the officer of the body of the person arrested, however slight that touching may be;[3] as laying hold of a hand which is out of the window. Some part of the officer must come in actual contact with some part of the person arrested.[4] Bare words will not make an arrest; as saying to a person: "I have a warrant, and arrest you."[5] It must be borne in mind, however, that these rules apply where the party does not submit. Words alone, imputing an arrest, will constitute one, if the party understands that he is arrested and submits, although the officer does not touch his person.[6] If an officer having process against a person who is in a carriage or on horseback says to him: "You are my prisoner; I have a writ against you," upon which he submits, turns back, or goes with him, it is an arrest; but if, instead of going with the officer, he flees away from him, it is no arrest unless the officer laid hold of him.[7] It is sufficient if the person be within the

[1] Rapalje & L. Law Dict., 79.

[2] 4 Steph. Com., 348; Rapalje & L. Law Dict., 79 (1888).

[3] Gener v. Sparkes, 1 Salk., 79.

[4] Huntington v. Blaisdell, 2 N. H., 318.

[5] Gwynne on Sheriffs, 96; 1 Salk., 79.

[6] Pike v. Hanson, 9 N. H., 491 (1838).

[7] Horner v. Battyn, Bull. N. P., 62; Gwynne on Sheriffs, 96.

power of the officer and submits to the arrest.[1] Where a party and an officer were together, and the party said he had surrendered, and the officer thereupon remarked that he had appointed a third person his keeper, it was held sufficient evidence of an arrest.[2] An officer said to a party, "I arrest you." The party replied, "Wait for me outside the door and I will come to you." The officer waited, but the party went another way. This was held to be no arrest, though had the party gone into the passage with the officer the arrest would have been complete.[3] So where the officers watched a party's house, and would have arrested him if he had tried to get away, but did not produce the writ, there was no arrest.[4] If process be shown to a party, and he then goes voluntarily with the officer, these acts alone do not, it seems, constitute an arrest.[5] So where an officer sent a message to a party informing him of process having issued against him, and requesting him to fix a time to call and give bail, which the party did, there was held to have been no arrest.[6] But where an officer accompanied a party to his (the party's) house, where the officer informed him that he had a writ for his arrest, upon which the party executed a bail bond and the officer withdrew, this transaction was held to be an arrest.[7] So if an officer puts his hand upon a man and tells him he must go, and he goes, supposing the officer has power to enforce him, it is an arrest.[8] Or, if an officer comes to one who is ill in bed and informs him that unless he satisfies the opposite party or gives bail he must take him or put him in charge of a keeper, the language of the officer shows the party sufficiently under restraint to constitute an arrest.[9] Where an officer entered a room and informed a party therein that he arrested him, and locked the door, it is an arrest, for he is in the custody of the officer.[10]

[1] Gold v. Bissell, 1 Wend. (N. Y.), 215 (1839).

[2] Straut v. Gooch, 8 Greenl., 126 (1831).

[3] Russell v. Lucas, 1 Car. & P., 153 (1824).

[4] Hender v. Robbins, 1 Har. & W., 204 (1835).

[5] Arrowsmith v. Le Mesurier, 2 New R., 211.

[6] Berry v. Adamson, 6 B. & C., 524 (1827).

[7] Reynolds v. Mathews, 2 Eng. Jur., 989.

[8] Wood v. Lane, 6 Car. & P., 774 (1834).

[9] Grainger v. Hill, 4 Bing. N. C., 212 (1838).

[10] Williams v. Jones, Ca. temp. Hardwicke, 301.

In all cases, to constitute an arrest, there must be circumstances indicating that the party is under restraint and within the power of the officer.[1]

§ 7. Detention of the person — Amount of force necessary.— In order to sustain a charge for false imprisonment it is not necessary for the person complaining to show that any actual violence was used, or that hands were laid upon him, or that he was shut up in any jail or prison; it is sufficient in law to sustain the charge if he has been at any time or place unlawfully restrained of his liberty, or detained in any manner from going where he wished, or prevented from doing what he desired.[2]

APPLICATIONS OF THE LAW.—

(1) *What is a sufficient imprisonment.*

(*a*) *Detention by cashier of a bank, etc.*— Woodward sued Washburn in case "for the loss of service of one Welcome W. Smith, his hired man. Smith was sent to the Bank of Syracuse a few minutes before 4 o'clock P. M., for the purpose of presenting some of the notes of the bank for redemption. Washburn was in attendance as the teller, and upon the notes being presented he counted out the money and handed it to Smith. While Smith was counting it the clock struck four, when Washburn locked the street-door of the bank on the inside and put the key in his pocket. When Smith had finished counting the money, finding the door locked, he requested to be let out. Washburn answered that the door would be unlocked when they went to tea. That it might by chance be opened before and requested him to sit down. About half an hour afterwards the door was opened to let in a notary who came on business, and Smith passed out. It was admitted that the bank was usually closed at 4 o'clock and that Smith was in the habit of coming to the bank with notes for redemption and was acquainted with the custom. It was held that the detention constituted a false imprisonment and a judgment for the plaintiff was sustained. Jewett, J.: "Smith was sent there on a legitimate errand at a proper time; he had a legal right to remain a reasonable time to transact the business, and was entitled to depart unmolested as soon as it was completed. Although the usual hour for closing the bank intervened, the means taken to detain him longer were unjustifiable." Woodward v. Washburn, 3 Denio (N. Y.), 369 (1846).

(*b*) *Arrest and imprisonment of infant — Assent immaterial.*— Nickerson and others entered a school-room and forcibly seized a child nine years old, placed there by the direction of his father, who had the legal custody of him, and carried him away without any previous knowledge on his part of the purpose. This is sufficient to sustain an indictment for an assault

[1] Gwynne on Sheriffs, 97.

[2] Hawk v. Ridgeway, 33 Ill., 473 (1864).

and false imprisonment under the Massachusetts statutes, without proof that the defendants knew that they were violating the father's rights; and although the acts were done under the direction of the child's mother, and the child, as soon as he knew that the seizure was for the purpose of taking him to his mother, was pleased, and desirous of having the purpose carried out. The child was incapable of giving a valid assent to a forcible transfer of him by a stranger from the legal custody of the father to the custody of the mother, who had no right to such custody, and evidence of such assent is incompetent in defense to an indictment for an assault, etc., upon him in making such transfer. Com. v. Nickerson et al., 6 Allen (87 Mass.), 518 (1862). *Citing* State v. Farrar, 41 N. H. 53; State v. Rollins, 8 N. H., 550; Mass. Gen. Stats., ch. 160, § 30; Com. Dig., Imprisonment, G.; 3 Chitty's Criminal Law, 835.

(c) *Forcible ejectment.*— In 1884 Wheeler made application to purchase from the University of California a tract of land bordering on Clear lake, and made a preliminary payment therefor. The land was at that time unsurveyed public land of the United States. Afterwards, in February, 1885, the township embracing the land was surveyed, and on the 19th of April, 1886, the map of the survey was filed in the local land-office. From the time of this attempted purchase Wheeler claimed the land, and, soon after the map was filed, made application to have it listed over to the state. There were two cabins on the tract,— one near what is called "Chappall Bay," and the other about a mile and a half away, and situate near the lake shore. In October, 1885, Wheeler employed John Standley to work on this tract, chopping brush; and he continued to so work until the 13th of March, 1886, when he was discharged. During this time he lived in one cabin and Wheeler in the other. Early in March Wheeler went away, leaving a man named Hall, who was in his employ, in his cabin. In April Standley went to the United States land-office and filed his declaratory statement to pre-empt a quarter-section of the tract, and received the usual certificate and receipt. The cabin occupied by Hall was on the land pre-empted. Two days later Standley told Hall he had a bill of sale of the cabin and requested him to move Wheeler's things out, which was done; and Standley commenced living in the cabin. Hall wrote Wheeler about the matter. Some days later Wheeler returned with the avowed purpose of removing Standley from the premises, forcibly if necessary. Mooney and two other persons were with him. They went where Standley was at work on his cabin and Wheeler said, "You have no legal right and I desire you to get away." Mooney laid his hand on Standley's shoulder and said, "There is your boat and I advise you to get into it." The parties clinched and Standley was thrown down, and his hands and feet tied; he was then put into the boat and taken around to Chappall Bay; there he was made to get into a wagon and was driven away. At Chappall Bay he asked the names of the four persons who had assisted Wheeler in removing him to that point, and each one of them gave him a false name. For these acts Wheeler and Mooney were convicted of false imprisonment. They appealed. In affirming the conviction Belcher, C. C., said: At the trial the defendants sought to justify their action upon the ground that Wheeler had had the actual possession of the disputed premises for more than a year, and was entitled to retain

that possession; that Standley induced Hall to surrender to him the possession of the cabin by fraudulent misrepresentations, and became a naked trespasser upon the land, and that under the law, as declared in Atherton v. Fowler, 96 U. S., 519, and McBrown v. Morris, 59 Cal., 65, he could acquire no rights to the land by his attempted pre-emption; and that Wheeler was therefore authorized to remove him, and to use as much force as was necessary to accomplish that end. The court below did not adopt defendants' theory, and therefore nearly all of the rulings were excepted to, and assigned as errors. For the purpose of the case it may be conceded that Standley obtained no rightful possession of the Wheeler cabin, and that his pre-emption filing was wholly invalid. Still the question remains, Were the defendants justified in removing him from the land in the manner they did remove him? In considering this question it must be observed that the land was uninclosed public land. Wheeler acquired no title to it, or right to its possession, by his application to purchase it from the university. He had a cabin upon it, and had cleared a small area, and planted some vegetables upon it. But all this evidently gave him no possession of the portions not actually occupied by him. Standley had commenced building a cabin for himself, some two hundred yards distant from Wheeler's cabin. This new cabin was upon ground which had not been inclosed, cleared or cultivated by Wheeler. While at work upon his cabin he was seized, thrown down, tied, and carried away by defendants. Upon these facts it seems to us that no plausible pretense of justification can be put forth. False imprisonment is the unlawful violation of the personal liberty of another, and every element of the offense seems to have been fully and clearly shown. People v. Wheeler, 73 Cal., 252; 14 Pac. Rep., 797 (1887).

(*d*) *What is a sufficient arrest and imprisonment — Sufficiency of complaint and warrant.*— In an action instituted by defendant in error to recover damages sustained by him by reason of a malicious prosecution previously instituted by plaintiff in error against him before a justice of the peace of the county, the answer filed by plaintiff in error was a general denial of the allegations of the petition. A trial was had, resulting in a verdict for defendant in error for $18. A motion for a new trial was overruled, and judgment rendered. He then prosecuted a writ of error to the supreme court. In delivering the opinion Reese, J., said: Plaintiff in error insists that the verdict of the jury is not sustained by sufficient evidence. The principal ground of the objection is that neither the complaint made by defendant in error, nor the warrant issued thereon, charged a criminal offense. While it is true that they were quite informal and unskilfully drawn, yet it is equally clear that a criminal offense was charged — that of stealing corn of the value of $75. The recital of the warrant was that defendant in error did, "in the county of Gage, take feloniously and steal corn to the amount of $75 from the said Malone." It was a sufficient charge of the commission of a crime, and the court did not err in admitting the complaint and warrant in evidence. The essential allegations of a complaint for larceny are that the party charged "did steal, take and carry away" the property named therein. These elements are all found in the complaint, in the charge "that the said Huston has

unlawfully and feloniously taken, stolen and carried the same off." It is contended that defendant in error was not in reality arrested nor deprived of his liberty, and, therefore, he was not imprisoned. The testimony shows that the constable went to the house of defendant in error, where he was, read the warrant to him and told him he was under arrest; that defendant in error requested the officer to take him, or allow him to go before another justice. The constable consented to this, and, as he had to subpœna the witnesses for the state, directed defendant in error to meet him at the office of the justice. He immediately went there, going by way of a neighbor's, whom he desired to become his surety. They met at the office of the justice that afternoon, and, upon his application, the cause was adjourned a week, he giving an undertaking for his appearance, and thereby procuring his discharge. At the appointed time he again appeared for trial with an attorney to conduct his defense, and upon his motion the proceedings were quashed, and he was finally discharged. This was sufficient arrest and imprisonment. Malone v. Huston, 17 Neb., 107; 22 N. W. Rep., 231 (1885).

(2) *What is not a sufficient imprisonment.*

(*a*) *Submitting to detention under misapprehension of the law.*— On the trial of an action for false imprisonment, the plaintiff, Warne, proved that between February and May, 1804, having been arrested on a *capias ad satisfaciendum* at the suit of one Frederick De Peyster, he executed a bond, according to the law (2 R. S. N. Y., 433; 1 Rev. Law, 429), for the jail liberties, and resided with his family within the limits. The defendant, Constant, the sheriff, returned the plaintiff in custody on the *capias*. On the 11th of May a *supersedeas* to the *capias* from the supreme court was delivered to the sheriff and a discharge of the plaintiff requested. This the sheriff refused, unless his poundage fees on the *capias* were paid him. On the following day the supreme court awarded a writ of *habeas corpus* on an affidavit that the plaintiff was not discharged on the *supersedeas*. To the *habeas corpus* the sheriff made his return that on the 18th day of February the plaintiff had been committed to his custody on a *capias ad satisfaciendum*, and that he still remained in his custody for his fees due on the execution. The court upon reading the return ordered the plaintiff to be discharged. After this order the plaintiff remained in the limits with his family for two or three months, and he never personally demanded his discharge, though it was demanded by his attorney of record. On the trial the judge ruled that the plaintiff, being upon the limits, at liberty to go at large if he chose to risk a suit upon his bond, and subject to no other restraint, could not maintain his action and ordered a nonsuit. On appeal Yates, J., said: "The bond given by him for the jail liberties under the statute could only continue operative so long as the authority by virtue of which he was at first confined, and on which the bond is grounded, remained in force. The delivery of the *supersedeas* to the defendant destroyed the further operation of the *capias*, and with it the necessity for, or further effect of, the security, so that the plaintiff was thereby virtually and legally discharged from imprisonment, and might immediately hereafter have left the jail liberties without risking

anything, had he been so disposed; nor could the sheriff legally have prevented his departure." . . . "We are of opinion that the judge properly ruled that this restraint, under all the circumstances, was not sufficient to sustain the action, and that a judgment of nonsuit must be entered." Warne v. Constant, 4 Johns. (N. Y.), 82 (1809), *cited* in 61 How. (N. Y.) Pr., 423.

(b) *Officer carried away to sea.*— Elias K. Sporr, a constable of the city of Boston, went on board the ship Granada, of which Nathaniel Spooner was master, with a civil process, for the purpose of arresting the steward of the ship, and was carried away to sea. A suit for false imprisonment against the master of the ship was the result. The defense was placed upon two grounds: (1) At the time, etc., the defendant, though master of the ship, had no control thereof. (2) The plaintiff did not use reasonable diligence in arresting the steward and taking him on shore.

At the trial the evidence tended to show that the ship was in her home port, on the point of sailing, when the plaintiff went on board; her sails were set and the fasts by which she was held to the wharf were singled. The plaintiff upon going on board immediately found and arrested the steward, but remained standing with him on board ten or twelve minutes without attempting to leave the ship. Repeated notices were given to all persons not belonging on board to quit the ship. The owner of the ship stood on the wharf at her side and gave the order to the pilot, who was on board, to cast off the fasts, and the pilot gave the orders to the crew. The pilot testified that during the alleged trespass he had control of the ship's movements; that he cast off the fasts by orders directly from the owner, and that the master had no agency in the matter. The court instructed the jury that if the defendant had not the control of the ship, still if a trespass was committed, as alleged, and the defendant countenanced and assented to it, directly or indirectly, he was liable as a trespasser. The jury were further instructed that if the plaintiff had not used due diligence in making the arrest and returning to the wharf, and if proper notice had been given to him of casting off the fasts, he had no right to complain that the ship sailed and carried him to sea. The jury found for the defendant, and on being asked to state the grounds of their verdict they replied that the plaintiff had not used due diligence in making the arrest, and that the owner of the ship and not the defendant had charge of her; and this finding was sustained by the supreme court. Sporr v. Spooner, 12 Met. (53 Mass.), 281 (1847).

§ 8. Summary of the law of arrest — The rule stated by Murfree.— "From all the cases and *dicta* on this subject may be gathered the general principle that whatever practically or theoretically gives to the officer the control of the person constitutes an arrest; that personal seizure in the name of the law is the most obvious, usual and unequivocal mode of executing process; that a *bona fide* submission, evidenced by words, or by the execution of bail bonds, or other like instruments, is an

adequate substitute for personal contact; that, without such contact, words of arrest by the officer, accepted by the defendant, or not straightway resisted by protest or flight, or otherwise, constitute such an arrest as will bind alike the officer, plaintiff and defendant."[1]

§ 9. Arrest with process.— Of course it cannot be said that an arrest under a regular and sufficient warrant is illegal. Such process is always a complete justification to the officer making the arrest.

§ 10. What is a regular and sufficient warrant — The law stated by Ashe, J.— "The conclusion that we deduce from the authorities is, if the warrant is for an offense within the jurisdiction of the justice, and the crime charged is described with sufficient precision to apprise the accused of the offense with which he is charged, the warrant is good, and will protect the officer. But this applies only to those cases where a justice acts ministerially, as in warrants to arrest offenders when he has no final jurisdiction. Where he takes cognizance of criminal actions within his jurisdiction, the warrant is the indictment, and must set out the facts constituting the offense with such certainty that the accused may be enabled to judge whether they constitute an indictable offense or not, and may be enabled to determine the species of offense with which he is charged."[2]

§ 11. The essentials of a criminal complaint and warrant.— It must be remembered that criminal complaints must often be made by persons of limited education before justices who are not lawyers, and who are not at all acquainted with legal niceties. To require them to do more than describe offenses with substantial correctness, or to give in the warrant any more information than is needed to inform the defendant of the crime he is charged with, and that it is a crime, would be to make it practically impossible to hold shrewd criminals at all in many places, and we think it would be of no use to any one. The criminal-law text-books do not, so far as we have examined them, require any particular formality in warrants of arrest, but they are treated of as varying according to the practice of different places.[3]

[1] Murfree on Sheriffs, § 147 (1884).
[2] State v. Jones, 88 N. C., 671 (1883).
[3] Haskins v. Ralston, 69 Mich., 63; 37 N. W. Rep., 45 (1888).

§ 12. Officers protected by process — Abuse of process, etc.— Process, when in due form, or where its defects are only such as render it voidable only, and not void, will protect the officer in the due and legal execution thereof, but it does not protect the officer in any abuse of the person or property of the person against whom such process is issued. And where the process is regular, and the officer has executed it in due manner, yet if he and the complainant or prosecutor combine to extort money from the defendant in the process, such officers thereby lose the protection afforded by such process, and become liable for false imprisonment.[1] We shall have occasion to treat of this subject more extensively in another part of this work.

§ 13. Arrest without process.—

(1) At common law.— By the common law no person could in general be arrested, without a warrant, for a mere misdemeanor unattended with violence.[2] But if a felony, treason or actual breach of the peace had been committed by a person arrested, the arrest might be justified by any one without warrant. If an innocent person was arrested upon suspicion by a private individual, such individual was excused if a felony was in fact committed and there was reasonable ground to suspect the person arrested; but if no felony had been committed by any one, such arrest without warrant by a private individual was illegal. An officer, however, would be justified if he acted upon information from another person, which he had reason to rely upon,[3] though if a peace officer of his own will took a person into custody on suspicion, he must prove that the crime charged had been committed.[4] Officers were required to arrest felons and might arrest persons suspected of capital offenses whose guilt was not certain. If assaulted in the execution of their duty they might apprehend the offender, and keep him in prison a reasonable time, to be carried before a justice of the peace to be committed or fined

[1] Crocker on Sheriffs, § 59 (1871); Barb. Crim. Law, 531, 532; Dickinson v. Brown, Peake's N. P., 234 (1780).

[2] 1 Chitty's Crim. Law, 15.

[3] Samuel v. Payne, Doug., 359; 3 Camp., 420.

[4] Holly v. Mix, 3 Wend., 350; Gwynne on Sheriffs, 522.

by him.[1] It is their duty to arrest all persons, with their abettors, who oppose the execution of process.[2]

(2) UNDER STATUTES.— The subject of arrest without process has been considered of sufficient importance in many of the states of our Union to be matters of statutory regulation.

AN ILLUSTRATION — THE STATUTE OF ILLINOIS.—

An arrest may be made by an officer or by a private person without warrant for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it. R. S. Ill. 1887, p. 488, sec. 4.

APPLICATIONS OF THE LAW.—

(1) *Time of making an arrest upon view and without a warrant — Resisting an officer making a search.*

Crossman, a constable of the commonwealth, was engaged in searching Mr. Leddy's tenement for intoxicating liquors under a warrant duly issued under a statute. Leddy hindered and opposed him. Some blows were exchanged. At some stage of the proceedings the constable arrested Leddy; but it was uncertain at what time, whether after the assault and hindering had ceased or before that time, the arrest was made. Leddy brought an action for false imprisonment. On the trial the court instructed the jury that if the arrest was so connected with what had previously taken place between the plaintiff and the officer as to be part of the same transaction, the defendant had a right to arrest the plaintiff then and there without a warrant; but otherwise he had no such right. The verdict was for the defendant and was sustained. Leddy v. Crossman, 108 Mass., 237 (1871).

(2) *Arrest without warrant, justifiable — Breach of the peace.*

At the time of the arrest complained of the defendant was a policeman of the city of Detroit. The plaintiff was a clerk of Mr. Van Baalem, a pawnbroker. The officer entered the pawnbroker's shop, when the clerk ordered him out, using profane and indecent language towards him as he left. On the next day the parties met again, when the plaintiff, Davis, again used towards the officer abusive epithets, calling him "a God damned son of a bitch." Davis continued to use foul language towards the officer and followed him across the street, attracting the attention of citizens passing along the street, among whom were many ladies and children. The officer went to him and asked him for his name, which he refused to give, saying to him, "If you lay your hands upon me I'll shoot you," calling him at the same time a vile name. The officer thereupon arrested him, took him to the city attorney's office, and made complaint against him under the city ordinance, which provides that "no person shall be guilty of

[1] 1 Chitty, Crim. Law, 25. (N. Y.), 85; Gwynne on Sheriffs,
[2] Coyles v. Hurtin, 10 Johns. 523.

using indecent or immoral language, nor be guilty of any indecent or immoral conduct or behavior, on any public street, lane, alley, square, park or space in said city," the penalty being fine or imprisonment. The city attorney took the complaint, but for some reason failed to prosecute it. Davis was discharged. This is the defendant's statement of the facts, and he claims that if found true by the jury they constitute a perfect defense to the action. But upon most of the material facts stated by him he was contradicted by the plaintiff.

The court charged the jury, in substance, that the only question for them to consider was the damages. The finding was for the plaintiff. The defendant prosecuted a writ of error. In delivering the opinion of the court, Sherwood, J., said:

"It is only needful for us to review the case as presented on the part of the defendant, and if, from his showing, he was not justified, the verdict must stand.

"There seems to be no question that the official position of the defendant in the city of Detroit constituted him a conservator of the peace. The arrest was made without warrant. At the time it was made (midday) the plaintiff was on the sidewalk, where citizens, men and women, were constantly passing and repassing, and there, in a loud, boisterous manner, he called the defendant a 'God damned son of a bitch,' and continued to use other indecent language. When asked for his name he refused to give it, and threatened to kill the officer if he laid his hands on him. Only a few minutes before, the plaintiff had used the same and other profane language towards him in the presence of a crowd upon the street. There is no question about the officer's right to arrest for a breach of the peace committed in his presence without process.

"Did the language and conduct of the plaintiff on that occasion amount to a breach of the peace? The answer must necessarily determine the case. The offense, whatever its character, was committed in the presence of the officers in the public street in a city, in the presence of citizens. The language used was not only vile and profane, but forbidden under penalties both by the by-laws of the city and the statutes of our state. It was against decency and public morals, of the most aggravating character, well calculated to arouse the passions and induce personal violence, which was threatened if the officer laid hands upon the offender.

"Now, what is understood by 'a breach of the peace?' By 'peace,' as used in the law in this connection, is meant the tranquillity enjoyed by citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in political society, and any intentional violation of that right is 'a breach of the peace.' It is the offense of disturbing the public peace, or violation of public order or public decorum. Actual personal violence is not an essential element in the offense. If it were, communities might be kept in a constant state of turmoil, fear and anticipated danger from the wicked language and conduct of a guilty party, not only destructive of the peace of the citizens, but of public morals, without the commission of the offense. The good sense and morality of the law forbid such a construction. I think the language and conduct of Davis in this case shows him guilty of a breach of the peace,

and in the act of committing it at the time he was arrested. The court should have submitted the defendant's case, as he made it, to the jury under proper instructions, to ascertain the truth of the facts as stated by him and his witnesses. This the court did not do, and the failure was error." Judgment reversed. Davis v. Burgess, 54 Mich., 514; 20 N. W. Rep., 540 (1884).

(3) *Power to arrest without warrant must be exercised promptly.*

In an action for false imprisonment, the defendant justified upon an arrest of plaintiff made by him, then a police officer of the city of Minneapolis, without a warrant, for a violation in his presence of an ordinance of that city. There was evidence tending to show that about noon the plaintiff violated the ordinance in the presence of defendant. The defendant did not then attempt to make the arrest, but went about his other duties during the afternoon, and arrested plaintiff at 5 or 6 o'clock in the evening. There was also evidence tending to show that plaintiff was committing a similar violation of the ordinance at the time of the arrest. The court instructed the jury in effect that plaintiff was at the time of the arrest committing a violation of the ordinance that would justify the arrest, though without a warrant, but that defendant had no authority to arrest in the evening for a violation at noon.

Gilfillan, C. J.: Section 11, chapter 105, General Statutes 1878, provides: "A peace officer may without warrant arrest a person — *First*, for a public offense committed or attempted in his presence; *second*, when a person arrested has committed a felony, although not in his presence; *third*, when felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it; *fourth*, on a charge made, upon reasonable cause, of the commission of a felony by the person arrested."

At the common law, a constable might, without warrant, arrest for a breach of the peace committed in his view. 4 Bl., 292. But it was well settled that in case of an offense not a felony the arrest must have been made at the time of, or within a reasonable time after, its commission. Regina v. Walker, 25 Eng. Law & Eq., 589; Cook v. Nethercote, 6 Car. & P., 741; Clifford v. Brandon, 2 Camp., 358; Derecourt v. Corbishley, 85 E. C. L., 188; Phillips v. Trull, 11 Johns., 486; Taylor v. Strong, 3 Wend., 384; Meyer v. Clark, 41 N. Y. Superior Ct., 107.

In case of felony *actually* committed, although not in his presence, he might, upon probable suspicion, arrest without a warrant. The reason for the distinction lay in the greater gravity of the latter class of offenses, and the greater importance to the public of bringing the offenders to punishment.

The statute seems to be a re-enactment of the common-law rule, with this change: that the first subdivision enlarges the class of cases in which a peace officer may arrest where the offense is committed in his presence, so that such arrest may be made for any public offense, felony or misdemeanor, though not amounting to a breach of the peace. But there is no reason to suppose that it was intended to change in any other respect the conditions on which the arrest may be made. The power to arrest without

warrant, while it may in some cases be useful to the public, is dangerous to the citizen, for it may be perverted to purposes of private malice or revenge, and it ought not, therefore, to be enlarged. When it is said that the arrest must be made at the time of or immediately after the offense, reference is had, not merely to time, but rather to sequence of events. The officer may not be able, at the exact time, to make the arrest; he may be opposed by friends of the offender; may find it necessary to procure assistance; considerable time may be employed in the pursuit. The officer must at once set about the arrest, and follow up the effort until the arrest is effected. In Regina v. Walker, *supra*, some two hours had elapsed between the offense and the arrest, and it was held that the authority to arrest was gone, because there was no continued pursuit; and the same was held in Meyer v. Clark, *supra*, because the officer had departed and afterwards returned, the court saying, "the shortness of the interval does not affect the question."

In this case, some five hours having elapsed between what occurred at noon and the arrest, during which the defendant was not about anything connected with the arrest, the court was right in its instruction that there was no authority to arrest for that occurrence. Wahl v. Walton, 30 Minn., 506; 16 N. W. Rep., 397 (1883).

§ 14. The manner of arrest — Use of handcuffs, etc., by officers.— While an officer is bound to treat his prisoner with such kindness and humanity as may be consistent with security, and will not be warranted in employing any harsh or unnecessary restraint, yet it is his duty to use such reasonable precautions as the case requires to prevent escape, especially in arrest for felony or offenses of magnitude. His action, in this regard, is to be considered in the light of all the circumstances of the particular case bearing upon the question of what means are reasonably necessary to keep his prisoner secure. There must be some discretion reposed in an officer, making an arrest for felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension. And this discretion cannot be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity. It must be found that the officer was unnecessarily rough and inhuman in his treatment of the person arrested, and without any view to prevent the escape of such person. But it is not necessary that the prisoner must be unruly or attempt to escape, before he can be handcuffed, or do anything indicating a necessity for such restraint. Nor, in the event that he does nothing, at the time of the arrest, in

the way of attempting to escape or resisting the officer, is it necessary that he should be a notoriously bad character in order to justify the tying of his hands. There may be other and sufficient reasons why such extreme measures should be resorted to in order to secure and safely lodge the prisoner.[1] Of course the arrest of an innocent man is an indignity hard to be borne, and the tying of his hands with cords or irons is something that makes the blood run chill to contemplate; but both are indignities ofttimes without redress, and a necessary consequence of the due administration of justice in the suppression of crime. But an officer is bound to act humanely, and cannot lightly and without reason either arrest or harshly treat a supposed offender, be he innocent or guilty. It is, no doubt, true that petty officers, too often unduly inflated by a too high conception of their office and authority, are inhuman and cruel in their treatment of suspected persons. Such conduct the law does not hesitate to punish. We must bear in mind that the hardened and skilful offender against the criminal laws is sometimes, and generally, the meekest when arrested, but his eye is open to every avenue of escape; and to say that unless such person attempts to escape, resist arrest, or is known to the officer to be a notoriously bad character, he cannot be shackled for an hour or two, until he can be conveyed to a place of safety, is to lay down a rule which will make escapes easy and place new obstacles in the way of the apprehension and safe-keeping of offenders. The officer cannot stop, when the man is unknown to him, at the moment of arrest, to inquire into his character, or his intentions as to escape, or his guilt or innocence of the offense charged against him. His duty is to take him, to safely keep him, and to bring his body before a magistrate. If he does this without wantonness or malice, it is not for a jury to find that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the accused, and to punish the officer in damages for what honestly appeared to him at the time to be reasonable and right.[2]

[1] Firestone v. Rice, 71 Mich., 377; 38 N. W. Rep., 887 (1888); Cochrane v. Toher, 14 Minn., 385; State v. Stalcup, 2 Ired., 50.

[2] Firestone v. Rice, 71 Mich., 377; 38 N. W. Rep., 889 (1888).

§ 15. The rule stated by Gwynne.[1]— Violence should be avoided if possible in making an arrest. The sheriff or other officer may, under peculiar circumstances, lay hands on another in order to serve him with process;[2] but cannot drag him about or strike him unless such acts are rendered necessary by his resistance.[3] The officer making an arrest may always use as much force as is necessary to accomplish his object, and cannot be made liable except for wanton violence.[4]

THE LAW ILLUSTRATED.—

(1) *Use of handcuffs.*

Daniel Firestone sued Walter J. Rice and Frank Fenn for false imprisonment. Rice was sheriff and Fenn was a night-watch in a village in Allegan county, Michigan. It was represented to the sheriff by William Dumont and his brother John, who waked him up in the night, that John Dumont's dam had been cut that night, and that they had tracked two persons directly from the spot where the dam was opened to the house of John Zeigler. The Dumonts were old citizens of Allegan county, and there was no reason why the sheriff should doubt the truth of the representations made by them, and a warrant was procured by John Dumont against Zeigler, and also directed against another as an unknown person. The sheriff called upon Fenn to assist him in the matter, and they went together in a buggy. Upon reaching the house, they found Zeigler and Firestone in bed. The wet boots of Zeigler and the shoes of Firestone were found at the house, and measured by Dumont, who claimed that they corresponded exactly with the tracks. The pantaloons of both parties were wet around the bottom of the legs, and a spade was found inside the kitchen door, which appeared to have been recently used. The lower part of this spade was wet and clean, but upon the upper part of the blade sand was sticking, which Dumont informed Rice was in appearance like the sand of which his dam was constructed. They were both arrested, and Fenn, by direction of the sheriff, put handcuffs on Firestone. The arrest was made in the night, at a late hour, under the supposition, if not made then, that the persons sought, or at least Firestone, might escape. The night was dark, and the country wooded. The parties had to be taken about eighty rods, along an old winding wood road, to the buggy, every foot of the way opening an inviting opportunity to escape. From there to Allegan was a night drive, with two officers and two prisoners. There was no harshness upon the part of the sheriff or Fenn other than the placing of the handcuffs upon Zeigler and Firestone. They made no complaint at the time. There was nothing tending to show malice or wantonness, or any ill will, or even a malevolent impulse, of the sheriff towards

[1] Gwynne on Sheriffs, 97 (1849).
[2] Harrison v. Hodgson, 10 B. & C., 445 (1830).
[3] Kreger v. Osborn, 7 Blackf., 74 (1843).
[4] Wright v. Keith, 24 Me., 158 (1844).

the prisoners. He put the handcuffs upon them for no other purpose than to prevent escape, and that he had good reason to believe it was necessary to do so. On the trial the jury returned a verdict for both defendants. Firestone appealed. On affirming the judgment, Moore, J., said: It turned out afterwards that Firestone was innocent of any offense, was neither a "slippery" nor desperate character, but an inoffensive and reputable citizen, and that he never had the remotest idea of trying to escape. But that cannot alter the rule which saves a sheriff harmless from an act which appeared, at the time it was done, to be both necessary and reasonable. . . . The chief indignity complained of was the handcuffing of the plaintiff. "To mulct the sheriff, under the circumstances, in damages for handcuffing the plaintiff while conveying him, on a dark night, through the woods to the village of Allegan, when he had good reason to suspect him to be guilty of a felony, and one likely to escape at the first opportunity, when it was done neither in recklessness, wantonness, nor malice, would be to put in peril every officer of the law who, under like circumstances, was alert and vigilant in the performance of his duties in the arrest of supposed criminals." Firestone v. Rice, 71 Mich., 377; 38 N. W. Rep., 885 (1888).

NOTE.—The plaintiff was arrested for an offense under section 9168, Howell's Statutes (Mich.), which reads as follows: "Every person who shall wilfully and maliciously break down, injure, remove or destroy any dam, reservoir, canal or trench, or any gate, flume, flash-boards or other appurtenances thereof, or any levee or structure for the purpose of conveying water to any such dam or reservoir, or any of the wheels, mill-gear or machinery of any mill, or shall wilfully or wantonly, without color of right, draw off the water contained in any mill-pond, reservoir, canal or trench, shall be punished by imprisonment in the state prison not more than five years, or by fine not exceeding $500, and imprisonment in the county jail not more than one year." And by Howell's Statutes of Michigan, section 9430: "The term 'felony,' when used in this title or in any other statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in the state prison."

§ 16. Abuse of process.— Officers sometimes render themselves liable in actions for false imprisonment for what is termed in law abuse of legal process; as where the officer refuses proper bail,[1] uses excessive force, subjects the defendant named in his process to unwarrantable insults or indignities, treats him with cruelty, denies him proper food, or otherwise subjects him to oppression or undue hardship,[2] or uses, or

[1] Mechem on Public Officers, § 771 (1890); Berrier v. Moorehead, 22 Neb., 687; 36 N. W. Rep., 118 (1888).

[2] Wood v. Graves, 144 Mass., 365; 59 Am. Rep., 95; Baldwin v. Weed, 17 Wend. (N. Y.), 224; Page v. Cushing, 38 Me., 523.

permits to be used, the process to extort money or other property from the defendant.[1] In regard to the proper use of his process, the officer is bound by law to know what the law is, and he must keep within its limits at his peril.[2]

§ 17. Discussion of the subject by Murfree.— "The manner in which an arrest should be made is a matter of no small importance. It is hardly necessary to say that the law, while requiring a strict obedience to its mandates, will tolerate in its ministers no unnecessary violence. *Moliter manus imponere* is as far as, under any normal circumstances, an officer can go with safety; and one who endangers the lives or limbs of others, or inflicts great bodily injuries in the discharge of his official duties, should be prepared to justify his conduct by proof showing that he acted under the pressure of an irresistible necessity. Especially is this true with regard to civil process." . . . "There is prevalent, not only among officers of every grade, but throughout the community, an exaggerated idea of the powers of officers in this respect which the law vouchsafes to its ministers. A sheriff, constable or policeman with a revolver and a warrant charging a misdemeanor is popularly supposed to hold the keys of life and death, and as he frequently shares in the delusion, he abuses his powers with, sometimes, very tragical results. What the law does allow in the use of physical force is the very *minimum* by which the desired object can be obtained. Whatever a rash or over-zealous officer may do in excess of this is without warrant of law."[3]

AN APPLICATION OF THE LAW.—

Abuse of process — Officer exceeding his powers — Carrying person arrested out of the jurisdiction.

Edmund O. Bacon was a deputy-sheriff. He arrested, without a warrant, Joseph Papineau, who was found intoxicated, in the town of Blackstone, kept him until the next morning and then took him to the town of Uxbridge, before a trial justice in that town, and made a complaint against him for drunkenness. There was no police court and no trial justice quali-

[1] Holly v. Mix, 3 Wend. (N. Y.), 350; 20 Am. Dec., 102.

[2] Malcumson v. Scott, 56 Mich., 459 (1885).

[3] Murfree on Sheriffs, § 148 (1884). Citing State v. Mahon, 3 Harr. (Del.), 568 (1839); Kreger v. Osborn, 7 Blackf., 74 (1843); Wright v. Keith, 24 Me., 158 (1844); Harrison v. Hodgson, 10 B. & Cr., 445 (1830).

fied to act in Blackstone, but there were two justices of the peace. After his release Papineau sued Bacon for false imprisonment. On the trial he contended that he should have been taken before a justice of the peace in Blackstone and the complaint made there. The court held otherwise and the verdict was for the defendant. The statute under which he was arrested provides that the officer making the arrest shall "take him before some justice of the peace or police court in the city or town wherein he has been found." Stat. Mass. 1869, ch. 415, § 42. On exception, Chapman, C. J., said: "The statute thus prescribes a peculiar method of dealing with a person arrested while intoxicated, and its evident purpose is that such person shall be dealt with in the city or town where he is found. The plaintiff should have been taken before a justice of the peace in Blackstone and there complained of and examined. A substantial compliance with the statute is sufficient; but it was not substantially complied with by taking the plaintiff to a magistrate in another town in the first instance, there being a justice of the peace in Blackstone." The authorities sustain the position that the officer was a trespasser, and the exceptions were sustained. Papineau v. Bacon, 110 Mass., 319 (1872). *Citing* Gainey v. Parkman, 100 Mass., 316; Tubbs v. Tukey, 8 Cush., 438; Stetson v. Packer, 7 Cush., 562; Ewigs v. Walker, 9 Gray, 95; Houghton v. Wilson, 10 Gray, 365; Kent v. Willey, 11 Gray, 368, 373; Kennedy v. Favor, 14 Gray, 200.

§ 18. The officer must arrest the right person — Misnomer.—It is almost unnecessary to say that an officer should be careful to arrest the right person, for if he arrests one person upon a writ against another he becomes liable in an action for false imprisonment. And this is true notwithstanding the similarity and even the identity of the names.[1] Lord Ellenborough said that process ought regularly to describe the party against whom it is meant to be issued, and the arrest of one person cannot be justified under a writ sued out against another.[2] An officer will be held a trespasser if he arrests a person who is named in a writ by another than his true name, and this rule holds true although the misnomer was only in his christian name.[3]

§ 19. A distinction.— In the rules of law applying to the doctrine of misnomer a distinction is taken between mesne and final process. If an officer arrest a person upon a *capias ad respondendum* served by a name other than his true name, he is liable as a trespasser; but if a defendant is misnamed in a *capias ad satisfaciendum*, the officer making the arrest is not

[1] Murfree on Sheriffs, § 155 (1884).
[2] Shadgett v. Clipson, 8 East, 328; Cole v. Hindson, 6 Term, 234; Price v. Horwood, 3 Camp., 108; Kelly v. Laurence, 10 Jurist, 636.
[3] Wilkes v. Lorch, 2 Taunt., 399.

liable, because the defendant should have pleaded the misnomer in abatement, and by failing to do so he is estopped from saying that the name by which he was served is not his real name.[1]

§ 20. Arrest of night-walkers.— Watchmen and beadles have authority, at common law, to arrest and detain in prison, for examination, persons walking the streets at night when there is reasonable ground to suspect felony, although there is no proof of a felony having been committed.[2] It is said by Hawkins and others that every private person may, by common law, arrest any suspicious night-walkers and detain them until they give a good account of themselves.[3] But where a person is taken up in the night as a night-walker, and disorderly, though by a lawful officer, it has been considered that the arrest would be illegal, if the person so arrested were innocent and there were no reasonable grounds of suspicion to mislead the officer.[4]

§ 21. Night-walker defined.— A night-walker is a person who sleeps by day and walks by night, that is, persons of suspicious appearance and demeanor who walk by night.[5]

§ 22. Discussion of the subject.— The reason why night-walking and lurking about the premises of peaceable inhabitants in the night-time is regarded as criminal conduct is because such conduct cannot, in general, be for any but a bad purpose, and it tends to the annoyance and discomfort of peaceable citizens who have the right by law to be exempt from such disturbances. What family, in a large city frequently infested with burglars and other desperate criminals, could retire to their beds and enjoy the quiet and repose due to them when they were conscious that suspiciously acting persons were lurking about their premises? And will it be said that the law gives no right to have such persons arrested and removed, until a burglary is actually committed or attempted? The right of arrest in such cases by the proper

[1] Murfree on Sheriffs, § 155 (1884); Crawford v. Satchwell, Strange, 1218; Fisher v. Magnay, 5 Man. & G., 779 (1841).

[2] Lawrence v. Hedger, 3 Taunt., 14; Miles v. Weston, 60 Ill., 361 (1871).

[3] Hawkins' Pleas of the Crown, ch. 13, § 6; ch. 12, § 20.

[4] Tooley's Case, 2 Ld. Raym., 1296; Miles v. Weston, 60 Ill., 361 (1871).

[5] 2 Bouvier's Law Dictionary, 230; 5 Edward III., ch. 14; Stokes v. State (Ala.), 9 So. Rep., 400 (1891).

officer is supported by the same reasons and necessities in the present that it was in the earlier history of the common law.[1]

THE LAW ILLUSTRATED.—

What is probable cause to arrest a night-walker.

Weston brought an action against Miles for false imprisonment. On the night of the arrest complained of, two men had been walking in front of Miles' house in Chicago apparently taking observations, and when any one approached they would separate, and come together again, and thus kept lurking around for an hour and a half, until late in the evening, when Miles, becoming alarmed at the suspicious conduct, brought two policemen to the place where the men had been, and found Weston there, who upon being interrogated as to his purpose and told that he had been hanging around there for an hour and a half, replied that he had been there two hours, giving no further account of himself. One of the policemen arrested him, and, without any directions from Miles as to what should be done with him after the arrest, he was taken by the officer to the station. He was tried by the police justice and fined. He then brought an action against Miles for false imprisonment, claiming that his arrest was illegal. He recovered a judgment on the trial, but Weston took the case to the supreme court, where Mr. Justice McAllister, in the opinion reversing the judgment, said: "It is true the plaintiff testified that he had been at the place in question but one or two minutes, yet five witnesses testify that he said, when questioned, that he had been there two hours, which admission was sufficient, under the circumstances, to cause the officer to believe him to be one of the two night-walkers who had been observed hovering about defendant's house. But for this statement he probably would not have been arrested. If his own declaration caused his arrest, surely this circumstance should go far, under the other circumstances of the case, in mitigation of damages, if not to justify the arrest. Miles v. Weston, 60 Ill., 361 (1871).

§ 23. Power of magistrates to imprison for breaches of city and village laws.— For the breach of an ordinance the party, as a general rule, forfeits a sum of money, which may be recovered in an action of debt. Statutory provisions are not unusual, however, authorizing the magistrate before whom the recovery is had to order the imprisonment of the offender until the fine and costs are paid. The imprisonment is not to exceed some reasonable limit fixed by the statute. Ordinarily these proceedings are not criminal in form, and the magistrate before whom a recovery of this nature is had has no more power to order the imprisonment of the defendant than he

[1] Miles v. Weston, 60 Ill., 361 (1871).

would at the end of an ordinary civil trial to order the committal of the defendant, unless, of course, he is proceeding under a statute which specially authorizes him to do so, in which case the provisions of the statute must be strictly followed.[1] When officers assume to imprison without the authority of law, or without the forms and processes usual and necessary to be observed or employed, they become liable for false imprisonment. So, under a statute of Illinois limiting such imprisonment to six months, it was held that a judgment which failed to state the limit as fixed by the statute, and a *mittimus* or warrant of commitment issued upon it which also failed to state the limit, were both void.[2]

§ 24. Magistrates cannot designate the place of confinement.— In the absence of statutory provisions authorizing a magistrate committing a person to prison to designate the place of imprisonment, he has no power to do so, and should he commit the person to a place not established or fixed by law as a prison for such persons, it seems he will be liable in trespass for false imprisonment. So held in Illinois, where the magistrate committed a person to the common jail of the county for a refusal to pay a fine on conviction for a breach of a village ordinance, there being no ordinance of the village fixing the jail as a place of confinement for such offenders.[3]

§ 25. Power to arrest in constables and police officers.— Blackstone says: "The constable hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace committed in his view and carry him before a justice of the peace; and in case of felony actually committed or a dangerous wounding whereby felony is likely to ensue, he may, upon probable suspicion, arrest the felon, and, for that purpose, is authorized (as upon a justice's warrant) to break open doors and even to

[1] Gurney v. Tufts, 37 Me., 133; Howard v. The People, 3 Mich., 208; Danforth v. Classen, 21 Ill. App., 577; Teft v. Ashbaugh, 13 Ill., 602; Davis v. Willson, 65 Ill., 528; Sample v. Bradwell, 87 Ill., 618; Robinson v. Spearman, 8 B. & C., 493; Martin v. Marshall, Hobart, 63; Parker v. Proctor, 2 Wils., 386; Briggs v. Woodwell, 10 Mass., 356; Bradley v. Trustees, etc., 58 Ill., 353; Grumon v. Raymond, 1 Conn., 40.

[2] Danforth v. Classen, 21 Ill. App., 577; Kanouse v. Lexington, 12 Ill. App., 318.

[3] Danforth v. Classen, 21 Ill. App., 572.

kill the felon if he cannot otherwise be taken."[1] In all other cases, however, the authorities are uniform; a constable or policeman has no authority to make an arrest without a warrant.[2] The powers of these officers are in nearly if not all of the states of our Union regulated by statute, and while not materially changing the rule of the common law, as a matter of caution it will be advisable to examine the provisions of the statute before giving advice upon the law.

§ 26. Special patrolmen, officers appointed for special duty in stores, hotels, etc.— Liability of the person who pays the salary.— This class of officers are appointed under statutory enactments usually providing that they shall be subject to the orders of the superintendent of police, obey the rules and regulations, general and special, of the police board, conform to its discipline, and wear its dress or emblems, but their salaries are to be paid by the person benefited in particular by their services. These statutory enactments usually provide that the patrolmen shall be subject to removal by the police board without cause assigned, and when appointed shall possess all the powers and discharge all the duties of the general police force applicable to regular patrolmen. Under these statutes it is held that these special patrolmen possess all the common-law and statutory powers of constables except for the service of civil process. In all other respects they are as much members of the general police force as any patrolman. It is the interest and purpose of these laws to invest special patrolmen with all the rights, powers, privileges and immunities of the regular policemen. It has been held that the relation of master and servant does not exist between the special patrolman and the person who pays his salary. The statutory provision that the person particularly benefited shall pay the salary does not render nugatory the other provisions and deprive the policeman of the broad authority expressly delegated. He is not, in other words, the mere servant of the

[1] 4 Black. Com., 292; Shanley v. Wells, 71 Ill., 78 (1873).

[2] 1 Russell on Crimes, 600; 2 Hawkins' Pleas of the Crown, 81; Shanley v. Wells, 71 Ill., 82 (1873); Com. v. Carey, 12 Cush., 246 (1853); Pow v. Becker, 8 Ind., 475; Cook v. Nethercole, 6 Carr. & P., 741; Cloupey v. Henly, 2 Esp., 540; Fox v. Gaunt, 3 B. & A., 798; Com. v. McLaughlin, 12 Cush., 615 (1853).

person who pays him, and the person is no more responsible for his acts than he would be for the acts of the regular patrolman under like circumstances.[1]

§ 27. Depot marshals, etc., not conservators of the peace at common law—Where they possess authority of constables at common law.— By the common law, so far as we are advised, such officers as depot marshals or policemen were unknown as conservators of the peace. But where officers, though unknown as such to the common law, are expressly authorized by statute, or by a municipal ordinance duly enacted, to conserve the peace, they have all the common-law authority of constables or peace officers, and may apprehend and take into custody those who violate the laws or ordinances of a city in their province without warrant.[2] To hold that officers charged with preserving the peace of a city, and who are especially commanded to arrest those who violate its ordinances within their view or cognizance, are, nevertheless, without power to that end without a formal warrant, and that one whose personal rights are being defiantly invaded in violation of an ordinance may not invoke the aid of a peace officer who is near by, would effectually tie the hands of the officers and compel others either to submit to the turbulent and lawless or maintain their rights as best they may.[3]

§ 28. Private persons appointed by magistrate—Minors. There can be no doubt that a minor, not being an elector, is ineligible to the office of constable, because he would be incompetent to execute the bond required of such an officer; but whether a person specially appointed by a trial justice to execute a particular warrant is rendered incompetent by minority to do so, is another question. Such a person is not an officer in the common acceptation of the term. He is not required to give a bond or to do any other act which it is incompetent for a minor to do. He is simply a private individual, appointed *pro hac vice* to perform the duty of a con-

[1] Hershey v. O'Neill, 86 Fed. Rep., 170 (1888).

[2] Veneman v. Jones, 118 Ind., 41; 20 N. E. Rep., 644 (1889); Wiltse v. Holt, 95 Ind., 469, and cases cited; State v. Freeman, 86 N. C., 683; Beville v. State, 16 Tex. App., 70; State v. Holcomb, 86 Mo., 871; 7 Amer. & Eng. Cyclop. Law, 675, 676.

[3] Veneman v. Jones, 118 Ind., 41; 20 N. E. Rep., 644 (1889).

stable; and we see no more reason why a minor of suitable age and discretion may not have such authority delegated to him by a trial justice than that a sheriff could not call upon such a minor to act as one of the *posse comitatus;* and surely it would not be contended that the sheriff, in summoning his *posse*, must be careful to see that each person so summoned had attained his majority.[1]

§ 29. Arrests by private persons on view and on information.—

(1) On view.— Every person who is present when a felony is committed is bound by law to arrest the felon, on pain of fine and imprisonment if he escape through his negligence.[2] And in such cases an arrest without a warrant may be justified whether there is time to obtain one or not.[3] After an indictment is found against a party any private person may arrest him, for he does not act upon his own suspicion but upon the finding of the fact by the grand jury upon oath, which is suspicion grounded upon high authority and is a charge against the offender on record.[4] A private person, however, is not justified in arresting without warrant or giving in charge of an officer a party who has been engaged in an affray, unless the affray is still continuing or there is reasonable ground to believe that the party intends to renew it.[5] In order to prevent the commission of a crime any person may lawfully lay hold of a lunatic who is about to commit any mischief, which, if committed by a sane person, would constitute a criminal offense. And he may do the same to any other person whom he shall see on the point of committing a felony, or doing any act which will manifestly endanger the life or person of another, and may detain him until it may reasonably be presumed he has changed his purpose. But where he interferes to prevent others from fighting, he should first give express notice of his intention to prevent the breach

[1] McConnell v. Kennedy, 29 S. C., 180; 7 S. E. Rep., 76 (1888).

[2] Barbour's Crim. Law, 549; 2 Hawkins, P. C., 74.

[3] Holley v. Mix, 3 Wend. (N. Y.), 350 (1829); Phillips v. Trull, 11 Johns. (N. Y.), 486 (1814).

[4] Barbour's Crim. Law, 550; Dalt. Ch., 170, § 5; 1 Hawk. P. C., ch. 28, § 12; 1 East, P. C., 301.

[5] Price v. Seely, 10 Clark & Fin., 28.

of the peace (command them to desist). It is every man's duty to interfere for the preservation of the peace and to arm himself for that purpose.[1]

(2) ON INFORMATION, SUSPICION, ETC.— There are cases in which, though the law does not enjoin an arrest, yet it permits it. Thus, upon probable suspicion, a private person may, if a felony has actually been committed by some person, arrest, or direct a peace officer to arrest, the party whom he supposes to be guilty.[2] And if it can be proved that a felony had been committed by some person, and there existed a reasonable and probable ground for suspicion, he will not be liable to an action for false imprisonment though it be shown that the party arrested and imprisoned was in fact innocent.[3] It seems clear from the authorities that a private person, in justifying the imprisonment without warrant of an innocent person, must state in his pleadings and prove in evidence that a felony was committed by some one, as well as that, under all the circumstances, there were reasonable grounds for suspecting the person arrested, or he will be liable to respond in damages.[4]

THE LAW ILLUSTRATED.—

Arrest upon view by a private person — Merchant's liability for acts of clerk.

Two sides of the story.— The plaintiff, a resident of Philadelphia, came to the store of the defendant, on Sixth avenue, New York, in company with a female friend. She had never been there before, and was a total stranger to the defendant and his employees. Her version of the subsequent occurrences is as follows: She says she went to the umberella counter, took up an umbrella, and, to enable her to examine more closely the quality of the silk, carried it a short distance to the light near the door. While she was adjusting her eye-glasses for this purpose, she was roughly seized by the arm by a salesman of the defendant, and pushed through the store, and into the basement. After an examination there, in the presence of a policeman and two or three of the defendant's employees, she was arrested, and taken to the station-house, and, after being examined by the officer in charge, she was locked up for two or three hours, until bail was

[1] Barbour's Crim. Law, 551; Foster's P. C., 310; 1 Chitty's Crim. Law, 18; 2 Hawkins, P. C., ch. 12, § 19.

[2] Barbour, Crim. Law, 550; 1 Chitty, C. L., 15, 16; Cald., 291; Doug., 359; 1 Hale, P. C., 588; 9 Bacon's Abr., Trespass, D. 3.

[3] 4 Taunt., 34; 5 Price, 525.

[4] Barbour's Crim. Law, 551; 2 Inst., 52; 2 Hawk. P. C., ch. 12, §§ 8–19; 4 Taunt., 34; 6 T. R., 313.

given by a friend. She was subsequently tried at a court of special sessions and acquitted. This is, in brief, the testimony of the plaintiff. It is uncorroborated, except in a few unimportant details.

On the other hand, the defendant proved that the umbrella counter was between forty and fifty feet from the door in question, and that it was in the lightest part of the store. Several witnesses testified that the plaintiff took the umbrella, walked with it through the store out upon the sidewalk, and was proceeding down Sixth avenue, having in the meantime pulled off the tag, when the salesman, who was a private person, not an officer, followed her, touched her politely on the shoulder, and requested her to return into the store. No physical restraint was used, and the two walked quietly through the store to the ladies' lunch-room in the basement. The special police officer stationed on the premises was then summoned, and the plaintiff, having in substance admitted her guilt, was taken to the police station. She was there examined by the captain of police in charge, and again confessed the larceny. Thereupon she was locked up until bail was furnished, some two or three hours afterwards. The following morning she appeared in court, and was held for trial. She then brought an action for false imprisonment against the merchant in whose employ the salesman was. Upon these facts the jury found a verdict for the defendant. The plaintiff now moves for a new trial.

Coxe, J.: The plaintiff was a total stranger to all in the store. Necessarily she was judged, not by what she was, but by what she seemed to be. It was a most natural inference from her conduct that she intended to take the defendant's property. The testimony is overwhelming that she took the umbrella without asking permission, and with no word of explanation carried it forty feet through the store, and was actually walking with it down Sixth avenue when she was requested to return. It would seem that a clerk who hesitated to protect his employer's property in such circumstances would be most derelict in his duty. The plaintiff's conduct, to state it mildly, was exceedingly suspicious, and for the unfortunate occurrences which followed she has herself alone to thank. It would seem that no impartial person can read this record and reach a conclusion different from that reached by the jury. The motion is denied. Hershey v. O'Neill, 36 Fed. Rep., 171 (1888).

§ 30. Assisting officers in the execution of process, etc.— Every private person is in general bound to assist an officer of the law in the execution of process when called upon to do so; and if he refuses to obey the call he is liable to be punished.[1] A person who responds to the call of one whom he knows to be an officer of the law is protected by the call, especially in criminal cases. The officer may be acting without authority and may be a trespasser, but the person assisting him at his command, who relies upon his official character and call, is pro-

[1] Hawk. P. C., ch. 12, § 1; Id., ch. P. C., 587; Burn's Justice, Arrest, 111; 13, §§ 7, 8; 4 Black. Com., 292; 1 Hale, 1 East, P. C., 298.

tected, against suit for false imprisonment.[1] But it seems, at common law, in civil cases, the sheriff having no authority to call for such aid when there is no breach of the peace or other criminal offense, where he is acting without legal authority, private persons who respond to his call must do so at their peril. They are not protected unless the sheriff can justify.[2]

§ 31. **Duty of a private person making an arrest.**—When a private person has apprehended another for a felony, he may deliver him into the hands of a constable or he may carry him to any jail of the county,[3] though this is rarely done.[4] The better course seems to be to cause him, as soon as convenience will permit, to be brought before a magistrate to be examined, admitted to bail or committed to prison.[5] When a private person has apprehended another in the heat of an affray, he may lawfully detain him till the heat is over and then deliver him to a constable.[6]

§ 32. **Arrest of fugitives from justice.**— A fugitive from justice is defined to be a person who has committed a criminal offense against the laws of a state or territory and has fled from justice and is found in another state or territory.[7] As such fugitive he may be arrested and lawfully detained preparatory to his surrender, before a demand has been made upon the governor of the state or territory in which he has taken refuge, for his surrender.[8] But in order to accomplish this, a complaint in writing and under oath must be made before an examining court, stating in proper language the commission of the criminal offense in the state or territory in question, that the accused stands charged with the same, and has fled from justice. In many of the states of our Union

[1] Firestone v. Rice, 71 Mich., 377; 38 N. W. Rep., 885 (1888); McMahon v. Green, 34 Vt., 69 (1861); Reed v. Rice, 2 J. J. Marsh., 44 (1829).

[2] Archbold's Practice, 853; Elder v. Morrison, 10 Wend. (N. Y.), 128 (1833); Oystead v. Shedd, 12 Mass. 511 (1807); Barbour on Crim. Law, 550; 1 Russ. on Crimes, 522, 525.

[3] Chitty, Crim. Law, 20.

[4] Davis, Justice, 42.

[5] 1 Hale, P. C., 589; Phillips v. Trull, 11 Johns. (N. Y.), 486.

[6] Barbour's Crim. Law, 20; 1 Hale, P. C., 589; 2 Hawkins, P. C., ch. 13. § 7; Id., ch. 16, § 8.

[7] 7 Am. & Eng. Ency. of Law, 635.

[8] In re Fetter, 3 Zab. (N. J.), 311; 57 Am. Dec., 382 (1852); People v. Schenck, 2 Johns. (N. Y.), 479 (1807); Ex parte Culbeth, 49 Cal., 436 (1875); Ex parte Romanes, 1 Utah, 23 (1876).

the arrest and detention of fugitives from justice is provided for by law, and such laws have been declared to be constitutional.[1]

[1] Ex parte Rosenblat, 51 Cal., 285 (Mass.), 586 (1843); Com. v. Hall, 75 (1876); Com. v. Tracey, 5 Met. Mass., 262 (1857).

CHAPTER III.

ACTION FOR FALSE IMPRISONMENT.

§ 1. The form of the action.— The action for false imprisonment is the common-law action of trespass, or its substitute in those states where the common-law forms are abolished. It is a form of action which lies to recover damages for the injury sustained by a person, as the immediate consequence of some wrong done forcibly to his person or property, against the person committing the injury. It is the proper action for injuries to the person, as by wounding, assault and battery, false imprisonment, and the like.[1] In those jurisdictions where the different forms of actions are abolished, the law applicable to the cause of action, the parties and the evidence is, as a general rule, unchanged.

§ 2. The common-law action of trespass.— The action of trespass lies for injuries committed with force, and generally only for such as are immediate. The force may be either actual or implied. The intention of the wrong-doer is in gen-

[1] Beecher v. Parmele, 9 Vt., 352 (1858); Hally v. Carson, 39 Ala., 345 (1837); Andre v. Johnson, 6 Blackf. (1864); Castro v. De Uriarte, 12 Fed. (Ind.), 375 (1843); Maher v. Ashmead, Rep., 250 (1882); 1 Chitty, Pleadings, 30 Pa. St., 344; 72 Am. Dec., 708 182.

eral immaterial in this action, and when the defendant has been acquitted of a criminal offense involving a trespass he may be sued in this action for the injury.[1]

§ 3. **Where the action lies, etc.**— The application of the action of trespass to injuries committed under color of legal process may be considered under five heads:

(1) IMMUNITY TO JUDICIAL OFFICERS.— In general the action cannot be supported for any act, however erroneous, if it be expressly sanctioned by the judgment of a superior or court of general jurisdiction or by an inferior magistrate acting within the scope of his jurisdiction.[2] If the judge of an inferior court has jurisdiction over the subject-matter he is not liable as a trespasser, however erroneous the conclusion at which he arrives may be.[3] But when an inferior court is guilty of an excess of jurisdiction the action may be supported for anything done under such proceeding.[4] In case of an error by ministerial officers, this action may be sustained if the injury complained of was committed with force and was the immediate result of the act.[5]

(2) PROCEEDINGS WITHOUT JURISDICTION OF THE SUBJECT-MATTER.— Where the court has no jurisdiction over the subject-matter, trespass is the proper form of action against all the parties for any act which independently of the process would be remedied by this action.[6] Justices of the peace and other inferior magistrates are liable in trespass, if, on their convicting or making an order on a party under a statute, where the conviction or order on the face of it does not show that any offense has been committed, and discloses that they have acted without jurisdiction, or if the conviction or order show an excess of jurisdiction by them; and in these cases trespass lies against the magistrates for any imprisonment upon the conviction or order, although the conviction or order has not been quashed, and this is an imputation of malice. A magis-

[1] 1 Chitty on Pleading, 166; 2 Campb., 465; 3 East, 593; 1 Campb., 497; Heker v. Jarret, 3 Binn. (Pa.), 404 (1811).

[2] Henderson v. Brown, 1 Caines' Rep. (N. Y.), 92 (1804).

[3] 1 Chitty's Pleading, 181.

[4] 1 Chitty's Pleadings, 182.

[5] Blood v. Sayre, 17 Vt., 609 (1843); Case v. Shepard, 2 Johns. Cas. (N. Y.), 27 (1800); Putnam v. Man, 3 Wend., 202 (1829); Bigelow v. Stearns, 19 Johns. (N. Y.), 39 (1821); 1 Chitty's Pleadings, 182.

[6] 1 Chitty's Pleadings, 182.

trate is a trespasser if the warrant of commitment does not show an offense over which he has jurisdiction, although there may have been a previous regular conviction which is still in force.[1] He is liable if the warrant of commitment substantially vary from the conviction, so that the offense stated in the former and that described in the latter are in law wholly different in their nature, for in such case the commitment has no conviction to support it;[2] or where he maliciously grants a warrant against another and causes his arrest without any information upon any supposed charge or felony;[3] or where he commits a party charged with felony for re-examination for unreasonable time but without any improper motives.[4]

(3) IRREGULAR PROCEEDINGS.— Where a court has jurisdiction but the proceeding is irregular, trespass against the attorney and plaintiff is, in general, the proper form of action; and where a judgment has been set aside for irregularity this is the appropriate remedy for any act done under it.[5]

(4) ABUSE OF PROCESS.— Where the process of any court has been abused, trespass against the sheriff or other ministerial officer committing the same is the proper action if the conduct of the officer was in the first instance illegal, and an immediate injury to the person of the plaintiff. And, although the conduct of the officer was in the first instance lawful, yet, if he abuses his authority and commits some act of trespass not warranted by the process, as detaining a party on a *capias ad satisfaciendum* after he tenders the debt and costs, he becomes a trespasser *ab initio*.[6]

(5) PROCEEDINGS WITHOUT PROCESS.— When a ministerial officer proceeds without warrant to arrest a person on the information of another, trespass is the proper form of action against the informer if it turns out that no offense for which an arrest without a warrant is justifiable had been committed

[1] 1 Chitty's Pleading, 183.

[2] Rogers v. Jones, 3 B. & C., 409 (1824); Massey v. Johnson, 12 East, 67 (1810); 1 Chitty's Pleading, 183.

[3] 1 Chitty's Pleading, 183.

[4] Davis v. Caffer, 10 B. & C., 28 (1829); 1 Chitty's Pleading, 183.

[5] Milliken v. Brown, 10 Serg. & R. (Pa.), 188; 1 Chitty's Pleading, 184.

[6] Melville v. Brown, 15 Mass., 82 (1818); Douglas v. The State, 6 Yerg., 525 (1834); Ratcliffe v. Burton, 3 B. & P., 223; Steadman v. Crane, 11 Met. (Mass.), 295 (1846); 1 Chitty, Pleading, 185.

by any person.[1] And trespass is the remedy against the informer if there was no warrant, although it appears that some person had committed the offense, and it is one for which an arrest might legally be made without a warrant, provided there was not reasonable or probable cause for charging the person with having committed the offense. Where an officer proceeds without warrant and without foundation, upon his own apprehension, trespass is the proper form of action against him.[2]

§ 4. What is necessary to sustain the charge.— In order to sustain a charge for false imprisonment it is not necessary for the plaintiff to show that the defendant used violence, or laid hands upon him, or shut him up in any jail or prison; but it is sufficient to show that the defendant at some time or place in some manner restrained the plaintiff of his liberty, or detained him in any manner from going where he wished or prevented him from doing as he desired.[3]

APPLICATION OF THE LAW.—

(1) *Mistake of the justice — A party not responsible for issue of process in justice court without his direction or sanction.*

In an action of trespass for false imprisonment, Trask, the defendant, April 11, 1826, recovered judgment of $37.50 against the plaintiff, Taylor, a freeholder and a man of family, before a justice, and immediately made the oath required by the third proviso to the fourteenth section of the Fifty-dollar Act (Sess. 47, ch. 338, p. 287, Laws of New York), that he would be in danger of losing his debt if execution was not immediately issued. The justice (who was a witness upon the trial) stated that he informed Trask that he then had no blank executions with him, but would issue an execution the next morning. That he, accordingly, the next day issued an execution, directing the constable to levy the damages and costs of the goods and chattels of Taylor; and for the want thereof to commit his body to jail. That he made use of an old blank, and, by mistake, omitted to strike out that part of the execution which directed the body of the defendant to be taken. That Trask gave no direction as to what kind of execution was to be issued, but simply made the oath required by the statutes and directed the witness to issue an execution. The witness delivered the execution to the constable, and Trask did not see it before it was delivered to the constable, nor until Taylor was arrested.

[1] 1 Chitty, Pleading, 186; Hedges v. Chapman, 2 Bing., 523 (1825); Flewster v. Royle, 1 Campb., 187 (1808).

[2] 1 Chitty, Pleading, 185; Groenvelt v. Burwell, 1 Salk., 396; Lord Raymond, 454; 1 Chitty, Crim. Law, 21, 22.

[3] Hawk et al. v. Ridgway, 33 Ill., 473 (1864).

Taylor was discharged as soon as the mistake was discovered and by the order of Trask as soon as he learned the arrest. That was before Taylor was committed to prison.

The jury, by the direction of the judge and with the assent of the parties, found a verdict for the plaintiff for nominal damages, subject to the opinion of this court.

Sutherland, J.: Here the duty of the justice is clearly and explicitly pointed out. He is expressly prohibited from issuing an execution against the body of a defendant in the cases enumerated in the proviso. He had no jurisdiction to award the process which was issued in this case. It was not demanded from him by the defendant. He made the oath required by law and requested an execution; that is, such execution as the law entitled him to, with respect to which there was no doubt or uncertainty. The case, therefore, stands precisely as it would have done if the defendant had in terms requested the justice to issue an execution against the goods and chattels of Taylor only. In such a case, I apprehend, the party would not be responsible for the accidental or unintentional error of the magistrate. Judgment for the defendant. Taylor v. Trask, 7 Cow., 247 (1827), cited in 24 Am. Dec., 48; 5 Duer, 124; 19 Am. Dec., 484; 1 Wend., 216; 5 Wend., 243, 299; 8 Wend., 467, 681; 10 Wend., 363; 16 Wend., 46; 5 Barb., 468; 1 Denio, 595; 5 Lans., 107.

(2) *Liability of prosecutor, justice and constable — Void proceedings.*

William E. Goddard went before the defendant, Jerome B. Forbes, a justice of the peace, and charged Samuel D. Hicks with the crime of being a fugitive from justice, by a written complaint upon oath. The justice issued a warrant for the arrest of Hicks, and placed it in the hands of Robert Mason, a constable. Mason arrested Hicks, and brought him before the justice. A trial was had, the justice found Hicks guilty in manner and form as charged in said complaint, and ordered him to be detained by the said constable for the period of ten days, unless sooner discharged or removed by operation of law, and issued a *mittimus* to said Robert Mason to that effect. Hicks continued in the custody of Mason until he was discharged by *habeas corpus* proceedings. For this imprisonment Hicks sued Goddard, Forbes and Mason.

Upon the trial Hicks took the stand, and testified that he was the plaintiff in the case; that he resided at Republican City; that he was in the custody of Robert Mason for nine days; that Mason told him that if he would conclude to stay with him, and not try to get away, he might stay with him, and he would not put him in jail; that he was before Forbes and Forbes turned him over to Mason; that he had to employ an attorney, and paid him $50; that he lost nine days while in custody; that he had to hire his brother to go and see an attorney, for which he paid him $3; and that Mason kept control of him all the time. To the question, "What was your time worth while you were in custody?" he answered, "Well, more than usual, as I wanted to go to seeding, and my wife was sick, and I ought to have been right there with her."

Copy of the docket entries.—"The State of Nebraska v. R. B. Hicks, February 28, 1887. Complaint in writing and on oath made and filed be-

fore me, by W. E. Goddard, charging one Samuel D. Hicks, late of Phillips county, Kansas, and now within the county of Harlan, Nebraska, as a fugitive from justice; that said Samuel D. Hicks is charged with, on the 30th day of January, 1887, in the county of Phillips, and state of Kansas, after having mortgaged one span of mules, one black and one bay horse with a black stripe across the shoulders, eight or nine years old, and bay mare mule nine or ten years old, one Standard corn-planter, one Standard corn-plow, one Mast sulky-plow, one double harness, one three-section sixty-tooth drag, W. E. Goddard being the owner thereof, fraudulently removing and concealing the said mortgaged property with the fraudulent intent to place the same beyond the control of the said W. E. Goddard; now to issue warrant, and deliver same to Robert Mason, constable. Warrant returned, and indorsed as follows: 'Received this warrant on the 28th day of February, 1887, and according to the command thereof I arrested the within-named S. D. Hicks, and now have his body before this court. ROBERT MASON, Constable.' Defendant arraigned, and pleaded not guilty; where, upon examination, after hearing the evidence, I find the defendant guilty in manner and form as charged in said complaint, and ordered the said Samuel D. Hicks to be detained by the said Robert Mason for the period of ten days, unless sooner discharged or removed by operation of the process of law. Issued *mittimus* to Robert Mason therefor. J. B. FORBES, Justice of the Peace."

There was a trial to a jury, with findings for the plaintiff, and a verdict for $350 damages. The defendant's motion for a new trial was overruled, in case the plaintiff should remit $150 of the amount of the verdict; and the plaintiff having remitted that sum, judgment was entered for $200 damages and costs. Exceptions having been taken, the defendant then took the case to the supreme court by a writ of error.

In delivering the opinion of the court affirming the decision of the court below, Cobb, J., said: "The law of this case arising upon the principal question presented is sufficiently stated in the opinion in the case of Smith v. State, 21 Neb., 552; 32 N. W. Rep., 594. By reference to the copy of the complaint made by Goddard against Hicks, as taken from the docket of the defendant Forbes, it will be seen that the only allegation against Hicks, in addition to the general one that he is a fugitive from justice, is that he 'is charged with on the 30th day of January, 1887, in the county of Phillips and state of Kansas, after having mortgaged one span of mules, fraudulently removing and concealing,' etc. It is not stated that this charge has been made upon oath, or that it was made to any court or authority, or that such charge was then pending against the said accused. For aught that is stated, said charge might have been a mere idle, non-judicial accusation, made through the newspapers or at the hustings, or, if ever made judicially, he may have been acquitted of it. For these reasons, upon the authority of the case above cited, and which opinion is amply sustained by cases cited from the courts of other states and of the United States, the warrant issued by the defendant Forbes, by the procuration of the defendant Goddard, and upon which the defendant Mason arrested and imprisoned the plaintiff, was simply void. It follows, therefore, that it could afford no protection to the defendants for the imprisonment of the plaintiff. Forbes et al. v. Hicks, 27 Neb., 111; 42 N. W. Rep., 898 (1889).

(3) *An arrest upon probable cause.*

Miles Olmstead brought an action against Asa Dolan for false imprisonment. On the trial it appeared from the evidence that the plaintiff and another man went to the livery stable of the defendant to hire a horse and wagon. It was about 8 o'clock in the morning. The men waked up the boy in charge of the stable, and Olmstead got of him a horse and wagon on the statement that he would be back by 9 or 10 o'clock on that day. He further stated that he was a regular customer at defendant's stables and had hired buggies there before. But this was not true. He had never hired horses at the stable before, and he did not give his name. The boy let him have the property solely on this false statement. The horse and wagon did not return as promised, and on Wednesday Dolan made a complaint. When taken before the justice Olmstead pleaded guilty to the charge and paid $20, and the charge was withdrawn. The jury found for the defendant and the plaintiff appealed.

Barnard, P. J., said: "The arrest was made under circumstances which justified the inference that the plaintiff was attempting to escape after he had notice that the constable had a warrant for his arrest. Whether or not the charge would have held good upon a trial is of no importance. The facts proven justified the arrest." Thaule v. Krekeler, 81 N. Y., 428. The release of the plaintiff with the property on the evening of Wednesday is a fact of no importance, as the warrant was then in the hands of the officer, and the case must be determined by the facts as they existed when the warrant was issued. The plaintiff's conduct subsequent to the return is not free from unfavorable inferences. The judgment should be affirmed. Olmstead v. Dolan, 6 N. Y. Sup., 180 (1889).

CHAPTER IV.

LIABILITY FOR FALSE IMPRISONMENT.

§ 1. Matters discussed in this chapter.— In a former chapter the elements which compose the wrong, commonly denominated false imprisonment, have been fully discussed. In this chapter the rules of law governing the liability of persons connected with the wrong will be considered. It is perhaps necessary to say that no general rule can be laid down as to such liability. The different relations sustained by the parties themselves to the transaction in question must, in each case, determine the liability.

§ 2. A general rule of liability.— As a general rule of law, a party is liable to respond in damages when he authorizes or directs, assists or encourages an officer to do an unlawful act, or to do a lawful act in an unlawful manner, or to abuse, exceed or disregard his duty or authority. For example, where he authorizes or directs the service of void process, or the

arrest of a privileged person; or where he procures the arrest of a person without process, or counsels, causes, directs or participates in the doing of any other act which the process or authority of the officer will not legally justify.[1]

The rule is well settled that whoever, whether it be a natural person or a corporation,[2] in person or by agent,[3] whether personally present or not, directs, procures or participates in the unlawful and unauthorized arrest and imprisonment of another, is liable in damages to the party injured.[4]

APPLICATION OF THE RULE.—

(1) *Corporation liable for acts of its agents.*

Michael Lynch purchased a ticket for a passage of the Metropolitan Elevated Railway, and entered one of its cars; before reaching his destination he lost the ticket, and when he attempted to pass through the gate from the station platform, he was stopped by the gate-keeper and told that he could not pass until he procured a ticket or paid his fare. He stated the facts of his purchase of a ticket and its loss and insisted on passing out, but was pushed back by the gate-keeper, who sent for a police officer and ordered his arrest. He was arrested and taken to the police station, where the gate-keeper made a complaint against him and he was locked up for the night. In the morning he was examined before a magistrate, the gate-keeper appearing against him, and was discharged. He brought an action for false imprisonment against the railway company and recovered a judgment from which an appeal was perfected. On the trial it appeared that the defendant had given orders to its gate-keepers not to let passengers pass out until they either paid their fare or showed their tickets.

In passing upon the appeal, Earl, J., held that the railway company could legally have no regulation that a passenger, before leaving its prem-

[1] Mechem on Public Officers, § 905 (1890); Bonesteel v. Bonesteel, 28 Wis., 245 (1871); Gibbs v. Randlett, 58 N. H., 407 (1878); Develing v. Sheldon, 83 Ill., 390 (1876); Snydacker v. Brosse, 51 Ill., 357; 99 Am. Dec., 551 (1869).

[2] Lynch v. Railway Co., 90 N. Y. 77; 43 Am. Rep., 141 (1882); Wheeler & W. Mfg. Co. v. Boyce, 36 Kans., 350; 59 Am. Rep., 571 (1887); Owsley v. Mont. R. R. Co., 37 Ala., 560 (1861); Mechem on Public Officers, § 906 (1890).

[3] Harris v. Louisville, etc., R. R. Co., 35 Fed. Rep., 116; Wheeler & W. Mfg. Co. v. Boyce, 36 Kans., 350; 59 Am. Rep., 571 (1887); Mechem on Public Officers, § 906 (1890).

[4] Bright v. Patton, 5 Mackey (D. C.), 534 (——); Winslow v. Hathaway, 1 Pick. (Mass.), 211 (1822); Curry v. Pringle, 11 Johns. (N. Y.), 444 (1814); Stoyek v. Lawrence, 3 Day (Conn.), 1 (1807); Clifton v. Grayson, 2 Stew. (Ala.), 412 (1830); McGarrahan v. Laress, 15 R. I., 302 (——); Allison v. Rheam, 3 Serg. & R. (Penn.), 139 (1817); Purson v. Gale, 8 Vt., 509 (1836); Floyd v. State, 12 Ark., 43; 54 Am. Dec., 250 (1851); Mechem on Public Officers, § 906 (1890).

ises or its cars, should produce a ticket or pay his fare, and if he did not he should be detained and imprisoned until he did so; that the detention of Lynch was unlawful and the railway company was responsible for the acts of its gate-keeper. The judgment was affirmed. Lynch v. Met. El. R'y Co., 90 N. Y., 77; 24 Hun, 506 (1882).

(2) *Ordering an officer to refuse bail.*

Randlett had Gibbs arrested. He was present at the time, and when Gibbs offered bail he ordered the sheriff to refuse it. The sheriff did as directed by Randlett, and in so doing committed the wrongful act complained of. Gibbs sued Randlett for false imprisonment and recovered. A motion for a new trial being under consideration, Bingham, J., held that the defendant, being present at the arrest and offer of bail, and having ordered the sheriff to refuse it, became liable as a principal for the wrongful act. If the defendant, knowing the bail tendered to be sufficient, directed the officer to refuse it, and he, acting under the direction, refused it, the defendant would be liable. The new trial was refused. Gibbs v. Randlett, 58 N. H., 407 (1878). Citing Smith v. Hall, 2 Mod., 31; 6 Bac. Abr., Tit. Sheriff, O., 180; Salomon v. Percival, 3 Cro., 196; Creswell v. Hoghton, 6 T. R., 355; Milne v. Wood, 5 C. & P., 587; Russell v. Fobyan, 34 N. H., 218.

(3) *Person procuring a writ of ne exeat to issue upon an insufficient affidavit, liable — Officer protected.*

Belinda Bonesteel commenced an action upon a promissory note against Jacob P. Bonesteel, and upon her affidavit, showing that he was about to leave the state to reside permanently in the territory of Dakota, she obtained a writ of *ne exeat*. The writ was duly delivered to the sheriff, who proceeded to execute it by arresting the defendant, demanding that he give the bond, and informing him that in default thereof he should put him in jail. The bond was not given. The defendant was not committed to prison, but was permitted to go at large upon the promise of himself and others that he would not abscond. A few days after the writ was set aside upon the ground that it was void, because the affidavit upon which it was granted was wholly insufficient, and Bonesteel was discharged. He then brought an action against Belinda Bonesteel and her husband for false imprisonment. On the trial a judgment was rendered for the defendants, and the plaintiff appealed. In passing upon the appeal, Lyon, J., held that the writ of *ne exeát* was issued without a sufficient affidavit to support it, and absolutely void (except only that, if regular on its face, it might protect an officer who executed it). That as Belinda Bonesteel sued out the writ upon which the arrest was made, and by her attorneys delivered it to the sheriff to be executed, she was liable as the one who set the machinery of the court in motion, and directed its motions until it culminated in an unlawful arrest upon void process. Judgment reversed. Bonesteel v. Bonesteel, 28 Wis., 249 (1871). Citing Kerr v. Mount, 28 N. Y., 639; Brown v. Chadsey, 39 Barb., 253; Vredenburgh v. Hendricks, 17 Barb., 179; Baldwin v. Hamilton, 3 Wis., 747.

§ 3. Liability by ratification.— It is not alone where the unlawful act of the officer was previously authorized or directed by the party that he is liable; he may become liable where he ratifies or confirms the act after it has been committed. But it must appear that the party ratifying or confirming the act does so with a full knowledge of all the material facts relating to the transaction, otherwise any alleged ratification will be unavailing.[1] The only exception to the rule is found in those cases in which the party intentionally assumes the responsibility without inquiry,[2] or deliberately ratifies or confirms the act, having all the knowledge in respect to it which he cares to have.[3]

§ 4. The ratification may be expressed or implied.— The evidence of a ratification must be clear and explicit and such as indicates the intention of the party to adopt the act as his own after a full knowledge of all the material facts in the case. But an express ratification is not requisite in all cases; it may be inferred in actions for false imprisonment and malicious prosecutions, as in other cases, from such acts or omissions as indicate the intention of the party to approve or ratify the act in question.[4]

APPLICATION OF THE RULE.—

(1) *A ratification held not sufficient.*

Tucker brought an action against Jerris to recover damages for an alleged false arrest. He recovered a judgment for $125. Tucker was arrested upon a writ sued out in the name of Jerris by one Chase, who subscribed the requisite oath to cause the arrest, as agent for Jerris. The suit was for the price of a hack which once belonged to the defendant, and was left at the shop of Chase, who was a carriage-maker. Chase called on the defendant to know what he would take for it, and defendant named the price for which he would sell it. Shortly after, Chase, without other per-

[1] Tucker v. Jerris, 75 Me., 184 (1883); Adams v. Freeman, 9 Johns. (N. Y.), 118 (1812); Hyde v. Cooper, 26 Vt., 552 (1854); Lewis v. Reed, 13 M. & W., 834.

[2] Lewis v. Reed, 13 M. & W., 834 (1845); Mechem on Public Officers, § 907 (1890).

[3] Kelly v. Newburyport H. R. R. Co., 141 Mass., 496 (1885).

[4] Mechem on Agency, §§ 146–165 (1889); Knight v. Nelson, 117 Mass., 458 (1875); Beveridge v. Rawson, 51 Ill., 504 (1869); Crossman v. Olsen, 62 Me., 538 (1873); Root v. Chandler, 10 Wend. (N. Y.), 110; 25 Am. Dec., 546 (1823); Lovejoy v. Murray, 3 Wall. (U. S.), 1(1865).

mission from the defendant to sell, sold the hack with some harness of his own to Tucker, the plaintiff, receiving of him $25 in part payment. Chase told defendant that he had sold the hack to a responsible party and paid him a small part of the cash received. But the defendant never ratified the sale to the plaintiff as made on his behalf, and before the commencement of the suit in which plaintiff was arrested, he told Chase that he should look to him for the pay for the hack. Chase went to an attorney to commence an action in his own name against the plaintiff, but gave the attorney such a version of the transaction that he advised that it should be commenced in the name of Jerris, the defendant here, and original owner of the hack, which was done. There was no evidence that Jerris ever employed an attorney or authorized Chase to employ one on his account, but the contrary. Chase, as he testified, employed the attorney on his own responsibility, and that he acted as agent for Jerris on the occasion, simply because he considered that under the advice of counsel he had a right to do so. There was no evidence that the defendant ever did anything touching the prosecution of that action, or knew that it had been commenced in his name, until after the arrest. The plaintiff was therefore obliged to rely upon a ratification by the defendant of the acts of Chase as his agent in order to maintain the action.

In passing upon the exceptions of Jerris to the rendition of the judgment, Barrows, J., said: "To bind one to the performance of a contract which another without authority has presumed to make for him, the ratification must be made with a full knowledge of all the material facts. 'Ignorance or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent.' Coombs v. Scott, 12 Allen, 493. And this is so even though the ignorance or misapprehension arises from the negligence and omission of the defendant to make any inquiry relating to the subject-matter. *Ibid.* To hold one responsible for a tort not committed by his orders, his adoption of and assent to the same must at all events be clear and explicit and founded on a clear knowledge of the tort committed. Adams v. Freeman, 9 Johns. (N. Y.), 117; West v. Shockley, 4 Harring., 287; Kreger v. Osborne, 7 Blackf., 74; Abbott v. Kimball, 19 Vt., 551. And this rule is not affected by the fact that the defendant has received the money coming by means of the tort from his servant. Hyde v. Cooper, 26 Vt., 552. The suit in this case was commenced in the defendant's name, according to all the testimony, by Chase, for his own benefit, and under the mistaken idea that he had a right to use the defendant's name in the process; and there is nothing from which it can be inferred that the defendant had any knowledge that Chase had committed any wrong in making the affidavit to procure the arrest, even if we regard the verdict of the jury as conclusive that he actually did. There is no evidence that at the time of the alleged ratification defendant knew even that plaintiff claimed that any wrong had been done. To hold the defendant responsible for such wrong, if there was one, upon the evidence here presented, the jury must have been governed by some unaccountable bias or prejudice. They probably accepted the assertions of counsel in lieu of

testimony, and their verdict is clearly against law and evidence, and without evidence to support it. It cannot stand." New trial granted. Tucker v. Jerris, 75 Me., 184 (1883).

(2) *Ratification — A party employing an officer for a lawful purpose not liable for his wrong-doing.*

Sutherland, the plaintiff, recovered a verdict below in trespass against both defendants, and Ingalls brings error. The trespass was for personal violence, committed by Moriarity, who as an officer had a writ of possession to serve for a house occupied by plaintiff's husband and herself, which was adjudged to be given up under the landlord and tenant act. Ingalls had the writ placed in the hands of Moriarity to serve, and the latter, meeting with opposition from plaintiff, seized and handcuffed her, and kept her so manacled for some time, while he put out the contents of the house, and completed his service. The general issue was pleaded, with a special plea setting up that what was done was in overcoming unlawful resistance to Moriarity as an officer in service of process.

On the trial the court said to the jury that Ingalls was jointly and equally liable with Moriarity for all that was done by Moriarity.

On the trial of the writ of error in the supreme court, Campbell, C. J., said:

"We think this was erroneous. There was no proof of any violence done by Ingalls himself, and none was alleged. He could only be made out a trespasser by showing that he was responsible for the conduct of Moriarity; and he could only be so responsible for what was fairly within the authority, if any, which he gave him. A man who employs another innocently, and for a lawful purpose, is not usually liable for his trespasses, and is not liable for aggravated and wanton wrong-doing in such damages as would be properly visited on him if himself sanctioning or doing it. Neild v. Burton, 49 Mich., 53; S. C., 12 N. W. Rep., 906; Pigott v. Lilly, 55 Mich., 150; S. C., 20 N. W. Rep., 879; Wood v. Detroit City R'y, 52 Mich., 402; S. C., 18 N. W. Rep., 124.

"No one can be held liable as a trespasser for employing an officer to execute lawful process. It is the right of every one to have his regular and valid writ served and enforced. The officers of the law are bound to perform that duty, and cannot be blamed for doing it in a legal manner. Every one has a right to suppose the ministers of the law will not abuse their functions, and no one who lawfully employs them is liable if they do. Michels v. Stork, 44 Mich., 2; S. C., 5 N. W. Rep., 1034. It is only where the party himself orders or encourages lawlessness that he can be treated as a joint wrong-doer, and then he is liable because he is actually a trespasser, and liable to the extent of his own misconduct. There is nothing in the record which would justify putting Ingalls and Moriarity on the same footing, and we have discovered nothing to show that he was in any way whatever responsible as a trespasser.

"The result of the ruling which put the two defendants in the same equal wrong was a heavy verdict, which may not have been excessive as to Moriarity, but was not in any way sustainable as to Ingalls, and, as he had taken out the writ on his own behalf, the judgment must be vacated as to him, and a new trial granted." Sutherland v. Ingalls, 63 Mich., 620; 30 N. W. Rep., 342 (1886).

§ 5. Liability of infants — The general rule.— An infant is liable in a civil action for his torts, such as trespass, slander and the like.[1] The law governing infants is intended as a shield only to protect them from improvident contracts, and not to exempt them from liability for their wrongs, or enable them to do injuries to others with impunity.[2] Hence infancy is no defense to an action for damages for personal injuries, as an assault and battery and the like, or for careless and negligent, even though unintentional, injuries.[3] Infants are liable to actions for personal injuries, assaults and the like, the same as adults. When the injury complained of is not the result of an unavoidable accident, the person by whom it is inflicted is liable to respond in damages to the sufferer; and the only difference between an infant and an adult in such a case is, that an injury might probably be considered as the result of an unavoidable accident in the case of an infant which would be otherwise in the case of an adult.[4] An infant is liable in an action of trespass for having procured another to commit a personal injury, as an assault and battery and the like, upon the principle that all persons aiding or abetting or counseling and procuring a trespass to be committed are principals whether present or not.[5] But Chitty in his work on Pleadings states the rule, upon the authority of Lord Coke, to be, that an infant cannot be a trespasser by prior or subsequent assent, but only by his own act.[6] And in Bacon's Abridgment it is said that an infant cannot be guilty of a forcible entry and detainer by barely commanding one, or assenting to one to his use, because every such command or assent by a person under such an incapacity as infancy is void.[7]

[1] Conklin v. Thompson, 29 Barb. (N. Y.), 218 (1869); Field on Infancy, 31; Reeve's Domestic Relations, 258; Peigne v. Sutcliffe, 4 McCord (S. C.), 387; 17 Am. Dec., 756 (1827).

[2] Shaw v. Coffin, 58 Me., 254; 4 Am. Rep., 290 (1870); 2 Kent's Com., 241; Field on Infancy, 31.

[3] Peterson v. Haffner, 59 Ind., 130; 26 Am. Rep., 81 (1877); Conway v. Reed, 66 Mo., 346; 27 Am. Rep., 354 (1877); Eaton v. Hill, 50 N. H., 235; 9 Am. Rep., 189 (1870); Ray v. Tubbs, 50 Vt., 688; 28 Am. Rep., 519 (1878); Shaw v. Coffin, 58 Me., 254; 4 Am. Rep., 290 (1870); Cooley on Torts, 98; Bing. on Infancy, 110; Hartford v. Roper, 21 Wend. (N. Y.), 615; 34 Am. Dec., 273 (1841).

[4] Bullock v. Babcock, 3 Wend. (N. Y.), 391 (1829); Tyler on Infancy, etc., 185.

[5] Sykes v. Johnson, 16 Mass., 389 (1820).

[6] 1 Chitty's Pleadings (7th Am. ed.), 86; Tyler on Infancy, 185.

[7] Bacon's Abridgment, Tit. Infancy, H.; Tyler on Infancy, 185.

§ 6. Ratification — Trespasser ab initio.— There is no law, nor is it justice, that a party who sues out and delivers to an officer a valid process should be responsible for the irregularity of the officer in executing the process, unless it appear affirmatively that the officer acted under the orders of the party in making the arrest. A party who sues out a process from a competent court is responsible only for the validity of the process and for good faith in suing it out. He is not to answer for the acts of the officer beyond the authority of the precept unless he makes those acts his own. In order to hold a party liable, by ratification, as a trespasser *ab initio* in cases of mere personal tort, the assent must be clear and explicit and founded on full *knowledge of the previous trespass.*[1]

APPLICATION OF THE RULE.—

Ratification — Trespasser ab initio.

Gold and Sill presented a note to a justice of the peace against Bissell for collection. The justice issued a summons and delivered it to a constable, who returned it served by copy, by leaving a copy at the defendant's residence. One year afterwards the justice in the same suit issued a warrant without the oath required by statute, upon which Bissell was arrested. The arrest was made by a constable calling upon Bissell and informing him of the process he had against him. Bissell went with the constable about half a mile, when he procured a person to engage that he would appear before the justice on the next day. He did appear, and Gold, being notified of the fact, sent a student from his office to attend the trial. Bissell objected: (1) That, being a freeholder and having a family residing in the county, process of warrant could not legally issue against him without an oath being made in conformity to the directions of the statute. (2) That the issue and return of a summons served by copy in July, 1824, did not authorize the issuing of a warrant in July, 1825, as a continuation of the suit. The justice overruled the objections and rendered judgment for Gold and Sill. Afterwards Bissell brought a suit against them for false imprisonment. On the trial the question of the defendants' liability arose. It was shown that the plaintiff was a freeholder at the time of issuing the warrant and that it was issued without an oath. The justice could not recollect whether or not Gold and Sill, or either of them, had given him explicit orders to issue the warrant. The trial court ruled, (1) the warrant was irregularly issued; (2) the imprisonment was sufficiently proved; (3) that Gold, by appearing, had made the trespass his own; (4) the question whether Sill was guilty or not was submitted to the jury. The verdict was against both defendants. On appeal in the supreme court it was

[1] Adams v. Freeman, 9 Johns. (N. Y.), 117 (1812); Bishop v. Vis- countess Montague, Cro. Eliz., 824 (1790).

held that the warrant was void and the arrest illegal. Savage, C. J.: "It becomes necessary thus to inquire whether the plaintiffs before the justice, the defendants here, sanctioned the conduct of the justice in issuing the warrant. Mr. Gold undoubtedly did. When he was notified by the constable he sent his clerk to attend the trial. The objection was expressly taken on the trial and opposed by Mr. Gold's agent: but there is no evidence showing any direction by Mr. Sill nor any approbation subsequently." New trial granted unless plaintiff consents to amend by entering verdict in favor of Mr. Sill. Gold et al. ads. Bissell, 1 Wend. (N. Y.), 210 (1828). Cited in 4 Blatch. (U. S.), 476; 32 Am. Dec., 48; 22 Am. Dec., 569; 21 Am. Dec., 188; 11 Mich., 213; 40 N. J. L., 235; 106 Mass., 504; 100 Mass., 85; 4 Leg. Obs., 225; Co. R., N. S., 269; 17 Abb. Pr. (N. Y.), 247; 2 T. & C., 227; 38 Barb (N. Y.), 347; 4 N. Y., 256, 383; 23 Wend. (N. Y.), 468; 6 Wend. (N. Y.), 599.

§ 7. No liability in employing an officer to perform a lawful act.— Every person having lawful occasion to avail himself of the services of a public ministerial officer authorized by law to perform the desired act at the time and under the circumstances given may lawfully do so without incurring any liability for the unlawful acts of the officer. It is the presumption of the law that the officer not only understands his duty, but will perform it in the manner and with the precaution which the law requires. No person can complain of the lawful doing of that which the person doing or causing it to be done had a legal right to do. Therefore, no liability can attach to one who in a lawful manner merely sets a public officer in motion to perform a lawful act within the scope of his authority. And if such officer, in the course of the performance of the act required of him, commit a trespass or do any unauthorized act, he alone must answer for it. His employer, who neither authorized nor ratified it, cannot be held liable.[1]

§ 8. The law stated by Campbell, C. J.— No one can be held liable as a trespasser for employing an officer to execute lawful process. It is the right of every one to have his regular and valid writ served and enforced. The officers of the law are bound to perform that duty, and cannot be blamed for doing it in a legal manner. Every one has a right to suppose the ministers of the law will not abuse their

[1] Sutherland v. Ingalls, 63 Mich., 620; 6 Am. St. Rep., 332 (1886); Mechem on Public Officers, § 904 (1890); Wilson v. Tumman, 6 M. & G., 244; Welch v. Cochrane, 63 N. Y., 181 (1875).

functions, and no one who lawfully employes them is liable if they do. It is only where the party himself orders or encourages lawlessness that he can be treated as a joint wrongdoer, and then he is liable because he is actually a trespasser, and is liable to the extent of his own misconduct.[1]

§ 9. **In what cases the liability exists.**— A party is liable when he authorizes, encourages, directs or assists an officer to do an unlawful act, or to do a lawful act in an unlawful manner, or to abuse, exceed or disregard his duty or authority; as. for example, when he directs the service of void process, the arrest of a person privileged fron arrest, directs the refusal of lawful bail, procures an arrest without process, or participates in the doing of any other act which the process or authority of the officer will not legally justify.[2]

§ 10. **Liability of parents and persons in loco parentis, etc.**— It is difficult to lay down any general rule as to the liability of various persons *in loco parentis* in connection with the wrong of false imprisonment; the different relations they sustain to the transaction under consideration must determine the liability in each. Cases falling under this title are those in which the relation of parent and child, guardian and ward, teacher and pupil, master and apprentice exist. In all these cases such restraint is lawful and permissible as, in the exercise of a sound discretion, the parent or person occupying his place shall deem necessary. It is said this power exists in a greater degree in the case of parent and child than in the other cases, for the exercise of which he cannot be held accountable except in case of its manifest abuse. The limit to the exercise of his authority seems to be that his restraint must be for the purpose of correction; it must be moderate, dictated by reason and not by passion.[3] If the parent exceeds the limits of the law he is liable to a criminal prosecution, but it seems never to have been held that the child might maintain

[1] Campbell, C. J., in Sutherland v. Ingalls, 63 Mich., 620; 6 Am. St. Rep., 332; — N. W. Rep., — (1886). Citing Michaels v. Stark, 44 Mich., 2; Nield v. Burton, 49 Mich., 53; Piggott v. Silly, 55 Mich., 150; Word v. Detroit, etc., 52 Mich., 402.

[2] Mechem on Public Officers, § 905; Bonesteel v. Bonesteel, 28 Wis., 245 (1871); 30 Wis., 511 (1872).

[3] Johnson v. State, 2 Humph. (Tenn.), 283; Winterburn v. Brooks, 2 C. & K., 16; 7 Am. & Eng. Ency. of Law, 665 (1889); Cooley on Torts, 171 (1879).

a personal action for the injury. "In principle," says Judge Cooley, "there seems to be no reason why such action should not be sustained; but the policy of permitting actions that thus invite the child to contest the parent's authority is so questionable that we may well doubt if the right will ever be sanctioned."[1]

APPLICATIONS OF THE LAW.—

Excess of punishment, etc., a question of fact for the jury.

Johnson and his wife were convicted of cruel and merciless punishment upon their child. They took an appeal. In delivering the opinion of the court, Turley, J., said: "The right of parents to chastise their refractory and disobedient children is so necessary to the government of families and to the good order of society that no moralist or law-giver has ever thought of interfering with its existence, or of calling upon them to account for the manner of its exercise upon light or frivolous pretenses. But at the same time the law has created this right, its regard for the safety of the child has prescribed the bounds beyond which it shall not be carried. In chastising a child the parent must be careful that he does not exceed the bounds of moderation and inflict cruel and merciless punishment; if he do, he is a trespasser and liable to be punished by indictment. It is not then the infliction of punishment but the excess which constitutes the offense; and what this excess shall be is not a conclusion of law but a question of fact for the determination of the jury. Bearing in mind this principle, let us examine the charge of the court below, and see whether this case was then properly submitted to a jury. The judge said: If the jury believed that the defendants took hold of the child, and one of them struck the child with his fist and pushed her head against the wall, and then led her off to another house and with a stick or switch struck her as she was led along, and that the defendants took the child into a room and tied her to a bed-post with a rope, and kept her tied thus for two hours, or even half an hour, and in this situation whipped her with a cowskin at different intervals, as described by witnesses, it would clearly exceed moderation and reason and would be barbarous in the extreme. Now under this charge what was left for the consideration of the jury? Surely nothing but the credibility of the witnesses. They were told if they believed them then there was an excess of punishment. Now, is not this making what constitutes excess of punishment a legal conclusion, instead of a question of fact, or is it not charging the jury upon the facts? Unquestionably it is. . . . The judge should have said to the jury, if you believe the facts (stating them) as proven by the witnesses, and in your opinion they constitute excess of punishment, then the law pronounces the defendants guilty." Judgment reversed. Johnson et al. v. The State, 2 Humph. (Tenn.), 283 (1840).

[1] Cooley on Torts, 171 (1879).

§ 11. Guardian and ward.— A guardian of the person of his ward has a right of personal restraint corresponding to that of a parent, but without the general power of chastisement, except, perhaps, in cases of the extreme youth of the ward.[1]

§ 12. Master and apprentice.— This relation depends upon statutory enactments giving to the master what authority he possesses. The power of the master is, in general, a power of restraint to a limited extent to compel the performance of duties under articles of indenture, but under the present condition of things the existence of this power is somewhat doubtful.[2]

§ 13. Teacher and pupil.— The teacher, to whom a child is committed by its parents or guardian, has the right of restraint, and even of punishment, to compel obedience to lawful orders, but, like the authority of the parent, it must be exercised with moderation; and while the presumptions of the law are in favor of the teacher, yet, in a clear case of abuse, he may be held liable in a criminal prosecution,[3] and also in a civil suit for damages.[4]

§ 13a. The law stated by Stewart, J.— "In one respect the tendency of the rod is so evidently evil that it might, perhaps, be arrested on the ground of public policy. The practice has an inherent proneness to abuse. The very act of whipping engenders passion, and very generally leads to excess. When one or two stripes only were at first intended, several usually follow, each increasing in vigor as the act of striking inflames the passions. This is a matter of daily observation and experience. Hence the spirit of the law is, and the leaning of the courts should be, to discountenance a practice which tends to excite human passions to heated and excessive action, ending in abuse and breaches of the peace. Such a system of petty tyranny cannot be watched too closely nor guarded too strictly. The tender age of the sufferers for-

[1] Cooley on Torts, 171 (1879).

[2] Cooley on Torts, 171 (1879).

[3] Cooley on Torts, 171 (1879); Com. v. Randall, 4 Gray (Mass.), 36 (1855); Hathaway v. Rice, 19 Vt., 102 (1846); State v. Pendergrass, 2 Dev. & Bat., 365 (1837); Cooper v. McJunkin, 4 Ind., 290 (1853).

[4] Lander v. Seaver, 32 Vt., 114 (1859); Morrow v. Wood, 35 Wis., 59 (1874).

bids that its slightest abuses should be tolerated. So long as the power to punish corporally in school exists, it needs to be put under wholesome restriction. Teachers should therefore understand that whenever correction is administered in anger or insolence, or in any other manner than in moderation and kindness, accompanied with that affectionate moral suasion so eminently due from one placed by the law *in loco parentis* — in the sacred relation of parent — the courts must consider them guilty of assault and battery, the more aggravated and wanton in proportion to the tender years and dependent position of the pupil. The law having elevated the teacher to the place of the parent, if he is still to retain that sacred relation, it becomes him to be careful in the exercise of his authority, and not make his power a pretext for cruelty and oppression."[1]

APPLICATIONS OF THE LAW.—

The criminal action — The extent of the power — Excess a question for the jury.

Alonzo D. Randall was convicted of excessively punishing a pupil named Lucy Ann Keoch. On the trial there was evidence showing that the pupil disobeyed a proper rule of the school, which had been published by the teacher to the school in her presence. The teacher introduced evidence to show that the pupil was obstinate, told falsehoods, and was insolent before and during the time of punishment. He alleged it was for those faults that he inflicted the punishment. There was also evidence tending to show that the punishment was not very severe till after the pupil had replied to him with insolent words and manner. It was shown that he ceased punishing her when she acknowledged her fault, asked forgiveness and promised to behave better.

The court instructed the jury "that a teacher had a right to inflict corporal punishment upon a scholar; that the case proved was one in which such punishment might properly be inflicted; that the instrument used (a ferrule) was a proper one; that in inflicting corporal punishment a teacher must exercise reasonable judgment and discretion, and must be governed as to the mode and severity of the punishment by the nature of the offense, by the age, size and apparent powers of endurance of the pupil; that the only question in this case was whether the punishment was excessive and improper, and if they should find the punishment to have been reasonable and proper, the defendant could not be deemed guilty of an assault and battery; but if, upon all the evidence in the case, they should find the punishment to have been improper and excessive, the defendant might prop-

[1] Cooper v. McJunkin, 4 Ind., 290 (1853).

erly be found guilty." The jury found the defendant guilty, and he alleged exceptions.

Bigelow, J., said: "The instructions given tended to justify the defendant in punishing his pupils with greater severity than is consistent with a just and humane exercise of the authority conferred on him by law. To say the least they were sufficiently favorable to the defendant. If in inflicting punishment upon his pupil he went beyond the limit of moderate castigation, was guilty of any unreasonable or disproportionate violence or force, he was clearly liable for such excess in a criminal prosecution. 1 Hawk. P. C., ch. 60, § 23; 1 Russell on Crimes (7th Am. ed.), 755; Bac. Abr., Ass. & Bat., C. It is undoubtedly true that in order to support an indictment for assault and battery, it is necessary to show that it was committed *ex intentione*, and that if criminal intent is wanting the offense is not made out. But this intent is always inferred from the unlawful act. The unreasonable and excessive use of force on the person of another being proved, the wrongful intent is a necessary and legitimate conclusion in all cases where the act was designedly committed. It then becomes an assault and battery, because purposely inflicted without justification or excuse. Whether, under all the facts, the punishment of this pupil is excessive, must be left to the jury." Com. v. Randall, 4 Gray (Mass.), 36 (1855).

§ 14. Other similar relations.— Circumstances may place any person in authority over another, where restraint would not only become excusable but a duty.

An example: The safety of a ship, its passengers and crew might depend upon strict subordination of all persons on board to the captain or master of the vessel. In such cases all persons must, of necessity, submit themselves to the proper orders of those in authority.[1]

APPLICATIONS OF THE LAW.—

(1) *Liability of the captain and master of a vessel for acts of discipline on the high seas.*

Howard brought an action against Brown, the master of the ship Teaplant, and two others, who were mates, for false imprisonment on the high seas. It was shown on the trial that, while it was blowing very hard, and the plaintiff and some others were engaged in hoisting and belaying the foresail, Brown, the master, took up a mallet, and, after cursing at them, threatened to knock out their brains if they did not exert themselves more. They were then ordered aft by the captain to hoist the mizzen staysail, who, having procured a rope about half an inch thick, violently attacked the plaintiff and gave him eight or ten blows with the rope. Howard then asked him what he meant by it, and the master again struck him a number of blows, and then endeavored to force him to go aloft to slush the sky-

[1] Cooley on Torts, 172 (1879); Brown v. Hound, 14 Johns., 119 (1817); Fleming v. Ball, 1 Bay (S. C.), 3 (1784).

sail mast, where, from the roughness of the sea, a sailor could not go with safety. He said he had been so beaten that he could not hold on, and he seized and clung to some part of the rigging. The captain pulled him with violence until he forced him away, and both by the violence of the captain's effort and the rolling of the ship, they both fell upon the deck. Afterwards, by the order of the captain, the two mates tied him hand and foot and laid him on the quarter-deck, where he was suffered to lay exposed to the inclemency of the weather in the month of March for five days and nights. Then he was asked by the captain if he would do his duty, and on being answered in the affirmative, he was released. The plaintiff recovered $125. The defendants brought error.

In affirming the judgment, Thompson, C. J., said: "If this was an illegal act in the captain, the mates were not bound to obey him, and cannot excuse themselves under such order. A master has no right to command his servant to commit a trespass or do a wrongful or unlawful act. From the facts stated in the return it appears to me that the conduct of the captain, to say the least of it, was harsh and rigorous, and altogether unjustifiable: and unless we are warranted in presuming the statement to be in some degree colored by the witnesses, who were fellow-seamen with the plaintiff, the conduct of the captain merits severe animadversion. Although a captain may have a right to inflict corporal punishment upon a seaman under his command, yet it is not an arbitrary and uncontrolled right. He is amenable to the law in the due exercise of it. He ought to be able to show not only that there was a sufficient cause for chastisement, but that the chastisement itself was reasonable and moderate. 2 Bos. & Pull., 224; 3 Day's Rep., 285. The rule on this subject is laid down by Abbott on Shipping, 125. By the common law, he says, the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters relative to the navigation of the ship, and the preservation of good order; and, in case of disobedience or disorderly conduct, he may lawfully correct them in a reasonable manner, his authority in this respect being analogous to that of a parent over a child, or a master over his apprentice or scholar. Such authority is absolutely necessary to the safety of the ship and of the lives of the persons on board; but it behooves the master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression. Not being able to discover from the return the least justification for the captain's treatment of the plaintiff below," etc., the judgment is affirmed. Brown v. Howard, 14 Johns. (N. Y.), 120 (1817).

§ 15. Liability of keepers of charitable institutions — Superintendents of asylums for the insane, etc.— (1) *Confinement of a lunatic in an asylum without a judicial inquiry:* The superintendent or keeper of an asylum or hospital for the insane who receives a person into his keeping without being authorized by a judicial inquiry and determination of the fact of such person's insanity, does so at his peril, and if the person so received objects, protests or does not consent to such

confinement, and it afterwards turns out that the person was not in fact insane, then the superintendent or keeper is liable for false imprisonment.[1]

§ 16. Liability of the superintendent of an insane asylum — Not acting under legal adjudications — The law stated by Cooley.— The powers actually conferred upon this office are clearly administrative and limited, and, like all corresponding officers, he must at his peril keep within their limits. The hardship of this is not special and peculiar to his office. The sheriff commits an actionable wrong when by mistake he arrests the wrong person, or levies on property not belonging to the defendant in the writ; the magistrate may commit a similar wrong in honestly asserting a jurisdiction he does not possess; the assessor in mistakenly imposing a tax upon a person not within his jurisdiction; the military officer in enforcing military law under error regarding his legal powers, and so on. All officers are liable to similar errors, but the rule of law, no less than the rule of justice, is that he who commits the mistake shall bear the consequences. The opposite rule would invite outrage and wrong instead of tending to prevent them, and would therefore be wholly inadmissible. Purity of motive should protect the officer against excessive damages, but individual rights must have settled and definite rules of protection, and cannot be left to depend upon the opinion of an officer as to what he may or may not do in abridging them.[2]

§ 17. The superintendent as a judicial officer.— There are cases in which powers that the superintendent of an asylum necessarily exercises seem to be judicial, especially the case of patients received when insane, and improved, and supposed to be cured by the treatment they have received. The time comes

[1] Davis v. Merril, 47 N. H., 208 (1868); Van Dusen v. Newcomer, 40 Mich., 90 (1879); Colby v. Jackson, 12 N. H., 526 (1842); Ex parte Greenwood, 24 L. J. Q. B., 148; Denny v. Tyler, 13 Allen, 225; Fletcher v. Fletcher, 1 Ell. & Ell., 420; Hall v. Semple, 3 F. & F., 337; Lyman v. Fraser, 3 F. & F., 589; Rex v. Clark, 2 Burr., 1362; Rex v. Gomley, 7 B. & C., 669; Rex v. Turlington, 2 Burr., 1115; Brookshore v. Hopkins, Lofft., 240.

[2] Com. v. Kirkbride, 3 Brewster, 586 (1869); Look v. Dean, 108 Mass., 116; 11 Am. Rep., 323 (1871); Anderson v. Burrows, 4 C. & P., 210; Van Dusen v. Newcomer, 40 Mich., 90 (1879); Lott v. Sweet, 33 Mich., 308 (1876).

when such persons are entitled to their discharge, but exactly when it has arrived the superintendent must in the first instance decide. Should he maliciously continue the confinement after a cure has been effected, he would rightfully be held responsible; but if through error in judgment he fails to discharge the patient, he might with great justice claim the benefit of the rule which under corresponding circumstances protects officers who exercise authority of a *quasi*-judicial nature. But under such circumstances the superintendent is dealing with a case in which, insanity having unquestionably existed, a presumption of its continued existence favors his action.[1]

APPLICATIONS OF THE LAW.—

(1) *Keepers of charitable institutions.*

Russell G. Toles was the superintendent of the Baldwin Place Home in the city of Boston, a corporation formed under the laws of Massachusetts (St. 1865, ch. 98) "for the purpose of rescuing destitute children from want and shame, providing them with food and clothing, giving them instruction for the mind and heart, and placing them, with the consent of their parents or legal guardians, in Christian homes." An action for false imprisonment was brought against him by one Kate Smith as next friend in behalf of one of her three children. On the trial it appeared that the mother (Kate Smith) had a settlement in Lowell. Her husband being dead and she being sick and partially insane, with her three children, being in need of relief and support, as paupers, were taken to the city poor-house to be cared for according to law. The overseers of the poor voted to transfer the children to the said Baldwin Place Home, and upon such transfer the defendant as superintendent received them. At the trial the court directed a verdict for the defendant. On exceptions the directions were sustained. Chapman, J.: "As the overseers were not bound to retain them within the city limits, but might provide for them elsewhere in a suitable place within the limits of the commonwealth, they might lawfully place them there (in the home). Of course the defendant, who was the superintendent of the home, might lawfully receive them." . . . "The evidence fails to prove that she (the child) was in his custody or under his control; or that the overseers were not providing for her as a pauper, in the discharge of their duty." Smith v. Toles, 106 Mass., 265 (1871). See Smith v. Peabody et al., 106 Mass., 262 (1871).

(2) *Unauthorized detention of a harmless lunatic.*

It was claimed that Mr. Look was a lunatic. He would read his Bible and preach to crowds of men. While he was on a steamboat on his way to Oak Bluffs, where a camp-meeting was in progress, he was arrested by a

[1] Van Dusen v. Newcomer, 40 Mich., 90 (1879).

constable and kept in custody till arrival of the boat, when he was taken to the lock-up on the camp-ground and there kept during the day. Then another constable took him to the insane hospital and desired to leave him there until the following Monday, for the purpose and with the intention of procuring some papers necessary to make his detention legal. The superintendent being absent, his assistant received Mr. Look, believing him to be a fit subject for hospital treatment, and kept him confined until Monday, when his friends came and took him away. He was, within the meaning of the law, an insane person, and a proper subject for treatment in the hospital, though not dangerous to himself or the community. On his release he brought an action for false imprisonment against Mr. Choate, the superintendent of the insane hospital, for unlawfully confining him. The case was before the supreme judicial court on demurrer. In delivering the opinion Chapman, C. J., said: "We look in vain in the statutes for any authority in the constable to take the plaintiff to the hospital, or to arrest him without a warrant, even though his purpose was to detain him till he could carry him before the judge of probate, and procure a warrant, the plaintiff not being dangerous either to himself or others. The statutes give no authority to arrest harmless persons without a warrant, even for the purpose of bringing them before the judge of probate. Being a mere stranger to the plaintiff, and abandoning the arrest without making any return, he had not even the rights that a relative or friend would have. He brought the plaintiff to the hospital tortiously, and no authority could be derived from him for the plaintiff's detention. As the plaintiff was not detained by virtue of the statutes, or by any power derived from the common law, all persons connected with the detention are wrong-doers." The demurrer was overruled and the case ordered for trial. Look v. Choate & Dean, 108 Mass., 116 (1871).

§ 18. Legal adjudications not necessary in every instance — The law stated by Cooley, J. — "It is not essential that a judicial hearing and determination should be had in every instance before an insane person can be admitted to the asylum. I concede that the right to restrain these unfortunate persons for their own benefit, as for the protection of others, is as clear as the right to restrain one who, in the delirium of fever, would break away from his attendants, or one who, with a contagious disease upon him, should attempt to enter a public assembly. But the first thing to be determined is whether there is insanity in fact. And in any case, where that is open to possible question, prudence would dictate a judicial investigation, unless the reasons against it are so imperative as not to admit of the necessary delay, or unless the investigation would probably be so far damaging to the subject of it as to more than counterbalance the probable benefits. It is no doubt true that a trial of the fact would be more or less excit-

ing or disturbing to a mind already in a diseased or abnormal condition; but that the consequences would be more serious than those likely to follow from the sudden arrest and removal for confinement in the asylum of a person who believes himself perfectly sane is by no means certain. An insane person does not necessarily lose his sense of justice or his right to the protection of the law; and when he is seized without warning, and without the hearing of those whom he might believe would testify in his behalf, and delivered helpless into the hands of strangers, to be dealt with as they may decide within the limits of a large discretion, it is impossible that he should not feel keenly the seeming injustice and lawlessness of the proceeding."[1]

§ 19. A public investigation not always a satisfactory test.— "It may be said with perfect truth that a public investigation is no very satisfactory or certain test of insanity, and that the superintendent of the asylum is much more competent to determine the question than the average judge or jury. But safety is not found in the competency of the tribunal merely; it is the publicity of the proceeding, and the opportunity that is afforded for meeting a fastidious or deceptive case, that constitute the chief protection. There is always danger that a secret investigation shall be made, by those who manage it, to reach the conclusion desired irrespective of the real facts; and the intelligence of the tribunal can constitute but an imperfect protection. Indeed, if one is to be judged unheard he must be condemned almost as a matter of course in any case where upon the facts there could be two opinions; and those are the very cases in which investigation ought to be careful, particular and thorough in proportion to the gravity of the consequences of error."[2]

§ 20. Further discussion of the subject — Difficulties of proceeding without judicial inquiry.— If an insane person is to be confined on the ground that his going at large is dangerous to the community, any one person has the same right to pass judgment upon his case as any others, and when opinions differ respecting the necessity for restraint, one person may bind and another release the subject of their con-

[1] Van Dusen v. Newcomer, 40 Mich., 90 (1879).

[2] Van Dusen v. Newcomer, 40 Mich., 90 (1879).

flicting opinions at discretion. Such a condition of things could not be tolerated. The difficulties are the same in kind when the unqualified right of the family to remove a member to the asylum for his own advantage is conceded. In law it becomes necessary carefully to prescribe the limits of judicial authority, so that such tribunal shall act with unquestioned right within its own proper bounds, and shall be wholly excluded from the jurisdiction of others. That is necessary for the protection of all classes of officers — those who judge and those who are to execute their judgments. The latter class are to know precisely what their duty is, so that they may proceed to perform it without peril. But between the different members of the family, proceeding to act upon their own opinions, the clashing of authority must be imminent in every case not perfectly clear and unquestioned. One part of the family may believe in an insanity which the other denies; and where the one rightfully confines, the other may rightfully demand the discharge. Nor in this family jurisdiction can the judgment of the supposed insane person be excluded; for until his insanity is determined he has the same right to judge that the others are insane as they have to judge that he is.[1]

§ 21. Effect of a judicial inquiry — The law stated by Cooley, J.—"The great defect, however, of all reasoning in favor of confinement without legal investigation, is that it assumes the person to be insane. Being insane, it is said he ought not to be subjected to the excitement of a public and perhaps prolonged investigation. But suppose he proves not to be insane; are there no consequences still more serious to be looked for from exposing him to the excitements of a sudden seizure and incarceration without a hearing, and a prolonged detention among persons unquestionably insane? In a given case the man who seizes and imprisons another does so upon evidence of mental disease, which, if he were a prudent man, he would not have acted upon in any important money transaction — the mere word of one or two persons who might, for aught he knew, be interested in making a false case for the purpose. Such treatment in the case of a sane person of a highly sensitive physical and mental organization

[1] Van Dusen v. Newcomer, 40 Mich., 90 (1879).

must necessarily prove a powerful tendency to induce the very condition which the arrest and confinement assume, and if the law would permit it, the possible wrongs in individual cases would be nothing short of the destruction of the intellect itself."[1]

APPLICATION OF THE LAW.—

Confinement in an asylum for the insane without judicial authority.

Mrs. Newcomer, being at the passenger house of the Michigan Central Railroad at Albion, was forcibly taken and put aboard of the cars and taken to the asylum for the insane at Kalamazoo, where she was restrained of her liberty for a period of ten months. The persons chiefly instrumental in procuring this confinement were her son-in-law and his mother, with whom she had had some difficulty, but her daughter gave consent. The person who accompanied her to the asylum was an overseer of the poor, who, it is conceded, had no legal authority for interference, beyond that which might be claimed for any citizen. The reason for assigning Mrs. Newcomer to the asylum was her insanity. There had been no judicial finding of the fact, and it was not alleged that there were any such manifestations of mental delusions as indicated danger to others. Van Dusen was at the time superintendent of the asylum, and received and detained Mrs. Newcomer in the full belief that she was insane. On being discharged from the asylum, she brought suit against the superintendent for false imprisonment, and recovered a verdict for $6,000, upon which judgment was entered. The defendant took the case to the supreme court on error, where the judgment was reversed. In the opinion by Campbell, C. J., it is said: The law has but one test of insanity, and that is whether a person is *compos mentis*, or capable of exercising rational self-control. If not so capable, those who have by relationship or otherwise become the actual and proper custodians of the person who is *non compos* may lawfully place him in a public asylum for treatment, and the superintendent may lawfully receive him. Having so lawfully received him, he may lawfully retain him, while in good faith he believes him insane, unless discharged by *habeas corpus* or by the request of his friends. Nothing but actual insanity will authorize the seclusion of one who makes known his objections and claims against reception. If no objection is made by a sane person to his seclusion, he cannot complain of it afterwards.

For the purpose of treatment in an asylum, it is certainly not necessary that in addition to insanity there should be evidence of danger to the lunatic or others beyond what is implied in the insanity itself. For other purposes, not designed for the care of the patient, imprisonment could not be justified probably without some danger. It is always justifiable in such cases. Lott v. Sweet, 33 Mich., 308. But no such danger was necessary to be shown here. If she was insane, then there was nothing to make out any cause of grievance whatever; and if she was sane, there was no testimony in the case which could make Van Dusen responsible for any act of her

[1] Van Dusen v. Newcomer, 40 Mich., 90 (1879); Cooley on Torts, 178.

relatives or their agents, or for anything beyond what was necessarily incident to the confinement in a properly regulated asylum. The rules and regulations were all shown beyond dispute to be proper, and if any other person in the asylum, without his procurement, did acts of an improper character, he cannot be bound to respond for them. There was no evidence legally tending to show conspiracy or bad faith in plaintiff in error, and the testimony of insanity was very strong; and I cannot avoid the belief that unless the jury had been instructed that Mrs. Newcomer could not be confined unless dangerous as well as insane, no verdict could have been rendered against Dr. Van Dusen. Van Dusen v. Newcomer, 40 Mich., 90 (1879).

The authorities are uniform that there must be consent or actual insanity. King v. Coate, Lofft, 73–76; Brookshaw v. Hopkins, Lofft, 240; In re Shuttleworth, 9 Q. B., 651; Rex v. Gourley, 7 B. & C., 669; Anderdon v. Burroughs, 4 C. & P., 210; Rex v. Turlington, 2 Burr., 1115; Rex v. Clark, 2 Burr., 1362; Scott v. Wakem, 3 F. & F., 328; Symm v. Fraser, 3 F. & F., 859; Hall v. Semple, 3 F. & F., 337; Fletcher v. Fletcher, 1 Ell. & Ell., 420; Ex parte Greenwood, 24 L. J., Q. B., 148; Denny v. Tyler, 3 Allen, 225; Look v. Dean, 108 Mass., 116; Colby v. Jackson, 12 N. H., 526; Davis v. Merrill, 47 N. H., 208.

§ 22. Liability of persons apprehending a lunatic without legal process, etc.— In all cases where there is no legal guardian, the law intrusts it to the relations and friends of an insane person to place him in an asylum in a proper case. To justify them in so placing him there, it is not necessary that the insane person should be dangerous. If it is proper that he should be placed there because his case requires treatment in the asylum, with a view to his cure, or because his insanity is of such a character as to make it improper that he should remain in his family or in the neighborhood on account of the disturbance and trouble caused by his insanity, or for any other sufficient cause, the relations and friends may place him in the asylum. And if they act from good motives, with prudence and sound discretion, the law intrusts it to their judgment to decide, where there is no guardian, the question of his confinement in the asylum; and if they exercise their best judgment honestly and discreetly they are justified. But such friends and relations cannot decide whether the person is in fact insane: that fact is for a judicial inquiry. And if it turns out in the end that the person was not in fact insane, then they can justify the inprisonment only by showing a consent to such confinement on the part of the person confined.[1]

[1] Davis v. Merrill, 47 N. H., 208 526 (1842): Van Dusen v. Newcomer, (1866); Colby v. Jackson, 12 N. H., 40 Mich., 90 (1879).

§ 23. The right to apprehend and confine insane persons under legal adjudication.— The rules of the common law relating to the apprehension and confinement of insane persons, or to the restraint of their liberty, have been the cause of so much abuse and oppression that the people have sought a remedy in statutory enactments. Under these enactments a strict compliance with the requirements of the law is necessary to restrain any person, especially an alleged lunatic, of his liberty.[1]

§ 24. Restraint of insane persons — The law stated by Cooley.— It is sometimes provided by statute that no one shall be restrained of his liberty as an insane person except upon the certificate of one or more reputable physicians. Such certificates may prevent injustice in some cases; but as a physician is not a judicial officer, and has no judicial powers, it is not an adjudication and cannot be given the force of law so as to protect parties who imprison one not insane in fact. It might assist in showing that the parties had acted in good faith, and therefore ought not to be subjected to exemplary damages; but it could not bind the party whose reason had been condemned without a hearing. Nothing but a judicial

[1] As a fair illustration of these statutory enactments we quote the statute of Illinois:

TRIAL BY JURY NECESSARY.— No superintendent, or other officer or person connected with either of the state hospitals for the insane, or with any hospital or asylum for insane or distracted persons, in this state, shall receive, detain or keep in custody, at such hospital or asylum, any person who shall not have been declared insane by the verdict of a jury, and authorized to be confined by the order of a court of competent jurisdiction; and no trial shall be had of the question of the sanity or insanity of any person before any judge or court, without the presence of the person alleged to be insane. L. 1867, p. 139, § 1; L. 1865, p. 85, § 1; R. S. Ill. 1874, 684.

PENALTY.— If any superintendent, or other officer or person connected with either of the state hospitals for the insane, or with any hospital or asylum for insane or distracted persons, in this state, whether public or private, shall receive or detain any person who has not been declared insane by the verdict of a jury, and whose confinement is not authorized by the order of a court of competent jurisdiction, he shall be confined in the county jail not exceeding one year, or fined not exceeding $500, or both, and be liable civilly to the person injured for all damages which he may have sustained; and if he be connected with either of the insane hospitals of this state, he shall be discharged from service therein. L. 1867, p. 139, § 2; R. S. Ill. 1874, 684.

investigation instituted for the purpose of trying the question of insanity, and in which the supposed *non compos* is allowed the opportunity of being heard, can conclude him.[1]

[1] Cooley on Torts, 178; Underwood v. People, 32 Mich., 1; 20 Am. Rep., 633; Colby v. Jackson, 12 N. H., 526.

The difficulties in the way of legislation on this subject are the following: 1. There has as yet been no adjudication that the person at the time of acquittal is insane, and if not, he cannot lawfully be confined. An insanity which has passed away cannot excuse an imprisonment. 2. If it be allowable to assume that an insanity found to exist at one time still continues, and on that ground to commit the party to an asylum as presumptively insane, still the supposed *non compos* would have a right to disprove this presumption at any time. To deny him the right to have his case investigated on the facts at any time would be to distinguish his case from that of other insane persons; and this must be justified on some legal ground. It certainly could not be justified on the ground that the jury had rendered an improper verdict; the verdict must be taken as correct. But as no other ground can possibly be suggested, it must follow that the restraint of liberty, though based upon a verdict which found the existence of insanity, must be made to cease whenever a judicial investigation, which is a matter of right, shall determine that insanity does not exist. It is not possible constitutionally to provide that one shall be imprisoned as an insane person who can show that he is not insane at all. Neither is it competent to order one so confined restored to his liberty until certain designated officers, on their voluntary investigation, shall certify that reason is restored. Underwood v. People, 32 Mich., 1.

Cases in which one has committed an act which in a sane person would be a crime, and has been acquitted on the ground of insanity, are always embarrassing. If the verdict is right on the facts, the principle on which he is acquitted is plain enough. No one can commit a crime who is incapable of harboring a criminal intent. The difficult question concerns what shall be done with him afterwards. And one would naturally suppose that this question ought not to be a difficult one. If a person, from mental disease, is unable to control his own actions, and is impelled by delusions or frenzy to commit violence upon others, he ought to be subjected to legal restraint. Cooley on Torts, 178, note.

The popular belief is that in a large proportion of these cases the defense of insanity was a fraud, or at least the suggestion of insanity has been seized upon as an excuse for discharging a guilty person for whose acquittal the jury could suggest no other reason. This belief has subjected the administration of the law to much criticism; and by some unthinking people the law itself is assailed. The fault in such cases is that the jury, improperly actuated by sympathy, assign one reason for acquittal, when the real reason is something quite different. They say, "We acquit because of insanity," when in their hearts they mean, "We acquit because we think the act excusable on grounds the law does not accept as an excuse." They assign a valid excuse because

§ 25. Persons confined as lunatics — Remedy by habeas corpus.— In cases where a person confined in an insane asylum has become sane, and the keeper is not authorized to discharge such person, or from some improper motive declines to do so, or where a person, whether sane or insane, is detained or confined as a lunatic without authority of law, it appears that such person is entitled to be brought into court upon a writ of *habeas corpus* in order that the question of his detention may be inquired into and judicially determined.[1] But on the application for this writ in such cases, it ought to appear that the party making the application is acting under the authority of the alleged lunatic.[2]

§ 26. The remedy by habeas corpus confined to what cases.— The remedy by *habeas corpus* seems to be confined to those cases in which —

(1). The confinement of the person does not appear to have been authorized by any form or color of legal process.

(2) The form of proceeding was not so far according to the course of the common law as to constitute a suit at law, and so admit the party to his remedy by writ of error.[3]

(3) The person so confined as a lunatic has recovered his sanity.

they know the real excuse is not valid. Shall a party thus excused be turned loose upon society? This is the problem. Certainly, if he is insane, he ought not to be, and the verdict of the jury must be accepted as conclusive that at the time to which their inquiry was directed he was insane in fact. But that time was not the time of the trial; it was the time of the alleged criminal act. Suppose, now, it be provided by legislation that a person thus acquitted shall be committed to an asylum as a permanent inmate; is this admissible? Cooley on Torts, 178, note.

Selectmen and overseers of the poor have no authority *ex officio* to control and restrain persons of unsound mind. Like all other persons they may, from the necessity of the case, confine them for a reasonable time to prevent mischief, until proper proceedings can be had for the appointment of a guardian. No one can confine an insane person indefinitely except under the sanction and upon compliance with the formalities of the law. Colby v. Jackson, 12 N. H., 526.

[1] Com. v. Kirkbride, 2 Brews., 400 (1868); Com. v. West Penn. Hos., 3 Pittsb., 299; Underwood v. People, 32 Mich., 1 (1875); Regina v. Pindar, 24 L. J. (N. S.), Exch., 148; Rex v. Choate, Lofft, 73; Rex v. Wright, 2 Strange, 915; Rex v. Turlington, 2 Burr., 1115; Buswell on Insanity, § 22 (1885).

[2] Child, Ex parte, 15 C. B., 237; Buswell on Insanity, § 22 (1885).

[3] Buswell on Insanity, § 22 (1885).

In many states the remedy in these cases is prescribed by statutory enactments.[1]

§ 27. **Judicial officer defined.**— The term "judicial officer" in its broadest sense signifies a public officer invested by law with the power and duty of exercising judicial powers. The term in this work will be used to signify such officers as exercise judicial powers in courts of greater or less jurisdiction, judges and inferior magistrates.

A *quasi*-judicial officer is one who is called upon to exercise judgment and discretion, but not in courts.[2]

§ 28. **The rule of liability of judicial officers.**—The rule of liability, as it affects judicial officers when acting within their jurisdiction, may be briefly stated as follows: "Such as are by law made judges of another shall not be criminally accused or made liable to an action for what they do as judges."[3] It is a very ancient law, and the converse of the proposition is also ancient, "Where there is no jurisdiction at all there is no judge, and the proceeding is as nothing."[4] The law has come down to modern times unchanged. The judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even where such acts are in excess of their jurisdiction and done maliciously and corruptly. There is a distinction, however, between their acts done in excess of their jurisdiction, and those done in the clear absence of all jurisdiction over the subject-matter of the controversy.[5] The rule of liability as applied to courts of inferior, limited jurisdiction is somewhat different, the judges of those

[1] *An illustration — The statute of Illinois:* RESTORATION TO REASON — DISCHARGE.—When any patient shall be restored to reason, he shall have the right to leave the hospital at any time; and if detained therein contrary to his wishes after such restoration, shall have the privilege of a writ of *habeas corpus* at all times, either on his own application or that of any other person in his behalf. If the patient is discharged on such writ, and if it shall appear that the superintendent has acted in bad faith or negligently, the superintendent shall pay all the cost of the proceeding. Such superintendent shall moreover be liable to a civil action for false imprisonment. R. S. Ill. 1874, p. 681, § 20.

[2] Mechem on Public Officers, § 617 (1890).

[3] Year Book, 43 Edw. III., 9; 9 Edw. IV., 3; Floyd v. Baker, 12 Coke, 26.

[4] Perkins v. Proctor, 2 Wils., 382.

[5] 7 Am. & Eng. Ency. of Law, 668 (1891).

courts being liable to civil actions for all acts done by them in excess or outside of their jurisdiction.[1]

§ 29. Judges of superior courts liable, when.— The presumption being that superior courts, that is, courts of general jurisdiction, never exceed their authority and always act within their jurisdiction, it is a well-settled rule of law that the judges of such courts can only be held liable in civil actions in those cases in which there is a clear absence of all jurisdiction whatever.[2] It is not sufficient to show that they have merely exceeded their jurisdiction: there must be a clear absence of it.[3]

§ 30. Excess of jurisdiction and want of jurisdiction distinguished.— A distinction must be observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is an usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.[4]

APPLICATIONS OF THE RULE.—

Judge of a superior court — Illegal sentence — Imprisonment thereunder, etc.

In October, 1873, the defendant, Benedict, was judge of the district court for the United States of the eastern district of New York. As such, by virtue of an act of congress, he presided at and held the circuit court of the United States for the southern district of New York for the October term of that year. The plaintiff, Lange, was at that time arraigned upon an indictment of twelve counts, the general import of which was that he had stolen, embezzled or appropriated to his own use certain mail-bags, the property of the United States, of the value of $25; he was tried upon the indictment and found guilty, but the jury found the value of the mail-bags to be less than $25. By the act of congress the punishment in such cases was a fine of $200 *or* imprisonment for one year. The defendant, sitting as such judge and holding that court for that time, sentenced the plaintiff to pay a fine of $200 *and* to be imprisoned for one year. The punishment

[1] People v. Liscomb, 60 N. Y., 559 (1875); Bigelow v. Stearns, 19 Johns. (N. Y.), 39 (1821).

[2] Bradley v. Fisher, 13 Wall. (U. S.), 335 (1871); Randall v. Brigham, 7 Wall. (U. S.), 523 (1868); Calder v. Holkett, 3 Moore's Privy Council Cases, 28 (1840).

[3] Bradley v. Fisher, 13 Wall. (U. S.), 335 (1871).

[4] Bradley v. Fisher, 13 Wall. (U. S.), 335 (1871); Johnston v. Moorman, 80 Va., 131 (1885).

thus imposed, it will be seen, was more than that fixed by the law. The fine was immediately paid, but the plaintiff was imprisoned five days under the sentence. At the same term of court a writ of *habeas corpus* was granted in which the imprisonment of the plaintiff was made to appear. On the return of the writ, the defendant, sitting and holding that court as the judge thereof, vacated and set aside the previous sentence and passed judgment anew upon the plaintiff, and resentenced him to be imprisoned for the term of one year. Under this action he was imprisoned, and which is the wrongful imprisonment complained of. Afterwards the supreme court of the United States adjudged the resentence to be without authority, and discharged the plaintiff from imprisonment. He then brought an action against the judge for false imprisonment. To his complaint a demurrer was sustained by the supreme court *in banc*, and the case finally reached the court of appeals on appeal by Lange.

On this state of facts the plaintiff insisted that the judge was liable in damages. The defendant claimed that all that he did was done by him as a United States judge, and that the judicial character in which he acted protected him from personal responsibility. In disposing of the case Folger, J., said: In our judgment, the question between the parties is brought to what, in words at least, is a very narrow issue. Did the defendant impose the second sentence *as a judge;* or, although he was at the moment of right upon the bench, and authorized and empowered to exercise the functions of a judge, was the act of resentencing the plaintiff so entirely without jurisdiction or so beyond and in excess of the jurisdiction which he then had, as judge, as that it was an arbitrary and unlawful act of a private person? A narrow issue, but not so easily determined to the satisfaction of a cautious inquirer. . . .

The general rule which applies to all such cases, and which is to be observed in this, has been in olden times stated thus: Such as are by law made judges of another shall not be criminally accused or made liable to an action for what they do as judges, to which the Year Books (43 Edw. III., 9; 9 Edw. IV., 3) are cited in Floyd v. Baker, 12 Coke, 26. The converse statement of it is also ancient: the proceeding is as nothing (Perkins v. Proctor, 2 Wilson, 382–384), citing the Marshalsea Case, 10 Coke, 65–76, which says: "Where he has no jurisdiction, *non est judex.*" It has been stated thus, also: No action will lie against a judge acting in a judicial capacity for any errors which he may commit in a matter within his jurisdiction. Gwyne v. Rool, Lutw., 290. It has been in modern days carried somewhat further than in the times of the statement. Judges of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously and corruptly. Bradley v. Fisher, 13 Wall., 351. It is to be seen that in these different modes of stating the principle there abides a qualification. To be free from liability for the act, it must have been done by a judge in his judicial capacity; it must have been a judicial act; so it always remains to be determined, when is an act done as judge in a judicial capacity? And this is the difficulty which has most often been found in the use of this rule, and which is present here — to determine when the facts exist which call into play that qualification.

For it is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there. Should such an one, rightfully holding a court for the trial of civil actions, order the head of a by-stander to be stricken off, and be obeyed, he would be liable. Thus a person in the office of judge of the ecclesiastical court in England excommunicated one for refusing to obey an order made by him, that he become guardian *ad litem* for an infant son; and though the order was made in a matter then lawfully before the court for adjudication and of which he as judge had jurisdiction, he was held liable to an action. Beauvain v. Sir William Scott, 3 Campb., 388. He had not, as judge, jurisdiction of the person to whom he addressed the order. On the other hand, one rightfully holding a court for the trial of a criminal action fined and imprisoned a juror for that he did not bring in a verdict of guilty against one on trial for an offense, after the court had directed the jury that such a verdict was according to the law and facts. The juror was discharged from imprisonment on *habeas corpus* brought in his behalf, and it was held that the act of fining and imprisoning him was unlawful, inasmuch as there was no allegation of corruption or like bad conduct against the juror. The juror then brought an action against him who sat as judge and made the order for fine and imprisonment, but took nothing thereby; for it was held that the judge acted judicially as judge, as he had jurisdiction of the person of the juror and jurisdiction of the subject-matter, to wit, the matter of punishing jurors for misbehaving as such, and that his judgment that the facts of the case warranted him in inflicting punishment was a judicial error to be assailed and set aside in due course of legal proceedings, for which, however, he was not personally liable. Hammond v. Howell, Recorder of London, 2 Mod., 218; Bushell's Case, Vaughan Rep., 135. So a judge of oyer and terminer was protected from indictment when he had made entry of record that some were indicted for felony before him, whereas in fact they were indicted for trespass only. 12 Coke, 25. Thus it appears that the test is not alone that the act is done while having on the judicial character and capacity, nor yet is it alone that the act is not lawful.

We have seen, too, that the test is not that the act was in excess of jurisdiction, or alleged to have been done with malice and corruptly; for even if it is such an act, it does not render liable the doer of the act if he be a judge of a court of general or superior authority. Bradley v. Fisher, 13 Wall., 451.

We think it clear that there is no liability to civil action if the act was done "in a matter within his jurisdiction," to use the words of Gwynne v. Pool, Lutw., 290. Those words mean that when the person assumed to do the act as judge he had judicial jurisdiction of the person acted upon and of the subject-matter as to which it was done. Jurisdiction of the person is when the citizen acted upon is before the judge, either constructively or in fact, by reason of the service upon him of some process known to the law, and which has been duly issued and executed. What is meant by jurisdiction of the subject-matter we have had occasion to consider lately in Hunt v. Hunt, 72 N. Y., 217. It is not confined within the particular facts which must be shown before a court or a judge to make out

a specific and immediate cause of action. It is as extensive as the general rule as to abstract questions which fall within the power of the tribunal or officer to act concerning. Our idea will be illustrated by a reference to Groenvelt v. Burwell, 1 Ld. Raym., 454. There the defendants, as censors of a college of physicians, had imposed punishment on the plaintiff for what they adjudged was malpractice by him. He brought his action; they pleaded the charter of the college, giving them power to make by-laws for the government of all practitioners in medicine in London, and to overlook them and to examine their medicines and prescriptions, and to punish malpractice by fine and imprisonment; that they had in the exercise of that power adjudged the plaintiff guilty of *mala praxis*, and fined him twenty pounds, and ordered him imprisoned twelve months, *nisi*, etc. It was held that the defendants had jurisdiction over the person of the plaintiff, inasmuch as he practiced medicine in London; and over the subject-matter, to wit, the unskilful administration of physic. That is the language of Holt, C. J., in that case; and because the defendants had power to hear and punish and to fine and imprison, it was held that they were judges of record, and because judges, not liable for the act of fining and imprisoning. See, also, Ackerly v. Parkinson, 3 Maule & Selw., 411. It is the general abstract thing which is the subject-matter, the power to inquire and adjudge whether the facts of each particular case make that case a fact or an instance of that general thing — that power is jurisdiction of the subject-matter. Thus in Hammond v. Howell, etc., 2 Mod., 218, the defendant was saved from liability to civil action, inasmuch as he had, as judge, jurisdiction of the subject-matter of punishing jurors for a misdemeanor upon the panel. He made an error in deciding that the facts of that case made an instance of that subject-matter. But the jurors were within his jurisdiction of their persons and he had jurisdiction of the subject-matter, and his error was a judicial error; an act done *quatenus* judge; not an act as Howell, the private person, though it was an act contrary to law, grievous and oppressive upon the citizen.

The inquiry, then, at this stage of our consideration of the case, is this: whether the defendant, sitting upon the bench of the circuit court, and being upon that occasion *de jure et de facto* the circuit court, and having, as such, jurisdiction of all persons by law within the power of the court, and jurisdiction of all subject-matters within its cognizance, — whether he had jurisdiction of the plaintiff, and of any subject-matter wherefrom he had authority to hear and adjudge whether the facts in the case of the plaintiff, as then presented to him, fell within any of those subject-matters. It is not the inquiry whether the act then done as the act of the court was erroneous and illegal; that is but another form of saying whether it could or could not be lawfully done, as a court, by the person then sitting as a judge thereof. It is whether that court then had the judicial power to consider and pass upon the facts presented, and to determine and adjudge that such an act based upon them would be lawful or unlawful. That the defendant as that court had jurisdiction of the person of the plaintiff is manifest. He was before it on a return to a writ of *habeas corpus* sued out by him, and was produced in court by the marshal to whom the writ was sent. He was in the custody of law upon a judgment and

sentence of that court, the validity of which he was questioning, and seeking from that court a vacating and annulling thereof. At least, till the order of vacating it was made, the plaintiff was lawfully within the power of the court. That court also had jurisdiction of the subject-matter. It might, by law, indict and try persons charged with stealing and appropriating mail-bags; it might pass sentence upon them, when duly convicted, of fine or imprisonment; during the same term of the court at which one sentence had been imposed, it might vacate it or modify it as law and justice would require. Ex parte Lange, 18 Wall., 163. If it had imposed a sentence greater than that prescribed by law, it would vacate it and inflict one in accord with the law. If no part of the invalid sentence imposed had been executed, it could vacate it and inflict one different in kind or degree. Ex parte Lange, 18 Wall., 163; Miller v. Finkle, 1 Park.C. C., 374, and cases there cited.

In England it has been held that at the same term the judgment might be altered, and by reason of subsequent conduct of the convicted person the punishment be increased. Reg. v. Fitzgerald, 1 Salk., 401. And another sentence has been given after a portion of the former one had been suffered. Rex v. Price, 6 East, 323. The judgment, as expressed in the prevailing opinion (Ex parte Lange, *supra*), is not in accord with those two cases, and we cite them without expression of approval or otherwise. This was the subject-matter — the general matter then before the court. The particular matter or question presented was the sentence of fine and imprisonment passed upon the plaintiff. Was it erroneous and unlawful in that it went beyond the limit of the law, he having been some days in imprisonment under it, and having paid a sum of money equal in amount to the fine to the clerk of the court, who in turn had paid it to an officer of the United States government; was it lawful to vacate the sentence if in excess of the law; if that sentence should be vacated, was it lawful, under the facts of the case, to impose another sentence which should be in accord with the statute,—did all these things present a case for the exercise of power, by virtue of the jurisdiction over the subject-matter? The court, we have seen, had the jurisdiction last named; did it not also have the jurisdiction to adjudicate upon that state of facts? If it did have it, and did adjudicate erroneously, was it not a judicial error to be relieved from, by such writ as would bring it up for review, rather than a wrong done personally to be answered for in a civil action? Is not the person who filled the office of judge, and by his presence on the bench made that court, free from liability for that adjudication, though the act done by him was erroneous and unauthorized by law? It was held by this court in Rodergris v. East River Savings Bank, 63 N. Y., 460, that when general jurisdiction is given to a court of any subject, and that jurisdiction in any particular case depends upon facts which must be brought before that court for its determination upon the evidence, and when it is required to act upon such evidence, its decision upon the question of jurisdiction is conclusive until reversed, so far as it protects its officers and all other innocent persons who act upon it. How does it differ when general jurisdiction is thus given and depends upon the legal conclusion, from a conceded state of facts, and when the court is required to act thereon and draw a conclusion

therefrom? Is not the adjudication of this court conclusive until reversed so as to protect? Is not the act of adjudication and the judgment given thereon an act done with jurisdiction, hence a judicial act—an act done as a judge or as a court? In Howell's Case there was no disputed question of fact. It was upon a conceded st ate of facts that he acted.

He erred in his judgment of the effect in law of those facts; yet it was deemed a judicial error. It is true that the United States supreme court, upon a certain state of facts before it, and in a proceeding by *certiorari* to which this defendant was not a party, and in which he was not heard by that court, reached the conclusion that the second sentence of the circuit court was pronounced without authority, and discharged the defendant from his imprisonment thereunder. Ex parte Lange, *supra*. In the prevailing opinion given in the case are repeated expressions to the effect that the power of the circuit court to punish, further than the first sentence, was gone; that its power to punish for that offense was at an end when the first sentence was inflicted, and the plaintiff had paid the $200 and laid in prison five days; that its power was exhausted; that its future exercise was prohibited; that the power to render any further judgment did not exist; that its authority was ended. It is claimed from these expressions that the force of the decision in that case is that the defendant in pronouncing judgment in the second case upon the plaintiff did not act as a judge. It is plausible to say that if an act, sought to be defended as a judicial act, has been pronounced without authority and void, it could not have been judicially. But we have yet to learn that the eminent court which used that language in adjudging upon the case made upon that writ would hold that the defendant did not act as a judge in pronouncing the judgment which was deemed without power to sustain it. The opinion also says: "A judgment may be erroneous and not void; and it may be erroneous *because* it is void. The distinctions between void and voidable judgments are very nice, and they may fall under the one case or the other, *as they are regarded for different purposes.*" We do not think that learned court would disregard the reasoning of Howell's Case, *supra*, and others like unto it; yet in Bushell's Case, *supra*, he was discharged on a *habeus corpus* on the ground that Howell as judge had no power or authority to fine or imprison him for the cause set up; it was called a "wrongful commitment" (1 Mod., 381, 392); and yet when Howell was called to answer in a civil action for the act, it was held that though without authority it was judicial. In Bushell's Case, 1 Mod., 119, Hale, C. J., said: "The *habeus corpus* and writ of error, though it doth make the judgment void, does not make the ordering of the process void to that purpose," *i. e.*, of an action against the judge, "and the matter was done in a court of justice." He continued, so is the comment on that case (Yates v. Lansing, 5 J. R., 290): "It had jurisdiction of the case because it had power to punish a misdemeanor in a juror, though in the case before the court the recorder made an erroneous judgment in considering the act of the juror as amounting to misdemeanor, when in fact it was no misdemeanor." 2 Mod., 218.

So in Ackerly v. Parkinson, *supra*, the defendant was held protected though the citation issued by him was considered as a nullity, on the

ground that the court had a general jurisdiction over the subject-matter. Let it be conceded at this point that the law is now declared that the act of the defendant was without authority and was void; yet it was not so plain as then to have been beyond the realm of judicial discussion, deliberation and consideration, as is apparent from the fact that four judges, other than the defendant, acting as judges, had agreed with him in his view of the law. He was, in fact, sitting in the place of justice; he was at the very time of the act a court; he was bound by his duty to the public and to the plaintiff to pass as such upon the question growing out of the facts presented to him, and as a court to adjudge whether a case has arisen in which it was the demand of the law that, on the vacating of the unlawful and erroneous sentence or judgment of the court, another sentence or judgment could be pronounced upon the plaintiff. So to adjudge was a judicial act, done as a judge, as a court; though the adjudication was erroneous, and the act based upon it was without authority and void. Where jurisdiction over the subject-matter is vested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other involved in the case; although upon the correctness of his determination in those particulars the validity of his judgment may depend. Ackerly v. Parkinson, *supra*. For such an act a person acting as judge therein is not liable to civil or criminal action. The power to decide protects, though the decision be erroneous. See Garnett v. Farrand, 6 B. & C., 611. There is another view of this case. It is certain that the defendant, as the circuit court, had at first jurisdiction of the plaintiff, and jurisdiction of the cause and the proceedings; that jurisdiction continued to and included the pronouncing of the first sentence; nay, until and including the giving of the order vacating that sentence. If it be admitted that at the instant of the utterance of that order jurisdiction ceased, as is claimed by the plaintiff, on the strength of the opinion in Ex parte Lange, *supra*, as commented upon Ex parte Parks, 93 U. S. 18,, and that all subsequent to that was *coram non judice* and void, still it was so; not that the court never had jurisdiction, but that the last act was in excess of its jurisdiction. Thus in the opinion (Ex parte Lange, *supra*, p. 165) it was said that the facts very fairly raised the question whether the circuit court, in the sentence which it pronounced, and under which the prisoner was held, had not exceeded its powers. See, also, page 174. We think that the whole effect of the opinion is, not that the court had no jurisdiction, no power over the prisoner and the case, but it had no authority to impose further punishment. "All further exercise of it in that direction was forbidden." Page 178. What is an act in excess of judicial authority is shown by Clarke v. May, 2 Gray, 410. There a justice of the peace, having jurisdiction of a case, summoned a person to appear before him as a witness therein; that person disobeyed. The case was tried and ended; thereafter the justice issued process to punish for contempt the person summoned as a witness. He was arrested, fined, and, not paying, was committed. It was held that the power to punish was incidental to the power to try the main case; that when the latter was ended jurisdiction had ceased, and the power to punish for contempt no longer existed, and that

the proceedings had to that end were in excess of the jurisdiction, and the justice was liable. And the distinction between a case where the magistrate acts with no jurisdiction at all, and one where his act is beyond or in excess of his jurisdiction, is shown by the case last cited, and that of Piper v. Pearson in the same volume, page 120.

The act of the defendant was thus one in excess of or beyond the jurisdiction of the court; and though when courts of special and limited jurisdiction exceed their powers the whole proceeding is *coram non judice* and void, and all concerned are liable, this has never been carried so far as to justify an action against a judge of a superior court or one of general jurisdiction for an act done by him in a judicial capacity. Yates v. Lansing, *supra;* Bradley v. Fisher, *supra;* Randall v. Brigham, 7 Wall., 523. In the case last cited it is said of judges of superior courts: They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps they are done maliciously or corruptly. Pages 536, 537. And in other cases a distinction is observed and insisted upon between excess of jurisdiction and a clear absence of all jurisdiction over the subject matter. And to the same effect is this: "For English judges, when they act *wholly without* jurisdiction, . . . have no privilege." Per Parke, B., Calder v. Halkett, 3 Moore, P. C. C., 28, 75.

Now it may be conceded that the circuit court is not a court of general jurisdiction; that in a sense it is a court of limited and special jurisdiction (Kempe's Lessee v. Kennedy, 5 Cranch, 173), inasmuch as it must look to the acts of congress for the powers conferred. But it is not an inferior court. It is not subordinate to all other courts in the same line of judicial functions. It is of intermediate jurisdiction between the inferior and the supreme court. It is a court of record; one having attributes and exercising functions independently of the person of the magistrate designated generally to hold it. Per Shaw, C. J., Ex parte Gladhill, 8 Metc., 168. It proceeds according to the course of the common law; it has power to render final judgments and decrees which bind the persons and things before it, conclusively, in criminal as well as civil cases, unless reversed on error or appeal. Grignon's Lessee v. Astor, 2 How. (U. S.), 341. See Ex parte Tobias Watkins, 3 Pet., 193. "Many cases are to be found wherein it is stated generally that when an inferior court exceeds its jurisdiction its proceedings are entirely void and afford no protection to the court, the party or the officer who executes its process. I apprehend that it should be qualified when the subject-matter of the suit is within the jurisdiction of the court, and the alleged defect of jurisdiction arises from some other cause." Per Marcy, J., Savacool v. Boughton, 5 Wend., 172. How much more so when the court is not inferior? There are analogies in the law. Take the case of the removal of a cause from the state court to the circuit court of the United States. When the party petitioning for a removal has presented his papers in due form and sufficiency to the state court, and has in all respects complied with the terms of the act of congress, the state court cannot refuse; though it does, all subsequent proceedings in it are *coram non judice.* See Fisk v. U. P. R. R. Co., 6 Blatch., 362; Matthews v. Lyall, 6 McLean, 13. Though the judge of the state court had a legal discretion to exercise as to the right of removal (Ladd v. Tudor, 3 Woodb.

& M., 825), if the facts entitle to a removal it may not be withheld, and when they are shown it is the duty of the state court to proceed no further; each step after that is *coram non judice*. Gordon v. Longest, 16 Pet., 101. Yet in case a judge did, in the honest exercise of his judgment, refuse a removal and proceed with the case in the state court, would it be contended that he was liable in a civil action? He had jurisdiction of the cause originally; that jurisdiction had ceased. His future acts were beyond or in excess of his jurisdiction. . . .

For these reasons we are of the opinion that the defendant is protected by his judicial character from the action brought by the plaintiff. Judgment affirmed. Lange v. Benedict, 73 N. Y., 12 (1878).

§ 31. Judges of inferior courts, liable when.— The judge of an inferior court or court of limited jurisdiction, or a justice of the peace, or magistrate exercising limited and inferior powers, is as free to exercise his judicial judgment or discretion, and is as exempt from liability for the exercise of his judicial powers within the limits of his jurisdiction, as the judge of a superior court or court of general jurisdiction, no matter how mistaken or erroneous his judgment may be,[1] or how corrupt or malicious his motives.[2] But unlike the judges of superior courts, if he usurp jurisdiction when by law he has none, or if he act without jurisdiction of the person or subject-matter, or if he exceed the limits of the jurisdiction lawfully conferred upon him, he is liable in damages to the party injured, notwithstanding he might have been acting in good faith and honestly endeavoring to discharge his duty.[3]

§ 32. The test—The law stated by Bigelow, J.—"One of the leading purposes of every wise system of law is to secure a fearless and impartial administration of justice, and at the

[1] Evarts v. Kiehl, 102 N. Y., 296 (1886); Chickering v. Robinson, 3 Cush. (Mass.), 543 (1849); Downing v. Herrick, 47 Me., 462 (1859); Bultill v. Clement, 16 B. Mon. (Ky.), 193 (1855); Heard v. Harris, 68 Ala., 43 (1880); Bell v. McKinney, 63 Miss., 187 (1885); Hitch v. Lambright, 66 Ga., 228 (1880); Mangold v. Thorp, 33 N. J. L., 134 (1868).

[2] Hughs v. McCoy, 11 Colo., 591, 19 Pac. Rep., 674 (1888); Mangold v. Thorp, 33 N. J. L., 134 (1868); Irion v. Lewis, 56 Ala., 190 (1876).

[3] Morill v. Thurston, 46 Vt., 732 (1874); Vaughn v. Congdon, 56 Vt., 111, 48 Am. Rep., 758 (1883); Kelley v. Bemis, 4 Gray (Mass.), 83; 64 Am. Dec., 50 (1855); Hendrick v. Whitemore, 105 Mass., 23 (1870); Yates v. Lansing, 5 Johns. (N. Y.), 282 (1810); Palmer v. Carroll, 24 N. H., 314 (1851); Craig v. Burnett, 32 Ala., 728 (1858); Mechem on Public Officers, § 630 (1890); Haltzman v. Robinson, 2 McAr. (D. C.), 520.

same time to guard individuals against a wanton and oppressive abuse of legal authority. To attain this end the common law affords to all inferior tribunals and magistrates complete protection in the discharge of their official functions, so long as they act within the scope of their jurisdiction, however false and erroneous may be the conclusions and judgments at which they arrive; but, on the other hand, if they act without any jurisdiction over the subject-matter, or if, having cognizance of a cause, they are guilty of an excess of jurisdiction, they are liable in damages to the party injured by such unauthorized acts. In all cases, therefore, where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done *colore officii*, the simple inquiry is whether he has acted without any jurisdiction over the subject-matter or has been guilty of an excess of jurisdiction. By this simple test his legal liability will at once be determined. If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; and if he attempts to enforce any process founded on any judgment, sentence or conviction, in such case he thereby becomes a trespasser.[1]

§ 33. Judicial officers not liable for acts not in excess of their jurisdiction.— It is a general rule of law, amply sustained by authority and reason, that no civil action can be maintained against a judicial officer for the recovery of damages by one claiming to have been injured by the officer's judicial action, when such action is within the scope of his jurisdiction. Such officers of the law are called upon to exercise their judgment in the matters before them, and the law holds their duty to the individual to be performed when they have exercised such judgment, however erroneous or disastrous in its consequences it may appear to be.[2]

§ 34. The law stated by Cooley approved by Stallcup, C.— "In Mr. Cooley's work on Torts, where the subject of immunity of judicial officers from private suits is treated, the law

[1] Bigelow, J., in Piper v. Pearson, 2 Gray (Mass.), 120 (1854). Citing 1 Chit. Pl. (6th Am. ed.), 90, 209–213; Beaurain v. Scott, 3 Camp., 388; Ackerly v. Parkinson, 3 M. & S., 425, 428; Borden v. Fitch, 15 Johns. (N. Y.), 121 (1818); Bigelow v. Stearns, 19 Johns., 39 (1822); Allen v. Gray, 11 Conn., 95 (1836).

[2] Mechem on Public Officers, § 619 (1890).

is stated as follows: 'Whenever, therefore, the state confers judicial powers upon an individual, it confers with them full immunity from private suits. In effect the state says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the state, and the peace and happiness of society; that if he shall fail in a faithful discharge of them, he shall be called to account as a criminal; but in order that he may not be annoyed, disturbed and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages.'"[1]

§ 35. Discussion of the subject.— Of the judge it is said: "His doing justice as between particular individuals, when they have a controversy before him, is not the end and object which were in view when his court was created and he was selected to preside over or sit in it. Courts are created on public grounds; they are to do justice as between suitors to the end that order may prevail in the political society, and that rights may be protected and preserved. The duty is public, and the end to be accomplished is public; the individual advantage or loss results from the proper and thorough or improper and imperfect performance of a duty for which his controversey is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice as between individuals, he may be called to account by the state, in such form and before such tribunal as the law may have provided. But as the duty neglected is not a duty to the individual, civil redress as for an individual injury is not admissible."[2]

§ 36. Reasons for the rule.— 1. One of the necessary results of holding a judge liable in such cases would be to occupy his time and mind with the defense of his own interests when he should be giving them up wholly to his public duties.

[1] Stallcup, C., in Hughs v. McCoy, 11 Colo., 591 (1888); Cooley on Torts (1st ed.), 408; Johnson v. Moorman, 80 Va., 131 (1885).

[2] Cooley on Torts (1st ed.), 380 (1879); Mechem on Public Officers, § 619 (1890).

2. Another result would be that of putting the judge on trial as a wrong-doer, and necessarily lowering him and his office in the public estimation and esteem.

3. An adjudication against him would lessen the weight of his subsequent decisions.

4. The civil responsibility of the judge would often be an incentive to dishonest, instead of honest, judgment, and would invite him to consult public opinion and public prejudices, when he ought to be wholly above and uninfluenced by them.

5. Such civil responsibility would constitute a serious obstruction to justice. It would render essential a large increase of the judicial force, not only as it would multiply litigation, but would open each case to endless controversy.

6. Judicial offices would never be accepted by any man of standing, reputation or financial worth, "if, at the peril of his fortune, he must justify his judgments to the satisfaction of a jury summoned by a dissatisfied litigant to renew them."[1]

§ 37. **The law stated by Shaw, C. J.**— It is a principle lying at the foundation of all well-ordered jurisprudence that every judge, whether of a higher or lower court, exercising the jurisdiction vested in him by law, and deciding upon the rights of others, should act upon his own free, unbiased convictions, uninfluenced by any apprehension of consequences. It is with a view to his qualifications for this duty, as well in regard to his firmness as to his intelligence and impartiality, that he ought to be selected by the appointing power. He is not bound, at the peril of an action for damages, or of a personal controversy, to decide aright in matters either of law or of fact, but to decide according to his own convictions of right, of which his recorded judgment is the best, and must be taken to be conclusive, evidence. Such, of necessity, is the nature of the trust assumed by all on whom judicial power, in greater or lesser measure, is conferred. The trust is fulfilled when he honestly decides according to the conclusions of his own mind in a given case, although there may be great conflict of evidence, great doubts of the law, and when another mind might honestly come to a different conclusion. But in a controverted case, however slight may be the preponderance

[1] Cooley on Torts (1st ed.), 406, 408; Mechem on Public Officers, § 620 (1890).

in one scale, it must lead to a decision as conclusive as if the weight were all in that scale. Now it is manifest that to every controversy there are two sides, and that a decision in favor of one must be against another, and this may extend to every interest which men hold most dear; to property, reputation, and liberty, civil and social; to political and religious privileges, to all that makes life desirable and to life itself. If an action might be brought against the judge by a party feeling himself aggrieved, the judge would be compelled to put in issue facts in which he has no interest, and the case must be tried before some other judge, who, in his turn, might be held amenable to the losing party, and so on indefinitely. The general principle which excepts judges from answering in a private action, as for a tort, for any judgment given in the due course of administration of justice, seems to be too well settled to require discussion."[1]

§ 38. **The officer must act in his official capacity.**— It is indispensable to this exemption that the officer shall have assumed to act as such by virtue of the authority vested in him by law. For his own private acts he is responsible as other private persons; there his official character affords him no protection.[2]

APPLICATIONS OF THE LAW.—

A mayor as peace officer not liable for ordering arrest, when.

Johnson was mayor of Danville, Va., an officer under the laws of that state endowed with judicial powers. On the evening of August 11, 1882, there was a political meeting held at Danville at which there appears to have been considerable enthusiasm. After the meeting was dismissed the mayor and several other persons, among whom was a man by the name of Moorman, repaired to a neighboring saloon and all took a drink of beer. A song was then sung in which both the mayor and Mr. Moorman joined, and some of the party danced, but there was nothing disorderly about the affair. Shortly afterwards, however, a row occurred between a man named Wilkinson and one by the name of Boney, in which Wilkinson was the aggressor, and the mayor, acting in his official capacity, forcibly ejected the man Wilkinson from the room for disorderly conduct. During the disturbance the barkeeper said: "Gentlemen, you must become quiet, or I will call a policeman;" to which Johnson replied: "I am the mayor and

[1] Shaw, C. J., in Pratt v. Gardner, 2 Cush. (Mass.), 63 (1848).

[2] Mechem on Public Officers, § 623 (1890); Lange v. Benedict, 8 Hun, 362; 73 N. Y., 12; 29 Am. Rep., 86 (1878).

I command the peace." After Wilkinson's ejectment, Moorman went to where the mayor and Wilkinson were, Wilkinson having become quiet, and addressing Wilkinson, said: "Captain John Boney (the man who raised the disturbance with Wilkinson) is in the bar and afraid to come out and go home; he is unarmed, and he does not wish to be attacked unprepared." Wilkinson replied: "Tell him to come out and go home, that I am no damned assassin." Then Moorman said: "He says he will meet you to-morrow and settle the matter." Wilkinson replied: "I will meet him any time and anywhere;" to which Moorman responded: "You are both drunk to-night, and to-morrow there will be nothing of it. I don't know that he wants to fight you at all." And then Wilkinson said: "I am not drunk; I have not taken a drink for five hours." Mayor Johnson, addressing Moorman, then said: "Go away from here! I am mayor and I intend to settle this matter, and if you don't go away I will send you to jail;" to which Moorman replied: "Mayor Johnson, I recognize you as mayor, but I have done nothing for which to be sent away." The mayor then said to a policeman: "Take that man to jail!" Moorman then said: "Well, if you say so, I must submit," and started off with the policeman, who, in pursuance of the mayor's order, had arrested him; but after proceeding a few steps asked to be allowed to return, which being permitted, he said in a quiet and peaceable manner: "Mayor Johnson, I have done nothing, and demand a trial or to be allowed to give bail," to which the mayor replied angrily: "Damn it, take him to jail." The policeman then took him into that part of the jail building occupied as the jailor's room and delivered him into the custody of the jailor, who took the keys and was proceeding to carry him into the cells, when Moorman requested permission to write a letter to his employer. While they were looking for pen and paper, a policeman came with an order for his release. Moorman then brought an action against Johnson for false imprisonment. In his defense Johnson filed four special pleas, to the effect that at the time of the alleged false imprisonment he was the duly elected and qualified mayor of the town of Danville, and in virtue thereof a justice and conservator of the peace, etc., and that in the discharge of his duties as such official and in order to restore the peace and good order, etc., and without any malice or ill-will whatever against the plaintiff, he caused him to be arrested while engaged in sundry violations of laws particularly designated in said pleas. On the trial it appeared that, while the mayor was trying to eject Wilkinson, Moorman caught hold of him, but as to how far he resisted him, if at all, did not appear. The court refused to instruct the jury "that any judicial officer is exempt from liability in damages for his actions in matters within his jurisdiction, even though his judgment and actions based thereon should prove to be erroneous." The jury returned a verdict for $2,000, upon which judgment was entered, and the defendant procured a writ of error.

In reversing the judgment, Richardson, J., said: "It cannot be doubted that this instruction correctly propounds the law." After reviewing the authorities, etc., the judge continues: "The doctrine remains unshaken that all judicial officers, whether inferior or superior in grade, are, when acting within their jurisdiction, exempt from liability in civil actions for

their judicial acts, though alleged to have been done maliciously or corruptly; the judges of courts of superior, general jurisdiction, though acting in excess of this jurisdiction, and although such acts be alleged to have been malicious or corrupt, are not so liable, except where there is a clear absence of all authority as contradistinguished from mere excess of authority; acts in the clear absence of all jurisdiction being usurpations and inexcusable. But with regard to judicial officers of inferior jurisdiction the doctrine is that they must keep within their jurisdictions and are liable to civil actions for acts done in excess thereof, especially if such acts be prompted by malicious or corrupt motives. . . . To the case at bar certainly the principle of law propounded by that instruction is expressly applicable. Johnson was mayor and *ex officio* a justice of the peace. In Virginia, with very few exceptions, the functions of a justice of the peace are judicial in character. 1 Minor's Ins., 108. When a justice considers a case upon the law, and decides it, however the case is presented to him, whether formally or informally, whether it be civil or criminal, whether he decides upon the testimony of sworn witnesses or upon the evidence of his own senses, he acts judicially, and he that executes his decision acts ministerially. The fact that a judge or justice sometimes acts ministerially makes him none the less a judicial officer. At all events the case here exhibited in the proceedings and facts certified would fully warrant any tribunal in arriving at the conclusion that Johnson, on the occasion of the arrest of Moorman, acted in his judicial capacity. Nor is there any evidence that he acted through personal spite or maliciously." Judgment reversed. Johnson v. Moorman, 80 Va., 131 (1885).

§ 39. The officer must act within his jurisdiction.— The judicial officer must not only have jurisdiction of the person of the parties to, and the subject-matter of, the controversy, but his action must be confined within that jurisdiction. The act for which the officer may claim immunity must be done while he is acting as a judicial officer in his judicial capacity and within his jurisdiction.[1]

§ 40. Immunity from liability not affected by improper motives.— The immunity from civil liability is not affected by the motives with which judicial officers perform their duties. If a judicial officer is corrupt, the public has its remedy, but the unfortunate suitor has none. He cannot be permitted to obtain redress because the judgment against him was the result of corrupt or malicious motives.[2]

[1] Lange v. Benedict, 8 Hun, 362; 73 N. Y., 12; 29 Am. Rep., 80 (1878).

[2] Bradley v. Fisher, 13 Wall. (U. S.). 335 (1871); Floyd v. Barker, 12 Coke, 25; Rains v. Simpson, 50 Tex., 495; 32 Am. Rep., 609 (1878); Weaver v. Devendorf, 3 Denio (N. Y.), 117 (1846); Pratt v. Gardner, 2 Cush. (Mass.), 63; 48 Am. Rep., 652 (1848); Stone v. Graves, 8 Mo., 148; 40 Am. Dec., 131 (1843); Johnson v. Moorman, 80 Va., 131 (1885); Henke v.

§ 41. Reasons for the rule stated by Mr. Justice Field.—"Controversies involving not merely great pecuniary interests but the liberties and character of the parties, and consequently exciting the deepest feelings, are being constantly determined by the courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest labor, and often creates in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and, from complaints of the judgment, to pass to the ascription of improper motives to the judge. When the controversy invokes questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and, from the imperfection of human nature, this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action. If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of

McCord, 55 Iowa, 378 (1880); Heard v. Harris, 68 Ala., 43 (1880); Evans v. Foster, 1 N. H., 377 (1819); Barhyte v. Shepherd, 35 N. Y., 242 (1866); Jordan v. Hansen, 49 N. H., 202; 6 Am. Rep., 508 (1870); Little v. Moore, 4 N. J. L., 74; 7 Am. Dec., 574 (1818); Barnardiston v. Soame, 1 East, 566, n.; Slowball v. Anson, Comb., 116; Garnett v. Ferrard, 6 B. & C., 611.

preserving a complete record of all the evidence produced before him in every litigated case and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party — and the judge perhaps one of an inferior jurisdiction — that he decided as he did with judicial integrity; and the second judge would be subjected to a similar burden as he in his turn might also be held amenable by the losing party."[1]

§ 42. **Jurisdiction — The term defined.**— Jurisdiction is defined as the authority of law to act officially in a matter before a judicial officer.[2] It is —

(1) *Jurisdiction of the person*, when the person acted upon is before the judicial officer, either constructively or in fact, by reason of the service upon him of legal process or by his voluntary appearance.[3]

(2) *Jurisdiction of the subject-matter*, when the judicial officer possesses the power legally conferred upon him by law to act upon the subject-matter in controversy — the matter involved in the action.[4]

§ 43. **What jurisdiction is essential to immunity.**— It is essential to this immunity from civil liability that the act done by the judicial officer must have been done in a matter within his jurisdiction. When the officer assumes to act, he must have judicial jurisdiction both of the person and subject-matter of the controversy.[5]

§ 44. **Jurisdiction must be legally acquired.**— If a court of limited jurisdiction issue process which is illegal, or if a court,

[1] Justice Field in Bradley v. Fisher, 13 Wall. (U. S.), 335 (1871).

[2] Cooley on Torts (1st ed.), 417 (1879); Mechem on Public Officers, § 625 (1890).

[3] Cooper v. Reynolds, 10 Wall. (U. S.), 308, 316; Lange v. Benedict, 8 Hun, 362; 73 N. Y., 12; 29 Am. Rep., 80 (1878).

[4] Hunt v. Hunt, 9 Hun, 622; 72 N. Y. 217; 28 Am. Rep., 129 (1878).

[5] Wright v. Rouss, 18 Neb., 234 (1885); Estopinal v. Peyromp, 37 La. Ann., 477 (1885); Kibling v. Clark, 53 Vt., 379 (1881); Hitch v. Lambright, 66 Ga., 228 (1880); Truesdell v. Combs, 33 Ohio St., 186 (1877); Patzock v. Von Gerichten, 10 Mo. App., 424 (1881); Mangold v. Thorp, 33 N. J. L., 134 (1868); Bullett v. Clement, 16 B. Mon. (Ky.), 193 (1855); Reid v. Hord, 2 N. & McC. (S. C.), 168; 10 Am. Dec., 582 (1819); Holcomb v. Cornish, 8 Conn., 375 (1831); Downing v. Herrick, 47 Me., 462 (1859); Blythe v. Tompkins, 2 Abb. (N. Y.) Pr., 468 (1856); Chickering v. Robinson, 3 Cush. (Mass.), 543 (1849);

whether its jurisdiction be limited or not, holds cognizance of a cause without having gained jurisdiction of the person of the defendant by having him before it in the manner required by law, the proceedings are void. Spencer, C. J.: "I consider it perfectly well settled that to justify an inferior magistrate in committing a person he must have jurisdiction, not only of the subject-matter of the complaint, but also of the process and the person of the defendant."[1]

§ 45. Distinction between superior and inferior courts acting within their jurisdiction — The law stated by Richardson, J. — "The doctrine remains unshaken that all judicial officers, whether inferior or superior in grade, are, when acting within their jurisdiction, exempt from liability in civil actions for their judicial acts, though alleged to have been done maliciously or corruptly; that judges of courts of superior, general jurisdiction, though acting in excess of their jurisdiction, and although such acts be alleged to have been malicious or corrupt, are not liable except where there is a clear absence of all authority as contradistinguished from mere excess of authority; acts in the clear absence of all jurisdiction being usurpations and inexcusable. But with regard to judicial officers of inferior, limited jurisdiction, the doctrine is that they must keep within their jurisdiction, and are liable to a civil action for acts done in excess thereof, especially if such acts be prompted by malicious or corrupt motives."[2]

§ 46. The rule applies to all judicial officers. — The rule as laid down by Cooley applies to large classes of officers, embracing some the powers attached to which are very extensive, and others whose authority is very limited. It applies to the highest judge in the state or nation, but it applies also to the lowest officer who sits as a court and tries petty causes. There are cases which seem to hold that a justice of the peace is civilly responsible when he acts maliciously or corruptly; but Judge Cooley, after a careful analysis of a long line of authorities from the time of Lord Coke, says: "There are *dicta*

Lange v. Benedict, 8 Hun, 362; 73 N. Y., 12; 29 Am. Rep., 80 (1878).

[1] Bigelow v. Stearns, 19 Johns., 3 (1821); Reynolds v. Orvis, 7 Cow., 269 (1827).

[2] Richardson, J., in Johnson v. Moorman, 80 Va., 131 (1885); Randall v. Brigham, 7 Wall. (U. S.), 523 (1868); Bradley v. Fisher, 13 Wall. (U. S.), 335 (1871).

in some cases that a justice is civilly responsible when he acts maliciously and corruptly, but they are not well founded, and the express decisions are against them."[1]

§ 47. **The doctrine stated by Chief Baron Kelly.**—"This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court-martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."[2]

§ 48. **Jurisdiction when presumed and when not — Superior and inferior courts.**— There is a marked distinction in law between superior courts or courts of general jurisdiction and inferior courts or courts of limited jurisdiction. In regard to superior courts it is a presumption of law that they never act without jurisdiction, and the burden of showing wherein the lack of jurisdiction consists is cast upon him who assails it.[3] But in regard to inferior courts, no such presumption exists; their jurisdiction must be made to appear, and that by the record itself. Whoever relies upon the judgment of an inferior court must establish every fact necessary to give it jurisdiction.[4]

In determining the liability of the police officer who has erroneously assumed jurisdiction, or who has erroneously

[1] Cooley on Torts, 408, 409, 410 (1879).

[2] Scott v. Stansfield, 3 L. R., Ex., 220 (1868).

[3] Reynolds v. Stansbury, 20 Ohio, 344; 55 Am. Dec., 459 (1851); Kenney v. Greer, 13 Ill., 432 (1851); Lowry v. Irwin, 6 Rob. (La.), 192; 39 Am. Dec., 556 (1843); Palmer v. Oakley, 2 Doug. (Mich.), 433; 47 Am. Dec., 41 (1847); Mechem on Public Officers, § 627 (1890).

[4] Tucker v. Harris, 13 Ga., 1; 58 Am. Dec., 488 (1851); Reynolds v. Stansbury, 20 Ohio, 344; 55 Am. Dec., 459 (1851); Gay v. Lloyd, 1 Greene (Iowa), 78; 46 Am. Dec., 499 (1847); Palmer v. Oakley, 2 Doug. (Mich.), 433; 47 Am. Dec., 41 (1847); Rossiter v. Peck, 3 Gray (Mass.), 539 (1855); Case v. Wooly, 6 Dana (Ky.), 17; 32 Am. Dec., 51 (1837); Bloom v. Burdick, 1 Hill (N. Y.), 130 (1841); Mechem on Public Officers, § 627 (1890); Kenney v. Grier, 13 Ill., 432; 54 Am. Dec., 439 (1851); Levy v. Shurman, 6 Ark., 182; 42 Am. Dec., 690 (1845).

decided that the power to do a certain act is within the jurisdiction conferred upon him, this distinction frequently becomes of great importance.

§ 49. Superior courts — Jurisdiction, when presumed.— It is a general and well settled proposition of law that the proceeding of courts of general jurisdiction are presumed to be regular and within the scope of their authority. It is said that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so.[1] A court of general jurisdiction is presumed to have jurisdiction to give the judgments it renders until the contrary is made to appear. This presumption embraces not only jurisdiction of the subject-matter of the controversy, but of the parties also. The jurisdiction of the court over the subject-matter must be determined by the law creating the court and declaring its powers, but jurisdiction over the person of the parties to the controversy should appear from the record. If, however, the former exists the latter will be presumed.[2]

§ 50. What is a superior court.— A superior court is one invested with common-law jurisdiction, at law or in equity, duly exercising such jurisdiction.[3] In this rule are included all courts of the common law and those created by statute having a common-law jurisdiction, courts of chancery, courts of probate and county courts in some states.[4] A court with general jurisdiction is not an inferior court under the rule, because an appeal may be taken from its decisions to a higher tribunal. In the appellate court the presumption is always in favor of the regularity of the court from which the appeal is taken, and this presumption must be removed by competent proof before the proceedings will be reversed.[5]

§ 51. Inferior courts — Jurisdiction never presumed.— It is said that nothing is intended to be within the jurisdiction of an inferior court but what is specially alleged. As to these

[1] Reynolds v. Stansbury, 20 Ohio, 344; 55 Am. Dec. 459 (1851); State v. Lewis, 22 N. J. L., 564 (1849); Davis v. Hudson, 29 Minn., 28 (1881); Read v. Vaughn, 15 Mo., 141 (1851); Hawes on Jurisdiction, § 257 (1886).

[2] Hawes on Jurisdiction, § 257 (1886); Goulding v. Clark, 34 N. H., 148 (1856); Galpin v. Page, 18 Wall., 350 (1873).

[3] Harvey v. Tyler, 2 Wall., 328 (1864).

[4] Hawes on Jurisdiction, § 258 (1886).

[5] State v. Farish, 23 Miss., 483 (1852).

courts there is no presumption of law in favor of their jurisdiction. It must affirmatively appear by sufficient evidence or proper averment in the record or their judgments will be deemed void on their face.[1]

§ 52. **What is an inferior court.**— Within this meaning an inferior court is one with only a limited jurisdiction and acting not according to the course of the common law. It is sometimes called a court not of record.[2]

§ 53. **The law stated by Mr. Justice Field.**— "It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears, and this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant or his appearance in the action. But when the former exists; the latter will be presumed. This is familiar law, and is asserted by all the adjudged cases. The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction. That must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face."[3]

§ 54. **Inferior courts — Justices of the peace — Jurisdiction never presumed.**— The jurisdiction of justices of the peace is of limited extent and nothing is ever presumed in its favor. Their authority is all derived from the various statutory provisions of the jurisdictions under which they reside,

[1] Dick v. Wilson, 10 Or., 490 (1882); Jackson v. New M. B. Co., 34 Conn., 266 (1867); Victor M. & M. Co. v. Justice's Court, 4 West. C. Rep., 299; Harvey v. Tyler, 2 Wall., 328; Hawes on Jurisdiction, § 258 (1886).

[2] Hahn v. Kelly, 34 Cal., 391 (1868); Grignon v. Astor, 2 How., 319 (1844).

[3] Field, J., in Galpin v. Page, 18 Wall., 350 (1873).

and they have no power beyond what is in that way conferred upon them.[1] In general they must execute their office within the bounds of the counties or jurisdictions in and for which they are severally elected or appointed, and they cannot regularly or legally do any judicial act in other places.[2] The particular instances in which other and different provisions are specially made to enable them to perform extra-judicial act or acts outside of their ordinary territorial jurisdictions evince very distinctly that in all other cases the legal processes which they issue have force and are to be executed only within their respective counties or jurisdictions. There would be no occasion for any such special provision if the authority of a justice of the peace extended beyond his county and through the state; and it is a fair and necessary implication from it, that all other processes have no such extent, but run only in the county where the justice from whom it emanates resides.[3]

§ 55. Judges of inferior courts, when not liable for acting without jurisdiction.— It is undoubtedly true that judges and magistrates cannot be held liable in trespass for acting without jurisdiction, or for exceeding the limits of their authority, where the defect or want of jurisdiction is occasioned by some facts or circumstances applicable to a particular case, of which the judge or magistrate had neither knowledge nor the means of knowledge. In other words, if the want of jurisdiction over a particular case is caused by matters of fact, it must be made to appear that they were known, or ought to have been known, to the judge or magistrate, in order to hold him liable for acts done without jurisdiction; otherwise the maxim *ignorantia facti excusat* applies.[4]

§ 56. The common law affords to all inferior tribunals and magistrates complete protection, when.— One of the leading purposes of every wise system of law is to secure a

[1] Tilley v. Damon, 65 Mass., 248 (1853); Bridge v. Ford, 4 Mass., 641 (1808); Com. v. Leach, 1 Mass., 59 (1804); Fisher v. Shattuck, 34 Mass., 252.

[2] 2 Hale's Pleas of the Crown, 50; Bacon's Abridgment, Tit. "Justice of Peace;" Tilley v. Damon, 65 Mass., 248 (1853).

[3] Tilley v. Damon, 65 Mass., 248 (1853).

[4] Clark & Whipple v. May & Kent, 68 Mass., 412 (1854); Pike v. Carter, 3 Bing., 78; 10 Moore, 376 (——); Lowther v. Earl of Radnor, 8 East, 113 (——); Calder v. Halket, 3 Moore, C. P., 77 (——).

fearless and impartial administration of justice, and at the same time to guard individuals against a wanton and oppressive abuse of legal authority. To attain this end, the common law affords to all inferior tribunals and magistrates complete protection in the discharge of their official functions, so long as they act within the scope of their jurisdiction, however false and erroneous may be the conclusions and judgments at which they may arrive. But on the other hand, if they act without any jurisdiction over the subject-matter, or if, having cognizance of the cause, they are guilty of an excess of jurisdiction, they are liable in damages to the party injured by such unauthorized acts. In all cases, therefore, where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done *colore officii*, the single inquiry is whether he has acted without any jurisdiction over the subject-matter, or has been guilty of an excess of jurisdiction. By this simple test, his legal liability will at once be determined.[1] If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; and if he attempts to enforce any process founded on any judgment, sentence or conviction in such case, he thereby becomes a trespasser.[2]

AN ILLUSTRATION.—

Sufficiency of complaint and warrant.

In May, 1886, Neall purchased of Albion W. Hart a quantity of curbing stone. Neall took possession, but failed to pay for the curbing according to agreement, and Hart made a complaint before Charles M. Griffith, a justice of the peace, charging "that Neall by misrepresentation and trickery had defrauded him in the sale of curbing stone, and had appropriated the same to his own use." Upon this complaint the justice issued a warrant charging Neall with "defrauding him (Hart) of moneys due for labor and stone." On the next day Neall was arrested and in default of bail committed to jail. In the evening he was discharged by the court of common pleas because the complaint and warrant charged no offense known to the

[1] Piper v. Pearson, 68 Mass., 120 (1854); 1 Chit. Pl. (6th Am. ed.), 90, 209-213; Beaurain v. Scott, 3 Campb., 388 (——); Ackerley v. Parkinson, 3 M. & S., 425, 428 (——); Borden v. Fitch, 15 Johns., 121 (1818); Bigelow v. Stearns, 19 Johns., 39 (1821); Allen v. Gray, 11 Conn., 95 (——).

[2] Piper v. Pearson, 68 Mass., 120 (1854); 1 Chit. Pl., 210; Bigelow v. Stearns, 19 Johns., 39 (1821); Clarke v. May, 68 Mass., 410 (1854).

criminal law. Nothing further was done in the matter. Neall brought an action against Hart and Griffith for false imprisonment. He was beaten on the trial and brought a writ of error, assigning the admission of certain testimony and the charge of the court.

In delivering the opinion of the supreme court Gordon, J., said:

"1. Was the court right when it said to the jury: 'The next question for you to determine is whether there were such circumstances surrounding the transaction as warranted the prosecutor in making the complaint to the justice in issuing the warrant of arrest, thus placing the plaintiff in the position of a criminal?' We are constrained to answer this interrogatory in the affirmative. A justice of the peace is not to be presumed to be learned in legal technicalities; hence, if the information set out a cheat of any kind, it was sufficient on which to ground a warrant. But that information alleged that 'James E. Neall, by misrepresentation and trickery, has defrauded me in the sale of curbing, and has appropriated the same to his own use.' This charge as here set forth is not very definite, forasmuch as it is difficult to say whether it was intended to charge embezzlement or obtaining goods on false pretenses; but that a cheat of some kind is thereby charged, no one, we think, will deny; and if so, it was sufficient to warrant the justice's action, and it was the business of the prosecuting officer, when the case reached his hands, to determine what should be the character of the indictment.

"2. Was the court right in its instruction to the jury that, if the stones were to be paid for in cash before removal, they continued the property of Hart, though Neall had possessed himself of them, and their sale by the latter, and appropriation of the money arising therefrom to his own use, would constitute such a fraud as justified Hart in making the complaint on which the warrant issued? This, in effect, raises the question of probable cause, which, as we think, was properly submitted. If the testimony of Hart and J. W. Morgan is to be believed, there was such cause for the prosecution, if nothing more. The plaintiff obtained a delivery of the curbing on the cars under a contract to pay when so delivered, and then, taking advantage of the defendant's performance, he shipped the curbing to market, under the pretense that he would pay the next day; but, instead of so doing, he sold the curbing and refused payment altogether. Let it be that this was not embezzlement in its technical sense, yet were the prosecutor's goods gotten under pretense of a contract and through a lie. In the case of Com. v. Burdick, 2 Pa. St., 163, Mr. Chief Justice Gibson makes use of the following language: 'But I think it at least doubtful whether a naked lie, by which credit has been gained, would not, in every case, be deemed within our statute, which declares it a cheat to obtain money or goods "by any false pretenses *whatsoever*."' If, then, so great a jurist was inclined to the opinion that a deliberate lie would support an indictment charging a false pretense under our statute, we may well excuse a layman and a country justice for coming to a like conclusion. In other words, on the strength of such authority, we may well conclude that Hart and Griffith had probable, if not actual, cause for what they did. The judgment is affirmed." Neall v. Hart, 115 Pa. St., 347; 8 Atl. Rep., 629 (1887).

§ 57. Liability of judges of inferior courts in cases of doubtful jurisdiction.— All judges of inferior courts, including justices of the peace and other magistrates, are liable for jurisdiction wrongfully assumed in doubtful cases, or for proceeding without jurisdiction, even though called upon to decide whether the preliminary complaint or affidavit was sufficient to confer jurisdiction, and though they acted honestly and in good faith in deciding that they were.[1] In speaking of the rule as announced in the text, Mechem in his treatise on Public Officers says: "This doctrine has, however, met with much forcible and reasonable dissent in recent times. There are undoubtedly cases in which the rule stated is properly applicable, as where jurisdiction is assumed or exercised without even color of authority, or beyond limits which are clearly and unambiguously defined, or in the face of express statutory prohibitions; but where, on the other hand, the officer has jurisdiction of the subject-matter, *i. e.*, of that class of cases, but the question of jurisdiction in that particular case depends upon some question for judicial determination, as upon the validity or proper construction of a doubtful statute, or upon the technical legal sufficiency of the averments of a preliminary complaint or affidavit, or the existence of jurisdictional facts,— questions upon which he is bound to decide, and questions, too, upon which, as is often the case, the learned judges of the courts of last resort are unable to agree,— it certainly seems not only impolitic, but a violation of the well-established principle governing the liability of judicial officers, to hold the inferior officer liable, at any rate where he has acted in good faith and with an honest endeavor to do right."[2]

§ 58. Reasons for the rule stated by Cooley.— "Why the law should protect one judge and not the other, and why if it protects one only it should be the very one who, from his higher position and presumed superior learning and ability, ought to be most free from error, are questions of which the following may be suggested as the solution.

[1] Piper v. Pearson, 2 Gray (Mass.), 120; 61 Am. Dec., 438 (1854); Houlden v. Smith, 14 Q. B., 841; Mechem on Public Officers, § 632 (1890); Wingate v. Waite, 16 M. & W., 739; Cooley on Torts (2d ed.), 491, note 1. See Adkins v. Brewer, 3 Cow. (N. Y.), 1824; 15 Am. Dec., 264; Tracy v. Williams, 4 Conn., 107; 10 Am. Dec., 102 (——).

[2] Mechem on Public Officers, § 632 (1890).

"The inferior judicial officer is not excused for exceeding his jurisdiction because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. The rule of law, therefore, which compels him to keep within the jurisdiction at his peril, cannot be unjust to him, because by declining to exercise any questionable authority he can always keep within safe bounds, and he will violate no duty in doing so. Moreover in doing so he keeps within the presumptions of law, for these are always against the rightfulness of any authority in an inferior court which under the law appears doubtful. On the other hand, where a grant of general jurisdiction is made, a presumption accompanies it that it is to be exercised generally until an exception appears which is clearly beyond its interest; its very nature is such as to confer upon the officer intrusted with it more liberty of action in deciding upon his powers than could arise from a grant expressly confined within narrow limits, and the law would be inconsistent with itself if it were not to protect him in the exercise of his judgment. Moreover, for him to decline to exercise an authority because of the existence of a question, when his own judgment favored it, would be to that extent to decline the performance of duty, and measurably to defeat the purpose of the law creating his office; for it cannot be supposed that this contemplated that the judge should act officially, as though all presumptions opposed his authority, when the fact was directly the contrary."[1]

§ 59. A better rule — Beasley, C. J. — "The true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers is that he is responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put *at least colorably* under his jurisdiction. When the judge is called upon by the facts before him to decide

[1] Cooley on Torts (2d ed.), 491.

whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, thus, in that event, for the magistrate to take jurisdiction is not in any manner the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically wilful. Such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression."[1]

AN APPLICATION OF THE BETTER RULE.—

Complaint failing to show where the offense was committed.

On the 30th day of April, 1881, the defendant, acting as the police justice of Coxsackie, issued a warrant for the arrest of the plaintiff on the charge of assault and battery, the sworn complaint alleging that the plaintiff did assault and beat the complainant in the latter's place of business by striking him without lawful authority. The complaint, upon which the warrant was issued, failed to show the place where the offense was committed. The defendant issued the warrant, in which was written the village of Coxsackie as the place where the offense was committed. During an adjournment of the trial a constable took the plaintiff to the village lockup, where he remained from fifteen minutes to an hour, when he was released; he then brought an action against the police justice for false imprisonment. On the trial the jury returned a verdict for $1,064.55, upon which judgment was entered; and the defendant appealed.

Learned, P. J.: "Considering that this is an action against a magistrate, acting in the apparent discharge of his duty, we think the jury must have been influenced by prejudice in their verdict. It can hardly be of any use

[1] Beasley, C. J., in Grove v. Van Duyn, 44 N. J. L., 654; 42 Am. Rep., 648, n. (1882). See, also, Bocock v. Cochran, 32 Hun (N. Y.), 521 (1884); Clark v. Spicer, 6 Kans., 440 (1870); Clark v. Holdridge, 58 Barb. (N. Y.), 61 (1870); Kenner v. Morrison, 12 Hun, 204 (1877); Harrison v. Clark, 4 Hun, 685 (1875); Stewart v. Hawley, 21 Wend. (N. Y.), 552 (1839); Harmon v. Brotherson, 1 Denio (N. Y.), 537 (1845); McCall v. Cohen, 16 S. C., 445; 42 Am. Rep., 641 (1881); Henke v. McCord, 55 Iowa, 378 (1880); Maguire v. Hughes, 13 La. Ann., 281 (1858); Savacool v. Boughton, 5 Wend. (N. Y.), 170; 21 Am. Dec., 181 (1830); Lange v. Benedict, 73 N. Y., 12; 29 Am. Rep., 80 (1878); Jordon v. Hanson, 49 N. H., 199; 6 Am. Rep., 508 (1870); Baily v. Wiggins, 5 Harr. (Del.), 462; 60 Am. Dec., 650 (1853).

to go over the testimony in detail on this point to support our views. With this view we might for the present dispose of this case, but a new trial will present questions of law which may well be considered at this time. In the first place it is claimed that the magistrate acquired no jurisdiction because the sworn complaint did not state the offense to have been committed in Coxsackie. Under the decisions in Harrison v. Clark, 11 Sup. Ct. N. Y. (4 Hun), 685; Stewart v. Hawley, 21 Wend., 552; Horman v. Brotherson, 1 Den., 537, we are of the opinion that the action of the magistrate in issuing a warrant upon the sworn complaint presented to him was judicial, and that he is not liable to a civil action of false imprisoment for error therein. The protection of any officer who acts judicially against liability to an action for error is most important, and has recently been asserted in the noticeable case of Lange v. Benedict, 73 N. Y., 12. We may refer also to Clark v. Holdridge, 58 Barb., 61, and Kenner v. Morrison, 19 Sup. Ct. N. Y. (12 Hun), 204. See, also, Blythe v. Tompkins, 2 Abb., 469, where this view is taken, although the magistrate was liable for a defect in the warrant. The case of Blodgett v. Race, 25 Sup. Ct. N. Y. (18 Hun), 133, cited by plaintiff, really sustains this same view. The magistrate was held liable in that case because no facts were stated in the complaint, not because the facts stated were insufficient. In the present case facts were positively sworn to. Admit that they were insufficient, still the magistrate, acting judicially, held that they were sufficient; and he is not liable to a civil action for his mistake." Judgment reversed on the law and for excessive damages. Babcock v. Cochran, 32 Hun (N. Y.), 521 (1884).

§ 60. Liability when jurisdiction is assumed through mistake of fact.— Judicial officers are not liable for acting without jurisdiction, or for exceeding the limits of their authority, where the defect or want of jurisdiction is occasioned by some matter or circumstance applicable to the case, of which the judicial officer had neither knowledge nor the means of knowledge. If the want of jurisdiction in a particular case is caused by matters of fact, it must be made to appear that they were known or ought to have been known to the officer, in order to hold him liable for his acts done without jurisdiction.[1]

APPLICATION OF THE LAW.—

(1) *A justice exceeds his jurisdiction knowing the facts.*

Clarke sued May for false imprisonment. Upon the trial it appeared that he was summoned to appear before May, who was a justice of the

[1] Mechem on Public Officers, § 634 (1890); Vaughn v. Congdon, 56 Vt., 111; 48 Am. Rep., 758 (1883); Clarke v. May, 2 Gray (Mass.), 410; 61 Am. Dec., 470 (1854); Pike v. Carter, 3 Bing., 78; 10 Moore, 376; Lowther v. Earl of Radnor, 8 East, 113; Calder v. Halket, 3 Moore, Privy Council Cases, 77 (1839).

peace, on the 30th day of August, 1853, to testify in behalf of the commonwealth on the trial of a complaint against one August Abell for being a common seller of intoxicating liquors, but failed to obey the summons, and Abell was tried on the said 30th day of August and acquitted. On the 7th of September following Clarke was arrested by the constable on a *capias* issued by May, and taken before him (May) to answer a charge of contempt for not appearing as a witness, and after a hearing was adjudged guilty and sentenced to pay a fine. On his refusal he was committed to jail by virtue of a *mittimus* issued by May, where he was kept until the next day, when he was discharged on *habeas corpus*. Upon these facts the case was submitted to the court for judgment. In delivering the opinion and rendering judgment for the plaintiff, Bigelow, J., said: The ground on which Clarke was discharged, on the return of the *habeas corpus*, was that under the Revised Statutes, chapter 94, sections 5, 6, and Statutes of 1838, chapter 42, by virtue of which justices of the peace are empowered to punish for contempt persons duly summoned to testify before them who fail or neglect to appear without reasonable excuse, no authority was conferred to punish contempt by a separate and independent proceeding, but that the power and jurisdiction of magistrates in such cases was only incidental and auxiliary to the trial of the cause in which the witnesses were summoned, and could not be legally exercised except during the pendency of the cause; that after its final disposition by a judgment the authority to punish such contempt ceased, and that Clarke was therefore illegally committed.

The decision in that case is decisive of the liability of the defendant May in the present action. Although he had jurisdiction of the subject-matter, he was empowered by law to exercise it only in a particular mode and under certain limitations. Having disregarded these limitations and exercised his authority in a manner not sanctioned by law, he was guilty of an excess of jurisdiction which renders him liable as a trespasser to the party injured. The rule of law by which such magistrates are held responsible in such cases, and the authorities in support of the rule, are fully stated in Piper v. Pearson, 2 Gray (68 Mass.), 120 (1854). It is undoubtedly true that judges and magistrates cannot be held liable in trespass for acting without jurisdiction, or for exceeding the limits of their authority, where the defect or want of jurisdiction is occasioned by some facts or circumstances applicable to a particular case of which the judge or magistrate had neither knowledge nor the means of knowledge. In other words, if the want of jurisdiction over a particular case is caused by matters of fact, it must be made to appear that they were known or ought to have been known to the judge or magistrate in order to hold him liable for acts done without jurisdiction; otherwise the maxim *ignorantia facti excusat* applies. Pike v. Carter, 3 Bing., 78; 10 Moore, 376; Lowther v. Earl of Radnor, 8 East, 113; Calder v. Halket, 3 Moore, P. C., 77. But the case at bar does not fall within this qualification of the general rule. The defendant May was cognizant of all the facts which constituted the defect of jurisdiction in the proceedings against the plaintiff. The result is, therefore, that the plaintiff is entitled to judgment for his damages against the defendant May. Clarke v. May, etc., 2 Gray (68 Mass.), 410 (1854).

(2) *Justice's liability — Complaint showing that the statute of limitations had run against the alleged offense.*

In a Vermont case a grand juror's complaint was exhibited to the defendant, who was a justice of the peace, November 12, 1880, charging the plaintiff with theft, and alleging the theft to have been committed on September 20, 1874, upon which the defendant, as justice of the peace, issued his warrant, and the plaintiff was arrested by a sheriff, brought before the defendant, and, after an examination, was ordered to procure bail for his appearance at court, and, having failed to do so, was committed to jail on a *mittimus* issued by the defendant. The statutes of that state provided that complaints for theft should be commenced within six years after the commission of the offense, and that, if a complaint is brought after the time thus limited, "such proceeding shall be void and of no effect." R. L., sec. 1714. In an action for false imprisonment brought by the accused against the justice, it was held that the complaint was void, as it showed on its face that the statute had run on the offense charged; that the defendant had no jurisdiction of the process, and was therefore liable; and that this was so, although it was made to appear to him that the crime had not been discovered until the time when the warrant issued, as the statute began to run from the commission of the offense, not from its discovery. Vaughn v. Congdon, 56 Vt., 111; 48 Am. Rep., 758 (1883).

§ 61. Judges of inferior courts acting under void or unconstitutional statutes.— The rule in relation to the liability of judges of inferior courts was here carried to the extent of holding them liable where they act in good faith under statutes afterwards held unconstitutional.[1] The severity of the rule has called forth much unfavorable comment, inasmuch as the officer, when called upon to act under the statute, is obliged, impliedly if not expressly, to pass upon its validity, thus clearly exercising judicial powers, for an error in which he ought not to be held responsible.[2]

AN APPLICATION OF THE RULE.—

A contrary doctrine.

McCord, the acting marshal of the city of Newton, filed before Stuver, an acting justice of the peace, an information charging Henke with keeping beer for sale contrary to the terms of an ordinance, and praying for a warrant "to take any beer that might be found in the possession of Henke, as by said ordinance provided." The warrant was issued, Henke's premises

[1] Kelly v. Bemis, 4 Gray (Mass.), 83; 64 Am. Dec., 50 (1855); Ely v. Thompson, 3 A. K. Marsh. (Ky.), 70 (1830); Mechem on Public Officers, § 631 (1890).

[2] Mechem on Public Officers, § 631 (1890); Henke v. McCord, 55 Iowa, 378, 385 (1880); Sessums v. Botts, 34 Tex., 334 (1870); State v. McNally, 34 Me., 210; 56 Am. Dec., 650 (1852).

searched, and two kegs of beer seized by McCord acting as marshal. The ordinance was afterwards adjudged to be void, and Henke sued the justice, Stuver, and McCord, the marshal, in trespass. A demurrer having been sustained to the petition, etc., the plaintiff appealed to the supreme court. In considering the question of the liability of the defendants, Day, J., after discussing the validity of the ordinance, said: "We feel constrained to hold that the city of Newton had no authority to pass the provisions of the ordinance in question. The provisions of the ordinance being void for want of authority of the municipal corporation to enact them, is the justice of the peace who attempted to enforce them liable to an action as a trespasser? The law is well settled that a judicial officer acting within his jurisdiction enjoys absolute immunity from liability in a civil action for mistake of law or error in judgment. 2 Hilliard on Torts, 101; Cooley on Torts, 403. In a note to page 409, Cooley on Torts, it is said: 'There are *dicta* in some cases that a justice is civilly responsible when he acts maliciously or corruptly, but they are not well founded, and the express decisions are against them.' See Jones v. Brown, 55 Iowa, 74; Green v. Talbott, 36 Iowa, 499; Howe v. Mason, 14 Iowa, 510; Gowing v. Gowhill, 12 Iowa, 495; Wasson v. Mitchell, 18 Iowa, 153; Lancaster v. Lane, 19 Ill., 242; Adkins v. Brewer, 5 Cowen, 206; Pratt v. Gardner, 2 Cush., 63; Yates v. Lansing, 5 Johns., 282; 9 Johns., 395. In order that this immunity may be enjoyed it is necessary that the judicial officer shall have jurisdiction in the premises. 2 Hilliard on Torts, 119, and authorities cited; Adkins v. Brewer, 5 Cowen, 206; Lancaster v. Lane, 19 Ill., 241. In Cooley on Torts, page 419, it is said: 'It is universally conceded that when inferior courts or judicial officers act without jurisdiction, the law can give them no protection whatever.'

"Recently, however, the rule has been held to be otherwise in the cases of judges of superior courts where the error consisted in exceeding their authority. The particular case was one in which the judge, sitting in one court, ordered the name of an attorney to be stricken from the rolls for contempt of authority committed in another court of which the judge was also a member. It was held by the federal supreme court that he was not responsible for this error. Bradley v. Fisher, 13 Wall., 335. Had it been a justice of the peace who had committed a like error, an action would have been supported, however honest might have been his motives, and however plainly it might have appeared that he was intending to keep within his powers. Whether a rule is just which affords immunity to the judge of a superior court, who from his position and presumed learning ought to be most free from error, whilst it holds an inferior judicial officer liable, we need not now determine. In Kelly v. Bemis, 4 Gray, 83, it was held that a justice of the peace who issued a warrant under an unconstitutional law was liable in damages to the person arrested thereon. This is the only case which can be found that goes to the extreme length, and the doctrine, notwithstanding the learning and ability of the court by which it was pronounced, does not meet with our approval. When the information was presented to the justice in this case, all the matters pertaining to his right to issue a warrant were properly brought within his jurisdiction. He was called upon to exercise judicial powers. If the ordinance was

valid, it was his duty to issue his warrant. A refusal to do so would be a disregard of the obligations imposed upon him by his office. He could justify his refusal only upon the ground that the ordinance was invalid. He was thus called upon to pass judicially upon the validity of the ordinance. In making this determination he acted strictly within his jurisdiction. An erroneous decision upon the subject is a mere mistake in judgment for which he ought not to be held responsible. If a judge of a circuit or a district court had committed a like error, it would hardly be claimed that he would be liable to a civil action. There is neither reason nor justice, it seems to us, in holding a justice of the peace liable to a civil action for such an error in judgment. The warrant upon which the defendant McCord acted is not set out in the record, and it is presumed to be regular on its face. As the justice of the peace had jurisdiction, and in the exercise of that jurisdiction simply erred in judgment, the ministerial officer executing the process is protected from civil liability. 2 Hilliard on Torts, 125; Clarke v. May, 2 Gray, 410. As the defendants are not liable to a civil action under the facts alleged, the decisions were properly sustained." Judgment affirmed. Henke v. McCord et al., 55 Iowa, 378 (1880).

§ 62. Liability of judicial officers acting ministerially.— Judicial officers are frequently called upon to perform duties which are purely ministerial in their nature, and when so acting they are liable the same as other ministerial officers; in such matters their judicial character affords them no protection.[1]

APPLICATION OF THE LAW.—

(1) *Liability of justice acting ministerially — Agent of plaintiff.*

Under an old law of New York, commonly called the ten-pound act, it is provided that the justice shall grant execution against the goods and chattels, and, for want of sufficient goods and chattels, against the body of the defendant. By another act, called the "act for the relief of debtors," with respect to the imprisonment of their persons, it is declared that no person having a family, not being a freeholder, should be imprisoned by virtue of any execution issued under the former. Chapin recovered a judgment before a justice of the peace of Albany county named Jones against Percival. An execution was issued against the goods and chattels of Percival, and in case no goods and chattels could be found, his body was directed to be taken, which was the usual form of execution under the ten-pound act. Under this execution Percival was taken and imprisoned for thirty days.

After his release he brought a suit against the justice for false imprisonment. On the trial it appeared that Percival, immediately after the judgment was obtained, declared to the justice that he was not a freeholder

[1] McTeer v. Lebow, 85 Tenn., 121 40 Am. Dec., 130 (1843); Mechem on (1886); Stone v. Graves, 8 Mo., 148; Public Officers, § 635 (1890).

and had a family in Albany county, where he was an inhabitant. While the constable was taking him to jail he met the justice, and Percival again alleged that he was not a freeholder and was an inhabitant of Albany county, and had a family there; but the justice directed the constable to commit him according to his precept. The jury found for the plaintiff, but the judge reserved the question whether, if the plaintiff was not a freeholder and had a family, the justice could be liable to suit for issuing the execution.

In the supreme court it was held that the plaintiff had been illegally imprisoned. "Justices of the peace in making out process act ministerially as distinguished from their judicial acts. They act both as judge and clerk, and in the latter capacity may, and, as to executions, they generally do, act as agent for the party." "Mere ministerial officers, who, as such, issue or execute process, cannot nor ought to be responsible as long as the court from which it issues has general jurisdiction to award such process. But the party who sues out the process does it at his peril and is responsible." "While the justice acts ministerially, or as clerk of the party, he will be justified in issuing any process within his jurisdiction that may be demanded by the plaintiff." "If it appears to be the officious or voluntary act of the justice, without any direct authority for that purpose, an innocent plaintiff ought not to be implicated. The justice was told by Percival that he was not a freeholder, and when he afterwards met him on his way to jail he directed the constable to obey the precept and commit him to prison, and we must conclude the justice acted voluntarily and took upon himself the capacity, and consequently the peril, of an agent of Chapin. He is therefore answerable," etc. Judgment for plaintiff. Percival v. Jones, 2 Johns. Cas. (N. Y.), 49 (1800). Citing Doug., 676; 3 Wils., 346; 1 Stra., 710; 2 Black. Rep., 1035; Cowp., 640, 647; 2 Wils., 385. Cited in 41 Barb. (N. Y.), 105; 6 Lans., 287; 1 Denio, 595; 8 Wend., 467; 11 Johns. (N. Y.), 445. Criticised in Hoose v. Sherill, 16 Wend., 86, dissenting opinion of Bronson, J.

(2) *Justice acting in good faith not liable for ministerial acts.*

Moores, a justice of the peace, at the suit of one Mulliner, issued a warrant for the arrest of one Rogers under a statute called the fifty-dollar act. No summons had been previously issued, nor was the warrant issued on oath that Rogers was about to depart from the county, or that the plaintiff would be in danger of losing his debt unless the process was by warrant, as required by the statute. On being arrested and brought before the justice, Rogers inquired whether the warrant had been issued on oath. On being told it had not, he informed the justice that he was a freeholder, objected to the regularity of the proceedings, and claimed to be discharged. The justice immediately discharged him. Rogers then brought an action for false imprisonment against both Mulliner and the justice.

On the trial it appeared that Mulliner, on the day before the warrant was issued, told the constable that he intended to take out a warrant, and made the necessary arrangements for the constable to receive it. Rogers proved that previous to the arrest he was a freeholder of the county. The jury

under the direction of the trial judge found a verdict against both defendants, and the counsel for the parties entered into a stipulation that if the supreme court should be of the opinion that the defendants, or either of them, were not liable to the action, the verdict should be amended accordingly, etc.

Savage, C. J.: "It is conceded that the defendant Mulliner is liable in this action, but it is contended that the justice is not." "In courts of limited and special jurisdiction the rule is strict that the party becomes a trespasser who extends the power of the court to a case in which it cannot be lawfully extended. The doctrine is undoubtedly correct. The difficulty in its application in this case is to ascertain who is the party who undertakes to extend the power of the court." "Mere ministerial officers, who as such issue or execute process, cannot nor ought to be responsible as long as the court from which it issues has general jurisdiction to award such process. But the party who sues out the process does so at his peril, and he is responsible." Percival v. Jones, 2 Johns. Cas., 49. "In issuing process at the request of the party a justice acts ministerially, and is justified in issuing any process within his jurisdiction which is demanded by a party, provided the justice acts in good faith. Should he knowingly issue a warrant against the provisions of the statute he would be amenable in an action. In this case the justice acted in good faith for aught appearing." Judgment for plaintiff against Mulliner and in favor of defendant Moores. Rogers v. Mulliner, 6 Wend. (N. Y.), 597 (1831). Citing Percival v. Jones, 2 Johns. Cas. (N. Y.), 49; The Marshalsea Case, 10 Co., 76; 2 Esp., 390; 2 Viner's Abr., 480, Trespass, C. a., pl. 19, 20; Hudson v. Cook, Skinn., 131; Hill v. Boteman, 1 Str., 710; Perrin v. Proctor, 2 Wils., 386; Smith v. Bouchier, 2 Str., 993; Warner v. Shed, 10 Johns., 138; Curry v. Pringle, 11 Johns., 444; Taylor v. Trask, 7 Cow., 250; Gold v. Bissell, 1 Wend., 210. Cited in 1 Doug., 199; 4 Am. Dec., 48; 17 Abb. Pr., 247; 2 Abb. Pr., 472; 38 Barb., 847; 16 Barb., 307; 14 Barb., 99; 4 Hun, 845; 5 Lans., 259; 20 N. Y., 302; 16 Wend., 35.

§ 63. Liability — Justice of the peace acting ministerially — The law stated by Ames, J. — No authority need be cited for the position that a justice of the peace, while acting in his judicial capacity, and within the limits of his lawful jurisdiction, is exempt from all responsibility in a private action, as a wrong-doer, for any official order or judgment, even though it may be erroneous and malicious. But this exemption does not extend to any illegal act which he may have done in the exercise of his ministerial powers and duties. When, in the progress of a civil action or a criminal proceeding, a final judgment has been rendered, his judicial duty is at an end, and nothing remains but to carry the judgment into effect. The issue of the execution or other warrant for that purpose is a ministerial and not a judicial act, and he may be

held responsible in a civil action for any illegal act of that description.[1]

§ 64. Ministerial acts — Corrupt motives. — The official irresponsibility of a justice of the peace, in a civil action, for errors or misconduct in the exercise of his judicial functions, does not protect him in unauthorized or illegal ministerial acts, done with corrupt motives or for dishonest purposes.[2]

APPLICATIONS OF THE LAW.—

(1) *Party not liable for the acts of the justice.*

One Trask recovered a judgment of $37.50 against one Taylor, a freeholder and a man of family, before a justice of the peace, and immediately made the oath required by statute that he was in danger of losing his debt if execution was not immediately issued. The justice had no blank executions, but stated that he would issue one the next morning. Accordingly the next day he issued an execution directing the constable to levy the damages and costs of the goods and chattels of Taylor, and for want thereof to commit his body to jail. He made use of an old blank, and omitted, by mistake, to strike out that part of the execution which directed the body to be committed, etc. Taylor was arrested, but as soon as the mistake was discovered, and by order of Trask as soon as he heard of the arrest, he was discharged. Taylor then brought an action for false imprisonment against Trask. On the trial it appeared that he had given no direction as to what kind of an execution was to be issued, but simply made the oath required by the statute and directed the justice to issue an execution. The justice delivered it to the constable. Trask did not see it until after the arrest, and then, before Taylor had been committed to prison, he ordered his discharge. The jury, under the direction of the trial court, found a verdict for nominal damages, subject to the opinion of the supreme court. In delivering the opinion of the supreme court, Sunderland, J., citing Percival v. Jones, 2 Johns. Cas. (N. Y.), 49, said: "While the justice acts ministerially, or as a clerk of the party, he will be justified in issuing any process within his jurisdiction that may be demanded by the plaintiff. But in order to charge the plaintiff in the suit it should appear that it was really his act. It ought not to depend on the general intendment of the law that any process is purchased by the party in whose favor it issues. If it appear to be the officious or voluntary act of the justice, without any direct authority for that purpose, an innocent plaintiff ought not to be implicated. In such a case the justice assumes the responsibility of the measure and is liable for all its consequences." In speaking of the defendant, the judge continues: "He requested the magistrate to issue an execution in a case in which the law clearly points out the kind of execu-

[1] Fisher v. Deans, 107 Mass., 118 (1871); Briggs v. Wardwell, 10 Mass., 356 (1813); Daggett v. Cook, 11 Cush., 262 (1853).

[2] Fisher v. Deans, 107 Mass., 118 (1871).

tion to be issued. No doubt existed upon any matter of fact which was necessary to be removed by the party before the magistrate could know what execution to issue. In issuing an execution of a different character he must be considered as acting officiously and voluntarily, and not as the agent of the party. He ought to be responsible, and not the plaintiff in the execution." Judgment was given for the defendant. Taylor v. Trask, 7 Cow. (N. Y.). 249 (1827). Cited in 25 Am. Dec., 48; 19 Am. Dec., 484; 5 Duer (N. Y.), 124; 5 Barb. (N. Y.), 468; 5 Lans. (N. Y.), 107; 1 Denio (N. Y.), 596; 16 Wend. (N. Y.), 46; 10 Wend. (N. Y.), 368; 8 Wend. (N. Y.), 467, 681; 6 Wend. (N. Y.), 602; 5 Wend. (N. Y.), 248, 299; 1 Wend. (N. Y.), 216.

(2) *Issuing mittimus after suffering defendant to go at large for a year, illegal.*

In July, 1850, Daggett, a minor, was tried and convicted before Alvin Cook, a justice of the peace, for an assault and battery. He was fined $2 and costs, and ordered to stand committed till fine and costs were paid. His father, as his next friend, appealed, and entered into recognizance to prosecute his appeal with effect, and he was allowed to go at large. In January, 1851, the appeal was dismissed, and the case remanded to the magistrate for the enforcement of the sentence. Cook issued a *mittimus* for the non-payment of fine and costs, which he delivered to an officer. On the 19th day of June, 1851, Daggett, being still at large, was taken by the officer to jail, and detained until the morning of the following day, when he was set at liberty on paying the fine and costs. Then he brought an action against the justice, Cook, for false imprisonment. On the foregoing facts appearing in evidence, the court ruled that if the magistrate voluntarily suffered the plaintiff to pass from custody before him, and by his order permitted him to go at large, and be at large, and not having first issued a *capias* or any process to bring him again before him, had no right to issue the *mittimus*. Being illegally issued, it afforded no protection, and rendered him liable. A verdict being returned for the plaintiff, the defendant excepted, and the matter coming before the full court, the ruling was sustained. Dewey, J.: "The case presents itself thus: A party accused of the crime of assault and battery was tried, convicted and sentenced to pay a fine and costs, all on the 10th day of July, 1850. Thereupon the party thus convicted was permitted to go at large, and no order for his committal was then made. On the 19th day of June, 1851, nearly a year after this, the party was arrested and committed to prison on the common *mittimus*, such an one as would have been appropriate on the day of the conviction if he had failed to pay the fine and costs.

"This proceeding was, we think, unauthorized. A preliminary step, the issuing a *capias* to bring the party before the justice to show cause why he should not be committed in execution of the sentence, would seem to be required at least before issuing a *mittimus* at that remote period from the time of passing sentence. The party should, at that late day, have had the opportunity to show cause why he should not be committed to jail for not paying the fine and costs he had been adjudged to pay. This not hav-

ing been done, but a *mittimus* issued nearly a year after the time the party had been permitted to go at large, under judgment and sentence on the complaint against him, the proceeding was irregular, and the *mittimus* not authorized." Daggett v. Cook, 65 Mass., 262 (1853).

§ 65. Liability of a justice of the peace in issuing process without authority of party in interest.— The relation existing between a plaintiff and a justice's judgment and the justice himself is very different from that between attorney and client in courts of record. The attorney is the mere agent of the client. The client is responsible for all the acts of the attorney which affect third persons, whether they were authorized by him or not. He is not, from considerations of public policy, permitted to deny his authority.[1] If a justice of the peace issue an execution without its being demanded by the plaintiff in the judgment, the latter is not responsible for it. It is considered the act of the justice only. He is not a mere clerk or agent, therefore, in issuing process in all cases. Whether he is or not depends on the circumstances of each particular case.[2]

APPLICATIONS OF THE LAW.—

Service of process by unauthorized persons void—Liability of justice for proceeding under such service.

Under the New York pauper act it was provided that a warrant might be issued against any person charged with being a pauper to the constable of the town likely to become chargeable. Reynolds was a resident of the town of Le Roy, in Jefferson county, having been assessed and paid taxes there in 1817 and 1821. In 1823 Orvis and Hamlin, justices of the county, issued a warrant directed to any constable of the county, commanding, etc., to bring Reynolds before them to be examined as a pauper. Instead of delivering the warrant to a constable of Le Roy, the town liable to become chargeable as required by the statute, they delivered it to a constable of the town of Philadelphia in the same county, who apprehended Reynolds and brought him before Orvis and Herrick, two justices, for examination. He was examined, and the justices made an order for his removal to Saratoga county, and they were removed, etc. Then Reynolds brought an action against the justices, Orvis and Herrick, for false imprisonment. On the trial, these facts being shown, the judge nonsuited him, a motion being made for a new trial on a bill of exceptions, etc. In the supreme court it was held that, the statute requiring that the process should be exe-

[1] Taylor v. Trask, 7 Cow., 250 (1827); Denton v. Noyes, 6 Johns., 296 (1810); 3 Wils., 345; Doug., 676.

[2] Taylor v. Trask, 7 Cow., 250 (1827); Percival v. Jones, 2 Johns. Cas., 49 (1800).

cuted by a certain person, and it having been executed by another, such proceeding were void and gave no jurisdiction to the justices. Their subsequent proceedings under it were *coram non judice* and void, and that the action of false imprisonment would lie. New trial ordered. Reynolds v. Orvis and Herrick, 7 Cow., 269 (1827).

§ 66. Liability of justices of the peace acting judicially.— In courts of special and limited jurisdiction the rule is strict that the party becomes a trespasser who extends the power of the court to a case in which it cannot lawfully be extended. A difficulty frequently arises in ascertaining who the party is who undertakes to extend the power of the court. Mere ministerial officers, who as such issue or execute process, cannot nor ought to be responsible as long as the court from which it issues has jurisdiction to award such process. The party who sues out the process does it at his peril and he is responsible.[1]

§ 67. Liability for the abuse of legal process.— Judicial officers sometimes become liable for the malicious abuse of legal process, as where they employ it for some unlawful object, not being the purpose for which it was intended by the law.[2]

ILLUSTRATIONS OF THE RULE.—

(1) *Abuse of process — Liability of justice.*

Charles H. Dean, trial justice, issued a warrant against Levi C. Fisher, on the complaint of David Fisher, charging him with maliciously taking and carrying away a pine log from his land. Fisher was tried, convicted, fined, and sentenced to stand committed till the fine and costs were paid. A *mittimus* was issued January 23, 1868, and on April 1, 1868, Fisher was arrested on it and committed to jail and kept there for thirty days. Upon his release he brought an action for false imprisonment against the justice. On the trial the plaintiff offered evidence tending to show that the conduct of the defendant, in issuing the warrant and convicting and sentencing him, was prompted by malice, but the trial judge excluded it. On exceptions it was held that the evidence was competent; that the defendant as a trial justice suffered the plaintiff, whom he had sentenced to pay a fine and costs, to go at large, and ten weeks afterwards, the fine and costs remaining unpaid, committed him to jail upon a *mittimus* for the purpose of extorting money from him. Fisher v. Deans, 107 Mass., 118 (1871).

[1] Percival v. Jones, 2 Johns. (N.Y.), 49 (1800); Rogers v. Mulliner, 6 Wend. (N. Y.), 597 (1831); The Marshalsea Case, 10 Co., 76.

[2] Mayer v. Walter, 64 Pa. St., 283 (1870).

(2) *Abuse of process — Use of criminal process to enforce settlement of a debt.*

One Wood brought an action against William W. Bailey, Josiah G. Graves and Charles H. Burns for false imprisonment and for abuse of criminal process. He alleged that in 1872 he was, and for a long time had been, agent of the Peterboro Railroad Company, a corporation organized under the laws of New Hampshire, and having its usual place of business at Nashua, Hillsboro county, New Hampshire, and had rendered the company valuable services as such agent; that in May, 1872, he became its treasurer, and remained its treasurer till 1877, giving bond as treasurer in the sum of $15,000, with said Bailey and Graves as his sureties, Graves being then and thereafter a director; that on September 30, 1875, with the consent and approval of a majority of the directors first obtained, and with knowledge of all, he rightfully, as defendants knew, took from the treasury of said company $4,200, as payment for his services as agent and treasurer, and entered the same properly on its books; that thereafter, on June 1, 1878, said Burns being the attorney of said railroad company, and also county solicitor for Hillsboro county, brought an action upon said bond against said Wood, Bailey and Graves to recover back said $4,200, and recovered judgment early in 1882 against all of them, in the sum of $6,000; that, after said judgment was recovered, said Burns, Bailey and Graves, for the sole purpose of enforcing the payment of said judgment by the said Wood alone, falsely, maliciously and without probable cause, procured an indictment against said Wood, in the supreme court of Hillsboro county, for the crime of embezzlement, they well knowing that he was not guilty of such crime, and that the court had no jurisdiction in the premises, inasmuch as the alleged offense occurred more than six years before the date of the indictment, and said Wood had been usually, publicly and continuously a resident of said Nashua during all of said period, and before, and knowing that such indictment could only be procured by the intentional and wilful misrepresentation and concealment of material facts, and that the court had no jurisdiction; that thereafter the defendants fraudulently obtained a requisition from the governor of New Hampshire upon the governor of Massachusetts, where said Wood then resided, for his rendition as a fugitive from justice, and caused said Wood to be arrested in Boston, and confined in a jail for one night, and then to be delivered to one Buxton, a deputy sheriff of said Hillsboro county, and the agent of the governor of New Hampshire, and to be conveyed by said Buxton to said Nashua, where, by the procurement of the defendants, he was wrongfully held in custody by said agent for six days, against his will, and without reasonable cause, and was fraudulently forced by the defendants to give to said Bailey and Graves a deed of nine thousand six hundred acres of land in Texas, and to procure a deed to them from his daughter of certain lands in New Hampshire, and to pay all the costs and expenses of his arrest and imprisonment, after which he was discharged without being brought to court, or allowed to procure bail; and that said indictment was afterwards *non pros'd* by Burns, and no warrant, precept, *capias* or requisition ever returned to court.

No service was made upon Burns, and the case proceeded to trial against Bailey and Graves.

On the trial, the facts appearing substantially as alleged, the jury found a verdict for the plaintiff of $7,500, and the defendants alleged exceptions.

In discussing the exceptions Allen, J., said:

"There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully issued for a just cause, and is valid in form, and that the arrest or other proceeding upon the process was justifiable and proper in its inception. But the grievance to be redressed arises in consequence of subsequent proceedings. For example, if, after an arrest upon civil or criminal process, the party arrested is subjected to unwarrantable insult and indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue hardship, he has a remedy by an action against the officer, and against others who may unite with the officer in doing the wrong.

"It is sometimes said that the protection afforded by the process is lost, and that the officer becomes a trespasser *ab initio*. Esty v. Wilmot, 15 Gray, 168; Malcom v. Spoor, 12 Metc., 279. This rule, however, is somewhat technical, and is hardly applicable to others than the officer himself. But the principle is general, and is applicable to all kinds of abuses outside of the proper service of lawful process, whether civil or criminal, that for every such wrong there is a remedy, not only against the officer whose duty it is to protect the person under arrest, but also against all others who may unite with him in inflicting the injury. Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest, for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act, in accordance with the wishes of those who have control of the prosecution. The leading case upon this subject is Grainger v. Hill, 4 Bing. N. C., 212, where the owner of a vessel was arrested on civil process, and the officer, acting under the directions of the plaintiffs in the suit, used the process to compel the defendant therein to give up his ship's register, to which they had no right. He was held entitled to recover damages, not for maliciously putting the process in force, but for maliciously abusing it, to effect an object not within its proper scope. In Page v. Cushing, 38 Me., 523, the same doctrine was held applicable to the abuse of criminal process. Holley v. Mix, 3 Wend., 350, is to the same effect, and it was held that an action for false imprisonment will lie against an officer and a complainant in a criminal prosecution where they combine and extort money from a party accused, by operating upon his fears, though the party was in the custody of the officer under a valid warrant, issued upon a charge of felony.

"The case of Baldwin v. Weed, 17 Wend., 224, was an action for false imprisonment. The plaintiff had been indicted in New York. He was arrested in Vermont and carried to New York for trial. The defendant, Weed, procured the requisition, was present at the arrest and caused the plaintiff to be put into irons, with the purpose to secure two small debts. The plaintiff executed to Weed a bond for the delivery of property much

in excess of the debts. The action for malicious prosecution failed, but the court (Nelson, J.) declared that an action of trespass, assault and false imprisonment should have been brought, and was the appropriate remedy for the excess of authority and abuse of the process, and intimated to the plaintiff to amend his pleadings accordingly. See, also, Carleton v. Taylor, 30 Vt., 220; Mayer v. Walter, 64 Pa. St., 283.

"On similar grounds, an officer becomes responsible in damages, for abuse of process, or as trespasser *ab initio*, by reason of such abuse, who omits to give an impounded beast reasonable food and water while under his care (Adams v. Adams, 13 Pick., 384); or who stays too long in a store where he has attached goods (Rowley v. Rice, 11 Metc., 337; Williams v. Powell, 101 Mass., 467; Davis v. Stone, 120 Mass., 228); or who keeps a keeper too long in possession of attached property (Cutter v. Howe, 122 Mass., 541); or who places in a dwelling-house an unfit person as keeper, against the owner's remonstrance (Malcom v. Spoor, 12 Metc., 279).

"In various other cases, where it has been said that the only remedy was by an action for malicious prosecution, the whole grievance complained of consisted in the original institution of the process, and no abuse in the mere manner of serving it was alleged. Such cases are Mullen v. Brown, 138 Mass., 114; Hamilburgh v. Shepard, 119 Mass., 30; Coupal v. Ward, 106 Mass., 289; O'Brien v. Barry, id., 300. The case of Hackett v. King, 6 Allen, 58, was trover for the conversion of property which the plaintiff conveyed to the defendant under alleged duress. In Taylor v. Jaques, 106 Mass., 291, the question arose in another form, the action being on a promissory note, in defense to which the defendant alleged that his signature was procured by duress."

The exceptions were sustained but upon other grounds. Wood v. Bailey, 144 Mass., 365; 11 Atl. Rep., 567 (1887).

§ 68. **Liability of quasi-judicial officers.**— The functions of a *quasi*-judicial officer are those which lie midway between the judicial and ministerial ones. The lines separating these from such as are thus on their two sides are necessarily indistinct; but in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a direction in its nature judicial, the function is termed *quasi*-judicial.[1] The same reasons of private interest and public policy which operate to render the judicial officer exempt from civil liability for his judicial acts within his jurisdiction apply equally as well to the *quasi*-judicial officer. He cannot be called upon to respond in damages for the honest exercise of his judgment within his jurisdiction, however erroneous or misguided that judgment may be.[2]

[1] Bishop's Non-contract Law, §§ 785, 786.

[2] Mechem on Public Officers, § 638 (1890).

AN ILLUSTRATION OF THE RULE.—

Quasi-judicial tribunals — Overseers of the poor.

Catherine Smith and her three children, John, aged ten; Kate, seven, and Thomas, five years, being poor and in need of support, went to the poor-house in the city of Lowell, and were there supported as paupers. At a meeting of the overseers of the poor, at which Josiah G. Peabody presided as mayor of the city of Lowell, it was voted that the children should be sent to the "Baldwin Place Home for Little Wanderers" in the city of Boston, a corporation established under the laws of Massachusetts "for the purpose of rescuing destitute children from want and shame, providing them with food and clothing," etc. In pursuance of the vote, and by direction of the overseers, Lorenzo Phelps, who was superintendent of the Lowell poor-house, took the children against their mother's wishes to the Baldwin Place Home. The mother, who was a soldier's widow, having procured a pension, afterwards left the poor-house. She then brought an action against both Peabody and Phelps for false imprisonment, claiming that they seized and took the children against her will, and kept them imprisoned and restrained against her will, and deprived her of their society and assistance. It appeared that the defendants, when asked where the children were, made no reply. On the trial, the foregoing facts appearing, the court directed a verdict for the defendants. On exceptions, Chapman, J., held that the fact that the plaintiff and her children, being poor and in need of support as paupers, went to the poor-house, gave to the overseers of the poor the care and oversight of each of them, with power to see that they were suitably relieved, supported and employed, either in the work-house or almshouse, or in such manner as the city should direct, or otherwise at their own discretion. As the overseers were not bound to retain them within the city limits, but might provide for them elsewhere in a suitable place within the limits of the commonwealth, they might lawfully place them in the Baldwin Place Home, the purposes of that institution, as stated in its charter, indicating that it was a suitable place, and there being no evidence in the case to prove the contrary. "The action, being for an illegal taking and imprisonment of the children against the plaintiff's will, is not sustained by the evidence." Smith v. Peabody, 106 Mass., 262 (1871).

§ 69. **Arrests by officers.**—(1) *With process:* An arrest has been defined to be the act of depriving a person of his liberty by legal authority; seizing his person and detaining him in the custody of the law.[1] The officer to whom the process is directed is in general the proper person to make the arrest. But if the authority of the process is insufficient, the officer may become liable as a trespasser.

(2) *Without process:* Any peace officer, as a justice of the peace, sheriff, coroner, constable or watchman, may arrest with-

[1] 1 Bouvier's Law Dictionary, 184.

out process any person committing a felony in his presence, or committing a breach of the peace during its continuance or immediately after, or even to prevent the commission, and such officer may arrest any one whom he reasonably suspects of having committed a felony, whether a felony has actually been committed or not, whether acting on his own knowledge or on information communicated by others, but not unless the offense amounts to a felony.[1]

§ 70. Officer protected by process regular on its face.— Where process regular upon its face is put into the hands of an officer, it is his duty to proceed without delay to execute it according to its mandates. Out of this duty arises the necessity of protection; and the rule of law is well settled, that for the proper execution of such process the officer incurs no liability, however disastrous may be the effect of its execution upon the person against whom it is issued, or however unlawful and irregular may have been the methods to procure the issuing of process.[2]

§ 71. What is process regular on its face.— The process which will afford this protection to an officer as being fair or regular upon its face has been defined as that which proceeds from a court, magistrate or body having authority of law to issue it, and which is legal in form and on its face contains nothing to notify or fairly apprise the officer into whose hands it is placed for service that it is issued without authority.[3]

§ 72. Officer protected by regular process — The law stated by Bigelow, J.— For reasons founded on public policy, and in order to secure a prompt and effective service of legal process, the law protects its officers and those acting under them in the performance of their duties, if there is no defect

[1] 1 Hale's P. C., 186; 3 Hawkins' P. C., 164; 1 Bouvier's Law Dictionary, 184, and cases cited.

[2] Nowell v. Tripp, 61 Me., 426; 14 Am. Rep., 572 (1871); Bird v. Perkins, 33 Mich., 28 (1875); Savacool v. Boughton, 5 Wend. (N. Y.), 170; 21 Am. Dec., 181; Chegaray v. Jenkins, 5 N. Y., 376 (1851); Ramsey v. Bader, 67 Mo., 476 (1878); Underwood v. Robinson, 106 Mass., 296 (1871); Brainard v. Head, 15 La. Ann., 489 (1860); Kelley v. Noyes, 43 N. H., 209 (1863); Cunningham v. Mitchell, 67 Penn. St., 78 (1870); Allen v. Scott, 13 Ill., 80 (1851); Prince v. Thomas, 11 Conn., 472 (1836); McLean v. Cook, 23 Wis., 364 (1868).

[3] Cooley on Torts, 460.

or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look beyond his warrant. He is not to exercise his judgment touching the validity of the process in point of law; but if it is in due form and is issued by a court or magistrate apparently having jurisdiction of the case or subject-matter, he is to obey its command. In such case he may justify under it, although in fact it may have been issued without authority and therefore be wholly void.[1]

APPLICATIONS OF THE LAW.—

An infant arrested illegally for debt — Regular process protects the officer.

Cassier brought an action for false imprisonment against Fales. He was under the age of twenty-one, and was arrested upon a writ sued out by Fales, upon which was the proper affidavit and certificate required by law to authorize the arrest. The plaintiff testified that he notified the officers and the defendant who was arresting him that he was under age. The court was asked to rule that if the defendant, attorney and constable were notified that the plaintiff was under age, after such notice they had no right to proceed with the arrest under mesne process. The court refused and the plaintiff excepted.

Morton, J., said: "We are of the opinion that by reason of his infancy the plaintiff was exempted from arrest for debt either upon execution or mesne process. But it does not follow that he can maintain an action of trespass for the arrest and imprisonment. It is entirely clear that such an action cannot be maintained against the officer making the arrest. An officer is protected in the service of process if it is issued by a court having jurisdiction, and appears upon its face to be regular and valid, even if it is fraudulently or irregularly issued. Wilmarth v. Bent, 7 Met., 257; Twitchell v. Shaw, 10 Cush., 46; Fisher v. McGirr, 1 Gray, 1; Blake's Case, 106 Mass., 501. But where an arrest is made upon legal process regular upon its face, and therefore sufficient to justify an officer, but which has been fraudulently or irregularly obtained and issued, the party who procures it, and directs it or causes it to be served, is not justified by it. He is bound to see to it, before he sets the law in motion, that the process he obtains is regular and valid; and if it is not he is liable in an action of trespass. Emery v. Hapgood, 7 Gray, 55; Cody v. Adams, id., 59. But in the case before us the writ sued out by the defendant was regular and valid.

"The plaintiff's exemption from imprisonment under it arises, not from any irregularity or illegality in the writ, but from his personal privilege of infancy. It is similar in principle to any other case of personal privilege. Suppose a creditor sues out an execution or writ in due form against his debtor and delivers it to an officer for service, the officer arrests the debtor,

[1] Emery v. Hapgood, 7 Gray (73 Mass.), 55 (1856).

and it turns out that at the time he is under protection as a party or witness attending court, can the creditor be liable as a trespasser? 'It is incomprehensible,' says Lord Kenyon, in Belk v. Broadbent, 3 Term R., 185, 'to say that a person shall be considered as a trespasser who acts under the process of the court." In Tarlton v. Fisher, 2 Doug., 671, which was trespass for arrest and false imprisonment of a certificated bankrupt arrested upon an execution, Butler, J., says that the debtor might have a *supersedeas* of the execution, but until superseded the original party was not liable in trespass, and even after *supersedeas*, though trespass would lie against the party, it would not lie against the officer. In Deyo v. Van Valkenburgh, 5 Hill, 242, it was held that a judgment creditor who took out execution after the judgment had been satisfied by a discharge in insolvency, and caused it to be executed, was liable in an action of trespass. But in delivering its opinion the court said that the violation of a personal privilege is no ground for an action for false imprisonment. The question before us was carefully considered in the recent case of Marks v. Townsend, 97 N. Y., 590. In that case the plaintiff was arrested for debt. He was discharged from the arrest upon showing to the court that he had previously been arrested for the same cause and upon the same grounds. It was held that an action for false imprisonment would not lie for the second arrest, even if the defendant maliciously caused it to be made, because it was made upon a process regularly issued by a court having jurisdiction of the matter.

"It is difficult to see how any person can be guilty of a trespass in serving, or causing to be served, a valid writ or other process of a court. The plaintiff has his remedy by a right to a speedy release upon proper application, and by the right to bring an action on the case if the defendant has maliciously violated his privilege by the arrest. The fact that the plaintiff gave notice of his infancy to the defendant at the time of the arrest is not material. It did not make the writ an illegal process. What might be its importance upon the question of the defendant's malice, in an another form of action, is not for us to consider.

"We are of opinion that upon the facts of this case an action of trespass will not lie, and that the court rightfully refused the rulings requested by the plaintiff. Exceptions overruled." Cassier v. Fales, 139 Mass., 461; 1 N. E. Rep., 923 (1885).

§ 73. Process regular on its face—When it does not protect the officer.— When the officer arrests one person, without his fault, upon a warrant issued against another;[1] or arrests the right person by the wrong name, unless it be shown that he was known as well by one name as the other;[2]

[1] Formwalt v. Hilton, 66 Tex., 288 (1886); Dunstan v. Patterson, 2 C. B. (N. S.). 495.

[2] Johnson v. Rily, 13 Ga., 97 (1853); Hoye v. Bush, 1 M. & G., 784; McMahan v. Green, 34 Vt., 69; 80 Am. Dec., 665 (1861); Mead v. Haws, 7 Cow. (N. Y.). 332 (1827); Griswold v. Sedgwick, 6 Cow. (N. Y.), 456; 1 Wend. (N. Y.), 126 (1828).

or where he makes an arrest in a place beyond his jurisdiction;[1] or where he takes the body of a debtor on execution without searching for goods, in cases where the defendant in the writ had goods subject to levy and notified the officer of the fact,[2] and in other similar cases, the writ, though regular on its face, affords him no protection, and he is liable to the injured person. In this respect the officer is bound to know the law, and in these matters he must keep within its provisions at his peril.[3]

APPLICATIONS OF THE LAW.—

(1) *Liability of officer under regular process.*

C. H. Robinson, a deputy sheriff, arrested and imprisoned Erastus C. Underwood on a writ in favor of E. C. Brown, issuing out of the superior court, in an action of contract, with an affidavit and certificate annexed in accordance with the statute, purporting to authorize the arrest of Underwood, and was regular in form. But the magistrate before whom Brown made the affidavit and who signed the certificate was James T. Joslin, of the firm of Joslin & Johnson, attorneys at law. Joslin made the writ as Brown's attorney, and indorsed on the back of it the words: "Mr. Officer, arrest defendant." "From the office of Joslin & Johnson." After his release Underwood sued the officer for false imprisonment, the process being void. It was sought to hold him on the ground that he knew Joslin's handwriting, and that as the indorsement and the body of the writ were both in the same hand, and Joslin's, he was chargeable with notice. The plaintiff requested the trial judge to rule, "if the defendant knew that the writ was made by the person before whom the affidavit was made, or by reasonable inspection of the writ could have known that fact, he was liable." The judge declined so to rule and the verdict was for the defendant. On exceptions, Gray, J., said: "The fact (that the person who as magistrate took the affidavit indorsed upon the writ in the former action also made out the writ as attorney for the plaintiff) did not appear on the face of the process or affect the jurisdiction of the court from which it issued over the parties or the cause of action, but depended on the officer's private knowledge of the magistrate's handwriting and relation to one of the parties to that action, which the officer was not bound to think about, and which could not deprive him of the conclusive protection which the law attributes to process regular on its face and issued by a court of competent jurisdiction." The verdict was sustained. Underwood v. Robinson, 106 Mass., 296 (1871). Citing Chase v. Ingalls, 97 Mass., 524; Webber v. Gay, 24 Wend., 485; People v. Warren, 5 Hill, 440; State v. Weed, 1 Foster, 262; Gen. Stats. Mass., ch. 124, § 1.

[1] People v. Burt, 51 Mich., 199 (1883).

[2] Barhydt v. Valk, 12 Wend. (N. Y.), 145; 27 Am. Dec., 124 (1834).

[3] Malcolmson v. Scott, 56 Mich., 459 (1885).

(2) *Process issued by a court having jurisdiction of subject-matter protects the officer executing it.*

One Shed, being a constable, in the execution of his office received a warrant of commitment under the hands and seals of three justices of the peace, against Warner, by virtue of which he took and carried him to the county jail, where he was imprisoned. This warrant stated that Warner and another had been brought before the justices and convicted at a court of special sessions of an assault and battery, fined $25 and sentenced to thirty days' imprisonment. After his release from imprisonment Warner sued Shed, the officer, for false imprisonment, on the ground that the conviction was erroneous. The officer relied upon this warrant for his justification, but the court ruled that it was insufficient, and the jury found a verdict for nominal damages. Upon a motion for a new trial the supreme court held that, the court having jurisdiction of the subject-matter, it is sufficient to justify the officer serving its process. Whether the conviction was erroneous or not was not material to him, as he is not bound to examine into the validity of its proceedings and of the process. New trial granted. Warner v. Shed, 10 Johns., 139 (1813). Citing Hill v. Bateman, Stra., 710 (1723); The Marshalsea, 10 Co., 76*a* (——).

§ 74. An officer's authority is derived from his writ.— As an officer derives his authority to interfere with the person of another only from his writ, and the writ confers authority to arrest the body of no one but the person named therein and against whom the writ is issued, any interference, therefore, with the liberty of a person other than the one named in the writ renders the officer liable in trespass, unless such interference is caused by the act of the person himself. So if the officer, having a warrant for the arrest of one person, arrests another, though of the same name,[1] he is liable,[2] unless the arrest was caused by the act of the person arrested,[3] or where he arrests the right person by the wrong name, unless it be shown that he was known by one name as well as by the other.[4]

APPLICATIONS OF THE LAW.—

(1) *Arrest of right person by wrong name.*

Daniel Griswold was arrested under process purporting to have been issued out of the equity side of the United States circuit court, directed to

[1] Mechem on Public Officers, §§ 780, 781 (1890); Jarmain v. Hooper, 6 M. & G., 827, 847.

[2] Formwalt v. Hylton, 66 Tex., 288 (1886); Comer v. Knowles, 17 Kan., 436 (1877); Hays v. Creary, 60 Tex., 445 (1883).

[3] Formwalt v. Hylton, 66 Tex., 288 (1886); Price v. Harwood, 3 Camp., 108.

[4] Mahan v. Green, 34 Vt., 69; 80 Am. Dec., 665 (1869); Johnston v. Rily, 13 Ga., 97 (——); Mead v. Haws, 7 Cow. (N. Y.), 332 (1827).

the marshal of the district, commanding him to take the body of Samuel S. Griswold. The process was issued by the Messrs. Sedgwick, as solicitors and counsel for Samuel Hill; and the arrest was made by Reid, as deputy of Morris, the marshal. As soon as the marshal discovered the mistake in the name, and before Griswold was taken to prison, he sent for the Sedgwicks, who immediately assented to the discharge of Griswold, he being present, although it was understood and admitted that he was the identical person intended to be arrested under the process in question. He was immediately discharged, and brought suit against the Sedgwicks, Morris and Reid, all the parties instrumental in his arrest. The process recited that, by an order made in the circuit court by one of the judges, in a cause between Daniel S. Griswold, complainant, and Hill, defendant, Griswold pay to the clerk $1,200 in ten days after notice of the order; and "whereas the said Samuel S. Griswold" had neglected to comply with the order, though more than ten days had elapsed, it commanded the marshal to take the said Samuel S. Griswold, etc., and keep him in custody till he should perform the order, or until the court should make order to the contrary. After the discharge of Griswold the marshal returned the writ *non est*, etc. On this evidence the plaintiff was nonsuited.

On appeal Sutherland, J., said: "It is apparent on the face of the process that it did not authorize the arrest of Daniel S. Griswold, the present plaintiff." . . . "The process was undoubtedly intended as an attachment for a contempt in disobeying a previous order of the court. It recites that previous order, and that the plaintiff had neglected to comply with it, and therefore commands the marshal to take the body," etc. . . . "The attachment on the face of it did not authorize the arrest of the plaintiff, and on that ground alone, I think the action was technically sustained, and the plaintiff ought not to have been nonsuited." The nonsuit was set aside. Griswold v. Sedgwick et al., 6 Cow. (N. Y.), 456 (1826). Citing Cole v. Hindson, 6 T. R., 234; Shagett v. Clipson, 8 East, 328; Wilkes v. Lorck, 2 Taunt., 400; Crawford v. Satchwell, 2 Str., 1218; Scandover v. Warne, 2 Camp., 270; Morgans v. Bridges, 1 B. & A., 647; Smith v. Brookes, 1 Mass., 76; Reynolds v. Corp., 3 Cai., 267. Cited in 7 Kan., 455; 29 Wis., 588; 2 Hilt., 275; 18 Abb. Pr., 78; 52 How. Pr., 500; 67 Barb., 445; 32 Barb., 279; 28 Barb., 631; 27 N. Y., 65; H. & D., 92; 10 Wend., 347; 7 Cow., 333.

(2) *Imprisonment by wrong name.*

Evelina H. Scott brought an action for false imprisonment against Messrs. Ely and White, two justices of the peace, for committing her to jail under an "act for relief of cities and towns from the maintenance of bastard children," for refusing to disclose the name of the father of her bastard child. The defendants, in their warrant of commitment, directed that she be committed to the common jail of the county, there to remain until she should consent to be sworn and examined, etc. She was arrested and imprisoned twenty days. On the trial the arrest and imprisonment was proved and the warrant of commitment produced, which, after reciting that Evelina Scott, a single woman, an acknowledged pauper, etc., had been delivered of a bastard child, and had been brought before them, jus-

tices, etc., upon complaint of the overseers of the poor, etc., to testify on oath who was the father of her child, had refused, commanded the constables of the town to convey her to the common jail of the county, etc. On the part of the defendants it was shown that the plaintiff was the identical person who was brought before them for examination and who was directed to be arrested on the warrant issued by them. On this evidence the plaintiff was nonsuited. On appeal, Marcy, J., said: "There is no doubt but the plaintiff is the person against whom the warrant was issued, and the defendants gave express directions to the constables to take her on it; but the warrant was no authority for so doing. The name of the plaintiff is Evelina and the warrant is against Emeline. There can be no pretense that the name is the same. But it said there is no doubt as to the person. There was no doubt as to the person in the case of Griswold v. Sedgwick, 6 Cow. (N. Y.), 456. There was in that case as in this a mistake in the christian name: Samuel was substituted for Daniel. The person to be taken was taken, but he maintained his action for false imprisonment by reason of the misnomer. The same point was decided in the case of Mead v. Haws, 7 Cow. (N. Y.), 332." The motion for a new trial was granted. See, also, 8 East, 328; 2 Camp., 270; Scott v. Ely and White, 4 Wend. (N. Y.), 555 (1830). Cited in 9 Wend. (N. Y.), 329; H. & D., 92; 28 Barb. (N. Y.), 631; 32 Barb. (N. Y.), 279; 67 Barb. (N. Y.), 445; 42 How. (N. Y.) Pr., 253; 29 Wis., 589; 7 Kans., 455.

(3) *Arrest of person by a wrong name not sustained — When it might be.*

Levi Mead sued Haws, Pultney and Culver for a false imprisonment. At the trial the plaintiff proved that, as he was leading a horse at the carriage of a cannon which he was ordered to take from Hudson to Taghanick, he was arrested by Haws, the defendant, a constable of the city of Hudson, who delivered him into the custody of another of the defendants, Culver. The arrest was by virtue of a warrant in favor of Pultney, the other defendant.

The defendants offered to prove that the plaintiff, with others, having taken a brass cannon from the custody of the defendant Pultney, at Hudson, and being in the act of carrying it off, Pultney went to the clerk's office of the justice's court in Hudson, and took out a warrant commanding to "take the body of John Doe, the person carrying off the cannon," to answer Pultney in a plea of trespass. That on this warrant the plaintiff was arrested, he having been in the act of carrying off the cannon at and from the time of the taking out the warrant to the time of the arrest. On objection, the judge excluded the evidence.

Verdict for the plaintiff for $35, pursuant to the charge of the jury.

Savage, C. J.: "The judge was correct. It was decided in Shagett v. Clipson, 8 East, 328, that the defendant could not justify an arrest of the plaintiff by a wrong name, though he was the person intended to be arrested, unless it was shown that he was known by one name as well as the other. There was no offer to show here that the plaintiff was known as well by the name John Doe as Levi Mead. The same principle is recognized in various other cases, and particularly in the late case of Griswold v. Sedgwick, 6 Cow., 456, in which the subject was fully examined, and

the authorities collected and considered by this court. The motion for a new trial must be denied." New trial denied. Mead v. Haws, 7 Cow., 332 (1827). Citing 2 Campb., 270; 3 Campb., 110; 6 T. R., 284; Griswold v. Sedgwick, 6 Cow., 456. Cited in 29 Wis., 589; 7 Kans., 455; 10 Allen, 404; 42 How. Pr., 253; 10 Wend., 347; 9 Wend., 320; 4 Wend., 558; 1 Wend., 132; 9 L. C. P. Co., 141.

(4) *The same subject continued.*

Holmes brought an action against Blyler to recover damages for false imprisonment. There was a trial by jury, and a verdict and judgment in favor of plaintiff. The defendants appealed.

The defendant Blyler was a constable of Polk county during the years 1887 and 1888. On the 20th day of April, 1887, acting as constable, he arrested plaintiff in Dubuque, caused him to be confined in the Dubuque jail for several hours, carried him home from the jail to the railway train, handcuffed, and thence took him to Des Moines, where plaintiff was discharged without a hearing. When the arrest was made Blyler had in his possession for service a warrant, duly issued by a justice of the peace in Polk county, directing the arrest of one Julian Martin, and defendants claim that all the acts of which plaintiff complains were done by Blyler in good faith, and under the honest belief that plaintiff was Martin, and that as soon as the mistake was discovered plaintiff was released. On the trial plaintiff waived all claim against defendants except for compensatory damages.

Robinson, J.: "Appellants complain of the refusal of the court to allow them to show that Blyler believed plaintiff was the person named in the warrant at the time of the arrest, and that plaintiff answered, substantially, to the description of Martin given by those who knew him. It is well settled that ministerial officers or sheriffs and constables act at their peril in serving judicial process, and that they cannot justify an abuse of process by showing that they acted in good faith, excepting in mitigation of damages. Murfree, Sher., §§ 155, 925; Bish. Non-cont. Law, §§ 209-213; Cooley, Torts, 461; 1 Add. Torts, 151; 2 Thomp. Neg., 825; Field, Dam., § 680; Hayes v. Creary, 60 Tex., 445. The plaintiff had waived claim for all but actual damages. He was entitled to recover those for the reason that his arrest was wholly unauthorized by the warrant, and the good faith of the officer would not exempt him from liability for the actual damages caused by his unauthorized act. 3 Suth. Dam., 732; 7 Amer. & Eng. Cyclop. Law, 690." Judgment affirmed. Holmes v. Blyler et al., 80 Iowa, 365; 45 N. W. Rep., 756 (1890).

§ 75. Officer having process not required to examine into extrinsic matters.— An officer, acting in good faith, has the right to rely for his protection upon the process put into his hands. He is not bound to go behind that process, and to assume the risk of determining the truth of any extrinsic matter which would exempt the person against whom the pro-

cess is issued from being arrested or imprisoned under it.[1] The law affords him conclusive protection under a process regular on its face and issued by a court of competent jurisdiction.[2]

APPLICATION OF THE LAW.—

Officer protected by execution issued on a judgment obtained by fraud.

John O'Shaughnessy was sued by name of John Shaughnessy, a name by which he was commonly known, upon a promissory note signed by another person of that name, and not by himself. The person who made the writ knew that O'Shaughnessy was not the person who signed the note, but intended to have the writ served upon him, and it was served upon him by another constable and entered in court. Judgment was rendered upon default for the plaintiff and an execution issued in due form of law. The execution with the proper certificates was delivered to Francis J. Baxter, an officer, with instructions to take O'Shaughnessy and commit him to jail. Baxter did so, in obedience to instructions and in good faith, after ascertaining that the original writ had been served upon the plaintiff, but knowing that he was not the person who signed the note upon which the action was brought. After his release O'Shaughnessy sued Baxter for false imprisonment.

On this statement of facts, Gray, C. J., said: "Whatever remedies he [O'Shaughnessy] might have to relieve him from the judgment and execution as obtained by fraud, or to recover damages against the person who fraudulently abused the process of the court, the officer, acting in good faith, had the right to rely, for his protection, upon the process, and was not bound to go behind that process, and to assume the risk of determining the question whether the plaintiff really signed the note upon which the action was brought, or the truth of any extrinsic fact which would exempt him from being arrested or imprisoned on the execution. In the words of Chief Justice Parker: 'The difficulty in such cases is, to ascertain whether the judgment was or was not in fact rendered against the person who is taken in the execution; for if it was, although the person was mistaken, yet the officer would be justified.'" Judgment for defendant. O'Shaughnessy v. Baxter, 121 Mass., 515 (1877). Citing Hollowell & A. Bank v. Howard, 14 Mass., 181, 183.

§ 76. Arrest for felony without warrant — Savage, C. J.— "My understanding of the law is that, if a felony has in fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time

[1] O'Shaughnessy v. Baxter, 121 Mass., 515 (1877); Laroche v. Washbrough, 2 T. R., 737, 739 (——); Underwood v. Robinson, 106 Mass., 296 (1871); Magnay v. Burt, 5 Q. B., 381 (Dav. & Meriv.); Webber v. Gray, 24 Wend., 485 (1840); People v. Warren, 5 Hill, 440 (1843); State v. Weed, 1 Foster, 262 (1850).

[2] Underwood v. Robinson, 106 Mass., 296 (1871).

to obtain one or not. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without a warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on."[1]

APPLICATION OF THE LAW.—

(1) *Arrest without warrant — Irregular process — Liability of officer and complainant in criminal cases — Abuse of process.*

Holly sued Mix and Clute for false imprisonment. On the trial it appeared in evidence that Stephen Mix, a brother of the defendant D. Mix, obtained from E. L. Davis, Esq., a justice of the peace of the county of Schenectady, a warrant against the plaintiff on a charge of having feloniously stolen a ten-dollar bank bill. Stephen Mix was deputed to serve the warrant, and went in pursuit of the plaintiff, whom he overtook on the canal a few miles west of Schenectady; but, having lost the warrant, he only required the plaintiff to return, which the plaintiff refused to do. Stephen Mix then obtained another warrant from J. J. Van Epps, Esq., another justice of Schenectady county, on the same charge, which was issued against "John Doe," the name of the plaintiff not being known by the complainant, and delivered to defendant Clute, who was informed by Stephen Mix that the plaintiff had stolen a ten-dollar bill belonging to D. Mix, the other defendant. Clute and Stephen Mix pursued and overtook the plaintiff. When they did overtake him, Stephen Mix said he wanted the plaintiff as a witness in relation to a ten-dollar bill dropped in a tailor's shop in Schenectady, but Clute, the constable, did not hear this remark. Clute arrested the plaintiff and carried him before the justice, Van Epps, where the plaintiff stated his name, and the justice altered the warrant by inserting his name, and then redelivered it to the constable. The plaintiff asked to go to Schenectady to settle with the defendant D. Mix, or to obtain counsel. The justice directed the constable to keep the plaintiff in custody until the next morning, when he would be tried by a special session; but he appointed no time or place for the holding of the session, nor did he designate or summon any justice to associate with him in holding the same, nor did the complainant or the constable make any inquiries respecting it. This justice heard no more of the matter. The constable, Stephen Mix and the plaintiff then proceeded to Schenectady and went directly to the shop of the defendant D. Mix, who told the plaintiff that the matter could not be settled, and directed the constable to take the plaintiff to the justice's office to be tried according to law. The constable, instead of going to the justice's office, took the plaintiff to a tavern, where he was followed by the defendant D. Mix. The constable and the plaintiff went into a

[1] Holly v. Mix, 3 Wend. (N. Y.), 350 (1829).

back room together. D. Mix did not go with them, but while they remained in the room walked in the hall of the house. The constable came out of the room and handed to D. Mix $10. Whilst the plaintiff was detained at the tavern, E. L. Davis, Esq., the justice who issued the first warrant, repeatedly told the constable and D. Mix to bring the plaintiff before him at his office. He was not brought. The constable told Justice Davis that Mix had got his money and he his costs, and Mix confessed that the plaintiff had given him $11 to settle the matter. Evidence was given in support of the charge that the felony had been committed, but it entirely failed to establish the fact.

The court ruled (1) that if the defendants acted in concert in taking the plaintiff into the back room of the tavern, and that they intended to keep him in custody and to work upon his fears for the purpose of extorting money from him, they were both liable. (2) That the warrant issued by Van Epps previous to the insertion of the name of the plaintiff was no protection to the officer. (3) An officer has no authority to arrest a person upon a criminal charge without a warrant, and upon information only, except in cases where there is not time to obtain a warrant and where an escape would take place unless the arrest was made. That in the case at bar there being sufficient time to obtain a warrant the constable was not justified to arrest upon information. The jury found for the plaintiff and assessed damages against Clute at six cents and against Mix at $25. The cause came before the supreme court on a bill of exceptions. Savage, C. J.: "There is certainly an inaccuracy in the charge of the judge as stated in the bill of exceptions. The judge is represented as laying down the broad proposition that a felon can in no case be arrested without a warrant where there is time to obtain one. My understanding of the law is that if a felony has in fact been committed by the person arrested, the arrest may be justified by any person without a warrant, whether there is time to obtain one or not." "It was not contended on the trial that a felony had been committed; an action would therefore lie against Stephen Mix and not against the constable, Clute, provided the arrest was made with the *bona fide* intention of bringing a supposed offender to justice." "The warrant against John Doe did not authorize the arrest of any other person than John Doe. It was altered by inserting the name of the present plaintiff, and thus it was a justification for all subsequent regular acts of all concerned in its execution. At this stage of the proceedings a shade of suspicion is cast upon the *bona fides* of the whole transaction. The justice directs the constable to take the supposed culprit to Schenectady for trial, but did not attend for that purpose nor take any steps preparatory thereto, nor could in fact any trial be had within forty-eight hours, unless by the consent of the accused. It was the duty of the justice to have taken the examination of the person brought before him; instead of doing so he sent him to Schenectady. When there, the defendant, D. Mix, directed the constable to take him before Justice Davis, who had issued the first warrant, and the justice gave the same direction; but the constable went to the tavern and so did the defendant Mix, and while the constable was probably frightening the prisoner in a back room, the defendant, Mix, was walking the hall, waiting the result of the conference

between the constable and the prisoner. He gave no further orders to go before the justice, and when the constable gave him $10 he said no more about the impossibility of a settlement. It was in reference to these facts that the judge charged the jury, that if the object of the two defendants was to extort money from the prisoner by working upon his fears, they were liable in this action. In this I think the judge was right. Had the constable performed his duty by taking the plaintiff before a magistrate he would have been justified; but having lent himself, according to the finding of the jury, to the unholy purpose of oppression, he lost the protection which the law would give him in the discharge of his official duty and became a trespasser, and so did David Mix, who acted in concert with him. There is no reason, therefore, for granting a new trial, . . . and leave given to the plaintiff to enter a *nolle prosequi* against Clute." Holly v. Mix et al., 3 Wend. (N. Y.), 350 (1829). Citing 1 Chitty's Criminal Law, 15; Samuel v. Payne, Doug., 359; Hobbs v. Branscomb, 3 Camp., 420. Cited in 9 Wend., 320; 2 Edw., 103; 40 N. Y., 466; 56 N. Y., 453; 80 N. Y., 499; 5 Lans., 86; 16 Barb., 307; 39 Barb., 263; 51 Barb., 101; 54 Barb., 493; 17 How. Pr., 101; 29 How. Pr., 187; 41 How. Pr., 489; 8 Abb. Pr., 73; 9 Abb. Pr., 99; 3 Park., 254; 1 Duer, 644; 4 Bos., 125; 9 Bos., 26; 1 Rob., 557, 560; 41 Super., 113; 4 E. D. S., 250; 1 Hilt., 593; 31 Ind., 424; 58 Ill., 264; 61 Pa. St., 358; 19 Am. Rep., 671; 49 Ind., 59.

(2) *Arrest of a harmless insane person without a warrant at a camp-meeting.*

David Dean, a deputy constable, and acting as such, was present at or near a camp-meeting, being assigned more particularly to duty immediately outside of the camp grounds, upon Oak Bluffs, a settlement occupied by summer residents. Mr. James H. Look, with the intention of attending the meeting, came on a steamboat to Oak Bluffs landing, the usual landing for persons going to the meeting. While he was at the Bluffs and about a quarter of a mile from the camp-meeting, and while he was reading from his bible and talking to a collection of people about him, Dean arrested him and took him to the headquarters of the state police inside of the camp grounds. He repeatedly demanded to know why he was arrested, to be taken before a magistrate, and to see the complaint if he was charged with any offense, but no cause was shown or made known to him. Upon his release he brought an action for false imprisonment against Dean. On the trial the defendant contended that the plaintiff was insane and incapable of taking care of himself, etc. He requested the court to instruct "that if the plaintiff was insane, and the defendant, honestly believing that the welfare of the plaintiff demanded that he should go from the crowd to which he was talking to a quiet place near by, took him forcibly to such place, using no more force than was necessary for such purpose, and acting from no other motive than a desire to assist and protect the plaintiff, such act would not be an assault nor an unlawful arrest or imprisonment." But instead the court instructed the jury that "if the plaintiff was insane, the officer had a right to arrest him, but it would in such case be his duty immediately to take proper steps to have him committed to a lunatic hospital, and if he failed to do so, he would be liable

from the beginning for the arrest." The jury found for the plaintiff and the defendant excepted. On the hearing the supreme judicial court overruled the exceptions. Chapman, C. J., said: "Both the request and the instructions assume that he was neither dangerously insane, nor disturbing the peace, but was merely insane. The defendant was a deputy of the state constable, but his office gave him no authority over the plaintiff. He had only such authority as any private person would have. The right which every citizen has to enjoy personal liberty is necessarily subject to some exceptions. Among them are the right to restrain a person who is fighting, or doing mischief, or disturbing a congregation, or has fallen in a fit, or is so sick as to be helpless, or is unconsciously going into great danger, or is drunk, or has delirium tremens, or is so insane as to be dangerous to himself or others. In such cases the right to restrain persons has its foundation in a reasonable necessity, and ceases with the necessity. As to insane persons who are not dangerous, they are not liable to be thus arrested or restrained by strangers. There is no reason why they should be thus liable; for it is well known that many persons who are insane, especially monomaniacs, are as harmless as any other persons, and are not deemed proper subjects for treatment in a hospital. The request for instructions was properly refused." Look v. Dean, 108 Mass., 116 (1871). Citing Colby v. Jackson, 12 N. H., 526; Anderdon v. Burrows, 4 C. & P., 210; Scott v. Wakem, 3 Fost. & Finl., 328; Fletcher v. Fletcher, 28 L. J., N. S. (Q. B.) 134; In re Oaks, 8 Law Reporter, 122.

(3) *Arrest without warrant — Right to a speedy trial — Abuse of power.*

Action for false imprisonment brought by Lewis Hopner against John E. McGowan, assistant clerk of the police court. There was verdict for defendant and judgment accordingly. Plaintiff appealed.

Bradley, J.: The plaintiff was arrested without warrant by a member of the police force of the city of New York and taken into the police court in which the defendant was assistant of the clerk. The defendant and the police justice of the court testified that the latter was then engaged in the consideration of some other case before him. The plaintiff, with one Graham, who, under the direction of the officer, accompanied him to the court, was taken to the desk of the defendant in the court-room, who proceeded to take a statement of the case upon which the plaintiff had been arrested, and while the officer was making his statement the defendant, apparently annoyed by the interruption of the plaintiff, directed the officer to put him in a room in which prisoners were kept, and he, with Graham, was taken there, where he remained a few minutes until the complaint was prepared, which was made by Graham against the plaintiff for an alleged assault and battery. Thereupon the plaintiff was brought before the court and discharged from custody on giving bail. The cause of the plaintiff's complaint was the direction upon which he was placed in the room in which prisoners were usually detained temporarily until their arraignment before the court. The clerk's assistants for the police courts are appointed by the board of police justices, and they are to obey the reasonable direction of the clerks, subject to the proper orders of the police justices and of such board. Laws of N. Y., 1882, ch. 410, § 1546. It does not conclusively

appear that the defendant, in giving the direction before mentioned, was acting pursuant to any rules or regulations of the court, or of the board of police justices, or in performance of any special authority conferred upon him by his superior. It is urged that his direction to place the plaintiff in the prisoner's room was wrongful, and charged the defendant as for unlawful imprisonment of the plaintiff.

If the plaintiff's arrest was without authority, and his custody by the police officer illegal, it might be seen that the defendant would, by causing the execution of his direction, be rendered liable as a participant in the unlawful arrest and custody of the plaintiff. But it must, upon the facts and exceptions as presented by the record, be assumed that the arrest of the plaintiff was legal. It was made while he was engaged, apparently, in the commission of a breach of the peace; that is to say, committing an assault upon Graham. This supported the right of the officer in making the arrest and in taking the plaintiff before the court, although there may have been circumstances which would constitute a defense for him upon the trial of the charge. He submitted to the arrest, and was immediately taken before the court, as required by the statute. And until he could be there arraigned it was within the power of the police officer to place the plaintiff in the prisoners' room without any direction of the court or its officer. No legal right of the plaintiff was therefore violated by placing and temporarily detaining him there to await the opportunity to bring his case in an orderly manner before the police justice. The defendant, as the assistant of the clerk, had his duties, whatever they were, to perform. In this instance he was attempting to ascertain the facts upon which to prepare the complaint with a view to the proper presentation for the action of the court or magistrate upon it of the charge on which the arrest was made. That service of the defendant, it may be assumed, was legitimately within his duties, and it was but reasonable that he should have the opportunity to do it without unnecessary interruption. The cause which induced him to direct the officer having the custody of the plaintiff to take him to the room referred to evidently did not spring from any purpose to make his detention oppressive. It was to enable him to obtain the information requisite to prepare the complaint for the presentation of the case to the magistrate. While it is reprehensible to render the custody of persons arrested unnecessarily uncomfortable, and for abuses in that respect an action may lie, there must be some discretion in the officer making arrests as to the nature of the restraint which may be essential to the security of the custody of prisoners. There was, in the present case, probably no ground for apprehension that the plaintiff would attempt to escape from the custody of the officer; but it is not seen that it could be treated as any abuse of the power of the police officer to place the plaintiff in the room as was done; and, if the orderly proceeding in the court-room would be promoted by the temporary absence of the plaintiff, it was fairly within the duty of the police officer, without any direction to do so, to remove him to the place appropriated to the detention of persons in custody awaiting the action of the magistrate or the opportunity to have their cases presented before him; and as this was legitimately within the authority of the officer, and could not be treated as an abuse of his power, it is difficult

to see any ground upon which the action against the defendant as for false imprisonment could be supported. Judgment affirmed. Hopner v. McGowan, 22 Jones & S., 98; 22 N. E. Rep., 558; 116 N. Y., 405 (1889).

(4) *Arrest of drunken rioters on view.*

Moseley was convicted for the false imprisonment of Tom Broxton, and assessed a fine of $25. The evidence of the state was to the effect that one Blake, then in company with Broxton, became intoxicated in the town of Alvarado, of which Moseley was marshal, and committed a disturbance of the peace, for which the marshal arrested and placed him in confinement; that *en route* to jail Broxton appealed to the defendant to release Blake, offering to provide bond, or to deposit money to secure his appearance before the mayor's court on the morrow. It was strenuously denied by the state witnesses that Broxton interfered any further with defendant in the discharge of his official duties.

For the defense it was proved, in substance, that Blake and Tom Broxton came into Alvarado; Blake got drunk, used loud and vulgar language, and was guilty of violent conduct on the public streets; while Broxton encouraged him, and declared that the "town officers could not arrest them," etc. Finally Moseley and his deputies arrested Blake and started to the calaboose with him. Broxton took hold of him and undertook to release him. Failing in this he determined that he should be released on bond. This the appellant refused and proceeded to the calaboose with his prisoner, Broxton following. When they reached the calaboose Broxton again demanded Blake's release, at the same time cursing and swearing that Blake should not be imprisoned. Finally Broxton entered on the platform of the calaboose, and took hold of or pushed one of the deputies back and demanded the release of Blake; whereupon Moseley and his deputies put him in the calaboose with Blake, and let them remain for about ten minutes.

On the trial Moseley asked the court to charge the jury, if Blake was drunk on the street, and was disturbing the peace, it was the duty of defendant, without warrant, to arrest and confine him in the calaboose, and that Broxton had no right to force or compel defendant to release said Blake on bond while said Blake was drunk; that if, while appellant and his deputies were conveying said Blake to the calaboose, the said Broxton tried to release said Blake by force, then appellant had the right to arrest and imprison said Broxton.

Willson, J.: It was error to refuse the second special charge requested by defendant. Said charge is applicable to the facts proved, is a part of the law of the case, and was not embraced in the general charge given to the jury. The action of the court in refusing said special charge was excepted to at the time of the trial, and is presented to this court by bill. For said error the judgment must be reversed, and the cause remanded for new trial. We find no other material error in the record. We will remark, however, upon the evidence, that it impresses us strongly with the belief that an officer has been convicted of an offense for doing that which the law not only authorized, but made it his duty to do. Moseley v. State, 23 Tex. App., 409; 4 S. W. Rep., 907 (1887).

§ 77. Detention by officer under dead, void and voidable process.— As the officer derives his authority from the process in his possession, it follows as a legal consequence that the detention of the person against whom the writ issues must depend for its legality upon the legality of the writ. And therefore when the process becomes dead or void, and in some cases voidable, the officer may become liable for false imprisonment.

THE LAW ILLUSTRATED.—

Irregular act of officer — Dead process — Ratification.

Adams was attached and imprisoned under a statute of New York for refusing or neglecting to perform an award, the statute making the party "subject to all the penalties of contemning a rule of court." After his release he brought suit for false imprisonment against Freeman, who had obtained the rule of court and caused his arrest. The plaintiff, Adams, contended that his arrest was irregular because the sheriff had arrested him on the attachment after its return day. Upon a demurrer the court held that it was lawful for the sheriff to have arrested Adams on the return day, and it not appearing that Freeman gave any directions to have him arrested afterwards, the trespass, therefore, if any, was committed by the sheriff and not by the defendant. It not appearing that the act had been in any way ratified, judgment was given for the defendant. Adams v. Freeman, 9 Johns. (N. Y.), 117 (1812). Citing Laws N. Y., vol. 1, 156. Cited in 2 Denio, 448; 2 Barb., 638; 8 Barb., 357; 42 How. Pr., 253.

(2) *Arrest on body execution after satisfaction of the judgment — Notice to sheriff.*

During the three years ending with December 31, 1882, Bowe was sheriff of the city and county of New York, and, as such, in August of that year, received an execution issued against the person of Abraham Davis, which, after reciting the recovery of a judgment in the marine court by one Gregg against him and another for the sum of $83.21, costs, commanded him to arrest the judgment debtors, and to commit them to the jail of said county until they paid said judgment, or were discharged according to law. In September, 1882, the sheriff, by virtue of said execution, arrested Davis, who furnished the usual bond, and was admitted to the liberties of the jail. December 31, 1882, said judgment was duly satisfied of record, and a notice, signed by the attorney who issued said execution, was delivered to the attorney for Davis, who on the same day caused it to be filed in the office of the defendant. The following is a copy of said notice, viz.: "Marine court of the city of New York. Michael Shutter and Abraham Davis v. Robert Gregg. To the sheriff of the city and county of New York: You will please discharge from custody the judgment debtor, Abrham Davis, by virtue of the execution herein. Yours, etc., T. Corning McKennie, Defendant's Attorney." Indorsed: "Received Decem-

ber 13, 1882, 12:53 P. M." The witness who delivered the notice to one of the deputies of the sheriff in the sheriff's office testified that he gave the paper to the deputy and asked him "if that was all right," and was answered that it was. He also testified that he left the paper there, and, in substance, that this was all that took place. The term of the sheriff expired on the 31st of December, 1882, and on the 6th of January, 1883, but within the time allowed by law for the delivery to the incoming sheriff of jails, prisoners, process, etc., Bowe indorsed upon the bond given by Davis on his admission to the jail liberties, among other things, the following: "Marine court. Robert C. Gregg v. Abraham Davis. . . . Abraham Davis, the above-named de fendant, is hereby remanded to jail;" and signed the same as late sheriff. This paper, called a "Remand Order," was delivered by Bowe to a deputy, and the plaintiff was arrested by virtue thereof on Saturday, January 6, 1883, after 10 o'clock at night. He was taken through the streets to the door of the Ludlow-street jail, when he was allowed to go until the following Monday morning upon the payment of $10 to the arresting officer. On Monday morning he went to the sheriff's office, and was informed that if he did not furnish bondsmen by 12 o'clock he would be arrested again, but, upon showing that the judgment was satisfied, was told that he could go home. The remand order, as Bowe testified, was issued for the purpose "of transfer to his successor," after notice by mail to prisoners upon the limits to appear with bondsmen, and give bail to the new sheriff. It did not appear that Davis received a notice of any kind. After his release Davis sued the sheriff for false imprisonment. On the trial a verdict was found for the plaintiff. The defendant appealed.

In the court of appeals the opinion was by Vann, J.: "Upon the trial of this action the court in its charge to the jury said: 'The plaintiff offered evidence to show that, some time before the re-arrest, a notice was given that you have heard read here, signed by the attorney for the opposite party, directing the sheriff to discharge the plaintiff from arrest under the execution. I will hold here, for the purposes of this action, that that notice was sufficient to entitle the plaintiff to a discharge, providing that such notice was left with the sheriff, and not withdrawn, and that is the first question that you are to determine here.' The defendant excepted 'to so much of the charge as stated . . . that the notice was sufficient to entitle the plaintiff to a discharge unless withdrawn.' This exception raises the question whether the notice signed by the attorney who issued the execution was, under all the circumstances, effective as a discharge of the prisoner. . . . Service upon the sheriff of a certified copy of a discharge by the clerk of a judgment would be notice to him that his power to collect an execution issued upon such judgment was at an end. Less formal notice, while not conclusive upon him, might charge him with the duty of making inquiry before taking further action, and he would be entitled to a reasonable time for that purpose. If, when a judgment is paid to the attorney, the judgment debtor is in custody, either actual or constructive, under an execution issued against his person upon such judgment, it is manifestly within the power of the attorney to authorize the sheriff to discharge him. The power to issue a satisfaction piece implies a

power to discharge, and while neither power may be exercised as between the attorney and his client to the injury of the latter, third persons, in the absence of notice to the contrary, have the right to presume that the power, when exercised, was authorized by the client, either expressly or by virtue of the original retainer. When, therefore, the direction to discharge was served upon the sheriff on the occasion in question, the presumption arose that it was duly authorized, because it was within the apparent powers of the attorney. Moreover, if an attorney does an act which would be a violation of his duty unless a certain condition had first been performed, it will be presumed that such condition was performed. 2 Best, Ev. (Wood's ed.), 641-645; Hamilton v. Wright, 37 N. Y., 502; Corning v. Southland, 3 Hill, 552. It follows that when the order to discharge the plaintiff from custody, by virtue of the execution against his person, reached the sheriff, it was accompanied with the presumption of lawful authority. While this presumption may not have been conclusive upon the defendant, it required some action on his part. Having received the discharge without objection, he was bound to return it or to give notice that he required something further, or else to act upon it as sufficient. He retained it for twenty-four days without notice or question, and then treated it as a nullity. If he was in doubt as to the authority of the attorney, it was his duty, under the circumstances, to say so. If he wanted further proof he should have demanded it. If he had any reason to question the sufficiency of the discharge, or for refusing to comply with it, he should have made it known, so that the plaintiff would have an opportunity to remove the objection. But he said nothing and did nothing, leaving it to be inferred that he was satisfied in all respects. Therefore, when he caused the plaintiff to be rearrested, under the facts as the jury is presumed to have found them, he acted at his peril and must suffer the consequences. The judgment should be affirmed." Davis v. Bowe, 118 N. Y., 55; 54 N. Y. Super. Ct., 520; 23 N. E. Rep., 166 (1889).

(3) *Execution against the body without judgment.*

For issuing an execution against the body and causing it to be executed on a satisfied judgment, an action for false imprisonment will lie, though the fact of the satisfaction be not entered of record, and though the execution have not been set aside for irregularity. The case is the same as if an execution had been issued without any judgment having ever been recovered. Although the execution being regular on its face will protect the sheriff, the party and attorney are bound to know at their peril whether there was a judgment to warrant it. Deyo v. Van Valkenburgh, 5 Hill (N. Y.), 246 (1843).

(4) *False imprisonment lies for an arrest under voidable process.*

Dyett obtained an assignment of a judgment which had been rendered against Chapman, and procured the substitution of an attorney in the place of the attorney who had obtained the judgment. A *ca. sa.* was then issued in the name of the substituted attorney and delivered by his partner to the sheriff, upon which Chapman was arrested September 27 or 28, 1827. October 31, following, the *ca. sa.* was set aside by this court, with costs.

Special bail had been put in and filed in the cause in which the *ca. sa.* was issued, and the *ca. sa.* was sued out without the previous issuing of a *fi. fa.* In an action of false imprisonment brought by Chapman against Dyett, upon showing these facts, the plaintiff rested. The defendant moved for a nonsuit, insisting that as the *ca. sa.* was voidable only, and not void, the appropriate action, if any, was case, and not trespass; and further, that to entitle the plaintiff to sustain his action, he should have shown that notice of bail was duly given in the cause in which the judgment was obtained, upon which a *ca. sa.* issued. The motion for a nonsuit was denied. The defendants then proved a notice from the plaintiffs to them, bearing date in 1829, that he had assigned all his interest in this suit to one Jacob Talman, for a valuable consideration; and they insisted that such notice was evidence of satisfaction to the plaintiff for his alleged damages, and a bar to his right to recover; which position was overruled by the judge in his charge to the jury, who found a verdict for the plaintiff. The defendants moved for a new trial. In the supreme court it was held that the action would lie for an arrest under bailable process set aside by the court as irregularly issued. A new trial was denied. Chapman v. Dyett, 11 Wend., 31; 11 L. C. P. Co., 1012 (1833). Citing 6 Cow., 608. Cited in 5 Hill, 246; 69 N. Y., 241; 8 Barb., 19; 6 Barb., 313; 23 How. Pr., 126; 28 N. Y., 664; 54 N. Y., 156; 87 N. Y., 61; 5 Lans., 105; 24 Hun, 82; 19 Barb., 290; 34 Barb., 149; 32 How. Pr., 410; 46 Super. N. Y., 466; 3 Daly, 42; 42 How. Pr., 404; 39 How. Pr., 494; 32 How. Pr., 410; 11 L. C. P. Co., 1012.

§ 78. **Abuse of process.**—In cases where the process is valid, the officer may still render himself liable for its abuse, as where he refuses proper bail,[1] uses excessive force, subjects the defendant to unwarrantable insults or indignities, treats him cruelly, denies him proper food, or otherwise subjects him to oppression or undue hardship,[2] or uses the process to extort money or other thing from the defendant or person against whom the process issues.[3]

§ 79. **The law stated by Walker, J.**— The officer, the prosecutor, and all other persons concerned, may be indicted for a conspiracy to procure a criminal process for improper purposes. And if it appear that the officer who executed the process was engaged in the conspiracy, the writ can afford him no protection. But it is a grave offense in him to combine with others to procure criminal process for purposes of oppression,

[1] Berrier v. Moorhead, 22 Neb., 687; 36 N. W. Rep., 118 (1888).

[2] Page v. Cushing, 38 Mo., 523 (1854); Baldwin v. Weed, 17 Wend. (N. Y.), 224 (1837); Wood v. Graves, 144 Mass., 365; 59 Am. Dec., 95 (1887).

[3] Mechem on Public Officers, § 771 (1890); Halley v. Mixe, 3 Wend. (N. Y.), 350; 20 Am. Dec., 702 (1829); Baldwin v. Weed, 17 Wend. (N. Y.), 224 (1837).

fraud or private ends. His duty requires him to preserve the peace, to aid in the apprehension of persons charged with crime, and when he prostitutes his office to the attainment of private purposes, he is guilty of a violation of duty that deserves to be severely punished, and renders him unworthy of his office. Nor does it make any difference that he has thus basely lent himself to such practices for the promotion of the private interest of another — it is equally corrupt and reprehensible. Such deviation from his duty deserves no sympathy at the hands of courts, and must degrade him in the estimation of all right-thinking men. When he receives his process his duty is plain and easily understood, and he must be held to its discharge fairly and in good faith. He has no right to control the process; he must execute it as required by the law, and has no power to release a prisoner thus apprehended; nor can he use the process to extort money from the accused, or make the writ a means of compelling him to submit to terms imposed by the prosecutor, and when he does, he violates his duty, betrays his trust, outrages public justice, and richly merits punishment. When he thus acts he arrogates powers with which no person in the government can be invested, and instead of aiding in the enforcement of the law, and protecting the community in their rights, he becomes an oppressor. The law can never tolerate such corruption.[1]

APPLICATIONS OF THE LAW.—

(1) *Criminal liability for abuse of process.*

Slomer and one John Reese were indicted and convicted of false imprisonment. Slomer procured a warrant from a justice of the peace for the apprehension of one Frederick Fernharber on a charge of perjury, and placed it in the hands of Reese, who was a constable, to execute. Upon the warrant Fernharber was arrested and held in custody until he made an affidavit, which Slomer desired to use on a motion for a new trial, in a case on the trial of which Fernharber had previously testified. Slomer participated actively in procuring the affidavit. After it was made the constable demanded $2 of Fernharber for his trouble, a portion of which he paid, and was then permitted to escape. Reese made no attempt to again arrest Slomer. He returned the warrant indorsed that the accused had been arrested, but had escaped. The justice refused to receive the return. On error in the supreme court, the question arose as to how far

[1] Slomer v. People, 25 Ill., 70 (1864).

the warrant was a justification to Slomer, who procured it to be issued, and Reese, the constable, who served it. The conviction was sustained. Walker, J., in delivering the opinion, said: "The officer, the prosecutor, and all other persons concerned, may be indicted for a conspiracy to procure criminal process for improper purposes, and if it appear that the officer who executed the process was engaged in the conspiracy, the writ can afford him no protection." . . . "There can be no doubt that a prosecutor who has reasonable grounds to believe that a crime has been committed, and that the accused is guilty of its perpetration, is properly protected from a civil prosecution, although the accused may be innocent of the imputed crime. But when there is no probable cause to believe that he is guilty, and the prosecution is prompted by malice, then the prosecutor is liable to respond in damages for the wrong he has inflicted. In a civil proceeding the accused may go behind the affidavit and writ and show want of probable cause and malice, and that what was in legal form was in fact a false imprisonment; and no reason is perceived, where it appears in a criminal proceeding that it was instituted for the purposes of fraud, oppression of any kind, or for any other private object, and not for the purpose of punishing crime, why the mere forms of the law should be permitted to screen the prosecutor from punishment criminally for such abuse of legal process. It would be monstrous to permit the process of the law to be used for such base purposes." Slomer v. People, 25 Ill., 70 (1864).

(2) *Officer taking prisoner out of the jurisdiction.*

One William Morgan was supposed to have been murdered at Fort Niagara, in Niagara county, New York. Sometime afterwards a justice of the peace of Genesee county, an adjoining county, issued a warrant for the arrest of one Green, who was charged with having been concerned in the murder, directed to any constable of the county of Genesee, and delivered to William Rumsey, a constable of that county, who proceeded with it to the county of Monroe, where he procured it to be indorsed by a justice of that county, as required by a statute, before he could lawfully execute it. This thing done he arrested Green, but instead of taking him before a justice of the peace of Monroe county, or conveying him to Niagara county, where the murder was committed, as required by law, he carried him to Batavia, in the county of Genesee, where he was kept in close confinement for several days and then suffered to go at large. After his discharge he sued the constable for false imprisonment. A recovery was had, from which the defendant appealed.

Marcy, J.: The constable could, by virtue of the warrant, only arrest the plaintiff and take him before a justice of the peace of Monroe county to give bail, if the offense was bailable, or convey him to the county where the offense was committed. . . . He had no authority whatever to carry him to the county of Genesee. He cannot be considered as doing this by virtue of his office as constable of Genesee county, and therefore cannot claim the benefit of the act, etc. The judgment was affirmed. Green v. Rumsey, 2 Wend. (N. Y.), 611 (1829). Cited in 4 N. Y., 194.

(3) *Object of writ to extort money — No protection.*

Alfred Hackett sued Alonzo King for the conversion of some personal property. King claimed the property under a bill of sale, and Hackett replied that the bill of sale was obtained from him by duress and fraud. On the trial it appeared that Hackett had been in King's employment, and a constable arrested him for stealing money from his employer. The constable took him to King's house and then to the marshal's office, where after much talk he executed the bill of sale and was discharged without being taken before a magistrate. The warrant was never returned. The court instructed the jury, "If the plaintiff was arrested under a legal warrant and by a proper officer, yet if one of the objects of the arrest was thereby to extort money or property from him, or to enforce the settlement of a civil claim, such arrest would be false imprisonment by all who directly or indirectly procured the same or participated therein for any such purpose." On exception, the supreme court held that the instruction stated the law correctly. Hackett v. King, 6 Allen (88 Mass.), 59 (1863).

§ 80. Liability of executive officers for the defaults of their deputies.— Executive, ministerial and administrative officers who are charged with the performance of duties to individuals are bound to perform those duties in a legal and proper manner, exercising due care and diligence, and respecting and protecting the legal rights of others. This responsibility cannot be evaded by delegating its performance to another, but, whether the officer acts in person or through the medium of another, his legal duties and responsibilities remain the same.[1]

The rule is well settled that these officers are liable to all

[1] Mechem on Public Officers, §§ 797, 798 (1890); Brown v. Compton, 8 Durn. & E., 424; Abercrombie v. Marshall, 2 Bay (S. C.), 90; Lucas v. Locke, 11 W. Va., 81 (1877); Murfree on Sheriffs, § 60 (1884); Smith's Sheriffs, Coroners & Constables, 566 *et seq.* (1883); Allen on Sheriffs, 81 (1845); Harlowe's Sheriffs & Constables, § 353 (1884). It is laid down in Rolle, pl. 10, if a man be arrested by the bailiffs of the sheriff and thereupon he showeth to them a *supersedeas* to discharge him, and the bailiffs refuse, and afterwards detain him in prison, he shall have false imprisonment against the bailiffs and not against the sheriff. Of this case Lord Mansfield said: "When rightly understood it will appear to be a particular exception to the general rule, and the true inference from it is that where there is no exception the sheriff is liable." Ackworth v. Kempe, Doug., 42. But the sheriff is not liable for any extra-official act or misconduct of his deputy, as where he goes outside of the execution of his duty impelled by some private motive or malice of his own. State v. Moore, 19 Mo., 369; 61 Am. Dec., 563; Mechem on Public Officers, § 798. See Gwynne on Sheriffs, ch. 11, 583 *et seq.* (1849); Crocker on Sheriffs, § 869 (1871).

persons to whom they owe such duty for the misfeasance, malfeasance or non-feasance of their deputies to whom they confide its performance, so long as the deputy acts by color of his office.[1]

§ 81. Liability of sheriffs for the acts of their deputies.— The rule under consideration has been most frequently applied to sheriffs, and their liability for the misconduct, abuses, trespasses or neglect of their deputies, acting by color of office, is perfectly well settled. He must answer for all damages sustained, either by parties to process[2] in his hands, or by strangers.[3] This liability extends not only to the sheriff, but to the sureties on his official bond.[4] It does not extend, however, to extra-official acts of the deputy,[5] nor to the omission of an act which it was not his legal duty to perform.[6]

§ 82. The subject discussed.— In discussing the question as to whether an action of trespass *vi et armis* will lie against a sheriff for the faults of his deputy, where no immediate command, consent or recognition by the sheriff of the act alleged to be a trespass appears in evidence, Sewall, J., said: "The law undoubtedly is, that in trespass all are principals, as well those who command or procure as those who, being present,

[1] Van Schaick v. Sigel, 60 How. Pr., 122 (1880); Welddes v. Edsell, McLean (U. S. C. C.), 366; Hazard v. Israel, 1 Binn. (Penn.), 240 (1808); 2 Am. Dec., 438; Forsythe v. Ellis, 4 J. J. Marsh. (Ky.), 298 (1830); 2 Am. Dec., 218; Kennon v. Ficklin, 6 B. Mon. (Ky.), 414 (1846); 44 Am. Dec., 776; Harrington v. Fuller, 18 Me., 277 (1841); 36 Am. Dec., 719; State v. Moore, 19 Mo., 369 (1854); 61 Am. Dec., 563; Flanagan v. Hoyt, 36 Vt., 565 (1864); 86 Am. Dec., 675; Prusser v. Coots, 50 Mich., 262 (1883); McNutt v. Livingston, 7 Smedes & M. (Miss.), 641 (1846); Snedicor v. Davis, 17 Ala., 472 (1850); Wood v. Farnell, 50 Ala., 546 (1874); Mechem on Public Officers, § 797 (1890).

[2] Blunt v. Shepard, 1 Mo., 219 (1822); Marshall v. Hosmer, 4 Mass., 60 (1808); Esty v. Chandler, 7 Mass., 464 (1811); McIntyre v. Trumbull, 7 Johns. (N. Y.), 35 (1810); Mason v. Ide, 30 Vt., 697 (1858); Seaver v. Pierce, 42 Vt., 235 (1869); Whitney v. Farrar, 51 Me., 418 (1864); Ross v. Campbell, 19 Hun (N. Y.), 615 (1880); Smith v. Judkins, 60 N. H., 127 (1880); Grinnell v. Phillips, 1 Mass., 529 (1805); Knowlton v. Bartlett, 1 Pick. (Mass.), 270 (1822).

[3] Campbell v. Phelps, 17 Mass., 244 (1821); Norton v. Nye, 56 Me., 211 (1868); Rides v. Chick, 59 N. H., 50 (1879); Mechem on Public Officers, § 798 (1890).

[4] State v. Moore, 19 Mo., 369 (1854); 61 Am. Dec., 563.

[5] State v. Moore, 19 Mo., 369 (1854); 61 Am. Dec., 563.

[6] Herrington v. Fuller, 18 Me., 277 (1841); 36 Am. Dec., 719; Knowlton v. Bartlett, 1 Pick. (Mass.), 270 (——); Cook v. Palmer, 6 B. & C., 739 (1827).

are the immediate agents of the act complained of. Therefore, in declaring in actions of this nature, it is never necessary to distinguish between the adviser, the companions and the agent, for each and all are answerable severally and jointly, and all as principals. That this is the legal effect, where the proof is of direct command, is not disputed. That an implied command has the like operation appears by the legal doctrine respecting masters and servants. It seems to be well established by ancient and modern decisions that the master is liable for every act done by the servant in the course of his employment, the law implying from their relation, and from the circumstances of the act, that it is done by the procurement and command of the master. The law views the relation of a sheriff and his deputies in the same light. In official acts they are not distinguishable from each other. The relation of command and agency is more intimate and direct, and the responsibility of the principal or master for the acts of the servant is maintained upon stronger reasons of public policy, and regard to public welfare, than in any case which can be supposed within the common relation between master and servant."[1]

§ 83. The acts of the deputy for which the sheriff is liable must be done colore officii.— There is no proposition better settled than that a sheriff is liable *civiliter*, though not *criminaliter*, for all the acts of his deputies *colore officii*, and is liable therefor in the same form of action as if the acts complained of had been actually committed by himself.[2] If the act from which the injury resulted was an official act, the authorities are clear that the sheriff is answerable; if it was not an official but a personal act, it is equally clear that he is not answerable. But an official act, or act done *colore officii*, does not necessarily mean what the deputy might lawfully do in the execution of his office; if so, no action would ever lie against the sheriff for the misconduct of his deputy. It means, therefore, whatever is done under color or by virtue of his office.[3]

[1] Sewall, J., in Grinnell v. Phillips, 1 Mass., 530 (1808).

[2] Lucas v. Locke, 11 W. Va., 81 (1877); Sangster et al. v. Com., 17 Gratt., 131, and cases cited; James v. McCabbin, 2 Call., 273; Campbell v. Phelps, 17 Mass., 245 (1821).

[3] Knowlton v. Bartlett, 1 Pick.

§ 84. Liability of the sheriff to respond in exemplary damages for the conduct of his deputy.— A distinction has been taken between exemplary damages and those which are only a compensation for the injury sustained. This distinction is certainly worthy of great consideration by a jury when a principal, who has been in no way to blame, is sued for the conduct of his deputy. But in point of law, if the sheriff is answerable at all he must be answerable for such damages as a jury, considering all the circumstances of the case, thinks proper to award. Juries, we regret to say, sometimes find it necessary to check the rude and improper behavior of the sheriff and his deputies. The public safety requires that implicit obedience should be rendered to the officers of justice in the execution of their duty. On the other hand, the happiness of the people requires that these officers should be influenced by powerful motives to avoid all acts of rudeness and wanton injury.[1]

§ 85. Private persons assisting officers — Execution of civil process — The rule of liability as stated by Savage, C. J. (1833).— It is certainly true that if an officer be guilty of a trespass, those who act by his command or in his aid must be trespassers also, unless they are to be excused by virtue of some statutory provision. If a stranger comes to the aid of an officer in doing a lawful act, as executing legal process, but the officer by reason of some subsequent improper act becomes a trespasser *ab initio*, the stranger does not thereby become a trespasser;[2] but when the original act of the officer is unlawful, any stranger who aids him will be a trespasser though he acts by the officer's command.[3] Whenever a sheriff or constable has power to execute process in a particular manner, his authority is justification to himself and all who may come to his aid; but if his authority is not sufficient to justify him, it cannot justify those who aid him. He has no power to command others to do an unlawful act. They are not bound to obey him, neither at the common law nor under the

(Mass.), 271 (1822); Campbell v. Phelps, 17 Mass., 245 (1821).

[1] Hazard v. Israel, 1 Binney (Penn.), 240 (1808); Campbell v. Phelps, 17 Mass., 245 (1821).

[2] Elder v. Morrison, 10 Wend. (N. Y.), 128 (1833); Girling's Case, Cro. Car., 446 (——).

[3] Aystead v. Shedd, 12 Mass., 511 (1815).

statute, and if they do obey it is at their peril. They are bound to obey when his demands are lawful, otherwise not. The only hardship in the case is, that they are bound to know the law. But this obligation is universal: ignorance of the law is no excuse for any one.[1]

APPLICATIONS OF THE RULE.—

(1) *Private person called upon to assist a deputy sheriff.*

The plaintiff, McMahon, was arrested by a deputy sheriff, upon a warrant issued against one McManus for an assault with intent to commit a rape. The defendant, Green, was called upon by the officer to assist him in making the arrest, and in obedience to such command he accompanied the officer in making the arrest and in committing the plaintiff to prison. The plaintiff's name being McMahon instead of McManus he claimed the warrant under which he was committed to prison was void, and he brought an action against Green, who assisted the officer, for false imprisonment. A verdict being directed for the defendant, the plaintiff excepted. In disposing of the exceptions Aldis, J., said: "Sheriffs and other officers are by statute empowered to require suitable aid in the execution of the office in apprehending criminals. Comp. Stat. Vt., ch. 13, § 11. When the defendant was called upon by the sheriff in this case to assist him in arresting the plaintiff he was not at liberty to refuse. Nor could he demand of the sheriff an inspection of the warrant under which he was acting, in order to see by what authority he was proceeding, and whether in his judgment it would be safe to assist him. It was enough that he was the sheriff (or deputy sheriff), *a known public officer*, who called on him for aid in the execution of his office; it was his duty to yield immediate obedience to the demand. The nature of the case requires that there shall be no delay in rendering the requisite assistance; no nice inquiries into the written authority of the sheriff to do what he is doing. It is sufficient that the officer asks for aid in a matter in which he has by law a right to ask for aid, and that he is a known public officer. The person who is thus called upon is protected by the call from being sued for rendering the requisite assistance. If the officer has no warrant or authority that will justify him he may be liable as a trespasser; but the person who is called upon for aid, having no means of knowing what the warrant is by which the officer acts, and who relies upon the official character and call of the sheriff as his security for doing what is required, is clearly entitled to protection against suits by persons arrested. The necessity of the case forbids that he should have the means of knowing or the time to inquire into the anterior proceedings.

"Nor does the law intend that any such inquiry should be tolerated, or that the man called upon to aid officers in arresting criminals shall stop to examine papers and to take counsel as to the legality of the process under which the officers act. This statutory right of an officer to call for aid is but an affirmance of the common law. Bac. Abr., tit. Sheriff, N. 2.

[1] Elder v. Morrison, 10 Wend. (N. Y.), 128 (1833).

"So, too, it is held at common law that those who obey the commands of the sheriff in arresting criminals will be thereby justified through the sheriff, he acting without authority. Hamm. N. P., 63, 65." McMahon v. Green, 34 Vt., 69 (1861).

(2) *The person responding to the call for assistance does so at his peril.*

Morrison sued Elder for an assault, etc. The plaintiff, on the premises of one Milburn, offered for sale two horses at public auction, in pursuance of a previous notice. Woodward, a constable having in his hands an execution against Milburn, was present and forbade the sale, claiming the horses under the execution and demanding possession of them, which the plaintiff refused to yield. The constable demanded assistance from the bystanders; no one obeyed him, and he then called upon Elder by name to assist him in obtaining possession of the horses, threatening him with legal proceedings if he did not obey. The constable succeeded in obtaining possession of one of the horses, and then he, Morrison and Elder went into the stable where the other horse was, when a struggle ensued over its possession, in the course of which Elder jerked Morrison, who had hold of a halter which was upon the horse, about, elbowed him, and threw him down, which was the assault, etc., complained of. On the trial it was shown that the horses in question were not the property of the defendant in the execution, and it was claimed that the act of the officer in taking the property was illegal. The jury found for the plaintiff and assessed his damages at $25, upon which judgment was rendered. The defendant took the case to the supreme court on error. In passing upon the question as to how far Elder was justified in responding to the call of the officer, Savage, C. J., said: Whenever a constable has power to execute process in a particular manner, his authority is a justification to himself and all who come in his aid; but if his authority is not sufficient to justify the officer, it cannot justify those who aid him. He has no power to command another to do an unlawful act. They are not bound to obey, neither at common law nor by statute.[1] And if they do obey it is at their peril. They are bound to obey when his commands are lawful, otherwise not. Elder v. Morrison, 10 Wend. (N. Y.), 128 (1833). Citing Aystead v. Shedd, 12 Mass., 511; Leonard v. Stacey, 6 Mod., 140.

§ 86. Private persons assisting officers in the execution of criminal process.— As a very general rule the sheriff and all other like officers are authorized to call upon private persons to aid in the execution of criminal process. For a refusal to respond when so called upon, the person is liable to be punished by a fine and sometimes by imprisonment; but the

[1] By the statute of New York in force when this decision was rendered, it was provided that when any public officer shall find resistance or have reason to apprehend it in the execution of any process delivered to him, he may command any male inhabitant of his county, or as many as he shall think proper, to assist him in overcoming such resistance and in seizing and confining the resister. Persons refusing without lawful cause are liable to fine and imprisonment. 2 R. S., 441, §§ 80, 81.

protection afforded him by law is far more complete than when called upon to assist the officer in the execution of civil process.[1]

§ 87. Private person assisting officer — Execution of criminal process — The rule of liability.— As a public officer the sheriff is authorized to call upon citizens to aid him in apprehending or securing any person for felony or breach of the peace, and, if any person so required to assist the sheriff neglect or refuse to do so, he is liable to punishment by fine or imprisonment. We do not think that a man called upon by the sheriff is required, at his peril, to ascertain whether the sheriff has a proper warrant, or whether the offense charged against the person to be arrested is a felony, or that he may refuse to act until he is satisfied that the sheriff is acting legally, or within the scope of his office, in a criminal case. If he were allowed to do this, the object of the law would be defeated and rendered nugatory in many cases. There is often no time for inquiry, as action must be immediate. The necessity of the case will not permit the person thus summoned to stop to examine papers, or take counsel as to the legality of the process in the officer's hands, or to inquire whether any process is necessary in the particular case where his aid is required. Therefore the person who responds to the call of one whom he knows to be an officer is protected by the call from being sued for rendering the requisite assistance. The officer may not be acting legally, and therefore a trespasser; but the person assisting him, at his request or command, and who relies upon his official character and call, is protected by the law, and must necessarily be, against suits for trespasses and false imprisonment, if in his acts he confines himself to the order and direction of the sheriff.[2]

AN APPLICATION OF THE LAW.—

Liability of a person assisting in the execution of a search-warrant illegal on its face.

Rice brought an action *quare clausum fregit* against Reed and others. On the trial it was shown that they came to his house and carried away

[1] Firestone v. Rice, 71 Mich., 377; 38 N. W. Rep., 885 (1888); McMahan v. Green, 34 Vt., 69 (1861); Reed v. Rice, 2 J. J. Marsh., 44 (1829).

[2] Firestone v. Rice, 71 Mich., 377; 38 N. W. Rep., 885 (1888).

some slaves. The warrant was read in evidence on the part of the defendants for the purpose of showing that Reed, as constable, summoned the defendants to assist him, etc. It was also shown that they went to Rice's house, and there found the slaves mentioned in the warrant, and took and carried them before a justice of the peace. The warrant was issued upon information, given on oath by one of the defendants, that the slaves, consisting of a woman and four children, had been stolen, etc.; but it was held void because it failed to describe the place to be searched, as required by the law of Kentucky.

On the trial the court instructed the jury that the warrant was illegal and afforded no defense to the defendants. Judgment being for the plaintiff, the case was removed to the court of appeals on error.

In discussing the question of the liability of the defendants, who were summoned to assist the officer, Underwood, J., said: "But here another question arises. Admitting the warrant to be illegal, were the individuals summoned by the officer to assist in its execution bound to take notice of its illegality and to refuse giving their aid, or were they justifiable in obeying his commands without inquiring whether his authority was legal or illegal? The right and power of an officer to summon the citizen to aid in the execution of precepts to him directed is highly necessary, if not indispensable, to the well-being of society. If all those summoned had to examine and judge of the legality of the process, and then act upon their own responsibility, this necessary power in the officer would in practice be paralyzed in a great degree. It is laid down in Bacon's Abridgment, title 'Trespass,' 610, that 'Every person who has assisted in the execution of a writ of *fieri facias* must, if he justify in an action of trespass under the writ, unless he acted by the command or at the request of the sheriff or his officer, show the judgment upon which it issued; for if he acted officiously, it was incumbent upon him to take care that the judgment was regular. But if a sheriff or his officer, or a person acting by the command or at the request of the sheriff or his officer, justify in this action under a writ of *fieri facias*, it is not necessary for either of those to show the judgment upon which the writ issued; because the writ was a sufficient justification to every one of these, although the judgment was not regular.'

"It requires but a trivial extension of this doctrine to exonerate those from actions of trespass who act in good faith when commanded or requested by an officer in assisting to execute process which may not be regular. There is something which instantly strikes the moral sense as being wrong, when told that a citizen is regarded a trespasser for conscientiously aiding to execute the law as he conscientiously believed at the time. If officiously he undertakes to do it, then he puts his conduct upon his own judgment, and if that deceives him he is responsible; but if he acts under the command of another, and that other, in cases of the kind, may have lawful authority to command him, then we think he ought not to be responsible. In such cases the citizen obeying the officer should be looked upon in the light of a servant acting by compulsion, and the party injured should seek redress against the officer and those who act officiously. Under this view we think the instruction calculated to mislead the jury in respect to the defendants summoned by the officer to assist," etc. . . . Judgment reversed. Rice et al. v. Reed, 2 J. J. Marsh. (Ky.), 44 (1829).

§ 88. Liability of persons who "officiously," etc., assist officers in the execution of process.—Private persons who volunteer to assist officers of the law in the execution of process, without being commanded or requested to do so, and those who act "officiously" in such matters, must do so at their peril; and they are bound to take care that the authority of the officer is sufficient and his precept regular. Such persons put their conduct upon their own judgment, and if that deceives them they are responsible for their acts and liable as trespassers.[1]

§ 89. Private persons — Arrests by without process.— The right of a private citizen to make an arrest without process is much more restricted than that of a public officer. It is, however, the right and duty of every citizen, whether public or private, being a witness to the commission of a felony, to immediately cause the arrest of the offender.[2] So a private person may arrest one to prevent a breach of the peace,[3] but his right to do so ceases as soon as the affray has terminated.[4]

A private person may also arrest without process one suspected of felony, but to justify such an arrest the proof must show that a felony had actually been committed, and that the person making the arrest had reasonable grounds for believing the person arrested guilty.[5]

§ 90. Private persons appointed to execute process.— Private persons are frequently appointed to execute legal process, in which case the process is usually directed to such persons by name. The person so appointed will in general

[1] Rice et al. v. Reed, 2 J. J. Marsh. (Ky.), 44 (1829); Bacon's Abridgment, tit. Trespass, 610.

[2] Vanderveer v. Mattocks, 3 Md., 479 (1852); Lang v. Stole, 12 Ga., 293 (1852); Hancock v. Baker, 2 B. & P., 260; Taylor v. Strange, 3 Wend. (N. Y.), 384 (1829); Phillips v. Trull, 11 Johns. (N. Y.), 486 (1814); Brockway v. Crawford, 3 Jones' (N. C.) L., 433.

[3] In re Powers, 25 Vt., 261 (1856); Knott v. Gay, 1 Root (Conn.), 66 (1774).

[4] People v. Adler, 3 Park. (N. Y.) Cr. Rep., 249; Addison on Torts (Wood's ed.), 804; Phillips v. Trull, 11 Johns. (N. Y.), 486 (1814).

[5] Teagarden v. Graham, 31 Ind., 422 (1869); Morley v. Chase, 143 Mass., 396 (1887); Wakely v. Hart, 6 Binn. (Pa.), 316 (1814); Allen v. Wright, 8 Car. & P., 522; Renck v. McGregor, 32 N. J. L., 70 (1866); Stamhouse v. Elliot, 6 T. R., 315; Allen v. Leonard, 28 Iowa, 529 (1869); Chinn v. Morris, 2 Car. & P., 361; Brockway v. Crawford, 3 Jones' L. (N. C.), 433 (1856).

have all the powers, in relation to the execution of the process, of the officer whose duty it is by law to serve the particular process, and is subject to the same obligations and no other; and the process, if regular on its face, affords the private person to whom it is directed the same protection it would the officer whose duty it is to serve it, and no more.

APPLICATIONS OF THE LAW.—

Void process, if regular on its face, protects a private person appointed by the magistrate to serve it.

Mudrock brought an action for an assault and battery and false imprisonment, etc., against William Killips and Joseph Killips. William Killips made a complaint in writing as follows:

"*State of Wisconsin, County of Waukesha, Town of New Berlin — ss.:* I, William Killips, of the above-named town and county, first being duly sworn, depose and say that, at the town of New Berlin, Martin Mudrock (*alias*) obtained a settlement for house rent by giving me a fraudulent order, which I received in good faith; otherwise should not have settled for said rent. WM. KILLIPS.

"Dated New Berlin, April 20, 1885."

Upon this affidavit, E. J. Loomis, a justice of the peace, issued a warrant.

The warrant on its face was regular in form, and had upon it the following indorsement:

"At the request and risk of the plaintiff, I authorize Joshua Killips to execute and return this writ. E. J. LOOMIS, Justice of the Peace."

The evidence shows that Joshua Killips is the son of William Killips, the plaintiff named in said warrant, and that William Killips delivered the warrant to his son, Joshua, to serve upon the respondent, Mudrock; that he accompanied Joshua to the house of Mudrock to make the arrest; and that the acts complained of were committed in attempting to execute such warrant.

The trial resulted in a judgment for $1,000, and the defendant appealed.

In delivering the opinion of the court, Taylor, J., says: "The appellant, Joshua Killips, was not present when the warrant was issued, and knew nothing of what transpired before the justice; nor does it appear that he was informed by his father, or any one else, before he undertook to execute the warrant, of the facts which transpired before the justice when it was issued. There was, perhaps, evidence in the case which would have justified the court in submitting to the jury the question whether the defendant, Joshua Killips, did not abuse his authority under the warrant in making the arrest. The circuit judge did not, however, submit that question to the jury, but instructed them that 'under the law of the case, as entertained by the court, the evidence in regard to the complaint and warrant before the justice, Loomis, and any justification that that might furnish to these defendants for this assault and battery, are excluded from the case, upon the ground that no offense was charged, and that the de-

fendants are not justified in anything they have done by virtue of the warrant.' This charge was excepted to by the defendants, and they allege it as error.

"The person appointed to serve the warrant has all the powers of a constable in relation to the execution of the process, and is subject to the same obligations, and no other. That this warrant would have been a full protection to a constable who was by law authorized to serve the same, had it been delivered to such constable and lawfully served by him, there can be no reasonable doubt. This court has so held in the following cases: Sprague v. Birchard, 1 Wis., 357; McLean v. Cook, 23 Wis., 364; Stahl v. O'Malley, 39 Wis., 328; Grace v. Mitchell, 31 Wis., 533–539; Young v. Wise, 7 Wis., 129; Bogert v. Phelps, 14 Wis., 88; Watkins v. Page, 2 Wis., 92; Weinberg v. Conover, 4 Wis., 803; Griffith v. Smith, 22 Wis., 646. The warrant was therefore a justification to Joshua Killips in making a lawful arrest of the respondent by virtue of it; and instead of charging the jury that it was not to be considered by them as of any consequence in the action, the court should have instructed the jury that it was a justification to Joshua Killips, unless they found from the evidence he had abused his process and exceeded his authority in executing, or attempting to execute, the same. Upon the question as to the abuse of the process we do not think the evidence was so conclusive against the defendant, Joshua Killips, as to justify the court in deciding, as a matter of law, that he had abused his process and exceeded his authority, and that his writ did not, therefore, protect him. For the error in the instruction of the circuit judge affecting the rights of the appellant, Joshua Killips, the judgment of the circuit court is reversed as to him, with costs, and as to William Killips the judgment is affirmed, with costs, and the cause is remanded for a new trial as to the said Joshua Killips." Mudrock v. Killips, 65 Wis., 622; 28 N. W. Rep., 66 (1886).

§ 91. Detention under erroneous or void orders of court—Protection to persons acting under them, etc.—The rule upon this subject, to be deduced from the authorities, seems to be, that when a court is called upon to adjudicate upon doubtful questions of law, or determine as to inferences to be drawn from circumstances reasonably susceptible of different interpretations or meanings, and calling for the exercise of the judicial function in their determination, its decision thereon does not render an order or process based upon it, although afterwards vacated or set aside as erroneous or void, or subject the party procuring it to an action for damages thereby inflicted. Where the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act in the premises; and if it, nevertheless, proceeds and entertains jurisdiction of the proceeding, all of its acts are void, and afford no

justification to the parties instituting them as against parties injuriously affected thereby. But if the facts presented to the court call upon it for the exercise of judgment and reason, upon evidence which might in its consideration affect different minds differently, a judicial question is presented, which, however decided, does not render either party or the court making it liable for the consequences of its action.[1]

APPLICATION OF THE LAW.—

(1) *Liability of person acting under erroneous or void orders of court.*

Fischer brought an action for false imprisonment against George F. and J. C. Langbein, who were attorneys for one John Raab, the defendant in a suit in the New York common pleas in which Fischer was the plaintiff. As such attorneys they procured an order and commitment of Fischer for contempt in refusing to obey an order of the court requiring him to pay the fees of the referee to whom the facts in the case had been referred. On the trial the plaintiff was nonsuited. He appealed.

Ruger, C. J.: It cannot be disputed but that an attorney who causes void or irregular process to be issued in an action, which occasions loss or injury to a party against whom it is enforced, is liable for the damages thereby occasioned. In the case of void process the liability attaches when the wrong is committed, and no preliminary proceeding is necessary to vacate or set it aside as a condition to the maintenance of an action. Process, however, that a court has general jurisdiction to award, but which is irregular by reason of the non-performance by the party procuring it of some preliminary requisite, or the existence of some fact not disclosed in his application therefor, must be regularly vacated or annulled by an order before an action can be maintained for damages occasioned by its enforcement. Day v. Bach, 87 N. Y., 56. In such cases the process is considered the act of the party, and not that of the court, and he is therefore made liable for the consequences of his act. Void process is such as the court has no power to award, or has not acquired jurisdiction to issue in the particular case, or which does not, in some material respect, comply in form with the legal requisites of such process, or which loses its vitality in consequence of non-compliance with a condition subsequent, obedience to which is rendered essential. Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or non-existence of some fact or circumstance rendering it improper in such a case. In all cases where a court has acquired jurisdiction in an action or proceeding, its orders made or judgment rendered therein are valid and enforceable, and afford protection to all persons acting under them, although they may be afterwards set aside or reversed as erroneous. Simpson v. Hornbeck, 8 Lans., 53. Errors com-

[1] Fisher v. Langbein, 103 N. Y., 84; 8 N. E. Rep., 251 (1886); Marks v. Townsend, 97 N. Y., 599 (1885); Miller v. Adams, 7 Lans., 133; 52 N. Y., 409 (1873); Williams v. Smith, 108 E. C. L., 596.

mitted by a court upon the hearing of an action or proceeding which it is authorized to hear, but not affecting any jurisdictional fact, do not invalidate its orders, or authorize a party to treat them as void, but can be taken advantage of only by appeal or motion in the original action. Day v. Bach, 87 N. Y., 56.

There is no claim made that the order and commitment under which the imprisonment complained of in this case was effected was void, or even irregular, except for the alleged erroneous determination made by the special term upon the merits of the application. This determination consisted in holding that a contempt had been committed by the plaintiff, while, upon appeal, this court held otherwise. All of the facts constituting the alleged contempt were undisputed, and were presented to the special term for its consideration upon the hearing. After hearing the parties it decided that a contempt had been committed, and ordered the imprisonment complained of. It was conceded on that hearing that the plaintiff had disobeyed an order of the court, and the only question presented for its consideration was whether such disobedience "defeated, impaired, impeded or prejudiced" a right or remedy of the defendants. Upon the appeal to this court it was held that the case did not clearly show that any right or remedy of the defendants had been defeated, impaired, impeded or prejudiced by the disobedience alleged, and the order adjudging the plaintiff guilty of a contempt was for that reason reversed as erroneous. Fischer v. Raab, 81 N. Y. 235. A simple question of law was thus presented to the court as to whether all of the elements constituting the offense of contempt appeared on the application for the commitment. Whether they did or did not in no sense constituted a jurisdictional question. The court concededly had jurisdiction of the parties and the subject-matter of the application, and we think authority to determine whether a contempt had been committed or not; and the question for its consideration was whether the facts of the case brought it within the statutory definition of a contempt. An erroneous decision of that question in no sense affected the jurisdiction of the court over the subject-matter of the application. In a similar case it was said by this court that the fact that a justice of the peace "had jurisdiction of the person of the plaintiff, and of the subject-matter then pending, did not give him judicial authority to adjudge her guilty of a contempt, and to imprison her therefor. To have that authority there must have arisen before him facts which gave him power to consider of the question whether there had been a contempt committed by her. When facts arose which gave him that power, he had a right to adjudicate upon them, and is not liable to an action, though he may have held erroneously as matter of law." Rutherford v. Holmes, 66 N. Y., 370.

In the present case the court made an order, upon the application of the plaintiff, referring a certain disputed question of fact to a referee to hear and determine, and, in case such report was against the plaintiff, that he should pay the referee's fees incurred thereon. The plaintiff cannot question the validity of this order, for it was made at his request and upon his stipulation to pay the fees in the event provided for. The order was therefore lawful and such as the court had a right to make under the circumstances. The report of the referee being against the plaintiff, he was

requested to pay the fees and take it up; but this he neglected and refused to do. For this refusal he was adjudged guilty of contempt. The disobedience of its order by the plaintiff gave the court jurisdiction of the subject-matter, and called upon it to determine whether a contempt had been committed or not. The right to adjudicate upon this question did not depend upon the fact whether the plaintiff was guilty of a contempt, but whether a case had been made for calling for an adjudication upon that question. The power of the court to entertain jurisdiction of an action or proceeding does not depend upon the existence of a substantial cause of action, but upon the performance by the party of the prerequisites authorizing it to determine whether one exists or not.

It seems to us that the case of Williams v. Smith, 108 E. C. L., 596, is undistinguishable in principle from this. As concisely stated by Justice Erle, it was as follows: "The master of the rolls decided on the facts that Williams was guilty of contempt in not obeying the order. Such is the judgment of the master of the rolls on the very facts between the parties. The legal inference which that learned judge drew from the facts which were presented to him on the part of Williams was that he was guilty of a contempt. Upon appeal the lords justices were of opinion that the master of the rolls came to an erroneous conclusion, and they reversed his decision. That is a totally different thing from setting aside the attachment for irregularity in the proceedings." It was held that the decision of the master of the rolls was a judicial determination that protected the parties acting under it, as well as the officers making it. The judgment is affirmed. Fischer v. Langbein, 103 N. Y., 84; 8 N. E. Rep., 251 (1886).

(2) *Imprisonment under order of court afterwards vacated.*

A county judge was prosecuted for false imprisonment for granting an order of arrest, which was afterwards vacated upon the ground that the affidavit upon which it was founded did not show a sufficient cause for arresting the party. It was held, however, that the "decision and the order protect the party applying for it, and the attorney and all persons acting in obedience to the order;" that the affidavit presented "a state of facts which called upon the officer to pass judicially upon the question, and to determine whether a case for an order was made out or not." "It presents, to say the least, a colorable case, and that is enough to protect the officer who issued it." It was further said "that the doctrine that the judicial officer is protected whenever he has jurisdiction, and enough is shown to call upon him for a decision, even though he err grossly, and even intentionally, has long been firmly established. Upon the same principle of public policy, parties who in good faith institute the proceedings, and act under and in accordance with judicial determination, should be protected from accountability as trespassers whenever the officer is entitled to protection." Landt v. Stitts, 19 Barb., 283; Fischer v. Langbein, 103 N. Y., 84; 8 N. E. Rep., 251; Marks v. Townsend, 97 N. Y., 509.

The defendant was prosecuted for false imprisonment in procuring an attachment for contempt against a third party for not appearing before the judge in supplemental proceedings in obedience to an order requiring

him to do so. The affidavit upon which the attachment was issued was held upon appeal to be defective, and not to show the existence of the contempt alleged. It was held, however, that it constituted a protection as well to the officer issuing it as to the party procuring it; that the officer issuing the attachment had "jurisdiction of the matter, and acted judicially in making the order, and it is entirely clear that he cannot be made answerable as a trespasser for an error in judgment." Miller v. Adams, 7 Lans., 183; 52 N. Y., 409; Fischer v. Langbein, 103 N. Y., 84; 8 N. E. Rep., 251.

(3) *Detention under a rescinded order.*

Coffin, who had been tried and convicted for malicious mischief and sentenced to ten months' imprisonment in the house of correction, after serving his time brought an action against Gardner, the sheriff of Nantucket, for false imprisonment. It appeared that after his conviction, the sheriff, by order of the court, took him into custody in order to execute the sentence, but the court on the same day, for the purpose of allowing Coffin to be called as a witness without sending to the house of correction for him, rescinded the order and directed the sheriff not to detain him. On the day following the court ordered the sheriff to execute the original sentence, which was accordingly done. The plaintiff claimed that the power of the court was exhausted by the final sentence, and his arrest by the sheriff in carrying the sentence into execution, and the subsequent directions of the court, were not binding. His release by the sheriff he claimed was voluntary and the subsequent commitment illegal. On the trial the jury found for the defendant, and, on exception, it was held that the defendant was not liable unless he detained the plaintiff in custody after the court directed him not to detain him, and before he was again ordered into custody. Coffin v. Gardner, 1 Gray (67 Mass.), 159 (1854).

§ 92. Prosecutors in criminal cases — Liability — The law stated by Walker, J. — "There can be no doubt that a prosecutor, who has reasonable grounds to believe that a crime has been committed and that the accused is guilty of its perpetration, is properly protected from a civil prosecution, although the accused may be innocent of the imputed crime. But when there is no probable cause to believe that he is guilty, and the prosecution is prompted by malice, then the prosecutor is liable to respond in damages for the wrong inflicted. In a civil proceeding the accused may go behind the affidavit and writ and show want of probable cause and malice, and that what was in legal form was in fact a false imprisonment. And no reason is perceived, where it appears in a criminal proceeding that it was instituted for the purpose of fraud, extortion, oppression of any kind, or for any other private object, and not for the purpose of punishing crime,

why the mere form of law should be permitted to screen the prosecutor for punishment criminally for such abuse of legal process. It would be monstrous to permit the process of law to be used for such base purposes. And it will hardly be said that the commission of perjury, to start the prosecution, can sanctify such turpitude. If the end were attained by direct force it would amount to imprisonment, and if money should be obtained by force it would amount to robbery. Can it then be said that, because the same purpose is accomplished by the forms of law, the transaction is justifiable? While the law will protect the prosecutor who acts in good faith on probable cause, it should never permit its process to be prostituted to such unwarranted purposes. It is not the design of government to permit the citizen to use the form of the criminal law for the redress of private grievances. Ample civil remedies are afforded for that purpose."[1]

APPLICATIONS OF THE LAW.—

(1) *Prosecutor's conduct reckless, unreasonable, and without probable cause.*

On March 1, 1871, some money was stolen from a money drawer in Wall's shop in Charlestown. Shortly before the theft was discovered, a stranger came in, purchased a cigar and changed a bill for $20. About the same time another stranger came around in the rear of the shop and attracted Wall's attention by making inquiries about some real estate. Five days afterwards Wall saw a man in Boston, and, supposing him to be one of the persons concerned in the larceny, followed him until he stopped to talk with a friend. Wall then accosted a police officer and told him that he identified the man as the person who got the bill changed and robbed his till. He requested the officer to arrest the man, which he did. The officer requested the man under arrest to walk with him to the police station; this he did, Wall going along with them. Upon reaching the station Wall repeated his statement to the captain in charge, adding that the man was a smart thief and that a description of him could be found in the office of the chief of police, which he had left there. The captain examined the description, and noticing a marked discrepancy between it and the man under arrest, he sent for two of his acquaintances who knew the man, and they represented him to be a respectable citizen, and requested Wall to enter into an examination at once. Wall declined to answer any questions, but said he "knew his man," that "he was sure of his man;" "he was the smartest thief in the state." The captain told Wall it was a case of mistaken identity. The man, whose name was Mitchell, was detained until Wall went to Charlestown and returned with officers who arrested Mitchell and took him back to Charlestown, where he was put

[1] Slomer v. People, 25 Ill., 70 (1860).

into a cell at the police station, searched, and his money and watch taken from him. Wall again repeated his former statements. Afterwards Mitchell's friends arrived, and, being known to the officers, assured them that he was a respectable citizen, and he was taken from the cell and allowed to sit in the marshal's office. Then two witnesses who had seen the stranger in the shop called, and upon inspecting Mitchell, one said to Wall, "he is not the man," but the other thought he was. Wall persisted in saying he knew his man and would rather give $10,000 than have him get away. Towards night Mitchell's friends procured bail and he was released. On his appearance the next morning no complaint was made against him, the witness who thought he identified Mitchell, upon further examination, being satisfied he was mistaken. Wall requested that he be discharged, which was immediately done. No warrant was ever issued, there was no examination or trial. Upon his release Mitchell sued Wall for false imprisonment. He received $1,500 for the imprisonment, and $500 on a second count for slander. On exceptions the supreme judicial court held: "The defendant justified his proceedings on the ground of an honest mistake, resulting from an alleged strong personal resemblance between the plaintiff and the real offender. But the existence of any such resemblance was a controverted fact. There was evidence also which had some tendency to show that such information was furnished as to the plaintiff's good character, and that such circumstances were pointed out as to his personal appearance, as to render it doubtful, as a matter of fact, whether the defendant was acting upon such reasonable grounds of belief as to justify him for the purposes of this trial, or whether, on the other hand, his conduct was reckless, unreasonable, and without probable cause. This was a question of fact, and was submitted to the jury with proper instructions." Mitchell v. Wall, 111 Mass., 492 (1873). Exceptions overruled.

(2) *Liability of prosecutor for illegal act of justice.— False imprisonment.*

Langenberg & Stoener went before a justice of the peace, and made a complaint that Boerger had bought some shingles or boards of one Jarvis, who had been making them from their timber. That the boards belonged to them, and were on Boerger's premises. After some conference, the justice furnished them blanks for a warrant, and a complaint, which they filled out, and, having sworn to the complaint, the justice issued the warrant. The complaint alleged that on or about the 22d of July, 1885, Simon Boerger, or some person unknown, had received, taken and carried away, from the premises of Langenberg & Stoener in Boulware township, in the county of Gasconade, the following goods and chattels, the property of Langenberg & Stoener; that is to say, one lot of oak shingles, between five and six hundred, made by Sam Jarvis out of timber belonging to Langenberg & Stoener, for the erection of a dwelling-house on the premises of Langenberg & Stoener; and they had reasonable ground to suspect, and did suspect, that they are concealed on or about the premises of Simon Boerger, in the township and county aforesaid. The search-warrant, after other recitals, commanded the officer to search the premises for the prop-

erty, and, if found, to bring the same, and also the said Boerger, before some justice of the peace of the county, to be dealt with according to law. The warrant was returned "executed by searching the premises of Boerger, and finding there the shingles, and by bringing the body of Boerger into court." The justice's docket shows that a few days later Boerger was discharged from arrest, by request of the prosecuting attorney, at the cost of Langenberg & Stoener. Then Boerger brought an action against his prosecutors for false imprisonment, etc. On the trial, at the close of his testimony, the court directed the jury to find for the defendants, and, denying a motion for a new trial, the plaintiff appealed.

In reversing the ruling, Barclay, J., said: 1. An action will lie for causing the issuance of a search-warrant maliciously, and without probable cause. To sustain it, the plaintiff must establish, among other things, want of probable cause on the part of defendant with reference to the action actually taken by the latter in the matter complained of. But a person making complaint to a magistrate is not necessarily answerable for whatever judicial action the magistrate of his own motion may take in the premises. If the magistrate misconceives the proper remedy, without the suggestion or intervention of the complainant in that particular, the latter is not liable for such error on the part of the former. The complainant is only responsible for the complaint he actually makes, and for such action thereon as may be lawful and proper in view of it. In the present case, however, the complainants not only made affidavit of facts before the justice, but wrote out the warrant ready for his signature. This tended to show their participation in the issue of the warrant, irrespective of the statements in their affidavit. The warrant, in so far as it commanded the arrest of plaintiff, was illegal; the affidavit on which it was founded being in many respects insufficient to support it. The circuit court excluded that part of the warrant when offered at the trial, but it should have been admitted as directly tending to sustain the cause of action for false imprisonment. Evidence tending to show that the plaintiff was restrained of his liberty, at defendants' instance, by reason of process which the magistrate had no authority to issue in the premises, is sufficient to sustain a count for false imprisonment. Neither malice nor want of probable cause need to be proved to support such an action. Under the present law of Missouri, a search-warrant, properly, should not contain a clause of arrest. The function of such a warrant is to cause a search to be made by an officer at a particular place for personal property stolen or embezzled, and to secure the production of the property, if found, before the magistrate. If the facts stated in the sworn application for it also constitute a charge of crime, the magistrate may issue a separate warrant of arrest, though in that event the insertion of such order in the search-warrant would be a mere irregularity, not vitally affecting the legality of the process. But in the case at bar the facts stated in the preliminary affidavit were wholly insufficient to justify the arrest of plaintiff. Hence there was evidence to go the jury upon the count for false imprisonment. Boerger v. Langenberg, 97 Mo., 390; 2 S. W. Rep., 223 (1889).

(3) *Ratification by prosecutor of an illegal arrest in a criminal case.*

In an action by a husband and his wife for a malicious prosecution of the wife, it appeared that the defendant made a complaint on oath before a trial justice, accusing the wife of larceny, and the husband of inciting and commanding the wife to the crime, and praying for the arrest of the husband; that the warrant was for the arrest of the husband only; that both were brought from another state on a requisition from the governor of Massachusetts, and were arrested and brought before the justice; that the wife was required to plead to the complaint, to answer further thereto at a subsequent day, and to give surety for her appearance for that purpose, and in default of bail was committed to jail, and on the day fixed for trial was discharged, being found by the magistrate to be not guilty. The jury were instructed that the making of the complaint did not in itself render the defendant liable for the subsequent arrest and imprisonment of the wife; but that if he intended and participated in her arrest and imprisonment upon the complaint, the requisition or the warrant, he was, if, and so far as, her arrest and imprisonment were caused by such acts of his, done with malice and without probable cause, liable for damages therefor in the action. The plaintiff recovered, and, exception being taken, it was held that the action could be maintained; that the instruction was correct. Gibbs v. Ames, 119 Mass., 60 (1875).

§ 93. Prosecutor must act in good faith.— Where a criminal prosecution is commenced under circumstances which make it apparent that the prosecutor had some collateral purpose in view, rather than the vindication of the law, as where a prosecution was commenced in order to compel the surrender of notes about which there was a dispute, a finding of a want of probable cause will be fully satisfied.[1]

§ 94. The prosecutor is not required to act from public motives.— To constitute probable cause for a criminal prosecution the law does not require that the prosecutor should act from public motives. It is sufficient if he has such information or knowledge of such facts as would lead a man of ordinary caution and prudence to entertain an honest belief that the person accused was guilty.[2]

[1] Paddock v. Watts, 116 Ind., 156; 18 N. E. Rep., 521 (1888); Kimball v. Bates, 50 Me., 308; Brooks v. Warwick, 2 Starkie, 893; McDonald v. Rooke, 2 Bing. N. C., 219.

[2] Woodman v. Prescott (N. H.), 10 Atl. Rep., 999 (1890); Eastman v. Keasor, 44 N. H., 518 (——).

AN APPLICATION OF THE RULE.—

Malicious prosecution — Probable cause — Prosecutor need not act from public motives.

The plaintiff claimed that the defendant wilfully and maliciously procured an indictment against him for larceny. Among other things, the court instructed the jury that, in order to entitle the plaintiff to recover, the burden was upon him to prove that the prosecution was instituted maliciously, and without probable cause, and that both these must concur; that probable cause for a criminal prosecution is such conduct on the part of the accused as may induce the belief that the prosecution was undertaken from public motives; that in the present case the plaintiff claimed, and his evidence tended to show, that the defendant obtained the indictment for larceny against him to coerce him and his friends to pay the defendant a private debt which the plaintiff owed him, and not from public motives, while the defendant claimed, and his evidence tended to prove, that he acted in good faith, from public motives, and prosecuted the plaintiff because he thought him guilty; that, if the defendant prosecuted the plaintiff, thinking him guilty, as he claimed, and for the reasons his evidence tended to prove, it would constitute a probable cause; on the contrary, if he did not, but prosecuted the plaintiff to obtain the pay on his debt, as the plaintiff's evidence tended to prove, it would be without probable cause. The defendant excepted to the charge, and requested the court to instruct the jury that "probable cause is where such a state of facts exists in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty." The court denied the request, and the defendant excepted.

Smith, J.: To constitute probable cause for a criminal prosecution, the prosecutor need not act from public motives. It is sufficient if he has such information and knowledge of such facts as would lead a man of ordinary caution and prudence to entertain an honest belief that the accused was guilty. The instructions requested were correct, and were approved in Eastman v. Keasor, 44 N. H., 518, 520. The instructions given required the jury, in order to return a verdict for the defendant, to find that he instituted the prosecution not only because he thought the defendant guilty, but that he acted from public motives. For error in the instructions the verdict must be set aside. Exceptions sustained. Woodman v. Prescott (N. H.), 10 Atl. Rep., 999 (1890).

§ 95. Persons directing the execution of legal process — The law stated by Bigelow, J.— Strangers and third persons are not required, in the exercise of a public duty, to assume the responsibility of executing legal process. If they interfere of their own motion, without authority or command from the officers of the law, to cause a writ or warrant to be enforced, they act at their peril; and if the process, though regular on

its face and apparently good, was unauthorized, or was issued by a tribunal having no jurisdiction, or acting beyond the scope of its power, they are liable for the consequences arising from the enforcement of unlawful process. It is upon this ground that a party is held responsible, at whose suit execution is made, when the officer serving it incurs no liability. The rule is that if a stranger voluntarily takes upon himself to direct or aid in the service of a bad warrant, or interposes and sets the officer to do execution, he must take care to find a record that will support the process, or he cannot set up and maintain a justification.[1]

APPLICATIONS OF THE LAW.—

(1) *Liability of a person causing the arrest of another.*

During the late civil war one Nicholas Roth was suspected of discouraging enlistments in the army. Several of his neighbors went to the sheriff of the county and requested him to arrest Roth. This he refused to do without an affidavit. The neighbors then went to one Bradner Smith and got him to make an affidavit stating that Roth had said in his presence that he had advised his friends not to enlist in the war. Upon this affidavit, without other authority, the sheriff arrested Roth, and, after confining him for about twenty days at the county jail, delivered him to the United States marshal, by whom he was taken to Chicago and confined for some time in Camp Douglas. After his discharge Roth sued Smith for false imprisonment. On the trial it appeared that Roth and Smith had an altercation on the day the arrest was made, and that hard words passed between them, but it did not appear that Smith advised the arrest or that he knew that Roth was to be arrested upon the affidavit. One of his neighbors testified that he advised him to make the affidavit. Another testified that he went to Smith to get him to make it, but nothing was said about the arrest. The sheriff testified that Smith did not advise him to make the arrest, but it did appear that on the day after the arrest Smith said, while speaking in reference to the arrest: "I am the man that had him arrested." On the trial the jury found for the defendant. A motion for a new trial being overruled, the plaintiff took the case to the supreme court on error. In delivering the opinion of the court, Chief Justice Walker said:

"The last ground urged in favor of a reversal was overruling the motion for a new trial by the court below. It involves the question whether the evidence warranted the finding of the jury.

[1] Emery v. Hapgood, 7 Gray (73 Mass.), 55 (1856); Barker v. Braham, 3 Wils., 376; Parsons v. Loyd, 3 Wils., 341 (——); Brant v. Clutton, 1 M. & W., 408 (——); West v. Smallwood, 3 M. & W., 418 (——); Codrington v. Lloyd, 8 Ad. & El., 449 (——); Carratt v. Morley, 1 Ad. & El., N. R., 18 (——); Green v. Elgee, 5 Ad. & El., N. R., 114.

"If defendant counseled, advised or procured the arrest and imprisonment, although not an active participant in the act, he was nevertheless responsible for its consequences. If, however, he neither advised, counseled, aided nor assisted in the arrest, he should not be held liable.

"Several persons seem to have advised him to make the affidavit for his arrest. He seems to have made it, and the sheriff had it when he arrested plaintiff. Again two witnesses testified that on the day following the arrest and imprisonment of the defendant, they heard defendant say that he was the man who had plaintiff arrested on the previous day. If this evidence is to be credited, it seems to us that it was an admission that he was responsible for the act. So far as the record before us discloses, these witnesses stand unimpeached, and unless their manner on the stand satisfied the jury that they were unworthy of belief, we must believe that the jury failed to give due weight to this admission. We therefore believe that the case should be submitted to another jury for their consideration. The judgment below is reversed." Roth v. Smith, 41 Ill., 314 (1866).

(2) *Liability of person making complaint.*

"If a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but if he receives a person into custody on a charge preferred by another of felony or breach of the peace, then he is to be considered as a mere conduit, and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable." Lord Ellenborough said this rule appeared reasonable, and that injurious consequences might follow if peace officers, under such circumstances, were personally responsible, should it turn out that in point of law no felony had been committed. Hobbs v. Branscomb, 3 Camp., 420 (1815). Cited in Holley v. Mix, 3 Wend. (N. Y.), 350 (1829).

(3) *Inciting officer to make arrest on a void writ.*

Under a statute in Massachusetts, justices of the peace had no jurisdiction to try complaints against persons for violating, in Lowell, the laws respecting the sale of intoxicating liquors. Notwithstanding this, Timothy Pearson, Esq., a justice of the peace, was trying one of these cases against Henry Emery, when Emery committed a contempt. For this the justice issued a warrant directing his commitment to jail. Ephraim Hapgood, who made the complaint against Emery for violating the laws respecting the sale of intoxicating liquors, was present; and after the warrant for Emery's commitment was issued and delivered to the officer, the officer having hesitated about serving it, Hapgood told him to serve it; if he did not he would be prosecuted; and that if he would serve it, he, Hapgood, would indemnify and save him harmless against all damages. In consequence of these statements the officer was induced to commit Emery to jail, which otherwise he would not have done. Emery, after his release, brought an action against Hapgood for false imprisonment. On the trial the court instructed the jury that the justice had no legal authority to issue the warrant, and that in issuing it he had exceeded his jurisdiction; and that the defendant (Hapgood), if he instigated and induced the officer

to commit the plaintiff (Emery) thereon when otherwise he would not have committed him, was liable. The verdict was for the plaintiff, and sustained. Emery v. Hapgood, 7 Gray (73 Mass.), 55 (1856).

(4) *Another case under the Massachusetts statute.*

Under the law of Massachusetts (St. 1854, ch. 63) no person could be arrested on mesne process, in an action of tort, unless the plaintiff, or someone in his behalf, first made oath that he believed that the cause of action set forth in the writ was just and true. Francis Adams commenced an action for slander against Simon Cody, and caused him to be arrested and committed to jail without such oath having been made. Cody brought an action for false imprisonment. On the trial it appeared that Adams, after procuring the writ as stated, took it to a constable and ordered him to serve it without delay. The constable, pursuant to instructions, arrested Cody and committed him to jail. The verdict was for the plaintiff. On exceptions, etc., the verdict was sustained. Dewey, J.: "The case shows an unlawful action on the part of the defendant for which he is properly sued," etc. Cody v. Adams, 7 Gray (73 Mass.), 59 (1856).

§ 96. A person who merely directs the attention of an officer to a violation of law not necessarily liable.— If one directs the attention of an officer to what he supposes to be a breach of the peace, and the officer, without other direction, arrests the offender, on his own responsibility, for what he assumes to be an offense committed in his presence, the person who did nothing more than to communicate the facts to the officer is not liable for false imprisonment, even though the arrest was unlawful.[1] Thus where a policeman made an arrest upon an unfounded charge preferred by a third person and not committed in the presence of the officer, Lord Denman said: "If the defendant directed the police officer to take the plaintiff into custody, he is liable, in the present action, for false imprisonment; but if he merely made his statement to the constable, leaving him to act or not, as he thought proper, . . . then the defendant will not be liable, at least in this form of action."[2] One who merely states to an officer what he knows of a supposed offense, even though he expresses the opinion that there is ground for an arrest, "but without making any charge, or requesting an arrest, does not thereby make himself liable in an action for illegal arrest."[3] Where,

[1] Veneman v. Jones, 118 Ind., 41; 20 N. E. Rep., 644 (1889); Taaffe v. Slevin, 11 Mo. App., 507; Lark v. Bande, 4 Mo. App., 186.

[2] Hopkins v. Crowe, 7 Car. & P., 373.

[3] Burns v. Erben, 1 Rob. (N. Y.), 555.

however, a private person induces an officer to arrest another without a warrant, and without an offense having been committed in the view of the officer, he will be liable for false imprisonment, unless he justify by showing that the charge was well founded.[1]

§ 97. **Client's liability for the acts of his attorney.**— It has always been held in this country that an attorney is invested with a large discretionary power, in anything pertaining to the collection of a demand intrusted to him for that purpose, and that his client must answer in damages if injury is occasioned by his conduct in the general scope of this employment. While he cannot discharge a debt or an execution without receiving satisfaction, he has control of the selection of legal remedies and processes which he may deem most effectual in accomplishing his object. The confidence reposed in him by his client, the supposed ignorance by the latter of the most appropriate remedies, require this.[2] Proceedings in the execution are proceedings in the suit which the attorney is authorized to bring.[3] It has been held that he may receive seizin on levy of execution; may discharge execution; may direct it to be issued in a particular manner; may, in his discretion, take out *feri facias* or *capias ad satisfaciendum*, and cause defendant to be arrested thereon.[4] In *Gray v. Wass*, 1 Greenl., 257, it is said by Chief Justice Mellen: That "the power of attorney does not cease until he has collected the debt committed to him for collection is admitted." In *Heard*

[1] Taaffe v. Slevin, *supra;* Ross v. Leggett, 61 Mich., 445; 28 N. W. Rep., 695; McGarrahan v. Lavers, 8 Atl. Rep., 592; Collett v. Foster, 2 Hurl. & N., 356; Griffin v. Coleman, 4 Hurl. & N., 264; Cooley, Torts (2d ed.), 202; Veneman v. Jones, 118 Ind., 41; 20 N. E. Rep., 644 (1889).

[2] Shattuck v. Bill, 142 Mass., 56; 7 N. E. Rep., 39 (1886); Willard v. Goodrich, 31 Vt., 597, 600; Jenney v. Delesdernier, 20 Me., 183; Fairbanks v. Stanley, 18 Me., 296; Turner v. Austin, 16 Mass., 181; Gordon v. Jenney, id., 465; Caswell v. Cross, 120 Mass., 545; Carleton v. Akron Sewer Pipe Co., 129 Mass., 40; Moulton v. Bowker, 115 Mass., 36; Schoregge v. Gordon, 29 Minn., 367; S. C., 13 N. W. Rep., 194; Clark v. Randall, 9 Wis., 135.

[3] Union Bank v. Geary, 5 Pet., 98–112; Erwin v. Blake, 8 Pet., 18–25; Flanders v. Sherman, 18 Wis., 575; Planters' Bank v. Massey, 2 Heisk., 360; Mayer v. Hermann, 10 Blatchf., 256.

[4] Pratt v. Putnam, 13 Mass., 363; Langdon v. Potter, id., 319; Corning v. Southland, 3 Hill, 552; Hyams v. Michel, 3 Rich. Law, 303.

v. Lodge, 20 Pick., 53, it is said by Mr. Justice Dewey: "It is within the scope of the power of the attorney to institute all such further proceedings as are necessary to render the judgment effectual to the creditor for the recovery of his debt. It has been held to be the imperative duty of an attorney in the original action, when the body of the debtor was arrested, to institute a *scire facias* against the bail, and if he neglect to do so he is held responsible." Citing *Dearborn v. Dearborn*, 15 Mass., 316.[1]

APPLICATIONS OF THE LAW.—

(1) *Capias ad satisfaciendum issued after satisfaction of judgment.*

Luther recovered a judgment in trover against Deyo and others. In August, 1837, Deyo obtained a discharge from all his debts on the application of two-thirds of his creditors under the provision of a statute of the state of New York. In 1838 Leland, the attorney of record for Luther, issued a *capias ad satisfaciendum* at the special instance and request of one Van Valkenburgh, he being then the assignee of Luther and owner of the judgment. Deyo was arrested on the *capias*. From this imprisonment Deyo was discharged on the ground that the discharge granted under the two-thirds act extinguished the judgment as effectually as if it had been paid or released. Deyo then brought suit against Leland, the attorney, and Van Valkenburgh, Luther's assignee, for whose benefit the *capias* had been issued. The facts being admitted on demurrer, it was held that the party at whose instance the *capias* was issued, as well as the attorney who issued it, was liable for false imprisonment, and this whether they were previously notified of the discharge or not, though the want of notice of the discharge was proper to be shown in mitigation of damages. Deyo v. Van Valkenburgh, 5 Hill (N. Y.), 242 (1843). Cited in 75 Ind., 103; 20 N. H., 329; 51 Am. Dec., 227; 11 N. Y., 71; 1 Wis., 468; 60 Am. Dec., 398; 6 How. Pr. (N. Y.), 253; 2 Abb. Pr. (N. Y.), 475; 4 Duer (N. Y.), 124; 4 T. & C., 623.

[1] The negligence or act of an attorney's clerk will be imputed to the party for whom the attorney acts. Hayward v. Goldsbury (Iowa), 19 N. W. Rep., 807. A client is liable in trespass where his attorney causes property to be taken and sold under an execution wrongfully issued. Foster v. Wiley, 27 Mich., 244. In the last case the court say that "it is sometimes said that the authority of an attorney ceases with recovery of judgment; but this is not so for all purposes. He is, in general, presumed to have authority to cause execution to be issued, and to receive the money in payment thereon. Langdon v. Potter, 13 Mass., 320; Commissioners v. Rose, 1 Desaus., 469; Gray v. Wass, 1 Greenl., 257; Brackett v. Norton, 4 Conn., 517; Silvis v. Ely, 3 Watts & S., 420." Shattuck v. Bill, 7 N. E. Rep., 39.

(2) Liability of attorney for acts of his clerk — Client's liability.

At the trial it appeared that the defendant brought an action against the plaintiff, and, after trial before a jury, recovered judgment. The action was brought by one Way, an attorney at law, and he conducted the case at the trial for Bill. Execution was issued to said attorney, and was in his office. One Clarence F. Eldridge, who was, and had been for about three years, a clerk in general employ in the attorney's office for him, and who assisted the attorney at the trial, seeing the execution in the office and deeming it needed attention, went before a master in chancery for Suffolk county and applied for a certificate, and made affidavit in the form provided by statute (cl. 5, § 17, ch. 162, Pub. Stat. Mass.), and the master annexed his certificate authorizing the arrest of Shattuck to the execution as well as said affidavit of Eldridge. Shattuck was described in the execution as of Natick, in the county of Middlesex, and it appeared his residence was there, and that he had no usual place of business in Suffolk county. Eldridge placed the execution in the hands of a deputy-sheriff, and caused the arrest of the plaintiff, Shattuck, thereon, who was taken before the same master in chancery, when he recognized in the usual form prescribed by law. Eldridge, who was called by the plaintiff, Shattuck, testified that he made said affidavit, procured said certificate, and caused the arrest, without the knowledge of or any instruction from said attorney, or from the defendant, Bill. Bill testified that he neither specially authorized his attorney to make said affidavit nor cause said arrest, and that he did not give any instruction to any one about making said affidavit or procuring such certificate or arrest, and that he had no knowledge of either of them until after this action was commenced. On the trial there was a judgment for the plaintiff.

On exceptions Devens, J., said: "While it does not clearly appear from the bill of exceptions what were the instructions as to the liability of the defendant for the acts of the clerk of the attorney, as the only ground, except that of express authority, upon which the plaintiff was allowed to recover, was by reason of the act of the attorney, we must assume, in favor of the defendant, that the acts of the clerk were treated as his acts only if done within the general scope of his employment, and that knowledge of or instruction to do the particular act by the attorney was not necessary. This was correct. Details of law business, especially such as that of the collection of claims, are often not done by the attorney, but intrusted to the subordinates, whose acts in the conduct of a business are his, so far as civil responsibility therefor, either on his own part or that of his clients, is concerned.

"But if this be conceded, the defendant still contends that the attorney had no authority himself, without express directions, to take the necessary steps, and to proceed to arrest the plaintiff. Certain early English cases have been cited by defendant, to the effect that the authority of an attorney terminates with obtaining judgment and execution. They do not require comment except to say that they proceed upon the ground that all the attorney is required to do by his warrant is thus terminated. But the warrant of attorney is not used in this commonwealth, and in this respect

there is a difference between the English practice and our own. Nor would it appear that obtaining the execution is now recognized in England as the termination of the duty of the attorney, if it ever was so formerly. In Collet v. Foster, 2 Hurl. & N., 356, the principal was held liable for the act of his attorney in causing a plaintiff to be improperly arrested on *ca. sa.*, no order to this effect having been given by him. In Smith v. Keal, 9 Q. B. Div., 340, it is said by Lord Justice Lindley: 'It was the duty of the solicitor to conduct the action in the ordinary way; and, if his client obtains judgment, it is his duty to do such acts as are necessary to obtain the fruits of his judgment. If a *fi. fa.* is necessary, he must issue it, and make the proper indorsement on the writ; and if he makes a mistake in so doing, his client is responsible.' In Butler v. Knight, L. R., 2 Exch., 109–113, it is said, in substance, the distinction between powers of attorney before and after judgment is less marked than formerly. The attorney has a reasonable discretion in the attainment of the object in view, and the selection of remedies. It would be mischievous to hold, where there is any evidence that the authority of the attorney was continued after judgment, that the attorney had not authority to act according to the exigency of the case. . . . The principal was properly held liable for the act of his attorney." Shattuck v. Bill, 142 Mass., 56; 7 N. E. Rep., 39 (1866).

(3) *Liability of plaintiffs in execution — Void writ.*

Winslow, by his attorney, at the term when judgment was recovered against him by Hathaway *et al.*, gave notice to him, by an entry on the clerk's docket, of his desire to be present on the taxing of the costs. Afterwards the attorney for Hathaway *et al.* taxed his bill of costs and gave it to Winslow's attorney, who marked a large number of items in it and then gave it to the clerk, informing him that if any of the marked items were allowed an appeal would be insisted upon. The clerk afterwards, in the absence of Winslow and of his attorney, struck out a small part of the marked items, and, on the application of the attorney for Hathaway *et al.*, made out an execution and sent it to him, but there being an informality in it, it was returned for correction. The clerk then made out another execution, but before it was taken from his office it was discovered by Winslow's attorney, who reminded the clerk of the unsettled question relative to the costs and the appeal claimed. He objected to the issuing of the execution. The clerk then said that the execution should not go out of his office until the question of costs should be settled by the court. In the clerk's absence it was delivered to one of the plaintiffs in the execution by the person who attended to the business of the office. Winslow's attorney, on hearing that the execution was in the hands of an officer, wrote to the judge before whom the cause was tried, and received a letter from him and another from the clerk, both in substance stating that the execution must not be served until the parties should have an opportunity to be heard respecting the costs. The letters were read to one of the plaintiffs in execution before it was served, who, notwithstanding, directed the officer to serve it. The officer then arrested Winslow, but he paid the execution without being committed to jail. On his release Winslow brought a suit for

false imprisonment against Hathaway *et al.*, the plaintiffs in the execution. On the trial the facts appearing as stated, the court instructed the jury that the appeal from the clerk was regularly claimed, and that it was immaterial whether it was claimed before or after the execution was issued; that the letter from the judge was equivalent to a *supersedeas;* that the execution was void, not being made returnable according to law; and thus they ought to find a verdict for the whole amount paid by Winslow in discharge of the execution with interest from the time of payment. The jury returned a verdict accordingly. The verdict was sustained. Winslow v. Hathaway, 1 Pick. (18 Mass.), 211 (1822).

(4) *Execution upon void judgment — Liability of attorney and plaintiff — Procuring false return.*

Farmer sued S. P, Crosby and Oliver Crosby for a malicious prosecution. The action grew out of that of Crosby v. Farmer, 39 Minn., 305; 40 N. W. Rep., 71, in which the plaintiff here was the defendant, and Oliver Crosby the plaintiff, and S. P. Crosby his attorney, and the judgment in which was set aside as void because there was no service of the summons upon the defendant. The allegations of the complaint are that in this former action the present defendants fraudulently and maliciously procured an officer to make a false return of personal service of the summons, and that, knowing such return to be false, they caused judgment on default to be entered against the present plaintiff, execution to be issued, and his personal property to be levied on and taken thereon. When the plaintiff rested, the court dismissed the action as to both defendants. The plaintiff appealed.

Mitchell, J.: "An examination of the evidence satisfies us that the plaintiff entirely failed to prove any malice, fraud or bad faith against either of the defendants. Indeed, his counsel here admits this to be the fact as to all proceedings up to and including the entry of judgment. The only charge of malice or bad faith which he now makes against the defendant is the issuing of execution after notice of the fact that the return of service of the summons was false, and causing plaintiff's property to be levied on after the judgment had been set aside. It appears that the execution was taken out and transmitted to the sheriff of Steele county, with instructions to collect, two days after the defendant (plaintiff here) had served notice of motion to have the judgment set aside. But the plaintiff and his attorney (defendants here) were not bound to accept as true the *ex parte* affidavits on which this motion was made. The sufficiency of the service of the summons depended upon the question whether the legal residence of Farmer was in Owatonna, where his family was living, or in St. Paul, where he boarded and spent most of his time, and where he was carrying on business. The judgment still remained, apparently, in full force, and regular on its face, with the return of an officer showing good service of summons. In the absence of malice or bad faith, S. P. Crosby would not be liable for causing an execution to be issued on the judgment at the instance of his client.

"An attorney is only liable where he institutes proceedings without authority from his client, or where he and his client fraudulently conspire to

do an illegal act, or where he acts dishonestly, with some sinister view or for some improper purpose of his own which the law considers malicious. Bicknell v. Dorion, 16 Pick., 478; Anon., 1 Mod., 209; Davies v. Jenkins, 11 Mees. & W., 745; Whart. Ag., § 611. It is true that the sheriff of Steele county made the levy a short time after the judgment was in fact vacated; but there was no evidence that this was at any directions of either of the defendants given afterwards. On the contrary, it is quite apparent that the only instructions to the sheriff were transmitted to him, with the execution itself, some time before the judgment was set aside. It does not appear when defendants received notice of the vacation of the judgment; but, assuming it was on the day the order was made, all that could be charged against them in that regard is that they were negligent in not more promptly recalling the execution. The action was therefore properly dismissed as to S. P. Crosby.

"His co-defendant, Oliver Crosby, however, who was plaintiff in the other action, occupies a different relation to the matter. Where a creditor causes an execution to issue upon a void judgment, he is liable for the damages arising from the acts of the officer in obedience to the writ. Gunz v. Heffner, 33 Minn., 216; 32 N. W. Rep., 886. In this instance, although the judgment was not vacated until March 20th, yet it was jurisdictionally void *ab initio;* and, moreover, the levy was not in fact made until April 3d. While the fact that the writ was regular on its face would protect the officer, and while the attorney who issued it at the direction of his client, in good faith, would not be liable, and while, if a judgment is merely erroneous, and hence valid until reversed, it might protect even the judgment creditor for acts done under it before reversal (see Peck v. McLean, 36 Minn., 228; 30 N. W. Rep., 759), and even conceding that the judgment in this case would have protected Oliver Crosby for anything done under it until it was formally vacated, yet, having set the process of the court in motion, and having placed it in the hands of an officer with directions to execute it, he is liable for the act of the officer in obedience to it, in making the levy after the judgment upon which it was issued was vacated. He was bound at his peril to see that the execution was recalled or proceedings under it stayed. Therefore, while the plaintiff failed to establish his allegations of fraud or malice, yet he made out a cause of action for trespass against the defendant Oliver Crosby." Farmer v. Crosby et al., 43 Minn., 459; 45 N. W. Rep., 864 (1890).

§ 98. Corporations, when liable, etc.— As a general rule, private corporations are responsible for the torts of their agents and servants, upon the same grounds and to the same extent as are individual principals or masters.[1] This liability does not rest in every respect on the rules which constitute the basis of the responsibility of the principal for the contract

[1] Taylor on Corporations (2d ed.), § 335 (1888); Denver, etc., R'y v. Harris, 122 U. S., 597 (1886); Fishkill, etc., Ass'n v. Nat. Bank, 80 N. Y. 162 (1880); Phil. R. R. Co. v. Quigly, 21 How. (U. S.), 202, 209 (1858); Salt Lake City v. Hollister, 118 U. S., 256 (1885).

of the agent, which depends altogether upon the question, was the contract within the scope of the agent's actual authority, or of such authority as the other contracting party, acting as a careful and prudent person, would be justified in inferring to exist from the course and general scope of the agent's employment.[1]

§ 99. **Municipal corporations — The cardinal inquiry — The doctrine stated by Dillon.** — "When it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation. If the municipality appoints or elects them, and can control them in the discharge of their duties; can continue or remove them; can hold them responsible for the manner in which they discharge their trust; and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest,— they may justly be regarded as its agents or servants, and the maxim of *respondeat superior* applies. But if, on the other hand, they are elected or appointed by the corporation in obedience to the statute, to perform a public service not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable."[2] Hence, on general principles, it is necessary, in order to render a municipal corporation impliedly liable on the maxim of *respondeat superior* for the wrongful act of an officer, to show that the officer was in fact an officer of the municipality, either generally or as respects the particular

[1] Taylor on Corporations (2d ed.), § 335 (1888).

[2] Dillon on Municipal Corporations, § 974; White v. Phillipston, 10 Met. (Mass.), 108 (1845); Hafford v. New Bedford, 16 Gray, 297 (1860); Griggs v. Foote, 4 Allen, 195, 197 (1862); Butrick v. Lowell, 1 Allen, 172 (1861); Kimball v. Boston, 1 Allen, 417 (1861); Child v. Boston, 4 Allen, 41, 52 (1862); Morrison v. Lawrence, 98 Mass., 219 (1867).

wrong complained of, and not an independent officer, and also that the wrong complained of was committed by him while in the legitimate performance of a duty of a corporate nature which devolved upon him by law or by the direction or authority of the municipality.[1]

§ 100. The subject continued.— Following the rules of law laid down in the preceding section, police officers appointed by a municipal corporation are not its agents or servants so as in law to render such municipalities liable for their unlawful acts in the discharge of their duties; and accordingly such corporations are not responsible for false imprisonments or assaults and batteries committed by its police officers, though done by them in attempts to enforce the ordinances of the municipality, nor for arrests made by them without process, unlawful acts of violence in suppressing unlawful assemblies,[2] and similar wrongs.

APPLICATIONS OF THE LAW.—

(1) *Municipality not liable for assault, etc., by police officers — Ratification.*

Colburn and Stacy were watchmen and police officers of the city of Lowell, with all powers of constables except that of serving civil precepts. About sunset on a day in October, 1855, while Mr. Butrick was standing peaceably and talking with another person upon the sidewalk, and interrupting no one in the proper use of the same, the officers ordered him off, and upon his refusing to go, assaulted, arrested and imprisoned him,

[1] Dillon on Municipal Corporations, § 974; Hilsdorf v. St. Louis, 45 Mo., 94; Lyman v. Bridge Company, 2 Aiken (Vt.), 255 (1827); Morrison v. Lawrence, 98 Mass., 219 (1867); Fisher v. Boston, 104 Mass., 87 (1870); Stewart v. New Orleans, 9 La. Ann., 461 (1854); Bennett v. New Orleans, 14 La. Ann., 120 (1849); Mitchell v. Rockland, 52 Me., 118 (1860); Small v. Danville, 51 Me., 359 (1864); Alcorn v. Philadelphia, 44 Pa. St., 348 (1863).

[2] 2 Dillon on Municipal Corporations, § 974; Perley v. Georgetown, 7 Gray (Mass.), 464 (1866); Tucker v. Rochester, 7 Wend. (N. Y.), 254 (1831); Butrick v. Lowell, 1 Allen (Mass.), 172 (1861); Burch v. Hardwick, 30 Gratt. (Va.), 24 (1878); Bowdloch v. Boston, 101 U. S., 16 (1880); Prather v. Lexington, 13 B. Mon. (Ky.), 559 (1852); Atwater v. Baltimore, 31 Md., 462 (1869); Ogg v. Lansing, 35 Iowa, 495 (1872); Odell v. Schroeder, 58 Ill. 353 (1871); Hafford v. New Bedford, 16 Gray (Mass.), 297 (1860); Pesterfield v. Vickers, 3 Coldw. (Tenn.), 205 (1866); Ready v. Mayor, etc., 6 Ala., 327 (1844); Stewart v. New Orleans, 9 La. Ann., 461 (1854); Dargaw v. Mobile, 31 Ala., 469 (1858); Chicago v. Turner, 80 Ill., 419 (1875); Martin v. Mayor, etc., of Brooklyn, 1 Hill (N. Y.), 545 (1841).

claiming that in so doing they were only performing their official duty. Butrick brought an action against them for false arrest, etc., and recovered $500. The city of Lowell authorized its solicitor to appear in the defense of the cause, and paid him for trying the same, and afterwards, in obedience to an ordinance, he made a report of all cases in which the city was a party or interested. The report included the case against the officers, and was accepted by the city council and placed on file in the city clerk's office. Being unable to collect his judgment, Butrick sued the city of Lowell, claiming that the city was liable both originally and by ratifying the acts by employing counsel to defend, etc. A nonsuit was ordered and the plaintiff appealed.

In deciding the case, Bigelow, C. J., said: "This case must be governed by the decisions in Hofford v. City of New Bedford, 16 Gray, 297, and Wolcott v. Swampcott, 1 Allen, 101. Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature; their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are intrusted, are derived from the law and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers and duties the city or town cannot be held liable. Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force as if they had been passed directly by the legislature. They are public laws of a limited and local operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, public officers act in their public capacity and not as the agents or servants of the city. The acts relied upon in this case to show a ratification or adoption by the city of the acts of the police officers cannot have that effect. They are entirely consistent with a belief on the part of the mayor and other agents of the city that the police officers had committed no invasion of the plaintiff's rights." Perley v. Georgetown, 7 Gray, 464.

It may be added that if the plaintiff could maintain his position, that police officers are so far agents or servants of the city that the maxim *respondeat superior* would be applicable to their acts, it is clear that the facts would not render the city liable in this action, because it plainly appears that in committing the acts complained of the officers exceeded the authority vested in them by the by-law of the city. Judgment for defendant. Butrick v. City of Lowell, 1 Allen (Mass.), 172 (1861).

(2) *A town not liable for false imprisonment, etc.— Ratification.*

Perley sued the inhabitants of Georgetown for false imprisonment. On the trial of the case it appeared that the assessors of the town illegally assessed a tax against Perley, and made their warrant in due form of law

to the town treasurer and collector for its collection. They subsequently abated a part of the tax and Perley paid the residue to the treasurer. Afterwards the treasurer demanded payment of a further amount, and, on plaintiff's refusal to pay it, issued a warrant to a constable, who arrested Perley and committed him to jail, where, after remaining fifteen days, he was released on *habeas corpus*. The town afterwards paid the constable's fees and charges for serving and executing the warrant, and also the jailer's charges for the board and maintenance of Perley while detained in custody at the jail. Merrick, J., the trial judge, reported the case to the full court upon the question whether the plaintiff could maintain his action against the town upon this evidence.

In ordering a nonsuit, Metcalf, J., said: "A town cannot be made liable for the illegal act of its officers or agents, unless those acts are done under its authority previously conferred, or are subsequently ratified by the town. In this case the town did not authorize its treasurer and collector to commit the plaintiff to prison for not paying a tax that had been abated, nor did it ratify the act of imprisonment by paying the collector's fees for commitment and the jailer's charges. If these payments had been made by an individual, it could not be pretended that he thereby made himself liable to the plaintiff in an action for false imprisonment. Nor can payment thereof by the town render the town so liable. The payment may have been made, and doubtless was made, for a very different purpose than that of ratifying or justifying the acts of their collector." Nonsuit ordered. Perley v. Georgetown, 7 Gray (Mass.), 464 (1866).

(3) *Liability of municipal corporations for acts of its officers.*

The town of Odell was incorporated under the general laws of the state of Illinois, and had, by virtue of such laws, passed ordinances for the preservation of the peace. and had appointed officers and intrusted them with the power of enforcing the ordinances adopted. Mrs. Hattie Schroeder was charged before a justice of the peace of the town with assault and battery: a warrant was issued, she was arrested, taken before the justice, tried and fined $15. Upon the termination of the trial the justice issued an execution against the property of the defendant, and handing it to the constable said: "Take care of her." She was then confined in the town prison for the space about of twenty-four hours. It was in the month of March; the weather was cold and very disagreeable. The prison was not close; it was without fire, bedding, or other furniture except a little straw, which was damp, until a few hours before her release, when a stove was put up and a fire made. It was claimed that Mrs. Schroeder had received great and permanent injury to her health; and upon her release she instituted a suit against the town to recover damages. A trial resulted in a verdict for $900.

On appeal, in delivering the opinion reversing the judgment, Walker, J., said: "It remains to determine whether the town is liable for this imprisonment. The fact that the trustees adopted the ordinances and appointed the town constable to see they were executed did not render the town liable for the unauthorized, illegal and oppressive acts of that officer. They, as the representatives of the town, only empowered him to do what the or-

dinances required, and not to oppress citizens of the place. They did not direct the act to be done, either as a board or as individuals; they, we must suppose, had no idea the officer would do anything more than the law required. All officers are required to perform their duty, and the electing or appointing power expects them to do no more; and if they should, that power is not responsible for the wrong. This was the individual act of the officer. The building of the prison was a lawful act, and its construction did not render the town liable for the wrongful imprisonment of prisoners therein, when they have done no act contributing to it. But while the trustees and other officers might, by illegal and unwarranted exercise of power, render themselves individually liable, that would not render the town liable. Any information the trustees may have had in reference to this imprisonment, or even had they participated in the illegal imprisonment, could not render the corporation liable. The people, when they elect these officers, cannot be presumed to have intended to authorize them to do illegal acts; to so hold would be to indulge in a presumption wholly unauthorized, as we know such could not have been intended. Their election but authorized them to perform legal acts and to exercise legitimate power; and when they depart from their proper power, they must be held individually liable, but not to impose a liability on the corporation. It would not be held that a county would become liable for the wrongful or oppressive acts of a sheriff because the people had elected him to the office, and, in principle, what constitutes the difference?" Board of Trustees v. Schroeder, 58 Ill., 353 (1871).

§ 101. Liability for the torts of employees.— If the corporation, acting within the scope of its corporate authority, employs agents or servants in such a manner as to put it within their power to cause a violation of a duty owed to third persons by the corporation, it will not be sustained in defense that the violation complained of was not authorized by it. And if the tort was committed in the course of an employment or in connection with transactions which the corporation had competently authorized or acquiesced in, and any such duty owed by the corporation is violated by the tort, it will be no valid defense to the corporation that the tort in question was not only unauthorized but was even *ultra vires* the corporation. In this field the doctrines of *ultra vires* have no application; but they do apply where the employment in the course of which, or the transaction in connection with which, the tort was committed, was *ultra vires* the corporation.[1]

[1] Cakes v. N. W. R'y Co., 36 Wis., 657 (1875); Taylor on Corporations, § 336 (1888).

§ 102. Liability for malicious prosecution and false imprisonment.— Private corporations are, as a general rule, liable for false arrests and imprisonments and suits maliciously prosecuted by its employees in all cases where the acts complained of were authorized or ratified by the corporation, or were instituted by some officer or agent acting within the scope of his authority or the course of his employment.[1]

APPLICATIONS OF THE RULE.—

(1) *Liability of a railroad corporation for false imprisonment.*

Michael Lynch purchased a ticket for a passage upon the Metropolitan Elevated Railway and entered one of its cars. Before reaching his destination he lost his ticket, and when he attempted to pass through the gate from the station platform, he was stopped by the gate-keeper of the company and informed that he could not pass until he produced a ticket or paid his fare. He stated the fact of his purchase of a ticket and its loss, and insisted on passing out, but was pushed back by the gate-keeper, who sent for a police officer and ordered his arrest. Lynch was then arrested and taken to the police station, where the gate-keeper made a complaint against him, and he was locked up for the night. In the morning he was examined before a police magistrate — the gate-keeper appearing against him — and was discharged. After his discharge he brought an action against the railroad company for false imprisonment. At the trial, in addition to the foregoing matters, it appeared that the railroad company had given orders to its gate-keepers not to let passengers pass out until they either paid their fares or showed tickets. Lynch recovered, and the railroad company appealed. It was held by the court of appeals that the detention was unlawful, and that the company was responsible for the acts of its gate-keeper. Lynch v. Met., etc., R'y Co., 24 Hun, 506; 90 N. Y., 77 (1882).

(2) *Another illustration.*

Action for false imprisonment. On July 7, 1884, the plaintiff, while riding in a train of the defendant, the Eastern R'y Co., from Lawrence to Salem, offered the conductor, when asked for a ticket, a ticket of the defendant corporation which read, "Lawrence to Salem and return," on which he had already ridden from Lawrence to Salem, and it was conceded that this ticket did not entitle him to be carried a second time from Lawrence to Salem. The conductor refused to accept the ticket, and demanded

[1] Lynch v. Met. El. R. R. Co., 90 N. Y., 77 (1882); Wheless v. Sec. Nat. Bank, 1 Baxt. (Tenn.), 469 (1872); Goodspeed v. East Had. Bank, 22 Conn., 530 (1853); Williams v. Planters' Ins. Co., 57 Miss., 759 (1880); Reed v. Home Sav. Bank, 130 Mass., 443 (1879); Wheeler & W. Manuf. Co. v. Boyce, 36 Kan., 350 (1887); Woodward v. St. L., etc., R'y Co., 85 Mo., 142 (1884); Carter v. Howe M. Co., 51 Md., 291 (1878); Jordan v. Ala., etc., R'y Co., 74 Ala., 85 (1883).

of the plaintiff payment of his fare. The plaintiff, who had ridden on the train with the same conductor a number of times before, said that he had no money with him, because he thought the ticket was good, and that he would pay the fare at night, to which the conductor retorted that that was what all tramps did. The plaintiff then offered to allow the conductor to keep the ticket as security. The conductor refused the offer, and told plaintiff that he would fix him when they got to Salem. It was denied by the conductor that he said anything about tramps, and the conductor testified that the plaintiff, upon offering the ticket, said, "That is all you will get,— take that or nothing;" and also refused to leave the train.

The testimony also tended to prove the following facts: The conductor, who was a railroad police officer under the Massachusetts statutes, after informing the plaintiff that if he did not pay fare he should arrest him, or have him arrested, on arrival at Salem, allowed the plaintiff to retain his position in the train until it arrived at Salem. On the arrival of the train at this station, certain of the local police, who were in readiness in consequence of a previous notice from the conductor, entered the train, and the conductor, pointing out the plaintiff, said to them, "That is the man," and told them to take him to the lock-up; whereupon, in consequence of this direction, and in the presence of the conductor, said officers, without a warrant, took the plaintiff in charge before he left or attempted to leave the car, and took him to the police station in said Salem, where he remained in custody until released on bail. The conductor afterwards made a complaint against the plaintiff for evading payment of fare on this occasion in the manner stated in the said complaint, by leaving the car without having paid his fare. On this complaint the plaintiff was tried and acquitted. At the conclusion of the testimony, the defendant asked the court to rule that the action could not be maintained; and further, that there was no sufficient evidence to warrant the jury in finding that said complaint was made without probable cause by the conductor; but the court declined so to rule.

The court submitted to the jury a special issue: "Did Nason, the railroad police officer, arrest the plaintiff?" and instructed them that if they found the special issue in the negative, they would be authorized in finding that the arrest in Salem was unlawful, and that the plaintiff would upon such findings be entitled to recover for false imprisonment. The jury found the special issue in the negative and rendered a general verdict for the plaintiff. The defendant alleged exceptions. In overruling the exceptions, Holmes, J., said: "The conductor did not arrest the plaintiff at once, nor did he arrest him at all in person, but, when the train reached Salem, pointed him out to other officers, who made the arrest at the conductor's request. This was not necessarily, and as matter of law, an arrest by the conductor in his capacity of railroad police officer. The jury were given to understand that they might take this view of the facts, which would regard the conductor's request as made in his capacity as officer, and the other officers as his servants. But it was also possible to find that the request to the officers was made by the conductor only in the capacity of conductor; in other words, that he simply made a complaint to them just as he might have done if he had not been an officer himself, in which

case the arrest was not made by him as railroad police officer. This was the view taken by the jury, and it follows that the arrest was not justified by the statute. The statute does not authorize an arrest by officers not present when the offense is committed, upon complaint by a conductor. Pub. St. (Mass.), ch. 103, § 18. It was not denied that the conductor caused the arrest to be made, or that he was acting within the scope of his employment so far as to make the defendant liable for his tort. The only question was in what capacity he acted. If the arrest was unlawful, it was an assault and a false imprisonment by the defendant." Cody v. Adams, 7 Gray, 59; Smith v. Bouchier, 2 Strange, 993; Krulevitz v. Eastern R. Co., 143 Mass., 228; 9 N. E. Rep., 613 (1887).

§ 103. Partners, principals, agents — Liability for torts, etc.— In order that responsibility may attach to the principal in respect to a tort committed by his agent, it is necessary —

(1) That such principal authorized the commission of the tort in the first instance;[1] or

(2) That he has made it his own by adoption or ratification;[2] or

(3) That the tort was committed by the agent in the course and as a part of his employment.[3]

As a general rule a principal is not liable for the torts of his agent except upon some one of the grounds mentioned above.

It follows, from the principles of agency, coupled with the doctrine that each partner is the agent of the firm for the purpose of carrying on its business in the usual way, that an ordinary partnership is liable in damages for the negligence of any one of its members in conducting the business of the partnership. As a rule, however, the wilful tort of one partner is not imputable to the firm. For example, if one partner maliciously prosecutes a person for stealing partnership property, the firm is not answerable, unless all the members are in fact privy to the malicious prosecution.[4]

§ 104. The law stated by Justice Craig.— By entering into partnership each party reposes confidence in the other and

[1] Cooley on Torts, 535, 536; Ewell's Evans on Agency, 480 and note; 1 Lindley on Partnership, § 297 (1881).

[2] Harvey v. McAdams, 32 Mich., 472 (1875); 1 Lindley on Partnership, § 297 (1881); Grund v. Van Vleck, 69 Ill., 478 (1873); Gurler v. Wood, 16 N. H., 539 (——).

[3] 1 Lindley on Partnership, § 298 (1881); Burns v. Poulson, L. R., 8 C. P., 563.

[4] Arbuckle v. Taylor, 3 Dowl., 160.

constitutes him his general agent as to all partnership concerns.[1] But the question involved here is not as to the liability of one partner for the contracts of the other, but it is whether one partner may be liable in damages for the wrongs of the other. Mr. Collyer, in his work on Partnership, section 457, says: "A learned writer observes that, though partners are, in general, bound by the contracts, they are not answerable for the wrongs, of each other. In general, acts or omissions in the course of the partnership trade or business, in violation of law, will only implicate those who are guilty of them." And in 1 Lindley on Partnership, book 2, chapter 1, section 4, the author says: "As a rule, however, the wilful tort of one partner is not imputable to the firm. For example, if one partner maliciously prosecutes a person for stealing partnership property, the firm is not answerable unless all the members are in fact privy to the malicious prosecution." In an Illinois case,[2] where a question arose as to the liability of one partner for the act of the other in causing the arrest of a person charged with larceny of money belonging to the firm, it was held that the mere knowledge and consent of one partner that the other should have the person accused arrested would not render the partner so knowing and consenting liable to an action for malicious prosecution. It was necessary that the consent should be of such a character as to amount to advice and co-operation. In another case[3] a question arose as to the liability of one partner for the tort of the other, and it was held that one partner cannot involve another in a trespass unless in the ordinary course of their business, and in a case where the trespass is in the nature of a taking which is available to the partnership; and in such case, to render the partner liable who did not join in the commission of the trespass, he must afterwards have concurred and received the benefit of it.[4]

APPLICATIONS OF THE LAW.—

A partner held not to be liable.

In 1882 Barker resided in Iowa, and was engaged, in a small way, in the jewelry business. In the latter part of the year he bought a bill of goods

[1] Gow on Partnership, 52.
[2] Gilbert v. Emmons, 42 Ill., 143.
[3] Grund v. Van Vleck, 69 Ill., 478.
[4] Rosenkrans et al. v. Barker, 115 Ill., 331 (1885).

of Rosenkrans & Weber, Chicago, amounting to $350. The goods were sold by a traveling man named Johnson. When the bill became due, $100 was paid, but no part of the balance has ever been paid. Rosenkrans resided in Wisconsin, and did business in Milwaukee, but at the same time he was a partner in the jewelry business of Rosenkrans & Weber, in Chicago, the firm being composed of Rosenkrans and Lucy B. Weber, who was the wife of J. H. Weber. J. H. Weber had the general management of the business of this Chicago firm. On or about the 1st of February, 1883, the bill of goods remaining unpaid, Johnson, who had sold the goods, induced Barker to visit Chicago, under the pretense that he would enter into partnership with him in the jewelry business in Chicago. Upon the arrival of Barker, Weber was notified, by Johnson, of the arrival, and on the 5th day of February, 1883, Weber filed a petition and obtained an order for a writ of *ne exeat*. The writ was issued, and placed in the hands of the sheriff, who arrested Barker, and held him in custody ten or twelve hours, when he was released on bail. Subsequently, and on the 17th day of March, 1883, on demurrer, the petition was dismissed. It does not appear that Rosenkrans had any knowledge that the proceedings had been instituted against Barker, until about the 1st day of April, 1883, and at this time the petition for a *ne exeat* had been held bad on demurrer, and dismissed, and Weber had then, or a few days thereafter, appealed to the appellate court. When Rosenkrans learned what had been done, he notified Weber that it was wrong, and advised the dismissal of the appeal from the appellate court, and under his advice no further steps were taken to prosecute the appeal. Barker brought an action for false imprisonment and malicious prosecution against Rosenkrans and the other partners.

On the trial, at the request of plaintiff, the court instructed the jury:

"If Rosenkrans became acquainted with the facts in the matter about the last of March, 1883, that, being so informed as to said facts attending the commencement of said proceedings, said Rosenkrans suffered said proceedings to be continued in the courts, through the medium of an appeal, and did not in any way discountenance said proceedings or put a stop to the same, then the court instructs the jury that if they find, from the evidence, that said *ne exeat* proceeding was instituted maliciously and without probable cause, and said Rosenkrans was so informed, but allowed the *ne exeat* case to proceed, then all such facts, if the jury so believe, may be taken in consideration in determining whether said Rosenkrans ratified and approved of the arrest of said Barker, and if he did so approve and ratify the arrest of said Barker, then he would be equally liable with Weber, if said arrest was made maliciously and without probable cause."

The court also instructed the jury that if they find the defendants guilty under the evidence, that the arrest was malicious and without probable cause, and that plaintiff has sustained actual damages, then, in assessing damages, they are not limited to compensation for actual damages sustained, but may give exemplary or vindictive damages. These instructions are claimed to be erroneous as to the defendant Rosenkrans. In the court below the plaintiff recovered and the defendants appealed. In reversing the judgment, Craig, J., said:

An instruction which is not based on the evidence in the case is im-

proper and should not be given. It is liable to mislead the jury, and usually results in a wrong verdict. As to the first instruction, we find no evidence in the record upon which it could fairly be predicated. Rosenkrans testified,— and in this he is corroborated by other evidence,— that when he came to Chicago and learned for the first time of the proceedings, he notified Weber, who was in charge of the matter, that it was wrong, and the appeal ought to be dismissed. Here he not only failed to sanction and approve, but condemned, what had been done, and under his direction no further steps were taken to prosecute the appeal. The conduct and acts of Rosenkrans contain no element of approval; in the absence of any evidence to sustain such a theory they could do no less than mislead the jury. As respects the other instruction, we are of opinion, as to Rosenkrans, it is erroneous. It is not claimed that he ordered, advised or directed the arrest, or that he even knew of the occurrence until after the proceedings in the *ne exeat* case had been dismissed. The claim is that after knowledge of the arrest he approved what had been done. If such was the case, he would only be liable for the real injury sustained, and not for vindictive damages, as held in Grund v. Van Vleck, 69 Ill., 478. But under the instruction the jury were directed that each defendant was liable for actual and vindictive damages.

It is, however, claimed by appellee that Rosenkrans is liable upon either one of two grounds: First, because those who caused the arrest were servants or agents of Rosenkrans, acting within the scope of their agency; and second, the wrongful proceeding was instituted for Rosenkrans, and in his name, and when he became aware of what had been done he ratified it. Weber, who caused the arrest of Barker, was not in fact a partner of Rosenkrans, but he acted for his wife, who was the partner, and so far as the acts are concerned they may be regarded as the acts of Rosenkrans' partner. In many respects one partner is the agent of the other. In the purchase and sale of goods within the scope of the partnership business the acts of one may be regarded as the acts of both. In such cases the one that transacts the business acts for himself and in the capacity as agent of the other, and in that capacity he binds himself and also binds his partner. By entering into partnership each party reposes confidence in the other, and constitutes him his general agent as to all partnership concerns. Gow on Partnership, 52. But the question involved here is not as to the liability of one partner for the contracts of the other, but it is whether one partner may be liable in damages for the wrongs of the other. In Gilbert v. Emmons, where a question arose as to the liability of one partner for the act of the other, in causing the arrest of a person charged with larceny of money belonging to the firm, it was held that the mere knowledge and consent of one partner that the other should have the person accused arrested would not render the partner so knowing and consenting liable to an action for malicious prosecution. It was necessary that the consent should be of such a character as to amount to advice and co-operation. In Grund v. Van Vleck, 69 Ill., 478, a question arose as to the liability of one partner for the tort of the other, and it was held that one partner cannot involve another in a trespass, unless in the ordinary course of their business, and in a case where the trespass is in the nature of a taking which is

available to the partnership. And in such case, to render the partner liable who did not join in the commission of the trespass, he must afterwards have concurred and received the benefit of it.

Here no part of the debt was collected by the commencement or prosecution of the proceedings against Barker, and it is not claimed that a liability exists on account of receiving any benefit from the arrest, and if Rosenkrans is to be held liable, it is upon the ground that he was a member of the firm which instituted the suit and caused the arrest. This, under the authorities cited, cannot be done.

As to the second ground relied upon by appellee — ratification — what was said in passing upon the instructions given for appellee is sufficient to dispose of that matter, and no further discussion of the subject is deemed necessary.

One question has been raised in regard to the admission of evidence which remains to be considered. On the trial the defendants, as preliminary to proving the general bad reputation of the plaintiff in the place where he resided, asked a witness the following question: "Do you know the general reputation of the plaintiff, Mr. Barker, among his friends and neighbors and acquaintances, in the city of McGregor, Iowa, as it existed in December and January and February, 1882 and 1883, for honesty and fair dealing in business?"— which was objected to, objection sustained and exception taken by defendants. We think that evidence of the general bad reputation of the plaintiff was admissible. In 3 Sutherland on Damages, p. 708, it is said: "According to the better authorities, the defendant may prove the general bad reputation of the plaintiff, both to rebut the proof of want of probable cause and in mitigation of damages." In Israel v. Brooks, 23 Ill., 575, an action for a malicious prosecution, it was held that previous good character may be shown as one evidence of want of probable cause, and bad character may be shown as a reason for probable cause. For the errors indicated the judgment is reversed. Rosenkrans v. Barker, 115 Ill., 331 (1885).

§ 105. Ratification.— On the principle that a person does not make himself liable by ratifying an illegal act of another unless the act was done in his behalf or for his benefit, if one member of a partnership commit a tort outside the scope of the business and of no benefit to the firm, nor on its behalf or in its interests, his copartner's subsequent approval of it will not make him liable.[1]

§ 106. Detention by keepers of prisons, jailers, etc.— The rules of law relating to arrests made by officers, and under which they may justify, are in general applicable to jailers and all other persons who may detain parties arrested or restrained of their liberty. Where the officer who arrests or

[1] Bates on Partnership, § 469; Rosenkrans v. Barker, 115 Ill., 331 (1885); Wilson v. Turnman, 6 M. & G., 236.

commits a person to jail has lawful authority to do so, the keeper of the prison has lawful authority to receive and detain. There seems to be but little distinction between the liability of the officer who makes the arrest, or the magistrate who commits, and the jailer who detains.[1] But the jailer does not become liable for any illegal or oppressive acts of the officers making the arrest because he thus receives the party arrested.[2] Nor is a jailer liable for refusing to release a debtor on a defective order of discharge, being advised by counsel that it was defective, although he would have been protected by the order had he discharged the person detained.[3]

AN APPLICATION OF THE LAW.—

Confinement in the penitentiary under void conviction—The tort cannot be waived.

James Prior was convicted and sent to the penitentiary by the court of common pleas in a proceeding in which the court had no jurisdiction. He was confined in the state's prison, in the custody of one Miller, who was the warden, under and by virtue of the judgment rendered in the proceeding aforesaid. During his confinement, by order of Miller, as warden, he worked as a criminal. His labor was shown to be worth $225. During all this time Patterson was the lessee of the prison and received all the benefit of said labor as such lessee. Prior's imprisonment commenced on the 12th day of September, 1853, and ended by his discharge therefrom on *habeas corpus* January 1, 1855. After his release he sued Patterson and Miller for the value of his wages on an implied *assumpsit*, and recovered a judgment on appeal from the denial of a motion for a new trial. Worden, J., said: "At the time the appellee was convicted and sent to the penitentiary, the court of common pleas had no jurisdiction in that behalf; hence the conviction and judgment were nullities and furnish the appellants no protection for the tort committed in confining him in the penitentiary. Patterson v. Crawford, 12 Ind., 241. The appellants must be presumed to have known the law and that they had no legal right to imprison the appellee or cause him to labor. That they may have been responsible to him in some form cannot be doubted. They undoubtedly committed a tort, and the question here is, whether the tort can be waived and the action maintained on an implied *assumpsit*. We will first examine the question so far as it relates to Patterson. He, it seems, was the lessee of the penitentiary and received all the benefit of appellee's labor. He must be pre-

[1] Artega v. Conner, 88 N. Y., 403 (1882); Boaz v. Tate, 43 Ind., 60 (1873); Ellis v. Cleveland, 54 Vt., 437 (1882); Patterson v. Prior, 18 Ind., 440; 81 Am. Dec., 367 (1862); 7 Am. & Eng. Ency. of Law, 685 (1889).

[2] Boaz v. Tate, 43 Ind., 60 (1873).

[3] Hayes v. Bowe, 12 Daly (N. Y.), 193 (1882).

sumed to have assented to the performance of the labor, and being benefited thereby, the law implies a promise to pay what it is reasonably worth. It was held in Patterson v. Crawford that when labor is performed for the benefit of a party without an express contract, if he knows it and tacitly assents to it he will be liable on an implied contract to pay a reasonable compensation therefor. The case, however, is entirely different as to Miller, the warden of the penitentiary. He received no benefit of the appellee's labor, and not having been benefited, there is, as to him, no consideration to support an implied *assumpsit* to pay. The case of Webster et al. v. Drinkwater, 5 Greenl. R., 275, is much in point, where it is held 'the party committing a tort cannot be charged as upon an implied contract, the tort being waived, unless some benefit has actually accrued to him.' The judgment against Miller is reversed and against Patterson it is affirmed." Patterson et al. v. Prior, 18 Ind., 440 (1862).

§ 107. Detention by private person.— Any unlawful detention by a private person of another is of course unjustifiable and amounts to a false imprisonment.[1]

ILLUSTRATIONS OF THE RULE.—

(1) *Detention by cashier closing the bank.*

At the bank of Syracuse a custom of closing at 4 o'clock P. M. prevailed. Malcolm W. Smith, who knew of this custom, went to the bank a few minutes before the usual time of closing for the purpose of presenting some notes of the bank for redemption. The teller of the bank counted out money sufficient to redeem the notes and handed it to Smith. While Smith was counting the money the clock struck four. The teller locked the street door of the bank and put the key in his pocket. When Smith had finished counting the money he turned to depart, but finding the door locked, he asked to be let out. The teller answered that the door would be unlocked when they went to tea; that it might, by chance, be opened before, and requested him to sit down. About half an hour afterwards a notary came on business. The door was opened to admit him, and Smith passed out. It was held that Smith's detention was unjustifiable, and a judgment for six cents was sustained. Woodward v. Washburn, 3 Denio (N. Y.), 369 (1846).

(2) *Not a cause of self-defense.*

Samuel McNay brought a suit against Daniel G. Stratton for false imprisonment. Stratton pleaded that he did the acts complained of in necessary self-defense. On the trial it appeared that Stratton rode to McNay's house and found him at work in a corn crib, and, drawing a revolver, threatened to keep him in the crib until he was as cold as the grave, unless he would state whether he had made certain derogatory remarks concerning Stratton's family, and when McNay refused he fired at him, and act-

[1] McCoy v. Stratton, 9 Brad. (Ill.), 215 (1881); Woodward v. Washburn, 3 Denio (N. Y.), 369 (1846).

ually kept him in the crib for over an hour, and until McNay obtained a revolver and drove him away. It was held that the evidence failed to support the plea of self-defense. McNay v. Stratton, 9 Brad., 215 (1881).

§ 108. Detention by officers of the army or navy.— Officers in the military or naval service are not answerable to the civil courts for arrests made by them in the performance of their duty and within their authority as such officers, unless they exceed their authority and make arrests for acts which are not offenses against the military or naval service of the government.[1] Thus an action will lie in favor of an inferior officer against his superior who imprisons him for disobedience of an order made under color but not within the scope of military authority;[2] and a naval officer is liable in an action brought in a state court for an illegal imprisonment of a subordinate, although the act was done on the high seas and under color of naval discipline.[3] The president of the United States, as commander-in-chief of the army and navy, has no legal authority, even during a rebellion or insurrection, to imprison any person not subject to military law, without some legal order, writ, precept or process from some court of competent jurisdiction.[4]

[1] Addison on Torts (Wood's ed.), § 1307; Wise v. Withers, 3 Cranch (U. S.), 331 (1806); Malory v. Merrett, 17 Conn., 178 (1845); Dynes v. Hoover, 20 How. (U. S.), 65 (1857); Tyler v. Pomeroy, 8 Allen (Mass.), 480 (1864).

[2] Warden v. Bailey,— Taunt., 67.

[3] Wilson v. McKenzie, 7 Hill (N. Y.), 95 (1845).

[4] Jones v. Seward, 40 Barb. (N. Y.), 563 (1863).

CHAPTER V.

FELONIES AND MISDEMEANORS.

1. A felony at common law defined.
2. A misdemeanor defined.
3. Statutory classification.
4. Felonies and misdemeanors under statutes.

In actions for false imprisonment, especially where the arrest complained of has been upon information of a felony committed and without process, it will frequently be necessary to determine what is a felony in fact and what is not. It has therefore been thought best to discuss the matter briefly in this chapter.

§ 1. A felony at common law defined.—An offense which occasions a total forfeiture of either lands or goods, or both, to which capital or other punishment may be superadded according to the degree of guilt.[1]

Bishop says, quoting from Gabbett: "The word *felon* is (according to the best opinions) derived from two northern words,[2] *fee*, which signifies fief, feud or beneficiary estate, and *lon*, which signifies price or value; and the word felony imports rather the feudal forfeiture, or act by which an estate is forfeited or escheats to the lord of the fee, than the capital punishment to which lay or unlearned offenders were formerly liable in all cases of felony. In proof of this, suicide has been always considered to be a felony, because it subjected the person committing it to forfeiture, though the party being already dead could not be the object of capital punishment; and homicide by misadventure or in self-defense is, strictly speaking, a felony also, being followed with forfeiture, though according to the better opinions it never was punished with

[1] 4 Black. Com., 94, 95; 1 Russell on Crimes, 42; 1 Chitty's Practice, 14; Coke on Littleton, 391; 1 Hawkins' Pleas of the Crown, ch. 37; 1 Bouvier's Law Dic., 517; 5 Wheat., 153, 159; Gray v. Reg., 6 Irish Law Rep., 482, 502; 1 Bishop's Crim. Law, § 580.

[2] Spelman, Glos., tit. Felon; 4 Black. Com., 94, 95.

death; while heresy, which was a capital offense by the common law but not a felony, never worked any forfeiture of goods.[1] And, as a further proof, treason was anciently held to be a felony, which can only be accounted for upon the principle that forfeiture was one of the consequences of attainder in high treason. Though this is the proper definition of felony, yet this term has been so generally connected with the idea of capital punishment, that, whenever a statute made any new offense a felony, the law implied that it should be punished by death by hanging as well as forfeiture, unless the offender prayed the benefit of the clergy."[2]

§ 2. **A misdemeanor defined.** — This term is defined to express every offense inferior to a felony, punishable by indictment or by particular prescribed proceedings. In its usual acceptation it is applied to all those crimes and offenses for which the law has not provided a particular name. The term is generally used in contradistinction to felony. Misdemeanors are sometimes called misprisions.[3]

§ 3. **Statutory classifications.** — Forfeitures and corruptions of blood consequent upon conviction for crimes have become almost unknown in the United States.[4] But the distinction between offenses of the different grades is a part of the common law. These distinctions are not to be considered arbitrary, in a sense unfavorable to the law. "Technical they are; but all truth is more or less technical when applied to the practical affairs of life. In the nature of things, a difference exists between the higher and lower crimes; but the rules to determine what acts shall belong to the higher, and what to the lower, must either be laid down in a way somewhat technical, or be left to the uncertain standard found in the breast of each individual judge. There are the weightiest objections to the latter method, and so the former comes as the only practical one."[5] The difficulty has, however, been

[1] 4 Black. Com., 97.

[2] 1 Bishop, Criminal Law, § 580; 1 Gab.. Crim. Law, 15, 16: Adams v. Barrett, 5 Ga., 404; Foxley's Case, 5 Co., 109*a*; Finch's Case, 6 Co., 63, 68; Reg. v. Whitehead, 2 Moody, 181; 9 Car. & P. 429; Whitaker v. Wisbey, 9 Eng. L. & Eq., 457.

[3] Burn's Justice, tit. Misdemeanor; 4 Black. Com., 5; 1 Russell on Crimes, 43; 2 Bouvier's Law Dic., 169.

[4] Woldrich v. Lucas, 7 B. Monr., 49; 1 Bishop Crim. Law, § 581.

[5] Bishop's Crim. Law, § 581.

obviated in a great measure by statutory enactment declaring that all offenses punishable by imprisonment in the penitentiary are felonies and all other offenses are misdemeanors.[1]

§ 4. **Under statutes.**— In many of the states of our Union, the classification of offenses into felonies and misdemeanor is made by statutory enactments. As an illustration, we produce the statute of Illinois upon this subject.

Felony.— A felony is an offense punishable with death or by imprisonment in the penitentiary.

Misdemeanor.— Every other offense is a misdemeanor.[2]

The statute of Iowa is a little more elaborate, but expresses the same idea.

SEC. 4428. Public offenses are divided into —

1. Felonies.
2. Misdemeanors.

SEC. 4429. A felony is a public offense punishable with death, or which is, or in the discretion of the court may be, punishable by imprisonment in the penitentiary.

SEC. 4430. Every other public offense is a misdemeanor.[3]

[1] Weinzorpflin v. The State, 7 Blackf., 186, 188.

[2] R. S. Illinois, 1874, 394, §§ 5, 6.

[3] Revised Code, Iowa, 1860, 763.

CHAPTER VI.

MALICE.

§ 1. **Malice explained by Blackstone.**— Blackstone explains the subject of malice in dealing with the crime of murder. We quote some of his statements thereon, placing in brackets certain words which will adapt his remarks to our present subject. He says that "malice prepense or *malitia præcogitata* is not so properly spite or malevolence to the deceased [or injured person] in particular as any evil design in general — the dictate of a wicked, depraved and malignant heart; *une disposition à faire une male chose* [a disposition to com-

mit a wicked act], and it may be either express or implied in law."[1]

§ 2. **Malice as a term of law.**— The word malice as a term of law has a meaning somewhat different from that which it possesses in ordinary parlance. In its ordinary sense "malice" denotes ill-will, a sentiment of hate or spite, especially when harbored by one person towards another. The word is so employed in the well-known sentence in the litany of the Church of England, "From envy, hatred and malice," etc. This is what the law terms "malice in fact," "actual" or "personal" malice, to distinguish it from the legal sense attributed to the term, and which, from being used in such sense, is accordingly designated "malice in law." "Malice in fact" is, to use the language of a late eminent judge, "of two kinds — either personal malice against an individual, or that sort of general violation of the right consideration due to all mankind which may not be personally directed against any one."[2] And Lord Justice Brett, in a comparatively recent case, where a question of privilege arose, said: "By malice here I mean, not a pleading expression, but actual malice, or what is termed 'malice in fact;' *i. e.*, a wrong feeling in the defendant's mind."[3]

§ 3. **Necessary ingredients of malice — Chief Justice Shaw.**— It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill-will toward the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of matters; but if, in pursuing that design, he wilfully inflicts a wrong on others which is not warranted by law, such act is malicious.

A man may, by his example and by his conduct, be doing great injury to society; he may in fact be guilty of the most heinous crimes, and that well known to an individual; that individual may be actuated by the most pure and single-hearted

[1] 4 Black. Com., p. 199; Flood on L. & S., 34.

[2] Sherwin v. Swindall, 12 M. & W., 783; L. J. (Ex.), C. B., 237; Flood on L. & S., 31.

[3] Newell on L. & S., 314; Clark v. Molyneux, L. R., 3 Q. B., 237 (C. A.); 47 L. J. (C. L.), 230; Stevens v. Sampson, 49 L. J. (C. L.), 120; Flood on L. & S., 32.

desire to rid society of a mischievous character, and entertain the firmest conviction that he would be doing great good by it; and yet it is very certain that, in contemplation of law, any attempt upon his life, his liberty, his person or property, made in the accomplishment of such a purpose, would be unlawful, and therefore malicious. This is founded upon a principle, essential to the very existence of a government of laws and of civil liberty, that no man can be punished except by the operation of law, and after a trial according with the forms of law, with such aids and shields as the law affords him; that individuals cannot take the execution of the law into their own hands; and that it is the duty of every good citizen, if he knows of any offense against society, not to assail the offender, but to bring the matter before proper tribunals for inquiry, trial and punishment.[1]

§ 4. **The law implies malice, when.**— "In many cases where no malice is expressed the law will imply it, as when a man wilfully poisons another; and in such a deliberate act the law presumes malice, though no particular enmity can be proved." To present this subject in a few words, malice in law is such as the law infers to exist without just or lawful excuse; also, in malice of either kind, "you cannot have shades and degrees."[2]

§ 5. **Malice in fact immaterial, when.**— Malice in fact is not material so far as regards the accomplishment or completion of an offense, and it matters not in this respect whether the malice was entertained by the wrong-doer five minutes or five years before the commission of the offense.[3]

§ 6. **Express malice or malice in fact defined.**— Express malice is when one with a sedate, deliberate mind and formed design doth kill (or injure) another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges and concerted schemes to do him bodily (or other) harm.[4]

[1] Com. v. Snelling, 15 Pick. (32 Mass.), 337 (1834); Com. v. Bonner, 9 Met. (51 Mass.), 410 (1845).

[2] Stevens v. Sampson, 49 L. J., C. L., 120; Flood on L. & S., 35; Wright v. Clark, 50 Vt., 130 (1877).

[3] Stephen's Dig. Crim. Law, 144, n. 2.

[4] 4 Black. Com., 199; Flood on L. & S., 34; Rideout v. Knox, 148 Mass., 368 (1888); Smith v. Morse, 148 Mass., 407 (1889); State v. Rob-

It is rarely if ever that express malice or malice in fact is proven upon the trial of a cause. Its existence lies at the heart of the wrong-doer and he alone knows its secrets. Its existence or non-existence is an inference to be drawn from all the facts in the case.[1]

§ 7. **Malice in law — A wider meaning.**— "Malice in law," however, is said to be an expression of much wider meaning than "malice in fact." By this term we are to understand much more than spite or ill-will; we are to understand what the Latin word from which "malice" itself is derived conveys to us. That word is *malitia*. Hence "malice in law" simply means a general wickedness of intent on the part of a person; a depraved inclination to do harm, or to disregard the rights or safety of mankind generally — the existence of which sentiments is made manifest by mischievous or injurious acts on the part of him who entertains them.[2]

§ 8. **The distinction between malice in law and malice in fact.**— The distinction between "malice in law" and "malice in fact" is certainly not one that would be evolved naturally and as a matter of course out of a person's "inner consciousness." It exists, however, and must be understood by those who would rightly comprehend the law on the subject of wrongs.[3]

The true distinction, however, seems to be not so much in the malice itself as in the evidence by which it is to be established. It is malice in both cases. It is in the proof only that it differs.[4]

§ 9. **The consequences of the distinction.**— It is in consequence of the distinction between "malice" in its ordinary sense and in its legal acceptation that judges, when engaged in the trials of persons indicted for murder, almost invariably tell the jury that malice prepense or aforethought merely signifies a preconceived wicked intent to kill, and that the period of time elapsing between such conception of a design and the

bins, 66 Me., 324 (1877); Ferguson v. Earl of Kinnoul, 9 Cl. & F., 321.

[1] United States v. Meagher (Tex.), 37 Fed. Rep., 879 (1888).

[2] Flood on L. & S., 32.

[3] Flood on L. & S., 37.

[4] Wilson v. Noonan, 35 Wis., 352 (1874); Wright v. State, 41 Tex., 246 (1874); Lewis v. Chapman, 16 N. Y., 369 (1857); Primus v. State, 1 Tex. App., 507 (1877).

carrying it into execution is of no consequence in law. The fact of a person having been known to previously harbor and express ill-will against the individual whose life he subsequently takes may of course be a matter of evidence as to the intent with which he committed the crime, but it would in no way intensify the gravity of the charge against him, so far as the legal offense itself is concerned.[1]

§ 10. Evidence of malice.— The proof of malice need not be direct; it may be inferred from circumstances, but it is not to be inferred from the mere fact of the plaintiff's acquittal for want of the prosecutor's appearance when called, nor, in the case of a civil suit, from the parties sending out an execution or neglecting to countermand it after the payment of the debt, and the like. But it may be inferred from the want of probable cause. It may be proved by evidence of the defendant's conduct and declarations and his forwardness and activity in exposing the plaintiff, by publishing the proceedings against him, or by any other acts or publications by the defendant concerning the charge.[2]

[1] Flood on L. & S., 33.

[2] 2 Greenl. Ev., § 453; Purcell v. McNamara, 9 East, 361; 1 Campb., 199; Sykes v. Dunbar, 1 Campb., 202, n.; Gibson v. Charters, 2 B. & P., 129; Chambers v. Robinson, 1 Stra., 691. Where there is a wanton, gross, reckless disregard of the rights of another in instituting a prosecution, as where confessedly there is no excuse for it, — no reasonable ground, — the jury may find the prosecution malicious, though there is no direct testimony of prior trouble, ill-will or grudge. Blunk v. Atchison, T. & S. F. R. Co., 38 Fed. Rep., 311. But mere dislike or ill-will towards one by another does not constitute malice in the legal sense. There must be some act done by defendant with intent to injure plaintiff, and such act must be wrongful, and done without legal justification or excuse. Peck v. Chouteau, 91 Mo., 138; 3 S. W. Rep., 577. In an action for damages for malicious prosecution, testimony of defendant as to a conversation by him with the prosecuting attorney and a justice of the peace as to a previous prosecution of plaintiff for a similar offense, which was settled by her paying the costs, testimony of a third person as to her seeing plaintiff picking the berries, for theft of which the prosecution complained of was brought, and testimony of a witness as to a conversation with another third party about plaintiff's having been seen picking berries in defendant's field, is all immaterial and inadmissible on the question of malice. Wilson v. Bowen (Mich.), 31 N. W. Rep., 81. It was proper to charge the jury that in determining defendant's malice they might consider any statements which they found were made by him in which he expressed ill-feeling against the plaintiff. Thurston v. Wright, 77 Mich., 96; 43

APPLICATIONS OF THE LAW.—

(1) *Declarations of ill-will evidence of malice.*

The defendant filed an information before a justice of the peace charging plaintiff with the crime of petit larceny. A warrant was issued, and plaintiff was arrested thereon. Upon a trial before the justice he was discharged.

On the trial of a suit for malicious prosecution which followed, the plaintiff recovered and the defendant appealed.

A witness for the plaintiff was permitted to testify, against defendant's objection, to a conversation had with defendant some time before the prosecution was instituted, in which defendant declared that he intended to assist another in a lawsuit against such person and plaintiff; that he believed that plaintiff was wronging his adversary, and that he believed that plaintiff was a rascal.

Beck, J.: The admission of this evidence is now complained of by defendant. There was other evidence tending to show hostility and enmity on the part of defendant towards plaintiff. The evidence objected to, we think, was properly admitted, to show the relations between the parties, and the feelings of hostility and enmity entertained by defendant towards the other party. When such feelings exist, malice may be more readily inferred from proper testimony.

Men do not institute unfounded prosecution of their friends, and we can hardly suppose a case where a trivial prosecution of this character would be commenced unless an ill-feeling existed between the parties; and it must be admitted that in most, if not all, cases where malicious prosecutions without probable cause are instituted, they are prompted by feelings of hostility and enmity. The evidence in question tends to show hostility and unfriendly feeling entertained by defendant toward plaintiff, which it would be proper for the jury to consider in determining the *animus* of defendant in instituting the prosecution. The court did not err in admitting the evidence.

Counsel of defendant insist that the verdict was not sufficiently supported by the evidence, and that the court, therefore, erred in overruling a motion for a new trial based upon that ground. Counsel claim that the proof fails to show the malice of defendant and want of probable cause for the prosecution. We confess that upon these points the evidence hardly satisfies our minds, but we are clear that there is not such an absence of evidence thereon as to justify us in reversing the judgment. The rules that govern us in such a case are familiar and of almost daily application.

There was evidence tending to show the hostility and enmity of defendant towards the plaintiff. The defendant had also expressed an opinion unfavorable to plaintiff's honesty, and had intimated that he was guilty of other crimes of the character of the one charged in the information. This

N. W. Rep., 860. Testimony of the plaintiff, upon direct examination, as to his having had a difficulty with defendant, is proper where it has a bearing upon the question of malice. Thurston v. Wright, 77 Mich., 96; 43 N. W. Rep., 860.

evidence, in connection with other testimony offered at the trial, tends to show the malice of defendant. We cannot say that upon this point there is a total failure of evidence. Judgment affirmed. Bruington v. Wingate, 55 Iowa, 140; 7 N. W. Rep., 479 (1880).

(2) *Defendant may testify as to his intent or motive.*

The defendant was examined as a witness in his own behalf at the trial, and the following questions were asked by his counsel, namely: "State as to whether, when you made that complaint, you believed it to be true." "State whether, when at the time you made this complaint before Esquire Merrill, you believed it to be true." To both of which counsel for plaintiff objected, for the reason that his belief in the truth of the complaint was a question for the jury. The court sustained the objection and excluded the evidence.

In reversing the trial court, Champlin, J., said:

"It was incumbent upon the plaintiff to establish by competent evidence that the proceeding before the justice was instituted by the defendant without any probable cause, and that his motive for instituting the prosecution was malicious. Whatever the plaintiff must prove, the defendant may disprove. He may show that he was not actuated by malice, and also that there was probable cause. One of the pertinent facts to show the existence of probable cause was the belief of the defendant that the crime charged in the complaint was true. It also had a bearing upon the question of malice. The defendant was entitled to prove that he believed the complaint to be true when he made it, and he was a competent witness to testify to it in his own behalf. His so testifying would not necessarily establish the fact that he did believe the complaint to be true. The jury must determine that from all the evidence, and they are to give to defendant's testimony such weight as they think it deserves, like that of any other witness. Mere belief, however, of the truth of the complaint, although an element embraced in the issue of probable cause, would not be sufficient of itself to justify a party in instituting a criminal prosecution. Such belief must rest upon reasonable grounds, and be induced by such a state of facts as would lead a man of ordinary prudence and caution to entertain an honest and strong suspicion that the accused is guilty of the offense charged.

"It has become the settled law in this state (Michigan) that in cases where intent or motive are involved in the issue, the person to whom such interest or motive is imputed is a competent witness to testify in regard thereto (Watkins v. Wallace, 19 Mich., 57), unless he is rendered incompetent by some statutory inhibition, or where such testimony would be excluded by other well-recognized principles of the law of evidence." Spalding v. Lowe, 56 Mich., 366; 23 N. W. Rep., 46 (1885).

(3) *Good faith and honest belief are mental conditions of which defendant may testify.*

The defendant, as a witness, was asked: "At the time you made the complaint did you believe Sherburne had sworn falsely?" "At the time you made the complaint did you make it in good faith?" "In making the

complaint against Sherburne for perjury, were you actuated by malice, or did you make it believing he was guilty of perjury, and that he might be punished therefor?" These questions were objected to and the objection sustained, and as they are of the same nature, and rest upon the same rule of admissibility, they will be considered together.

Orton, J.: "In actions for malicious prosecution, the want of probable cause and malice must concur, and the defendant is allowed, if he can, to disprove either. Spain v. Howe, 25 Wis., 625; Plath v. Braunsdorff, 40 Wis., 107; McKown v. Hunter, 30 N. Y., 625. The intent, good faith and honest belief of the defendant are mental conditions which can be proved only indirectly, presumptively and inferentially by the facts and circumstances of the case. Malice being a fact to be proved and directly in issue, now, since parties are allowed to be witnesses, there seems to be no good reason why the party who alone can positively and directly know and testify to such fact, or in contradiction of such fact, may not so testify by any and all accepted rules of evidence. We think that within the reason of Wilson v. Noonan, 35 Wis., 321, and according to the authorities cited by the learned counsel of the appellant, these questions were proper in this case, going to the question of actual malice, and strictly the circuit court erred in sustaining the objection of the plaintiff to the admissibility of the testimony so offered." Sherburne v. Rodman, 51 Wis., 474; 8 N. W. Rep., 414 (1881).

(4) *Motive of the prosecutor — A desire to make an example for the purpose of of deterring others — No evidence of malice.*

A doctrine which appears to have been sustained by the opinion of two members of the court of exchequer (Stevens v. Railway Co., 10 Exch., 352) does not appear to have been generally recognized in this country. It might have been properly applied to the case which was before that court at that time, because there were circumstances indicating that the charge had been trumped up. The doctrine announced by Alderson, B., was this: "Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice is a malicious motive on the part of the person who acts in that way. And it appears to me that the prosecution of a person for the purpose of frightening others, and thereby deterring them from committing depredations upon property, is not a motive of such a direct character as to afford a legitimate foundation for a criminal prosecution." And Martin, B., in the same case, said: "I think that the fact of the defendant prosecuting the plaintiff, not for the purpose of punishing him, but to make an example to others, is ample evidence of malice." In so far as any general test of the right purpose of instituting a prosecution is there hinted at, it seems at variance with sound principle. The most elevated motive that can possibly be entertained for prosecuting anybody is to make an example for the benefit of the public; the next is to make an example for the benefit of individuals other than self; and the next is to make an example for the benefit of one's self. The bringing of anybody to justice, without regard to its effect for good by way of example, is excusable but not commendable. Such a motive of the prosecution seems to be a proper one, being the desire to deter others from commit-

ting crime by making an example of the alleged criminal; but no one has a right to make any person an example unless he is guilty, and it will not do to proceed against him for example or anything else unless the person prosecuting honestly and in good faith believes him to be guilty and had good and probable grounds upon which to base the opinion. I cannot see anything to criticise in the motive of such prosecutor who candidly avows that he does not want to hurt the accused, but simply wants to make him an example to deter others. Such a mental attitude towards offenders is that of the law itself. Coleman v. Allen, 79 Ga., 657; 5 S. E. Rep., 204 (1888).

(5) *Witness' opinion that the prosecutor appeared vindictive not competent.*

On the trial of an action for malicious prosecution, the court permitted the plaintiff to call a witness, who was present at the examination of the plaintiff on a certain charge and heard the defendant testify against the plaintiff, and allowed the witness to give his opinion of the appearance of the defendant on the stand, and that he was vindictive. *Held*, that there was no principle of law under which the admission of such evidence could be justified. Ames v. Schneider, 69 Ill., 376 (1873).

(6) *A multiplicity of suits — Evidence of malice, etc.*

In an action to recover damages for the malicious prosecution of a replevin suit, the plaintiff was permitted to give, under objection, evidence of other actions of replevin subsequently commenced by the defendant against him; also evidence of actions brought by the defendant against him to recover possession of the premises which the latter occupied for a bakery. The complaint charges that the defendant maliciously, and without probable cause, instituted a replevin suit February 29, 1884, and caused to be seized a top wagon, sleigh and three sets of harness which the plaintiff owned, and needed to deliver his bread and rolls daily to his customers, and that this was done with the intention to injure him in his business. One or more of the actions which the plaintiff was allowed to prove were brought prior to the 29th of February; but the whole series related to the same personal property or to the possession of the bakery which the defendant owned; and all these actions were either discontinued by the defendant, or were decided against him. In the replevin suit described in the complaint, the defendant based his claim to the property seized upon a chattel mortgage, which was given by the plaintiff to his son in November, 1883, to secure the payment of a note of $75. This note had been paid and taken up by the maker. The defendant took an assignment of the mortgage from the son, while the instrument was off the record after it had been discharged, giving in fact nothing for the assignment. The evidence in regard to these successive suits of replevin and for the unlawful detainer of the bakery was received by the trial court as bearing upon the question of the defendant's malice in bringing the action of the 29th of February, described in the complaint.

Cole, J.: "The question is, was the evidence legally admissible for that purpose? It seems to us that it was. In order to recover, it was essential

for the plaintiff to prove both the want of probable cause in bringing the replevin suit, and malice on the part of the defendant. There was no direct proof of malice. It had to be shown by circumstances. Bringing one replevin suit, even upon an unfounded claim, might not be very cogent or satisfactory proof that the defendant was acting maliciously and without probable cause; but the bringing of a series of suits, upon the same groundless claim, for the same property, would afford the clearest and most irresistible proof that he was acting maliciously and with intent to injure and oppress the plaintiff; for it is inconceivable that a man, acting from good motives, and honest intention of enforcing only what he deems to be his right, should persist in bringing one suit after another on the same groundless claim. Such conduct is strong evidence of malice and want of probable cause." Magmer v. Renk, 65 Wis., 364; 27 N. W. Rep., 26 (1886).

§ 11. Undue publicity of arrests — Evidence of malice.— Persons who set the machinery of the law in motion, when acting in good faith, are not required by any public motives or otherwise to give undue publicity to arrests. The law does not permit a person to maliciously cause the arrest of another without any probable cause, to give undue publicity to the matter, and should he do so, it is competent to prove the same as evidence of malice.[1]

APPLICATION OF THE RULE.—

Undue publicity — Publishing accounts of arrests in newspapers.

Upon the refusal of Cooney to pay over some money claimed by Chase, the defendant made a complaint before the recorder of the city of Kalamazoo against Cooney for larceny of the money. This complaint was found defective; and on February 3, 1888, Cooney, having been brought into court under warrant, was discharged, and the warrant returned. On February 9, 1888, Cooney commenced an action of malicious prosecution. On February 11th, two days thereafter, the defendant made another complaint for embezzlement and larceny against Cooney before the recorder. Warrant was issued, and Cooney arrested thereon, and taken before the recorder. This examination was adjourned from time to time until July 28, 1888, when Cooney, after a full examination, was discharged. On the trial of the case for malicious prosecution, the plaintiff had verdict and judgment for $1,000. Defendant brings error. After the warrant was issued, it was put into the hands of the sheriff, who was advised by the defendant to look after Cooney, as he might leave the city. While the sheriff did not take the plaintiff into actual custody on the warrant, yet he advised him he must not leave the city. He was kept and detained for several days

[1] Allison v. Chandler, 11 Mich., 554 (1863); Cooney v. Chase (Mich.), 45 N. W. Rep., 833 (1890).

under the first warrant, and finally discharged. Under the second arrest, he was also held, and required to appear at the court on several occasions, though no bail was required. Plaintiff claims that he made an effort to keep the matter of his arrest out of the public press, but that Chase caused it to be published, and the affair was noticed in several newspapers. Chase admitted that he took an article to one of the newspapers in Kalamazoo, for publication, stating the arrest of Cooney. It was claimed on the trial by plaintiff, and testimony introduced tending to show the fact, that the plaintiff had sustained great damage to his business by reason of the arrest and the publicity given to it by the defendant. And the admission of this testimony was assigned for error.

Long, J.: This evidence was properly admitted. It would be a strange rule that would permit one to maliciously cause the arrest of another without any probable cause, to give publicity to the arrest to an extent that his business friends and acquaintances desert him, and withdraw their support and trade, and then deny relief or satisfaction for such wrongs. The plaintiff was entitled to put this element of damage before the jury, and the court was not in error in receiving the testimony. This element of damage has been repeatedly recognized by this court. Allison v. Chandler, 11 Mich., 554; Gilbert v. Kennedy, 22 Mich., 117. The court was not in error in permitting the plaintiff to show the publicity given to the arrest, and the part Chase took in giving the facts to the press. It was not only competent as one of the facts tending to show the extent of the plaintiff's damages, but as tending strongly to show malice. Cooney v. Chase (Mich.), 45 N. W. Rep., 833 (1890).

§ 12. Malice and the want of probable cause must exist concurrently in actions for malicious prosecution.— In order to maintain an action for malicious prosecution, the burden of proof is upon the plaintiff to show the concurrent existence of malice and the want of probable or reasonable cause in the institution of the proceeding complained of. To show the existence of malice and not the want of probable or reasonable cause, or to show the existence of the want of probable or reasonable cause without the concurrent existence of malice, must in either case be fatal to the action. They are both essential ingredients of the action and must exist concurrently.[1] But it is not necessary in all cases to make proof of malice; its existence may be inferred from the want of probable or reasonable cause.[2]

[1] 2 Greenl. Ev., § 453; Farmer v. Darling, 4 Burr., 1971; Stone v. Crocker, 24 Pick. (Mass.), 81 (1831); Bell v. Graham, 1 Nott & McC., 278; Hall v. Suydam, 6 Barb. (N. Y.), 83 (1849).

[2] 2 Greenl. Ev., § 453; Murray v. Long, 1 Wend. (N. Y.), 440 (1828); Turner v. Turner, Gow, 20.

§ 13. Malice may be inferred from the want of probable cause.— The burden of showing that the prosecution complained of was malicious is upon the plaintiff;[1] but if a want of probable cause is shown, malice may be inferred, but the deduction is not a necessary one.[2] Legal malice is sufficiently proven by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or corrupt design be shown.[3]

§ 14. Want of probable cause — Evidence of malice.— Malice is any wrong or unjustifiable motive. Of the existence of this, the want of probable cause is not only evidence, but very strong evidence. He who will prosecute his neighbor for a crime of which he has no reason to believe him guilty surely cannot be influenced by private friendship, a love of justice, or any other justifiable motive.[4]

§ 15. The existence of malice a question for the jury.— The question as to what in a legal sense constitutes malice, whether malice in fact or malice in law, and the legal definitions of the terms, being purely questions of law, are for the court; but the question of the existence of the circumstances which go to make up the essential elements of malice in a particular case is purely a question of fact and is for the jury to determine.[5]

[1] Fleckinger v. Wagner, 46 Md., 531 (1881); McKnown v. Hunter, 30 N. Y., 625 (1864); Dietz v. Langfitt, 63 Pa. St., 234 (1869); Savill v. Roberts, 1 Salk., 14; Williams v. Taylor, 6 Bing., 183; 2 Greenl. Ev., § 453.

[2] Merriam v. Mitchell, 13 Me., 439 (1836); Pangburn v. Bull, 1 Wend., 345 (1828); Mowry v. Whipple, 8 R. I., 360 (1866); Couper v. Utterbach, 37 Md., 282 (1872); Harpham v. Whitney, 77 Ill., 32 (1875); Holliday v. Sterling, 62 Mo., 321 (1876).

[3] Cooley on Torts, 185; Page v. Cushing, 38 Me., 523 (1854); Baron v. Mason, 31 Vt., 189 (1858); Harpham v. Whitney, 77 Ill., 32 (1875).

[4] Wilder v. Holden, 41 Mass., 8 (1833).

[5] United States v. King, 34 Fed. Rep., 302 (1888). In a malicious prosecution it appeared that there was a dispute about the ownership of certain horses delivered to plaintiff by defendant on a contract of sale, under which plaintiff claimed the right to hold them; that a small part of the purchase-money had been paid; that the defendant had taken the horses from plaintiff by force; that plaintiff retook them and was arrested by defendant for larceny; and that the county attorney told defendant that there was no ground for a criminal charge of larceny, but that he acted on advice of other counsel. Defendant testified that he did not think plaintiff was a horse thief; that he locked the horses in the barn, and saw plaintiff pull the door open;

§ 16. Malice a question for the jury — The general rule.— Malice may be inferred by the jury from want of probable cause, but is not presumed by the law mainly for that reason.[1] It may also be inferred from evidence of an intention to use criminal process as a means of compelling the settlement of a disputed claim.[2] It may be proved by evidence of defendant's conduct, admissions and declarations, showing ill-will, passion or vindictiveness, and his forwardness or activity in exposing the plaintiff by a publication of the proceedings against him,[3] and so also if he knowingly and wilfully institute a groundless prosecution. It is said: "The malice necessary to be shown, in order to maintain this action, is not necessarily revenge, or other base or malignant passion. Whatever is done wilfully and purposely, if it be at the same time wrongful and unlawful, and that known to the party, is in legal contemplation malicious. That which is done contrary to one's own conviction of duty, or with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or to do a wrong and unlawful act, knowing it to be such, constitutes legal malice."[4] But the general rule is that the question of malice is for the jury, though it may be true that in some cases the evidence of want of probable cause and of intentional wrong may be so clear as to authorize the court to hold that certain undisputed facts establish a *prima facie* case, warranting a verdict unless rebutted.[5]

§ 17. Malice in actions for malicious prosecution — The law stated by Shaw, C. J.— "The malice necessary to be shown in order to maintain the action for malicious prosecution is not necessarily revenge or other base and malignant

that he did not call what he did stealing; that when he made the complaint he supposed plaintiff had stolen them; and that he did not make it maliciously. *Held*, that the question of malice was for the jury. Bartlett v. Hawley, 38 Minn., 308; 37 N. W. Rep., 580.

[1] Bartlett v. Hawley, 38 Minn., 308; 37 N. W. Rep., 580 (1888).

[2] Grinnell v. Stewart, 32 Barb., 550; Add. Torts, 226.

[3] 2 Greenl. Ev., § 453.

[4] Wills v. Noyes, 12 Pick., 328.

[5] Bartlett v. Hawley, 38 Minn., 308; 37 N. W. Rep., 58 (1888); Briggs v. Richmond, 10 Pick., 395. And see Kavanagh v. Beckwith, 44 Barb., 195; Robinson v. Stewart, 10 N. Y., 194; Cunningham v. Freeborn, 11 Wend., 241; Webb v. Daggett, 2 Barb., 12.

passion. Whatever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious. That which is done contrary to one's own conviction of duty, or with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or to do a wrong and unlawful act knowing it to be such, constitutes legal malice."[1]

§ 17. **Malice in actions for false imprisonment.**— The existence of malice is not an essential ingredient of the plaintiff's case in an action for false imprisonment. Its existence may, however, be shown for the purpose of enhancing the damages sought to be recovered. The defendant may show his good faith and the absence of malice in the matter complained of for the purpose of mitigating the damages, unless the plaintiff stipulates to confine his recovery to the actual damages sustained, in which case the question of malice seems to be entirely eliminated from the case.

[1] Wills v. Noyes, 29 Mass., 324 (1832); United States v. Ruggles, 5 Mason, 192 (1828); Locker v. Holcomb, 4 Bing., 190; 1 East's Rep., 567, n.

CHAPTER VII.

PROBABLE CAUSE.

§ 1. Reasonable or probable cause defined. Reasonable or probable cause is defined to be such a state of facts in the mind of the prosecutor as would lead a person of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty.[1] It does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution.[2]

§ 2. The point of inquiry — The law stated by Shaw, C. J. In order to maintain the action for malicious prosecution, it is very clear that the plaintiff must aver and prove that the suit complained of was commenced and prosecuted without reasonable or probable cause, and that it was malicious. The groundlessness of the suit may, in many instances, be so obvious and palpable that the existence of malice may be inferred from it. The question of probable cause applies to the nature of the suit; and the point of inquiry is, whether the defendant had probable cause to maintain the particular suit upon the existing facts known to him.[3]

[1] Harpham et al. v. Whitney, 77 Ill., 32 (1875); Bacon v. Towne et al., 4 Cush. (58 Mass.), 217 (1849).

[2] James v. Phelps, 11 Ad. & El., 483, 489; Foshay v. Ferguson, 2 Denio (N. Y.), 617 (1846). At the trial of a suit for malicious prosecution, the court, in an instruction, defined "probable cause" as the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person accused was guilty. *Held*, that the definition was correct. Glasgow v. Owen, 69 Tex., 167; 6 S. W. Rep., 527 (1887).

[3] Wills v. Noyes, 29 Mass., 324 (1832).

THE SUBJECT ILLUSTRATED.—

(1) *What is reasonable or probable cause.*

(a) *Conviction before the magistrate — Acquittal on appeal — Probable cause — Advice of counsel.* — In an action for malicious prosecution, the complaint alleged that the defendant instituted before a justice of the peace a prosecution against the plaintiff, charging the appellant with having obstructed a public highway. It appeared from the averments of the complaint that the appellant was convicted before a justice of the peace, and he took an appeal to the circuit court and was acquitted of the charge. The complaint contained proper averments that the prosecution was malicious and without probable cause; but there were no averments that the conviction before the justice was procured by perjury or subornation of perjury on the part of the appellee, or by fraud or collusion or any improper motives on the part of the justice. A demurrer was sustained to the complaint. The plaintiff took appeal.

Olds, C. J.: The sole question presented is as to whether the complaint is rendered defective on account of it showing that there was a conviction of the appellant before the justice of the peace. It is contended by counsel for appellee that the fact that the appellant was convicted by the justice, in the absence of averments that such conviction was procured by perjury or subornation of perjury on the part of the appellee, or showing that it was procured by fraud or collusion on his part, rebuts the other averments of malice and want of probable cause, and is conclusive evidence of probable cause, and exonerates the appellee from liability. On the other hand, it is contended by counsel for appellant that the appeal operated to vacate the judgment before the justice, and the cause came up in the circuit court for a trial *de novo;* that it is the same as if a new trial had been granted by the justice, and hence is not conclusive evidence that probable cause existed for instituting the prosecution. The decisions of the court are not uniform upon the question presented, but we think the great weight of authority is to the effect that the judgment of the justice's court, though appealed from, and an acquittal had in the circuit court, is, in the absence of fraud, conclusive of probable cause. Cooley, Torts (2d ed.), p. 185, states the law to be: "If the defendant is convicted on the first instance, and appeals, and is acquitted in the appellate court, the conviction below is conclusive of probable cause." Stephen, in his work on the law relating to actions for malicious prosecutions, says: "It seems probable that the reversal on appeal of a conviction is not a termination favorable to the person convicted, upon which he can found an action for malicious prosecution." Reynolds v. Kennedy, 1 Wils., 232 (1748), which has frequently been quoted as an authority, was an appeal from the court of king's bench in Ireland. The declaration was for seizing the plaintiff's brandy, and falsely and maliciously exhibiting an information against him before the subcommissioners of excise for not having paid duty upon it. It alleged that the subcommissioners condemned the brandy, and that the commissioners of appeal "most justly reversed the judgment of the subcommissioners." It was held that, as to the information before the subcommissioners, the declaration showed a foundation for the prosecution, and that, as to the appeal,

"we cannot infer from the judgment of reversal of the commissioners of appeal, that the defendant, the prosecutor, was guilty of any malice."

In Griffis v. Sellars, 2 Dev. & B., 492, a well-reasoned case, it is held that, where there was a trial and conviction in the county court, and an appeal taken to the superior court, where the defendant was acquitted, it was conclusive of probable cause, and that a defendant in such case could not maintain an action for malicious prosecution; and the declaration was held bad for this reason. In the case of Clements v. Apparatus Co., 10 Atl. Rep., 442, the supreme court of Maryland, in a case for malicious prosecution, in a case where there had been a judgment in favor of the defendant in the case upon which the prosecution was based, which judgment had been reversed, said: "It was the deliberate judgment of a court of competent jurisdiction that there was not only a probable cause for filing the bill for injunction, but that the appellee was entitled to the relief prayed. A judgment thus rendered ought to be considered conclusive as to the question of probable cause, although it was reversed on appeal by the supreme court; otherwise, in every case of reversal an action would lie for the institution of the original suit." Whitney v. Peckham, 15 Mass., 243, is a case directly in point. The plaintiff in that case was arrested for an alleged assault and battery, and tried and convicted before the justice. On appeal to the circuit court of common pleas he was acquitted. The supreme court held that the conviction before the justice, he having jurisdiction of the subject-matter, was conclusive evidence that there was probable cause. Parker v. Huntington, 2 Gray, 124; Parker v. Farley, 10 Cush., 279. In Bitting v. Ten Eyck, 82 Ind., 421, it is said by this court: "The conviction of the plaintiff is always evidence of probable cause, unless it was obtained chiefly or wholly by the false testimony of the defendant. Generally it is conclusive evidence of probable cause." It is further said: "And it has been held sufficient evidence of probable cause to show that the plaintiff was convicted of the offense before a justice of the peace who had jurisdiction, although he was afterwards acquitted on appeal." These decisions are in accordance with other holdings in regard to the law governing malicious prosecutions. The burden of proof rests upon the plaintiff in such cases to prove the want of probable cause; and, in this class of cases, it has been held that where one lays all the facts before counsel, and acts in good faith upon an opinion given, it exonerates him from liability. In Cooley, Torts, page 183, Mr. Cooley says: "It may perhaps turn out that the complainant, instead of relying upon his own judgment, has taken the advice of counsel learned in the law, and acted upon that. This should be safer and more reliable than his own judgment, not only because it is the advice of one who can view the facts calmly and dispassionately, but because he is capable of judging of the facts in their legal bearings. A prudent man is therefore expected to take such advice, and when he does so, and places all the facts before his counsel, and acts upon his opinion, proof of the facts makes out a case of probable cause, provided the disclosure appears to have been full and fair, and not to have withheld any of the material facts;" and this doctrine is adhered to by this court, and is distinctly and clearly stated in the case of Paddock v. Watts, 116 Ind., 146–151, as follows: "Where one lays all the facts before counsel, and

acts in good faith upon an opinion given, he is not liable to an action, even though it turn out that he was mistaken. But, in order that he may obtain immunity, he must have made a full and fair statement of all the facts known to him."

When the question arises upon the evidence, it is usually a controverted fact as to whether the defendant did make a full and fair statement of all the facts know to him, and acted in good faith on the opinion given; but, should it affirmatively appear in a complaint that the defendant did make a full and fair statement to counsel, and in good faith acted upon an opinion given, it would seem that it would show a case of probable cause on the part of the defendant, and render the complaint insufficient to withstand a demurrer; or, if such a state of facts should be pleaded as a defense, it would be good to withstand a demurrer. If it be a good defense, then it destroys the plaintiff's right of action, when it is fully stated in his complaint. One of the reasons upon which this rule is based is that when the prosecuting witness acts upon facts which are of such a character as that when they are stated to a calm and dispassionate person capable of judging, they lead him to conclude the person charged is guilty, they are such as to make a case of probable cause on which the prosecuting witness has the right to act. So, in relation to a case like the one at bar, if the facts are such as lead a court of competent jurisdiction to try the offense to act upon them, and find the defendant guilty, then it makes out a case of probable cause, and conclusively exonerates the prosecuting witness from liability, although an appeal may be taken, and an acquittal had in the appellate court. As said in Paddock v. Watts, *supra:* "If he lays all the facts before counsel, and acts in good faith upon an opinion given, he is not liable, though it turn out that he was mistaken." So it may be said in a case where the judgment of conviction is appealed from, and an acquittal had, if the prosecuting witness presented the facts to one court competent to try the cause, and the court found the defendant guilty, it makes out a case of probable cause and exonerates him from liability, though that court erred in its judgment. This is undoubtedly the true rule. It is the duty of citizens when they are in possession of facts which, when fully and fairly presented to a calm and dispassionate lawyer, capable of determining whether such facts constitute a crime such as should be prosecuted and punished, or sufficient, when presented to a court having jurisdiction to try the offense, to lead the court to act upon them, and find the defendant guilty, to take legal steps for the punishment of such offenders; and they should, when they act in good faith upon such facts, be exonerated from any liability in an action for malicious prosecution. If it was averred or shown, by the complaint in this case, that such conviction had been procured by perjury or subornation of perjury on the part of the appellee, or by any fraud or collusion on his part, it would present a different question; but it contains no such averments. The conclusion we have reached being in harmony with the ruling of the circuit court, the judgment must be affirmed. Adams v. Bicknell, 126 Ind., 210; 25 N. E. Rep., 804 (1890).

(*b*) *Facts constituting probable cause.*— Moore brought a suit against the Northern Pacific Railroad Company and others for a malicious prosecution.

On the trial the jury found in favor of Moore, and the railroad company appealed. It appeared that a quantity of fence wire on spools and kegs of staples had been stolen from the defendant, the railroad company. The company employed a detective agency to make investigation, and ascertain the facts relating to the larceny. The agency sent a detective, Gibson, who, after making some investigation, reported to one of the officers of the road, and was referred by him to the general attorney of the company at St. Paul, Mr. Clough, who had charge of its legal affairs, and who had been requested to investigate this matter. Gibson having stated to him the substance of what was afterwards embodied in the affidavits hereafter referred to, the attorney, Mr. Clough, sent to another attorney, a Mr. Fernold, to take and send to him the depositions of the persons referred to by Gibson. The parties referred to were brought before a justice of the peace, and their statements there made were by Mr. Fernold written out, and were sworn to by them. These affidavits were returned to Mr. Clough, who, after careful examination, concluded that the statements in the affidavit were probably true. He, however, directed another attorney, the defendant Bullitt, to take the affidavits to the county attorney for examination, with the further direction that, if the latter should also think that there was a probable case against this plaintiff, a prosecution should be instituted against him. The case was then fully presented to the county attorney, who, after examination, stated to Mr. Bullitt that he thought it a complete and good *prima facie* case, and sanctioned the commencement of criminal proceedings. Mr. Bullitt then made formal complaint before a justice of the peace charging this plaintiff with the larceny of a quantity of wire and staples. After the arrest of the plaintiff, and before the examination, Mr. Bullitt declined to proceed with the prosecution, and the plaintiff was discharged. Mr. Bullitt feared that the result might be affected by some local prejudice. He immediately renewed the prosecution before another justice, in the same county, before whom an examination was held, and, after hearing, the accused was discharged.

One of the affidavits referred to was made by one Simeon Parks. This set forth, with considerable particularity, the circumstances of the larceny, which was committed by Parks and this plaintiff. It further set forth a subsequent conversation between those two persons, in which the plaintiff is alleged to have said to Parks that there was going to be trouble about the wire, and that the best thing they could do was to "put it on" one Virgin. Another affidavit was made by Mrs. Parks, the wife of Simeon. Besides some other corroborating matter, Mrs. Parks avers that she overheard a conversation between Moore and her husband, in which the former said that he (Parks) would "have trouble about this unless you swear it on to Virgin. . . . We can put it on to Virgin." Another of the affidavits was made by George W. Parks, a brother of Simeon, to the effect that Moore came to him and talked about a charge that had been made against Simeon for stealing wire from this railroad company: and proposed to lay it upon Virgin, and suggested the payment of a sum of money to him for doing so. Another affidavit was made by one Ruddy, who averred that he met Moore and Simeon Parks near the depot one night, between 9 and 10 o'clock, with some spools of fence wire and some

kegs in their wagon; the time of this occurrence being about the time when, according to the affidavit of Parks, he and Moore committed the larceny, taking the property from the vicinity of the depot in a wagon.

In reversing the judgment Dickinson, J., said: "Without referring to some other allegations made in the affidavits of a circumstantial nature, what has been already referred to seems to us sufficient to show probable cause for the prosecution." . . .

"Aside from the showing of probable cause, the case of the railroad corporation was greatly strengthened by the fact that the prosecution was advised by its general counsel after a careful and prudent investigation of the supposed facts, and more especially by the fact that the prosecuting attorney of the county, whose advice was prudently sought, approved the commencement of the criminal proceeding. We are of the opinion that probable cause for the prosecution was shown and that the verdict cannot stand." Moore v. Northern Pac. R. Co., 37 Minn., 147; 33 N. W. Rep., 335 (1887).

(c) *Probable cause — Suing out an attachment.* — A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged, constitutes probable cause. When the plaintiff had been, for several years prior to January, 1869, engaged in an extensive mercantile business, and had received large shipments of goods during the last part of December, 1868, and up to January 2, 1869, through the defendants, as common carriers, on which he failed to pay the freight, and had received, through the hands of the defendants, as common carriers, packages containing very considerable sums of money, being the returns from goods shipped by him to his customers, and had given checks to the defendants for freight at several different times, all of which were dishonored at the bank on which they were drawn, for the reason that he had no funds there to pay them; and, on the 2d or 3d day of January, when the defendants demanded payment of their bills for freight, told them he had no money, and that since the 1st day of January he had been doing business as agent, — *held*, that these facts constitute probable cause for swearing that the plaintiff had, within two years, fraudulently conveyed or assigned his property and effects, so as to hinder and delay his creditors, and to cause an attachment on that ground to be issued against his property. Barrett v. Spaids, 70 Ill., 408 (1873).

(d) *Circumstances showing probable cause.* — Edmond L. Cheever brought an action against Joseph L. Sweet and others for malicious prosecution. Plaintiff alleged that defendants maliciously, and without probable cause, procured an indictment against him for breaking and entering a jewelry store belonging to Healy Bros., defendants. The record showed an indictment against plaintiff, and that he was tried and acquitted. The court ordered a verdict for defendants on the evidence, and plaintiff excepted.

There was evidence that defendants' store had been robbed and burned, and that plaintiff had formerly been a partner of defendants, but had left them, and that he was well acquainted with the premises burned. Plaintiff's way of life was rather suspicious. He was present at the fire, and was immediately suspected by other persons than defendants. He told a

detective he had stolen property, and arranged with him about disposing of it, and also proposed to the detective to break into other shops where jewelry similar to that kept by defendants was made. Several bags of jewelry like that which was in defendant's shop were found in the bushes, near a pond, and plaintiff was seen to go there under suspicious circumstances. *Held*, that, in the absence of evidence sufficient to connect defendants with the crime, the evidence showed probable cause for the prosecution against plaintiff by defendants. 2. The safe containing the jewelry which was stolen from defendants' store was not broken open, but was found locked immediately after the fire; but the evidence was not clear that the combination was known only to defendants and their clerks, nor whether it was easy or difficult to open the safe. The finding of the bags of jewelry near the pond was kept secret, under the advice of the detective. *Held*, that these facts were not sufficient to show that defendants were parties to the crime, and did not have an honest belief that plaintiff was guilty. 3. A witness testified that one of the defendants, on the morning after the fire, said, "We've been robbed," and then said, "We have not been robbed," and that defendant asked witness to conceal some dies worth from $200 to $300 until after the insurance men had been there. Witness also testified that this defendant told him, a few days afterwards, that they had made $3,000 by the fire; that a detective had worked plaintiff, and if there was money to put plaintiff in jail he would go there; that he wished the detective had worked another person, as he would have been an easier man to have worked; and that, just before the trial of the plaintiff on the indictment, this defendant twice offered witness $25 to go away and not testify for plaintiff. *Held*, that the evidence as to this defendant entitled plaintiff to go to the jury on the question of probable cause. Cheever v. Sweet et al., 151 Mass., 186; 24 N. E. Rep., 830 (1890).

(e) *Want of probable cause appearing from circumstances.*— Mr. Pomeroy was an auctioneer and was conducting an auction of furniture at a private house. Mrs. Villavossa bid off some articles. Upon settlement for them she disputed her bill, and, having previously made a deposit, she grabbed at a pile of silver coin from which she took an amount, how much Pomeroy could not tell, and he seized her to compel her to give it up. Her husband came to her rescue, and both of them went away without surrendering the money. Pomeroy then procured the arrest of the woman for larceny. They were strangers to him. On the hearing the justice discharged her. The woman then brought her action for malicious prosecution. There was a judgment in her favor which was reversed on appeal.

Gary, J.: "On these facts there was reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the conduct of the appellee and his wife, both strangers to him, was that of thieves, availing themselves of an opportunity to plunder, and therefore there was probable cause, which is an answer to this action." The judgment was reversed. Pomeroy v. Villavossa, 31 Ill. App., 590 (1889), citing Ross v. Innis, 35 Ill., 487.

(2) *What is not reasonable or probable cause.*

(a) *Circumstances showing no reasonable cause.*— Robert J. Roy sold to Alfred Goings a farm and executed a bond for a title when payment should

be made, etc. For a part of the consideration, he gave his note to Roy for $278.47, payable on the 1st day of March, 1879. To secure the payment of the note he and his son executed a chattel mortgage on one mule, three horses, a two-horse wagon, and all the crops that should be grown on the farm in the year 1878. The mortgage contained a clause authorizing the mortgagors to retain the possession of the property until the maturity of the debt. Also, a provision authorizing the mortgagee, Roy, to foreclose at any time he might feel that the debt was insecure. Goings entered into possession of the farm, and planted a crop of corn and tobacco, and also planted among the corn some pumpkins and beans. He, during the time, resided with his family on another farm, about two miles distant. There was no barn or building on the farm in which to secure the corn, tobacco and beans when matured, but he had a house on the place where he lived, suitable for curing and preserving the tobacco. When matured he cut it, and removed it to the place where he resided, for the purpose of curing and preserving it. Soon after the execution of the mortgage, Goings sold the mule named in the mortgage, to Roy, for $110, which sum was credited on the mortgage. After the tobacco was cured, appellee returned it to the farm on which it was raised, and stored it in a small cabin on the place. Roy made several attempts to purchase the corn raised on the place, but was unable to agree upon the price. When the beans were ripe, assisted by his family, Goings gathered a load of them and hauled them to his house, as he claimed, for threshing them. The next day he gathered another load and hauled them home. Roy, having learned that Goings had hauled a load on the previous day, posted in the morning a notice on a tree in the vicinity of the farm, that he had taken the crop raised under the mortgage and would offer it for sale. Having learned that Goings had gathered another load of the beans on that day, Roy saw him at his home and informed him that he had advertised the property for sale, and notified him that he would put him in jail if he did not quit gathering the beans. Goings insisted that Roy had no right to foreclose the mortgage, and that he would continue to gather the beans as he had a right to do. Three days afterwards, while Goings and his children were in the field gathering the beans, Roy had him arrested on a charge of larceny and taken before a justice of the peace, who, after hearing the evidence, bound him over, in the sum of $200, for his appearance at the next term of the circuit court of the county. Being unable to procure bail he was committed to jail, where he remained thirty-seven days, when, the grand jury failing to indict him, he was discharged from imprisonment. After his discharge he commenced a suit for malicious prosecution against Roy, and on the trial the jury found a verdict for $1,272 in his favor. A motion for a new trial was overruled and Roy appealed. In affirming the finding the supreme court held that the evidence showed a want of probable cause. Roy v. Goings, 112 Ill., 656 (1885).[1]

[1] Under a clause in a chattel mortgage providing that if the mortgagee shall, at any time before the debt becomes due, feel himself unsafe or insecure, he shall have a right to take possession of the mortgaged property, etc., the mortgagee has the right to judge of the crisis himself, subject only to the limitation that his judgment of insecurity

(b) *Abuse of process — Want of probable cause.* — In the winter of 1887-8 Ross purchased or traded for a pair of horses from one Forster, the horses being valued at $260. In payment of said horses he delivered to Forster a yoke of oxen valued at $120, and, to secure the remainder, executed a chattel mortgage upon the horses, due in October, 1878. Before this mortgage became due he purchased a wagon of an implement firm in Central City for the sum of $80, due in one year; and, to secure the payment of the same, executed a chattel mortgage upon the horses and wagon. Just before the time that Forster's mortgage became due, he applied to Langworthy for a loan of $100, to pay the Forster mortgage.

After various conversations with him in regard to the matter, he procured a loan of $100 for sixty days, with which he immediately satisfied the Forster mortgage, and to secure the payment of the loan from Langworthy, he executed a chattel mortgage upon the horses above referred to. A suggestive circumstance in connection with this mortgage is the fact that the words "the above-described chattels are now in my possession, are owned by me, and free from all incumbrances in all respects," were stricken out. Those words were on one line in the printed form of the mortgage, and a pen had been run across them to erase them. The mortgage was not paid when it became due, and the time was extended thirty days, Ross paying $3 interest.

Ross made every effort possible to a man of limited means to pay the debt, and wrote to Langworthy as follows:

"MR. LANGWORTHY: I have been trying for the past two weeks to get the money for you and got disappointed all round. I can't get it no place. I have done all that I could do, and can't do any more. Veerig & Wilder, at Central City, have closed in on me now, but would not have done it if you had waited on me. They said that if you was a going to take the team from me they would come it first. Now, if we can compromise and you give me a chance, I will pay you as quick as I can. I would have come down to-day and seen you about it myself. I am going to the mill to-morrow and could not get back in time to go, if I went to town. Let me know the best you can do with me. I can make the first mortgage all right, if you would give me a chance, and keep my team; and if you don't give me a chance, I can't; that is all there is about it. I have been running around so much that I am sick and discouraged.

"Answer, and let me know.

[Signed] "J. K. ROSS."

And in reply received the following:

"YORK COUNTY BANK (Edward Bates, Attorney),

"YORK, NEBRASKA, February 4, 1879.

"*J. K. Ross* — DEAR SIR: You can make my note all right by paying me the money, or giving me extra security that is clear for the amount, and if you don't make the matter good I shall have to deal according to law with you, and under the circumstances on which you obtained the money,

must be exercised in good faith upon reasonable grounds or probable cause. Held in the case at bar that Roy had no reasonable grounds or probable cause to feel insecure. Roy v. Goings, 96 Ill., 361 (1880).

it will place you in a bad place. I will give you until February 8th to make the matter good, and I want you for your own interest to attend to it. Yours,

[Signed] "C. LANGWORTHY."

On the 10th day of February, 1879, Langworthy caused Ross' arrest and imprisonment upon the ground "that the crime of obtaining money under false pretenses has been committed in the county of York, and that J. K. Ross committed the same." He was imprisoned twenty-six days. The alleged false pretenses consisted in the representation that the property was free from incumbrances; that is, that he represented to Langworthy, at the time he borrowed the money, that the property was free from incumbrances, as an inducement to loan the money upon the security. This Ross denied, and further stated that he informed Langworthy of the mortgage, and Langworthy then asked him what the horses were worth, and he informed him $250, and Langworthy said that was sufficient.

On the trial of an action for malicious prosecution, brought by Ross against Langworthy, a verdict was returned for the defendant, upon which judgment was rendered. Ross then took the matter to the supreme court on error. The principal error relied upon is that the verdict is not sustained by the evidence.

In delivering the opinion of the court, Maxwell, J., said: "We think it it is pretty clear from all the testimony that the plaintiff did not conceal the execution of the chattel mortgage for the wagon. It is very clear, too, from the testimony of the defendant himself, that this imprisonment was a mere means of collecting a debt. On cross-examination he testified as follows: 'Question. What started you up to swear out a warrant just at that time? Answer. A man would be naturally started; because I saw the property was going, and I had to protect myself. Q. Where was the property going? A. Going to be sold under this mortgage. Q. And this is what started you up to make this first complaint? A. Yes, sir. Q. That is all that started you to make this first complaint? A. Yes, sir. Q. You had no other reason nor motive but that? A. No, sir.'

"'Probable cause' is defined as a reasonable ground or suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty. Boyd v. Cross, 35 Md., 197; Cooper v. Utterback, 37 Md., 282. The question of probable cause is one of law and fact, composing two distinct inquiries: the one for the jury to say what facts are proved, and it is for the court to say whether those facts constitute probable cause. Turner v. O'Brien, 5 Neb., 547-8; Johns v. Marsh, 9 Reporter, 143; Boyd v. Cross, 35 Md., 194. Probable cause does not depend upon mere belief, however sincerely entertained; because, if that were so, any citizen would be liable to arrest and imprisonment, without redress, whenever any person prompted by malice saw fit to swear that he believed the accused was guilty of the offense charged. The law, therefore, has imposed an additional ground, viz., such knowledge of facts as would induce a reasonable man to believe that the accused was guilty. Nothing short of this will justify the institution of a criminal charge against another. Cooley, Torts, 182. The defendant's own testimony shows very clearly that the object he had in causing the plaintiff's impris-

onment was to aid him in collecting his debt, and not to vindicate public justice. The rule of law is that a prosecution instituted for any other purpose than that of bringing the party to justice shows a malicious motive. Johns v. Marsh, 9 Reporter, 143; Mitchell v. Jenkins, 5 Barn. & Adol., 594. The reason is, the prosecution was not instituted to vindicate the law and punish crime, but as a means of coercing the accused to comply with the wishes of the prosecutor." Judgment reversed. Ross v. Langworthy, 13 Neb., 492; 14 N. W. Rep., 515 (1882).

(*c*) *Maliciously, etc., swearing out a peace warrant — Abuse of process — No probable cause.*— Mounts, Kimmel and Henry lived in the same neighborhood. Henry's wife was Mounts' sister, and he and Mounts were both in the employ of Kimmel, who owned a mill. They got into trouble, it seems, about Kimmel's undue familiarity with Henry's wife. Matters became so uncomfortable for Henry that he determined to take his family to Pennsylvania. He took his wife and three little girls to a friend's house. While they were there, Kimmel's wagon, driven by his son, in which was Mounts and three other men, came to the house in the night, took the children out of bed and carried them and their mother to Kimmel's house, where they remained several days, during which time Henry was forbidden by Kimmel to see them. To secure themselves from interruption by Henry, Mounts, on the same day previous to taking Henry's wife and children to Kimmel, had appeared before a justice of the peace and made oath that he was afraid Henry would beat and wound him; that he had, two weeks before, assaulted and threatened to strike him, and that he was a man whom he had reason to fear. A warrant was issued and Henry was arrested, and after some delay was examined and discharged. Henry then brought an action for malicious prosecution against Mounts and Kimmel. Mounts' defense for causing the arrest was that he had reasonable cause. Kimmel insisted he had nothing to do with it. But the jury thought differently and returned a verdict against them for $250. They appealed. On the question of probable cause for instituting the proceedings, it appeared that Mounts, wishing to prepare himself for church, went to Henry's house to procure some hair oil. Henry was angry and he left. Henry followed him out and asked him if he intended to make trouble in his family, and he said no. It also appeared that Mounts had said that he was not afraid of Henry, but if he was arrested he would have a better chance to get his sister away, and that his whole object was to get the woman, as her husband was abusing her. On being asked by the magistrate if Henry could give bail, and who stated if he could not he would have to go to jail, Mounts said that was just what he wanted. The evidence showed that Kimmel was sufficiently connected with the matter to sustain the verdict as to him.

In affirming the judgment, Justice Breese said: "Appellants may be thankful the jury did not visit them with a more severe affliction. There was no cause for the prosecution. It was not made in good faith." Kimmel et al. v. Henry, 64 Ill., 505 (1872).

(*d*) *Facts not amounting to probable cause.*— In an action for malicious prosecution it appeared that defendant intrusted rugs to plaintiff to be sold, leased or returned on demand. A dispute having arisen as to their account,

it was agreed that defendant should receive in full settlement a certain sum money and thirteen rugs. Before the last instalment of the money was paid, defendant swore out a warrant for plaintiff's arrest for larceny of a rug; but it was not served until after he had tendered thirteen rugs, which were refused on the ground that they were not of the quality required by the settlement, as to which the parties differed.

Parker, J.: The only question requiring consideration is presented by an exception to the charge. The court instructed the jury that the plaintiff did not commit an offense, and defendant did not have probable cause to believe that he had, and submitted to their consideration the question of malice only. The defendant excepted. Where facts are undisputed, and but one inference can be drawn from them, the question of probable cause is one of law for the court. Now, can it be said that these facts permit an inference that the defendant had probable cause to believe that the plaintiff was guilty of larceny? By the original agreement plaintiff had the right to take the rugs, sell them, lease them, or keep them in his possession until after demand made for their return by the defendant. Not until after demand and refusal could the plaintiff be in the wrong. But the right to make such demand, as to this rug, was waived by the defendant when he made the agreement of settlement to which we have referred. Thereafter the plaintiff had the right to the possession of the rug. The fact that his counsel may have advised him otherwise, while proper upon the question of malice, does not form the basis for a finding of fact that he had probable cause to believe the plaintiff guilty of larceny. Probable cause may be founded on misinformation as to the facts but not as to the law. The facts within his knowledge did not indicate that a crime had been committed. They did not tend to cause a man with knowledge of the law to suspect or believe that it had been violated, and the defendant was bound to know the law. The court, therefore, rightly instructed the jury, as a matter of law, that the defendant, in causing the arrest of the plaintiff, did so without probable cause to believe that an offense had been committed by the plaintiff. Hazzard v. Flury, 120 N. Y., 223; 24 N. E. Rep., 194 (1890).

(e) *Want of probable cause and abuse of process.*— Morris Rosen brought an action against Nathan Stein, Leopold Bloch, Louis Stein and Abraham N. Stein for false imprisonment. The plaintiff, Rosen, was a journeyman tailor, and as such was given by the defendants' firm the material and trimming to make a dozen coats, for which he was to be paid a stipulated sum per coat. The work was done outside the defendants' establishment. When the coats were completed it was discovered that there was something wrong with the linings of some or all of them. The defendants claimed that the trouble was caused by the mistake of Rosen in mixing two different shades together, and insisted that he should take out the defective linings, and replace them with others, for which he was given the stuff. Rosen, it appeared, afterwards returned to the defendants' store, and claimed that upon again testing the lining, and pressing it, the same discoloration was caused, and that the trouble was enirely the result of the quality of the lining, and not any fault of his making. The plaintiff claims

that the defendant Louis Stein still insisted that he should fix the coats, and stated that, unless he did remedy the defects, he would not get paid for his work. This he refused to do, and was directed to return three of the coats, which he had not already brought to the defendants' establishment. He refused to do so unless he got his pay. The defendants then sent their messenger to the plaintiff's house for the coats, and he again refused to give up the coats without his pay. Then they sent the messenger with a police officer, and demanded the coats, but Rosen refused to let them have them, or take them to the defendants' place, without being paid for his work; all the while insisting on the right to retain the property until he was paid. There was no evidence showing any purpose on the part of Rosen other than to assert his supposed legal right to keep the coats until his services had been fully paid. The evidence also shows that the defendant Louis Stein was fully advised of the plaintiff's claim. After the fruitless effort of the officer to get possession, the defendant Louis Stein went before the police justice, where he claimed he stated the facts to the justice, and was advised by him that the only thing to do was to get a warrant. The justice wrote the affidavit which charged the plaintiff with petit larceny. Stein signed and swore to it, as he claimed, without reading it, and a warrant for the arrest of Rosen was issued. Upon the warrant he was arrested, taken through the streets to the station, detained there for a couple of hours, then paroled, and upon an adjourned day discharged. On the trial he recovered $1,000. The defendants appealed.

In affirming the judgment, Barker, P. J., said: "It is claimed by the defendants' counsel that the evidence in the case showed that the defendants proceeded in good faith, that there was no evidence in the case from which malice could be inferred, and that Stein, who procured the warrant, was acting on the advice of the justice who issued it, and not on his own judgment. The justice who issued the warrant was called as a witness on the trial, but was unable to recall the particular circumstances attending the issuing of the warrant. It does appear, however, from the testimony of Louis Stein, that he signed and swore to the affidavit, charging the plaintiff with petit larceny, without reading the paper; and he stated at the time of the hearing before the police justice, when the plaintiff was discharged, that he was satisfied, and that all he wanted was to get back the coats, which he had obtained. That there was no probable cause for the arrest of the plaintiff the evidence clearly establishes. It is quite possible that the defendant Stein did not fully realize or reflect on the character of the criminal charge he made against the plaintiff; but he knew that, by putting the machinery of the criminal law in motion, he was subjecting the plaintiff to arrest, public indignity, and humiliation; and certainly a jury was justified in finding that he who would resort to the criminal law to enforce a civil right was actuated by malice. The question of malice, under the circumstances, was for the jury to pass upon, and was properly submitted to them by the court; and this court cannot say, as a matter of law, that the evidence does not sustain this finding." Judgment affirmed. Rosen v. Stein, 61 Hun, 179; 5 N. Y. Sup., 369 (1889).

§ 3. Malice and want of probable cause must concur.—The want of probable cause is essential to every suit for a malicious prosecution. Both that and malice must concur. Malice, it is admitted, may be inferred by the jury from a want of probable cause, but the want of probable cause cannot be inferred from any degree of express malice.[1]

THE LAW ILLUSTRATED.—

(1) *Concurrence of malice and want of probable cause.*

Ferguson charged Foshay with stealing his cattle, and for which he was indicted, tried and acquitted. He then brought an action against Ferguson for malicious prosecution. On the trial it appeared that the plaintiff, a drover, who was driving cattle to market, had, on passing the defendant's farm, received into his drove two of the defendant's cattle, and had proceeded on his journey with them seventy miles, when he was overtaken by the defendant, who charged him with the theft. The plaintiff paid him a large sum of money to settle the affair. The defendant returned home, and some litigation resulting between the parties growing out of the matter, he went before the grand jury and procured an indictment, upon which the drover was tried and acquitted. The jury found for the plaintiff and assessed his damages at $250. The defendant moved for a new trial on the evidence.

In the supreme court, Bronson, C. J., said: "There was evidence enough in this case to warrant the jury in finding that the defendant set the prosecution in motion from a bad motive; but all the books agree that proof of express malice is not enough without showing also the want of probable cause. However innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time the charge was made." New trial granted. Foshay v. Ferguson, 2 Den. (N. Y.), 617 (1846). Citing Swain v. Stafford, 3 Ired. (N. C.), 289; Delegal v. Highly, 3 Bing. N. C., 950. Criticised, 48 Barb. (N. Y.), 33. Cited in 49 Ind., 157; 19 Am. Rep., 678; 77 Ill., 40, 42; 98 U. S., 301; 97 U. S., 645; 24 How. (U. S.), 550; 62 N. Y., 22.

(2) *Malice and probable cause—Sufficiency of facts to justify an arrest.*

Action by Joseph Dearmond against Joseph St. Amant for $3,500 damages, claimed for defamation of character and malicious prosecution. From a judgment condemning him to pay $500 defendant appeals.

Fenner, J.: This is an action for defamation of character and malicious prosecution. The defamation of character alleged consists in merely making public statements that plaintiff was guilty of the crime for which he

[1] Stewart v. Sonneborn, 98 U. S., 187 (1878); Sutton v. Johnstone, 1 T. R., 493; Foshay v. Ferguson, 2 Den. (N. Y.), 617 (1846); Murray v. Long, 1 Wend. (N. Y.), 140 (1828); Wood v. Weir, 5 B. Mon. (Ky.), 544 (1845).

was arrested and prosecuted upon the affidavit of defendant. Manifestly the slander is merged in the prosecution, and, if the prosecution is not actionable, neither is the slander. The record shows that an attempt was made in the night-time to burn down defendant's store. It was a palpable attempt at deliberate arson, only thwarted by a fortunate discovery, and alarm in time to extinguish the flames. Arson is one of the most dangerous and cowardly of all crimes, and none is calculated to impress its victim with a deeper sense of alarm and insecurity. It was natural that defendant should have been anxious to discover and punish the perpetrator of such a crime. He employed a professional detective in New Orleans, and brought him to the parish, to aid him in ferreting out the criminal. Evidence was obtained pointing to one Joseph Guedry as the guilty person, and he was arrested, and confined in the parish jail. While so confined he made to the sheriff a most circumstantial confession, to the effect, substantially, that he had been engaged by plaintiff to burn the store; that they had gone together and set fire to it; that Dearmond had told him that a mercantile rival of St. Amant had promised to give $1,500 for the burning of defendant's store; that plaintiff had gone early next day to the rival's store to claim the reward, but that the merchant had refused to pay because the attempt had not succeeded. This confession, repeated several times, was communicated by the sheriff to defendant, and also to the district attorney, and, after consultation between the three, it was determined that plaintiff should be arrested. The district attorney prepared an unqualified affidavit charging plaintiff with the crime, but defendant declined to make it in that form, saying that he could only swear from information received, and not from his own knowledge; whereupon the affidavit was so changed, and defendant made oath to it before the judge, who issued his warrant for the arrest of plaintiff. Unwilling, however, to have the arrest made without further inquiry, the defendant asked time to make such. and it was determined that the warrant might be held. subject to his discretion, after further investigation. Defendant thereupon engaged another detective from New Orleans to assist him in further investigations. After several days thus employed, resulting in the discovery of various circumstances tending to confirm the confession of Guedry, the arrest was made by defendant and the detective to whom the sheriff had given the warrant; and plaintiff was incarcerated. It turned out that Guedry's confession had been obtained by the sheriff under threats of the certainty of his conviction, and under promises that, if he would tell all, he would be set free. Of course such confession was inadmissible as evidence for any purpose; and upon the preliminary examination before the judge, Guedry was discharged. On the following day the district attorney entered a *nolle prosequi* as to the case of plaintiff, and he was discharged after a confinement of about a week. Neither the defendant nor district attorney was informed of the threats and promises by which the confession of Guedry was obtained. The sheriff admits that, after getting the confession, he suggested to defendant to make an affidavit against plaintiff. The district attorney states that, having no reason to doubt its truth, he "considered that confession alone sufficient for him to advise the affidavit and warrant." If plaintiff is innocent of this heinous charge, as the law presumes him to be,

he has undoubtedly suffered a great wrong; and for him to be compelled to bear it without redress is indeed a hardship, but it is one of those sacrifices which the individual is required to make to the interests of society. It is not only the lawful right, but the civil duty, of every citizen to set on foot criminal proceedings whenever he believes honestly and on reasonable grounds that a crime has been committed. The social interests require, and the law invites, him thus to aid the state in the discovery and punishment of crime; and it would be equally unjust and impolitic to make him a guarantor of the success of the prosecution, or to make its failure an actionable wrong. Hence the law wisely holds the prosecutor harmless in such a case, notwithstanding the acquittal of the person accused, unless his conduct has been tainted by two concurrent vices: (1) Malicious motive; (2) want of probable cause, *i. e.*, absence of reasonable grounds for believing in the truth of the charge made. From the huge volume of testimony in this case, we have selected and detailed a few of the pertinent and indisputable facts, the effect of which is not, in our judgment, destroyed by any other of the numerous facts and circumstances proved. It would serve no useful purpose to discuss the latter. Suffice it to say that the record fully satisfies us that the defendant acted throughout in good faith, from honest motives, on probable and reasonable grounds, and without malice, express or implied.

It is therefore ordered, adjudged and decreed that the verdict and judgment appealed from be annulled and set aside, and that there be now judgment in favor of defendant, rejecting the demand of plaintiff at the latter's cost in both courts. Dearmond v. St. Amant, 40 La. Ann., 374; 4 So. Rep., 73 (1888).

§ 4. Reasonable and probable cause an element of the plaintiff's case — Honest and reasonable belief. — In actions for malicious prosecution the real controversy is generally upon the question of probable cause, the want of which is a vital and indispensable element in the plaintiff's case, and as to which the burden of proof is upon him. Whether there was want of such cause is a question of law upon the facts proved.[1] It is to be judged of, not upon the actual state of the case, but upon the honest and reasonable belief of the party that instituted the proceeding complained of.[2]

[1] Good v. French, 115 Mass., 203 (1874): Kidder v. Parkhurst, 3 Allen, 393 (1862).

[2] Good v. French, 115 Mass., 203 (1874); Bacon v. Towne, 4 Cush., 217 (1849). Probable cause depends upon the prosecutor's sincere belief, based upon facts which would justify such belief in a reasonable man. Woodward v. Mills (Wis.), 20 N. W. Rep., 728; Walker v. Camp (Iowa), 19 N. W. Rep., 802; Murphy v. Martin (Wis.), 16 N. W. Rep., 603; Ross v. Langworthy (Neb.), 14 N. W. Rep., 515; Smith v. Austin (Mich.), 13 N. W. Rep., 593. The defendant may be asked whether he made the complaint in good faith, believing

§ 5. The right to judge from appearances as to the existence of reasonable or probable cause.— A party about to commence legal proceedings, either civil or criminal, has the right, as affecting the existence of reasonable or probable cause, to judge for himself from appearances; and if from such appearances, though they may have been deceiving, there was a reasonable ground of suspicion supported by circumstances, apparent or real, sufficiently strong in themselves to warrant a cautious man, acting in good faith, in the belief of the existence of reasonable or probable cause, and to create in his mind a reasonable ground of suspicion, it is sufficient in law even if there was in fact no reasonable cause for his action.[1]

APPLICATIONS OF THE LAW.—

(1) *A person may judge from appearances as to probable cause — Honest and reasonable belief, etc.*

Good had bought a lot of flour, in the name of Cutler, of the firm of which George W. French was a member. He had no authority to use Cutler's name and the flour was not paid for. French made a complaint and caused Good to be arrested for obtaining the flour by false pretenses. After his release he brought an action for malicious prosecution against French. On the trial the plaintiff, against the objection of the defendant, testified to facts tending to show that he was in good credit, and had funds in the hands of a third person sufficient to pay for the flour, and that there was a practice among flour dealers to buy flour in the name of other persons, and that the reason of this practice was to conceal the names of the actual purchasers, and cover up any speculation in which the actual purchaser might be engaged. On his cross-examination he admitted that he used the name of Cutler in the purchase of the flour because he feared that his credit would be called in question if he attempted to buy in his own name; and that he did not want the defendant to understand that credit for the flour was to be given to him. When the testimony was all in the defendant asked the court to order a verdict for him. The request was refused and the jury found for the plaintiff. Exceptions were taken to the admission of the testimony and refusal to order a verdict for the defendant.

Ames, J., said: "The plaintiff represented himself, in making the purchase, as the agent of Cutler, which was not true. He made this false representation for the sake of concealing the fact that he was the real purchaser. He did not intend to have the flour charged to himself, for fear his credit might be called in question, and he obtained possession of the

the plaintiff to be guilty. White v. Beck (Iowa), 19 N. W. Rep., 872; Sherburne v. Rodman (Wis.), 8 N. W. Rep., 414.

[1] Good v. French, 115 Mass., 203 (1874); Pomeroy v. Villavossa, 81 Ill. App., 590 (1889).

property by means of that false representation. . . . The defendant had a right to judge from appearances, and the evidence wholly fails to do away with the effect of these appearances. Neither the existence of the alleged practice, nor the fact that the plaintiff had funds with which he could have paid for the flour, has any tendency to show that the defendant instituted the prosecution without probable cause. . . . The evidence relied upon by the plaintiff, whatever its effect may be to explain his conduct, and to acquit him of any fraudulent intent, has no tendency to show that the defendant was not acting under an honest and reasonable belief and with apparent or probable cause. This defect in the plaintiff's case is insuperable." Exceptions sustained. Good v. French, 115 Mass., 203 (1874).

(2) *A man's conduct may justify a suspicion.*

It is not sufficient on the part of the plaintiff to show that he was acquitted of the charge; he must prove that there were no reasonable grounds for it. It is not every verdict of not guilty, nor every subsequent proof of complete innocence, that shows a want of probable cause in the incipient stages of a prosecution. A man's conduct may, from his folly, his neglect, or his ignorance, be such as to justify a suspicion of guilt and produce a prosecution in the course of which it may be made to appear that he is clearly innocent; but that will not authorize an action for malicious prosecution. Grant v. Denel, 8 Rob. (La.), 17; 38 Am. Dec., 228.

§ 6. Good faith on the part of the prosecutor a defense. Our experience teaches us there are few questions of law more difficult of apprehension by a jury than those which govern trials for malicious prosecution. It seems difficult for them to appreciate, if the plaintiff was really innocent of the charge for which he was prosecuted, that he still ought not to recover. They do not readily comprehend why an innocent man may be prosecuted for a supposed crime or offense, and yet have no recourse against the prosecutor who caused his arrest and imprisonment; and yet the preservation of the peace and the good order of society requires that every innocent man may be compelled to submit to great inconveniences and hardships, rather than that citizens should be deterred from instituting prosecutions where there is reasonable or probable grounds to believe in the existence of guilt. Good faith on the part of the prosecution is always an important, if not a vital, element of inquiry, and is always a sufficient justification, except where an unreasonable credulity is manifested, inducing the prosecutor to draw conclusions of guilt, when it would have been wanting in the perception of a person of ordinary prudence and judgment.[1]

[1] Collins et al. v. Hayte, 50 Ill., 358 (1869).

APPLICATIONS OF THE LAW.—

(1) *Municipal officers prosecuting saloon-keeper under void charter — Advice of counsel — Probable cause.*

Gilbertson sued Fuller and others for maliciously prosecuting him for keeping a saloon contrary to an ordinance of the village of Rothsay. One of the defendants was a justice of the peace for Wilkin county; another, a constable in said county, as well as a member of the village council of Rothsay, a village which had organized and acted, in common with many others, under the provisions of chapter 78, General Laws, 1887 — the chapter declared unconstitutional by this court in State v. Simons, 32 Minn., 540; 21 N. W. Rep., 750. The other defendants were also members of the village council. Upon being informed of the decision referred to, the members of the council were at a loss to determine what course to pursue should certain saloon-keepers decline to take out a license in conformity with the terms of an ordinance which prohibited the sale of intoxicating liquors within the village limits without such license. They resolved to seek the advice of the attorney-general of the state, and, according to the testimony, upon more than one occasion consulted him in reference to the legal *status* of the village, and as to the powers and privileges of its officers should the saloon-keepers refuse or neglect to obey the ordinance. The testimony is uncontradicted that, upon a full and fair presentation of the facts to the then attorney-general, the village council was advised that it had a right to proceed against such persons as disregarded the ordinance, precisely as if the decision (which was in reference to another municipality) had not been rendered. This advice was discussed and made public at a meeting of the council held just prior to the termination of the license year, and seems to have been predicated upon the fact that the incorporation of the village of Rothsay had not been passed upon, and also on a supposition that the legislature, then in session, would immediately pass a bill validating the incorporation of all villages organized and acting under the obnoxious law. After the plaintiff opened his place of business, without having obtained a village license, the circumstances of his case were presented to the attorney-general, and the council was by him advised to prosecute. A prosecution having resulted disastrously to the municipality, Gilbertson brought an action for a malicious prosecution. He recovered, and the defendants appealed.

In delivering the opinion of the supreme court, Collins, J., said: "There is no claim that this advice was not given, as stated upon the trial, nor is there a pretense that any of these defendants did not act in perfect good faith throughout the entire transaction, relying upon the assurance of the chief law officer of the state, to whom they had, at the outset, stated all of the facts and circumstances, and with whom they subsequently counseled with reference to the prosecution of this plaintiff. It was upon his express advice that the steps were taken upon which is based this action. A charge of malicious prosecution is well met by proof that the proceedings were instituted in reliance, in good faith, upon the advice of competent legal counsel, received upon a full statement to him of the facts known to the prosecutor, or which he had reason to suppose existed; and this rule

applies with still greater force when the proceeding is instituted upon the advice and approval of the prosecuting officer. Moore v. Railway Co., 37 Minn., 147; 33 N. W. Rep., 334. And the rule is especially pertinent and relevant when the prosecution is commenced upon the suggestion, and with the indorsement, of the attorney-general of the state.

"There being no controversy over the facts, it was for the court to declare whether probable cause existed; that is, whether the defendants had 'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.' Cole v. Curtis, 16 Minn., 182 (Gil., 161); Casey v. Sevatson, 30 Minn., 516; 16 N. W. Rep., 407; Burton v. Railway Co., 33 Minn., 189; 22 N. W. Rep., 300. The defendants, in a case where there was no doubt of the guilt of the accused, if the ordinance was enforceable, took the precaution to submit that question to the attorney-general for his opinion, and thereafter acted in strict accordance with his views, under his instructions, and in good faith. There was no want of probable cause, and the court erred in so holding. Order reversed." Gilbertson v. Fuller et al., 40 Minn., 413; 42 N. W. Rep., 303 (1889).

(2) *Arrest for theft — Settlement and discharge — Malicious prosecution not sustained — Want of probable cause the gist of the action.*

McCormick brought an action for malicious prosecution against Sisson. At the trial it appeared that the defendant obtained a warrant from a justice against the plaintiff on a charge of theft, and when he was brought before the justice he (the justice) examined some witnesses, and before he had finished the examination the parties declared they had settled all matters of difficulty between them; and, on this account, he proceeded no further. The defendant moved for a nonsuit, on the ground that the plaintiff had not shown that he was acquitted and discharged by the justice, and the motion was overruled. Evidence was given by the plaintiff tending to show that Sisson prosecuted before the justice with a view to coerce a settlement and surrender of the property alleged to be stolen; and the justice decided that other evidence given on the part of the plaintiff to show malice in the defendant, both want of probable cause and malice, might be implied. He submitted to the jury, upon the evidence, whether there was probable cause. Verdict for the plaintiff, with $75 damages.

In the supreme court Woodward, J., said: "I think the objection taken, that there was no acquittal, is fatal. The justice did not decide whether there were grounds for the complaint or not. It is essential that the plaintiff prove he has been acquitted. The damage must be in consequence of the acquittal. The action cannot be submitted unless the proceedings are at an end by reason of an acquittal. In this case the proceedings ended in consequence of a settlement. The justice heard a part of the testimony only, and formed no opinion on the subject. The judge also decided that the defendant must show probable cause. It appears the law is otherwise. The want of probable cause is the gist of the action, and, if so, the plaintiff must show it to maintain his action. The judge also erred in submitting to the jury the question whether there was probable cause. Whether

the circumstances alleged are true is a matter of fact; if true, whether they amounted to probable cause is a question of law. The verdict must be set aside and a new trial granted, with costs to abide the event." McCormick v. Sisson, 7 Cow., 715 (1827). Citing 2 T. R., 281; Doug., 215; 2 Johns., 215; 10 Johns., 106; 1 Campb., 199; 1 T. R., 545; Bull. N. P., 14. Cited in 29 Cal., 650; 48 Barb., 86; 80 N. Y., 627; 41 Barb., 306; 6 Hill, 347; 14 Wend., 194; 9 L. C. P. Co., 276.

(3) *A want of probable cause.*

Cawrey rented a house of Chapman for a month and paid the rent. After the expiration of the term, Cawrey was temporarily absent, having his furniture in the house. Upon his return he found it fastened up, whereupon he forced open the door and entered. Then Chapman ordered him to leave the premises, but he refused and told Chapman not to enter, threatening violence to him if he did so. Chapman made an affidavit to the effect that Cawrey did break into his store-house and threaten to kill him if he interfered with him. Upon this affidavit a warrant was issued the same night by a justice of the peace, which Chapman gave to an officer about midnight and ordered Cawrey arrested, after he had gone to bed, and without allowing him any opportunity to procure bail, and had him taken to jail and there imprisoned until Monday morning, when, upon examination, he was discharged. Cawrey brought an action for malicious prosecution and recovered $1,000.

On an appeal to the supreme court, in discussing the question of the existence of probable cause, Breese, C. J., said: In examining the testimony on this point, no reasonable ground of suspicion, supported by any circumstances, existed at the time of this transaction, or linked with it, to warrant a cautious and prudent man to believe that appellee was guilty of any criminal offense in entering the premises in the manner he did. They had been rented to him at a stipulated rent, which he had paid, and if he was holding over after the expiration of his term, that did not warrant appellant in the course he took to regain possession of them. The lessee had left them for a temporary purpose merely, leaving all he had in them, including the bed in which he slept; and when he returned at night, finding the entrance closed, he had a right to force the obstruction and enter. Such an entry could hardly be deemed burglarious, nor indeed did appellant, in his complaint to the magistrate, charge, in terms, the breaking to be felonious. The most that can be inferred from the complaint was a breach of the peace, accompanied by a threat of homicide. But this threat to kill was conditional if appellant interfered with him, and that was made after appellee had got into possession of the house. Such a threat is no ground for a criminal prosecution; on the contrary, it might prevent a violation of law by the party threatened. If a person in the exercise of a right is approached by another in a menacing manner, and is told if he does the act his menaces indicated he would kill him, such a declaration, instead of a threat to kill, should be rather regarded as a warning to the other party not to do violence. Chapman v. Cawrey, 50 Ill., 512 (1869).

(4) *Probable cause — Suing out and levying a distress warrant.*

A tenant abandoned premises of his own accord, and drew a check for a few dollars more than was due for a month's rent, and sent it to the agent of the landlord, with a view of terminating the lease by having it received as the amount due to date after the month's rent was due, and thus estop the landlord from claiming rent for the balance of the term, but the agent refused to accept it and offered to return it, and never presented it for payment. It was held that these facts showed probable cause for distraining for the month's rent which was due, and that there was not grounds for maintaining an action for maliciously, and without probable cause, suing out and levying a distress warrant for rent due. Hammond et al. v. Will, 60 Ill., 404 (1871).

§ 7. Character of the plaintiff an element in the question of probable cause.— The burden is on the plaintiff to show affirmatively, by circumstances or otherwise, that the defendant had no ground for the prosecution,— no such reasonable ground of suspicion, sufficiently strong in itself, as to warrant a cautious man in believing that the person to be arrested was guilty of the offense with which he was charged.[1] What these circumstances may be of course depends upon the circumstances of each particular case, but among them the good character of the party accused will stand out prominently. All must admit that that is, and must be, a strong fact, if known to the accuser, to ward off suspicion, and therefore for this purpose it is entirely competent for the plaintiff in the action, in his opening proof, to show that his character was good, and known to be so by the defendant when the accusation was made. As the burden of proving a negative — the absence of probable cause — is thrown upon the plaintiff, slight evidence will usually suffice for such purpose. But evidence of a uniform good character up to the time of the charge is something more than slight evidence, and the plaintiff should have the benefit of it. If known to the prosecutor, what simple fact is better calculated to weaken a belief, he being a prudent and cautious man, in the guilt of the suspected party? On the other hand, his bad character may be shown by the defense as a good ground for augmenting a suspicion against him.[2]

[1] Jacks v. Stimpson, 13 Ill., 701 (1858); Israel v. Brooks, 23 Ill., 572 (1851); Hurd v. Shaw, 20 Ill., 356 (1860).

[2] Israel v. Brooks, 23 Ill., 575 (1860).

APPLICATIONS OF THE LAW.—

Reasonable inquiry as to character of the accused — An element of probable cause.

Feeney was in the employ of a wholesale house in Chicago. He was trusted with their goods and a key of their establishment. One night he went into Hirsh's store and paid a small bill. There was nothing suspicious about his entry or departure. Hirsh did not remember of his having been there at all, or at least on the next day he had forgotten it. That same night the store was entered by burglars and robbed. Hirsh consulted detectives, and finally procured the arrest of Feeney. There being no evidence against him he was discharged after a short imprisonment. He then brought an action against Hirsh for malicious prosecution. On the trial the jury found for the plaintiff $1,200.

On an appeal being taken, on the question, Did Hirsh in causing the arrest to be made act as a cautious and prudent man under the circumstances, Mr. Justice Walker said: "The whole of the evidence, with the attending circumstances, should be considered in determining whether there is probable cause. The jury were bound to consider the facts that the manner in which Feeney had entered Hirsh's store the evening before the burglary was committed had not attracted his attention, even so that he remembered his having been in the store when asked the next day if anyone had been in, and he had forgotten it. His entrance, therefore, excited no suspicion, nor did it even attract attention at the time. Again, Feeney seems to have sustained a good character, and in determining whether his character was good or bad, he should have applied to his employers, or those with whom he was intimate, and not to persons who knew him but slightly. He and the officers, it seems, referred to the city directory to find his residence, and we presume they there found his occupation, and with whom he was employed, and if so, he should have been apprised of the fact that he was respectable, and was trusted by business men; and knowing that, he had no right to believe, because Feeney had entered his store the evening before in such a manner as to attract no attention, that he was therefore a burglar, notwithstanding he was employed and trusted by men engaged in business in the city. The officers were, no doubt, largely influenced in forming their opinion and in giving advice by what Hirsh had told them. The fact that Feeney was a householder, had a good character, and was trusted by business men, should have prevented Hirsh from supposing him guilty, except on strong evidence of the fact. It was his duty to have used reasonable efforts to learn and know his true character, especially when the directory pointed him to the sources of information. Hirsh v. Feeney, 83 Ill., 548 (1876).

§ 8. Gross negligence — Error — Mistake — As affecting probable cause — Reeves, J.—"While the law is that an honest belief in the party swearing out a warrant for the arrest of another upon a criminal charge, that such person is probably guilty, will not constitute probable cause if he could have

ascertained such belief but for gross negligence on his part, acting as an ordinarily prudent person would under like circumstances, still a mistake or error not amounting to such gross negligence would not affect the question of probable cause where there was such honest belief." [1]

APPLICATION OF THE LAW.—

A belief induced by error and negligence.

McGuire made a complaint upon which Goodman was arrested for trespass for cutting timber and brought before a justice for preliminary examination. Subsequently this proceeding was discontinued and an information for the same offense against Goodman and others was filed in the county court, and Goodman arrested and held to bail. Before the trial the state's attorney entered a *nolle* as to Goodman, who then brought an action against McGuire for malicious prosecution. On the trial the jury were instructed: "Although the defendant may have honestly believed, at the time the prosecution was commenced, that there was reasonable and probable cause for such prosecution, yet if this belief on his part, however confident and strong, was induced by his own error, mistake or negligence, without any occasion for suspicion given by plaintiff, such belief of the plaintiff will not amount to probable cause." There was a judgment for the plaintiff, which was reversed on appeal, the appellate court holding that a mistake or error not amounting to gross negligence does not affect the question of probable cause, where there is an honest belief that a person is probably guilty on the part of the party swearing out a warrant for his arrest. McGuire v. Goodman, 31 Ill. App., 420 (1889).

§ 9. Ignorance of the law excuses no one.— A person who commences a groundless action or prosecution must be presumed to know that his action or prosecution will not lie. It is a correct doctrine in law, that what a man is bound to know the law presumes he does know and holds him responsible accordingly. A man ought not to take out legal process to seize the property or arrest the person of another without some knowledge on the subject-matter of the suit or prosecution in which such process is issued, and the law applicable to the subject-matter, and he ought to be responsible for the consequences, if he acts in utter recklessness and ignorance. But the presumption, in point of fact, is that he does know the law, because it is within the common experience that men not themselves instructed in the law do not ordinarily take such measures without legal advice.[2]

[1] McGuire v. Goodman, 31 Ill. App., 420 (1889).

[2] Wills v. Noyes, 29 Mass., 324 (1832).

§ 10. Character of accused where the charge is upon information and belief.— In all cases where a criminal charge is made upon information and belief, evidence that the person charged had a character the natural tendencies of which would not prompt the person to commit the act charged is competent to enable the court or jury to determine the question whether the prosecutor had reasonable ground for entertaining the belief notwithstanding such character. When a person has an unblemished character, the prosecutor is aware of the fact that it must necessarily require more evidence to create a reasonable belief of guilt than where the character is bad. This is the rule when the prosecution is based upon information and belief, but the reason for the rule ceases in cases where the prosecution is based on a direct knowledge of the facts.[1]

§ 11. Probable cause a mixed question of law and fact.— The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable are true and existed is a matter of fact, and to be determined by the jury; but whether, supposing this to be true, they amount to probable cause, is a question of law.[2] It is true cases may be found in some jurisdictions holding differently, but the doctrine as announced is philosophical, and has been generally adopted in American courts.

§ 12. Discussion of the subject.— In an action of malicious prosecution, the affirmative is on the plaintiff to show want of probable cause. As respects a criminal prosecution, the following definition of "probable cause" is approved by many authorities, viz.: "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to

[1] Skidmore v. Bricker, 77 Ill., 164 (1875).

[2] Besson v. Southard, 10 N. Y., 236 (——); Stewart v. Sonneborn, 98 U. S., 187 (1878); McCormick v. Sisson, 7 Cow. (N. Y.), 715 (1827); Griffis v. Sellars, 2 Dev. & B. (N. C.), 492 (1837); Moore v. Railroad Co. (Minn.), 33 N. W. Rep., 334; Burton v. Railroad Co. (Minn.), 22 N. W. Rep., 300; Johnson v. Miller (Iowa), 29 N. W. Rep., 747; 17 N. W. Rep., 34; 19 N. W. Rep., 310; Ross v. Langworthy (Neb.), 14 N. W. Rep., 515; Castro v. De Uriarte, 16 Fed. Rep., 93; Gee v. Culver (Ore.), 6 Pac. Rep., 775; Sartwell v. Parker (Mass.), 5 N. E. Rep., 807; McNulty v. Walker (Miss.), 1 South. Rep., 55; Bell v. Keepers (Kan.), 14 Pac. Rep., 542; Bell v. Matthews (Kan.), 16 Pac. Rep., 97.

warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged."[1] *Mutatis mutandis*, this definition is applicable to *civil* prosecutions or actions. As to them, probable cause may be defined as such reasons, supported by facts and circumstances, as will warrant a cautious man in the belief that his action, and the means taken in prosecuting it, are legally just and proper.[2]

What facts, and whether particular facts, constitute probable cause, is a question exclusively for the court. What facts exist in a particular case, where there is a dispute in reference to them, is a question exclusively for the jury. When the facts are in controversy, the subject of probable cause should be submitted to the jury, either for specific findings of the facts, or with instructions from the court as to what facts will constitute probable cause. These rules involve an apparent anomaly, and yet few, if any, rules of the common law rest upon a greater unanimity or strength of authority.[3]

But while the question, what facts make out probable cause, is for the court, it is ordinarily, if not always, really a question of fact to be determined upon the facts and circumstances of the particular case; and hence it has been sometimes regretted that it was not, as in the law of Scotland, a question for a jury.[4] Considerations of public policy, in view of the importance of not discouraging public prosecutions, or the prosecution of private suits in good faith and with honest purposes, have, however, led to the establishment and maintenance of the rule.[5]

For the purpose of reviewing the action of trial courts in determining the question of probable cause, the appellate

[1] Cole v. Curtis, 16 Minn., 182 (Gil., 161) (1870); Casey v. Sevatson, 30 Minn., 516; 16 N. W. Rep., 407.

[2] 2 Greenl. Ev., § 454; Stewart v. Sonneborn, 98 U. S., 187 (1878).

[3] Sutton v. Johnstone, 1 Term R. (Durn. & E.), 493 (Lord Mansfield); Panton v. Williams, 2 Q. B., 169; Lister v. Perryman, L. R., 4 H. L., 521; Stone v. Crocker, 24 Pick., 81; Kidder v. Parkhurst, 3 Allen, 393; Ash v. Marliw, 20 Ohio, 119; Stewart v. Sonneborn, 98 U. S., 187; Speck v. Judson, 63 Me., 207; Grant v. Moore, 29 Cal., 644; Thaule v. Krekeler, 81 N. Y., 428; Cole v. Curtis, 16 Minn., 182 (Gil., 161).

[4] Lister v. Perryman, L. R., 4 H. L., 521.

[5] Cole v. Curtis, 16 Minn., 182 (1870); Stewart v. Sonneborn, 98 U. S., 187 (1878); Stone v. Crocker, 24 Pick. (Mass.), 81 (1841).

courts have treated it as a question of law, because determined by the court, and have therefore considered and examined the evidence bearing upon it as freely as if the question was before them originally.[1]

§ 13. Province of the court and jury.— What is meant by the expression that probable cause is a mixed question of law and fact is, if the circumstances of the case which are adduced as proof of a want of probable cause are controverted, if conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed on, the fact of the existence or non-existence of probable cause should be submitted to the jury with proper instructions as to the law. But where there is no dispute about the facts, it is the duty of the court on the trial to apply the law to them and pronounce upon the legal effect of the evidence without the intervention of the jury.[2]

§ 14. The law stated by Marcy, J.— "It is conceded on all hands that the question of probable cause is a mixed question of law and fact, and it would seem necessarily to result that the jury are to say whether the circumstances relied upon to show probable cause really existed; and the court are to decide, if they did exist, whether they constituted probable cause. A judge, therefore, who would assume the right to determine the whole question, to the exclusion of the jury, would encroach upon their province."[3]

§ 15. The law stated by Morton, J.— The question of probable cause is a mixed question, partly of law and partly of fact; but not, as in many cases, so combined as to blend the duties of the court and jury. What facts constitute probable cause is a question for the court. Whether those facts exist in each particular case is a question for the jury. The jury must weigh the evidence and ascertain what facts are

[1] Burton v. St. Paul, M. & M. R'y Co., 33 Minn., 189; 22 N. W. Rep., 301 (1885).

[2] Gorton v. De Angelis, 6 Wend. (N. Y.), 418 (1831); Sutton v. Johnstone, 1 T. R., 493; Panton v. Williams, 2 Q. B., 169; Stone v. Crooker, 24 Pick., 81; Kidder v. Parkhurst, 3 Allen, 393; Ash v. Marlow, 20 Ohio, 119; Stewart v. Sonneborn, 98 U. S., 187; Speck v. Judson, 63 Me., 207; Grant v. Moore, 29 Cal., 644; Thale v. Krekeler, 81 N. Y., 428; Cole v. Curtis, 16 Minn., 182; Rosenkranz v. Baker, 115 Ill., 332; Atchison, T. & S. F. R. Co. v. Watson (Kan.), 15 Pac. Rep., 877; Bulkeley v. Keteltas, 2 Seld., 384.

[3] Masters v. Deyo, 2 Wend. (N. Y.), 424 (1829).

proved, and the court must determine the inference of law from them. The facts must be such as will induce a candid and intelligent man in the defendant's situation to believe the plaintiff to have been guilty of the crime for which he was prosecuted.[1]

APPLICATION OF THE LAW.—

(1) *Action for malicious civil prosecution — Probable cause.*

On the trial of an action for maliciously commencing and prosecuting a civil suit, it was shown that Gorton sued De Angelis in a justice's court, and February 9, 1829, the parties appeared before the justice, J. B. Reed, Esq., and the plaintiff declared for a quantity of hogsheads, barrels, etc., and for work and labor. The defendant pleaded the general issue, and gave a general notice of set-off, and claimed damages for leakage of the hogsheads, etc., and the cause was adjourned until February 26, when at the request of the defendant it was further adjourned until April 1, and subsequently, on a like request, until May 2, and afterwards until May 12, where the cause was tried and a judgment rendered for the plaintiff for $5.98 damages. While this suit was pending De Angelis commenced a suit by summons against Gorton, before another justice, viz., W. Townsend, Esq. The action was trespass on the case, and the summons was returnable April 14. Gorton appeared, and De Angelis not appearing the suit was discontinued. A few minutes after the discontinuance, and previous to Gorton's leaving the court, De Angelis appeared and took out a new summons, in an action of trespass on the case, against Gorton, returnable April 21. On the return of this second summons the parties appeared, and De Angelis declared against Gorton, charging him with damage sustained in the leaking of certain hogsheads, and with money paid, etc. Gorton pleaded the suit commenced by him against De Angelis in bar of a recovery, averring that De Angelis had set off the same matters now alleged in his declaration in that suit, and asked for time to procure the attendance of J. B. Reed, Esq., the justice before whom the first suit was commenced. Time was granted. This was at about 4 o'clock in the afternoon. At 10 o'clock P. M., Gorton not having returned, the justice, Townsend, proceeded to the hearing of the cause, and gave judgment for De Angelis for the sum of $28.32. Gorton returned, and brought with him Reed, the justice, about fifteen minutes after the judgment was rendered against him by Townsend. De Angelis, having withdrawn two items of the demand exhibited before the justice April 21, took out another summons from Townsend, in an action of trespass on the case against Gorton, returnable April 28; on which day Gorton appeared, and, De Angelis not appearing, the justice rendered judgment against him for costs. The justice stated that before Gorton went away he thought that De Angelis came, but could not be confident of the fact. The summons was returnable at the distance of nine miles from the residence

[1] Wilder v. Holden, 41 Mass., 8 (1833).

of Gorton. Gorton appealed from the judgment rendered against him April 21 to the common pleas, and April 30 discontinued the same and paid the costs of the appeal. On those facts appearing, and the plaintiff resting, the defendant moved for a nonsuit on the ground that no evidence of want of probable cause had been given.

The judge decided that, on the evidence before him, the question of want of probable cause was a question of law, and that in his opinion the plaintiff had failed to establish this essential ground of his action, and directed a nonsuit to be entered, which the plaintiff now moved to set aside.

Marcy, J.: "If the facts which are adduced as proof of a want of probable cause are controverted; if conflicting testimony is to be weighed; or if the credibility of witnesses is to be passed upon, the question of probable cause should go to a jury with proper instructions as to the law; but when there is no dispute about the facts it is the duty of the court on the trial to apply the law to them. In this case there was no contest about the facts, no conflict in the testimony, no impeachment of the witnesses. We cannot, therefore, say the judge erred in assuming to himself to pronounce upon the legal effect of the evidence, nor do we think he erred in the conclusion to which he arrived." The motion was denied. Gorton v. De Angelis, 6 Wend. (N. Y.), 418 (1831). Citing Masters v. Deyo, 2 Wend. (N. Y.), 424.

(2) *Where the facts are undisputed the question of probable cause is for the court to determine.*

McNulty owned some hogs, which had disappeared. He was informed that Brasfield and Walker had killed them. He went to see them, and asked them about it, but they denied having even seen his hogs. Not being satisfied with this denial, he made affidavit against both of them before a justice of the peace, charging them with killing his hogs. They appeared before the justice. A trial was had, which resulted in the conviction of Brasfield, and the acquittal of Walker. Walker, feeling aggrieved at this action of McNulty, sued him for malicious prosecution.

On the trial, defendant, McNulty, asked the court to charge the jury to find for him, which the court refused. A trial being had, resulted in a verdict for plaintiff, and McNulty was mulcted in the costs of the suit, from which judgment he appealed.

In delivering the opinion of the supreme court, Arnold, J., said: "The verdict was manifestly wrong, and the instruction asked by appellant, to the effect that the jury should find for him, should have been given. In an action for malicious prosecution it is essential for the plaintiff to show that the prosecution complained of was instituted with malice and without probable cause. Here the proof, by uncontradicted testimony, of probable cause,—that is to say, of such a state of facts as would ordinarily be sufficient to produce a reasonable belief that the party charged was guilty,—is abundant. It is not disputed that his hogs were killed by appellee and Brasfield, nor that appellant was told by Vail that he had been informed by the McGees that they had seen appellee and Brasfield kill the hogs, nor that afterwards, and before appellant made affidavit for the arrest, he went to Brasfield and made inquiry in regard to the matter, and that he

denied that he and appellee had been in the bottom, or seen appellant's hogs.

"What constitutes probable cause, or whether there was probable cause for the prosecution, is generally a mixed question of law and fact; but if the facts are undisputed, it then becomes a question of law to be determined by the court. In this view of the law and the facts, the judgment is reversed and cause remanded." McNulty v. Walker, 64 Miss., 198; 1 So. Rep., 55 (1887). Citing Greenwade v. Mills, 31 Miss., 464; Whitfield v. Westbrook, 40 Miss., 311; Cooley, Torts, 181.

§ 16. Province of the court and jury — Malice and probable cause.— In one of the earliest cases[1] Lord Mansfield instructed the jury that the foundation of the action for malicious prosecution was malice, and all the judges concurred that "malice either expressed or implied and the want of probable cause must concur." For more than a hundred years such has been constantly held to be the law in all English-speaking countries.[2] The existence of malice is always a question exclusively for the jury. It must be found by them or the action cannot be sustained. Hence it must always be submitted to them to find whether it existed. The court has no right to find it, nor to instruct the jury that they may return a verdict for the plaintiff without it.[3] Even the inference of malice from the want of probable cause is one which the jury alone can draw.[4]

Lord Denman: "I have always understood the question of

[1] Farmer v. Darling, 4 Burr., 1971 (1766).

[2] Virgin v. Coffin, 3 Story, 1 (1836); Cook v. Walker, 30 Ga., 519 (1860); Wade v. Walden, 23 Ill., 425 (1860); Ammerman v. Crosby, 26 Ind., 451 (1866); Center v. Spring, 2 Iowa, 393 (1849): Malone v. Murphy, 2 Kan., 250 (1864); Dickenson v. Maywood, 20 La. Ann., 66 (1868); McLellan v. Cumb. Bank, 24 Me., 566 (1844); Stone v. Crocker, 24 Pick. (Mass.), 83 (1841); Greenwade v. Mills, 31 Miss., 464 (1856); Moore v. Sanborin, 42 Mo., 490 (1868); Bessen v. Southard, 10 N. Y., 236 (1851); Campbell v. O'Brien, 9 Rich. (S. C.), 204 (1855); Hitson v. Forest, 12 Tex., 320 (1854); Kelton v. Bevins, Cooke (Tenn.), 90 (1812); Bell v. Ursury, 4 Litt. (Ky.), 334 (1823); Turner v. Walker, 3 Gill & J. (Md.), 377 (1831); Smith v. Shackleford, 1 Nott & M. (S. C.), 36 (1818); Stone v. Stevens, 12 Conn., 219 (1837); Young v. Gregorie, 3 Call (Va.), 446 (1802); Mims v. Dupont, 2 Browne (Pa.), 42 (1807); Sonneborn v. Stewart, 98 U. S., 187 (1878).

[3] Stewart v. Sonneborn, 98 U. S., 187 (1878).

[4] Wheeler v. Nesbitt, 24 How. (U. S.), 544 (1860); Newell v. Downs, 8 Blackf. (Ind.), 523 (1847); Johnson v. Chalmers, 10 Ired. L. (N. C.), 287 (1849); Van Voorhees v. Leonard, 1 N. Y. Sup. Court (T. & C.), 148 (1874); Schofield v. Ferrers, 47 Pa. St., 194 (1864): Stewart v. Sonneborn, 98 U. S., 187 (1878).

reasonable or probable cause on the facts found to be a question for the opinion of the court, and malice to be altogether a question for the jury."[1]

Justice Strong (U. S. Sup. Ct., 1878): "It is generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to probable cause, or that they do not."[2] There may be and there are, doubtless, some seeming exceptions to this rule, growing out of the nature of the evidence, as where the question of the defendant's belief of the facts relied upon to prove a want of probable cause is involved. What his belief was is always a question for the jury."[3]

§ 17. **Evidence of the want of probable cause.**— The burden of establishing by competent evidence the want of reasonable or probable cause falls upon the plaintiff. Though a negative proposition, it generally requires but little evidence to establish it. It is the essential ground of an action for malicious prosecution. Malice may be inferred from the want of probable cause, but the want of probable cause cannot be inferred from anything but positive and express proof. The burden of proof is upon the person asserting it to show affirmatively, by circumstances or otherwise, as he may be able, that there was no reasonable or probable cause or grounds for commencing the proceedings in question.[4]

The rule as held by other American courts seems to be that an acquittal or discharge by the examining magistrate or grand jury is competent, but is not sufficient evidence to show the want of reasonable or probable cause.[5]

[1] Mitchell v. Jenkins, 5 B. & Ad., 588.

[2] Stewart v. Sonneborn, 98 U. S., 187 (1878); Taylor v. Williams, 2 B. & Ad., 845.

[3] Stewart v. Sonneborn, 98 U. S., 187 (1878).

[4] Hall v. Hawkins, 5 Humph. (Tenn.), 357 (1871): Stone v. Crocker, 24 Pick. (Mass.), 81 (1832); Bitting v. Ten Eyck, 82 Ind., 421; 42 Am. Rep., 505 (1882); Hayne v. Blair, 62 N. Y., 19 (1875); Skidmore v. Bricker, 77 Ill., 164 (1875); Caperson v. Sproule, 39 Mo., 39 (1866): Travis v. Smith, 1 Pa. St., 234 (1845); Marable v. Mayer, 78 Ga., 710 (1887); Good v. French, 115 Mass., 201 (1874); Levi v. Brannan, 39 Cal., 485 (1870); Wheeler v. Nesbitt, 24 How. (U. S.), 544 (1864): Malone v. Murphy, 2 Kan., 250 (1864).

[5] Williams v. Van Meter, 8 Mo., 360; 41 Am. Dec., 644 (1843); Fleck-

DIGEST OF RECENT CASES.—

The discharge of the plaintiff by the examining magistrate is *prima facie* evidence of the want of probable cause sufficient to throw upon the defendant the burden of proving the contrary. Secor v. Babcock, 2 Johns. (N. Y.), 203; Israel v. Brooks, 23 Ill., 575 (1860); Jones v. Finch, 84 Va., 204; Gould v. Sherman, 10 Abb. Pr. (N. Y.), 411; Johnson v. Martin, 2 Murphy (N. C.), 248; Mitchinson v. Cross, 58 Ill., 366 (1871); Cooper v. Utterback, 37 Md., 282; Frost v. Holland, 75 Me., 108; Vinal v. Core, 18 W. Va., 1; Josselyn v. McAllister, 25 Mich., 45; Sharp v. Johnson, 76 Mo., 660; Jones v. Finch, 84 Va., 204; Boonholdt v. Lorrilard, 36 La. Ann., 103.

The verdict of a jury upon the trial of a civil action is essentially different from the discharge of a supposed criminal by the examining magistrate, or upon a bill of indictment ignored by a grand jury. Even in the criminal proceeding the final acquittal of the accused can have but little weight as evidence of probable cause compared with an acquittal or discharge before the magistrate or grand jury. The magistrate and grand jury have the very question of probable cause to try; and the evidence on the side of the prosecution is alone examined and the proceeding is entirely *ex parte*. Under such circumstances the refusal of the examining tribunal to hold the accused over till tried must necessarily be very persuasive evidence that the prosecution is groundless. Brant v. Higgins, 10 Mo., 728.

The discharge of the defendant in a criminal prosecution does not raise a presumption of want of probable cause. Williams v. Van Meter, 8 Mo., 339; Stone v. Crocker, 24 Pick. (Mass.), 8; Heldt v. Webster, 60 Tex., 207; Thompson v. Beacon Valley R. Co. (Conn.), 16 Atl. Rep., 554; Griffis v. Sellars, 2 D. & B. (N. C.), 492; 31 Am. Rep., 422; Griffin v. Chubb, 7 Tex., 603; 58 Am. Dec., 85; Bitting v. Ten Eyck, 82 Ind., 421; 42 Am. Rep., 505.

Where an accusation of felony is withdrawn, and the defendant is convicted of a misdemeanor included in the felony charged, but is acquitted on appeal, the conviction is not such evidence of probable cause as will defeat an action for malicious prosecution based on the charge of felony. Whitney v. Peckham, 15 Mass., 243; Labar v. Crane, 49 Mich., 561; Dennehey v. Woodsum, 100 Mass., 197; Cloon v. Gerry, 3 Gray (Mass.), 203; Crescent City Live Stock Co. v. Butchers' Union, etc., 120 U. S., 141.

§ 18. Proof of the want of probable cause, etc.—It is necessary for the plaintiff to establish on the trial that the prosecution or proceedings complained of were carried on without probable cause. The question of probable cause being a mixed question of law and fact, it is necessary to show only the circumstances relied upon to establish the facts and the legal consequences follow. The proofs will of course vary

inger v. Wagner, 46 Md., 580 (1877); v. Tschechtelen, 12 Daly (N. Y.), 34
Grant v. Denel, 3 Rob. (La.), 17; (1881).
38 Am. Dec., 238 (1842); Dorendenger

with the circumstances of each particular case, and are subject to the same general rules governing the introduction of evidence in other cases.[1]

§ 19. Evidence of probable cause.— I. CONCLUSIVE EVIDENCE.— It has been universally held by our courts that the conviction of a person charged with the commission of a criminal offense is evidence, and generally conclusive evidence, of probable cause;[2] but it is always competent to show, however, to overcome the conclusive character of such evidence, that such counter-claim was obtained wholly or chiefly by the false testimony of the opposing party.[3]

APPLICATION OF THE LAW.—

(1) *Conviction before justice must be for the identical prosecution complained of.*

In October, 1879, Crane instituted a prosecution against Labar before a justice of the peace of Kalamazoo, charging him with making an assault upon complainant with a gun, with intent to murder; Labar was arrested upon this charge, but after a continuance of the case for a time, the complaint was withdrawn and one for simple assault and battery substituted, upon which Labar was tried and convicted; he appealed the case to the circuit court, where he was tried and acquitted. Crane and others were witnesses against him in the justice's court, and also in the circuit court, and the case in the circuit court was disposed of without the introduction of evidence by the defense. Labar then sued Crane and the witnesses who had testified against him for a malicious prosecution. On the trial he was not successful, and he took the case to the supreme court on error.

In reversing the judgment of the court below, Cooley, J.. said: "The principal question in the case, and the only one we find it necessary to decide, is whether the conviction of the plaintiff in the justice's court is conclusive evidence of probable cause. The defendants strongly insist that it is, and the circuit judge concurred in that view. It will be observed

[1] 3 Phillips' Ev., 570; 3 Greenleaf's Ev., 455.

[2] Olson v. Neal, 63 Iowa, 214 (1884); Parker v. Farley, 10 Cush. (Mass.), 279 (1852); Bitting v. Ten Eyck, 82 Ind., 421 (1882); Williams v. Gowen, 14 Me., 362 (1837); Dennehey v. Woodsum, 100 Mass., 195 (1868); Clements v. Od. Ex. App. Co., 67 Md., 461; 1 Am. St. Rep.. 409 (1887); Kaye v. Kean, 18 B. Mon. (Ky.), 839; Philips v. Kalamazoo, 53 Mich., 33 (1884).

[3] Bowman v. Brown, 52 Iowa, 437 (1879); Womac v. Circle, 29 Gratt. (Va.), 192 (1877); Olson v. Neal, 63 Iowa, 214 (1884); Cloon v. Gerrey, 13 Gray (Mass.), 201 (1859); Peak v. Choteau, 91 Mo., 138 (1886); Palmer v. Avery, 41 Barb. (N. Y.), 290 (1864); Richey v. McBean, 17 Ill., 63 (1874); Payson v. Casswell, 22 Me., 212 (1842); 14 Am. & Eng. Ency. Law, 66 (1891).

that there were two prosecutions: one for assault with intent to murder, and the other for a simple assault, in which the plaintiff was at first convicted and then on appeal acquitted. The plaintiff in different counts of his declaration complains of each prosecution as malicious and groundless, and the first, by the admission of the complaint in abandoning it, must be deemed groundless, unless the institution of the second, and the result of the trial in the justice's court, can by retroactive effect give evidence of probable cause.

"If the second prosecution was in legal effect identical with the first, and only instituted because of some technical defect or other imperfection or failure in the first, the argument of the defendants would be plausible and perhaps conclusive. But the two prosecutions were far from being identical in legal effect. The first was for one of the highest offenses known to the law; a felony which, in the discretion of the court, may be punished with imprisonment for life. It is therefore ranked in criminality with murder itself. The second was for a misdemeanor, which a court only empowered to try trivial offenses and inflict insignificant punishments was competent to deal with. The first, when instituted on probable cause, exposes the respondent to great peril and corresponding loss in standing and reputation; it may call for heavy and perhaps impossible bail, and in every respect the consequences to the party accused are as different from the other as it is possible for two cases, both criminal in form, to have. No court has held that there was probable cause to believe the felony was committed, and as has been said, the complainant abandoned all attempt to prove it.

"It is perfectly true that if the felony had been committed the misdemeanor would have been included in it; but the particular misdemeanor of which the justice found the plaintiff guilty could not have been included in a felony if no felony was committed. In point of fact, when the charge of misdemeanor was tried there was no accusation of felony whatever; and it would be monstrous to hold that because an assault might have been committed in an attempt to murder, therefore the conviction of this particular assault is evidence of probable cause to charge such an attempt. To hold this would be to justify the making of a charge of the felony in every case of assault, no matter how trivial, and might excuse the most groundless and atrocious prosecutions." Labar v. Crane, 49 Mich., 561; 14 N. W. Rep., 495 (1883).

(2) *Verdict of guilty founded on correct instructions conclusive of evidence probable cause.*

Samuel Parker was indicted, tried and convicted of perjury. He took exceptions to the rulings of the court, but they were overruled. He then moved for a new trial, alleging that he had been convicted on false evidence, etc. His motion was sustained, and the case was then continued on the docket for five years, when the district attorney entered a *nolle prosequi*. Then Parker sued Farley, who had made the complaint upon which he was indicted, for malicious prosecution. On the trial before the chief justice the question was, "Was the conviction of the plaintiff by the jury

in point of law proof of probable cause?" The chief justice expressed an opinion that it was, whereupon a verdict was taken by consent for the defendant, subject to the opinion of the whole court.

Shaw, C. J.: "The court are of the opinion that this action cannot be maintained. The main question is whether there was probable cause for the prosecution complained of as malicious. Malice may be inferred from the fact that the complaint was groundless, but not the reverse. Want of probable cause is not to be inferred even from proof of express malice, and whether there was probable cause or not is a question of law upon the facts admitted or uncontested, the truth of which are to be ascertained by the jury on the evidence submitted to them. Now in looking into the record of this case we find that on the only trial by jury they found him guilty. Exceptions were taken and overruled. At this stage of the cause the plaintiff stood liable to be sentenced, but he was granted a new trial to admit newly-discovered evidence, but it was never brought before the jury, and no new trial was ever had. The court are therefore of the opinion that such a verdict of conviction upon instructions correct in matter of law, though afterwards set aside for another cause, must be regarded as proof of probable cause for the prosecution, and stand as a bar to the prosecution of this suit." Parker v. Farley, 10 Cush. (64 Mass.), 279 (1852).

(3) *Verdict of a jury for a set-off in a civil suit evidence of probable cause.*

Thompson and others sued Dolan on two promissory notes signed by him. Dolan set up in defense (1) that he had paid the notes, and (2) that he had a claim in set-off against Thompson *et al.* larger than the amount of the notes, and the jury returned a verdict for Dolan under his declaration of set-off. Afterwards Dolan sued Thompson *et al.* for malicious prosecution. On exception it was held that the verdict of the jury was conclusive that Thompson *et al.* had a cause of action against Dolan, and that his action for malicious prosecution could not be maintained. Dolan v. Thompson et al., 129 Mass., 205 (1880).

(4) *A verdict of guilty in a criminal prosecution, though obtained by false testimony, and set aside for newly-discovered evidence, and a verdict of not guilty returned, is conclusive evidence of probable cause in a subsequent action for malicious prosecution.*

Samuel Parker sued Asahel Huntington for a malicious prosecution. On the trial he offered to prove that, at the time of the prosecution complained of, Huntington, being then district attorney, obtained pursuant to concert with one Farley, and by false testimony of Farley, and knowing it to be without probable cause, an indictment against him for perjury, and caused him to be arrested and tried thereon. It appeared from the record that the indictment contained two counts alleging the same perjury on two distinct occasions. Parker was tried on both counts and convicted. The instructions were correct, but he obtained a new trial on newly-discovered evidence. On the new trial only one count was submitted, and on this he was acquitted, and the then district attorney therefore entered a *nolle prosequi* on the other count. The plaintiff offered to prove that notwithstanding the record the said prosecution was malicious and without probable cause,

the *nolle prosequi* was entered because of the acquittal, and that more than six years had elapsed since the alleged perjury, but the court ruled that the evidence would not sustain the action. A verdict for the defendant was directed and the case reported to the full court.

Metcalf, J., delivered the opinion of the court: "This case furnishes no exception to the general rule that a conviction of a party by a jury is conclusive evidence of a probable cause for the prosecution." Parker v. Huntington, 73 Mass., 36 (1856). Citing Parker v. Farley, 10 Cush., 279; Parker v. Huntington, 2 Gray, 124; Phelps v. Stearns, 4 Gray, 105.

(5) *A conviction before a justice of the peace evidence of probable cause.*

It was alleged that Gerry, maliciously contriving to injure Cloon, and without probable cause, made a complaint to a justice of the peace against him for an illegal sale of intoxicating liquor. On this complaint Cloon was tried before the justice, convicted and sentenced. He appealed to the court of common pleas, and was there tried and acquitted. Then he brought an action against Gerry for malicious prosecution. On the trial he was nonsuited by the court, and, having alleged exceptions, the nonsuit was sustained.

Shaw, C. J.: "On this case the court ruled that such conviction was proof of probable cause; or, to state the proposition with more precision, it negatived the plaintiff's leading and essential averment that the complaint was made without reasonable and probable cause, and that, for this reason, the action could not be maintained, and therefore ordered a nonsuit. The court are of the opinion that the direction was right." Cloon v. Gerry, 79 Mass., 201 (1859).

(6) *Evidence of probable cause — Conviction on trial before justice.*

Whitney sued Peckham for maliciously prosecuting him before a justice of the peace for an assault and battery. On the trial the plaintiff offered a copy of the record of the proceedings before the justice, by which it appeared that he pleaded not guilty, but the justice found him guilty, and sentenced him to pay a fine of $2 and costs. It was shown that he appealed to the circuit court, where he was acquitted. The trial judge, being of the opinion that the conviction before the justice, he having jurisdiction of the subject-matter of the complaint, was conclusive evidence that there was probable cause, directed a nonsuit. The point being reserved for the opinion of the whole court was confirmed. Whitney v. Peckham, 15 Mass., 243 (1818). See Reynolds v. Kennedy, 1 Wils., 232; Cotton v. James, 1 B. & Ad., 128; Pierce v. Thompson, 6 Pick., 193.

(7) *Collateral judgment, when evidence of probable cause.*

Hunt had brought suit and recovered judgment against one Collins, an engineer of the St. Johnsbury & L. C. R. Co., for injury to a heifer struck by one of its locomotives in charge of said Collins. Collins was arrested while on duty, thereby delaying an important train. Suit was brought

against Hunt to recover damages for such delay. The declaration alleged, in substance, that said suit was brought without any just cause of action against said Collins, and for the sole purpose of injuring the plaintiff. On demurrer it was held (55 Vt., 570) that the declaration was sufficient, and that there was nothing alleged to make the judgment in Hunt v. Collins an estoppel on this plaintiff: and the cause was remanded for trial.

On the trial the defendant, as tending to show that he had a cause of action against Collins, offered to show that plaintiff had not performed its statutory duty as to fences and cattle-guards, and that said heifer got on the track for want thereof. The statute (R. L. Vermont, §§ 3407-3412) requires railroad companies to maintain sufficient fences and cattle-guards, and makes them and their agents responsible for damage caused by the want thereof. The court excluded the evidence, to which the defendant excepted.

The defendant offered in evidence a duly-certified copy of record in Hunt v. Collins as tending to show that he had a cause of action against said Collins. The court excluded the evidence, to which the defendant excepted.

In reversing the rulings it was said by Rowell, J.: "The declaration alleges that the defendant had no cause of action against Collins, and, as tending to show that he had, he offered to show that plaintiff had neither fenced its road nor built cattle-guards along where the heifer was killed, and that she got onto the track for want thereof. Although the defendant was not bound to show that he had a cause of action against Collins,— for if he had probable cause to believe, and did believe, that he had, it was enough, and he might then lawfully sue and arrest Collins, as he did, even as against the plaintiff, though he did it with the motive alleged,— yet, if he saw fit to assume the burden of showing that he had a cause of action, it was competent for him to do so; for, as the greater includes the less, he would thereby be showing probable cause, and so the evidence should have been admitted if it bore on the question, as we think it did. When a railroad is completed and in running order, it is the statutory duty of the company to fence it with good and sufficient fences; and until its fences and cattle-guards are duly made, the corporation and its agents are made liable for the damage done by its agents or engines to cattle on the railroad, if occasioned by want of such fences and cattle-guards. R. L. Vermont, §§ 3409, 3412.

"When this case was before the court on demurrer, it was held there was nothing alleged to make the judgment in Hunt v. Collins an estoppel on the plaintiff. The judgment is now offered as evidence tending to show that Hunt had a cause of action against Collins. But if that judgment is any evidence in his behalf against the plaintiff, it is conclusive evidence of probable cause for the suit in which it is rendered; and as nothing now appears in this case to make that judgment conclusive on the plaintiff that did not appear before, the former decision on this point must stand, for a decision once made in a case is final and conclusive in the case in which it is made." St. Johnsbury & L. C. R. Co. v. Hunt, 59 Vt., 294; 7 Atl. Rep., 277 (1886). Citing Hathaway v. Allen, Brayt., 152; Reynolds v. Kennedy, 2 Wis., 232; Cloon v. Gerry, 13 Gray, 201.

II. PRIMA FACIE EVIDENCE.— Upon the question of what is a sufficient showing in the first instance of the want of probable cause, the decisions of the American courts are not quite uniform. As the conviction of a person by an examining magistrate of an offense charged upon him has been almost universally held to be conclusive evidence of probable cause, it would seem reasonable that the converse of the proposition must hold, that his acquittal should be conclusive evidence of the want of probable cause; but such is not the law. Greenleaf states the law as follows: "The discharge of the plaintiff by the examining magistrate is *prima facie* evidence of the want of probable cause, sufficient to throw upon the defendant the burden of proving the contrary."[1] This doctrine has been criticised by some eminent jurists; by others it has been denounced as "a principle of the most dangerous character."[2]

[1] 2 Greenleaf, Ev., § 455.

[2] Breese, J., in Israel v. Roberts, 23 Ill., 575 (1860). In speaking of the doctrine as announced by Greenleaf, Judge Breese, in Israel v. Roberts, 23 Ill., 575 (1860), says: In support of the principle as announced, Dr. Greenleaf cites Secor v. Babcock, 2 Johns., 203, but this case does not seem to bear him out. The opinion in that case is *per curiam* and is as follows: "The justice had power on examination of a charge of suspicion of felony or of having stolen goods to dismiss the plaintiff below, if he was satisfied there was no ground for the suspicion. The acquittal was lawful and there was a sufficient ground for a suit for malicious prosecution." It seems to be a more reasonable inference that the discharge was a sufficient termination of the prosecution upon which to base a suit for malicious prosecution, rather than that it was *prima facie* evidence of a want of probable cause, and sufficient to cast the burden of proving the contrary upon the defendant. The other authorities referred to by Dr. Greenleaf in support of the principle are two cases from North Carolina. Johnston v. Martin, 2 Murphy (N. C.), 249; Bostick v. Rutherford, 4 Hawk. (N. C.), 83. No good reasoning is adduced and these cases stand alone. If the doctrine is correctly stated by Dr. Greenleaf, then every man who appears before a magistrate to give information of a criminal offense incurs the hazard of a prosecution against himself, should the magistrate happen to be ignorant, prejudiced or corrupt. How many magistrates are there in obscure localities, who are as little capable of determining what is probable cause for a criminal prosecution as they are of explaining any of the phenomena of nature? How many do we find prejudiced against a public accuser, how many in sympathy with the accused? The decisions of such an official, on intricate questions of law or fact, should not weigh against the accused, and they do not, practically; for if he is committed, the grand jury pay no attention to the finding of the magistrate. If a committal by the magistrate is not *prima facie* evidence of his guilt, it would

Our courts, however, seem to be settling down to the rule that the discharge of a person accused of crime by a committing magistrate, or the ignoring of like charges by a grand jury, and similar adjudications, are *prima facie* evidence of the want of probable cause, sufficient to cast upon the opposite party the burden of proving the contrary.[1] On the other hand the waiving of a preliminary examination,[2] the disagreement of a jury, their hesitation in finding a verdict of acquittal,[3] requiring the accused to enter into a recognizance by an examining magistrate,[4] the finding of an indictment by a grand jury, have been held to be *prima facie* evidence of the existence of probable cause.[5]

APPLICATION OF THE LAW.—

(1) *Disagreement of jury — Evidence of probable cause.*

In an action for malicious prosecution it was stated in the petition that the defendants caused the plaintiff to be indicted for the crime of grand larceny, and that in so doing they acted maliciously and without probable cause, and that they conspired together for the purpose aforesaid; that said plaintiff had been acquitted of said charge. The defendants pleaded a general denial. Trial by jury and judgment for the plaintiff, and defendants appealed.

seem preposterous to say that his discharge is *prima facie* evidence of a want of probable cause. The better and more reasonable doctrine is that the discharge of the examining magistrate is not *prima facie* evidence of a want of probable cause, and it should in no case be so regarded. As a fact, it is proper to go to the jury as tending to show an end of the prosecution, but no such inference unfavorable to the accuser can legally be drawn from it. See Stone v. Crocker, 24 Pick., 81, 88, *quære* (1831); Scott v. Simpson, 1 Sandf., 601 (1848); Smith v. Ege, 52 Penn. St., 419 (1866); Ross v. Innis, 26 Ill., 259 (1861).

[1] Sharpe v. Johnston, 76 Mo., 660 (1882); Sapping v. Watson, 50 Mo., 83 (1872); Vinal v. Core et al., 18 W. Va., 1 (1881); Frost v. Holland, 75 Me., 108 (1883); Griffis v. Sellars, 2 Dev. & B. (N. C.), 492; 41 Am. Dec., 422 (1837); Jones v. Finch, 84 Va., 204 (1887); Womac v. Circle, 33 Gratt. (Va.), 347 (1879); 2 Greenleaf's Ev., § 455; 2 Starkie's Ev., 494; 3 Phillips' Ev., 296; 14 Am. & Eng. Ency. of Law, 67 (1891); Moffatt v. Fisher, 47 Iowa, 473 (1877).

[2] Van Sickle v. Brown, 68 Mo., 627 (1878).

[3] Johnson v. Miller et al., 63 Iowa, 529 (1884).

[4] Womac v. Circle, 29 Gratt. (Va.), 347 (1879); Diemer v. Herber, 75 Cal., 287 (1888).

[5] Garrard v. Willett, 4 J. J. Marsh. (Ky.), 628 (1830); Peck v. Choteau, 91 Mo., 138 (1886). *Contra*, Motis v. Bates, 80 Ala., 382 (1886). See Crescent City, etc., Co. v. Butchers' Union, etc., Co., 120 U. S., 141 (1886).

The plaintiff was twice tried on the indictment. On the first trial the jury were unable to agree on a verdict, and were discharged. The defendants sought to introduce in evidence the record of such trial, which showed that the jury retired to consider as to their verdict on the 5th day of May, and, being unable to agree, they were discharged the next day. Upon the objection of the plaintiff this evidence was excluded.

In discussing this question Seevers, J., said: "It is insisted by counsel for the defendants the evidence sought to be introduced was evidence of probable cause, and therefore the court erred in excluding it. It has been held that a conviction before a justice of the peace on a criminal charge, and upon appeal there was an acquittal, is conclusive evidence of probable cause. Whitney v. Peckham, 15 Mass., 243; Witham v. Gowen, 14 Me., 362. In Bacon v. Towne, 4 Cush., 217, it is said the authority of the first case has been doubted in Burt v. Place, 4 Wend., 591, and that, if the conviction before the justice is regarded 'as evidence of probable cause, we think it is *prima facie* only, and not conclusive.' And such is the rule in this state. Moffatt v. Fisher, 47 Iowa, 473. In Garrard v. Willet, 4 J. J. Marsh., 628, it was held 'that the finding by the grand jury [of an indictment] is *prima facie* evidence of probable cause.' In Smith v. McDonald, 3 Esp., 7, it is said if the evidence on the trial of the criminal charge is such as to cause the jury to hesitate as to an acquittal, it was evidence of probable cause. In the case at bar the jury were unable to agree as to the innocence or guilt of the defendant. It follows, of course, that the jury, or some of them, must have believed the plaintiff to be guilty. The fact that he was acquitted by another jury cannot affect the result which must necessarily follow, because the first jury failed to acquit. We think the evidence offered was admissible, because it tended to show probable cause. It was not conclusive, and, like any other *prima facie* evidence, was subject to be explained. The question is not whether the plaintiff was guilty, but whether the defendants had reasonable cause to so believe. If the finding of an indictment is evidence of probable cause, or the evidence on the trial of the criminal charge is such as to cause the jury to hesitate, is evidence of probable cause, it seems to us the inability of the jury to agree must have the same effect. The evidence offered was therefore admissible." The judgment is reversed. Johnson v. Miller, 63 Iowa, 529; 17 N. W. Rep., 84 (1883).

(2) *A conviction before a magistrate reversed on appeal.*

Phillips brought an action for malicious prosecution against the village of Kalamazoo. In his declaration he alleged that the defendant wrongfully and maliciously caused him to be prosecuted and arrested for the violation of a village ordinance prohibiting peddling without a license in the village; that he was tried before a justice of the peace and convicted, and on appeal to the circuit court he was acquitted and discharged. The declaration contained no averment that his conviction was procured by any fraud, perjury or subornation, and he does not show that his case comes within any of the exceptions applicable to cases where a conviction has been had. Hence, by his own showing, there was not a want of probable

cause. The defendant demurred. The plaintiff joined in the demurrer. The judge sustained the demurrer and rendered judgment for the defendant.

On appeal, in the supreme court, Champlin, J., said: "As a general rule, a conviction before a magistrate is a bar to a malicious prosecution, and if the party complaining relies on an exception to it, he must allege the facts which create the exception. Cooley, Torts, 185. No exception to the operation of the rule is claimed in this case, and the judgment is affirmed." Phillips v. Village of Kalamazoo, 53 Mich., 33; 18 N. W. Rep., 547.

(3) *A reversed decree evidence of probable cause — Malicious prosecution of a civil suit will lie in what cases.*

The Odorless Excavating Company filed a bill, in the United States circuit court for the district of Maryland, against Clements for the infringement of re-issued letters patent granted to Lewis R. Keizer, for an apparatus used in the cleaning and emptying of privies, the original patent having been granted to Henry C. Bull. In his answer Clements denied that Bull was the inventor of apparatus described in the original patent, and charged that the re-issued letters patent granted to Keizer were not for the same invention described in the original patent, but for other and different inventions not known to Bull at the time the original patent was granted; and further, that the said re-issued letters patent were fraudulently obtained, and that the specifications and claims were fraudulently enlarged for the purpose of including other and subsequent inventions. He also claimed that the apparatus or machine used by him was constructed in accordance with letters patent granted to Samuel R. Scharf and Jerome Bradley. The case was heard on bill, answer and proof, and the circuit court, being of opinion that the machine used by Clements was an infringement of the re-issued letters patent granted to Keizer, enjoined him from making, using or vending said machine containing the inventions and improvements described in said re-issued letters patent. On appeal to the supreme court of the United States, the decree below was reversed on the ground that the improvement claimed in the re-issued letters patent granted to Keizer was but an expansion of the Scharf and Bradley improvements. Clements then brought an action against the Odorless Excavating Apparatus Company to recover damages for having instituted the suit in the United States district court maliciously and without probable cause. On the trial it was held that the decree of the district court, though reversed, was conclusive evidence of probable cause. He took the case to the court of appeals.

In delivering the opinion affirming the judgment of the court below, Robinson, J., said: "Whatever may be said of the earlier decisions, it is quite well settled that an action will lie in some cases for the malicious prosecution of a civil suit without probable or reasonable cause, although there is some conflict as to the cases embraced within the rule. Such suits are not, however, encouraged, because the law recognizes the rights of every one to sue for that which he honestly believes to be his own, and the payment of costs incident to the failure to maintain the suit is ordinarily considered a sufficient penalty. In McNamee v. Minke, 49 Md., 122, we had occasion to consider the law in regard to such actions, and the

court said: 'When it has been attempted to hold a party liable for the prosecution of a civil proceeding, it has generally been in cases where there has been an alleged malicious arrest of the person, as in the case of Turner v. Walker, 3 Gill & J., 377, or a groundless seizure of property, or the false and malicious placing the plaintiff in bankruptcy, or the like.' Now, if it be conceded that a bill in equity by the appellee to restrain the appellant from using an apparatus or machine, on the ground that it was an infringement of letters patent issued to the plaintiff, comes within the rule thus laid down (without, however, so deciding), it is sufficient to say there was no evidence in this case to sustain the action. To entitle the appellant to recover, he was bound to offer evidence from which a jury could reasonably find that the bill for an injunction was instituted by the appellee, not only maliciously, but without probable cause.

"Now, what was the evidence relied on to support the action? In the first place, the appellant offered the record of the appeal from the decree of the district court, and the decree of the supreme court reversing the same. By this record it appears that the injunction proceeding was heard by the district court on proof taken by both sides, and, after argument by counsel of the respective parties, that court was of opinion that the apparatus used by the appellant was an infringement of the patent-rights of the appellee. It was the deliberate judgment of a court of competent jurisdiction that there was not only a probable cause for filing the bill for injunction, but that the appellee was entitled to the relief prayed. A judgment thus rendered ought to be considered conclusive as to the question of probable cause, although it was reversed on appeal by the supreme court; otherwise, in every case of reversal, an action would lie for the institution of the original suit." Judgment affirmed. Clements v. Odorless Excavating Apparatus Co., 67 Md., 461, 605; 10 Atl. Rep., 442 (1887).

(4) *Signs displayed, when evidence of probable cause to believe ownership, etc.*

It appeared that certain beer pumps in the custody of Holden were attached as the property of Wilder and were delivered by the officer to Holden for safe-keeping. In the absence of Holden they were taken away by Wilder and a person who claimed them as his property. Holden thereupon made a complaint against Wilder, charging him with stealing the pumps. In an action brought by Wilder against Holden for a malicious prosecution, Holden gave in evidence a card which had been posted up at his place of business, and had been seen there by Wilder, if not put up by him, advertising that Wilder made and sold beer pumps. It was held that this card, though inadmissible as evidence of the ownership of the pumps attached, was nevertheless evidence of probable cause for making the complaint, it having some tendency, though very slight, to induce the defendant to believe that the plaintiff was the owner. Wilder v. Holden, 41 Mass., 8 (1833).

§ 20. Acquittal of the accused not evidence of a want of probable cause — The contrary rule stated by Walker, J.—To recover in cases for malicious prosecution of criminal com-

plaints there must be malice on the part of the person starting the prosecution, and a want of probable cause for believing the accused guilty. A want of probable cause is not shown by the acquittal of the accused. If such were the rule, but few, if any, would dare make an effort to enforce the criminal laws of a state. To do so would involve the prosecuting witness, wherever the prosecution failed, in vexatious litigation and loss, and none could be expected to incur such hazards. Prosecuting witnesses must be protected where they act in good faith on facts and circumstances which are such as induce a belief of guilt in the mind of a reasonable person. This has always been the rule of the law. The issue for the jury or the court to try is not the guilt of the plaintiff. If the defendant act in good faith on evidence, whether true or false, which is sufficient to create a reasonable belief that the accused is guilty of the offense, he is protected.[1]

DIGEST OF RECENT CASES.—

(1) *Evidence in general.*

(*a*) It is not incumbent upon the plaintiff to give in evidence all the testimony introduced before the magistrate, in order that the court may determine the question of the existence of probable cause. Bacon v. Towne, 4 Cush. (Mass.), 217.

(*b*) The official stenographer of the court may read from his notes the testimony of a witness taken at the trial of an indictment, and who is beyond the jurisdiction of the trial court, for the purpose of showing want of probable cause. Brown v. Willoughly, 5 Colo., 1.

(*c*) By-standers who heard the evidence before the examining magistrate are not allowed to rehearse what that evidence was, because their testimony would then be secondary and hearsay. The witnesses themselves should be called to testify as to their evidence before the magistrate. Richards v. Foulke, 3 Ohio, 52. But see Goodrich v. Warner, 21 Conn., 432.

(*d*) Where the judgment of the magistrate by whom the plaintiff has been bound over is relied upon as evidence of probable cause, it cannot be impeached by evidence that he acted unfairly and improperly in the examination. Bacon v. Towne, 4 Cush. (Mass.), 217.

(*e*) An action for malicious prosecution will not lie if plaintiff was convicted before a justice of the peace, but was discharged on appeal, unless the conviction was procured by fraud, perjury or subornation, or was otherwise exceptional. Phillips v. Kalamazoo, 53 Mich., 33.

(*f*) It cannot be shown for the purpose of proving probable cause that the grand jury deliberated some time before agreeing to return no bill and that eight of the jury were in favor of finding an indictment. Scotten v. Longfellow, 40 Ind., 28.

[1] Walker, J., in Anderson v. Friend, 85 Ill., 135 (1877).

(2) *Sufficient evidence to be submitted to a jury.*

(*a*) The presumption of probable cause, which ordinarily prevails when it appears on the face of a petition for malicious prosecution that plaintiff was convicted in the trial court, but judgment reversed on appeal, is rebutted by further allegations that the conviction was procured by fraud in depriving plaintiff of the testimony of his principal witness by joining him as co-indictee. Boogher v. Hough (99 Mo. 183), 12 S. W. Rep., 524.

(*b*) A witness testified that one of the defendants, on the morning after the fire, said, "We've been robbed," and then said, "We have not been robbed," and that defendant asked witness to conceal some dies worth $200 to $300 until after the insurance men had been there. Witness also testified that this defendant told him, a few days afterwards, that they had made $3,000 by the fire; that a detective had worked plaintiff, and if there was money to put plaintiff in jail he would go there; that he wished the detective had worked another person, as he would have been an easier man to have worked; and that, just before the trial of plaintiff on the indictment, this defendant twice offered witness $25 to go away and not testify for plaintiff. *Held*, that the evidence as to this defendant entitled plaintiff to go to the jury on the question of probable cause. Cheever v. Sweet, 151 Mass., 186; 23 N. E. Rep., 831.

(*c*) The A. Company, having by its charter a monopoly of the slaughtering business in and around New Orleans, brought suit in the United States circuit court for Louisiana against the B. Company, to restrain it from carrying on the same business, which the latter claimed a right to do under the provisions of the constitution of Louisiana of 1879, sections 248, 258, vesting the regulation of the business in municipalities, and abolishing the monopoly features thereof. The circuit court gave judgment in favor of the A. Company, but, upon appeal to the United States supreme court, this judgment was reversed. *Held*, that the judgment of the circuit court, although afterwards reversed, was sufficient evidence of probable cause for the suit to prevent the maintenance of an action for malicious prosecution on account thereof, brought by the B. Company against the A. Company in the state courts; and that the fact that, before the beginning of the suit in the United States circuit court, the state courts had decided against the A. Company in a suit brought by it against the city of New Orleans to restrain the city from proceeding under the new constitutional provisions, did not alter the case. Crescent City, etc., Co. v. Butchers' Union, etc., Co., 120 U. S., 141; 7 S. Ct. Rep., 472 (1886).

(3) *Prima facie evidence.*

(*a*) The jury were unable to agree as to the guilt or innocence of the defendant. It followed, of course, that the jury or some of them must have believed the plaintiff to have been guilty. The fact that he was acquitted by another jury cannot affect the result which must necessarily follow because the first jury failed to convict. "We think the evidence offered was admissible because it tended to show probable cause. It was not conclusive, but, like any other *prima facie* evidence, was subject to be explained. The question was not whether the plaintiff was guilty, but whether the de-

fendant had reasonable cause to so believe. If the finding of an indictment is evidence of probable cause, or the evidence on the trial of a criminal charge is such as to cause the jury to hesitate as to an acquittal, it is evidence of probable cause. It seems to us that the inability of the jury to agree must have the same effect." Johnson v. Miller, 63 Iowa, 529; 50 Am. Rep., 758.

(*b*) The fact that the judge held the plaintiff to bail, and refused to discharge him on the accusation made by defendant and former conspirators, or that plaintiff was indicted by a grand jury for the offense they charged against him, was not conclusive evidence of probable cause. Graham v. Noble, 13 Serg. & R. (Pa.), 233; Religh v. Cook, 60 Tex., 438; Bacon v. Towne, 4 Cush. (Mass.), 217; Ricord v. Central Pac. R. Co., 15 Nev., 167.

(*c*) The decision of a magistrate that there is sufficient evidence to warrant requiring the accused to enter into recognizance is at least *prima facie* evidence of probable cause, unless such decision has been procured by evidence known to the complainant to be false. Womac v. Circle, 29 Gratt. (Va.), 192; Diemer v. Herber, 75 Cal., 287.

(*d*) In an action for malicious prosecution, the weak presumption that exists in every case, that every public prosecution is founded on probable cause, is strengthened by the proof that the plaintiff had, after an examination by a justice, been committed to jail to answer an indictment when found, but it may be rebutted by other testimony showing that there was no probable cause for the prosecution. Hale v. Boylen, 22 W. Va., 234.

(*e*) A verdict of guilty is strong *prima facie* evidence of probable cause, but is capable of being rebutted. Jones v. Kirksey, 10 Ala., 839; Payson v. Caswell, 22 Me., 212; Herman v. Brookerhoff, 8 Watts (Pa.), 240.

(*f*) The plaintiff won some money from defendant on a wager, and because he did not return such money he was arrested at defendant's instance and committed on a charge of larceny; an information charging plaintiff with such crime was dismissed for want of evidence. It was held that the commitment was only *prima facie* evidence of probable cause and was fully rebutted by other evidence. Diemer v. Herber, 75 Cal., 287.

§ 21. Judgments and decrees of trial courts — How far conclusive evidence of probable cause — Review of the authorities and discussion of the subject. — How much weight as proof of probable cause shall be attributed to the judgment of the court in the original action, especially where subsequently reversed, may admit of some question.[1] Ruffin, C. J., said that probable cause is judicially ascertained by the verdict of the jury and judgment of the court thereon, although upon an appeal a contrary verdict and judgment be given in a higher court.[2] And in Massachusetts, such a judgment was

[1] Crescent City L. S., etc., Co. v. Butchers' Union, etc., Co., 120 U. S., 141 (1886).

[2] Griffiths v. Sellars, 4 Dev. & B. L., 177 (1839).

held to be conclusive in favor of the existence of probable cause.[1] In Pennsylvania, Chief Justice Gibson held the same way.[2] The Massachusetts decision was questioned by the supreme court of the state of New York, where Marcy, J.,[3] delivering the opinion, said that the decision rested entirely upon the decision of the English court of common pleas.[4] "The English case was well considered; it was twice argued, and the opinion given after mature advisement. It is to be considered as a highly respectable authority for what it professes to establish. The entire view of the court in the case appears to be presented in the last sentence of the opinion delivered by Chief Justice Lee. He says: 'Upon the whole, we think the plaintiff has shown by his declaration that the prosecution was not malicious, because the subcommissioners gave judgment for the defendant, and therefore we cannot infer any malice in him.' It is nowhere said in the case that under no circumstances could malice be inferred if any inferior tribunal had given judgment in favor of the prosecutor of a suit said to be malicious.

"Such is not the necessary inference; and Baron Eyre, of the Exchequer,[5] thought that the expressions of the chief justice should have been a little varied, and if varied as he thought they ought to be, they would in my judgment seem to repel the inference that the condemnation of the subcommissioners was conclusive upon the question of probable cause. He was of the opinion that, instead of saying as Chief Justice Lee did, that 'We cannot infer malice,' it would have been more correct to say, 'We will infer that there was probable cause for prosecuting the brandy to condemnation.' And when this case[6] came before Lords Mansfield and Loughborough on a writ of error it was viewed in much the same light. They say that whether the circumstances alleged to show probable cause are true and exist is a matter of fact; but whether, supposing them true, they amount to probable cause, is a question

[1] Whitney v. Peckham, 15 Mass., 243 (1818).

[2] Herman v. Brookerhoff, 8 Watts (Penn.), 240 (1839).

[3] Burt v. Place, 4 Wend., 599 (1830).

[4] Reynolds v. Kennedy, 1 Wils., 232 (1753).

[5] Johnstone v. Sutton, 1 T. R., 505 (——).

of law."[1] The effect of these English authorities as laid down by Justice Marcy is as follows: "That if it appears by the plaintiff's own declaration that the prosecution he charges to have been malicious was before a tribunal having jurisdiction, and was there decided in favor of the plaintiff in that court, nothing appearing to fix on him any unfair means of conducting the suit, the court will regard the judgment in favor of the prosecution satisfactory evidence of probable cause."[2] In the New York case the judgment relied upon by the defendant was held by Justice Marcy not to be conclusive, and he gave his reasons as follows: "Though the plaintiff admits in his declaration that the suits instituted before the magistrate by the defendant were decided against him, he sufficiently counteracts the effect of that admission by alleging 'that the defendant, well knowing that he had no cause of action, and that the plaintiff had a full defense, prevented the plaintiff from procuring the necessary evidence to make out that defense, by causing him to be detained a prisoner until the judgments were obtained,' and alleging that the imprisonment was for the very purpose of preventing a defense to the action."[3]

Commenting upon the New York case the court of appeals of Kentucky held: "The principle settled in that case we understand to be that such a judgment will not in every possible state of the case be deemed conclusive of the question of probable cause; but that, like judgments in other cases, its effect may be destroyed by showing that it was procured by fraud or other undue means."[4] The limitations upon the general principle declared by Justice Marcy were followed by the supreme court of Maine,[5] and were subsequently referred to by the same court as follows: "In these two cases[6] we have instances of exceptions to the general rule, indicative of

[1] Johnstone v. Sutton, 1 T. R., 512 (——).

[2] Burt v. Place, 4 Wend., 599 (1830); Crescent City L. S., etc., Co. v. Butchers' Union Co., 120 U. S., 141 (1886).

[3] Burt v. Place, 4 Wend., 599 (1830).

[4] Spring v. Besore, 12 B. Mon., 551 (1851).

[5] Witham v. Gowan, 14 Me., 362 (1837).

[6] Burt v. Place, 4 Wend., 599 (1830); Witham v. Gowen, 14 Me., 362 (1837).

the general nature of the characteristics which might be expected to attend them; but the rule itself remains unimpaired. If there be a conviction before a magistrate having jurisdiction of the subject-matter not obtained by undue means, it will be conclusive evidence of proble cause."[1] The propriety of this limitation of the rule seems to have been admitted in Massachusetts in one case,[2] though in later cases the rule formerly established seems to have been reiterated.[3]

§ 22. **The correct rule.**— "The correct doctrine on the subject is, in our opinion, that the decree or judgment in favor of the plaintiff, although it be afterwards reversed, is, in cases where the parties have appeared and proof has been heard on both sides, conclusive evidence of probable cause, unless other matters be relied upon to impeach the judgment or decree and show that it was obtained by fraud; and in such cases it is indispensable that such matter should be alleged in the plaintiff's declaration, for unless it be done, as the other facts which have to be stated establish the existence of probable cause, the declaration is suicidal. The plaintiff's declaration will itself always furnish evidence of probable cause when it states, as it must do, the proceedings that have taken place in the suit alleged to be malicious, and shows that a judgment or decree has been rendered against the plaintiff. To counteract the effect of the judgment or decree and the legal deduction of probable cause, it is incumbent upon him to make it appear in his declaration that such judgment or decree was unfairly obtained, and the results of acts of malice, fraud and oppression on the part of the defendant, designed and having the effect to deprive him of the opportunity and necessary means to have defeated the suit and obtained a judgment in his favor."[4] This is the rule as laid down by the court of appeals of Kentucky, and which has recently received the approval of the supreme court of the United States.[5] It seems to rec-

[1] Payson v. Caswell, 22 Me., 212 (1842).

[2] Bacon v. Towne, 4 Cush., 217 (1849).

[3] Whitney v. Peckham, 15 Mass., 243 (1818); Parker v. Huntington, 7 Gray, 36 (1856).

[4] Spring v. Besore, 12 B. Mon., 551 (1851).

[5] Crescent City L. S., etc., Co. v. Butchers' Union, etc., Co., 120 U. S., 141 (1886).

oncile the apparent contradiction in the authorities, and states the rule which we think to be well grounded in reason, fair and just to both parties, and consistent with the principle on which the action for malicious prosecution is founded.

APPLICATION OF THE LAW.—

(1) *Judgments of trial courts, how far conclusive evidence of probable cause.*

In the case of Burt against Place for malicious prosecution, on the trial of the cause the following facts were shown on the part of the plaintiff: June 13, 1826, the defendant obtained three warrants to be issued against the plaintiff by a justice of the peace of Oswego county, on which the plaintiff was arrested and brought before the justice July 24, 1826. The defendant declared against the plaintiff in three several causes: in one for work, labor and services; in another for a yoke of oxen sold and delivered; and in the third for a horse sold. The plaintiff pleaded the general issue in each suit, and asked for an adjournment; but not being able to give bail for his appearance, the adjournment was refused and the cases were tried, and a judgment rendered in each suit in favor of the defendant for $50 damages, besides costs of suit. Immediately after obtaining those judgments the defendant obtained another warrant against the plaintiff, which was returned forthwith, and another judgment rendered against the plaintiff for $9.96 damages, being for $8 money lent and interest thereon, and an execution issued thereon on the same day, on which the plaintiff was arrested and confined in the jail of the county of Oswego. The plaintiff appealed from the judgments rendered against him by the justice of the common pleas of Oswego, on which appeals judgments were rendered for the plaintiff in this cause.

To show a want of probable cause for the suits prosecuted by the defendant, it was proved that in 1822, the plaintiff having a law-suit with his brother, the defendant induced the plaintiff to convey to him an undivided third of a tavern stand which had descended to him from his father; the defendant agreed to allow the plaintiff $300 for the property, $250 to be secured by notes, and $50 to be allowed the defendant for assisting the plaintiff in his contest with his brother, and a deed was accordingly executed by the plaintiff to the defendant. In December, 1822, the defendant sold the land conveyed to him by the plaintiff to one Addington for $250, whereupon the plaintiff brought suit against the defendant to recover the price of the land, which was tried at Whitestown in March, 1826, on the trial of which cause the defendant insisted that he had paid the plaintiff for the land in a horse, a yoke of oxen, in services in his suit with his brother, and in cash the sum of $8. After evidence was adduced on both sides in relation to the defense set up, the defense was withdrawn as to all but the $8, and the defendant insisted that the plaintiff was not entitled to recover, on the ground that the contract between the parties was void for maintenance. A verdict was taken for the plaintiff for the price of the land, deducting the $8, subject to the opinion of this court on the question of maintenance, and this court decided that the objection was well taken, and

that the plaintiff was not entitled to recover. Further to show the want of probable cause it was proved that the plaintiff was a very poor man and had never been known to be the owner of a yoke of oxen or a horse.

To prove malice it was shown that the defendant, after obtaining the warrants issued in June, 1826, put them in the hands of a constable of Oswego county, telling him that the plaintiff was at work in Onondaga county, and hired him to decoy the plaintiff into Oswego county, so that he might arrest him. The constable went in pursuit of the plaintiff, but he had left the place. About two months afterwards the plaintiff happened in Oswego county and was arrested. When the defendant put the warrant into the hands of the constable he told him that the plaintiff had got a verdict against him at Whitestown for about $300, and he wanted to get some judgment to offset against the verdict; and if the plaintiff would give up the verdict he would let him go clear. When the plaintiff was arrested on the warrants, the defendant retained an attorney so as to prevent him being employed by the plaintiff, telling the attorney: "I have a fellow coming that I am going to train, and I want to buy you to hold your tongue;" adding that if he did not engage for the plaintiff the latter would not be able to obtain counsel, as there was no one else he could get, he having employed the other attorneys in the place; and telling him further, "He has got a judgment against me for $275, and now I've got him, and I'll train him till he gives up that judgment." On the next day the attorney asked him if he had obtained his judgments, and if they were for the same property which he set off on the former trial, to which he answered: "If it is, that is my business." It was further proved that while the plaintiff was in jail on the execution issued against him, the defendant caused a summons to be served on him upon which he obtained another judgment against the plaintiff for $50 for the same yoke of oxen for which one of his judgments obtained in July was rendered. The plaintiff having rested, the defendant moved for a nonsuit on the ground that the judgments obtained by him before the justice were conclusive evidence of probable cause. The judge decided that the judgments were *prima facie*, but not conclusive, evidence of probable cause, denied the motion, but reserved the question for the decision of this court.

The jury under the direction of the judge found a verdict for the plaintiff for $825, subject to the opinion of this court on the points reserved. In the supreme court the judgment was confirmed for the plaintiff. Marcy, J., after reviewing the English authorities, said: Though the plaintiff admits in his declaration that the suits instituted before the magistrate by the defendant were decided against him, he sufficiently countervails the effect of that admission by alleging that the defendant, well knowing that he had no cause of action and that the plaintiff had a full defense, prevented him from procuring the necessary evidence to make out that defense by causing him to be detained as a prisoner until the judgments were obtained, and by alleging that the imprisonment was for the very purpose of preventing a defense to the actions. We are asked by the defendant to look at the declaration and to say there was evidence of probable cause, because it appears therein that the magistrate gave judgments in his favor, when the plaintiff, at the same time that he confesses that fact, also al-

leges it to be the result of the malicious, vexatious and oppressive acts of the defendant in designedly depriving him of the opportunity and necessary means to defeat the unfounded prosecution. When the court look at the declaration for evidence of want of probable cause, they must assume that the whole of it will or can be proved. Taking all the allegations in the declaration to be true, I cannot believe we are required or warranted to infer that there was probable cause for the suits that were instituted by the defendant before the magistrate.

If we look beyond the declaration to the evidence we see an iniquitous abuse of the process of the law to accomplish an illegal purpose. When the warrants were issued against the plaintiff he was in Onondaga county, and the defendant engaged the constable to decoy him within Oswego county, so that he might be arrested. He was taken a great distance from his friends, before a magistrate, where, by reason of being a stranger, he was unable to procure the requisite bail to entitle him to an adjournment. After the arrest, the defendant went to a person on whom he supposed the plaintiff would be likely to call for assistance, and attempted to purchase his silence, at the same time confessing that he had got the plaintiff and intended to train him until he gave up the verdict which had been obtained in the supreme court. After stating that he had recovered judgments, and for what cause, he observed in answer to a question if they were not obtained for the same property that had been set off in the former suit, "If it is, that is my business." It is proper to remark that the defendant in this conversation did complain of the plaintiff's conduct, alleging that he had recovered for the land, and at the same time wanted to keep what he had paid him for it. Immediately after judgments were rendered against the plaintiff on the three warrants on which he was first brought before the magistrate, a fourth warrant was issued, a judgment obtained for money paid, and the plaintiff committed to jail on an execution issued thereon. This judgment was obtained on a claim for money paid, which was allowed to the defendant as a set-off on the trial of the cause in which the plaintiff obtained a verdict against him at Whitestown. There is no substantial allegation in the declaration which was not proved. The evidence exhibited a case of flagrant oppression. If the declaration does not show want of probable cause, there is abundant proof of the want of it in the testimony. Judgment for the plaintiff. Burt v. Place, 4 Wend., 591 (1830). Cited in 120 U. S., 141; 10 Minn., 360; 4 Duer, 656; 12 B. Mon., 551, 555; 14 Me., 362; 22 Me., 212, 226; 2 Abb. Pr., 4; 1 Abb. Pr., 365; 16 How. Pr., 262; 41 Barb., 299; 40 Barb., 455; 14 Hun, 463; 11 Hun, 267; 24 Wend., 15.

(2) *Judgment obtained by ex parte proceedings not conclusive evidence of probable cause.*

In Bump's absence Betts obtained an attachment against his property on the allegation that he had departed from the country in which he had resided with the intent to defraud his creditors. Betts obtained a judgment against him in the proceedings then commenced, sued out an execution and sold his property. Afterwards Bump brought an action of malicious prosecution against Betts. On the trial it was shown that the plaintiff had paid

the demand on which judgment was had in the attachment proceedings previous to the commencement of that suit. The judge ruled that the judgment, remaining unreversed, rebutted the presumption of a want of probable cause arising from the fact of payment; that there was no malice shown. A nonsuit was entered and a motion to set it aside made. In delivering the opinion of the supreme court Nelson, C. J., said: "This action lies against any person who maliciously and without probable cause prosecutes another, whereby the party prosecuted sustains an injury, either in person, property or reputation.[1] . . . Where the malicious prosecution complained of arises out of proceedings on attachment in the absence of the party defendant, in which no opportunity is afforded him to defend the suit, a judgment against him, under such circumstances, cannot be deemed conclusive evidence of probable cause or want of malice, as in cases of personal service of process." New trial granted. Bump v. Betts, 19 Wend., 421 (1838). Cited in 20 Hun, 560; 56 How. Pr., 320; 1 Leg. Obs., 330; 56 Ill., 79; 66 Ill., 342; 8 Am. Rep., 679; 55 Ill., 56; 11 Am. Rep., 13; 67 Ill., 294.

§ 22. Testimony before the magistrate on a preliminary examination competent on the question of probable cause.—Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty. The matters testified to on an examination may have been, and generally are, very influential in raising such suspicion or belief, and are therefore competent evidence to show the ground the prosecutor had, or cause to believe whether the charge was true or not. They are therefore matters material to the issue, and may be proved by any witness who can testify to them, as well as by those who testified at the examination. The persons who were present at the examination before the justice may be dead, absent or insane; they may have forgotten, or refuse to testify, or even deny them. It may not be the less true that they did testify; and if such testimony was of a character to induce a belief or strong suspicion, in the mind of a reasonable man, of the guilt of the accused of the crime charged, they have a direct bearing on the question of probable cause, or want of the same, in actions for malicious prosecution.[2]

[1] Citing 1 Selw., 806; Saund. Pl. & Ev., 651; 2 Chitty's Pleading, 248, n. R; 12 Mod., 208; 1 Salk., 12; 1 T. R., 493, 551.

[2] Bacon v. Towne et al., 58 Mass., 238 (1849); 2 Greenl. Ev., § 454; French v. Smith, 4 Vt., 363 (1827); Bull. N. P., 13, 14; Steph. N. P., 2282, 2284.

Probable cause does not depend on the actual state of the case in point of fact, but upon the state of the mind of the prosecutor; upon the reasonable and honest belief of the party commencing the action.[1] The only case I have been able to find in the books which seems to countenance a different rule was decided by the supreme court of New York in 1830. It was a case of gross fraud and oppression under the forms of law, practiced by the defendant himself, and in which there was abundant evidence of malice, groundlessness and fraudulent design in the suits complained of as malicious.[2]

§ 24. Character — Its effect on the question of probable cause.— Vindication of character is not the object of a suit for false imprisonment, and therefore evidence in relation to character is in general immaterial. It is only competent in actions of slander, seduction, and the like, where character is necessarily involved in the nature of the action.[3] It is sometimes admitted in actions for malicious prosecution, where the question of probable cause arises, for the purpose of showing the character of the plaintiff to have been so notoriously bad that a cautious and reasonable man might more readily believe him guilty of the crime with which he was charged.[4]

§ 25. Plaintiff's bad character — Competent to rebut want of probable cause.— Evidence of the general bad reputation of the plaintiff in actions for malicious prosecution of criminal charges is always competent to rebut the want of probable cause as well as in mitigation of damages. The burden of showing a want of probable cause is upon the plaintiff. The same facts which would raise a strong suspicion in the mind of a cautious and reasonable man against a person of notoriously bad character for honesty and integrity would make a slighter impression if they tended to throw a charge of guilt upon a man of good reputation.[5]

[1] James v. Phelps, 11 Ad. & El., 483, 489 (——); Bacon v. Towne, 58 Mass., 238 (1849).

[2] Burt v. Place, 4 Wend., 591 (1830).

[3] Smith v. Hyndman, 64 Mass., 554 (1852); 2 Greenl. Ev., § 269.

[4] Smith v. Hyndman, 64 Mass., 554 (1852); Vinal v. Core et al., 18 W. Va., 1 (1881).

[5] Bacon v. Towne, 58 Mass., 240 (1849); Rodriguez v. Tadmire, 2 Esp., 721 (——); Wood v. United States, 16 Pet., 342, 366 (1842); 2 Greenl. Ev., § 458. But see Newsman. v. Carr, 2 Stock., 69.

§ 26. Probable cause — Admission of the existence of.— In cases where a person voluntarily terminates a suit by satisfying the demand, where there is no duress of person or property, it is held that he cannot be admitted to say that the action was commenced without probable cause.[1]

THE LAW ILLUSTRATED.—

(1) *Settlement of suit by paying demand.*

The defendant gave his note to the plaintiff, payable to his own order, and indorsed by him. The plaintiff negotiated the note, and received and retained the money procured upon it. When the note became due the defendant paid it, and afterwards sued the plaintiff to recover from him the money paid to take up the note, joining with a count for money had and received a count in tort for the conversion of the note. The note was given upon the consideration that the plaintiff would sign a certain composition paper releasing his debt against a third person. The note was delivered on condition that it should not be used, but should be returned, if the settlement with the debtor was not effected. The settlement was not carried out, and the composition paper never became operative. After the giving of the note, and after the composition had been abandoned and the debtor had gone into insolvency, the plaintiff became satisfied that the defendant was liable for the debts of the insolvent debtor, and brought an action against the defendant to recover the amount due from the insolvent debtor to the plaintiff, as well as a sum due from the defendant to the plaintiff. The two suits were pending at the same time, and were included in one settlement by the parties, by which the defendant paid to the plaintiff the whole amount of the defendant's own debt and one-half of the amount due from the insolvent debtor, less the amount claimed by the defendant in his suit against the plaintiff; and in that suit judgment was entered for the defendant against the plaintiff in this suit. *Held*, in a suit brought by the plaintiff against the defendant for malicious prosecution for instituting the suit against him, that the plaintiff having settled the suit against him by allowing all that was claimed in it, the undisputed facts did not show want of probable cause, and that the court properly ordered a verdict for defendant.

A party who terminates a suit by paying what is demanded in it, by being charged with it as an item in account, cannot be admitted to say that the action was commenced without probable cause. Sartwell v. Parker, 141 Mass., 405; 5 N. E. Rep., 807 (1886).

(2) *Payment of demand estops plaintiff from saying there was want of probable cause.*

In an action for malicious prosecution it appeared that the defendant gave his note to the plaintiff, payable to his own order, and indorsed by him. The plaintiff negotiated the note, and received and retained the

[1] Sartwell v. Parker, 141 Mass., 405; 5 N. E. Rep., 807 (1886).

money procured upon it. When the note became due, the defendant paid it, and afterwards sued the plaintiff to recover from him the money paid to take up the note; joining with a count for money had and received a count in tort for the conversion of the note. This action is brought for malicious prosecution in instituting that suit. The plaintiff must prove that it was commenced without probable cause, and, as essential to that, the prosecution was terminated in the plaintiff's favor. The evidence of the plaintiff tended to show that the note was given upon the consideration that the plaintiff would sign a certain composition paper releasing his debt against a third person. The evidence of the defendant tended to prove that the note was delivered on condition that it should not be used, but should be returned if the settlement with the debtor could not be effected, and that in fact the settlement was not carried out, and that the composition paper never became operative, and the giving of the note, and after the composition deed had been abandoned and the debtor had gone into insolvency, the plaintiff became satisfied, for reasons not material to this inquiry, that the defendant was liable for the debts of the insolvent debtor, and brought an action against the defendant to recover the amount due from the insolvent debtor to the plaintiff, as well as a sum due from the defendant to the plaintiff. The two suits were pending at the same time, and were included in one settlement by the parties, by which the defendant paid to the plaintiff the whole amount of the defendant's own debt, and one-half of the amount due from the insolvent debtor, less the amount claimed by the defendant in his suit against the plaintiff, and in that suit judgment was entered for the defendant against the plaintiff in this suit. These facts were not contested. On the trial the court ordered a verdict for the defendant.

On exceptions, W. Allen, J., said: "It thus appears that the plaintiff settled the suit, which he must prove was commenced without probable cause, by allowing all that was claimed in it. A party who terminates a suit by paying what is demanded in it, by being charged with it as an item in account, cannot be admitted to say that the action was commenced without probable cause. The question whether want of probable cause appears is solely for the court, except so far as it depends upon disputed facts, which must be determined by the jury. In this case the facts claimed by the plaintiff, with the undisputed facts, do not show want of probable cause, and will not sustain a verdict for the plaintiff, and the court properly ordered a verdict for defendant." Sartwell v. Parker, 141 Mass., 405; 5 N. E. Rep., 807 (1886). Citing Stone v. Crocker, 24 Pick., 81.

(3) *Waiving examination before the magistrate not an admission of probable cause, etc.*

Meyers sued Schoonover for malicious prosecution, the latter having caused him and two of his infant children to be arrested for the larceny of a bee hive. Meyers was ill at the time the officer came after him, but he subsequently appeared before the justice and waived examination and gave bail for his appearance. The two children were acquitted and discharged after five days' imprisonment. In the circuit court Meyers was discharged by the state's attorney, the grand jury having found no bill

against him. Under the plea of not guilty there was a trial and a judgment for Meyers of $4,500. Schoonover appealed.

On the appeal it was urged that the prosecution was not sufficiently ended when this suit was brought. Caton, C. J., said: "No indictment was found nor was one returned, ignored by the grand jury, but the recognizance was discharged by the state's attorney. This, according to our practice, is the usual mode of terminating a prosecution where the party has been recognized by a magistrate, or, in case he has been committed, it is by discharging him from jail where the evidence is insufficient to induce the grand jury to find an indictment. It is not usual in this state for the state's attorney to prepare an indictment and present it to the grand jury, in the first instance, as in England, to be by them ignored, if not sustained by the proof. Indictments here are usually drawn only when directed by the grand jury after having heard the proof. The only record, therefore, of the termination of the prosecution is the order to discharge the prisoner or the recognizance."

"It was urged that the fact that the plaintiff appeared before the magistrate and waived examination and gave bail for his appearance was an admission at least of such a probability of guilt as to preclude him from ever after saying that the prosecution was maliciously instituted. We do not think so. Such a course may often be judiciously advised, when the party is not only innocent in fact but known to be so by the prosecutor." Schoonover v. Meyers, 28 Ill., 308 (1862).

§ 27. The question of probable cause in actions for false imprisonment.— The question of the existence or want of existence of reasonable or probable cause in actions for false imprisonment, while subject to the same general rules of law governing its introduction in evidence as in actions for malicious prosecution, is a much less important element of defense. In actions for malicious prosecution, we have seen that it is a complete defense when properly shown. In actions for false imprisonment, its effect is quite different: it will afford no justification; but evidence that the defendant acted with reasonable or probable cause is always competent to mitigate punitive or exemplary damages.[1]

§ 28. Probable cause and absence of malice no bar to an action for false imprisonment.— If a party is assaulted, beaten and imprisoned by a public officer, in arresting him

[1] Conner v. Knowles, 17 Kan., 436 (1877); Shanley v. Wells, 71 Ill., 78 (1873); McDaniel v. Needham, 61 Tex., 269 (1884); Livingston v. Burroughs, 33 Mich., 511 (1876); Miller v. Grice, 2 Rich. L. (S. C.), 27; 44 Am. Dec., 271 (1845); Sugg v. Pool, 2 Stew. & P. (Ala.), 196 (1832); McCall v. Corning, 1 Abb. (U. S.), 212 (1867); Sleight v. Ogle, 4 E. D. Smith (N. Y.), 445 (1855).

without authority of law, he will be entitled to recover in an action of trespass, no matter what may have been the officer's motive. In such a case, probable cause that the plaintiff was guilty of a misdemeanor or violation of an ordinance, and absence of malice on the part of the officer, will afford no justification.[1]

[1] Shanley v. Wells, 71 Ill., 78 (1873).

CHAPTER VIII.

ADVICE OF COUNSEL IN ACTIONS FOR MALICIOUS PROSECUTION AND FALSE IMPRISONMENT.

I. In Malicious Prosecution.

II. In False Imprisonment.

I. In Actions for Malicious Prosecution.

§ 1. Authorities not entirely uniform.— The authorities are not entirely uniform as to how far or in what manner the advice of counsel constitutes a defense to an action for mali-

cious prosecution. A long line of cases holds that it is proof of probable cause;[1] other authorities maintain that it is evidence of the absence of malice;[2] while others, and probably the majority of cases, refer to it as proof of both the absence of malice and the presence of probable cause.[3]

§ 2. The general rule.— The general rule seems to be that where a party has communicated to his counsel all the facts bearing on the case of which he has knowledge, or could have ascertained by reasonable diligence and inquiry, and has acted upon the advice received, honestly and in good faith, the absence of malice is established, the want of probable cause is negatived, and the action for malicious prosecution will not lie.[4]

[1] Ross v. Irvine, 26 Ill., 259 (1861); Le Maister v. Hunter, Bright, 495; Laughin v. Clawson, 27 Pa. St., 330 (1856); Olmstead v. Partridge, 16 Gray, 383 (1860); Potter v. Seale, 8 Cal., 217 (1857); Levy v. Brannan, 39 id., 485 (1872); Besson v. Southard, 10 N. Y., 236 (1867); Murray v. McLain, 2 Car. Law Rep., 186.

[2] Murphy v. Larson, 77 Ill., 172 (1875); Center v. Spring, 2 Clarke, 393 (1856); Rover v. Webster, 3 id., 502 (1856); Sommer v. Wilt, 4 S. & R., 20 (1818); Stanton v. Hart, 27 Mich., 539 (1873); Williams v. Van Meter, 8 Mo., 339 (1843); Davenport v. Lynch, 6 Jones' L., 545 (1859); Cooper v. Utterbach, 37 Md., 282 (1872).

[3] Wilkinson v. Arnold, 11 Ind., 45 (1858); Galoway v. Stewart, 49 Ind., 156 (1874); Gould v. Gardiner, 8 La. Ann., 11 (1853); Phillips v. Bonham, 16 id., 387 (1861); Bartlett v. Brown, 6 R. I., 37 (1859); Newton v. Weaver, 13 id., 616 (1882); Wicker v. Hotchkiss, 62 Ill., 107 (1871); Palmer v. Richardson, 70 id., 545 (1873); Davie v. Wisher, 72 id., 262 (1874); Skidmore v. Brickey, 77 id., 164 (1875); Stevens v. Farrett, 27 Me., 267 (1847); Soule v. Winslow, 66 id., 447 (1876); Watler v. Sample, 25 Pa. St., 275 (1855); Emerson v. Cochran, 111 id., 619 (1886); Stone v. Swift, 4 Pick., 389 (1826); Wilder v. Holden, 24 id., 8 (1836); Stanton v. Hart, 27 Mich., 539 (1874); Ash v. Marlow, 20 Ohio, 119 (1870); Wood v. Weir, 5 B. Mon., 544 (1844); Lerney v. Williams, 32 Ark., 166 (1877); Turner v. Walker, 3 G. & J., 380 (1831); Chandler v. McPherson, 11 Ala., 916 (1847); Ames v. Rathbun, 55 Barb., 194 (1869); Bliss v. Wyman, 7 Cal., 257 (1857); Blunt v. Little, 3 Mason, 102 (1822); Burnap v. Albert, Taney, U. S. C. C., 244 (1855); Johnson v. Daws, 5 Cr. C. C., 283 (1837); Schipple v. Norton, 38 Kans., 567 (1888).

[4] Ash v. Marlow, 20 Ohio, 119 (1870); Hill v. Palm, 38 Mo., 13 (1866); Eastman v. Keason, 44 N. H., 519 (1863); Walter v. Sample, 25 Pa. St., 275 (1855); Wicker v. Hotchkiss, 62 Ill., 107; 14 Am. Rep., 75 (1871); Anderson v. Friend, 71 Ill., 475 (1874); Stone v. Swift, 4 Pick., 389; 16 Am. Dec., 349 (1826); Whitfield v. Brooks, 40 Miss., 311 (1866); Laird v. Davis, 17 Ala., 27 (1850); Levi v. Brannan, 39 Cal., 489 (1870); Blunt v. Little, 3 Mason, 102 (1822); Sappington v. Watson, 50 Mo., 83 (1872); Cooper v. Utterbach, 37 Md., 282 (1872); Glasscock v. Bridges, 15 La.

§ 3. **The law stated by Walker, J.**— The general rule, long and uniformly recognized, in this class of defenses requires a person to make a full, fair and honest statement of all the material circumstances of the supposed guilt which are within his knowledge, or which he could learn by ordinary care, to a respectable attorney in good standing, and act on his advice. "To protect himself he must make a full statement of all material facts. He will not be protected if he makes a garbled and untrue statement. Human liberty is too sacred to be recklessly invaded to gratify malice, or for the advancement of personal interest. The law will not tolerate such nefarious purposes or reckless disregard of the liberty of the citizen." [1]

APPLICATIONS OF THE LAW.—

(1) *A person acting under advice of commonwealth attorney, although actuated by malice, not liable for a malicious prosecution.*

Polly sued Yocum for a malicious prosecution upon a charge of being present, aiding and assisting in the murder of Preston Coulter, upon which he was arrested, imprisoned, and remained in prison until he was brought before the justices and put upon his trial, and the evidence having been heard the prosecution was dismissed by the commonwealth. On the trial of the case the evidence tended to show that any agency which Yocum may have had in the prosecution, so far as Polly was concerned, was wholly in subordination to the attorney for the commonwealth; that Yocum and his friends had determined to prosecute the actual homicide alone, unless upon the evidence on his trial it should appear that Polly and others of his party who were present ought to be prosecuted, and that he would not have been prosecuted had not the attorney for the commonwealth, upon information not derived from the defendant, directed a constable, who was acting in the business, to procure the warrant. A judgment was entered for the plaintiff and the defendant appealed.

In delivering the opinion of the court, Marshall, J., after reviewing the facts, said: "If this be so, we are well satisfied that, whatever malice the defendant may have had against the plaintiff, he cannot be liable for a prosecution instituted by the immediate direction of the public attorney, and in which he did nothing but in subordination to that officer and to effectuate his directions. If, being, as he (the defendant) was, a justice of the peace, he had, on being informed by the constable of the attorney's directions, actually issued the warrant, this would not have implicated him; and much less, as we suppose, was he implicated by merely writing the body of the warrant, as requested, when neither the constable nor the other

Ann., 672 (1860); Bartlett v. Brown, 6 R. I., 37 (1859); Davenport v. Lynch, 6 Jones (N. C.), 545 (1859).

[1] Roy v. Goings, 112 Ill., 656 (1885); Anderson v. Friend, 85 Ill., 135 (1877).

justice who was applied to was able to make it out without a form; and it makes no difference if he, in conjunction with the constable, applied to the other justice for the warrant which had been directed by the attorney. As to any subsequent agency which he may have had, nothing appears, except that he was used and consulted with by the prosecuting attorney as a near friend and relative of the deceased, not instituting the prosecution, so far as the plaintiff was concerned, nor officiously interfering to carry out even the directions of the attorney. If these inferences of fact, which the evidence conduces to establish, are just, surely the opinions and directions of the attorney for the commonwealth, founded on information not derived from the defendant, must have the effect of protecting him from such liability for such an agency as is here supposed." The judgment is reversed. Yocum v. Polly, 1 B. Mon., 358; 36 Am. Dec., 583 (1841). See Thompson v. Lumley, 50 Abb. Pr., 105 (1871).

(2) *Advice of counsel. The county attorney advised against the prosecution. Another attorney advised in favor of it. The finding of the jury conclusive on the question of good faith.*

There was a controversy over the ownership of a team of horses which had been delivered to Bartlett by Hawley on a contract of sale, and Bartlett claimed the right to hold them. A small part of the purchase-money had been paid. Hawley discharged Bartlett, who was in his employ, and there was a dispute about the right to hold the horses. Hawley took them out of Bartlett's possession by force, and there was a bitter feeling between them. Immediately afterwards Bartlett went to Hawley's barn and took out the horses and put them in a neighbor's barn. Hawley then went to the county attorney and laid the case before him, but was advised that there was no ground upon which to base a criminal charge of larceny. Not satisfied with this advice, he went to another attorney, who advised him to have Bartlett arrested for breaking and entering the barn and for taking the horses. Hawley then went to a magistrate, made a complaint and procured a warrant, upon which Bartlett was arrested for taking the horses. Upon a trial he was discharged. He then brought an action against Hawley for a malicious prosecution. At the trial the jury found for the defendant and the plaintiff appealed.

Vandenburg, J., in affirming the judgment, said: "Upon the evidence, though we think the case not free from doubt, and we sustain the trial court with some hesitation, the question of malice was for the jury; and if we concede that a *prima facie* case was made by the plaintiff's evidence requiring evidence in rebuttal or explanation, yet we cannot say that the evidence on the part of the defendant in respect to the advice of counsel and his reliance thereon, though subject to criticism before the jury, was not proper to be submitted to them on the question of his good faith. He was not obliged to consult the county attorney, and he might act in good faith in following the advice of other counsel in opposition to his. It is a circumstance to be very carefully considered, upon the question of defendant's good faith; for if the advice he received did not induce an honest belief that he had probable cause, and that the plaintiff was guilty of larceny, it would afford him no legal protection. He admitted, indeed, in his

cross-examination in this case, that he testified on the preliminary examination 'that he did not know that he had any reason to think defendant a horse thief;' 'that he did not really call what Bartlett did stealing.' But we have not the whole of his evidence on that examination, and on this trial he testified 'that when he made the complaint he supposed that the plaintiff had stolen the horses.' 'I made the complaint. Did not make it maliciously. Had no malice against the plaintiff. I thought he had taken the horses out of my barn, and had committed the crime of larceny.' He also testified that, in making the complaint, he acted on the advice of an attorney; that he had previously consulted him, after stating to him all the facts relating to the transaction about the horses and trade; that he locked the horses in the barn. Saw the plaintiff pull the barn door open. 'I went and consulted Bassett. He advised me to get a warrant for breaking and entering the barn. . . . Mr. Bassett had advised me to have the plaintiff arrested in case of his attempting to take the horses, and taking them.' This evidence was competent on the question of malice, and any evidence tending to disprove malice was proper. Garrett v. Mannheimer, 24 Minn., 193. Upon all the evidence, we are of the opinion that the question of good faith and credibility of the defendant was for the jury. The trial court appears to be satisfied with the verdict, and has refused in the exercise of its discretion to grant a new trial upon the evidence, and we will not assume to interfere on this ground." Bartlett v. Hawley, 69 Minn., 558; 37 N. W. Rep., 580 (1888).

(3) *Advice of counsel as a defense.*

Hayne, C.: Action for malicious prosecution: verdict for plaintiff; defendant appeals. It is contended that the verdict is not sustained by the evidence in this, that the evidence shows that the defendant relied upon the advice of counsel. But in view of the testimony, the jury may well have concluded that the defendant did not believe that the plaintiff was guilty of the crime with which he was charged. Mr. Crawford, who was the district attorney, testified that he said to the defendant, when he came to him to start the prosecution: "I did not think he could convict under the testimony. I gave him reasons for it. . . . I told him my opinion was that he had not a very good case. He then remarked that he wanted the case prosecuted. . . . I don't think I told him it constituted grand larceny. I wrote the complaint as district attorney because I understood and thought the facts were sufficient to demand an investigation. . . . I wrote out the complaint because there might be additional facts in the case obtained by investigation." Another witness — the constable who arrested the plaintiff — testified to the following conversation with the defendant: "I said: 'I don't think you can do anything with George.' 'Well,' he says, 'George took sides against me in regard to a woman scrape. I am going to set him up for some of his meanness, anyhow.'" It is true the defendant testifies that he consulted other lawyers besides the district attorney and that they advised him that the prosecution could be maintained. But he did not produce such lawyers as witnesses, and this is a somewhat suspicious circumstance. We think the evidence is sufficient to sustain the verdict. Vaun v. McCrearey, 77 Cal., 474; 19 Pac. Rep., 826 (1888).

§ 4. Advice of an attorney personally interested in the result of the suit is not sufficient — The law stated by Libbey, J.—"A party who consults an attorney at law in regard to his legal right to bring an action against another when the attorney is interested in the subject-matter of the suit, and known by him to be so interested when consulted, cannot show the opinion of the attorney as probable cause for bringing the suit, although the opinion is honestly given. We think the grounds upon which the opinion of an attorney can be shown as probable cause for bringing a suit are, that he is an officer of the court held out to the public as one learned in the law, and that the client has a right to presume that he will give him a fair, unbiased and well-grounded opinion as to his legal rights. But when the attorney is directly interested in the subject-matter of the suit and his interest is known to the client, the client has no right to presume that he will give him an unbiased opinion, and if he takes it and acts upon it, and it turns out to be erroneous, it will afford him no justification. The client knows that he has not consulted a disinterested and unbiased attorney. Neither a judge nor juror thus interested would be competent to sit in the trial of the case, and if either should act it would be ground for a new trial, although he acted honestly. Why should the opinion of an attorney thus interested be entitled to greater respect than the decision of the judge? It might as well be held that when an attorney is defendant in an action for malicious prosecution, he may justify on the ground of probable cause by satisfying the jury that, as a lawyer, he, in good faith, believed he had a good cause of action, although in fact he had none."[1]

§ 5. Character of the counselor.— When the advice of counsel is relied upon as a bar to the action for malicious prosecution, it must appear that the counselor is a regular attorney licensed to practice under the laws of the state in which he resides, competent to give advice in legal matters. Attorneys at law are, in some sense, regarded as officers of court; and it is upon grounds of public policy, where a party has been advised by an attorney in active practice, upon full consideration of the facts, to institute a criminal prosecution,

[1] Libbey, J., in White v. Carr, 71 Me., 555: 26 Am. Rep., 353.

if he acts in good faith under the advice given, he shall not be mulcted in damages, although the party accused may be innocent of the crime alleged against him. If this was not the law, no man would feel safe in preferring a complaint against another for a criminal offense. The policy of the law is to encourage prosecutions when there are facts and circumstances that would induce the belief, in the mind of a reasonably cautious man, of the guilt of the party accused. In such cases the advice of competent counsel, if given and acted upon in good faith, upon a full disclosure of all the facts, has uniformly been held to constitute probable cause for instituting a criminal prosecution, notwithstanding it may appear afterwards that the party accused was not guilty.[1] To permit the counsel of those of whose capacity the courts have no means of judging, and who owe no responsibility to the courts, to be received as evidence in bar of the action, would lead to collusion, and furnish a ready defense to all actions in which the advice of counsel is a defense.[2]

§ 6. **Advice of a justice of the peace is not sufficient.**— In actions for malicious prosecution it has been held to be competent for the defendant to prove, in order to establish the fact of probable cause, that on prosecuting the plaintiff on a criminal charge he acted in accordance with the advice of counsel on a full and correct statement of all the material facts bearing on the case.[3] But such testimony has always been limited to communications with counsel or attorneys. Statements made to other persons, as justices of the peace,[4] and advice given by them, have never been deemed admissible for this purpose. The law wisely requires that a party who has instituted a groundless suit against another should show that he acted on the advice of a person who by his professional training and experience as an officer of the court may be reasonably supposed to be competent to give safe and prudent counsel on which a party may act honestly and in good faith, although

[1] Murphy v. Larson, 77 Ill., 172 (1875).

[2] Williams v. Van Meter, 8 Mo., 339 (——).

[3] Olmstead v. Partridge, 82 Mass., 381 (1860); Hewlett v. Cruchley, 5 Taunt., 277 (——); Swift v. Stone, 4 Pick., 393; Ravenga v. Mackintosh, 2 B. & C., 693 (——).

[4] Olmstead v. Partridge, 82 Mass., 381 (1860); Moore v. Sanborin, 42 Mo., 494 (——); Brobst v. Ruff, 100 Pa. St., 91; 45 Am. Rep., 358 (——).

to the injury of another. It would open the door to great abuse of legal process if shelter and protection from the consequences of instituting an unfounded prosecution could be obtained by proof that a party acted on the irresponsible advice of one who could not be presumed to have better means of judging of the rights and duties of the prosecutor on a given state of facts than the prosecutor himself.[1]

APPLICATION OF THE RULE.—

(1) *Advice of a justice of the peace not sufficient.*

Sabina Olmstead brought an action against Jerusha Partridge for a malicious prosecution. On the trial it appeared that in the prosecution complained of as being malicious the defendant charged the plaintiff with the larceny of one hundred sticks of oak wood, on which she was arrested, and after a trial before a trial justice was discharged. The defendant called the justice of the peace to whom the complaint was addressed and offered to prove by him that at the time of making the complaint she applied to him for advice and counsel and stated that she had caught the plaintiff with two sticks of her wood in her arms, but it appearing that the justice was not an attorney or counselor at law, the evidence was rejected. The plaintiff recovered a verdict, which, on exceptances in the supreme judicial court, was sustained. Olmstead v. Partridge, 82 Mass., 381 (1860).

(2) *The advice of a justice of the peace not sufficient in Pennsylvania.*

Josiah Ruff brought an action against Willoughby K. Brobst for an alleged malicious prosecution. The plea was not guilty. On the trial it appeared that in March, 1879, Brobst made an information before a justice of the peace that Ruff had stolen timber belonging to him. A warrant was issued, and an arrest and bail for Ruff's appearance at court followed. An indictment was subsequently submitted to the grand jury, but they ignored it. Brobst offered to prove, for the purpose of showing that he acted with the greatest caution and took the advice and counsel of one whom he believed to be more skilled in such matters than himself, that he went to the justice of the peace and stated to him all the facts as he had heard them from different parties, and asked the justice whether such a statement of facts was sufficient to constitute a ground for the charge of larceny against Ruff, and whether, in his judgment, it was sufficient upon which to base a criminal prosecution, and that he was then and there advised by the justice of the peace that it was sufficient for that purpose, etc. The offer was denied and judgment followed for the plaintiff. On error in the supreme court, Mercer, J., said: "The plaintiff in error offered to prove that he stated to the justice, before whom the prosecution was about to be instituted, the facts as he had heard them, and that he was advised by the justice that they were sufficient upon which to base a criminal action.

[1] Olmstead v. Partridge, 82 Mass., 381 (1860).

"When a prosecutor fully and fairly submits to his counsel, learned in the law, all the facts which he knows to be capable of proof, and is advised that they are sufficient to sustain a prosecution, and, acting in good faith on that opinion, does institute the prosecution, he is not liable to an action for malicious prosecution, although the opinion be erroneous. Shall the advice of a committing magistrate have the same effect? We think not. Justices of the peace are not required to be learned in the law. In fact, generally through the state they are not; they are not qualified by a course of study to give advice on questions of law. They do not pursue it as a profession; they are not charged with the duty of advising any person to commence a prosecution. They ought not to act as attorney or agent for one in regard to a prosecution he is about to institute before them. Their duties are judicial. They may, in the discharge thereof, reduce the substance of the complaint to writing, in the form of an information of the prosecutor. Thus they judicially determine whether the facts therein averred be sufficient to justify the issuing of a warrant.

"An educated business man may be much better qualified than many inexperienced justices of the peace to advise as to the law, and yet I am not aware that the advice of such a person has ever been held to protect against damages for a malicious prosecution. The protecting power of the rule extends no further than the advice of one learned in the law. In an action for malicious prosecution, the defendant cannot be permitted to prove that he acted under the advice of a magistrate." Brobst v. Ruff, 100 Pa. St., 91; 45 Am. Rep., 358 (1882). Citing Straus v. Young, 37 Md., 282; Olmstead v. Partridge, 82 Mass., 381.

NOTE.— It does not appear from the case for what particular purpose the evidence was offered, though it must have been as a defense in bar of the action, and not for the purpose of disproving malice and in mitigation of damages. It is probable that the plaintiff waived his right to claim punitive damages, as he might have done, and so rendered the evidence incompetent for any purpose.

§ 7. Honest prosecutors protected as a matter of public policy — Advice of counsel.— It has been uniformly held that when the prosecutor fairly presents all the facts to a responsible practicing attorney, who, from such a statement of facts, advises him that they are sufficient to warrant a prosecution, he is protected against a suit for malicious prosecution from the very nature of our criminal laws. This must be so, otherwise there would be no safety in originating such proceedings. But few persons outside of the profession can determine, in many cases, whether or not the facts will justify a criminal prosecution; but it is to be presumed that all respectable attorneys in full practice will, as it is their duty to do, fairly and honestly advise in these as in all other cases. If a prosecutor may not safely act upon such advice, then he has almost to guaranty a conviction when he starts a prosecution. The

criminal law must be enforced and human agencies must be employed for the purpose, and the law wisely protects all persons who in good faith act on reasonable presumption of the guilt of the accused. Where the prosecution is commenced on the advice of respectable counsel, after fairly presenting to his consideration all the facts, and he advises that they are sufficient, it cannot be held that the prosecution is groundless and that there is want of probable cause.[1]

THE RULE ILLUSTRATED.—

Prosecutor relying upon statements of persons to which they declined to testify, etc., protected.

Anderson lost two hogs which he supposed were stolen. On learning matters which led him to suppose that Mrs. Friend and her husband and others were the guilty parties, he went to the state's attorney and laid before him the evidence, but was advised it was not sufficient. Afterwards a person communicated to him matters which he professed to be willing to swear to, and Anderson went again to the state's attorney, where the person made his statement. Upon this he was advised that the evidence was sufficient. Anderson then procured a warrant from a justice of the peace against Mrs. Friend and her husband, but on the preliminary examination they were discharged. Mrs. Friend then brought an action for malicious prosecution against Anderson and recovered a judgment, but it was reversed on appeal to the supreme court.

Walker, J.: "In this case appellant twice consulted the prosecuting attorney, and on first being advised that there was not a sufficient case, he refrained until he found other evidence. He then took the witness with him to the attorney, who, after hearing what facts he knew, advised the prosecution which was then commenced. What more could appellant have done? Owing to the frequency of suits for malicious prosecution, he probably felt and knew that he must act with prudence and circumspection, and he seems to have acted with deliberation, caution and prudence. If the advice of the attorney selected to institute and prosecute for crimes and offenses against the penal code will not protect the prosecutor on the facts fairly stated, we should be at a loss to know what would protect him short of a conviction; but it does protect and shield him from a suit for malicious prosecution." Anderson v. Friend, 85 Ill., 135 (1877).

§ 8. **Duty of one seeking the advice of counsel — Reasonable inquiry as to the existence of facts.**— One who seeks the advice of counsel with reference to the commencement of a criminal prosecution is bound to act in good faith in the matter. Unless he does this, he will not be protected from

[1] Anderson v. Friend, 85 Ill., 135 (1877); Roy v. Goings, 112 Ill., 656 (1885).

liability on the ground that he acted upon the advice given him. He is required to make to the counsel a full and fair statement of all of the material facts known to him. If he has reasonable ground for believing that facts exist which would tend to exculpate the accused from the charge, good faith requires that he shall either make further inquiry with reference to those facts, and communicate the information obtained to the counsel, or that he shall inform him of his belief of their existence, in order that he may investigate with reference to them, and take into account, in forming his opinion, the information attained with reference to them. But he is not required to do more than this. He is not required to institute a blind inquiry to ascertain whether facts exist which would tend to the exculpation of the party accused. But if he honestly believes that he is in possession of all of the material facts, and makes a full and fair statement of those facts to the counsel, and acts in good faith on the advice given him, he ought to be protected. This, it seems to us, should be the rule when the advice of private counsel is relied on. But there are more cogent reasons for applying it where the communication is made to the public prosecutor. In criminal cases that officer is the representative of the state. He is required not only to prosecute indictments which are found, but it is his duty to assist in the investigation of charges against individuals which are brought to the attention of the grand jury. He is by law made the legal adviser of the grand jury. When complaint is made to him that a public offense has been committed, it is his duty to investigate the charge, and, if he deems it a matter of sufficient importance, to demand the attention of the grand jury. It is also his duty to have the witnesses subpœnaed and brought before that body, and he has the right to appear also and assist in their examination. Neither he nor the grand jury are confined in their investigation to the witnesses named by the complainant, but they have the power to send for and examine any witnesses whom they have reason to believe can give any material evidence bearing on the question of the guilt of the accused. We will not, of course, be understood as holding that a party who maliciously makes a groundless charge to the district attorney, and thereby procures the find-

ing of an indictment, is not answerable to the one injured by the proceeding. It would, however, be a very harsh rule, and one calculated to discourage entirely the making of complaints by private individuals, to hold that one who has acted on the advice of the district attorney, given upon a full and fair statement of all the material facts which he knew, or which he had reasonable ground to believe, existed at the time, was not protected by the advice of the attorney, simply because he did not, before making the complaint, learn of the other material facts of the existence of which he might have learned by reasonable inquiry; yet this doctrine seems to have the support of Hilliard in his work on Torts,[1] and Wait in his work on Actions and Defenses.[2] The doctrine of the text is supported, however, by but few of the cases cited in the notes in support of it, and we do not believe it is sound.[3]

APPLICATIONS OF THE RULE.—

(1) *Did not lay all the facts before the counsel.*

James W. Watts brought an action against William Paddock, B. F. Paddock and D. E. Paddock. The defendants were partners in the summer of 1882, engaged in the milling business in the city of Terre Haute. They employed the plaintiff to purchase wheat, agreeing to furnish the money, and to pay him a commission of three cents per bushel on one kind of wheat, and to share the profits equally with him on all wheat of another kind which he should purchase for them. Considerable quantities of wheat were purchased, and a large sum of money furnished, under this arrangement, which was continued until in the autumn of 1882. After the plaintiff ceased purchasing wheat, an accounting was attempted between the parties, and a dispute arose concerning a certain check drawn by Paddock & Co. in favor of the plaintiff for $1,000, upon the First National Bank of Terre Haute. That a check for that amount was drawn, payable to Watts or bearer, on the 26th day of July, 1882, and that it was paid by the bank on that day to some one, is not disputed. Watts had no account of it on his books, and, according to his testimony, disputed the fact of ever having received the check or the money it called for, although the amount was charged to him on the books of Paddock & Co. Failing to arrive at a satisfactory adjustment of their affairs. Watts commenced a civil suit against Paddock & Co. for damages growing out of an alleged violation of their contract; after which, at the instigation and upon the testimony of the defendants, the grand jury of Vigo county returned an indictment charging him with having embezzled their money and checks. After

[1] 1 Hilliard's Torts, 506.
[2] 4 Wait's Actions and Defenses, 335.
[3] Johnson v. Miller, 69 Iowa, 562; 29 N. W. Rep., 743 (1886).

hearing the evidence on behalf of the state, the court directed a verdict of acquittal, and this ended the criminal prosecution, which is now alleged to have been begun maliciously and without probable cause.

During the progress of the trial the prosecuting attorney, who, upon the facts as communicated to him by the appellants, advised the institution of a criminal prosecution against Watts, after having testified to that effect in appellants' behalf in chief, was asked the following question on cross-examination: "State if you had known that he still disputed the payment of the check, and disputed that he got it, would you have given the advice you did;" to which the witness responded that he "would not." It was competent for the defendants, in order to disprove malice, to show that in instituting criminal proceedings they acted under the advice of competent counsel. Where one lays all the facts before counsel, and acts in good faith upon an opinion given, he is not liable to an action, even though it turns out that he was mistaken; but, in order that he may obtain indemnity, he must have made a full and fair statement of all the facts known to him. McCarthy v. Kitchen, 59 Ind., 500, and cases cited; Center v. Spring, 2 Iowa, 393. The prosecuting attorney having testified that, upon a certain hypothesis or state of facts communicated to him by the appellants, he, as a lawyer and an officer of the law, advised the institution of criminal proceedings against Watts, it was competent to ask him, as an expert, whether or not, if the hypothesis or facts upon which he proceeded had been changed in the manner indicated by the question, he would have arrived at a different conclusion. This was only another way of showing the materiality of the facts assumed to have been withheld from the prosecuting attorney. We find no error. The judgment is affirmed. Paddock et al. v. Watts, 116 Ind., 146; 18 N. E. Rep., 521 (1888).

(2) *Did not state all of the material facts to the advising counsel.*

In an action for malicious prosecution, it appeared that Donnelly, the plaintiff, who had obtained goods upon a conditional sale, mortgaged them to defendant; that afterwards the goods were taken away by the seller upon a lease, and this fact was made known to the defendant by the plaintiff, and the former asked plaintiff to assign to him the suit against the party taking them away, but no such assignment was given. The defendant afterwards instituted criminal complaints against the plaintiff on a charge of concealing the property, the complaints being made after the defendant had consulted a competent lawyer, but it appeared that the defendant did not state to the latter all the facts known to him relative to the case. On this point the defendant called J. E. Pond, who testified that he was an attorney, having practiced fourteen years; that the defendant came to him with the mortgages, telling him he wanted him to collect them, either by foreclosure and sale, or otherwise. He gave the mortgages to a deputy-sheriff to hunt up the property; from the latter's report he told him the only course he could see was to bring the criminal prosecution; and that he did not obtain any of the facts on which he based the advice from the defendant, except the fact that the mortgages were given; that all the defendant said to him was that the mortgages were given. The defendant, to the question whether or not he had any facts within his knowl-

edge with relation to this matter which were not stated to Pond, testified: "No, sir." "In fact I got the most of my knowledge about this from Pond, from his report." Defendant also testified that there were no facts which he knew about this matter which were not brought out in his conversations with Pond, his attorney; that he told Pond that the plaintiff owed him the mortgages, and that he wished Pond to collect them; that perhaps he said to Pond that he had heard the furniture had been taken away. At the close of the evidence, the defendant requested the court to rule that the question whether or not there was probable cause on the facts proven was a question of law for the court, and to rule as a matter of law that the evidence did not show want of probable cause. The presiding judge refused to so rule, the jury found for the plaintiff in the sum of $975, and the defendant alleged exceptions.

Field, J.: If a person lays before counsel, learned in the law, fully all the facts which he knows, and all the facts which he believes to be true, and can be established by evidence, and he is advised by counsel that they constitute a legal cause for a prosecution, and he in good faith accepts this advice and follows it, he is not liable to an action for malicious prosecution. Olmstead v. Partridge, 16 Gray, 381.

In the case at bar material facts were in dispute, and it does not appear that a full and correct statement of the facts, as known to the defendant, was laid before counsel. Exceptions overruled. Donnelly v. Daggett, 145 Mass., 314; 14 N. E. Rep., 163 (1887).

(3) *Advice of state's attorney — Statement of facts.*

Phœbe Thomas rented land to Morgan S. Thomas, which he cultivated in corn in the summer of 1872, his term expiring March 1, 1873. In August, 1872, he entered into a contract whereby he sold his part of the crop to Rufus Calef, to be delivered in the shock on the ground. Delay occurred in estimating the quantity of the corn so that the transaction was not finally closed between Calef and Morgan until March, 1873. Phœbe rented the land on which the corn was to John Thomas for the year 1873, his term commencing March 1st of that year. Calef neglected to remove the corn until late in May (whether by the consent of John or not is in controversy) and then commenced to remove it with ox teams. Phœbe objected to the use of ox teams in removing the corn, insisting they would damage her land more than horses; but no heed was given to this objection. John commenced plowing for the spring crop before the corn was all removed, and made frequent complaints to Phœbe that Calef was not removing his corn sufficiently fast to enable him to progress with his work. Calef had been notified previously to remove the corn, and there was evidence tending to show that the two teams employed for that purpose by him, and which were constantly engaged at it, were not sufficient to remove the corn fast enough to keep out of the way of the teams of John in plowing. Finally Phœbe burned, on one occasion, several of the shocks of corn, and shortly after a number more, in all sixty shocks. Calef, after the burning, saw her and she acknowledged that she had burned it; whereupon he went to the state's attorney and made a statement in regard to the matter. The state's attorney advised that she be prosecuted for malicious mischief, and

prepared an affidavit charging her with burning the corn, which Calef took to a justice of the peace and obtained a warrant for her arrest. When arrested she went before the justice, waived an examination, and gave bail for her appearance to answer to an indictment, etc. At the next term of the court the case was presented to the grand jury, who ignored the bill and she was discharged. She then brought an action against Calef for malicious prosecution. On the trial the jury returned a verdict for $1,055.55, upon which judgment was entered, and Calef appealed to the supreme court.

Chief Justice Scott said: "I am of the opinion defendant made a full and fair statement of all the material facts of the transaction out of which this litigation arose, to the state's attorney, to enable him to advise him as to his duty in the matter, before he commenced the criminal prosecution, and in good faith acted on the advice received from that officer. Under the decisions of this court, this advice was a sufficient warrant for instituting a criminal prosecution. Whether plaintiff was guilty of a criminal act in destroying defendant's property, or whether she was justified in so doing, are questions which need not be discussed in this case." Judgment reversed. Calef v. Thomas, 81 Ill., 478 (1876).

§ 9. Advice of officers, policemen and detectives.— The advice given by policemen, detectives and like officers is properly admitted in evidence on the trial of actions for malicious prosecutions and false imprisonment to show the circumstances under which the prosecution was instituted and to mitigate the damages; but such advice can never be shown as a defense, as would be the advice of a respectable attorney, fairly and honestly obtained, regarding a prosecution claimed to be malicious. The law has never regarded the advice of such officers as being a justification for instituting mistaken criminal proceedings. It is believed that such officers from the very nature of their business become more suspicious than ordinary persons.[1]

§ 10. Effect of the advice of persons who are not lawyers — Competent on the question of malice.— As one of the grounds of action for malicious prosecution is malice, and any fact tending to disprove it is competent evidence, hence the fact that before the commencement of the proceeding complained of the party sought for and obtained the advice of persons whom he in good faith supposed to be competent to give such advice, while it does not constitute a defense to the action, is certainly competent on the question of malice in mitigation of damages.[2]

[1] Hirsh v. Feeney, 83 Ill., 548 (1876).

[2] Murphy v. Larson, 77 Ill., 176 (1875).

APPLICATION OF THE RULE.—

Advice of a person not a lawyer not competent as a bar to the action but may be in mitigation of damages.

Victor Larson brought an action for malicious prosecution against Samuel A. Murphy for maliciously and without probable cause procuring his arrest on a charge of larceny. Larson was about to remove some lumber from a farm he had been occupying as tenant of a former owner. Murphy had purchased the farm and claimed the lumber. Murphy discovered Larson in the act of removing the lumber, and a violent altercation took place between them. Murphy immediately went to a neighboring town for legal advice. He applied to one attorney, who informed him that he was retained by Larson, but that there were other attorneys in town, but, as it was claimed, they were not attorneys of record. To one of these Murphy applied and made a full and fair statement of the case, and was advised to have Larson arrested on a charge of larceny, and drew the necessary papers. On the trial the defendant relied upon this advice as a defense. This jury rendered a verdict for $300 and Murphy appealed to the supreme court. Scott, J.: "There can be no question but the defendant consulted the person in the utmost good faith, believing he was an attorney-at-law, and competent to give advice in legal matters; that he made a full and fair statement of all the facts to him in relation to the charge, and relying upon the advice he received he caused the arrest to be made. Had he been a regular attorney licensed under the laws of this state, in good standing, competent to give advice, and had he counseled the arrest of plaintiff on a charge of larceny, after having a full statement of all the facts, however much he may have been mistaken as to the law, still, if defendant was in good faith guided by his counsel, and it appeared that he sought the counsel with an honest purpose to be informed as to the law, such advice would constitute probable cause, and an effectual bar to any action for malicious prosecution; but there must always be the element of good faith, and we have been referred to no case that holds there are any exceptions to the general rule. The counsel selected must be a regularly licensed attorney and counselor, reputable in character, and considered in the community competent to give legal advice on all matters pertaining to the law." . . . "We are unwilling to establish the doctrine that counsel taken of a person not a lawyer, although received and acted upon in good faith, can ever be a justification for commencing a criminal prosecution." Murphy v. Larson, 77 Ill., 176 (1875).

Competent on the question of malice.—"As the ground of this action is malice and want of probable cause, any fact tending to disprove either is competent evidence." . . . "The fact that he obtained counsel of one he supposed was learned in the law and competent to give advice, and was advised by him, upon a disclosure of the facts and circumstances, to commence the criminal prosecution, while it constitutes no defense, was certainly competent evidence on the question of malice. If he acted in good faith,—and that was a question for the jury,—it would negative in a high degree the idea of malice, and that fact ought to go in mitigation of exemplary damages." Scott, J., in Murphy v. Larson, 77 Ill., 176 (1875).

§ 11. Good faith — Independent of legal advice.— The law requires that one in instituting a criminal prosecution shall act in good faith, or under an honest belief of the guilt of the party arrested; and this notwithstanding he has taken legal advice.[1]

II. In Actions for False Imprisonment.

§ 12. Advice of counsel.— The advice of counsel in actions for false imprisonment, while subject to the same general rules of law governing its introduction in evidence as in actions for malicious prosecution, is a much less important element of defense. In actions for malicious prosecution, as we have seen, the advice of counsel goes to disprove malice, and it may, in effect, become a complete defense to the action. But in actions for false imprisonment its effect is very different. It goes only in mitigation of exemplary damages.[2]

An application of the rule.—

Advice of an inexperienced attorney is sufficient.

Thomas sued Mortimer and Harrell for false imprisonment in procuring his arrest for a debt. The trial resulted in a judgment for $1,000, from which the defendants took an appeal.

Wyly, J.: "We have no doubt that Thomas, the creditor, merely desired to collect the claim due him by the plaintiff; but the utter want of probable cause for the arrest shown in his petition for arrest is a sufficient ground for inferring malice. He acted, however, under the advice of a young lawyer who instituted the proceedings, whose ignorance of the law, although not justifying the arrest, might to some extent mitigate the damages to which his client should be subjected." Mortimer v. Thomas, 23 La. Ann., 165 (1871).

[1] Roy v. Goings, 112 Ill., 656 (1885).

[2] Field on Damages, § 682, p. 541 (1876); Eggleston on Damages, 124 (1880); Bohm v. Dunphy, 1 Mont. T., 333 (1871); 1 Sutherland on Damages, 237 (1883); Fox v. Davis, 55 Ga., 248 (1875); Josselyn v. McAllister, 22 Mich., 300 (1871); Reuck v. McGregor, 32 N. J. L., 70 (1866); Mortimer v. Thomas & Harrell, 23 La. Ann., 165 (1871); McCall v. McDowell, 1 Abb. (U. S.) C. C., 212; Deady, 233 (1867).

CHAPTER IX.

THE END OF THE PROSECUTION.

§ 1. The end of the prosecution.— It is well settled that in order to maintain an action for malicious prosecution the prosecution complained of as being malicious must have been legally terminated prior to the commencement of the action; but just what is a legal termination of the prosecution and sufficient to maintain the action for malicious prosecution does not appear to have been so completely settled.

§ 2. The end of the prosecution — The subject continued. The general rules of law governing actions for malicious arrests and prosecutions have long been well settled. In the words of Lord Camden: "This is an action for bringing a suit at law, and courts will be cautious how they discourage men from suing. When a party has been maliciously sued and held to bail, malice, and that it was without any probable cause, must be alleged and proved."[1] The new action must not be brought before the first is determined, because till then it cannot appear that the first was unjust.[2]

[1] Goslin v. Wilcock, 2 Wils., 302, 307; Cardival v. Smith, 109 Mass., 158 (1872).

[2] Buller's Nisi Prius, 12; Cardival v. Smith, 109 Mass., 158 (1872).

§ 3. (1) **For prosecuting criminal actions.**— When the prosecution alleged to have been malicious is by complaint in behalf of the government for a crime, and in pursuance thereof an indictment has been found and presented to a court having jurisdiction to try it, an acquittal by a jury must be shown. A *nolle prosequi* entered by the attorney for the government is not as a general rule sufficient, for the finding of the grand jury is some evidence of probable cause, and another indictment may still be found on the same complaint.[1] But if the prosecution is commenced by a complaint to a magistrate who has jurisdiction to bind over or discharge, his record, stating that "the complainant withdrew his prosecution, and it was therefore ordered that the accused be discharged," is equivalent to an acquittal.[2] If the accused, after being arrested, is discharged by the grand jury finding no indictment, that shows a legal end to the prosecution.[3] And if the prosecutor, after procuring the arrest, fails to enter complaint, this, with the attending circumstances, is sufficient to be submitted to a jury as evidence of want of probable cause, and a sufficient termination of the prosecution.[4]

§ 4. (2) **For prosecuting civil actions.**— When the suit complained of is a civil action, wholly under the control of the plaintiff therein, it would seem that a discharge thereof by him, without any judgment or verdict, is a sufficient lim-

[1] Buller's Nisi Prius, 14; Bacon v. Towne, 4 Cush., 217 (1849); Parker v. Farley, 10 Cush., 279 (1852); Bacon v. Waters, 2 Allen, 400 (1861); Cardival v. Smith, 109 Mass., 158 (1872).

[2] Sales v. Briggs, 4 Met., 421, 426 (1842).

[3] Cardival v. Smith, 109 Mass., 159 (1872); Mitchell v. Williams, 11 M. & W., 205; Bacon v. Waters, 2 Allen, 400 (1861); Freeman v. Arkell, 2 B. & C., 494; 3 D. & R., 669; Morgan v. Hughes, 2 T. R., 225, 232. The *dictum* of Mr. Justice Buller, in Morgan v. Hughes, that if the accused "was discharged by the grand jury not finding the bill, that would have shown a legal end to the prosecution," does not necessarily imply that the mere fact of the grand jury not finding a bill at the term to which the accused is bound over would be an end to the prosecution. It rather implies that the prosecution is not ended unless he is *discharged* by reason of the jury finding no bill. Knott v. Sargent, 125 Mass., 95 (1878); Jones v. Givin, Gilb., 185, 220.

[4] Venefra v. Johnson, 10 Bing., 301; 3 Moore & Scott, 847; 6 C. & P., 50; McDonald v. Rooke, 2 Bing. N. C., 217; 2 Scott, 359; Cardival v. Smith, 109 Mass., 158 (1872).

itation of the suit; and that, for instance, if one maliciously causes another to be arrested and held to bail for a sum not due, or for more than is due, knowing that there is no probable cause, and after entering his action becomes nonsuited, or settles the case upon receiving part of the sum demanded, an action for malicious prosecution may be maintained against him.[1]

APPLICATIONS OF THE LAW.—

(1) *The action prematurely brought.*

Hamilburgh hired a store of Shepard, paying the rent monthly. He sold out his stock and was about to go to Europe, when Shepard, on June 9, 1873, by the advice of counsel, caused him to be arrested on a writ of that date although the rent was not due until five days after. An officer arrested Hamilburgh and held him in custody for two hours and then released him on his furnishing a sum of money, which the officer took and held, as he claimed in his return, by attachment. Hamilburgh paid his rent when due and the officer returned him his money, and it was agreed between Hamilburgh and Shepard that the suit in which Hamilburgh was arrested should be entered "neither party." The writ was returnable June 28, 1873, but was never entered in court. On June 11, 1873, Hamilburgh brought a suit against Shepard for malicious prosecution. It was held by Gray, C. J., that the action could not be sustained without proof that the prosecution had been determined, which it had not at the time his action was commenced. Hamilburgh v. Shepard, 119 Mass., 30 (1875).

(2) *The suit prematurely brought.*

Johnson brought an action against Shove for maliciously prosecuting him on a charge of larceny. The evidence showed that he was bound over by a justice of the peace to answer at the next term, etc. At that time the grand jury, having investigated the charge and found no bill, were dismissed. The action was commenced before the final adjournment of the term. The judge ruled that as the suit was commenced before the final adjournment of the court it could not be maintained, and the ruling was sustained. Johnson v. Shove, 72 Mass., 498 (1856).

(3) *What is not an end of the prosecution.*

In an action for malicious prosecution, the summons was issued on June 30, 1884. The case was tried in December term, 1884, of the circuit court. It was proved that Peter Lowe, the plaintiff, was arrested on the 29th day of March, 1884, by virtue of a warrant issued by a justice of the

[1] Cardival v. Smith, 109 Mass., 159 (1872); Nicholson v. Coghill, 4 B. & C., 21; 6 D. & R., 12; Watkins v. Lee, 5 M. & W., 270; Ross v. Norman, 5 Exch., 359; Bicknell v. Dorion, 16 Pick., 478, 487 (1835); Arundell v. White, 14 East, 216; Savage v. Brewer, 16 Pick., 453 (1835).

peace upon complaint of John V. Wartman, the defendant, made by him in writing, under oath, that Lowe had been guilty of larceny. Lowe entered into the usual recognizance for his appearance at the then next term of the oyer and terminer, to be held in April, 1884.

It appears that the justice of the peace did not send the papers to the prosecutor of the pleas, or to any officer of the court, until after the April term. It does not appear that the matter was brought to the attention of the grand jury until the September term following, when Wartman was subpœnaed as a witness. He attended, and was examined in reference to the complaint. At that time this suit had been commenced, the process being tested on the 30th of June. There had never been a rule entered discharging Lowe from the complaint, or to release his securities. The jury found for the plaintiff, whereupon a rule to show cause was granted, and the case certified to the supreme court.

Parker J.: The only question for decision is whether this suit was prematurely brought. There is no doubt that this question may be raised under the plea of general issue. Several cases are found in our reports which settle the law in New Jersey. An action for malicious prosecution is premature if commenced before the criminal prosecution is ended. What constitutes the ending of the prosecution sometimes may admit of some doubt. But in this case it is clear that on the 30th of June the criminal prosecution had not terminated. The complaint was pending before the grand jury three months after this suit had been commenced. A criminal prosecution may be said to have been terminated (1) where there is a verdict of not guilty; (2) where the grand jury ignore a bill; (3) where a *nolle prosequi* is entered; and (4) where the accused has been discharged from bail or imprisonment. This case does not come under either of above heads. Lowe v. Wartman, 47 N. J. L. 413, 1 Atl. Rep., 489 (1885).

§ 5. **The law stated by Cowen, J.**—"I by no means accede to the doctrine inadvertently advanced by some judges, that all rights to prosecute for the offense must be terminated by a technical acquittal,[1] nor can it be essentially necessary that there should be an adjudication of the magistrate, or, indeed, any judicial decision upon the merits, by any court, as seems to be supposed by some.[2] The manner in which the prosecution is disposed of, as if it be by compromise, may impose great if not insurmountable obstacles to showing a want of probable cause; but the technical prerequisite is only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor must be put to a new one. Thus, supposing the warrant to be duly executed and the party to appear, though the bill of indictment be re-

[1] Buller, J., in Morgan v. Hughes, 2 T. R., 225–232.

[2] Secor v. Babcock, 2 Johns., 203 (1807); McCormick v. Lisson, 7 Cow., 715 (1827).

turnable ignoramus, or be preferred *coram non judice*, or, after being found, an acquittal follow for its insufficiency, the cause is at an end within the rule, for it would be strange if a party could be protected from prosecution for his malice by procuring the cause to be discontinued on account of some irregularity. So where the prosecution stops with the justice, if the accused be there discharged for any cause, though the justice err, the warrant is *functus officio*, and the particular prosecution at an end. The mere discontinuance of a civil suit in any way satisfies the rule; and the defendant may sue the plaintiff, if he can make out malice and want of probable cause." [1]

§ 6. **The subject discussed.**— The reasons why an action should be terminated in favor of a defendant before the defendant can commence an action for malicious prosecution would seem to be as follows: *First*, if the action is still pending, the plaintiff therein may show in that action that he had probable cause for commencing the suit, by obtaining a judgment therein against the defendant, and he should not be called upon to show such fact in a second action until he has had this opportunity of showing it in the first; *second*, and if the action has terminated against the defendant, then there is already an adjudication against him showing conclusively that the plaintiff had probable cause for commencing the action. When neither of these reasons apply, we suppose the action for malicious prosecution in some instances may be maintained, if the other necessary facts can be shown. If the plaintiff has neither shown, nor is attempting to show, by an action in which he is plaintiff (or prosecutor), that he had probable cause for commencing his action, then the defendant may show in an action brought by himself that the plaintiff did not have probable cause. If a criminal prosecution has been dismissed, with no intention of commencing it again, or if delay has been made in commencing the criminal prosecution again, so as to lead the plaintiff to believe that the criminal prosecution had been finally terminated, and if he had then, and at once, commenced his action for malicious prosecution, he might probably maintain the same.[2] But in all

[1] Cowen, J., in Oak v. Cleveland, 6 Hill (N. Y.), 344 (1844).

[2] Marbourg v. Smith, 11 Kan., 554, 562; Schippel v. Norton, 38 Kan., 567; 16 Pac. Rep., 804 (1888).

reason he should not be allowed to maintain such an action when substantially the same criminal prosecution as the one upon which he founds his action is still in the courts undisposed of.

§ 7. **The means by which the end of the prosecution is accomplished.**— The most usual way in which a prosecution is determined is by a verdict and judgment for the defendant, but the terminations of legal proceedings are as varied as the proceedings themselves. We shall in this chapter consider terminations:

I. By *nolle prosequi.*
II. By dismissal and abandonment.
III. By vacation of orders of arrest.
IV. By discharge on orders of court.
V. By discharge by magistrates.
VI. By discharge on *habeas corpus.*
VII. By miscellaneous matters of discharge.

I. Nolle Prosequi.

§ 8. **Nolle prosequi — The term defined.**— (1) *In civil proceedings:* An acknowledgment or undertaking entered on record by the plaintiff in an action to forbear to proceed in the action either wholly or partially. It has been superseded in most cases by the modern practice, but it still seems to be applicable in some cases.[1]

(2) *In criminal prosecutions* by indictment or information, a *nolle prosequi* to stay proceedings may be entered in England at any time by leave of the attorney-general.[2] In some of the states of our Union leave of the court must first be obtained, but generally the prosecuting officer may enter the *nolle prosequi* at his discretion at any time before the jury is impaneled, and afterwards by consent of the defendant.[3]

§ 9. **Effect of the entry of a nolle prosequi — The law stated by Parsons, C. J., Massachusetts (1806).**— "It cannot be considered as having the effect of a pardon, because, by our constitution, the governor with the advice of the council has the sole power of granting pardons, and he can-

[1] 2 Rapalje & L. Law Dic., 870 (1883); Arch., Practice, 1201.
[2] Arch., Crim. Pl., 109.
[3] 2 Rapalje & L. Law Dic., 870 (1888).

not have this power until after conviction. Neither can a *nolle prosequi* be deemed an acquittal. The practice of entering a *nolle prosequi* to informations is very ancient, but to indictments it began in the latter end of the reign of Charles the Second."[1]

§ 10. **When it is a sufficient termination of the prosecution.**— The law in regard to the question as to whether the entry of a *nolle prosequi* is such a termination of the prosecution as will sustain an action for a malicious prosecution does not appear to be perfectly settled in the different states. The unsettled state of the question may be and probably is owing (1) to a great extent to the effect given to the entry of the *nolle prosequi* in the different jurisdictions, and (2) to the prejudice which seems to have existed against suits for malicious prosecution.

To illustrate the subject more intelligibly, some of the leading adjudications on this subject are presented, and an effort will be made to deduce from them a general rule of law applicable to all cases.

ILLUSTRATIONS FROM AMERICAN CASES.—

(1) *A nolle prosequi an end of the prosecution — Discussion of the question.*

In an action for malicious prosecution it appeared that Murphy, who was in possession of a brick-yard in Pittsburgh, on July 18, 1884, made an information before Alderman Reilly, in which he charged William J. and George E. Moore with wilfully and maliciously interfering with his employees, threatening to kill said employees, and by said threats compelling said employees to leave the premises. The defendants were held to answer at court, and on this information the grand jury found a true bill charging that the said Moores did wilfully and maliciously enter upon the premises of said Murphy, and did unlawfully, wilfully and maliciously destroy one of his kilns of brick. Afterwards, on February 12, 1885, at Murphy's request, on motion of the district attorney, the court allowed a *nolle pros.* to be entered on payment of costs by Murphy, and thereupon the plaintiff brought this suit. The jury found a verdict in his favor, subject to the question of law reserved, to wit, whether the entry of the *nolle pros.* given in evidence was or was not such an ending of the prosecution as to entitle the plaintiff to maintain the action. The court below was of the opinion that the court of quarter sessions had no power to enter the *nolle pros.* in question, but nevertheless decided the reserved question against Murphy on the ground that the manner of the entry of the *nolle pros.* was equivalent to an abandonment of the prosecution.

[1] Com. v. Wheeler, 2 Mass., 172 (1806).

On the question of law reserved, the court delivered the following opinion:

"After the evidence was closed the defendant's attorney asked us to charge the jury 'that the entry of the *nolle pros.* given in evidence in the case, in the prosecution complained of, is not such an ending thereof as to entitle the plaintiff to maintain the action.' This we refused to do, and reserved the question of law thus raised for the consideration of the court in bank. The jury having found a verdict for plaintiff, subject to our opinion on the question thus presented, it now arises for our determination. It seems originally to have been thought that an acquittal by a jury was necessary before an action for malicious prosecution could be maintained (2 Starkie, Ev., 677, tit. 'Malicious Prosecution'), and it was said that the entry of a *nolle pros.* was insufficient, because fresh process might be issued upon the indictment. Goddard v. Smith, 6 Mod., 262.

"A careful examination of the leading case shows that the real point ruled was that a *nolle pros.* entered by the attorney-general was not sufficient to sustain the allegation in the narr that plaintiff had been acquitted; but it seems to have been generally understood and recognized as an authority upon the point under consideration. And it has been expressly so decided in Massachusetts. Parker v. Huntington, 2 Gray, 124, and Bacon v. Towne, 4 Cush., 217, both of which were cited with apparent approbation in Kirkpatrick v. Kirkpatrick by Justice Thompson, sitting at *nisi prius* in Philadelphia. See 39 Pa. St., 291.

"But while this is so, it seems to me so clear that there is no reason for the rule, and that the only foundation upon which it ever was supposed to rest, to wit, that the prosecution must be so disposed of as to bar another proceeding for the same offense, has been so entirely swept away by late decisions, both in England and the United States, that I do not think it can be regarded as the law now. Even if we were to consider it as a distinct expression of the views of Justice Thompson in the case above cited, it was a mere *dictum* and not at all necessary to sustain the conclusion reached here. Thus we have it said in Berner v. Dunlap, 94 Pa. St., 331, that in an action against the prosecutor, if the plaintiff proves a discharge by the examining magistrate, it is sufficient not only to justify suit, but is evidence of the want of probable cause, which casts the burden of proof upon the defendant. And in Stewart v. Thompson, 51 Pa. St., 158, the court says: A bill was presented to the grand jury, which was ignored as to plaintiff, and the prosecution was wholly ended and determined and the plaintiff discharged. In both of these cases the prosecution could have been reinstated or renewed, and the subsequent proceedings would not have been barred either by the discharge or the ignoramus. A *nolle pros.* duly entered is as much a determination of the prosecution as either. But we have quite a number of cases in other states in which the doctrine that a *nolle pros.* is a sufficient ending of the prosecution to maintain the action is expressly declared. 'Where the prosecuting attorney enters a *nolle pros.*, and the magistrate made such entry on the files and the defendant was actually discharged, it is sufficient.' Driggs v. Burton, 44 Vt., 124, and to same effect cases cited below.

"The grounds for this action are the malice of defendant, the want of

probable cause, and injury sustained by plaintiff. The authorities referred to in the main agree that where the particular indictment or charge specifically made is disposed of, and defendant allowed to depart without any obligation to answer further, there is a sufficient termination of the prosecution. It is argued, however, that while a *nolle pros.* properly entered may be sufficient to maintain the action, the one entered in this case was absolutely void, as being contrary to the law of this state. But looking at this case even in that point of view, and treating the *nolle pros.* as a nullity, so far as its strict legal effect is concerned, I think that it may well be treated as an abandonment of the prosecution by the defendant in this case, and as *prima facie* evidence of an acknowledgment of the fact that he had no sufficient cause for prosecution.

"It is sufficient if the plaintiff be discharged without day by withdrawal or abandonment of the prosecution, not made by arrangement with him. Brown v. Randall, 36 Conn., 56. So even in Massachusetts (Sayles v. Briggs, 4 Metc., 421), it was held that when a prosecution was abandoned before the magistrate, and the defendant discharged, the action could be maintained. On the same line we refer to Kelly v. Sage, 12 Kan., 109; McWilliams v. Hoban, 42 Md., 56; Gilbert v. Emmons, 42 Ill., 143; Fay v. O'Neill, 36 N. Y., 11; Leever v. Hamill, 57 Ind., 423; and particularly Lowe v. Wartman, 1 Atl. Rep., 489 (decided by the supreme court of New Jersey, November, 1885), where it is summed up as follows: 'A criminal prosecution may be said to have been terminated (1) where there is a verdict of not guilty; (2) where the grand jury ignore the bill; (3) where a *nolle prosequi* is entered; and (4) where the accused has been discharged from bail or imprisonment.' Here the entry of the *nolle pros.* must be taken from the record (as was the actual fact) to have been without plaintiff's knowledge or consent, while he was under bail and waiting for trial. The first thing he knew, the cause was, so far as the charge contained in the indictment is concerned, disposed of, and he turned out of court without day. I think it manifest that a due regard for personal safety, and a proper discrimination of the rules of law involved in this case, justify the entry of judgment for plaintiff upon the question of law reversed upon payment of verdict fee; and it is now so ordered."

Defendant brings error.

PER CURIAM. The opinion of the court below on the reserved question is, in our opinion, unexceptionable; hence we adjudge that the assignments of error are not well taken. Judgment affirmed. Murphy v. Moore (Pa.), 11 Atl. Rep., 665 (1887).

(2) *A nolle prosequi not such an end of the prosecution as is necessary to sustain an action for malicious prosecution.*

In his declaration, Parker alleged that Farley in 1845 made a complaint before the grand jury charging him with perjury in 1843. An indictment was the result, upon which Parker was tried in 1845 and convicted. He took exceptions to the ruling of the court, which were overruled, and he then moved for a new trial, alleging that he had been convicted on false testimony and newly discovered evidence. Upon this motion a new trial was granted. The case was then continued for several years. In 1849 the pros-

ecuting attorney entered a *nolle prosequi*. While the case was still on the docket, Parker applied to the court for an order requiring the prosecuting attorney to enter a *nolle prosequi*, on the ground of some alleged agreement to that effect on the part of the prosecuting attorney. The action for malicious prosecution was commenced in 1850. While it was pending for trial before the chief justice, both parties desired the opinion of the court upon the question: "Was the termination of the suit, complained of as malicious and without probable cause, by a *nolle prosequi*, such an acquittal or determination of the prosecution as would enable the plaintiff to maintain this suit." Upon this point the court say: "The court are of the opinion that, according to the well-settled series of authorities, a plaintiff cannot maintain an action for a malicious criminal prosecution by indictment, by showing that the prosecution has been determined by a *nolle prosequi*." "Were this a new question to be decided upon principle, it might be doubted whether it would be just and wise to establish this as an inflexible rule of practice, because, perhaps, cases can be imagined, as where a party has been long kept in court, always desirous and ready for a trial, and when a *nolle prosequi* is entered without his consent and against his remonstrance, when he ought not to be deprived of his right of showing that the suit was groundless and malicious. But the common law seems to have gone upon the ground that a party criminally prosecuted shall have a right to maintain an action and recover damages against one who has acted as complainant in behalf of the commonwealth, and ostensibly for the public good (an action certainly not to be favored); he shall begin by offering a verdict in his favor by a jury who have considered the cause on its merits. But even if it were now open to consider any such modified rule, we should be of the opinion that it would not apply when a *nolle prosequi* and discontinuance is entered by consent, or by way of compromise, or where such exemption from further prosecution has been demanded as a right or sought for as a favor by the party prosecuted. In the present case, it appears by the record that the plaintiff endeavored to obtain such exemption from trial by requiring the district attorney to enter a *nolle prosequi*." Parker v. Farley, 10 Cush. (64 Mass.), 281 (1852). Citing Bacon v. Towne, 4 Cush., 217.

(3) *End of prosecution, what is—When a nolle prosequi is not.*

It was alleged that Dawson, the defendant, maliciously, and without probable cause therefor, caused a complaint to be sworn out before a trial justice charging Graves, the plaintiff, with larceny. The justice issued his warrant and the plaintiff was arrested and brought into court, when, failing to enter into a recognizance for his appearance, etc., he was committed to jail. At the following term of court, the grand jury failing to indict him, the district attorney entered a *nolle prosequi*. Upon a demurrer judgment was given for the defendant. One of the grounds of demurrer was, "because neither the plaintiff's discharge by the justice of the superior court, nor the entry of a *nolle prosequi* by the district attorney, fully, effectually and finally terminated the prosecution against the plaintiff so as to entitle him to maintain this action."

On exception it was held that whether a *nolle prosequi* is or is not such a

determination of a criminal proceeding as is necessary to sustain an action for malicious prosecution depends on the other facts in the case, but the discharge, upon the failure to find an indictment, is such a determination of the proceedings. The demurrer was overruled. Graves v. Dawson, 130 Mass., 78 (1881). Citing Cardival v. Smith, 109 Mass., 158; Parker v. Farley, 10 Cush., 279.

End of prosecution — Nolle prosequi.

On the trial of an action for false imprisonment, Caupal, the plaintiff, offered to show that Ward, the defendant, having failed in a civil action brought by him against Caupal, and being angry thereat, went to a justice of the police court and so misrepresented the manner in which he, Caupal, became indebted to him, that the justice gave him a written paper to take to the clerk of the court, by which the clerk was authorized to hear and receive a complaint and issue a warrant against him. The clerk dissuaded Ward; but he replied that he did not care whether he had any cause or not: that what he wanted was his pay. By these means he got the complaint filled out, to which he swore, and which stated that Caupal had obtained goods from him by false pretenses. A warrant was issued upon the complaint, upon which Caupal was arrested and taken to the station house; but upon being brought before the court, a *nolle prosequi* was entered upon the suggestion of the counsel who had appeared for Ward in his civil suit, that he had examined the case and had come to the conclusion that no offense had been committed. The trial judge on these facts ruled that the action for false imprisonment could not be maintained. Caupal v. Ward, 106 Mass., 289 (1871).

(5) *A nolle prosequi — When an end of the prosecution.*

Mills brought an action against Woodworth for malicious prosecution for causing him to be arrested upon a charge of grand larceny. He alleged that one Daniel T. Hockert made the complaint upon which the arrest was made, but charges that the defendant maliciously and without probable cause advised and caused the said Hockert to make such complaint and to have the plaintiff arrested; the issuing of a warrant by a justice of the peace against the plaintiff for larceny, his arrest thereon; the fact that he was brought before the justice, an examination had, that the justice after examination adjudged that an offense had been committed, that there was probable cause for believing him guilty, and thereupon held him to bail for his appearance at court; that he gave bail as required by the justice; that at said next term the defendant falsely and maliciously, and without probable cause, caused and procured the district attorney to present an information against him on said charge of larceny; that the trial of the cause was continued at the term at which the information was presented, by the consent of the parties, to the next regular term, and that at that term the district attorney, with the leave of said court, entered a *nolle prosequi* in said action, and that said action was then and there determined with the advice of the defendant and abandoned by him, and that since that time he has not further prosecuted said charge.

The defendant's answer was, first, a general denial. The answer then alleged and charges the fact to be, that Daniel T. Hockert made complaint in writing to the justice, setting forth the substance of such complaint, the issuing of a warrant upon such complaint, the arrest of the plaintiff, his examination before the justice, the judgment of the justice upon such hearing; that he held the defendant to bail for his appearance at the next term of court; that at said term an information was presented against the plaintiff by the district attorney; that the trial on said information was continued until the March term on the application of the plaintiff; that at the next March term, 1882, the case was continued, on the application of the district attorney, to the September term of the same year, and at such September term the district attorney, with leave of the court, entered a *nolle prosequi* in said action *without the consent* or *advice of the defendant*, and that said action has not been commenced again to the knowledge of the defendant.

It is not denied by the learned attorney for the respondent that it is necessary to show a final determination of the criminal action against the plaintiff before the action for the malicious prosecution of the same can be maintained by him. Miller v. Milligan, 48 Barb., 80; Pratt v. Page, 18 Wis., 337-344: Winn v. Peckham, 42 Wis., 493-499. It is unnecessary to cite other authorities to sustain this proposition, as both parties admit that such is the rule of law, and the authorities are not in conflict upon that point. But it is claimed by the learned counsel for the appellant that the facts stated in the complaint do not show a final termination of the criminal action upon which this suit is founded, and they rely upon the following authorities to sustain their contention: Bacon v. Towne, 4 Cush., 217: Parker v. Farley, 10 Cush., 279; Brown v. Lakeman, 12 Cush., 482; Parker v. Huntington, 2 Gray, 124; Dennehey v. Woodsum, 100 Mass., 195-198; Cardival v. Smith, 109 Mass., 158. These cases, as well as others cited by the appellant, would seem to hold that the entering of a *nolle prosequi* by the district attorney, with the consent and leave of the court, upon the indictment or information for a crime, is not a final determination of such criminal action, and therefore no action for malicious prosecution can be maintained, because it is urged that the defendant may be again arrested upon such indictment or information, and tried, and that upon such trial the accused might be convicted, which conviction would be conclusive evidence that there was probable cause for the prosecution; and upon this point the learned counsel for the appellant cite the following cases: Whart. Crim. Law, § 513; State v. McNeill, 3 Hawks, 183; Com. v. Wheeler, 2 Mass., 172; Teague v. Wilkes, 3 McCord, 461; Smith v. Shackleford, 1 Nott & McC., 86; Heyward v. Cuthbert, 4 McCord, 354; State v. Blackwell, 9 Ala., 79: Wortham v. Com., 5 Rand. (Va.), 669; Lindsay v. Com., 2 Va. Cas., 345; State v. Haskett, 3 Hill (S. C.), 95; United States v. Shoemaker, 2 McLean, 114.

It will be seen by an examination of these authorities that the question as to whether, after a *nolle prosequi* had been entered upon an indictment or information, the party could be afterwards proceeded against upon the same indictment or information, was not the point decided; and if such rule was stated as the law, it was only incidental to the real question. All

the authorities hold that a *nolle prosequi*, entered with leave of the court before the jury is impaneled in the case, is not a bar to a subsequent prosecution for the same offense upon a new indictment or information, and there are a few cases which hold that the *nolle prosequi* may be recalled, and the defendant tried upon the same indictment or information. All that was decided in United States v. Shoemaker, *supra*, was that a *nolle prosequi* entered on an indictment was not a bar to a subsequent indictment for the same cause. Such was the fact, also, in the case of Com. v. Wheeler, *supra*. In this last case Justice Sewell says: "A *nolle prosequi* is often entered by the attorney for the government on discovering some informality in his indictment. I consider that it applies to the particular indictment only, and not to the offense." Sedgwick, J., says: "I think it has been held that a *nolle prosequi* is not a bar even to the indictment on which it is entered, though I believe this opinion has been since overruled." Bishop, in his work on Criminal Procedure, in speaking of the effect of the entry of a *nolle prosequi*, says: "We see, therefore, that a *nolle prosequi* during trial bars a subsequent prosecution for the same offense, whether on the same or any other indictment. *A fortiori*, it does, when entered between the verdict and sentence. Entered before trial, it and the proceedings it discontinues are no inpediment to a subsequent prosecution for the same offense. It simply puts an end to the particular indictment, count or part of a count to which it applied, without prejudice to new proceedings; but the part or whole of the present proceeding which has been reached by it cannot be revived. In the language of an old case, 'the king cannot afterwards proceed in the same suit, but he may begin anew.'" See sec. 1395. In a note to this section, the learned author refers to some of the cases cited by the learned counsel for the appellant in this case, which seem to hold that proceedings might be afterwards had upon the same indictment or information, and disapproves what was said upon that question in those cases; and cites the following cases to sustain his statement in the text, that "the *nolle prosequi* puts an end to the particular indictment, count or part of a count to which it is applied, without prejudice to a new proceeding; but the part or whole of the present proceeding which has been reached by it cannot be revived." Reg. v. Pickering, 2 Barn. & Adol., 267; Bowden v. State, 1 Tex. App., 137; State v. Shilling, 10 Iowa, 106; Com. v. Dowdican, 115 Mass., 133; Brittain v. State, 7 Humph., 159; Reg. v. Mitchell, 3 Cox, Crim. Cas., 93; State v. Primm, 61 Mo., 166; Moulton v. Beecher, 8 Hun, 100; Reg. v. Allen, 1 Best & S., 850.

In the case last cited, which was decided in 1862, Cockburn, C. J., says: "No instance has been cited, and therefore it may be presumed that none can be found, in which, after a *nolle prosequi* has been entered by the fiat of the attorney-general, this court has taken upon itself to award fresh process, or has allowed any further proceedings to be taken on the indictment." Crompton, J., says: "The *nolle prosequi* being on the record, there is an end of this prosecution; but the question remains whether that is final or not. I rather think, however, that Mr. Archbold, in his Practice of the Crown Office, is right when he says (page 62) 'that it has the effect of putting an end to the prosecution altogether.' It is said that, notwith-

standing that the attorney-general may interfere in any prosecution in any court in England and stop it, the court may afterwards award process. Goddard v. Smith, 6 Mod., 261, only decided the entry of a *nolle prosequi* is not a decision on the merits of the prosecution. The court, in the course of the argument, said the attorney-general might issue new process upon the indictment; but, as I have said, I rather think the *nolle prosequi* puts an end to the prosecution." Blackburn, J., gave no opinion on this point. The remarks of the judges above quoted were made in a case where the attorney-general had acted without the leave of the court.

It seems to us very clear that the rule as stated by Mr. Bishop and the judges in the case above cited must be the true rule, when the *nolle prosequi* is entered upon an indictment for any cause. If it be entered because the indictment is bad upon its face for want of sufficient allegations, either in form or substance, then there can be no reason for arresting the defendant for trial upon such imperfect indictment. And if the *nolle prosequi* is entered because there is no proof of the guilt of the defendant, he certainly ought not to be proceeded against further, and the action, though a criminal one, is discontinued for all purposes. Whether in this state, where the information is presented by the attorney for the state after an examination of the defendant before a justice, and a *nolle prosequi* is entered because of some imperfection in the information which renders it bad in law, a new information may not be presented without a new complaint and examination of the defendant, need not be determined in this case, as we think it must be presumed from the evidence in the case that the *nolle prosequi* was entered by the district attorney with the leave of the court, because the attorney and the court were satisfied that there was not sufficient proof of the defendant's guilt. And when the prosecution is discontinued for that reason, or for any other reason except for some irregularity or informality in the information itself, such discontinuance puts an end to all further proceedings in that case; and if the defendant can be thereafter further prosecuted for the offense charged in the information, it must be upon a new complaint, arrest and examination. In this view of the case the entry of the *nolle prosequi* with the leave and consent of the court was a final determination of that action, within the meaning of the rule laid down for the government of actions for malicious prosecution.

In the case of Moulton v. Beecher, above cited, a complaint for malicious prosecution was sustained upon demurrer, which alleged that a *nolle prosequi* had been entered in the criminal action in substantially the same language used in the case at the bar, and the court held the complaint sufficient. We think, upon principle as well as authority, the entry of a *nolle prosequi* upon an information, not upon the ground that the information is insufficient upon its face, is an end to the prosecution of that case, and that such *nolle prosequi* cannot afterwards be vacated, and further proceedings had in that case, unless vacated at the same term at which it is entered. Bish. Crim. Proc., § 1396; State v. Nutting, 39 Me., 359; Parry v. State, 21 Tex., 746. The exception made to the sufficiency of the complaint was properly overruled. Woodworth v. Mills, 61 Wis., 44; 20 N.W. Rep., 728 (1884).

(6) *Discharge by magistrate upon entry of a nolle prosequi.*

William S. Driggs brought an action against Oscar A. Burton for malicious prosecution. He recovered $4,500. On the trial the justice before whom the prosecution complained of was had testified that the plaintiff was brought before him July 22, 1868; that Burton, the defendant, was not present. The case was continued until the next day on the application of the state's attorney to enable him to procure testimony. On the next day the plaintiff was present with his counsel. The defendant was not present. The case was again continued to the 25th to enable the state's attorney to procure the attendance of the defendant and some witnesses from a distance. On the morning of the 25th the state's attorney entered a *nolle prosequi* and no hearing was had, the plaintiff and his counsel not being present at the time. In the supreme court it was insisted that the prosecution before the justice, having terminated in a *nolle prosequi* in the manner stated, was not such a determination of the case as to warrant the recovery.

In passing upon this question, Wheeler, J., said: "From the oral evidence received without objection and not contradicted, it appears that the plaintiff was in fact discharged from custody, and that the proceedings against him before the justice came in fact to an end. There was no formal discharge by the justice, but the proceedings that were had in effect discharged him. The entry made by the justice upon his files was merely "*nolle prosequi* by the state's attorney," but that entry was a mere memorandum made by the justice by which to write out the formal record of the proceedings at large. The full record would show the discharge of the plaintiff and the end of the proceedings. Neither the form of the memorandum nor the want of a full record ought to or can vary the effect of what was done. The justice could neither acquit nor convict, but could only bind over or discharge. He did, in effect, discharge the plaintiff, and there was a complete termination of that prosecution, and as favorable a one as could be had for the plaintiff. Upon principle it seems that the termination upon the *nolle prosequi* of the state's attorney under these circumstances was sufficient." Driggs v. Burton, 44 Vt., 124 (1871).

NOTE.— The case was reversed, but upon other grounds.

(7) *Entry of a nolle prosequi — Judgment that the defendant "go hence thereof, without day," sufficient.*

In an action for malicious prosecution, it was claimed that Chapman, without any reasonable or probable cause, procured Woods to be indicted for perjury. At the trial it was proved by the record that, at the same term the indictment was found, a *nolle prosequi* was entered by the prosecuting attorney, whereupon the court rendered the following judgment: "It is therefore considered that said defendant as to said indictment go hence thereof acquit, without day." The court refused to instruct the jury that the entering of the *nolle prosequi* to the indictment by the prosecuting attorney was not such an acquittal as is necessary to maintain the action for malicious prosecution, but did instruct that the evidence offered was sufficient to prove that the plaintiff had been prosecuted and that the prosecution

was ended. The verdict and judgment were for the plaintiff and the defendant brought a writ of error.

In passing upon the question of the entry of the *nolle prosequi*, Sullivan, J., said: There is no doubt but that to support the action it must be shown that the prosecution is determined. All the authorities concur in the point. And perhaps it is equally true that the entry of a *nolle prosequi* by the prosecuting attorney without any judgment of the court discharging the defendant from the indictment is not regarded as a termination. In Goddard v. Smith, 3 Salk., 245, which was an action for malicious prosecution upon an indictment for barratry to which a *nolle prosequi* had been entered by the attorney-general, it was held that the prosecution was not determined. The reason given was that upon the same indictment new process might be taken out. In the same case it was said by the court that the termination of the prosecution must be by an acquittal on the merits of the case, but this does not seem to be necessary. Chambers v. Robinson, 2 Strange, 691; Wicks v. Fenthan, 4 T. R., 247. If it be shown that the original prosecution, wherever instituted, is at an end, it will be sufficient. Fisher v. Bristow, 1 Doug., 215, and note. Is the prosecution to which reference is made in this case at an end? We answer, it is, although a new indictment may be preferred against the defendant. New process cannot be issued upon the former indictment. The judgment of the court puts an end to further proceedings against the defendant upon it. Where a man is maliciously indicted he may not be able to obtain a trial on the merits if the prosecuting attorney is determined to, and actually does, *nolle prosequi* the indictment. It is therefore not unreasonable that he should in that event ask for and obtain a judgment of the court discharging him from further answering to the indictment, and in such a case, if an action lies, an innocent man may be harassed without the hope of redress. We are therefore of the opinion that the original prosecution was determined and that there was no error in the instructions given to the jury. Chapman v. Woods, 6 Blackf. (Ind.), 504 (1843).

§ 11. Summary of the law — The entry of a nolle prosequi when a sufficient end of the prosecution and when not.— If any general rule of law upon this subject can be deduced from the authorities, it would seem to be that where the entry of the *nolle prosequi* is the mere act of the prosecuting attorney and no action of the court is had upon it, the entry will not be an end of the proceedings, and for that reason would not warrant any action which could not be had before the proceedings were at an end.[1] But when a judgment of discharge or some other action has been entered or had by the court upon the *nolle prosequi*, it seems to be a sufficient termination of the prosecution.

[1] Driggs v. Burton, 44 Vt., 143 (1871).

§ 12. A better rule.—A better and more equitable rule of law in such cases would seem to be that the particular prosecution is sufficiently ended for the purpose of maintaining an action for malicious prosecution by the entry of a *nolle prosequi*, either with or without orders of court, when it cannot be renewed without again taking the initiatory steps required by law in the first instance to set the machinery of the law in motion, as, for example, making a new complaint, procuring another indictment or filing a new information. It would seem reasonable to hold that a prosecution is ended when, in order to make a further prosecution for the offense claimed to have been committed, the complainant must begin anew. Such beginning is another and a new prosecution. The end of the prosecution is only one of the elements which go to make up the cause of action for a malicious prosecution. After this is established the plaintiff must still show malice and want of probable cause.

II. Dismissal or Abandonment.

§ 13. Dismissal of a prosecution, etc.—In some jurisdictions the practice of dismissing criminal prosecutions seems to prevail. In civil cases, if the plaintiff does not prosecute his suit within the time in which he is bound to do so, or if he does not set down the action for trial or file his declaration within the time required by law or the rules of the court, or if he abandons his suit, the defendant may make his application for the dismissal of the action for want of prosecution. And where the plaintiff fails to make out his case the suit may be dismissed by the entry of a nonsuit. Preliminary examinations of persons charged with violations of the criminal law before magistrates are sometimes terminated by dismissals. In these cases the question as to whether the dismissal is a sufficient termination of the prosecutions or suits complained of as malicious must depend largely upon the circumstances of each particular case.

Illustrations from American cases.—

(1) *Dismissal of a criminal prosecution a sufficient termination, etc.*

On the 29th of October, 1880, the defendant in error Rice was arrested upon a criminal charge made against him before the county judge. The crime charged by the complaint was that of unlawful assembly, or, per-

haps, what is denominated "rout." The complaint was signed and sworn to by Mathias Drahoble, the husband of one of plaintiffs in error. Such proceedings were had as resulted in a dismissal of the cause and the discharge of the accused, by reason of the failure of the prosecution to give security for costs. Defendant in error then brought suit, alleging damages sustained by reason of the arrest, etc., and that the prosecution was malicious and without probable cause. The jury returned a verdict assessing Rice's damages at $102. Defendant prosecuted error to the supreme court.

In affirming the finding of the court below, Reese, J., said: "The first contention is that the dismissal of the criminal prosecution was not such a final determination thereof as would entitle defendants in error to recover. While there are some cases which seem to hold with plaintiff in error upon that point, yet we deem it settled by the great weight of authority that there was such a final termination of the prosecution as would enable defendants in error to maintain this action if the prosecution was found to be malicious and without probable cause. In Casebeer v. Drahoble, 13 Neb., 465; S. C., 14 N. W. Rep., 397, it was held that the right of action accrues 'whenever the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one.'" Casebeer v. Rice, 18 Neb., 203; 24 N. W. Rep., 693.

(2) *A dismissal not necessarily an end of the prosecution.*

On or about December 27, 1879, Norton, Wagstaff, and another, through a mistake of boundary lines, went upon the land of Schippel, and cut down and carried away one or more trees standing and growing thereon. Immediately thereafter, Schippel consulted the county attorney, stated to him the facts, and the county attorney advised the commencement of a criminal prosecution against Norton and the others, under sec. 1, ch. 113, Comp. Laws, 1879, of Kansas. Such prosecution was so commenced before E. L. Norton, a justice of the peace of said county, on December 31, 1879; the county attorney having charge thereof. About January 6, 1880, the county attorney dismissed this prosecution, and on the same day commenced a new prosecution in the district court against Norton and the others for the same offense. Afterwards, and on March 3, 1880, Norton commenced this present action against the defendant Schippel. The plaintiff recovered and the defendant appealed.

In the opinion of the supreme court reversing the judgment, Valentine, J., said: "In legal contemplation we do not think that the criminal prosecution in the present case had terminated when this action for malicious prosecution was commenced, and therefore this action cannot be maintained." Schippel v. North, 38 Kan., 567 16 Pac. Rep., 804 (1888). Citing Hilliard on Torts, 450; Fay v. O'Neil, 36 N. Y., 11; Burhans v. Sanford, 19 Wend., 417; Secor v. Babcock, 2 Johns., 203; Chapman v. Woods, 6 Blackf., 504; Hays v. Blissard, 30 Ind., 457; Marbourg v. Smith, 11 Kan., 554, 562.

(3) *Abandonment of civil suit.*

A plaintiff's declaration for malicious prosecution, after setting out the suing out of a writ in an ordinary action at law against him, and an arrest and holding to bail thereon, and alleging that it was done maliciously and

without probable cause, averred that no proceedings were thereupon had in that action, and that the plaintiff did not declare against the defendant nor prosecute his suit against him with effect, but voluntarily permitted the action to be discontinued for want of prosecution thereof, whereupon and whereby, and according to the practice of the court, the suit became determined. At the trial it appeared that no declaration was delivered or filed in the former action, and that the action for malicious prosecution was not commenced until a year after the return day of the former action. It was objected that, there being no judgment of court, there was no evidence of the determination of the suit to satisfy the averment of the declaration. But Lord Lyndhurst, C. B., thought there was, and overruled the objection, and the ruling was confirmed by the court of queen's bench, Lord Tenterden, C. J., saying: "The length of time which had elapsed shows that the suit was abandoned altogether;" and Park, J., said: "When the cause is out of court it must be considered as determined." Pierce v. Street, 3 B. & Ad., 397. See Cardival v. Smith, 109 Mass., 158 (1872); Jewett v. Lack, 6 Gray, 233 (1856); Lombard v. Olins, 5 Gray, 8 (1855); Clark v. Montague, 1 Gray, 446, 448 (1854).

NOTE.— In nearly all of the states of our Union statutes expressly provide for the filing of declarations, or complaints as they are called in many jurisdictions, by a certain day after the commencement of the action. If not filed according to these requirements, it works of itself a discontinuance of the suit. Gen. Stats. Mass. (1882), ch. 129, § 9; R. S. Ill. (1869), ch. 110, § 17.

(4) *Abandonment of civil suit — Plaintiff failing to appear.*

The statutes of Massachusetts expressly provide that, if no declaration is inserted in the writ, or filed on or before the return term, it shall be a discontinuance of the action. Gen. Stats. Mass. (1882), ch. 129, § 9. In an action for malicious prosecution the declaration stated that the defendant maliciously, etc., procured the arrest of the plaintiff and held him to bail on a writ returnable to the superior court at the September term, 1869; that the plaintiff "duly appeared at said court to which said writ was returnable; but that the defendant did not appear, well knowing that he had no probable cause to maintain the action against the plaintiff, nor was said writ ever returned into the office of the clerk of said court." A demurrer on the ground "that the suit alleged to be malicious was not determined in favor of the defendant therein by a judgment of court" was sustained and the plaintiff appealed.

Gray, J., overruled the demurrer, saying: "A plaintiff cannot be compelled to enter his action, and, until he does, may judge for himself whether he will proceed with it or not. If he does not enter it, it never comes before the court, nor becomes the subject of any judgment, nor appears on its records, unless the defendant, upon filing a complaint at the return term, obtains judgment for his costs. If the defendant does not make such a complaint, the action is not the less finally abandoned and determined by the neglect of the plaintiff to proceed with it. The only cause assigned for the demurrer being that the declaration shows no determination of the former suit in favor of the defendant therein by a judgment of court, the demurrer must be overruled." Cardival v. Smith, 109 Mass., 158 (1872).

III. Vacation of Orders.

§ 14. By vacation of orders of arrest, etc.— As we have seen, in order to sustain the action for a malicious prosecution, the rule is imperative that the prosecution must be at an end, or the action or special proceeding complained of finally determined in favor of the defendant, when the imprisonment is the result of an order of court made in the course of legal proceedings. The vacation of the order of arrest has been held to be a sufficient termination to sustain the action.

Illustrations from American cases.—

Vacation of an order of court in a civil suit for the arrest of the plaintiff.

An action for malicious prosecution was based upon an arrest by virtue of an order obtained upon a false affidavit, concealing designedly from the court a circumstance which, if it had been revealed, would have prevented the granting of the order. The complaint alleged that the defendant, maliciously intending to injure the plaintiff, without probable cause, and with full knowledge that the same was false and untrue, made an affidavit in which he falsely and maliciously alleged certain facts not necessary to mention here, and which, if true, warranted the order of arrest; that he also, maliciously intending to injure the plaintiff, without probable cause, and with full knowledge that the same was untrue, falsely and maliciously made and verified a complaint alleging substantially the same facts; that said affidavit and complaint were made in an action then brought against this plaintiff, by these defendants, in the court of common pleas for the city and county of New York; that the statements made, upon which said order of arrest was granted, were false and untrue, and were known to the said defendants to be false and untrue; and that thereafter, on motion of the plaintiff in this action, the said order of arrest was vacated upon the ground that the defendants had no cause of action. The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The judge before whom the demurrer was argued rendered judgment in favor of the defendants upon the ground that there was no allegation that the action in the court of common pleas had been tried, or that final judgment had been entered thereon; his proposition being that, in order to sustain the action for malicious prosecution, the rule was imperative that the prosecution must be at an end, or the action or special proceeding complained of finally determined in favor of the defendant.

In discussing the question, Brady, J., said: "The propriety of this view is now presented for our consideration, and the question is whether, after an order of arrest has been dismissed upon the merits, the injured party is obliged to wait until the action in which the order is obtained has been decided in his favor. It will be observed here, in passing, that the order of arrest may depend upon extrinsic facts which it is not necessary to

allege in the complaint, and *vice versa*. There can be no doubt that when the order of arrest is dependent for its propriety upon facts *dehors* the complaint. an action for malicious prosecution may be maintained, if the facts otherwise warrant it, after the order is discharged, inasmuch as such discharge of the order is, unless appealed from, necessarily a final judgment thereon in favor of the arrested party. This was the view expressed in Searll v. McCracken, 16 How. Pr., 262. The plaintiff there sought damages against the defendant on the ground that the latter had maliciously and falsely obtained an order of arrest against him in another action, and the complaint was demurred to. The justice who disposed of the demurrer expressed no doubt about the right of action, but said that the complaint was defective because it did not state that the order of arrest which was alleged to have been falsely and maliciously obtained had been vacated, or that judgment had been rendered for the defendant. Upon demurrer, it must be borne in mind, the plaintiff comes into court with a confession by the defendant of all the facts alleged in the complaint. The general doctrine, however, of the cases is as stated by the learned justice in the court below, and as contended for by the counsel for the respondents. 'When a party,' as said by Earl, J., in Marks v. Townsend, 97 N. Y., 590, 'has a final judgment in his favor upon the trial, the prosecution has so far terminated that he may sue for malicious prosecution. If an appeal be taken from the judgment, that may furnish a reason for staying the trial of the action for malicious prosecution until the decision of the appeal.' The complaint in that case alleged two causes,—one for malicious prosecution, and another for false imprisonment,—and the gist of the action was in procuring an order of arrest by the defendants under the 'Stilwell Act,' so called, and the arrest of the plaintiff. The warrant was dismissed and the plaintiff discharged from arrest. There was an appeal to the general term, where the order of discharge was affirmed (20 Hun, 81), and then an appeal to the court of appeals (81 N. Y., 644), pending which an action was brought, and upon that ground the plaintiff was defeated. The court said: 'A party commencing such an action while an appeal from the decision in his favor was pending simply takes the risk of an adverse decision upon the appeal, and thus suffering defeat in the action.' There is no suggestion that an action might not be maintained if there had been no appeal taken from the order by which the plaintiff secured his discharge. In Dusenbury v. Keiley, 85 N. Y., 383, the plaintiff was arrested, as in the previous case, under the Stilwell act. He was discharged, and the proceedings were removed into the supreme court, where an order was made, after due hearing, directing a reversal, and that the proceedings under the Stilwell act be revived and restored. The plaintiff failed to succeed for the reason that his action was barred by the statute of limitations. The right to maintain an action on the discharge of the order was not disputed. Smith v. Smith, 26 Hun, 576, a case upon which both parties to this action rely, was brought to recover damages for maliciously and without probable cause filing a notice of *lis pendens* and a complaint affecting land belonging to the plaintiff. The demurrer was sustained upon the ground that it was not averred that the action had been in any form terminated, or that it was maliciously and without probable

cause prosecuted against the plaintiff. It will be perceived that this case — assuming it to have any application — is entirely different for the reason that it is here alleged that the affidavit upon which the order of arrest was obtained was falsely and maliciously made. It might well be that there was no such determination of the propriety of the *lis pendens* in that action as would justify the commencement of a suit, which was not the case with regard to the order herein, which was disposed of on the merits.

"A class of cases has been referred to which would seem, at first, to sustain the proposition that there was no such determination of the process under which the arrest was made as would justify the commencement of the action. One of these cases is Nebenzahl v. Townsend, 10 Daly, 232. In that case the warrant was granted by a justice of the supreme court for the arrest of the plaintiff and another under the provisions of the Stilwell act. They were discharged, and from the order declarative of that result an appeal was taken to the general term, which affirmed the order; and a further appeal was then taken to the court of appeals, and while the latter appeal was pending an action was brought by the plaintiff. The action was held to be premature in consequence of that appeal. It is true that the learned justice said that no action for malicious prosecution was maintainable until the proceedings or suit in which the party had been prosecuted and imprisoned had been finally terminated by his acquittal and discharge, or a verdict in his favor, and he cited what was said in Parker v. Langly, 10 Mod., 209, that it was a proper answer to show that the action was pending,— which it certainly is, when there has been an appeal from the judgment which has not yet been decided. So far, therefore, as this case has any application whatever to the controversy in hand, it does not affect the right of action asserted. In Swartwout v. Dickelman, 12 Hun, 358, a case relied upon by the respondent, it appeared in the complaint that the plaintiff had been committed to jail by a justice of the peace to await the action of the grand jury, before the meeting of which he was discharged under a writ of *habeas corpus*, and then brought his action. It was held that the discharge was not a determination of the plaintiff's innocence, and that the prosecution was not determined until the grand jury met, and the case was presented and ignored, or there was a failure to prosecute. That is not a case bearing upon the question herein considered, and does not seem to have any application. In Peck v. Hotchkiss, 52 How. Pr., 226, also relied upon by the respondent, it was held that an action for seizing property under an attachment was prematurely brought, if an appeal was pending from the order dismissing the attachment, and this decision is in accord with those to which reference has been made, and which established the proposition that, if an appeal be taken from the order of arrest, and an action be brought pending the appeal, it cannot be maintained, inasmuch as there is no final disposition of the process under which the arrest was made. A consideration of all these authorities leads to the conclusion that in a case like the present, and particularly where the averments of falsity and malice are so sweeping, and it appears that no appeal was taken from the order vacating the order of arrest, the action may be maintained.

"The authorities considered seem to result in the necessity of averring the converse of the condition suggested, placing the burden on the plaintiff of

showing that no appeal was taken from the order. His cause of action is not complete without it; and this springs from the rule requiring at least, as already shown, a final determination of the right of arrest. The plaintiff has failed to make the averment suggested, and the judgment pronounced must for that reason be sustained." Ingram v. Root, 51 Hun, 238; 3 N. Y. Sup., 858 (1889), Daniels, J., dissenting.

IV. Discharge on Orders of Court.

§ 15. By discharge on orders of court.— Where a party is bound over to appear before another court by an examining magistrate, the rule seems to be that, in order to maintain the action for malicious prosecution, he must show that he has been discharged by an order of the court in which he was bound to appear.

Illustration from American cases.—

End of the prosecution — A person recognized to appear, etc., must be discharged by order of court.

In an action for malicious prosecution brought by Margaret Knott against Horace B. Sargent, it appeared that the prosecution was begun by complaint to a police court, upon which the accused was arrested and tried; and that the judge found that there was probable cause to believe the accused guilty of the offense charged, and ordered him to recognize to appear and answer at the next term of the superior court; that a recognizance was given, containing the condition that if the accused should personally appear before the superior court at the term mentioned, and at any subsequent term "to which the same may be continued, if not previously surrendered and discharged, and so from term to term until the final decree, sentence or order of the superior court thereon, and shall abide such final sentense, decree or order," etc., the recognizance should be void; that the records of the superior court only showed that, at the term of that court to which the recognisance was returned, the grand jury returned no bill in the case of the accused. Parol evidence was admitted, against the plaintiff's objection, to the effect that the case was continued by the grand jury on account of the absence of a material witness, and that, the next term of the court the same action was had by the grand jury, for the same reason, and had not for more than a year afterwards been acted upon. It was held that the parol evidence was properly admitted, and that the prosecution had not been so far terminated that the action for malicious prosecution could be maintained, and the plaintiff was nonsuited. Knott v. Sargent, 125 Mass., 95 (1878). Citing Thomas v. De Graffenried, 2 N. & M., 143.

V. Discharge by Magistrates.

§ 16. Discharge by magistrates sufficient, when.— The discharge of a defendant in a criminal prosecution by an examining magistrate has usually been held a sufficient termina-

tion of the prosecution upon which to found an action for a malicious prosecution, especially in cases where the magistrate has either complete or partial jurisdiction over the offense charged.[1] It has been held otherwise, however, where the magistrate is acting without jurisdiction, the remedy in such cases being in trespass for false imprisonment.[2]

ILLUSTRATIONS FROM AMERICAN CASES.—

(1) *Discharge by justice sufficient though he does not have full jurisdiction.*

In the trial of an action for malicious prosecution it appeared that the defendant made a complaint before a trial justice, charging that the plaintiff committed a trespass by unlawfully and wilfully cutting down, carrying away and destroying certain timber. A warrant issued upon this complaint, by virtue of which the plaintiff was arrested, tried and discharged by the justice who made a record of the same. One Endicott testified that he was a surveyor and civil engineer, and that a path cut by the plaintiff, which constituted the alleged trespass, damaged the premises to the amount of ten or fifteen cents; that the trees cut were very small, many of them only huckleberry bushes, etc. The plaintiff testified that he had lived a short distance southerly of the defendant's house; that he had permission to cut a path through land of a third person, and in cutting the path made a mistake, unintentionally cutting into the land of the defendant; that, when informed of his mistake by defendant, plaintiff said he would pay the damages, and if they could not agree would leave it to referees. Subsequently he tendered defendant two dollars in payment of the civil damages caused by the trespass, which the defendant accepted. Another witness testified that the damage made in the cutting of the path would not exceed twenty-five cents. Upon these facts the judge ruled that the action could not be maintained; ordered the jury to return a verdict for the defendant; and, at the plaintiff's request, reported the case for the determination of the full court.

Field, J., in passing upon the question, said: "The defendant made a complaint before a trial justice against the plaintiff, under Massachusetts Public Statutes, chapter 203, section 94, on which the plaintiff was arrested, and after an examination by the trial justice was discharged. This section of the Massachusetts Public Statutes is a re-enactment of the General Statutes, chapter 161, section 81, as amended by the statute of 1868, chapter 321, section 1. By the statute of 1868, chapter 321, section 2, jurisdiction to punish this offense was given to trial justices, concurrently with the superior court, "when the value of the property cut," etc., "or the injury occasioned by the trespass, is not alleged to exceed the sum of one hundred dollars." It seems that by the Massachusetts Public Statutes,

[1] Moyle v. Drake, 141 Mass., 238; Burton, 44 Vt., 124 (1871); Fay v. 6 N. E. Rep., 520 (1886); Driggs v. O'Neill, 36 N. Y., 11 (1867).

[2] Painter v. Ives, 4 Neb., 122 (1875).

chapter 155, section 51, this grant of jurisdiction to trial justices over offenses under this section of the statutes was omitted, and that since the Public Statutes took effect they have jurisdiction only to commit or bind over for trial by the superior court those who, on complaint, appear to be guilty of offenses under this section. But this change in the law is immaterial. A discharge by the trial justice is an end of the prosecution, and the prosecution was before a court having some jurisdiction over the offense. Sayles v. Briggs, 4 Metc., 421, 426; Cardival v. Smith, 109 Mass., 158; Driggs v. Burton, 44 Vt., 124; Fay v. O'Neill, 36 N. Y., 11. There was evidence for the jury that the complaint was prosecuted without probable cause and with malice. New trial granted." Moyle v. Drake, 141 Mass., 238; 6 N. E. Rep., 520 (1886).

(2) *Acquittal before magistrate having no jurisdiction not sufficient, etc.*

Bixby sued Brundige for a malicious prosecution. At the trial the plaintiff, in proof of the prosecution and acquittal, produced a certified copy of a complaint, warrant and judgment of an acquittal against him by the state for an illegal sale of intoxicating liquor in Lowell before a justice of the peace, who, it was admitted, had no jurisdiction of the complaint or authority to issue a warrant returnable before himself. It was objected by the defendant that, the justice having no jurisdiction, there was no sufficient record either of a prosecution or acquittal to sustain the action. Bishop, J., so held, and the verdict was for the defendant. The ruling was upheld. Merick, J., said: "The ruling excepted to was unobjectionable. As the magistrate had no jurisdiction of the offense of which the plaintiff was accused in the complaint, the proceedings before him were of no legal force or validity; and they therefore afford no sufficient basis to sustain an action for malicious prosecution." Bixby v. Brundige, 68 Mass., 129 (1854).

(3) *A discharge by a magistrate — Prosecution abandoned by the complainant sufficient.*

On the trial of a suit for false imprisonment and malicious prosecution it appeared that the plaintiff was arrested and imprisoned on a warrant procured by the defendant charging him with the crime of perjury. The defendant subsequently abandoned the prosecution and the plaintiff was discharged by the magistrate. The charge was not brought before the grand jury, and the defendant admitted that he did not intend to proceed further in the matter. The jury found that the charge was made from malicious motives and without probable cause. The verdict was for $500. An appeal was prosecuted to the court of appeals.

In disposing of the question as to whether the discharge of the magistrate was a sufficient termination of the prosecution, Parker, J., said: "It was sufficiently shown that the prosecution was *at an end*. The complaint was dismissed by the magistrate 'in consequence of the complainant not appearing to prosecute at the time to which the case was adjourned.' This was a sufficient termination of the prosecution." Judgment affirmed. Fay v. O'Neill, 36 N. Y., 11 (1867). Citing Clark v. Cleveland, 6

Hill, 344; Secor v. Babcock, 2 Johns., 203; Purcell v. MacNamara, 9 East, 361; Burhans v. Sanford, 19 Wend., 417; Walkins v. Lee, 5 Mees. & Wel., 270.

(4) *Discharge on preliminary examination by trial justice, when a sufficient end of the prosecution.*

Mrs. Sophia Gibbs was brought before a trial justice upon a criminal charge. She was required to plead to the complaint, to answer further thereto at a subsequent day, and to give surety in the sum of $6,000 for her appearance for that purpose. In default she was committed to jail by order of the magistrate, and a *mittimus* therefor in due form was issued. Upon the day fixed for trial she was discharged, the magistrate finding and adjudging her to be "not guilty of said charge." All this appeared from the records of the trial justice. The court held this to be a sufficient prosecution and acquittal therefrom to furnish a foundation for the action of malicious prosecution, notwithstanding there was a deficiency in the complaint, and a defect in the process by which she was brought before the court, and a want of jurisdiction in the magistrate arising from such defect, the magistrate having jurisdiction of the subject-matter of the complaint. Gibbs v. Ames, 119 Mass., 60 (1875). Citing 2 Greenl. Ev., §§ 449, 452; Mims v. Dupont, 1 Am. Lead. Cas. (4th ed.), 215, 216, notes; O'Brien v. Barry, 106 Mass., 300, 304. Distinguished from Bixby v. Brundige, 2 Gray, 129, and Whiting v. Johnson, 6 Gray, 246 — the magistrate having no jurisdiction of the subject-matter of the complaint.

(5) *Abandonment of the prosecution — Discharge by justice, prosecutor failing to appear.*

In an action to recover damages for a malicious criminal prosecution of the plaintiff before a justice of the peace upon complaint of the defendant, it appeared that the proceeding was never brought to trial, the justice of the peace having failed to attend at the time set for trial. Subsequently, the complainant failing to appear and prosecute after notice to do so, the justice formally discharged the accused. Upon the trial of this action, the above facts appearing, the court nonsuited the plaintiff, upon motion of the defendant, for the reason that the plaintiff had not been acquitted of the offense charged against him. Afterwards the court, deeming this ruling erroneous, granted a new trial, and the defendant appealed.

Dickinson, J., said: The general rule, making the right to maintain an action of this nature to depend upon the fact that the prosecution complained of has resulted in a determination in favor of the accused, is applicable only when the course of the prosecution has been such that the accused had the opportunity to controvert the facts alleged against him, and to secure a determination in his favor. Pixley v. Reed, 26 Minn., 80; S. C., 1 N. W. Rep., 800; Cardival v. Smith, 109 Mass., 158; Buckland v. Green, 133 Mass., 421; Clarke v. Cleveland, 6 Hill, 344; Fay v. O'Neill, 86 N. Y., 11; Apgar v. Woolston, 43 N. J. Law, 57; Stanton v. Hart, 27 Mich., 539. In the case under consideration the prosecution was terminated without this plaintiff having had such an opportunity, and the nonsuit was erroneous. The order granting a new trial is therefore affirmed. Swensgaard v. Davis, 33 Minn., 363; 23 N. W. Rep., 543 (1885).

VI. On Habeas Corpus.

§ 17. By a discharge on habeas corpus.— A discharge upon a hearing in a suit of *habeas corpus* has been held to be a sufficient termination of the proceeding, though the rule is not quite uniform.

Illustrations from American cases.—

(1) *When a discharge on a habeas corpus is an end of the prosecution.*

A warrant was issued against Hugh Martin on the 17th day of March, 1886. Twelve days later he was arrested and brought before the justice. On the examination he was required to give bail in the sum of $300, in default of which he was sent to jail. On the 5th day of April he sued out a writ of *habeas corpus* and was discharged. After his release he brought an action for malicious prosecution against Martin O. Walker and Guy H. Cutting. On the trial the jury found for the plaintiff, assessing his damages at $20,000. The defendants appealed.

In delivering the opinion of the supreme court reversing the judgment, Breese, J., said: Under the facts shown in this record the prosecution was not ended by the discharge of the appellee on the writ of *habeas corpus*. On principle, and for the safety of the republic, such a discharge should not of itself have such an effect. If it had, the vilest criminals might go unwhipped of justice. The appellee should have shown, or it should have been made to appear on the trial, that the state's attorney did not send the case with the recognized witnesses to the grand jury. Or if he did send them, and no steps were taken by the people in court, then the discharge under the *habeas corpus* act should be regarded as having ended the prosecution. Walker et al. v. Martin, 43 Ill., 508 (1867).

(2) *Discharge upon habeas corpus a sufficient end of the prosecution.*

John W. Story brought an action against John Zebly, Jr., for a malicious prosecution. The first trial resulted in a verdict for the plaintiff, but it was set aside and a new trial granted. At the second trial there was a disagreement of the jury. The third trial resulted in a verdict and judgment for the plaintiff, and this the defendant brought to the supreme court on a writ of error. On the trial in the supreme court it was claimed that the trial court erred in holding the discharge upon a writ of *habeas corpus* such an end of the prosecution as would enable him to sustain the action for malicious prosecution. It appeared on the trial that Story was arrested for obtaining goods from the firm of which Zebly was a member by means of false pretenses. At the hearing he was committed to the county prison, where he remained twenty-seven days, when he was brought before Judge Brewster upon a writ of *habeas corpus* and discharged.

In discussing the assignments of error upon this point, Paxon, J., said: "The second and ninth assignments of error may be considered together. The first alleges error in admitting in evidence the record of the quarter

sessions upon the *habeas corpus* proceeding. The second was to the refusal to affirm the defendant's last point. The point was as follows: 'A discharge of the plaintiff upon a writ of *habeas corpus*, after hearing thereon in the court of quarter sessions, is not such a final determination of the prosecution against him as will entitle him to maintain his present action, and the verdict of the jury must be for the defendant.' The question raised by this point has never yet been decided by this court to my knowledge. Under such circumstances it would seem natural to suppose that counsel presenting it would give us the benefit of their aid and research in disposing of it; on the contrary, it is thrown in upon us not only without an authority *pro* or *con*, but without an argument. Yet we are asked to decide it. We might perhaps decline to do so, but as the question lies directly in the path of another trial, we will consider and dispose of it. The eleventh section of the *habeas corpus* act, 18th February, 1785 (1 Smith's Laws, 275), provides as follows: 'And for preventing unjust vexation by reiterated commitments for the same offense, *be it enacted* that no person who shall be delivered or set at large upon a *habeas corpus* shall at any term thereafter be again imprisoned or committed for the same offense by any person or persons whatsoever, other than by the legal order and process of such court wherein he or she shall be bound by recognizance to appear, or other court having jurisdiction of the cause; and if any other person or persons shall knowingly, contrary to this act, recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned, for the same offense or supposed offense, any person delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved, any pretense of variation in the warrants of commitment notwithstanding, the sum of £500, to be recovered by the prisoner or party grieved in manner aforesaid.' It will be seen that the act prohibits, under a heavy penalty, the re-arrest or imprisonment, for the same offense, of a person discharged upon *habeas corpus*, except by 'the legal order and process of such court wherein he or she shall be bound by recognizance to appear, or other court having jurisdiction of the cause.' A discharge upon *habeas corpus* is not necessarily, and in all cases, the end of the prosecution. The public prosecutor, for public reasons and with leave of the proper court, may send a bill to the grand jury, even in a case where the prisoner has been discharged upon *habeas corpus*. This view of the act was evidently taken by the late Judge King, of Philadelphia, in the case of Com. v. Ridgeway, 2 Ashm., 247, where he said, in discharging the relator: 'I rejoice, however, that our judgment is not conclusive of the subject. The sole effect of this decision is that in the present state of the evidence we see no sufficient cause to hold the defendant to bail. It is still competent for the proper public officer — particularly in a different state of the evidence — to submit the case to the grand jury. That respectable body are entirely independent of us; they can form their own views of the prosecutor's case, and may, if their judgment so indicates, place the defendant on his trial; we at present do not see adequate cause to induce us either to restrain him of his liberty or to compel him to give bail to answer. He is discharged.' It will be noticed that there is no indication from Judge King that a private prosecutor could procure the recommitment of a person so

discharged. It must be done by the public prosecutor and manifestly for a public purpose.

"The nearest approach to an authority in this state [Pennsylvania] is the ruling of the late Justice Bell at *nisi prius*, in Charles v. Abell, Brightly, N. P., 131, where he held that a discharge on *habeas corpus* puts an end to a criminal prosecution so as to enable the defendant therein to maintain an action for malicious prosecution. It was said by that learned judge: 'It must be acknowledged that the law on this subject has undergone many alterations in modern times. It seems to be now agreed that if a grand jury ignore the bill it is sufficient to maintain an action. But this rule has been still further modified, and it is settled that if a party is brought before an examining magistrate and discharged, though the proceedings might be again renewed, still, in point of law, that prosecution is ended, and the party may maintain an action for malicious prosecution. There is a precedent for a declaration in Chitty's Pleadings in an action brought under such circumstances. There is no difference, in point of principle and practice, between a discharge by a committing magistrate and a discharge by a judge who examines the case upon *habeas corpus*. It as effectually puts an end to the prosecution as if the defendant were discharged by a magistrate, although a new charge may be afterwards made.' The practice of commencing suits for a malicious prosecution, after a hearing and discharge by a committing magistrate, appears to have passed unchallenged in this state. There are many such cases in our reports. It is sufficient to refer to Orr v. Seiler, 1 Penn., 445; Bernar v. Dunlap, 94 Pa. St., 329. It would be unreasonable to give greater effect to the discharge of a prisoner by a committing magistrate, who is ordinarily a layman, than to a discharge upon *habeas corpus* by a judge of a court of record. The offense with which the plaintiff was charged was a mere misdemeanor. It lacks every element of public importance. Such prosecutions are seldom resorted to except to collect a debt, and one can hardly imagine an instance in which a public prosecutor would ever interfere in such a case where the offender had been discharged upon *habeas corpus*. And, as the private prosecutor may not re-arrest the party, such discharge, for all practical purposes, is an end of this case. If, therefore, a suit for malicious prosecution may not be brought after a discharge upon *habeas corpus*, it can never be brought, no matter how gross may have been the abuse of legal process. Speaking for myself, I would do nothing to impair the right to bring such actions. The fear of the rebound has saved many an unfortunate debtor from an unjust prosecution.

"We are of the opinion that the learned judge below committed no error in refusing the defendant's point. It follows that it was not error to permit the record of the *habeas corpus* to go to the jury. It was the proper and legal way of showing the plaintiff's discharge." Zebley v. Storey, 117 Pa. St., 478; 12 Atl. Rep., 568 (1888).

VII. Miscellaneous Matters.

§ 18. Miscellaneous matters of discharge.— The particular matters relied upon for a termination of the proceedings complained of must, of course, vary largely and depend to

some extent upon the peculiar circumstances of each case. Aside from the matters already discussed, there are some others which have been held sufficient, and which may be conveniently grouped under the head of "Miscellaneous matters of discharge."

ILLUSTRATIONS FROM AMERICAN CASES.—

(1) *Voluntary escape from officer not a sufficient termination.*

Cleveland made a complaint before a justice that Clark designedly and by false pretenses did obtain from him $108.35 with intent to cheat and defraud him. A warrant was issued and sent to a neighboring town where Clark then was. It having been indorsed by a justice of that county as required by law, it was delivered to a constable who arrested Clark, but let him go upon his entering into a recognizance to appear at the general sessions of the county where the justice resided who issued the warrant. Clark appeared but Cleveland did not. No charge was ever preferred against him before the grand jury. He was never taken before the justice who issued the warrant as required law; the warrant was never returned, the constable having lost it. Having brought his action against Cleveland for malicious prosecution, and these facts appearing on the trial, the defendant moved for a nonsuit. The judge refused and submitted the cause to the jury, who returned a verdict for the plaintiff. The defendant then moved for a new trial of the case.

Cowen, J., after holding that the admission to bail by the constable was a mere nullity, and the officer was guilty of suffering a voluntary escape, said: "Thus did the voluntary escape put an end to the warrant? It is said in some books that in case of criminal process the officer suffering the escape cannot retake the accused; the question is not settled, but I am inclined to think the law otherwise, and so it is considered in those books which treat the subject with greatest care, that the people ought not to be deprived of any right by an escape of whatever kind from custody under criminal process. Though the officer consent to the escape, he is bound to retake the prisoner. 2 Curw. Hawk., ch. 19, § 12; Dickinson v. Brown, 1 Esp., 218; Peake, N. P., 234; Butt v. Jones, 1 Neil Gow, N. P., 99; Chit. Crim. Law, 61 (Am. Ed. 1841). The established distinction in civil cases is this: On mesne process the sheriff may retake the prisoner even after a voluntary escape, the object being to have him at the return day; and it would be most unreasonable to receive his objection that the sheriff had indulged him without bail. But after commitment in execution he is discharged because the sheriff is answerable in his stead. Atkinson v. Matteson, 2 T. R., 172. In criminal cases no such distinction prevails between mesne and final process; and in Butt v. Jones it was held that after the voluntary escape of a criminal in execution for a fine, he might be retaken by the very officer who consented to the escape; *a fortiori*, as to an escape of that sort from mesne process. If this view of the question be right, then the warrant by virtue of which the plaintiff was arrested still remains in force to all intents and purposes; it is process under which he may yet be arrested. The prosecution was not at end within the reason of the rule

we have examined." New trial granted. Clark v. Cleveland, 6 Hill (N. Y.), 344 (1844). Cited in 42 N. Y., 70; 49 N. H., 148; 6 Am. Rep., 477; 5 Park., 660; 41 N. J. L., 24; 9 Abb. Pr., 242; 18 How. Pr., 529; 48 Barb., 37; 41 Barb., 306; 25 Hun, 576; 12 Hun, 359; 86 N. Y., 18. Disapproved, 30 Barb. (N. Y.), 300, 303.

(2) *Termination of a prosecution by obtaining leave not to file an information.*

In an action for malicious prosecution the defendant made a complaint against the plaintiff, charging him with having committed the crime of perjury. A warrant was issued on the 5th of February, 1880, the defendant was arrested and brought before a justice of the peace, and, after several adjournments on the application of the people, a hearing was had, and the defendant was held to answer the charge in the circuit court. He entered into a recognizance for his appearance at the May term. Nothing further was done towards prosecuting him, and at the December term the prosecuting attorney obtained leave of court not to file an information. Plaintiff then brought this action for a malicious prosecution, and recovered. Defendant alleged error.

The record before the supreme court showed that the following journal entry was introduced in evidence: "The People v. Henry C. Spaulding. December 7, 1880. In this cause, the prosecuting attorney filing reasons therefor, it is ordered that he have leave not to file an information."

In passing upon this question Champlin, J., said: "The defendant contends that this is not such a final order as would prevent a further prosecution of the suit without a new complaint. Section 9553 of Howell's Statutes [Michigan] enacts that 'it shall be the duty of the prosecuting attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination, as provided by law, touching the commission of any offense, whereon the offender shall be committed to jail, or become recognized or held to bail; and if the prosecuting attorney shall determine, in any such case, that an information ought not to be filed, he shall make, subscribe and file with the clerk of the court a statement in writing containing his reasons, in fact and in law, for not filing an information in such case, and that such statement shall be filed at and during the term of the court at which the offender shall be held for appearance: provided, that in such case such court may examine such statement, together with the evidence filed in the case; and if upon such examination the court shall not be satisfied with said statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial.' The statute does not require the prosecuting officer to obtain leave of court to permit him to file his reasons for not filing an information. The record introduced in evidence shows the action of the court based upon the reasons filed, and was a proper entry to be made when the court is satisfied with the reasons stated by the prosecuting attorney. It is conclusive both upon the fact that the prosecuting attorney had filed his reasons therefor and that the prosecution was at an end." Spalding v. Lowe, 56 Mich., 366; 23 N. W. Rep., 46 (1885).

(3) *When an indictment is quashed and defendant released.*

Blizzard brought an action against Hays for a malicious prosecution. There was a verdict and judgment for the plaintiff, and the defendant appealed. The complaint contained an allegation that the defendant "falsely, maliciously, and without any reasonable or probable cause, indicted, and caused and procured to be indicted, the said plaintiff for the alleged crime of forgery," upon which he was arrested; that the indictment was subsequently quashed, and the plaintiff released and discharged therefrom. To this a demurrer was overruled, the overruling of which was assigned for error. In passing upon this assignment, Elliott, J., said: "The objection urged to the paragraph is that, to sustain an action for malicious prosecution, it must appear that the plaintiff was finally acquitted of the criminal charge, and that his release therefrom in consequence of the indictment being quashed is not sufficient. All authorities concur in saying that, to support the action, it must be shown that the prosecution is determined. But it was shown in Chapman v. Woods, 6 Blackf., 504, after a very careful consideration of the question, that where a *nolle prosequi* had been entered to the indictment, and a judgment entered thereon that the defendant go hence acquit thereof, there was a final determination of the prosecution. It was ended by the judgment, and although a new indictment might be preferred, no further process could issue on the old one, and hence such a termination of the action was sufficient to support the action. The same result is produced by the indictment being quashed and a judgment for the defendant thereon. In such case a new indictment may be presented, but the first prosecution is finally ended when the indictment is quashed and the plaintiff discharged by the judgment of the court. We think there was no error in overruling the demurrer." Hays v. Blizzard, 30 Ind., 457 (1868).

§ 19. When the grand jury find an indictment for a different offense than that charged in the complaint before the magistrate.— It is a well-settled rule of law that when a party is arrested and bound over on a criminal charge he must show, in order to prove a discharge and a termination of the prosecution, that no bill was found against him by the grand jury.[1] The complaint in such case, being only a preliminary step, is regarded as part of the proceedings which are subsequently continued in the court, to which the party is bound to answer to that which may be found against him by the grand jury. But it does not follow that the prosecution originally commenced by complaint before a magistrate is terminated because the accused party is not charged by indictment with precisely the same offense as that set out in

[1] 2 Greenl. Ev., 452; Morgan v. Hughs, 2 T. R., 225; Jones v. Given, Gilb. Cas. 185, 200.

the complaint. If on the same evidence the grand jury present an indictment for a different offense from that charged before the magistrate, it does not destroy the identity of the prosecution, but only shows that different minds arrive at different conclusions from proof of the same facts. The prosecution commenced against the party still continues, and cannot be said to be at an end until the indictment found by the grand jury is finally disposed of.[1]

AN ILLUSTRATION.—

End of the prosecution — Indictment for an offense different from the one charged in the original complaint.

Waters, it was alleged, without probable cause and with malice caused and procured a complaint to be made before a trial justice, charging Mr. Bacon with larceny. Bacon was examined and bound over to appear at court, etc. The grand jury found no bill for larceny, but upon the same evidence found a bill against Bacon for feloniously receiving stolen goods, to which it appeared Bacon had not pleaded. Bacon brought an action against Waters for a malicious prosecution, and, these facts appearing, a verdict was rendered for the defendant.

On exceptions, Bigelow, C. J., said: "The only difference between the offense set out in the complaint and that laid in the indictment was, that the former charged the plaintiff as principal in committing the felony, and the latter as accessory after the fact. The line which separates a felonious taking as proved by recent possession of stolen property, and a receiving of it knowing it to be stolen, is often indistinct and difficult to establish by proof. But the identity of the prosecution is none the less clear because the nature of the evidence rendered it difficult to ascertain whether the offense consist in an active commission of a felony, or being accessory to it before or after the fact. It was regularly before the grand jury on a return of a copy of the complaint and warrant, and of the record of the proceedings before the magistrate. By placing the indictment on file the prosecution is not ended. The defendant is liable at any time to be called upon to answer to the charge. Bacon v. Waters et al., 84 Mass., 400 (1861).

§ 20. Conclusion — False imprisonment — End of the prosecution in suits for the abuse of legal process.— An abuse of legal process is where a party employs it for some unlawful object, not the purpose it is intended by the law to effect; in other words, it is a perversion of it. Thus if a man is arrested or his goods seized in order to extort money

[1] Bacon v. Waters, 84 Mass., 400 (1861).

from him, even though it be to pay a just claim other than that in suit, or to compel him to give up the possession of some property not the legal object of the process, it is well settled that in an action for such malicious abuse of process it is not necessary to prove that the action in which the process issued has been determined.[1]

§ 21. Malicious prosecution — End of the prosecution in suits for the malicious use of legal process.— Legal process, civil and criminal, may be maliciously used so as to give rise to a cause of action where no object is contemplated to be gained by it other than its proper effect and execution. As any man has a legal right to prosecute his claims in a court of law, no matter by what motives of malice he may be actuated in doing so, it is necessary in this class of cases to aver and prove that he has acted not only maliciously but without reasonable or probable cause. It is clearly settled, also, that the proceedings must be determined finally before any action lies for the injury.[2]

§ 22. Distinction between actions for malicious prosecution and false imprisonment.— An action for malicious prosecution is in effect an action for the malicious use of legal process without reasonable or probable cause. In these actions it is always necessary to show that the proceeding in which it is claimed there has been a malicious use of legal process has been fully determined; because, as it was said by an eminent English jurist, "the plaintiff will clear himself too soon, viz., before the fact is tried, which will be inconvenient; besides the two determinations might be contrary and inconsistent."[3] But in an action for false imprisonment, which is in effect an action for the malicious abuse of legal process, it is not necessary to prove that the action in which the process issued has been determined, or to aver that it was sued out without reasonable or probable cause.[4]

[1] Mayer v. Walter, 64 Pa. St., 283 (1870); Grainer v. Hill, 4 Bing. N. C., 212.

[2] Arundell v. Tregono, Yelv., 117; Mayer v. Walter, 64 Pa. St., 283 (1870).

[3] Mayer v. Walter, 64 Pa. St., 283 (1870); Arundell v. Tregono, Yelv., 117.

[4] Grainer v. Hill, 4 Bing. N. C., 212; Mayer v. Walter, 64 Pa. St., 283 (1870).

§ 23. End of the prosecution.—

DIGEST OF AMERICAN CASES.

1. To maintain an action for malicious prosecution, it is not necessary to show an acquittal which will bar a second prosecution for the same offense; nor that any judicial decision shall have been made upon the merits. Clark v. Cleveland, 6 Hill (N. Y.), 344.

2. The action cannot be maintained until the plaintiff has been acquitted, or the prosecution is fully terminated in his favor. The determination of the prosecuting officer, never to bring the indictment to trial, for the reason that he deems the charge entirely unsupported, is not sufficient. Thomason v. Demotte, 9 Abb. Pr. (N. Y.), 242; 18 How. Pr., 529; S. P., Monroe v. Maples, 1 Root (Conn.), 553.

3. An action for malicious prosecution cannot lie where there has been a judgment and verdict by a competent court, though there has been afterwards an acquittal by a superior tribunal. Griffis v. Sellars, 2 Dev. & B. (N. C.), 492.

4. A party who has escaped, because not technically though morally, guilty, cannot recover damages for the injury to his reputation by the unsuccessful prosecution. Sears v. Hathaway, 12 Cal., 277.

5. An action will lie, though there has been no trial by jury or verdict of acquittal upon the charge. Gilbert v. Emmons, 42 Ill., 143.

6. Suit for malicious prosecution may be founded on an indictment where no acquittal can be had, as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. Stancliff v. Palmeter, 18 Ind., 321.

7. An action will not lie if such prosecution was terminated by the entry of a *nolle prosequi*. Brown v. Lakeman, 12 Cush. (Mass.), 282; S. P., Parker v. Farley, 10 Cush., 279.

8. But if it appears that a *nolle prosequi* to the indictment was entered, and a judgment thereupon rendered that the defendant "go hence, thereof acquit, without day," the acquittal is sufficient to warrant a suit. Chapman v. Wood, 6 Blackf. (Ind.), 504.

9. If one who is charged with larceny in a complaint before a magistrate is held under recognizance to answer before the superior court, but not at the next or any regular term thereof, and at the next term of that court is indicted by the grand jury on the same evidence that was before the magistrate, for fraudulently receiving the stolen goods and not for the larceny, and the indictment is placed on file and not pleaded to, the finding of the indictment is to be regarded as a continuation of the same prosecution; but placing it on file is not a termination thereof which will authorize a person indicted to maintain an action for malicious prosecution. Bacon v. Waters, 2 Allen (Mass.), 400.

10. The defendant prosecuted the plaintiff for theft. He was brought before a justice, but was discharged because the parties had settled. It was held that this was not such an acquittal as would warrant an action for malicious prosecution. McCormick v. Sisson, 7 Cow. (N. Y.), 715.

11. In an action by husband and wife for malicious prosecution, the plaintiffs alleged that the defendant maliciously replevied the husband's

goods for the purpose of injuring the wife, and when the person who replevied the goods had no property in them. It was held that the plaintiffs could not maintain their action while the replevin suit was still pending. O'Brien v. Barry, 106 Mass., 300 (1871).

12. To sustain an action for malicious prosecution, it is a sufficient termination of the criminal proceeding out of which it arose if there was a dismissal before trial; a verdict and judgment on the merits is not essential. Kelly v. Sage, 12 Kan., 109 (1873).

13. An action may be maintained in any case where a malicious prosecution, without probable cause, has in fact been had and terminated, and the defendant in such prosecution has sustained damage over and above his taxable costs in the case. Marbourg v. Smith, 11 Kan., 554 (1873).

14. Where an indictment is quashed and the defendant discharged by the judgment of the court, there is such a determination of the prosecution as is sufficient to support an action for malicious prosecution. It need not appear that the defendant was finally acquitted of the criminal charge. Hays v. Blizzard, 30 Ind., 457 (1868).

15. That the plaintiff should have been formally acquitted, on the criminal proceedings, is not necessary, if the prosecution was abandoned without any arrangement with the accused and not at his request. Brown v. Randall, 36 Conn., 56.

16. Where in a suit for malicious prosecution the plaintiff desires to establish the fact that the prosecution against him had terminated, and no recorded evidence existed showing that fact, he may properly introduce other evidence. If the complaint and warrant upon which the arrest was made were not preserved by the police court, but have been lost and destroyed, evidence of the fact, in connection with proof of their contents, may be offered. Brown v. Randall, 36 Conn., 56 (1869).

17. In an action for malicious prosecution, the plaintiff giving no evidence of want of probable cause for the arrest complained of, and objecting to any evidence of the existence of probable cause, the complaint is properly sustained. Such action cannot be maintained when the proceedings under which the arrest complained of had been made were not terminated, but an appeal was pending. Nebenzahl v. Townsend, 61 How. (N. Y.) Pr., 353.

18. To maintain the action plaintiff must allege and prove a legal determination of the original action. And when *nol. pros.* was entered of record, and the defendant discharged, it is such a conclusion of the original action as will entitle him to sue. Hatch v. Cohen, 84 N. C., 602.

19. When an action has been dismissed at plaintiff's costs and is not commenced again, such dismissal is a sufficient termination of the suit in favor of the defendant as will authorize him to sue for malicious prosecution. Marbourg v. Smith, 11 Kan., 554.

20. Where counsel for defendant, in an action alleged to have been prosecuted maliciously, agreed without any authority from their client that the dismissal of the action should be a bar to an action for malicious prosecution, it was held that such an agreement was a nullity. Marbourg v. Smith, 11 Kan., 554.

21. The entry of a *nolle prosequi* with the consent of the defendant in a criminal action is a sufficient termination of such action to enable the de-

fendant to maintain a suit for malicious prosecution. Moulton v. Beecher, 15 N. Y. Sup. Ct., 100; 1 Abb. N. Cas., 193.

22. On the trial of an action to recover damages for an alleged malicious prosecution of the plaintiff by the defendant, it was established by parol evidence that he had caused the plaintiff to be arrested for a crime, and that, owing to the failure of the defendant to appear as a witness against the plaintiff, the cause had been continued from time to time till the plaintiff was finally allowed to go at liberty. It was held that the evidence sufficiently showed an end of such prosecution. Leever v. Hamill, 57 Ind., 423.

23. Plaintiff, after being held to the grand jury on a criminal charge by a committing magistrate, was discharged on *habeas corpus* by a circuit judge. He then brought suit for malicious prosecution. It was held: 1. That the discharge on *habeas corpus* was not a sufficient termination of the criminal proceedings against him necessary to maintain an action. 2. That on *habeas corpus* the matters properly before the court are the return and traverse thereto. 3. Irregularities of a committing magistrate, which do not appear on the process, except the question of jurisdiction, will not be inquired into on *habeas corpus*. Merriman v. Morgan, 7 Oreg., 68.

24. The general rule that an action for a malicious criminal prosecution cannot be maintained unless the prosecution has terminated in an acquittal of the accused is not applicable where the prosecution has terminated under such circumstances that the accused had no opportunity to controvert the facts alleged against him and to secure a determination thereon in his favor. Swensgaard v. Davis, 33 Minn., 368; 23 N. W. Rep., 543 (1885).

25. A discharge on hearing by a magistrate having no jurisdiction to try, but only to bind over or discharge, has been held sufficient. Sayles v. Briggs, 4 Met., 421; Goodrich v. Warner, 21 Conn., 432; Smith v. Ege, 52 Penn., 419; Secor v. Babcock, 2 Johns., 203.

26. So a discharge by magistrate without hearing, by the consent of the prosecutor or with his acquiescence. Driggs v. Burton, 44 Vt., 124; Burkett v. Sanata, 15 La., 337. So upon a *nolle prosequi*. Chapman v. Woods, 6 Blackf., 501; 1 Am. Lead. Cas., 222; Brown v. Randall, 36 Conn., 56.

27. A discharge of the accused upon the return of a bill "not found" by the grand jury is sufficient. Payne v. Porter, Cro. Jac., 490; Thomas v. Graffenreid, 2 Nott & McC., 143.

28. The right to maintain an action for a malicious criminal prosecution accrues whenever the prosecution is disposed of in such a manner that it cannot be revived, and the prosecutor, if he proceeds further, must bring a fresh indictment. Casebeer v. Rice (Neb.), 24 N. W. Rep., 693. The entering of a *nolle prosequi* is such a final determination. Woodworth v. Mills (Wis.), 20 N. W. Rep., 728. See West v. Hayes (Ind.), 3 N. E. Rep., 932 and note; Murphy v. Moore, 11 Atl. Rep., 665.

29. A criminal prosecution may be said to have terminated (1) where there is a verdict of not guilty; (2) where the grand jury ignore a bill; (3) where a *nolle prosequi* is entered; (4) where the accused has been discharged from bail or imprisonment. Lowe v. Wartman, 1 Atl. Rep., 489.

30. An order by the court in a criminal case that the prosecuting attorney, having filed "reasons therefor, he have leave not to file an informa-

tion," is a final order and an end of the prosecution. Spalding v. Lowe, 56 Mich., 366; 23 N. W. Rep., 46 (1885).

31. Where a criminal prosecution is commenced before a justice of the peace, and is afterwards dismissed with the intention of commencing it again in the district court, and on the same day it is commenced in the district court, *held*, that such criminal prosecution before the justice of the peace cannot constitute the basis of an action for a malicious prosecution while the criminal prosecution is still pending in the district court. Schippel v. Norton, 16 Pac. Rep., 804.

32. In order to maintain an action for malicious prosecution it must be shown that the alleged malicious prosecution has been legally terminated. Striking the cause from the docket, on motion of the state's attorney, with leave to reinstate the same, is not a legal termination of the prosecution. An order striking a criminal cause from the docket with leave to reinstate the same does not discharge the defendant from the indictment. It may again be placed upon the docket and the defendant subjected to a trial upon it. Blalock v. Randall, 76 Ill., 224; Fibbs v. Allen, 1 Scam., 547.

33. At the trial of a suit for malicious prosecution defendant asked the court to instruct the jury that plaintiff could not recover unless the evidence showed that the prosecution was at an end. *Held*, that the instruction ought to have been given, as plaintiff had no cause of action until there was a final acquittal. Glasgow v. Owen, 69 Tex., 167; 6 S. W. Rep., 527 (1887).

34. If, in an action for malicious prosecution, in instituting proceedings before a magistrate against the plaintiff on a criminal charge, upon which the plaintiff was bound over and subsequently indicted, it appear that the indictment has been withdrawn by a *nolle prosequi*, on account of a formal defect therein, and that a second indictment has been returned upon the same evidence for the same or a substantive part of the same charge, the original complaint and the proceedings thereon must be considered as the actual cause of the second indictment. Bacon v. Towne, 58 Mass., 217 (1849).

35. The entry of a *nolle prosequi* for any reason other than some irregularity or informality in the information itself is an end to the prosecution of that case, and, unless such *nolle* is vacated at the same term, the defendant can be further prosecuted for the same offense, if at all, only upon a new complaint, arrest, and examination. Such entry of a *nolle prosequi* is, therefore, such a final determination of the action that an action for its malicious prosecution may be maintained. Woodworth v. Mills, 61 Wis., 44; 20 N. W. Rep., 728 (1884).

CHAPTER X.

PARTIES.

§ 1. **Parties.**— The proper person to bring an action for the wrongs treated of in this work is he in whom the *legal* right was vested, and whose legal right has been affected by the injury complained of.[1] An injury to the absolute rights of a person may consist of an assault, a battery, false imprisonment, by wrongs to his reputation, as by libel or slander, and by malicious prosecution. In all these cases, the party who has received the injury must be made plaintiff, and he who committed it the defendant.[2]

Claims for mere personal torts which die with the person — such as slander, assault and battery, false imprisonment, malicious prosecution, crim. con., seduction, and the like — are not assignable, so as to authorize the assignee to sue in his own name.[3]

§ 2. **Plaintiffs — Who may sue.**— It is a general rule at common law that only the person who has been injured can maintain this action, though it has been held that a master might maintain the action for a malicious prosecution of his slave,[4] and a father for his minor son. Where the injury is to the person, and suffered by more than one, though inflicted by the same person at the same time, the action is usually several, and each person who has sustained damages by reason of the injury must bring his separate action.[5] But where two or more persons jointly incur expense in procuring their discharge from a joint arrest of both, it seems they may bring a joint action.[6]

§ 3. **Joinder of plaintiffs.**— Where several persons, who are severally interested, sustain a joint damage, they may sue either jointly or separately in respect thereof.[7] But several persons, having separate and distinct interests, as in a chattel,

[1] Barbour on Parties, 158; Dawes v. Peck, 8 T. R., 330, 332; Broom on Par., 198. See 7 T. R., 47; 1 East, 244; 2 Saund., 47*d*; Ham. on Par., 36; Baker v. Miller, 6 John., 195 (1810); Gibbs v. Chase, 10 Mass., 125 (1813); Strambaugh v. Hollanbaugh, 10 Serg. & R., 357 (1823).

[2] 3 Bouv. Inst., § 2735.

[3] Butler v. New York & E. R. R. Co., 22 Barb., 110 (1856); Barbour on Parties, 158.

[4] Locke v. Gibbs, 4 Ired. (N. C.), 42 (1843), Severence v. Judkins, 73 Me., 376 (1882).

[5] 1 Chitty's Pleading, 64; McLeod v. McLeod, 73 Ala., 42 (1882).

[6] 1 Chitty's Pleading, 64; 10 Moore, 446; 14 Am. & Eng. Ency. Law, 37 (1890).

[7] Broom on Par., 210. See Coryton v. Lithebye, 2 Saund., 115; Weller v. Baker, 2 Wils., 423.

cannot unite in replevin therefor.[1] Nor, if the goods of A. and B., the separate property of each, be unlawfully distrained, can the owners join in an action of replevin.[2] For it is a rule that where the interest affected and the damage sustained are respectively several, there must be separate actions at the suit of the parties injured.[3] So in actions for torts to the person, the parties aggrieved must sue separately, as for assault and battery, or false imprisonment, and the like.[4] Two or more persons cannot join in an action for slander, though the terms in which the slander was uttered comprehended them all; except in case of partners, who may sue jointly as a firm for damages resulting to the *firm* from words spoken or from a libel against them in respect of their business.[5]

Two persons may bring a joint action for maliciously holding them to bail, in respect to the expenses jointly incurred in obtaining their liberty, but for the imprisonment and the personal inconvenience resulting therefrom they should sue separately.[6] But where an action on the case for maintenance was brought by several jointly, who had been the defendants in the previous action, and had employed one attorney, to the amount of whose bill of costs the verdict was confined, such action was held maintainable, the interest in the expenses of the defense being a joint and not a several damage.[7]

§ 4. **Defendants — Who may be sued.**— As a general rule the person who makes the charge which sets the machinery of the law in motion, or procures the prosecution, is liable; and this rule applies equally whether he does the act himself or procures another to do it. It is enough that the defendant instituted the prosecution, actively promoted it, or that it was

[1] 3 Harring., 399.

[2] Broom on Par., 210.

[3] Co. Litt., 145*b*; 2 Selw. N. P., 10th ed., 1185.

[4] Smith v. Crooker, Cro. Car., 512; Worseley v. Charnock, Cro. Eliz., 472; Barbour on Parties, 168; 2 Wms. Saund., 117.

[5] Dyer, 191, pl. 112; Barbour on Parties, 168; Gould's Pl., 6, p. 78; Robinson v. Marchant, 5 L. J. (N. S.), 135; Broom on Parties, 211; Harrison v. Bevington, 8 C. & P., 708; Williams v. Beaumont, 10 Bing., 270.

[6] Barbour on Parties, 169; Foster v. Lawson, 3 Bing., 455; Haythorn v. Lawson, 3 C. & P., 196; Barrett v. Collins, 10 Moore, 446.

[7] Barbour on Parties, 168; Perchell v. Watson, 8 M. & W., 691; Ward v. Brampston, 3 Lev., 362.

carried on with his approbation and countenance;[1] or that the defendant procured the warrant and wagered that he would convict the plaintiff.[2] But the defendant need not participate in the execution of the prosecution. It is enough if he makes out the affidavit maliciously, vexatiously and without probable cause, without proof of further intervention on his part.[3]

§ 5. In actions for malicious prosecution and false imprisonment.— In the actions under consideration the party committing the tortious act must be made defendant.[4] All persons, natural and artificial, who have legal capacity to sue, are liable to be sued for their tortious acts. An infant may be sued like an adult, for torts committed by him, as for slanders, assaults, batteries, trespasses, and the like. But a slave, who is not, in general, considered a person, but a thing, cannot be sued for a tort; as an action against him would be wholly fruitless. And though his master may, in some cases, be liable for the injury he has committed to property, he cannot be made responsible for his act.[5]

The person committing the injury is the party liable; and whether he commits the wrong by his own hands or those of another, he is the one who does the injury; for he who acts by another acts by himself: *qui facit per alium facit per se.*

§ 6. Joinder of defendants.— The general rule in actions of tort is that all persons concerned in the wrong are liable to be charged as principals;[6] but the plaintiff may, at his election, sue one or more without exposing himself to a plea in abatement for non-joinder.[7]

There are injuries which, when committed by several, may authorize a joint action against all the parties; but when in legal contemplation several cannot concur in the act complained of, separate actions must be brought against each.

[1] Stansbury v. Fogle, 37 Md., 369 (1872); Wells v. Parsons, 3 Harr. (Del.), 505 (1842); Grant v. Deuel, 3 Rob. (La.), 17; 38 Am. Dec., 228 (1842); Burnap v. Abbot, Taney (U. S.), 244 (1840).

[2] Kline v. Shuler, 8 Ired. (N. C.), 484 (1848).

[3] Walser v. Thies, 56 Mo., 89 (1874).

[4] Barbour on Parties, 199; Broom on Parties, 246; Goodright v. Govett, 7 T. R., 327; Ferne v. Wood, 1 B. & P., 573.

[5] 3 Bouv. Inst., § 2766.

[6] Barbour on Parties, 203; Broom on Par., 248; Cranch v. White, 1 Bing. N. C., 418.

[7] Bristow v. James, 7 T. R., 259; Sutton v. Clarke, 6 Taunt., 29; Barbour on Parties, 203.

The cases of several persons joining in the publication of a libel, a malicious prosecution, an assault and battery and false imprisonment are cases of the first kind; slander is a case of the second kind.[1] When persons have committed an injury which is capable of being done by several, they may be jointly sued, or the plaintiff may sue one or more of them without the others as he may see fit.[2]

§ 7. **Death of the plaintiff.**— For a wrong done to the person no action will lie at the common law in the name of the executor or administrator of the injured party after his decease, when the action must be in form *ex delicto;* the maxim, *actio personalis moritur cum persona*, applies in such cases. And under this rule the wife or husband, parent or child of the party killed by the wrongful act, negligence or default of another, cannot recover any pecuniary compensation for the injury sustained by the death of such person.[3]

The common-law rule on this subject has, however, been changed by statute in England, as well as in many of the states of our Union, so far as to allow an action to be brought in certain cases by the personal representatives for an injury done to their testator or intestate resulting in his death. It is provided by statute in New York that, whenever the death of a person shall be caused by wrongful act, neglect or default, such as would (had death not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person. Such actions must be brought by the personal representatives of the deceased.[4] Similar statutes exist in other states.

§ 8. **Death of the defendant.**— For a tort committed to the *person*, at common law no action can be maintained against the personal representatives of the wrong-doer.[5]

[1] Thomas v. Rumsey, 6 John., 32 (1810).

[2] Bac. Ab., Action, Qui Tam, D.; Roll. Ab., 707; 8 East, 62; 7 T. R., 259; 5 id., 651; 6 Taunt., 29; Low v. Mumford, 14 John., 426 (1817); Guille v. Swan, 19 id., 381 (1825).

[3] Barbour on Parties, 174; Baker v. Bolton, 1 Camp., 493.

[4] Laws of N. Y., 1847, p. 575; 1849, p. 388.

[5] Barbour on Parties, 232; Broom on Parties, 285; Le Masan v. Dixon, Sir W. Jones, 173.

But it is provided by statute (3 and 4 Wm. IV., ch. 42, § 12) in England, that trespass or trespass on the case may be maintained against executors or administrators for any wrong committed by the deceased against another, in respect of his property, real or personal, if committed within six months before his decease.[1] Similar statutes prevail in many of the states of our Union.

§ 9. **The right of survivorship.**— Where one of several persons jointly interested dies, the remedy for an injury to the joint interest survives to the others, and the personal representatives of the deceased should not be joined with them, nor can such representative sue alone. In such a case the rule is as in the case of any community of interest: the remedy survives, but not the right.[2]

If the husband survive the wife, he may sue for any tort to the wife's person or property for which he might have sued alone during the coverture.[3] The right of action for a tort of that description will not survive unless there be special damage to the husband.[4]

If one of several plaintiffs, in an action *ex delicto*, dies pending the action, the suit does not abate: the survivor may prosecute it to the final end.[5]

§ 10. **Joint and several liability.**—Chitty: "If in legal consideration the act complained of could not have been committed by several persons, and can only be considered the tort of the actual aggressor, or the distinct tort of each, a separate action against the actual wrong-doer only, or against each, must be brought."[6] Thornton, J.: "It is the general rule, that where an act is done by the co-operation of several persons, they may be sued jointly or severally; but one is never liable for the injury of another, unless they act in concert; and several will not be held liable for the acts of one without the co-operation, or their conduct naturally produced the acts which resulted in injury. Where the acts of different persons are entirely distinct and separate as to any aid, advice, counsel

[1] Barbour on Parties, 232.

[2] Barbour on Parties, 193; Broom on Par., 212; Rex v. Collector of Customs, 2 M. & S., 225; Bouv. Inst., § 2754.

[3] Barbour on Parties, 233; Vin. Ab., Baron and Feme (G.); Com. Dig., Bar. and Feme (W.) (X.).

[4] Barbour on Parties, 193; Broom on Par., 233.

[5] Bouv. Inst., § 2754.

[6] 1 Chitty's Pleadings, 87.

or countenance from one to the other, there cannot be a joint liability."[1]

§ 11. A tort the several act of all concerned.— If several persons are sued, and in point of law the tort could not be joint, they may demur, or move in arrest of judgment after verdict, or a *nolle prosequi* may be entered, and the objection obviated, but in such cases the objection must be apparent on the face of the declaration. If several persons jointly commit a tort, some, or all, may be sued jointly, or some separately; for a tort is in its nature the separate act of each.[2]

§ 12. A joint action for a joint injury.— When there is a joint injury a joint action may be sustained, but the evidence and damages must be confined to such joint injury or cause of action; as when the plaintiffs are jointly engaged in business, and bring an action for maliciously and without probable cause suing out an attachment in aid of a suit against them jointly upon a joint note, and causing it to be levied upon property jointly owned by them.[3] If then their joint or partnership credit has been injuriously affected, their business stopped or assets depreciated, they may rightly join in an action to recover appropriate damages therefor.[4]

APPLICATIONS OF THE LAW.—

(1) *Joint liability a question for the jury upon the evidence — Persons instituting proceedings not accountable — Collateral results.*

Butts recovered a judgment against Fenelon, upon which an execution was issued and returned unsatisfied. He then commenced supplemental proceedings upon the judgment before one Jacobs, who was acting as a court commissioner. Mrs. Fenelon was examined as a witness touching her husband's property, and upon her refusing to answer certain questions the commissioner committed her to jail, there to remain until she was willing to answer. She was afterwards discharged, because it appeared that the commissioner was not a commissioner at all. She then brought an action, joining her husband with her, against Butts, who had caused the supplemental proceedings to be instituted, and Jacobs, the pre-

[1] Yeazel v. Alexander et al., 58 Ill., 261 (1871).

[2] Yeazel v. Alexander et al., 58 Ill., 261 (1871).

[3] Cochrane v. Quackenbush, 29 Minn., 376; 13 N. W. Rep., 154 (1882).

[4] Donnell v. Jones, 13 Ala. (N. S.), 509; Patton v. Gurney, 17 Mass., 185; Medbury v. Watson, 6 Met., 257; Collyer on Partnership, § 689; Cochrane v. Quackenbush, 29 Minn., 376 (1882).

tended commissioner. On the trial it appeared that Jacobs acted in good faith, but his appointment as court commissioner was illegal. Butts denied that he said anything to the court commissioner about committing Mrs. Fenelon on her refusing to answer questions, or that he in any way instigated her imprisonment. It did appear that he made the affidavit upon which Jacobs issued his order requiring Mrs. Fenelon to appear and answer, but it did not appear that he knew she would refuse to answer questions asked and be committed for contempt. Her imprisonment was not the necessary or probable consequence of the proceeding instituted by the defendant. The court instructed the jury that the defendant, having instituted and directed the proceedings, was responsible in damages for the wrongful imprisonment.

On appeal, Cole, J., said: "We think the court erred in withdrawing from the jury the question whether the defendant did in fact instigate the imprisonment. That was a disputed fact, as we understand the testimony. In support of the ruling of the court below the plaintiff relies upon a remark of Mr. Justice Lyon in Bonesteel v. Bonesteel, 28 Wis., 245, 253, to the effect that one who sets the machinery of the court in motion, and directs its operations until it culminates in an unlawful arrest upon a void process, must be held liable in damages to the injured party.

"The remark is strictly true as applied to the facts of that case, which was an unlawful arrest upon a writ of *ne exeat*. The defendant, Mrs. Bonesteel, there procured the writ upon which the plaintiff was arrested; in other words, she caused him to be arrested on a void process. Her agency in the matter was direct and potent. Here, unless we say that a party who makes an affidavit on which supplemental proceedings are taken by an officer having no jurisdiction is necessarily responsible for all the possible consequences and for a commitment which the officer may deem it his duty to make in vindication of the law, the question whether the defendant directed and instigated the imprisonment of Mrs. Fenelon should have been submitted to the jury. It seems to us the mere fact that the defendant made the affidavit, under the circumstances, is not enough to warrant the court in ruling, as a matter of law, that he was liable for the imprisonment. It should appear that he did something more to bring about or cause the imprisonment." The judgment is reversed. Fenelon v. Butts, 49 Wis., 392; 5 N. W. Rep., 502 (1880).

(2) *Joint liability — Instructions — Province of the jury — Arrest on view for a breach of the peace.*

Bannert Lewis sued Kahn and Philbin for false imprisonment. Kahn kept a tailor shop, two doors from Lewis, and did the work for the police in that precinct. One day something was thrown through Kahn's window, a pane of glass was broken, Kahn rushed over to Lewis' store and grabbed hold of one of his workmen, who was outside the entrance carrying in some goods preparatory to closing the store, and claimed that he threw the stone. The workman released himself. Kahn went away and presently returned with two policemen, one of whom was the defendant Philbin. The officers entered the building to arrest the workman, but failed to find him. Then

Kahn stated that he held the plaintiff, Lewis, responsible, and directed the policemen to arrest him. An altercation ensued. The plaintiff was arrested on a charge of disorderly conduct. On the trial of the action for false imprisonment there was a judgment in favor of the plaintiff and the defendants appealed.

Larremore, C. J.: With regard to the defendant Kahn's individual relation to the arrest, the case seems to have been properly presented to the jury. But we think error was committed in that portion of the judge's charge relating to defendant Philbin, which will render a new trial necessary. Undoubtedly, Philbin was brought to the scene of the arrest by Kahn, and he (Philbin) avers that, although he entered the plaintiff's premises, he did so with the permission of plaintiff's wife. Philbin further testifies that after he came out on the sidewalk again plaintiff and his wife applied opprobrious epithets to himself and other policemen present. "I started to drive the crowd away, and I turned around and said to Mrs. Lewis: 'Don't make any disturbance around here, go inside.' Mrs. Lewis laughed, and said: 'You thieves, loafers and pickpockets,' addressed to me. Officers Taylor and Smith were there also. I went outside to drive the crowd away, they numbering all of a hundred, and Mr. Lewis was hollering. I asked him the second time not to make any disturbance. Mrs. Lewis said: 'This is my property and I will do what I please.' I told him to go in the third time; if he did not keep quiet and go inside, I would lock him up on a charge of disorderly conduct. He said: 'I will dare and defy you.'" The testimony of Kahn corroborates that of the policeman to the effect that plaintiff was guilty of noisy, violent and defiant conduct in the open street, and in presence of a crowd, after having been warned by the policeman to desist. It further appears that the charge at the station-house against plaintiff was made by Philbin, and for disorderly conduct. With this evidence in the case it was error for the trial judge to charge the jury as matter of law that no question of disorderly conduct or breach of the peace could arise for their determination. We regard the rule stated in Howell v. Jackson, 6 Car. & P., 723, as the correct one: "'If the plaintiff made such a noise and disturbance as would create alarm, and would disquiet the neighborhood and the persons passing along the adjacent street, that would be such a breach of the peace as would not only authorize the landlord to turn the plaintiff out of the house, but it would also give the landlord a right to have the plaintiff taken into custody if this occurred in the view of the watchman.' . . . In a case like the present it should be left to the jury to determine whether the conduct of the arrested party was calculated to disturb and alarm the neighborhood, to attract a crowd, to lead to disorder or riot." See, also, McIntyre v. Raduns, 14 Jones & S., 123. The question as to whether a breach of the peace had been committed by plaintiff should have been sent to the jury, and they should further have been charged that, if they found affirmatively on this point, and that the officer had made the arrest on his own responsibility because of such breach of the peace, a verdict should be given in favor of both defendants. Lewis v. Kahn, 5 N. Y. Sup., 661 (1889).

(3) *Joint criminal liability — What acts are not sufficient.*

On an information charging the false imprisonment of William Barnett, the appellant, Walker, was jointly impleaded, and being alone upon trial, was convicted. Some time before the alleged offense, a dispute arose between the parties named in the information, on one side, and a tenant of Barnett, the alleged injured party. The parties named in the information took exceptions to certain statements about transactions made by Barnett, as a witness on a trial in court involving the matter. On the day alleged in the information, Barnett was intercepted on his way to his cotton-patch by the four co-defendants of appellant, and was by one or more of them threatened, cursed and abused for his testimony about the matter, and finally forced by them to sign a "lie bill," or a paper admitting that his testimony was false. It was shown that, while Barnett was being thus restrained, abused and cursed, the appellant, flushed and apparently angry, and having a penknife in his hand, came to a point on his own land, separated by a fence from his co-defendants and Barnett, sat down on the ground and observed all that transpired, without saying or doing anything, either to aid or encourage or prevent his co-defendants from restraining said Barnett.

Hurt, J.: Appellant was tried separately, and convicted, and appeals to this court. We have given the statement of facts a careful examination, and the conclusion we have reached is that the evidence fails to connect the appellant with the commission of the offense for which he stands convicted, with reasonable certainty; and it would be a dangerous precedent to sustain this conviction. Proof that he did nothing to prevent others from the commission of the offense did not tend to show inculpatory facts, and hence his objections to such evidence should have been sustained. The judgment is reversed. Walker v. State, 25 Tex. Ap. 448, 8 S. W. Rep., 647 (1888).

(4) *Illegal arrests on suspicion of being pickpockets — Extent of the joint liability of different officers.*

Action for an alleged false imprisonment. At the trial it appeared from the plaintiff's testimony that he lived in Worcester, and was a dealer in wool and rags; that he arrived in Springfield about 12 M.; that he came from the New York & New England Railroad depot to the Boston & Albany Railroad depot in a hack; that he had some ten minutes to spare, as he intended to take the 12:49 P. M. train for Worcester; that he went into the gentlemen's waiting-room, and sat down on a settee with a Mr. Pierce, of Providence, who had been with him all day; that he had three bundles of samples with him, of ordinary size; that before the train arrived, four men came in; that one of them spoke to witness and Pierce, and said he wanted they should "go and see the chief;" that, not understanding what he meant, he asked him to repeat, which he did, and he replied that he could not, for he had a ticket for Worcester, and was waiting for the train; that the man then took him by the collar, and said, "I want you; come along; I have been watching you all day;" that as this was done, Pierce said, "Who are you? What right have you to detain us in this way?" that the man then threw back his coat and said, "We are detectives;"

that the men then took him and Pierce, in spite of their protestations of innocence, to the police station, where he showed his business card, and bank-book with his name and address thereon, also letters addressed to him, and his bundles and samples were opened; that they were put into a room, and the door looked; that in a short time defendant Pettis, the city marshal, came to the door; that witness told him they wanted to know why they were detained; and also told him they belonged in Worcester, showed him the same means of identification shown the other officers, and asked for counsel and for an opportunity to telegraph to Worcester; that Pettis said, "Be good boys; I will go out and investigate your case;" that he (Pettis) came back about 5 P. M.; the outside door was closed; that he opened it and came to the grating as before, and said, "Well, boys, how are you getting along?" and said he had been very busy; that he then asked them if they wanted to go to Worcester, and being answered in the affirmative, said, "I will send you off on the next train; I guess you are all right. The next train goes at 6 or 6:30 P. M.; I will take you myself, or send some one to escort you to the depot." He further testified: "We waited till about 7:30 P. M.; no one came. We tapped on the door, and Mr. Wright came to us; said he told the city marshal we were all right; he had no doubt we wanted to go; that the marshal must have forgotten us. He returned in a few moments and said, 'Get ready.' That was between fifteen and twenty minutes of 8 o'clock. The doors were unlocked by Mr. Wright, and we were turned over by him to two policemen in citizens' clothes, and they went to the depot with us — defendant Graves with me. We locked arms, and he walked side of me. They remained on the platform till the train started, and saw that we were on the train. We left on the 8 o'clock train. A few days after, I saw Mr. Pettis in Springfield; asked who the men were who arrested us; he gave the names of Hadd and Wheeler, and said that the other two were detectives from Pinkerton's agency, and that he hired them by consent of the mayor, defendant Metcalf. I asked him if he recognized me as the man he locked up, and he said he did." There was evidence that plaintiff was in Hazardville the morning of May 25th, and that he left that place for Springfield on the 11:20 A. M. train, and that plaintiff and Pierce were driven from the New York & New England depot in Springfield to the Boston & Albany depot (where the arrest was made) about 12 o'clock. Pierce also testified substantially as did the plaintiff, and there was evidence of other parties who witnessed the arrest. It was in evidence, and not disputed, that the day on which the arrest took place was the day on which the two hundred and fiftieth anniversary of the settlement of Springfield was being celebrated; that Hadd and Wheeler were police officers of Springfield; that defendant Wright was assistant marshal, and duly appointed keeper of the lock-up where plaintiff was detained; that defendant Pettis was city marshal, and defendant Graves a special policeman, of Springfield.

One Clark, for defendants, testified that he was depot master at Springfield; that on the day of the arrest, and the day prior to that, several persons had told him that on leaving trains their pockets had been picked; that he informed defendant Hadd of these complaints, and told him he thought the depot was being worked by pickpockets. Defendant Hadd

testified that defendant Clark told him pickpockets were at work in the depot; that as he and one Butler, the officer who first spoke to the plaintiff and Pierce, as above stated, were going along the south side of the depot, Butler said: "There are two pickpockets sitting on that settee," pointing to plaintiff and Pierce; that they (the officers) then went in and told the plaintiff and Pierce that they wanted them to go and see the chief. He further testified that he arrested the men because of what Butler said to him; that he did not think they were pickpockets until he heard what Butler said. This witness substantially admitted having heard all of the offers made by plaintiff to identify himself, and having seen all the evidence of identity offered by him. Defendant Wheeler testified that he saw the plaintiff and Pierce at the depot just before the 12:49 train went, crowding in and out among the passengers; that the train went out, and the two then went back to the waiting-room; that he then went with Butler and Hadd into the waiting-room where the arrest was made; that he afterwards told the city marshal of the arrest; that the men were arrested because he (witness) thought they had something to do with the pocket-books that had been stolen. Defendant O'Malley testified that he was present when the men were arrested, but not when they were released. Defendant Charles M. Wright testified that he was not present when the men were brought in; that about 7:30 o'clock he went to the marshal's office, and asked what was to be done with the men; that the marshal said, "Send some one up to the depot with them;" that he (witness) then went to the lock-up, and told plaintiff and Pierce that they could go, and told defendant Graves and another special police officer to go with them. Defendant Pettis testified that the detectives were sent to him by Pinkerton's agency, and he told them that all he wanted was for them to point out to the defendants Hadd and Wheeler any one whom they knew to be pickpockets — dangerous men; that he saw the plaintiff and Pierce after they were locked up, and asked them if they would go to Worcester on being released; that they said they would; that he said he would send them on the first train that should go; that he forgot about them, and they were not sent on the next train, but on one that went about 8 o'clock; that he (witness) saw the men between 5 and 6 o'clock. Defendant Graves testified that he came to the police station a little before 8 o'clock; that Assistant Marshal Wright directed him and another special officer to go with plaintiff and Pierce to the depot; that he walked with plaintiff; that they arrived at the depot about the time the train started; that the plaintiff entered the train, and that he (witness) stood on the platform till the train started.

The jury found for the plaintiff against the defendants Pettis, Wheeler, Wright, Hadd and Graves, and by order of the court found in favor of the defendant Metcalf and defendant O'Malley.

Holmes, J.: This is an action for false imprisonment against seven defendants, five of whom the jury have found guilty. Of these five the defendants Hadd and Wheeler made the original arrest, without a warrant, on a charge of felony. We cannot say that the evidence, if believed, showed that Hadd and Wheeler had reasonable grounds to suspect the plaintiff of being a pickpocket (supposing the justification to be well

pleaded), whether the question was properly one for the jury, or was for the court like other questions of reasonable cause. Compare Rohan v. Sawin, 5 Cush., 281; Davis v. Russell, 5 Bing., 354; Hill v. Yates, 8 Taunt., 182; Mure v. Kaye, 4 Taunt., 34; 2 Hawk. P. C., ch. 12, § 18; 2 Co. Inst., 52; Good v. French, 115 Mass., 201. If the original arrest was wrongful, those who made it were answerable for the subsequent detention of the plaintiff under it. Murphy v. Countiss, 1 Har., 143; Powell v. Hodgetts, 2 Car. & P., 432. And although the officers who carried the plaintiff in custody from the lock-up to the railroad station, after they had determined to release him, would have been liable even if the previous imprisonment had been lawful, we do not think this continuation of the unlawful imprisonment so remote that the jury could not properly hold Hadd and Wheeler responsible for it.

The defendant Pettis was city marshal; and, whether responsible for the arrest and detention of the plaintiff in the lock-up or not, sent the plaintiff to the railroad station in custody, after he had reason to believe him innocent, and had made up his mind to release him. The defendant Wright, the assistant marshal, took part in sending the plaintiff to the station, and the defendant Graves was the officer who took him there, only releasing him when on the train, and just before it started. As we have said, we think that even if the arrest had been lawful, the officers would have had no right to prolong the imprisonment beyond the doors of the lock-up, for the purpose of sending the plaintiff out of town, and would have been liable whether they had a right to release him without bringing him before a magistrate or not. See M'Cloughan v. Clayton, 8 E. C. L., 478, 480; Caffrey v. Drugan, 144 Mass., 294; 11 N. E. Rep., 96; 1 Hale, P. C., 592; Brock v. Stimson, 108 Mass., 520; Phillips v. Fadden, 125 Mass., 198. The only purpose for which an imprisonment without warrant can be justified, in circumstances like the present, is that future proceedings may be instituted in due form. Rohan v. Sawin, *ubi supra*, at p. 285. *A fortiori*, these officers are liable if the original arrest was unlawful, for then the whole detention under it was unlawful. Aaron v. Alexander, 3 Camp., 35; Griffin v. Coleman, 4 Hurl. & N., 265. It thus appears that the evidence warranted a verdict against each of the defendants named, and against all of them jointly, and that the instructions asked to the contrary were properly refused.

If the arrest had been made upon reasonable grounds of suspicion against the plaintiff, the defendants Hadd and Wheeler could not have been held liable for the subsequent wrongful imprisonment, in which they took no part. On the other hand, Graves, at least, was not answerable for the imprisonment before the plaintiff was taken from the police station to the train, as he took no part in that. Aaron v. Alexander and Powell v. Hodgetts, *ubi supra*. It follows that a verdict could be found against the five defendants jointly only for the imprisonment between the lock-up and the train, and on the ground that the arrest was wrongful. We regret that it does not appear that these considerations were brought distinctly to the jury's attention. But we cannot say that they were not; the exceptions are only to the refusal of rulings which were properly refused. And as the jury were fully instructed that they could not find a verdict against

two or more defendants unless they found that all such defendants participated in the same imprisonment, and were parties to a joint wrong, we must assume that the verdict went on the proper ground, and covered the proper time. Exceptions overruled. Bath v. Metcalf, 145 Mass., 274; 14 N. E. Rep., 133 (1887).

(5) *Joint liability, void warrant — Evidence in mitigation improper when plaintiff disclaims all right to exemplary damages.*

Mr. Frazier brought an action against Martha E. Turner, David Turner and others to recover damages for alleged false imprisonment. On the trial the plaintiff recovered, and from the judgment rendered in his favor the appellants, Martha E. Turner and David Turner, appealed. Martha E. Turner in her answer denied malice and participation in the arrest made, setting forth that she simply made her complaint to the justice who issued the writ, and that in so making complaint she acted upon the advice of the district attorney, and that such attorney drew the complaint. On the trial, J. K. Taylor, the justice of the peace who issued the warrant on which the plaintiff was arrested, testified that the defendants Martha E. Turner and David Turner came to his house; Mrs. Turner signed a complaint and upon it he issued a warrant. Mrs. Turner took the warrant, saying she wanted Mr. Conger, the deputy-sheriff, to serve it. Conger lived at the village of Oxford, about five miles. She and Mr. Turner went away together, taking the warrant with them, but came back to the justice's house in the afternoon. Conger brought Frazier there about the same time. Frazier was required to give bail; afterwards there was a trial lasting two days and he was discharged. Mrs. Turner, when she gave the warrant to Conger, stated that she wanted it served on Frazier right away. David Turner was with her. On the trial the plaintiff stated that he made no claim to punitory damages and no claim on account of malice, only actual damages. The defendants offered to show that they had, previous to the application for the warrant, made a statement of the facts to the district attorney and that he drew up the complaint. This was objected to on the ground that as there was no claim that the arrest was made maliciously, and no claim for punitory damages, the motives which actuated the defendants in making the complaint and procuring the arrest were immaterial. The complaint was for the larceny of a promissory note. The value of the note was not stated.

In delivering the opinion, Taylor, J., said: "On this appeal it is contended by the learned counsel for the plaintiff and respondent that the complaint and warrant do not state facts sufficient to show that the plaintiff had committed any crime known to the law; that the warrant was absolutely void upon its face, and was therefore no justification to the officer serving the same for making the arrest complained of; and it is also insisted that there is sufficient evidence to show that the appellants, Martin E. and David Turner, directed the officer serving such void warrant to make such arrest, and are therefore liable in the law for such unlawful arrest. On the part of the appellants, the counsel claim that the warrant was not void on its face, and, if it was voidable, it could have been amended by the justice on the return of the warrant, on the application of the state.

We think that there can be no doubt but that the complaint does not state facts showing that the plaintiff had committed any crime, and that the warrant was void on its face for the same reason. The warrant was void because it does not state that the thing alleged to have been stolen was of any value.

"To the claim that the warrant was amendable, it is answered — *First*, that it was not amended, and that no application to amend the same was made in the proceedings in the justice's court; and *second*, that the defect in the complaint and warrant was not amendable under sections 4703 and 4742 of the Revised Statutes of Wisconsin of 1878. The value of the thing alleged to have been stolen is a material allegation under our statute, as different degrees of punishment are prescribed for the larceny of property depending upon such value. See sec. 4415, R. S. Wis. 1878. And an information, warrant or complaint which does not state the value of the thing stolen, when the punishment of the crime depends upon such value, is clearly a substantial defect, and renders the warrant or information void, and wholly insufficient to support any conviction or judgment thereon. 2 Bish. Crim. Proc., §§ 713, 714, 736; Hope v. Com., 9 Metc., 134; Wilson v. State, 1 Port. (Ala.), 118; State v. Daniels, 82 Mo., 558; Johnson v. State, 29 Tex., 492; Steuer v. State, 59 Wis., 472; 18 N. W. Rep., 433; Gelzenleuchter v. Niemeyer, 64 Wis., 816; 25 N. W. Rep,, 442.

"We think the defect in this complaint and warrant was such as rendered all proceedings in the case void and the arrest thereon unlawful, and was not amendable under said section 4703 of the Revised Statutes of Wisconsin, so as to legalize the arrest and imprisonment thereunder. Whether the complaint and warrant were void for not sufficiently describing the note need not be considered in this case, and it may be admitted that such general description was sufficient.

"The warrant, being void on its face, was no justification for the arrest by the deputy-sheriff; and the appellant having delivered the void warrant to the sheriff, and having directed him to make the arrest on such void warrant, is equally liable with the sheriff. This was fully discussed and decided by this court in the case of Gelzenleuchter v. Niemeyer, *supra*. There is as much evidence of the participation of the appellants in making the arrest in this case as in the case above cited. The question as to whether the appellants participated in procuring the arrest of the respondent under the void warrant was properly submitted to the jury by the learned circuit judge. There was no error in excluding the evidence offered by the appellants that they had submitted the facts of the case to the district attorney, and acted under his advice. Having participated in the arrest of plaintiff under a void warrant, they are equally liable as the officer making such arrest. The judgment is affirmed." Frazier v. Turner, 76 Wis., 562; 45 N. W. Rep., 411 (1890).

(6) *Complainant not liable for the acts of the justice — Changing complaint.*

Jacob Frankfurter instigated the suing out by Nicholas Blocks of a state warrant against one W. H. Bryan. The complaint on which it issued contained an accusation of larceny alone. During the examination the justice, on his own motion, changed the charge of larceny to that of "dis-

orderly" conduct, and imposed a fine of $3 and costs. In default of payment, after some preliminaries the justice issued a *mittimus* commanding the constable to take him to jail, and upon which he was committed, etc. Afterwards he brought an action for malicious prosecution against Frankfurter, Henry Farrar, the justice and Nicholas Blocks. On the trial the suit was dismissed as to Farrar and the justice. On appeal it was held that the justice in changing the charge from larceny to disorderly conduct acted outside of any authority which the law gave him by reason of the accusation of larceny, and he became as much outside of the protection of the law in respect to that act and what followed as if he had held no office at all. The act itself was by implication a dismissal of the charge of larceny, and Frankfurter and Blocks could not be held responsible for the illegal acts of the justice; there being no evidence to show that they or either of them requested or in any manner directed the justice to change the charge, inflict the fine or issue the *mittimus*, the justice having done all of these things on his own motion. Frankfurter v. Bryan, 12 Brad. (Ill. App.), 549 (1883).

§ 13. **No contribution between wrong-doers.**— In actions growing out of that class of torts characterized by the existence of a wrongful intent, as distinguished from torts arising from negligence, the rule is recognized as just which compels each of the wrong-doers, when sued, to bear and assume the responsibility of all. The injured party may sue one, any number, or all, chargeable with the tort, and it is no defense, if one is sued, that the others are not required to share his responsibility; nor, where all are sued, would it be any defense that one only is made to assume the liability for the acts of all. The reason is, there can be no contribution as between them.[1] "While the law permits all the wrong-doers to be proceeded against jointly, it also leaves the party injured at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy regardless of the participation of the others."[2]

§ 14. **Attorneys and clients.**— An attorney and client may be treated as joint trespassers for an illegal arrest made by the attorney or his agent.[3] And where an arrest is made under process which is afterwards set aside for irregularity, the attorney in the suit is liable for trespass as well as the plaintiff.[4]

[1] Cooley, Torts, 133.

[2] Gulf, C. & S. F. R'y Co. v. James, 73 Tex., 12; 10 S. E. Rep., 744 (1889).

[3] Barker v. Braham, 3 Wils., 368; Bates v. Pilling, 6 B. & C., 38.

[4] Codington v. Lloyd, 8 Ad. & El., 449.

§ 15. **Corporations — The general rule.**— Corporations are liable, by the common law, for torts committed or authorized by them; and for this purpose the acts of their agents are regarded as the acts of the corporation.[1] And this is so though the agent was not appointed by seal, if such act be an ordinary service within the scope of his authority, such as a distress professedly made under a statute for a debt due to the corporation.[2] A jury may infer the agency from an adoption of the act by the corporation; as from their having received the proceeds of the seizure,[3] and actions for malicious prosecution and false imprisonment will lie accordingly.[4]

§ 16. **Corporations liable for malicious prosecutions.**— It is too late now to discuss the question, once much debated, whether a corporation can commit a trespass, or is liable in an action on the case, or subject generally to actions of tort as individuals are. It has been contended that an action for malicious prosecution so differs from other actions that it cannot be maintained against a corporation. But although, in order to maintain such an action, both malice and want of probable cause must exist, yet proof of want of probable cause will warrant the jury in inferring malice.[5] And by the great weight of modern authority, a corporation may be liable even when a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation as in actions for fraudulent representations.[6]

[1] Barbour on Parties, 207; Beach v. The Fulton Bank, 7 Cow. (N. Y.), 485 (1827); Hawkins v. Dutchess O. S. Co., 2 Wend., 452 (1829); Foster v. Essex Bank, 17 Mass., 503 (1821); McCready v. Guardian, etc., 9 Serg. & R., 94 (1822).

[2] Barbour on Parties, 207; Broom on Par., 250; Carey v. Mathews, cited 1 Salk., 191.

[3] Smith v. Birmingham G. Co., 1 Ad. & El., 526; Yarborough v. Bank of England, 16 East, 6.

[4] Broom on Par., 250; Barbour on Parties, 207.

[5] Reed v. Home Savings Bank, 130 Mass., 443 (1881); Ripley v. McBarron, 125 Mass., 272 (1878); Mitchell v. Jenkins, 5 B. & Ad., 588; 2 Nev. & Man., 301 (——); Stewart v. Sonneborne, 98 U. S., 187 (1878); Stone v. Crocker, 24 Pick., 81 (1831).

[6] Reed v. Home Savings Bank, 130 Mass., 443 (1881); Vance v. Erie Railway, 3 Vroom (32 N. J. L.), 334 (1867); Copley v. Grover & Baker Co., 2 Woods, 494 (1875); Goodspeed v. East Had. Bank, 22 Conn., 530 (1853); Carter v. Howe Mach. Co., 51 Md., 290 (1878); Wheless v. Second Nat. Bank, 1 Baxter (Tenn.), 469 (1872); Williams v. Planters' Ins. Co.,

§ 17. Corporations in the days of Coke and Sir William Blackstone.— Coke and Blackstone say that a corporation, being ideal and intangible, cannot maintain nor be made defendant to an action for personal injuries, "for it can neither beat nor be beaten in its body politic." It cannot "be committed to prison, for no man can apprehend or arrest it." It cannot be outlawed; "neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture or corruption of blood. It cannot be executor or administrator, or perform any personal duties, for it cannot take the oath of office." "Neither can a corporation be excommunicated, for it has no soul." The days of Lord Coke and Sir William Blackstone have passed away. Had they lived in the closing days of the nineteenth century they would have undoubtedly seen something besides their imaginary soulless concerns in the gigantic corporations of this age. The venerable absurdity on which those views were founded has been superseded by an enlightened modern doctrine. A corporation is now held liable for an injury done by one of its employees or servants in the same manner and to the same extent as natural persons are liable under like circumstances.[1]

§ 18. An obsolete doctrine.— The old doctrine was that a corporation was not liable in an action for a malicious prosecution because, as it was said, malice being the gist of the action, could not be imputed to a mere legal entity, which having no mind could have no motive, and therefore no mal-

57 Miss., 759 (1880); Iron Mountain Bank v. Mercantile Bank, 4 Mo. App., 505 (1877); Walker v. S. E. R'y, L. R., 5 C. P., 640 (——); Edwards v. Midland Railway, 6 Q. B. D., 287 (——); Phil., W. & B. R'd v. Quigley, 21 How., 202 (1858); Whitfield v. S. E. R'y, E., B. & E., 115; Mitchell v. Jenkins, 5 B. & Ad., 588; 2 Nev. & Mann., 301; Stewart v. Sonneborne, 98 U. S., 187 (1878); Ripley v. McBarron, 125 Mass., 272 (1878); Wheeler & W. Mfg. Co. v. Boyce, 36 Kan., 350 (1887); Jordan v. Ala., etc., R'y Co., 74 Ala., 85 (1883).

[1] Angell & Ames on Corporations, §§ 386, 387; Taylor on Corporations, §§ 343, 344; Potter on Corporations, §§ 114, 115; Boone on Corporations, §§ 78, 255, 256; Morawetz on Corporations, §§ 725–734; Field on Corporations, § 350; Wheeler & W. Mfg. Co. v. Boyce, 36 Kan., 350 (1887); Jordan v. Ala., etc., R'y Co., 74 Ala., 85 (1883); Reed v. Home Savings Bank, 130 Mass., 443 (1879); Paster v. Howe Mach. Co., 51 Md., 290 (1878).

ice, and this narrow view has prevailed to some extent in the United States; at least two cases are to be found in the books where it appears to have been followed.[1] But a steady process of judicial evolution has led to the establishment of the just doctrine of the civil responsibility of corporations for the acts of the sentient persons who represent them, and through whom they act, and of the liability for the acts of its agents, under the conditions that attach to natural persons.[2]

APPLICATIONS OF THE LAW.—

(1) *A savings bank liable for malicious prosecution.*

Samuel G. Reed brought an action for malicious prosecution against the Home Savings Bank. The bank insisted that the action would not lie against a corporation, especially a savings bank. Lord, J.: "It is too late to discuss the question, once much debated, whether a corporation can commit a trespass, or is liable in an action on the case, or subject generally to actions of tort as individuals are. The books for a quarter of a century show that a very large proportion of actions of this nature, both for nonfeasance and misfeasance, are against corporations. It is contended that an action for malicious prosecution so differs from other actions that it cannot be maintained against a corporation. But although, in order to maintain such an action, both malice and want of probable cause must be found, yet proof of probable cause will warrant the jury in inferring malice." . . . "A savings bank in its business transactions with individuals is subject to the same rules of law as other corporations or individuals. Its contracts may be impeached for fraud, or may be void for illegality, as the contracts of other parties are void for illegality, and we see no ground upon which we can distinguish its corporate liabilities from those of other corporations, and therefore no reason why this action cannot be maintained against the defendant." Reed v. Home Savings Bank, 130 Mass., 443 (1881). Citing Mitchell v. Jenkins, 5 B. & Ad., 588; S. C., 2 Nev. & Man., 301; Stewart v. Sonneborn, 98 U. S., 187; Stone v. Crocker, 24 Pick., 81; Ripley v. McBarron, 125 Mass., 272; National Exchange Co. v. Drew, 2 Macq., 103; New Brunswick & Canada Railroad v. Conybeare, 9 H. L. Cas., 711, 788, 740; Barwick v. English Joint Stock Bank, L. R., 2 Ex., 259; Philadelphia, Wilmington & Baltimore Railroad v. Quigley, 21

[1] Owsley v. Mont. R. R. Co., 37 Ala., 560; overruled in Jordan v. Ala., etc., R. R. Co., 74 Ala., 85 (1883), and Gillett v. Mo. Val. R. R. Co., 55 Mo., 315.

[2] Phil. R. R. Co. v. Quigley, 21 How. (U. S.), 202 (1858); Goodspeed v. East, etc., R. R., 22 Conn., 530 (1853); Vance v. Erie R'y Co., 32 N. J. L., 334 (1867); Capley v. Grover & B. Mach. Co., 2 Woods, 494 (1875); N. O. R. R. Co. v. Bailey, 40 Miss., 395 (1866); Williams v. Planters' Ins. Co., 57 Miss., 754 (1880); Wheeler & W.. etc., v. Boyce, 36 Kan., 350 (1887).

How., 202; Whitefield v. Southeastern Railroad, E., B. & E., 115; Vance v. Erie Railroad, 3 Vroom, 334; Copley v. Grover & Baker Co., 2 Woods, 494; Goodspeed v. East Haddam Bank, 22 Conn., 530; Carter v. Howe Machine Co., 51 Md., 290; Wheless v. Second National Bank, 1 Baxter, 469; Williams v. Planters' Ins. Co., 57 Mass., 759; Iron Mountain Bank v. Mercantile Bank, 4 Mo. App., 505; Walker v. Southeastern Railway, L. R., 5 C. P., 640; Edwards v. Midland Railway, 6 Q. B. D., 287.

(2) *Corporate liability for acts of employees, etc.*

In Krulevitz v. Eastern Railroad Company, the first count was for false imprisonment; the second, for malicious prosecution. At the trial evidence was offered for the plaintiff to prove that on July 5, 1884, the plaintiff, who was accustomed to go frequently from Lawrence to Salem, on business, bought at the first-named place a ticket which read, "Lawrence to Salem and return," for which he paid $1; the price of a single ticket either way between the two places being sixty-five cents. Upon the day on which he bought the ticket he rode over the defendant's road to Salem from Lawrence, but returned by another route. On July 7th he took the train at Lawrence for Salem. Before starting he had expended all the money he had, but honestly believed that the ticket which he had was good to carry him to Salem, where he expected to collect a sum of money. He did not intend to evade payment of his fare. When the conductor, to whom he was personally known, asked him for his ticket, he offered the ticket above mentioned, but the conductor refused to take it, on the ground that it was not good in that direction, and demanding payment of his fare. The plaintiff then stated his belief that the ticket was good, and told the conductor why he had no money. He also stated that he expected to get some money in Salem; that it was necessary for him to get there that morning, and that he would pay the fare on his return at night, and that the conductor might keep the ticket as security. Other passengers stated in the hearing of the conductor that he had carried them on return tickets like this one, and no denial was made. The conductor refused to accept the plaintiff's offer, and called him opprobrious names, which he repeated at times until the train reached Salem. In the meantime officers had been telegraphed for by the conductor, and on the arrival of the train at Salem the plaintiff was arrested and removed to the station-house; the conductor having pointed him out as the person to be arrested for having evaded his fare. The conductor followed to the police station, where he signed and swore to a complaint charging the plaintiff with fraudulently evading his fare. Upon this complaint, the plaintiff was confined in the police station for twelve hours, when he procured bail. About two weeks afterwards the complaint against the plaintiff was tried, and the latter acquitted. The conductor had been in the habit of taking round-trip tickets in cases like this. He was acting under the orders and rules of the railroad company in making the arrest, complaint and prosecution. Upon the offer of proof, the defendant requested the court to rule that the action could not be maintained, and the court so ruled, ordering a verdict for the defendant, and the case was reported for the determination of the full court.

C. Allen, J.: The defendant contends that the ticket did not entitle the plaintiff to be carried the second time from Lawrence to Salem, and the cases cited by him will support this proposition. The plaintiff, indeed, no longer controverts it, but now insists that he may nevertheless prevail by proving that the conductor acted without probable cause and maliciously, and that there was sufficient evidence for the jury on these points, and in this we agree with him. Ripley v. McBarron, 125 Mass., 272. Want of probable cause, and malice, on the part of the conductor, if established, may be imputed to the corporation. Reed v. Home Sav. Bank, 130 Mass., 445. But the report does not show whether the conductor believed the plaintiff's story, or whether he was acting in good faith in causing the arrest and making the complaint. His honest and reasonable belief is a necessary element in determining upon the questions of malice and probable cause, and since this is not found in his favor there must be a new trial. Good v. French, 115 Mass., 201; Bacon v. Towne, 4 Cush., 217, 239; Krulevitz v. Eastern R. Co., 140 Mass., 573; 5 N. E. Rep., 500 (1886); S. C., 143 Mass., 228; 9 N. E. Rep., 613 (1887).

(3) *Railroad, liability for false imprisonment—Arresting passenger for non-payment of fare.*

Marshall brought an action against the Boston & Albany Railroad Company for an assault, for assault and false imprisonment, and for malicious prosecution, in different counts. At the trial it appeared that the plaintiff was a public lecturer, and, having delivered a lecture at Poughkeepsie, New York, on April 4, 1885, he sent his assistant by night train to Palmer, Massachusetts, intending himself to go to Palmer on April 6th. The plaintiff was the owner of a thousand-mile coupon mileage ticket, good to bearer over defendant's railroad, which book was in the usual form and contained on the first page the printed words, "to be used upon the conditions named in the contract attached to and made a part hereof," and on the back page was printed the following: "Contract. The conditions upon which this mileage coupon ticket is sold by the Boston & Albany Railroad Company, and purchased and used by the bearer of this ticket, are as follows: (1) That conductors shall detach, in consecutive order, coupons representing the distance traveled, except when presented for any distance less than three miles; then three coupons shall be detached. (2) That all mileage coupons will be void if detached by any person but the conductor." The plaintiff tore out seven pages, containing one hundred and forty coupons, from this book, and gave the balance of the book to his assistant for his use in going to Palmer. Upon April 6th, plaintiff took a train on defendant's road, intending to go to Palmer, and, when the conductor asked him for his ticket, he offered him these coupons, which he had torn from his mileage book, which in amount were more than sufficient to pay his fare to Palmer, at coupon rates. The conductor asked the plaintiff if he had the book from which these coupons had been detached, and the plaintiff explained to him the circumstances of his sending the book to Palmer by his assistant, and told him that he could see the book when the train arrived at Palmer, as his assistant would be at the depot with it. The conductor declined to accept these coupons for plaintiff's fare, and demanded

the amount of the cash to Springfield, which was as far as that conductor would go on that train, as he then informed plaintiff. The plaintiff stated his belief that the coupons were good, and gave to the conductor his card, showing his name, business, and residence. The conductor told the plaintiff that he had no doubt that plaintiff owned the book, but stated that coupons were not good without the book, and declined to accept them. At several other times and places, before the arrival of the train at Pittsfield, conversations similar to the above took place between the plaintiff and the conductor, the plaintiff offering these coupons for his fare, and the conductor declining to accept them. There was also evidence to show that, upon the arrival of the train at Pittsfield, the conductor called a policeman of the town into the car, and after again demanding payment of fare, and after the plaintiff had again tendered the coupons, and refused to pay fare, the conductor, who was a railroad police officer, arrested plaintiff, and placed him in charge of the police officer, who took him to the police station and afterwards to the district court, where he made a complaint for "fraudulently evading the payment of fare by refusing to pay the fare lawfully established by the Boston & Albany Railroad Corporation." The plaintiff was released on bail, and, at a later day, was tried on the complaint, and discharged.

It appeared from evidence of the defendant that the following among other rules for the government of conductors had been established by the defendant corporation, and was in force at the time: "Coupons detached by passengers will be refused, and fare collected, unless passengers can show the book from which coupons were detached, which must agree in number and form." This rule was not known to the plaintiff. The plaintiff, for the purpose of showing his intent and belief that the said coupons were a proper tender of his fare, offered to prove that he had frequently seen the conductors on the defendant's railroad accept, without objection, in payment of fare, similar coupons, which had been detached by passengers or others than such conductors; but the court excluded the evidence in this form, and for the specific purpose for which it was offered, but stated if the plaintiff proposed to prove a custom of the defendant to accept coupons so tendered, the evidence would be admissible. The plaintiff asked the court to rule that "the evasion or attempt to evade the payment of fare, for which a passenger may be lawfully ejected or removed from a railroad car, must be a fraudulent evasion, with an intention to defraud the railroad company;" but the court declined so to rule, but did rule that the coupons offered by the plaintiff to the conductor were not a legal tender of his fare, and, upon the plaintiff's refusal to make any other payment, the conductor, who was a railroad police officer, might arrest him. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

In passing upon the exceptions, Holmes, J., said: "The ruling requested by the plaintiff was that 'the evasion, or attempt to evade, the payment of fare, for which a passenger may be lawfully ejected or removed from a railroad car, must be a fraudulent evasion, with an intent to defraud the railroad company.' There is no question, and the plaintiff does not dispute, that this ruling, if taken literally, was rightfully refused. Beckwith v.

Railroad Co., 143 Mass., 68; 8 N. E. Rep., 875. We are asked to construe the words 'ejected or removed,' in connection with the facts and with instructions given and not excepted to as meaning 'removed by arrest,' or in other words 'arrested.' We think, however, that the suggestion does too great violence to the language used, and that we should not be warranted in assuming that the judge to whom the request was addressed understood it as the plaintiff would have us understand it.

"The plaintiff, for the purpose of showing his intent and belief that the said coupons were a proper tender of his fare, offered to prove that he had frequently seen the conductors of the defendant railroad company accept, without objection, in payment of fare, similar coupons, which had been detached from similar mileage books by passengers or others than such conductors; but the court excluded the evidence in this form and for the specific purpose for which it was offered, but stated, if the plaintiff proposed to prove a custom of the defendant to accept coupons so tendered, the evidence would be admissible; and the plaintiff excepted. It would seem that the plaintiff could not have been injured by the exclusion of the evidence as stated; for, upon the rulings of the court under which this case was tried without objection by the plaintiff, his belief or intent was only material to the count for malicious prosecution, and the verdict for the defendant on that count was based on the finding that it acted under the advice of counsel. But the evidence was properly excluded. If the plaintiff's actual belief was material, and was really controverted, he could not, as of right, strengthen his direct testimony as to what his belief was by swearing to other facts which would make it likely that he believed as he said. Delano v. Smith Charities, 138 Mass., 63. This seems to have been the purpose for which the evidence was offered. If it had been offered to show that the defendant company had justified the plaintiff's conduct by its own, the court was ready to admit it subject to proper limitations. Exceptions overruled." Marshall v. Boston & A. R. R., 145 Mass., 164; 13 N. E. Rep., 884 (1887).

§ 19. Municipal corporations.—A municipal corporation is liable for a tortious act, as a trespass, committed by an agent pursuant to its directions, in relation to matters within the scope of the objects of its incorporation; but not for any unauthorized acts of its officers though done *colore officii*. It cannot be made liable for an act of its agent by ratification, where the act complained of was of such a nature that the corporation did not possess the power to authorize the doing of it by the agent.[1]

Municipal corporations are liable to an action for injuries sustained in consequence of the misfeasance of their officers or agents only in cases where the duty to be performed is

[1] Barbour on Parties, 214; Brown v. City of Utica, 2 Barb. (N. Y.), 104 (1848).

absolute, and due from the corporation; or where they were acting for the purposes of private advantage or emolument, and are to be regarded as a private company.[1] Municipal corporations are not liable for a misfeasance committed by independent corporate officers.

§ 20. The prosecution of criminal offenders not ultra vires. In an action for malicious prosecution against a railroad company, where it was contended that the power of instituting a criminal proceeding was not conferred upon it by law, it was said: "Conceding that a corporation cannot be bound unless for an act done in pursuance of some object embraced by its charter, or conferred by law, it is not always, or necessarily, outside of the objects and privileges of a railroad company to prosecute criminal offenders. It is the object of such companies to acquire and protect their property by every lawful means. It is a lawful and commendable means to protect it by the institution of criminal proceedings against those infringing such rights, etc. . . . No law or public policy restrains them in this respect, and to hold that they cannot be held to a proper accountability would endow them with an invidious privilege." Discussing in the same connection the character of proof requisite in such a case to show that a prosecution was instituted and conducted by its authority, it was further said in the same case: "We do not consider it necessary to produce a resolution of a board of directors." "In the absence of opposing proof," it was said that "its legal advisers, acting in conjunction with such of its agents and servants as have knowledge of the facts, will be authorized to institute the proper proceedings."[2]

§ 21. Husband and wife — The rule at common law. — (1) *As plaintiffs:* At common law, for a malicious prosecution or false imprisonment;[3] or for any personal wrong or violence done to the wife, for which an action would survive to her, the wife ought to be joined.[4] But where the injury is not of

[1] Hickok v. Trustees, etc., 15 Barb., 427 (1853); Barbour on Parties, 211.

[2] Ricord v. Railroad Co., 15 Nev., 176; Gulf, C. & S. F. R'y Co. v. James, 73 Tex., 12; 10 So. Rep., 744 (1889).

[3] 3 Black. Com., 140; Hardy v. Robinson, 1 Keb., 440; Horton v. Byles, 1 Sid., 387.

[4] Barbour on Parties, 193; Broom on Par., 236; Newton v. Hatter, 2 Ld. Ray., 1208; Russell v. Corne, id., 1031; 3 Bouv. Inst., § 2757; Beach v. Ramsey, 2 Hill (N. Y.), 309 (1842).

that kind, and no action would survive to the wife, the only cause being a special damage to the husband, the wife cannot be joined.[1] Therefore they cannot join in an action for the battery of both; the battery of the husband being a distinct cause of action.[2]

For an assault on the wife, as well as for compensation for the loss of the wife's society and services, occasioned thereby, or in actions to recover damages from her false imprisonment or malicious prosecution, the husband alone must sue; but in the declaration he may also include a claim for a personal tort to himself.[3] So that, although an action could not be maintained for the battery of husband and wife by both jointly, yet the husband may sue alone for the assault on himself, and for the consequential damage resulting from the personal wrong to his wife.[4] And when the husband receives a separate loss or damage, as if, in consequence of the battery, he has been deprived of his wife's society, or has been put to expense, he may bring a separate action in his own name.[5]

The declaration may either seek compensation for the immediate and direct injury to the wife, in respect of which a right of action would survive to her, or for the consequential and special damage to the husband. In the former case, both must join; in the latter, the husband must sue alone.[6] And when the injury to the wife deprives the husband, for any time, of her company or assistance, or if she be maliciously prosecuted or imprisoned, and the husband is put to expense on account of the same, he may bring a separate action in his own name for these consequential injuries, which are, indeed, wrongs done to himself alone; and for this reason he may, in the same action, proceed for injury committed upon himself. Whenever, on account of an injury to the wife, he has sustained special damages, he may bring a separate action.[7]

[1] 4 B. & Ad., 523; Coleman v. Harcourt, 1 Lev., 140.

[2] 2 Brev., 170.

[3] Barbour on Parties, 180; Broom on Parties, 231.

[4] Barbour on Parties, 2d ed., 284; Broom on Parties, 232; Ld. Raymond, 208; Read v. Marshall, 8 Mod., 342; Grey v. Livesey, 8 Mod., 342.

[5] McKinney v. Western Stage Co., 4 Iowa, 420 (1857).

[6] Barbour on Parties, 179; Saville v. Sweeny, 4 B. & Ad., 523; 3 Black. Com., 140.

[7] Barbour on Parties, 179; 3 Bouv. Inst., § 2757.

(2) *As defendants:* Coverture does not change the liabilities of the husband in respect to his own torts; he being the person to be sued for such torts, whether committed before or during the coverture. It is otherwise with the wife. After her marriage she has no personal property with which to pay damages that may be recovered. For her torts committed before marriage the action must be against the husband and wife jointly.[1] So the wife must be joined in an action for a tort committed by her during coverture;[2] as, for example, a libel or slander uttered by her.[3] But for words spoken by husband and wife, there must be separate actions — the one against husband and wife, the other against the husband only; the wife not being answerable for her husband's tort.[4] It is proper to join both husband and wife in an action for a tort committed by the wife, although the injury was committed by the sole act of the wife and without the husband's knowledge.[5]

§ 22. **Under statutes.**— The rule of the common law has been changed in many of the states of our Union. In New York, by the act of March, 1860, concerning the rights and liabilities of husband and wife, it is enacted that any married woman may, while married, sue and be sued in all matters having relation to her property which may be her sole and separate property, or which may come to her by descent, devise, bequest or the gift of any person except her husband, in the same manner as if she were sole. And any married woman may bring and maintain an action in her own name for damages, against any person or body corporate, for any injury to her person or character, the same as if she were sole; and the money received upon the settlement of any such action, or recovered upon a judgment, shall be her sole and separate property.[6] Similar enactments exist in other states, to which of

[1] Bac. Ab., Baron & Feme (L); 5 Bin., 43; Com. Dig., Bar. & Feme (Y); 2 Roper, Husb. & Wife, 127; Co. Litt., 351*b*.

[2] Barbour on Parties, 399; Broom on Par., 279: Com. Dig., Baron & Feme (Y); Bac. Ab., Baron & Feme (L); Matthews v. Fiestel, 2 E. D. Smith, 90 (1853); Wagener v. Bill, 19 Barb., 321 (1855).

[3] Head v. Briscoe, 5 C. & P., 484.

[4] Swithin v. Vincent, 2 Wils., 227; Bac. Ab., Baron & Feme (L).

[5] Matthews v. Fiestel, 2 E. D. Smith, 90 (1853).

[6] Laws of N. Y., 1860, 158, § 7.

course reference must be had to ascertain the true state of the law.

§ 23. **Infants.**— (1) *As plaintiffs:* At common law an infant is required to sue by his next friend or *prochein ami.*[1] But an objection on the ground that the plaintiff is an infant can only be made by a proper plea in abatement. Proof of such matter cannot be made under a plea of the general issue.[2]

§ 24. **Infants.**— (2) *As defendants:* Actions against infants, in the absence of statutory regulations to the contrary, may be commenced in the same manner as if they were adults, but they must appear on the record by a guardian *ad litem* and not in person or by an attorney.[3] A judgment should not be rendered against an infant except after his appearance in the action by a guardian, and judgment against an infant by default is void or voidable where there is nothing in the record showing an acceptance by a guardian *ad litem* of his trust or notice to him thereof; and where a judgment is entered against an infant who appears in court only by an attorney, it will be set aside on his motion upon his becoming of age.[4]

Infants are liable, in actions arising *ex delicto*, whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds.[5]

APPLICATION OF THE LAW.—

Liability of infants in actions for malicious prosecution.

One Burnham brought an action against Herbert Seaverns, for the alleged malicious prosecution of a civil action by Seaverns, who was a minor,

[1] The term *prochein ami* is taken from the Norman French, next friend, one who, without being appointed guardian, sues in the name of an infant for the recovery of the infant's rights. 2 Bouvier's Law Dic., 469; Edwards on Parties, 182, 204.

[2] Miles v. Kaigler, 10 Yerg. (Tenn.), 10; — Am. Dec., 592 (1836); Drago v. Moss, 1 Spear's L. (S. C.), 212; — Am. Dec., 425 (1841); Field on Infants, 88.

[3] Strofer v. Gates, 2 B. Mon. (Ky.), 453; 38 Am. Dec., 114 (1842); Field on Infancy, 88.

[4] Stupp v. Helmes, 48 Mo., 89 (1871); Keeler v. Fassett, 21 Vt., 539; 52 Am. Dec., 71 (1849); Hanna v. Spotts, 5 B. Mon. (Ky.), 362; 43 Am. Dec., 138 (1845); Austin v. Charlestown, etc., 8 Met. (Mass.), 196; 41 Am. Dec., 497 (1844); Powell v. Gott, 13 Mo., 458; 53 Am. Dec., 158 (1850); Field on Infancy, 39.

[5] Barbour on Parties, 220; 2 Kent's Com., 241; Broom on Par., 280; Co. Litt., 180*b*, n. 4; Johnson v. Pye, 1 Lev., 169; Bullock v. Babcock, 3 Wend., 391 (1829); Conklin v. Thompson, 29 Barb., 218 (1859); Jennings v. Rundall, 8 T. R., 337; Noy, 129.

by William Seaver, his next friend. The evidence tended to show that the defendant was a minor, and that the action complained of was brought in his name without his knowledge by Seaver, who was his uncle, and that he took no part in conducting it. Seaver paid all costs and expenses. On cross-examination the defendant testified that he first knew of the action six weeks after it was begun, and knew of its pendency from that time until final judgment was entered. That judgment was finally entered for this plaintiff because he did not wish to have the suit prosecuted further after the death of his sister; otherwise he never interfered to prevent its prosecution, except about six months after it was begun he had an interview with the attorney employed to conduct it. The jury found for the defendant. The finding was sustained. Colt, J.: "Under the finding of the jury the alleged malicious suit was commenced entirely without the knowledge or authority of the defendant, who was during its pendency an infant. It was prosecuted by the *prochein ami*, in theory at least receiving his appointment from the court, and having the sole control of the case so long as he is allowed by the court to retain the place. The defendant had no power to prosecute or discontinue the suit during his minority. If the infant expressly assented to the suit after he had knowledge of it, yet he cannot become a trespasser by such assent, being liable only for his own personal acts." Burnham v. Seaverns, 101 Mass., 360 (1869). Citing Bac. Ab., Infancy & Age, K. 2; Guild v. Cranston, 8 Cush., 506; 1 Chit. Plead. (6th ed.), 76. Distinguished from Sterling v. Adams, 3 Day, 411.

§ 25. **Master and servant.**— Where an injury is sustained in consequence of a servant's misconduct, negligence or default while acting under the authority delegated to him, in his master's business, an action lies against either the master or the servant.[1]

For injuries occasioned by the tortious acts of his servant, in the course of his employment, although in disobedience of the master's orders, the master is responsible,[2] if the act was not done in wilful disregard of such orders.[3]

The liability of the master, for the act of his servant, done by his express direction, does not rest upon the relationship of master and servant, but upon the fact that the act was done by the master's express direction.[4]

An express authority from the master need not be shown, in all cases, to render him liable for the tortious act of his

[1] Barbour on Parties, 220; Broom on Parties, 268; 1 Black. Com., 431; Montfort v. Hughes, 3 E. D. Smith, 591 (1854); Harlow v. Humiston, 6 Cow., 189 (1826).

[2] Phil. & R. R. R. v. Derby, 14 How., 468 (1852).

[3] Southwick v. Estes, 7 Cush., 385 (1851).

[4] Thames S. Co. v. Housatonic R. Co., 24 Conn., 40 (1855).

servant, provided the act be subsequently ratified by the master.[1]

§ 26. Liability of partners — In an action against two, what concurrence will render both liable.— One person cannot be made liable in damages because he knows that another person is about to commit an unlawful act, even though he fails to protest against it, and therefore, in the ordinary use of language, may be said to have consented to it. So, when one of two partners was about to commence a prosecution against a party, upon a charge of having stolen the money of the firm, the mere "knowledge and consent" of the other partner that he should have the person accused arrested would not render the partner so knowing and consenting liable to an action for malicious prosecution at the suit of the person arrested. Something further would be necessary in order to make him liable. It would be necessary that his "consent" should be of so active and positive a character as to amount to advice and co-operation. If he advised the arrest, although he may not have directly caused it, he would be equally responsible with the other partner who was the active prosecutor. But his mere "knowledge and consent" would not render him liable.[2] Although, as a general rule, one partner cannot involve another in a joint liability for a trespass committed by the former, yet an exception exists where the trespass is in the nature of a taking which is for the benefit of the partnership; more especially if the other partner afterwards agrees and consents to the act.[3]

§ 27. Personal representatives.— If one of several persons who are jointly interested dies, the remedy for an injury to the joint interest survives to the others, and the personal representatives of the deceased are not to be joined; the rule being that the remedy survives but not the right.[4] When the right of action is joint and several, or several only, in case of death the personal representatives of the deceased may sue,

[1] Broom on Parties, 260; Barbour on Parties, 225.

[2] Gilbert v. Emmons, 42 Ill., 143 (1866); Rosenkranz v. Baker, 115 Ill., 332 (1885).

[3] Rosenkranz v. Baker, 115 Ill., 332 (1885); Barbour on Parties, 228; Broom on Par., 249, 250; Petrie v. Lamont, 1 Car. & March., 96; Becknell v. Dosion, 33 Mass., 480.

[4] Broom on Parties, 212; Rex v. Collector of Customs, 2 M. & S., 225.

provided the rule *actio personalis moritur cum persona* does not apply.[1] For a wrong altogether personal, as where one has been injured by false imprisonment or malicious prosecution, no action can be supported, at common law, by his personal representatives, after his death.[2] In such cases the maxim *actio personalis moritur cum persona* applies.[3]

§ 28. **Principal and agent.**— A principal is liable to third persons for the torts of his agent committed in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade or disproved of them; the rule *respondeat superior* being applicable in these cases.[4]

If the agent commit a tortious act under the direction or with the assent of his principal, either is liable, at the suit of the party injured; for the authority of the principal is no justification of the wrongful act of the agent.[5]

An express authority from the principal need not be shown, in order to render him liable for the torts of his agent; provided the act is subsequently ratified by the principal.[6]

§ 29. **Misnomer — The use of wrong names.**— Misnomer of one of the parties must be taken advantage of by a plea in abatement. If a corporation or natural person, sued by a wrong name, appears without objection, the misnomer is waived.[7] It is a sufficient answer to a plea of misnomer to say that the defendant is as well known by the one name as the other. The fact that a person is commonly known by the name by which he was sued and arrested in a civil proceeding is distinguished from those cases in which one person has been arrested upon a writ against another person of a different name.[8]

[1] Ibid.; Broom's Leg. Max., 400; Barbour on Parties, 176.

[2] 3 Bouvier's Inst., § 2751.

[3] Broom's Leg. Max., 702; Barbour on Parties, 176.

[4] Barbour on Parties, 230; 2 Bouvier's Inst., 33; Story on Agency, § 452; Paley on Agency, 294, 301.

[5] Barbour on Parties, 230; Broom on Parties, 258; Sands v. Child, 3 Lev., 352; Jones v. Hart, 1 Ld. Ray., 738; Britton v. Cole, 1 Salk., 408.

[6] Barbour on Parties, 230.

[7] Virginia & M. S. N. Co. v. United States, Taney, 418 (1840).

[8] O'Shaughnessy v. Baxter, 121 Mass., 515 (1877); Cole v. Hindson, 6 T. R., 234; Finch v. Cocken, 5 Tyrwh., 774, 785; 3 Dowl., 678, 686; Griswold v. Sedgwick, 1 Wend., 126, 132 (1828); Langmaid v. Pieffer, 7 Gray, 378 (1856).

CHAPTER XI.

PLEADING.

§ 1. The pleadings in actions for malicious prosecution and false imprisonment.— It is common in the course of every system of judicature to require, on behalf of each of the litigating parties, before proceeding with the cause, a statement of his case. In the forensic language of the courts these statements are called "the pleadings."

The term defined: A pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense.[1]

Regular pleadings: (1) The declaration or complaint. (2) The pleas or answer. (3) The replication.

§ 2. Pleading under codes.— It would appear from an examination of many of the earlier cases in the state of New York that the contest was, in many instances, merely a contest of pleaders. The real matters in litigation appear to have become insignificant in comparison to the manner of stating them in the pleadings. As a result of this condition of things the legislature of that state attempted to sweep away the whole system of common-law pleading by a statutory enactment providing that "All the forms of pleading heretofore existing are abolished, and hereafter the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act."[2] The act commonly called the "code of procedure" provided that the first pleading on the part of the plaintiff, "the complaint," should contain — "1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant. 2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition. 3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated."

The pleading on the part of the defendant. The answer must

[1] Bouvier's Law Dictionary, 343. [2] N. Y. Code of Procedure.

contain — "1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition."

§ 3. Complaint in an action for malicious prosecution.— To support this action it must be alleged (1) that a prosecution was commenced against the plaintiff; (2) that it was instituted or instigated by the defendant; (3) that it was malicious; (4) that it was without probable cause; and (5) that it has been legally and finally terminated in the plaintiff's favor.[1]

§ 4. Precedents.—

(1) COMPLAINT FOR MALICIOUS PROSECUTION.

(1) *Title, etc.*

The plaintiff complains of the defendant, and alleges:

That on or about the —— day of ——, A. D. ——, the defendant above named appeared before —— ——, a justice of the peace of the town of ——, in the county of ——, at his office in said town, and then and there made a complaint against the plaintiff herein, charging the plaintiff with having on the —— day of ——, A. D. ——, at ——, in the county and state aforesaid, committed the crime of petit larceny by stealing from the defendant's place of business at ——, aforesaid, a certain harness, the property of the defendant, of the value of $5.

That upon said complaint the justice issued his warrant for the arrest of this plaintiff, and that upon said warrant this plaintiff was arrested by a constable of said town and taken before said magistrate, and was then arraigned and held to bail for his further appearance before said magistrate on the —— day of ——, A. D. ——.

That on the said —— day of ——, A. D. ——, the plaintiff appeared before the said magistrate, then holding a court of special sessions, and was then and there by said court tried for the offense of petit larceny charged in said complaint. That the defendant herein attended said trial with counsel and conducted the prosecution of this plaintiff thereon, and that at said trial this plaintiff was found not guilty of the offense charged, and said criminal proceeding was then and there finally terminated by the acquittal and discharge of the plaintiff herein. That the said charge of larceny was wholly false and unfounded; that the defendant herein made

[1] Wheeler v. Nesbitt, 65 U. S. (24 How.), 544 (1860); Miller v. Miligan, 48 Barb. (N. Y.). 30 (1866); Farnum v. Freley, 56 N. Y., 451 (1874); Vinwal v. Care, 18 W. Va., 1 (1881); Baylies' Code of Pleading and Forms, 155 (1891).

said charge and caused the arrest, imprisonment and prosecution of the plaintiff therefor maliciously and without probable cause.

That by reason of said malicious and unfounded criminal prosecution by the defendant the plaintiff has suffered great damage, and has been caused great mental distress, loss of time, physical discomfort and expense.

Wherefore the plaintiff demands judgment against the defendant herein for —— dollars damages and his costs in this action.

—— ——,
Plaintiff's Attorney.[1]

(2) PETITION IN AN ACTION FOR MALICIOUS PROSECUTION BY A PERSON WHO HAS BEEN PROSECUTED FOR LARCENY — A KANSAS FORM.[2]

—— ——, Plaintiff,
vs.
—— ——, Defendant.

Plaintiff states that the defendant, on the —— day of ——, A. D. 18—, in said county, falsely and maliciously, and without any reasonable or probable cause, made an affidavit charging plaintiff with the crime of larceny in stealing a certain watch, which was the property of the defendant, and on the same day caused plaintiff to be arrested and imprisoned on said charge of larceny. That afterwards, on the —— day of ——, A. D. 18—, plaintiff was brought before one —— ——, a justice of the peace in and for the city of ——, in said county, and put upon his trial on the said charge of larceny, which said justice, after hearing the evidence, discharged plaintiff, and the said prosecution is now fully ended.

That by reason of the said arrest and prosecution, plaintiff has been injured in reputation, and has lost —— days' time, and has been obliged to expend —— dollars in and about his defense to said prosecution, and has otherwise been greatly injured, to his damage —— dollars, for which he asks judgment.

—— ——,
Attorney for Plaintiff.

§ 5. Modifications of the common-law system.—The common-law system has been abolished in many of the states and modified in others. In England, the place of its birth, it has been completely abolished.[3]

The principles upon which the system was founded, however, still remain in full force, and are of every-day applica-

[1] Baylies' Code of Pleading and Forms, 429 (1891).

[2] Green & Dassler's Practice, etc., 210.

[3] The New York method is followed substantially in California, Missouri, Ohio, Kentucky, Indiana, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Nevada, Oregon, Mississippi, North Carolina, South Carolina, Arkansas, Colorado, Connecticut, Dakota, Wyoming, Arizona, Washington, Utah, Montana and Idaho. In the other states the common-law system seems to prevail. But it is believed that a declaration under the common law, well drawn, would still be held good under the codes of many of the states.

tion in the courts of law throughout the United States. It is now our purpose to illustrate these principles so far as they apply to the subject of pleadings in actions for malicious prosecution and false imprisonment.

§ 6. **Statement of the claim defined.**— The complaint, the statement of the claim, or, as it was formerly and still is in many jurisdictions called, the declaration, is a specification in methodical and legal form of the circumstances which constitute the plaintiff's cause of action, which necessarily consists of the statement of a legal right, or in other words a right recognized in a court of law, and of an injury to such right remedial at law by an action.[1]

The subject may be well illustrated by an analysis of a declaration for malicious prosecution at common law, and an examination of its form and particular parts or essential averments.

§ 7. **The declaration at common law — Its form and particular parts.**— At common law the declaration may be divided into the following parts:

First — The title.

Second — Designation of the parties litigant.

Third — Inducement of good character.

Fourth — Statement of the institution of the prosecution alleged to be malicious and without probable cause.

Fifth — Statement of the discharge of the plaintiff and end of the prosecution.

Sixth — Statement of the second count.

Seventh — Statement of the claim for damages.

Eighth — The *ad damnum*.

Ninth — The conclusion.

§ 8. **The subject illustrated — A declaration at common law in an action for maliciously charging the plaintiff with felony before a justice of the peace and causing him to be arrested and imprisoned, etc., until discharged by the justice.**— The declaration which is the subject for dissection, with the exception of the title, is taken from Chitty's Pleadings, volume 11, page 606.[2]

[1] 1 Chitty's Pleadings, 13th Am. ed., 240.

[2] See the various forms in 8 Wentw., Index, xv to xxi; Morg., 410, 413, 415; 2 Rich. C. P., 158; Plead. A., 180, and the approved one

FIRST.— THE TITLE — THE COURT.

In the —— Court of —— County,
—— Term, A. D. 18—,

STATE OF ——,
—— County. } ss.

SECOND.— DESIGNATION OF THE PARTIES LITIGANT.

—— ——, the plaintiff in this suit, by —— ——, his attorney, complains of —— ——, the defendant in this suit, summoned, etc., of a plea of trespass on the case.[1]

THIRD.— INDUCEMENT OF GOOD CHARACTER.

For that whereas the said plaintiff now is a good, true, honest, just and faithful subject of this kingdom, and as such hath always behaved and conducted himself, and hath not ever been guilty, or until the time of the committing of the several grievances by the said defendant as hereinafter mentioned been suspected to have been guilty, of felony or of any other such crime, by means whereof the said plaintiff, before the committing of the said several grievances by the said defendant as hereinafter mentioned, had deservedly obtained and acquired the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to wit, at, etc. (*venue*).[2]

in 1 D. & R., 97; 2 Chit. Rep., 304; Bac. Ab., Action on the Case, H.; Com. Dig., 1 Saund., 228 to 230, in notes; 3 Bla. Com., by Chitty, 326, from which it appears that, to support an action for a criminal prosecution, four circumstances must occur: 1st. Falsehood in the original charge, and which must have terminated in favor of the plaintiff. 2d. The want of probable cause for instituting such proceedings. 3 Dow, Rep., 160. 3d. Malice in the prosecutor, which must be proved. 9 East, 361; 5 Taunt., 187; 1 Marsh., 12. 4th. Damages to the accused party, which may be either to his person by imprisonment — to his reputation by scandal,— or to his property by expense. Gilb. Cases Law & Evid., 185, 202; 12 Mod., 208; 1 T. R., 493 to 551. These four circumstances must be correctly stated in the declaration. The falsehood of the charge must have been substantiated by a verdict, or the decision of the court in which it is instituted, or by the proceedings having been otherwise legally determined, before the party aggrieved can commence his action for the injury sustained. 2 T. R., 225; 1 Saund., 228; Bul. N. P., 11; 1 Esp., 79.

[1] The essential parts of the declaration relating to the title of the court, the venue and designation of the parties litigant remain the same as at common law, and are essential to every well-drawn complaint.

[2] This inducement was usually inserted by the common-law pleaders, but it was not traversable, and if omitted the declaration would be sufficient. The inducement is similar to that in an action for a libel, or for words. In general, a criminal prosecution is injurious to the character of the plaintiff, in which case this inducement of the plaintiff's good character is proper, but if the proceeding were not prejudicial to the plaintiff's character, the induce-

FOURTH.—STATEMENT OF THE INSTITUTION, ETC., OF THE PROSECUTION ALLEGED TO BE MALICIOUS AND WITHOUT PROBABLE CAUSE.

Yet the said defendant, well knowing the premises, but contriving and maliciously intending to injure the said plaintiff in his aforesaid good name, fame and credit, and to bring him into public scandal, infamy and disgrace, and to cause the said plaintiff to be imprisoned for a long space of time, and thereby to impoverish, oppress and wholly ruin him, heretofore,* to wit, on, etc. (*date of warrant or about it*), at, etc. (*venue*), went and appeared before one —— ——, then and there being one of the justices of our lord the now king, assigned to keep the peace of our said lord the king, in and for the county of ——, and also to hear and determine divers felonies, trespasses and other misdemeanors committed in the said county, and then and there, before the said —— ——, so being such justice as aforesaid, to wit, at, etc. (*venue*), aforesaid, falsely and maliciously, and without any reasonable or probable cause whatsoever, charged the said plaintiff with having [feloniously stolen a certain gold watch of the said *defendant], and upon such charge the said defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said —— ——, so being such justice as aforesaid, to make and grant his certain warrant, under his hand and seal, for the apprehending and taking of the said plaintiff, and for bringing the said plaintiff before him, the said —— ——, or some other of his majesty's justices of the peace in and for the said county of ——, to be dealt with according to law of the said supposed offense. And the said defendant, under and by virtue of the said warrant, afterwards, to wit, on the day and year aforesaid, to wit, at, etc. (*venue*), aforesaid, wrongfully and unjustly, and without any reasonable cause whatsoever,[1] caused and procured the said plaintiff to be arrested by his body,

ment should be omitted, and the declaration commence with the statement that the defendant, contriving to cause the plaintiff to be imprisoned, etc. It is still retained in some later American works on pleading. Puterbaugh's Common Law, 446; 2 Chitty's Pleading, 13th Am. ed., 620, 634; Gilb. Cases, L. & E., 185; 12 Mod., 208; Styl., 118.

[1] *The complaint must allege affirmatively a want of probable cause.* In an action for malicious prosecution the declaration alleged in one count that the defendant made a false and malicious complaint against the plaintiff, a trial justice, and testified falsely at the trial thereof before the justice, "and thereupon" the justice found the plaintiff guilty, but at the trial of the complaint in the superior court on appeal the plaintiff was acquitted; and in another count alleged that the defendant made another false and malicious complaint against the plaintiff to the trial justice, and testified falsely at the trial thereof before the justice, and "upon that evidence" the justice found the plaintiff guilty, but in the superior court on appeal the complaint was dismissed without trial. It was held, on demurrer, that both counts were bad, as failing to allege distinctly want of probable cause for the respective prosecutions. Dennehay v. Woodsum, 100 Mass., 195 (1868). Citing Whitney v. Peckham, 15 Mass., 243; Parker v. Huntington, 7 Gray, 36; Bixby v. Brundige, id., 129; Bacon v. Towne, 4 Cush., 217, 235; Brown v. Lakeman,

and to be imprisoned and kept and detained in prison for a long space of time, to wit, for the space of —— hours then next following, and until the said defendant afterwards, to wit, on, etc., to wit, at, etc. (*venue*), aforesaid, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said plaintiff to be carried and conveyed in custody before the said —— ——, so being such justice as aforesaid (if the plaintiff was committed for further examination then insert this averment between brackets [and to be committed by the said justice for a further examination to a certain gaol or prison of our said lord the king called ——, and there, to wit, in the said gaol or prison, the said defendant then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said plaintiff to be imprisoned, and to be kept and detained in prison for a long space of time, to wit, for the space of ——, then next following, and until he, the said defendant, afterwards, to wit, on, etc., falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said plaintiff to be carried and conveyed in custody before one —— ——, then and there being a certain other justice of our said lord the king, assigned to keep the peace of our said lord the king, and to hear and determine divers felonies, trespasses and other misdemeanors committed in the same county of ——], to be examined before the said justice, touching and concerning the said supposed crime.

FIFTH.—STATEMENT OF THE DISCHARGE OF THE PLAINTIFF AND END OF THE PROSECUTION.

Which said (last mentioned) justice having heard and considered all that the said defendant could say or allege against the said plaintiff touching and concerning the said supposed offense, then and there, to wit, on the day and year last aforesaid, at, etc. (*venue*), aforesaid, adjudged and determined that the said plaintiff was not guilty of the said supposed offense, and then and there caused the said plaintiff to be discharged out of custody, fully acquitted and discharged of the said supposed offense; and the said defendant hath not further prosecuted his said complaint, but hath deserted and abandoned the same, and the said complaint and prosecution is wholly ended and determined, to wit, at, etc. (*venue*), aforesaid.[1]

12 Cush., 482; Parker v. Farley, 10 Cush., 279.

[1] The declaration must show that the former prosecution was at an end, though the omission will be aided by verdict. 1 Stra., 114; Com. Dig., Action on the Case for Conspiracy, C. 5; Bac. Ab., Action on the Case, H. In 2 T. R., 231, Buller, J., observed that "the words 'released and discharged from the said imprisonment' are not sufficient, they not being equal to the word 'acquitted,' which has a definite meaning, namely, by a jury on the trial, and that it must be shown upon the face of the declaration that the original prosecution was at an end." The action must not be brought before the first suit has been legally determined, and it must be averred that the former suit terminated in the present plaintiff's favor, and a legal conclusion of the suit must be shown; and if the suit be not proved to have been determined in the manner al-

SIXTH. — STATEMENT OF THE SECOND COUNT.

And whereas also the said defendant, further contriving and maliciously and wickedly intending as aforesaid, heretofore, to wit, on, etc., at, etc. (*venue*), aforesaid, falsely and maliciously, and without any reasonable or probable cause whatsoever, charged the said plaintiff with having committed a certain offense punishable by law, to wit, felony; and upon such last-mentioned charge he, the said defendant, then and there, to wit, on the same day and year last aforesaid, at, etc. (*venue*), falsely and maliciously caused and procured the said plaintiff to be arrested by his body, and to be imprisoned, and to be kept and detained in prison for a long space of time, to wit, for the space of ——, then next following, and at the expiration of

leged, it is a ground of nonsuit. 2 Chitty's Pleadings, 13th Am. ed., 603; Year Book, 2 R., 3, pl. 22; Dyer, 284; Yelv., 117; Gilb. Cases Law and Evid., 163; Com. Rep., 190; 1 Salk., 15; Dougl., 215; Willes, 250, n. *a*; 1 Esp. Rep., 79; 10 Mod., 209; Bac. Abr., Action on the Case, H.; Com. Dig., Action Case Conspiracy, C. 5; 2 T. R., 225, 232; 1 Saund., 228*b*, in notes, and 228, 229. But the omission is aided by verdict by the common law. 1 Saund., 228*b*, in notes, and 228, 229. See the reason. 1 Saund., 228*b*; 2 T. R., 228. It seems sufficient to say generally "that the said suit was ended and determined." See 3 Ld. Raym., 300. In Morg. Prec., 554–5, the declaration merely alleges "that the plaint was duly ended and determined." In Wetherden v. Embden, partially reported in 1 Campb., 295, the manner in which the suit ended was shown and objected to on motion in arrest of judgment, but the court held that it was averred that the suit was ended, the statement of the manner how was unnecessary, and the plaintiff had judgment, and it should seem a count averring generally a discontinuance is sufficient. 5 Price, 540. Several of the precedents in the old entries referred to 8 Wentw. Index, XIX, do not show the termination of the first suit. The plaintiff in the above action obtained a verdict, notwithstanding the case in 1 Esp. Rep., 79; 3 Esp. Rep., 34, and no objection was taken to this mode of determining the suit. See Tidd's Prac. Forms, Index, Judgment for Defendant, as to the manner of describing the different modes by which the suit terminated in favor of the present plaintiff. An averment that the suit is ended is evidenced by proof of the rule to discontinue upon paying of costs, and that the costs were taxed and paid (1 Stark., 48; 4 Campb., 213, S. C.); and the discontinuance (upon payment of the costs) has relation back to the term when the rule to discontinue was pronounced. 1 D. & R., 2; 1 B. & C., 640, S. C. In the common pleas it seems that the plaintiff must prove the discontinuance by an entry of it on the roll, *semble*. 1 M. & P.. 195. How far an agreement to determine a suit, afterwards made a rule of court, is sufficient, see 2 D. & R., 343. In an action for a false arrest upon a plaint in the sheriff's court of London, evidence was given that the usual course of that court, upon the abandonment of a suit by the plaintiff, was to make an entry in the minute book of "withdrawn," and it was held that proof of such entry in the minute book was sufficient to prove the determination of the suit. 14 East, 216.

which said time, he, the said plaintiff, was duly discharged and fully acquitted of the said last-mentioned offense, to wit, at, etc. (*venue*), aforesaid.

SEVENTH.— STATEMENT OF THE CLAIM FOR DAMAGES.

By means of which said several premises, he, the said plaintiff, hath been and is greatly injured in his said credit and reputation, and brought into public scandal, infamy and disgrace with and amongst all his neighbors, and other good and worthy subjects of this kingdom, and divers of those neighbors and subjects, to whom his innocence in the premises was unknown, have, on occasion of the premises, suspected and believed, and still do suspect and believe, that the said plaintiff hath been and is guilty of [felony]; and also the said plaintiff hath, by means of the premises, suffered great anxiety and pain of body and mind, and hath been forced and obliged to lay out and expend, and hath laid out and expended, divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £——, in and about the procuring his discharge from the said imprisonment, and defending of himself in the premises, and the manifestation of his innocence in that behalf, and hath been greatly hindered and prevented, by reason of the premises, from following and transacting his lawful and necessary affairs and business for a long space of time, to wit, for the space of ——, and also, by reason and by means of the said premises, the said plaintiff hath been, and is, otherwise greatly injured in his credit and circumstances, to wit, at, etc. (venue aforesaid).

EIGHTH.— THE AD DAMNUM.

To the damage of the plaintiff of ——[1] dollars.

NINTH.— THE CONCLUSION.

And therefore he brings suit, etc. By —— ——, his Attorney.

§ 9. Complaint for abuse of legal process.— An action to recover the damages sustained by reason of the abuse of legal process differs materially from actions for malicious prosecution and false imprisonment, both in matter of pleading and proof. The action will lie against one who wrongfully and wilfully causes an execution to issue on a judgment which he knows to be paid and satisfied, under which the property of the defendant in the execution is taken and sold, and it is not necessary that actual malice should be alleged in terms or explicitly proved;[2] and the action may be maintained against

[1] In regard to the amount of damages to be assesed, it is only necessary to lay them high enough to cover the injury complained of, for no recovery can be had beyond the amount claimed in the declaration. If the jury assess an amount beyond that sum, the excess should be remitted and judgment rendered only for the residue. Sedgwick on Damages, 5th ed., 681.

[2] Baylies' Code Pleading and

any one who wrongfully sues, arrests and imprisons a party for a wrongful or fictitious claim, without alleging or proving a want of probable cause.[1] The action lies against a landlord who, without right, turns his tenant off the farm and seizes his personal property, and, for the purpose of compelling him to abandon his rights, has caused his arrest on a false and fictitious criminal charge. And the tenant may maintain an action to recover damages without alleging or proving the termination of the criminal proceeding.[2]

§ 10. A precedent.—

(1) STATEMENT OF THE CASE.

The defendant, R. J., pretended to have a claim of $50 against Antcliff, the plaintiff, an old man over sixty years of age, and a farmer, living in Washtenaw county, which adjoins the township of N., in Jackson county, where R. J., a laborer, resided. In November, 1886, J. put his claim in the hands of C. for collection. C. understood what the claim was for, and was to have all he collected over $40. Without attempting to collect it without suit, C. went to J. M. G., a justice of the peace of Jackson county, and took out a summons in favor of J. against Antcliff, returnable January 11, 1887, and commanded the constable to summon Antcliff, "if he shall be found in your county, to answer to J.," etc. This summons was directed to any constable of Jackson county, and was handed by C. to one B., a deputy-sheriff of Washtenaw county, to serve, claiming that there was a new statute under which B. could make service in Washtenaw county. The deputy returned the summons as personally served upon Antcliff in the township of M., Washtenaw county, January 4, 1887. Between the day of this service and the return day of the summons, Antcliff received the following letter, unsigned: "Brooklyn, Feb. 3, 1887. Mr. Antcliff: Don't let Mr. C. or any one else fool you into coming into Jackson county. All they serve those kind of papers on you for is to get you into this county; then they will serve another kind of summons on you. Look out for them." In consequence of this communication Antcliff did not appear. On the return day J. and C. were on hand. No one else was present except the justice. His docket shows that plaintiff filed an affidavit on that day, stating, in substance, that he was a resident of the township of N., in Jackson county; that the defendant was a resident of M., Washtenaw county; that the suit was commenced for the recovery of the value of personal services rendered by him for Antcliff, at the latter's request; and that Jackson and Washtenaw are adjoining counties. This affidavit was prepared by C., who also filed a declaration upon some of the common counts. No bill of particulars was filed. The justice's docket shows that: "After waiting

Forms, 157 (1891); Brown v. Feeter, 7 Wend., 301 (1831).

[1] Hazard v. Harding, 63 How. (N. Y.), 326 (1882).

[2] Babinger v. Sweet, 1 Abb. N. C., 263; 6 Hun, 478; Baylies' Code Pleading and Forms, 157 (1891).

one hour, and defendant not appearing, I proceeded to hear and try the cause. Plaintiff, being sworn in his own behalf, testified that he was a resident of the township of N., Jackson county; that he was acquainted with Antcliff, the defendant, who resided in M., Washtenaw county; that in the year 1886 he performed personal labor for the defendant at his request, which said personal labor was worth the sum of $300; that the same was now due and unpaid. There being no witnesses on the part of the defense, and no one appearing for the same, and having waited one hour, therefore, after hearing the testimony of the plaintiff, and in pursuance of a statute approved May 31, 1879, entitled," etc., . . . "I hereby render judgment forthwith in favor of the plaintiff, R. J., and against the defendant, Antcliff, for the sum of three hundred dollars ($300) damages, and two dollars and sixty cents costs of suit. J. M. G., Justice of the Peace."

Five days after the rendition of this judgment, C. procured a transcript of the judgment and filed it with the clerk of the circuit court of Jackson on the same day. Execution was issued the same day on this transcript and taken by C. to Ann Arbor, and put into the hands of William Walsh, sheriff of Washtenaw county. It was there agreed between C. and the sheriff that the latter should meet him in the village of M. on the 27th day of January, 1887, and they two then to go together to the farm of Antcliff to collect the execution. On the last-named day C. and one C. E. P. met the sheriff at M., and from there started to the farm of Antcliff. Upon the way there they met Antcliff and his wife on their way to town. They informed Antcliff of the execution. He denied owing J. a cent, but, upon threats of a levy, he and his wife went back to his farm with them. While there C. and P. threatened to have the sheriff levy on the farm if the judgment was not paid, as there was not, as they said, personal property enough to pay it. Antcliff, before going back to the farm, wanted to go on to the village and see an attorney, but he was told by all three of them that if he did they should go on to his farm and levy upon it. Finally, under the threats of C. and P. to drive off his stock and to also levy on his farm, and also influenced by his scared wife, he settled the matter up by paying them $240 in cash. Antcliff v. June et al., 81 Mich., 477; 45 N. W. Rep., 1019 (1890).

(2) The Declaration.

State of Michigan, Circuit Court for the County of Jackson, of the 3d day of February, A. D. 1888. Jackson County — ss.: John Antcliff, plaintiff in this suit, by H. & F., his attorneys, complains of R. J. and J. R. C., defendants in this suit, being in custody, etc., of a plea of trespass on the case, for that whereas the said defendants heretofore, to wit, on the 3d day of January, A. D. 1887, at the township of Columbia, in said county, went and appeared before one J. M. G., then and there being one of the justices of the peace in and for said county of Jackson, and then and there, before the said justice, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said justice to issue and grant him certain summons against the said plaintiff, and in favor of the said R. J., as plaintiff therein, as follows, to wit: "State of Michigan, County of Jackson — ss.: To any constable of said county, greet-

ing: In the name of the people of the state of Michigan, you are hereby commanded to summon John Antcliff, if he shall be found in your county, to appear before me, one of the justices of the peace in and for said county, at my office in Columbia, on the 11th of January, A. D. 1887, at 10 o'clock in the forenoon, then and there to answer to R. J., in a plea of trespass on the case upon promises, to his damage $300 or under. Hereof fail not, but of this writ, with your doings, make return according to law. Given under my hand at Columbia, Jackson county, this 3d day of January, A. D. 1887. J. G., Justice of the Peace." And the said defendants afterwards, to wit, on the same day of the date of said summons, delivered the same to one M. B., who claimed to be a deputy-sheriff of the county of Washtenaw, and then and there, without any reasonable or probable cause whatever, caused and procured the said pretended deputy-sheriff of the county of Washtenaw to serve the said summons, so issued as aforesaid by said justice of the peace, upon the plaintiff in the said county of Washtenaw, he, the said plaintiff, being then and there a resident of said county of Washtenaw, and not of the county of Jackson, and the said M. B., as such deputy-sheriff, as aforesaid, returned the said summons to the said justice on or before the return-day thereof, with a return of personal service thereon indorsed by him, and filed the same with the said justice of the peace, and afterwards, to wit, on the 11th day of January, 1887, the said defendants, without any reasonable or probable cause whatsoever, caused and procured the said justice of the peace then and there to give and enter in his docket a judgment in favor of said R. J., and against this plaintiff, for the sum of $300 damages and $2.60 costs of suit, they, the said R. J., and J. R. C., knowing that the said justice had no jurisdiction of the said pretended cause so pending before him; and thereupon the said defendants afterwards, to wit, on the 17th day of January, A. D. 1887, falsely and maliciously, and without any reasonable or probable cause whatsoever, went and appeared before said justice of the peace, and then and there made and filed with the said justice an affidavit of the said J. R. C., for the purpose of obtaining a transcript of the said pretended judgment to be filed in the office of the clerk of the circuit court for the county of Jackson, and then and there obtained such transcript of said justice, in due form, duly certified by said justice; and afterwards, to wit, on the same day last mentioned, they, the said defendants, caused and procured the said transcript so obtained as aforesaid to be filed in the office of the circuit court for the county of Jackson, and the same was by the said clerk then and there duly entered and docketed as a judgment of the circuit court for the county of Jackson; and, at the same time of entering and docketing said transcript judgment, they, the said defendants, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said clerk of the circuit court for the county of Jackson to issue an execution upon said pretended judgment, in due form, dated the 17th day of January, and directed to the sheriff of the county of Washtenaw; and afterwards, on the same day last aforesaid, went and delivered the said execution to W. W., then sheriff of the said county of Washtenaw, and afterwards, to wit, on the 27th day of January, A. D. 1887, the said defendants caused and procured the said sheriff of Washtenaw county to go and enter upon the

premises of the plaintiff, and then and there demand from said plaintiff payment of the said execution, and then and there threatened the said plaintiff that if he did not immediately pay the same, then the said sheriff should and would at once levy upon and seize all of the personal property of said plaintiff upon said execution, and sell the same to make the amount thereof; and the said defendant J. R. C. was then and there present with the said sheriff, aiding as the attorney and agent of the defendant R. J., and assisting and directing the said sheriff, and then and there stated to the plaintiff that said execution was good and valid, and he would have to pay the same, and then and there, by means of said representations last mentioned, and the threats aforesaid, so made by said sheriff to seize and sell the property of said plaintiff, they, the said defendants, falsely and maliciously, and without any reasonable or probable cause whatsoever, procured and forced the said plaintiff to pay to the said defendants, against his will, a large sum of money, to wit, the sum of $240, as satisfaction of said pretended execution and the pretended judgment upon which the same was issued, and the plaintiff did then and there pay the same to the said W. W., sheriff as aforesaid, and the said defendant J. R. C., attorney for said defendant R. J., then and there received the same in full satisfaction aforesaid.

And whereas, also, the said defendants, without having any reasonable or probable cause for so doing, but contriving and intending to harm, oppress and injure the said plaintiff, falsely and maliciously went and swore out a summons in favor of said defendant R. J., and against the plaintiff, before J. M. G., a justice of the peace of the township of Columbia, in said county of Jackson, on the 3d day of January, A. D. 1887, and returnable before said justice on the 11th day of said January, 1887, at 10 o'clock in the forenoon of that day, they, the said defendants, then and there well knowing that the said pretended plaintiff in said suit had no just cause of action whatever against the said plaintiff of any kind, and that said plaintiff resided in the county of Washtenaw, and not in said county of Jackson, and they, the defendants, then and there, falsely and maliciously intending to so use the said summons, so issued as aforesaid, as to obtain an illegal and fraudulent judgment against the said plaintiff for a large amount of money, to wit, the sum of $300, and to obtain an execution, and to use the same for the purpose of extorting the said amount of money from said plaintiff; and such proceedings were thereupon had that afterwards, to wit, on the said 11th day of January, A. D. 1887, the said defendants appeared before the said justice at his office in said township of Columbia, at the hour mentioned in the said summons for the return thereof, and then and there caused and procured the said justice to enter and docket a judgment in favor of said R. J., and against the plaintiff, for the sum of $300 damages and $2.60 costs of suit, which said pretended judgment was illegal, fraudulent and void, as said defendants well knew; and the said defendants afterwards, to wit, on the 17th day of January, 1887, falsely and maliciously caused and procured the said justice to make and issue a transcript of said pretended judgment in due form, and duly certified by said justice, and afterwards, to wit, on the same day last mentioned, filed the said transcript in the office of the clerk of the circuit court for the county of Jackson, and then and there caused the said clerk to

enter and docket the same as a judgment of the circuit court for the county of Jackson; and, at the same time of entering and docketing said transcript judgment, the said defendants caused and procured the said clerk of the circuit court to issue an execution upon said pretended judgment in due form, and directed to the sheriff of said county of Washtenaw, and on the same day delivered the said execution to W. W., sheriff of said Washtenaw county, and afterwards, to wit, on the 27th day of January, 1887, the said defendants caused and procured the said W. W., sheriff as aforesaid, to proceed to collect the said execution from the plaintiff, and force him, the said plaintiff, to pay the same; and the said plaintiff, then and there, against his will, and protesting that he was not liable to pay the same, or any part thereof, was forced and compelled by said sheriff, in order to protect his property from levy and sale, to pay the same to him, and did pay to him, for said defendants, the sum of $210 in money,—all which said several grievances in this court mentioned were done and committed by said defendants against the plaintiff, falsely and maliciously, and without any reasonable or probable cause whatsoever. By reason of which said several premises the said plaintiff has been and is greatly injured and put to large expense and trouble and to great anxiety, and has been and is otherwise greatly injured in his credit and circumstances, to the damage of the plaintiff of $5,000, and therefore he brings this suit. H. & F., plaintiff's attorneys. A. B., of counsel.[1]

[1] In discussing the sufficiency of this declaration Morse, J., said: For every malicious wrong there is certainly in this day and age a remedy; and, under our liberal system of pleading in this state, a plain and clear statement of the facts constituting the wrong is sufficient, and it is but little matter, in actions of trespass on the case, what the action is named or called. The declaration plainly shows a malicious and actionable wrong, and every averment was supported by cogent proof. It may be that the prosecution of the suit to judgment in a justice court by itself alone did not touch the person or property of the plaintiff, but the writer of this opinion, in Brand v. Hinchman, 68 Mich., 596–598; 36 N. W. Rep., 664, held that it was not necessary, in an action for the malicious prosecution of a civil suit, that the person should be molested or property seized, if it appeared that the suit was malicious, and without probable cause, and the party had been injured or damaged thereby. I am still of the opinion there expressed, and have been fortified in my position by the facts of this case, and the decisions of other courts. McPherson v. Runyon, 41 Minn., 524; 43 N. W. Rep., 392; Pope v. Pollock, 46 Ohio, 367; 21 N. E. Rep., 356; Allen v. Codman, 139 Mass., 136. See, also, 21 Amer. Law Reg., 281, 353.

It is true that the general rule is that, to support an action for malicious prosecution, the plaintiff must establish three things: *First*, the fact of the alleged prosecution, and that it has come to a legal termination in the plaintiff's favor; *second*, that the defendant had not probable cause; *third*, that he acted from malicious motives. Hamilton v. Smith, 39 Mich., 222, 225. In the case before us, the defendants had not probable cause against Antcliff. It was conclusively shown that J.

§ 11. Special damages.—The rule of law is that special damages must be particularly specified in the statement of the claim, declaration or complaint, or the plaintiff will not be permitted to give evidence of such damages at the trial.

The law stated by Greenleaf: Where the damages, though the natural consequences of the act complained of, are not the necessary result of it; they are termed special damages, which the law does not imply, and therefore, in order to prevent a surprise upon the defendant, they must be particularly specified in the declaration.[1]

§ 12. The law stated by Chitty.—Whenever the damages sustained have not necessarily accrued from the act com-

never had any claim against Antcliff, except one for $50 for getting him a wife, and never pretended to have any other; and from C.'s own testimony it is apparent that he knew this. He testifies that J. told him of some other items of account, but he cannot remember any except of the $50. The judgment was taken for $300. Witnesses swore that J. told them he did this because C. told him he might just as well get a judgment for $300 as for $50. C. does not deny this in his testimony. The taking and collecting of a judgment for $300, under these circumstances, shows malice.

But it is not necessary to determine whether the first count was a good one, in an action of malicious prosecution. It sets out fully a conspiracy between the defendants, J. and C., to defraud the plaintiff, and that he was defrauded out of the money paid upon this void judgment. It therefore clearly sets out an actionable wrong,—one that can be recovered for in an action upon the case,—and it is immaterial what it is called.

If process is also wilfully made use of for a purpose not justified by the law, this is an abuse for which an action will lie. I can conceive of no case of any greater abuse of process than this. There was nothing to base it upon in the beginning, and it was procured, in every stage of the proceeding thereafter, by fraud and perjury, which ought to be punished by a term in state prison to both of the defendants. It was used for no lawful or legitimate purpose. If "entering up a judgment and suing out execution after the demand is satisfied" is an abuse of process (Barnett v. Reed, 51 Pa. St., 190), then, certainly, obtaining a judgment by fraud and perjury, when there was never any demand in favor of J. against Antcliff, and suing out an execution upon such judgment, when the defendants knew that it was false and fraudulent, and extorting money under such execution, is also an abuse of process. Antcliff v. June (Mich.), 45 N. W. Rep., 1019 (1890).

[1] 2 Greenl. Ev., § 254; Horne v. Sullivan, 83 Ill., 30 (1876); Baldwin v. W. R. Corporation, 4 Gray, 333 (1855); Squire v. Goold, 14 Wend., 159 (1835); Donnell v. Jones, 13 Ala., 490 (1848); Adams v. Gardner, 78 Ill., 568 (1875); 1 Chitty's Pleading (4th ed.), 328, 346, 347; Baker v. Green, 4 Bing., 317; Pindar v. Wadworth, 2 East, 154.

plained of, and consequently are not implied by law, then, in order to prevent the surprise of the defendant which might otherwise ensue on the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Thus, in an action of trespass and false imprisonment, when the plaintiff offered to give in evidence that during his imprisonment he was stinted in his allowance of food, he was not permitted to do so because the fact was not, as it should have been, stated in his declaration.[1]

ILLUSTRATIONS OF THE RULE.—

(1) *Special damages must be specially pleaded — Loss of boarders.*

Horne and Sullivan occupied adjoining houses in Chicago separated by a narrow space. Horne erected on his ground a high-board fence to protect his premises from annoyances which he had suffered from the inmates of Sullivan's house casting offensive substances from the windows upon his premises. Repeated attempts were made by the inmates of Sullivan's house, in the night-time, to tear down the fence, and it was partially destroyed. This conduct formed the subject of a complaint under which Sullivan was arrested. He was discharged and the complaint dismissed. Nearly two years afterwards he brought an action for malicious prosecution against Horne. In his declaration the statement of damages was in the usual form. On the trial of the case the court admitted evidence of special damages, loss of income, claimed as arising from plaintiff's boarders leaving his house after his arrest. The judgment being for the plaintiff Horne appealed.

Sheldon, C. J.: "It was error to permit evidence of special damages, claimed as arising from plaintiff's boarders leaving after the arrest, and the loss of income on this account. There is no particular allegation in respect thereto in the declaration. The rule is, that special damages, such as these, must be particularly specified in the declaration or the plaintiff will not be permitted to give evidence of them at the trial." Horne v. Sullivan, 83 Ill., 30 (1876).

(2) *Bad condition of prison and poor food — Special damages — Must be specially pleaded.*

Weston sued Miles for false imprisonment. He had been found loitering around Miles' house in the night, and Miles called a policeman, and he was arrested without a warrant, taken to the station, and then tried, convicted and fined. In his declaration the general statement of damages was in the usual form. No special damages were stated. On the trial the court, under objections, permitted the plaintiff to give evidence of the abuses to which he was subject, by giving a description of the particular place

[1] 1 Chitty's Pleadings, 397.

where he was confined, its bad and unfit character, and the fact that he was not furnished with food; and while plaintiff was detailing these abuses the court said to him, "You can state in that connection that you were not allowed to get witnesses." Under this suggestion, which was excepted to by defendant's counsel, the plaintiff said: "I was not allowed to get witnesses. I was fined $25."

The judgment being for the plaintiff defendant appealed. In the opinion of the supreme court reversing the judgment, Justice McAllister on this point said: "That he was ill-treated by being put by the officer in such place as described, denied food or the privilege of getting his witnesses, subjected to oppressive conduct on the part of the magistrate, and fined, were none of them damages which necessarily accrued from the act of the defendant, nor were they damages implied by law; and to prevent surprise on the defendant, such of them as defendant could be held responsible for should have been stated in the declaration." Miles v. Weston, 60 Ill., 361 (1871).

(3) *Special damages — Insufficient statement in declaration.*

During the months of June and July, 1883, one L. C. Hartman was a justice of the peace of Dodge township, Ford county, Kansas; Hamilton county was attached to Ford county for judicial purposes; Levi T. Rice was at Coolidge, in Hamilton county, in the employment of the railroad company. On June 29, 1883, the company, through its agents, procured the justice to go to Coolidge, a distance of one hundred and fifteen miles from his office, and there to entertain a complaint made by one of the company's agents against Rice and others, charging them with grand larceny, to administer the necessary oath, and then and there issue his warrant for the arrest of the persons so charged. Rice, along with the others, was arrested and taken to Dodge City, and there imprisoned in the county jail until July 2, 1883, when he was discharged. Rice, upon his discharge, brought an action against the railroad company for a malicious prosecution. He recovered, and the company removed the case to the supreme court on a writ of error.

Valentine, J.: It is claimed that the trial court erred in admitting evidence of special damages not specifically alleged in the petition. The court permitted Rice, the plaintiff below, as a witness, to testify that shortly after his arrest and imprisonment he was taken down with a fever, and by reason thereof was obliged to give up work entirely. This evidence was permitted over the objections and exceptions of the defendant below, and under the claim, on the part of the plaintiff below, that such sickness was produced by the imprisonment. There is no allegation in the petition, or elsewhere, that the arrest or imprisonment caused the plaintiff to become sick, nor any allegation of facts from which such sickness would necessarily follow as a consequence. The plaintiff, in his petition, simply claims damages for injury to his reputation as an honorable citizen, and for having suffered remorse and humiliation, by reason of the prosecution, and for damage to his reputation as a business man. Under this petition evidence could not be given of any such consequential damage as sickness, for no notice was anywhere given that such evidence would be offered. Upon

this subject the court instructed the jury, among other things, as follows: "The plaintiff should be made whole for his loss of time, of health, his anxiety and suffering," etc.

Mr. Sutherland, in his work on Damages, uses the following language: "Under a general allegation of damages the plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of; for these damages, the law implies, will proceed from it. These are called general, as contradistinguished from special, damages, which are the natural, but not the necessary, consequence." "Special damages are required to be stated in the declaration, for notice to the defendant, and to prevent surprise at the trial." 1 Suth. Dam., 763.

In the case of Roberts v. Graham, 6 Wall., 579, the following language is used: "Special damage, whether resulting from tort or breach of contract, must be particularly averred in order that the defendant may be notified of the charge and come prepared to meet it. *Special*, as contradistinguished from *general*, damage, is that which is the natural, but not the necessary, consequence of the act complained of."

In 1 Chit. Pl. (16th Amer. ed. from 7th Eng. ed.), 411, the following language is used: "Damages are either general or special. *General* damages are such as the law *implies* or presumes to have accrued from the wrong complained of. *Special* damages are such as *really* took place and are *not implied* by law, and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arise from an act indifferent, and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing. . . . And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Thus, in an action of trespass and false imprisonment, where the plaintiff offered to give in evidence that during his imprisonment he was stinted in his allowance of food, he was not permitted to do so, because the fact was not, as it should have been, stated in his declaration. *And in a similar action it was held that the plaintiff could not give evidence of his health being injured, unless specially stated.*"

We think the court below erred in the admission of this evidence. No person could have anticipated from the facts alleged in the plaintiff's petition, including the arrest and imprisonment, that any such sickness would have followed. Such sickness would not be a necessary result from such facts, nor would the law imply any such result. If it was the desire of the plaintiff to recover enhanced damages because of his sickness he should have alleged the sickness in his petition, or at least he should have alleged facts from which it might be inferred, or from which the law would imply that sickness would necessarily follow. No such facts were alleged. This question was raised in the court below by objecting to the introduction of the evidence, by excepting to the ruling of the court permitting it to be

introduced, by exceptions taken to the instructions of the court to the jury, by motion for a new trial, and by excepting to the ruling of the court overruling the motion for a new trial. Judgment reversed. Atchison, T. & S. F. R. Co. v. Rice, 36 Kan., 593; 14 Pac. Rep., 228 (1887).

§ 13. Allegation of special damages.—

(1) STATEMENT OF FACTS.

In an action for maliciously suing out a writ of attachment without probable cause, the declaration averred that the plaintiff had shipped to Chicago four carloads of hogs of great value, to wit, of the value of $3,500, and which were lawfully in the possession of and the property of the plaintiff, in which all his capital for the conducting of his said business had been invested; that the defendant, well knowing the premises, but contriving and wrongfully, maliciously and injuriously intending to injure the plaintiff, and to deprive him of the profits he otherwise would have derived from conducting his said business, and from the sale of his said produce, and to break up his said business and employment and cause him to be greatly aggrieved and injured in the premises in that behalf, wrongfully, unjustly and maliciously and without probable cause therefor, caused and procured to be issued out of the superior court of Chicago a writ of attachment, etc., and wrongfully, injuriously and maliciously caused the same to be levied on the property of the plaintiff, to wit, two hundred and forty-nine hogs, of great value, to wit, of the value of $3,500, and caused and procured said hogs, by virtue of said writ, to be kept and detained in custody of the sheriff for a long space of time, etc.

(2) STATEMENT OF THE CLAIM FOR SPECIAL DAMAGES.

And the said plaintiff, in order to get possession of said goods, or the proceeds of the same, was forced and obliged to pay out a large amount of money, to wit, the sum of $1,200 in attorney's fees and costs, and charges and other expenses in the litigation which said defendants forced upon said plaintiff in the said court and in the supreme court of the state of Illinois, and the said plaintiff has been and is by means of the premises greatly injured and damnified in his credit and circumstances. . . . And plaintiff says that by means of the premises aforesaid, and the wrongful and injurious acts of the said defendants toward him, his business aforementioned was broken up and destroyed, and the profits that would have otherwise accrued to said plaintiff from the prosecution of and conducting of said business were wholly lost, and the profits that would otherwise have accrued to said plaintiff from the sale of said property of plaintiff, so seized and attached as aforesaid, was wholly lost to plaintiff, and the said property so attached as aforesaid by means of the premises was greatly depreciated in value, and in order that the same might not be rendered totally valueless, the plaintiff was forced and obliged to consent to a sale of said property by the sheriff at a rate and price greatly below the real value of said hogs, and that such sale was attended with great expense, which was taken from the proceeds of such sale and the balance of the proceeds de-

tained and kept in possession by the sheriff of said county. And the plaintiff says that, by reason of the premises aforesaid, he lost a large amount of money, to wit, the sum of $1,000, on the sale of said hogs. And he further says that, by reason of the wrongful and injurious acts of the defendants aforesaid, he was unable to meet his engagements or conduct his business, whereby he was greatly injured in his credit and circumstances and reputation. And, also, that, by reason of such injurious acts by said defendants aforesaid, his business was broken up and his means of obtaining a livelihood taken away. And by means of the false and malicious averments in the said affidavit of said Lawrence, and upon which said writ of attachment was founded, his business reputation and credit were greatly injured, to wit, at the county of Cook aforesaid, to the damage of said plaintiff of $6,000.[1]

§ 14. Defendant's pleas and answer in actions for malicious prosecution.— The answer or plea of not guilty, in an action for malicious prosecution, puts in issue the wrongful act, and it is very seldom necessary to plead any other plea. The gist of the action is the tort, and this is put in issue by this plea. It compels the plaintiff to prove every essential allegation in his declaration that goes to make up the liability of the defendant.[2]

FORM OF THE PLEA OF NOT GUILTY.

In the —— —— Court.

—— Term, 18—.

—— ——. }
ats. } Malicious prosecution.
—— ——. }

And the defendant, by —— ——, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, in manner and form as the plaintiff has thereof complained against him. And of this he puts himself upon the country, etc.[3]

§ 15. Plaintiff's pleadings in actions for false imprisonment.— The statement of the plaintiff's claim, or complaint as it is called in those jurisdictions in which the code practice prevails, is at the most a very simple pleading. It will be seen that it does not vary in any material part whether under the code or at the common law.

[1] Lawrence v. Hagerman, 56 Ill., 68 (1870).

[2] Puterbaugh's Common Law, 489; 1 Bing. N. C., 588; 3 Dowl. (S. C.), 619; 8 Jur., 986; 2 Greenl. Ev., sec. 231.

[3] Puterbaugh's Common Law, 489.

(1) A COMPLAINT FOR FALSE IMPRISONMENT.[1]

STATE OF ——
—— COUNTY. } ss.

In the —— Court,
To the —— Term, A. D. 18—.

A. B., the plaintiff in this suit, by —— ——, his attorney, complains of C. D., the defendant, of a plea of trespass; for that the defendant on, etc., at, etc., with force and arms, etc., then and there beat, bruised and ill-treated him, the plaintiff, and arrested him, the plaintiff, without any authority of law whatever, and then and there imprisoned him, and detained him in prison there without any reasonable or probable cause whatever, for a long space of time, to wit, for the space of —— hours then next following, contrary to the laws of the state of —— and the will of the plaintiff; whereby the plaintiff was greatly injured and bruised, and was also greatly injured in his circumstances and credit, to wit, at, etc., aforesaid; and other wrongs to the plaintiff then and there did, against the peace and dignity of the people of the state of ——; and to the damage of the plaintiff of —— dollars; and therefore he brings suit, etc.

[*Count for common assault.*[2]]

And also for that the defendant, on, etc., at, etc., with force and arms, etc., assaulted the plaintiff, and then and there beat, bruised, wounded and ill-treated him, and other wrongs to the plaintiff then and there did; against the peace and dignity of the people of the state of ——, and to the damage of the plaintiff of —— dollars; and therefore he brings suit, etc.

By —— ——, Attorney for Pl'ff.

(2) PETITION IN AN ACTION FOR FALSE IMPRISONMENT — A KANSAS FORM.[3]

—— ——, Plaintiff,
vs.
—— ——, Defendant.

Plaintiff states that the defendant on the —— day of ——, A. D. 18—, in said county, arrested and imprisoned the plaintiff, and kept him detained in prison for a long time, to wit, —— days, at the expiration of which time he forced the plaintiff, contrary to law, to the office of —— ——, a justice of the peace; which imprisonment was under the false charge that the plaintiff had committed the crime or offense of larceny, whereby plaintiff was greatly injured in mind and body, and lost —— days' time from his business, was injured in his credit and reputation, and was put to the expense of —— dollars in procuring his release from said imprisonment, to his damage —— dollars, for which he asks judgment.

—— ——,
Attorney for Plaintiff.

§ 18. Defendant's pleadings in actions for false imprisonment.— In trespass to the person the defendant can, under the plea of not guilty, give in evidence any matter which

[1] Puterbaugh's Common Law, 462 (1867); Outlaw v. Davis et al., 27 Ill., 467 (1861).

[2] Chitty's Pleadings, 13th Am. ed., 850 (1866); Puterbaugh's Common Law, 459 (1867).

[3] Green and Dassler, Practice, etc., 215 (1879).

directly controverts the fact of his having committed the acts complained of. The plea of not guilty, therefore, is proper in actions for false imprisonment if the defendant committed no imprisonment. But where the act complained of by the rules of the common law *prima facie* appears to be a trespass, and the allegations of the complaint cannot be denied, all matters of confession and avoidance, justification or excuse, or those by virtue of some warrant or authority, must, in general, be specially pleaded.[1]

§ 16. **Reasons for the rules.**— The foregoing rules are positive rules of law. The reason for their existence is to prevent surprise on the plaintiff at the trial by the defendant thus assigning various reasons and causes of imprisoning the plaintiff of which he had no notice, and which, consequently, he could not be prepared to meet at the trial on the plea of not guilty on fair and equal terms, with respect to the evidence and proof of facts.[2]

§ 17. **Pleas of justification — Son assault demesne — Moliter manus imposuit, etc.**— In trespass to persons, actions for false imprisonment, etc., such defenses as *son assault demesne;* moderate correction of a servant, etc.; *moliter manus imposuit* to preserve the peace, or a justification in defense of the possession of property; or by authority of law without process, as a private individual; or under civil process, either mesne or final, of superior or inferior courts, must, in the absence of statutory regulations, be specially pleaded.[3] For whoever assaults or imprisons another must justify by showing specially that the act was lawful.[4] A plea justifying an arrest, upon the ground that a felony had been committed, and that there are reasonable grounds to suspect and accuse the plaintiff, must distinctly state the specific reasons for suspecting the plaintiff.[5]

[1] 1 Chitty on Pleadings, 501; 1 Saund., 298; 1 Com. Dig., Pleader, E., 15, 16, 17; Stephens on Pleading (2d ed.), 377; 2 Roll. Abr., 682; Waters v. Silly, 4 Pick., 145 (1826); Gelston v. Hoyt, 13 John., 561 (1816); Rawson v. Morse, 4 Pick., 127 (1826).

[2] Coke on Littleton, 383*a*, 482*b*; 1 Chitty, Pleadings, 502.

[3] 1 Chitty, Pleadings, 501; Butterworth v. Soper, 13 Johns., 443 (1816); Callet v. Keith, 2 East, 260; Rowland v. Veale, Cowp., 18.

[4] 1 Chitty, Pleadings, 502; Herrick v. Manley, 1 Caines (N. Y.), 253 (1803); Hobart v. Haggett, 3 Fairf. (N. Y.), 67 (1835).

[5] 1 Chitty, Pleadings, 230, 501.

§ 18. Plea of justification — Opening and close.— In cases where the acts complained of cannot be disputed but can be justified, it is frequently advisable to plead the justification alone, without the general issue, for by so doing the defendant's counsel may be on the trial entitled to the opening and close.[1]

§ 19. Former recovery — Estoppel.— Where the defendant obtained a verdict, etc., in a former trial upon the same cause of action, either against the defendant or another person jointly engaged with him in the commission of the act complained of, the defendant's answer or pleas should be special by way of estoppel.[2]

§ 20. Pleading separately — Sometimes a question of policy.— In actions of trespass for false imprisonment it is a very familiar rule of law that all persons engaged in the commission of the act complained of are jointly liable to the person injured for the damages sustained, but they are not necessarily equally liable. They may, however, estop themselves from saying they are not equally responsible by joining in a single plea. Where all are in fact equally liable, they may with safety join in their pleas; but where they are not all equally liable, the proper thing to do will be to plead separately each his particular defense. And if the defendants are found guilty, the jury may assess damages against each one separately according to the degree of his culpability as shown by the evidence.

§ 21. Joint and several pleas — The general rule.— Where the defense is in its nature joint, the defendants may all join in the same plea, or they may each plead separately, without committing the fault of duplicity; one defendant may plead in abatement, another in bar, and a third may demur. In trespass against two or more for an assault or for false imprisonment they may jointly plead that the plaintiff assaulted them and that they in self-defense beat and imprisoned him, etc.; or they may sever in their pleas. So two defendants may jointly justify an arrest under a joint warrant, and one of several defendants may plead not guilty, and the other a justi-

[1] 1 Chitty's Pleadings, 501; Weidman v. Kohr, 13 Serg. & R., 17 (1825); Davis v. Mason, 4 Pick., 156 (1826).

[2] 1 Chitty's Pleadings, 501.

fication; for one defendant cannot, by any plea he may plead, oust the other of his defense.[1]

§ 22. Precedents of pleas — False imprisonment.—

(1) THE GENERAL ISSUE AT COMMON LAW — NOT GUILTY.

And the said —— ——, by —— ——, his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said supposed trespasses above laid to his charge, or any part thereof, in manner and form as the said —— —— has thereof complained against him. And of this he puts himself upon the country, etc.[2]

(2) PLEA OF THE STATUTE OF LIMITATIONS — AN AMERICAN COMMON-LAW FORM.

And for further plea in this behalf defendant says *actio non*, because he says that the cause of action in the said counts mentioned, and each and every one of them, did not, at any time within [*five*] years next before the commencement of this suit, accrue to the plaintiff; and this he, the defendant, is ready to verify; wherefore he prays judgment if the plaintiff, his action aforesaid, thereof against him, ought to have or maintain.

By —— ——, his Attorney.[3]

(3) THE MODERN ENGLISH FORM.

The alleged cause of action did not accrue within six years before this suit.

Or,

The defendant will rely upon the statute of limitations.[4]

§ 23. Pleas of justification.—

(1) UNDER FINAL PROCESS.

[*Actio non.*] Because the said defendant says that, before the time when, etc., to wit, at, etc., on, etc. [*time and place*], one —— ——, by the consideration and judgment of the court [*here state the style of the court*], recovered against the said plaintiff, as well a certain debt of, etc., as also, etc., for his damages [*here state the nature of the recovery and amount, etc.*], which he had sustained as well by occasion of the detaining of that debt as for his costs and charges by him about his suit in that behalf expended, whereof the said plaintiff was convicted, as by the record and proceedings thereof remaining in the said court appears, which said judgment remains in its full force, not reversed, annulled, set aside, paid off or satisfied; and the said [debt and] damages, or any part thereof, not being paid or satisfied to the said —— ——, and the said judgment being in full force, he, the said —— ——, on, etc., for obtaining the said debt and damages, sued out of the said court, etc., a certain writ of execution, under

[1] 1 Chitty's Pleadings, 566; 2 Vin. Ab., 76, pl. 14.

[2] 3 Chitty's Pleadings, 1061.

[3] Puterbaugh's Common Law (Ill.), 175 (1888).

[4] Odgers on L. & S., 575.

the seal of the said court, directed to the sheriff of, etc., by which said writ, etc. [*following the writ*], which said writ afterwards and before the return thereof, to wit, on, etc., at, etc., was delivered to the said defendant, then and there being sheriff of the said county, etc. [*or*, "coroner," *or*, "constable," *or other officer, as the case may be*], to be executed in due form of law; by virtue of which said writ the said sheriff of, etc., afterwards, and before the return of said writ, and also before the said time when, etc., to wit, on, etc., at, etc., gently laid his hands upon the said plaintiff in order to take and arrest, and did then and there accordingly arrest and take him, the said plaintiff, under and by virtue of the said writ of execution, and imprison him, and keep and detain him so there imprisoned and in custody under such execution and arrest, for the said time in said declaration mentioned, as he lawfully might do for the cause aforesaid, which is the said trespass in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against him, the said —— ——, and this, etc. Wherefore, etc., if, etc.[1]

(2) On Suspicion of Felony, Without Process.

[*Actio non.*] Because he says that, before and at the time when, etc., to wit, on, etc., aforesaid, at, etc. [*venue*], aforesaid [*here state the felony to have been committed and the causes of suspicion against the plaintiff, and which, in the plea in question, was stated as follows*]: "The said plaintiff was the servant of the said defendant, and was then and there living and residing in the house of him, the said defendant; and the said plaintiff, so being such servant as aforesaid, to wit, at, etc., divers goods and chattels, to wit, twenty pairs of silk stockings and one hundred yards of lace of great value, to wit, of the value of $1,000, the property of the said defendant, had been and were feloniously stolen, taken, and carried away from and out of the possession of the said defendant, and afterwards, to wit, on, etc., at, etc., divers, to wit, twenty bundles, containing the said goods and chattels so feloniously taken and carried away as aforesaid, were found and discovered hidden and concealed in a certain cellar of and belonging to the house of the said defendant, and to which the servants of the said defendant had access, and the said bundles containing the said goods and chattels being so found and discovered as aforesaid were immediately seized and taken away by the said plaintiff, the said plaintiff then and there averring that the same were the property of her, the said plaintiff, and the said plaintiff then and there endeavored to burn and make away with the said bundles, with their contents aforesaid, and did actually burn divers, to wit, ten of the said bundles so containing the said goods and chattels, the property of the said defendant as aforesaid;" wherefore the said defendant, having good and probable cause of suspicion, and vehemently suspecting the said plaintiff to have been guilty of or concerned in the stealing and carrying away of the said goods and chattels of the said defendant, and to have feloniously taken and carried away the same, did, at the same time when, etc., gently lay hands on the said plaintiff, and did give the said plaintiff in charge to one —— ——, then and there

[1] Yates' Pleadings, 151.

being a constable and peace officer of and for the county of Albany, and then and there requested the said constable and peace officer to take the said plaintiff into his custody, and safely keep her until she could be carried and conveyed, and to carry and convey her before some one of the justices assigned to keep the peace in the same county, and to hear and determine divers felonies and misdemeanors committed within the said city of Albany, to be examined by and before such justice, touching and concerning the premises, and to be further dealt with according to law; and on that occasion the said —— ——, so being such constable and peace officer as aforesaid, at the request of the said defendant, did then and there gently lay his hands upon the said plaintiff, take the said plaintiff into his custody, and as soon as conveniently could be, to wit, on the said —— day of ——, in the year aforesaid, the said plaintiff was carried and conveyed in custody to and before [*here name the justice with his title, etc.*], and also to hear and determine divers felonies and misdemeanors committed within the said city, to be examined by and before him touching and concerning the premises, and to be further dealt with according to law; and the said plaintiff was then and there detained by order of the said justice, until and upon the —— day of ——, in the year aforesaid, when she, the said plaintiff, was examined by the said justice touching and concerning the premises, and the said plaintiff was afterwards discharged out of custody by the said justice, and by means of the said several premises aforesaid the said plaintiff was imprisoned, and kept and detained in prison, for the said several spaces of time in the said declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the cause aforesaid, which are the supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against the said defendant; and this he is ready to verify. Wherefore, etc., if, etc.[1]

(3) Under Mesne Process.

[*Actio non.*] Because he says that before the said time, when, etc., in the said complaint mentioned, to wit, on, etc., at, etc., a certain writ [*or*, warrant] called [*here the name of the process*] was issued out of the court [*here the style or name of the court, or*, was issued by, *naming the officer*], whereby [*recite the process*], and which said writ [*or*, warrant] was delivered to the said defendant, who was then and there [and yet is] sheriff [*or*, coroner; *or*, constable, etc.], to be executed according to law, by virtue of which said writ [*or*, warrant], [*then as* (1) *until the words* which is the said

[1] Yates' Pleadings, 152. Chitty says: "The plea justifying the apprehension of plaintiff on suspicion of felony must show the cause of suspicion. 4 Taunt., 34; Holt, C. N. P., 478. As to the causes for such suspicion, see Burn, J., title "Arrest." The question of a probable cause is a mixed proposition of law and fact. 5 Bing., 554, and cases there cited. To justify an arrest by a private individual without warrant, on suspicion, it is absolutely necessary that a *felony* shall have been actually committed. 6 B. & C., 637. And so in the case of a constable who, of his own head, takes a party into custody on suspicion. 3 Camp., 420." 3 Chitty's Pleadings, 13th Am. ed., 1081.

trespass, *and then as follows, if an assault and battery and wounding is charged*], and because at the said time, when, etc., in the said —— count mentioned, the said plaintiff having been so arrested as aforesaid, it was necessary and expedient in order to keep him in safe custody, under and by virtue of the said writ [*or*, warrant], and to prevent him from escaping out of such custody, that the said plaintiff should be taken by and in the custody of the said —— ——, out of the said messuage or dwelling-house, in the said first count mentioned, the same not being a place where the said plaintiff could be kept in safe custody by the said —— ——, in pursuance of the said writ [*or*, warrant] to some place in the said bailiwick, where he might be kept in the safe custody of the said —— ——, under and by virtue of the said writ [*or*, warrant], and because the said plaintiff, being then and there requested by the said —— ——, peaceably and quietly to go out of the said messuage or dwelling-house with the said —— ——, for the purpose aforesaid, would not peaceably or quietly go with, nor could otherwise be taken by, the said —— ——, from and out of the said messuage or dwelling-house to such place, for the purpose of being kept in safe custody as aforesaid, the said —— ——, as such sheriff [*or*, coroner; *or*, constable], as aforesaid, and the said —— ——, as his servant, and by his command, before the time appointed for the return of the said writ, to wit, at the said time when, etc., in the said first count mentioned, within the bailiwick of the said sheriff, were forced and obliged to, and did then and there necessarily and unavoidably, in order to keep the said plaintiff in safe custody under and by virtue of the said writ and warrant, and to prevent him from escaping out of the custody of the said —— ——, so being such sheriff as aforesaid, with a little force and violence push, force and thrust the said plaintiff from and out of the said messuage or dwelling-house in the said first count mentioned, into the said street there; and because the said plaintiff, at the said times when, etc., in the said first and second counts mentioned, being down on the ground in the said street, wholly refused peaceably or quietly to go with, nor could be otherwise taken by, the said —— ——, to a place wherein he might be kept in safe custody, under and by virtue of the said writ [*or*, warrant], and being so in custody as aforesaid, attempted to escape from and out of the same custody, the said defendants, for the purpose of taking him to some place of safe custody as aforesaid, and to prevent him from escaping out of the custody of the said —— ——, were forced and obliged to pull, haul and drag the said plaintiff upon his back through the mud and dirt, in and along the said street there, for the distance and length of way in the said first count mentioned, and in so doing unavoidably a little hurt, bruised and wounded the said plaintiff, and a little rent, tore, damaged and spoiled the said clothes and wearing apparel of the said plaintiff in the said second count mentioned, the said defendants doing as little damage to the said plaintiff, etc.[1]

[1] Yates' Pleadings, 153; 3 Chitty's Pleadings, 18th Am. ed., 1081. Chitty says: "If the sheriff or the officer to whom mesne process is directed justify imprisonment by force of such process, he must show the writ to be returned, but the bailiff who has a warrant from the sheriff, or any per-

§ 24. Other pleas and answers.—

(1) Molliter Manus to Preserve the Peace.

[*Actio non.*] Because he says that the said —— —— and one —— —— at the said time, when, etc., at, etc., aforesaid, were fighting together, and striving with force and arms to beat and wound each other, against the peace, whereupon the said —— ——, being then and there present, for the preservation of the peace, and that the said —— —— and —— —— might do no hurt to each other, and in order to separate and part them, then and there gently laid his hands upon the said —— —— as he lawfully might for the cause aforesaid, which are the said assaulting, beating and ill-treating the said —— —— in the said declaration mentioned, and whereof he, the said —— ——, hath above thereof complained against him, the said —— ——. And this he is ready to verify. Wherefore, etc.[1]

(2) Molliter Manus Imposuit[2] — The Plaintiff Made an Assault on a Third Person.

[*Actio non.*] Because he says that the said —— ——, just before the said time, when, etc., in the complaint mentioned, to wit, on the day and year mentioned, with force and arms, etc., had made an assault upon one —— ——, and was then and there, and at the said time, when, etc., beating and ill-treating the said —— —— in breach of the peace; wherefore the said —— —— at the said time, when, etc., to preserve the peace and to part the said —— —— from, and to prevent him from further beating and ill-treating the said —— ——, gently laid his hands upon the said —— —— as he lawfully might for the cause aforesaid, which are the same assaulting, beating and ill-treating the said —— —— in the said complaint mentioned, and whereof the said —— —— hath above thereof complained against him, the said —— ——. And this he is ready to verify. Wherefore, etc.[3]

(3) Correction of an Apprentice for Disobedience.

[*Actio non.*] Because he says that before and at the said time, when, etc., in the said complaint mentioned, to wit, at, etc., aforesaid, the said —— —— was the apprentice of the said —— —— in his trade and business of a ——, and then and there behaved and conducted himself saucily and contumaciously towards the said —— ——, and then and there refused to obey his lawful commands relating to his duty as such apprentice as aforesaid, whereupon he, the said —— ——, then and there moderately cor-

son who acts in his aid, need not. 1 Salk., 409; 12 Mod., 396; Com. Dig. Pleader, 3 M."

[1] 3 Chitty's Pleadings, 13th Am. ed., 1071 (1866).

[2] *Molliter manus imposuit.* In actions for trespass to the person the defendant may justify by pleading that he used no more force than was necessary, etc. That is, he, for this purpose, gently laid his hands upon him. The lawyers in old times when the pleadings were in Latin expressed this idea by saying *molliter manus imposuit.* Bouvier's Law Dic., 181.

[3] 3 Chitty's Pleadings, 13th Am. ed., 1071 (1866).

rected him, the said —— ——, for his said misbehavior, which are the said assaulting, beating and ill-treating the said —— —— in the said complaint mentioned. And this he is ready to verify, etc.[1]

(4) SATISFACTION.

[*Actio non.*] Because he says that after the committing of the said trespasses, and before the commencement of this suit, to wit, on, etc., at, etc., he, the said —— ——, paid to the plaintiff the sum of —— dollars in full satisfaction and discharge of the said trespasses; and which sum of —— dollars the plaintiff then and there accepted and received from the said —— —— in full satisfaction and discharge of the said trespasses; and this the defendant is ready to verify. Wherefore, etc., if, etc.[2]

(5) SATISFACTION BY ONE JOINT TRESPASSER.

[*Actio non.*] Because he says that he, together with the said —— —— [*that is, if —— —— is also sued in same suit, but if not, then state,* one —— ——], at the times of the assaults, trespasses, wrongs and injuries aforesaid, complained of as aforesaid, at, etc., did jointly commit the same on the plaintiff, and afterwards, on, etc., at, etc., the said —— —— paid the said —— ——, the plaintiff, the sum of $50, lawful money, in full satisfaction of all the assaults, trespasses, wrongs and injuries whatever aforesaid, complained of as aforesaid, and of all damages and losses whatever sustained by the plaintiff, and in full satisfaction of all demands on account thereof, which said sum the plaintiff then and there did accept and receive in full satisfaction and discharge of the said assaults, trespasses, wrongs and injuries whatever, aforesaid, and of all damages and losses so sustained and complained of, and in full of all demands on account thereof; and thereupon the plaintiff, thereafterwards, the same day, caused the said —— —— to be discharged therefrom; and the said —— —— avers that the assaults, trespasses, wrongs, injuries, losses and damages, whereof the said —— —— complains as aforesaid in his said declaration, and the assaults, trespasses, wrongs, injuries, losses and damages, for which the said —— —— gave, and the plaintiff received, the said $50 in satisfaction as aforesaid, are one and the same, and not different; and this the said —— —— is ready to verify. Wherefore, etc., if, etc.[3]

(6) FORMER JUDGMENT RECOVERED.

[*Actio non.*] Because he says that the said —— —— heretofore, to wit, in term, in the —— year of our Lord one thousand eight hundred and ——, in the —— court of ——, at the —— in the —— of —— [*state the recovery particularly*], impleaded the said —— —— in a certain plea of trespass to the damage of the said —— —— of —— dollars, for the very same trespasses and cause of action in the said declaration mentioned, and none other or different, and such proceedings were thereupon had in the said court in that plea, that afterwards, to wit, in that same —— term, the said —— ——,

[1] 3 Chitty's Pleadings, 13th Am. ed., 1072 (1866).

[2] Yates' Pleadings, 149.

[3] Yates' Pleadings, 149.

by the consideration and judgment of the said court, recovered in the said plea, against the said —— ——, —— dollars, for his damages which he had sustained, as well on occasion of the very same trespasses and cause of action in the said declaration mentioned as for the costs and charges by him about his suit in that behalf expended, whereof the said —— —— was convicted; as by the record and proceedings thereof still remaining in the said court at the —— in the —— of —— more fully and at large appears. Which said judgment still remains in full force and effect, not in the least reversed, satisfied or made void. And this he is ready to verify by the record. Wherefore, etc., if, etc.[1]

(7) RELEASE.

[*Actio non.*] Because he says that after the commission of the said trespasses in the said declaration mentioned, and before the commencement of this suit, to wit, on, etc. [*the date of the release*], at, etc., aforesaid, the said —— ——, by his certain writing of release [*sealed with his seal*], and now shown to the said court here, the date whereof is the day and year last aforesaid [*or, if the release have been lost instead of the profert, say,* which said writing of release having been lost and destroyed by accident, the said —— —— cannot produce the same to the said court here], did remise, release and forever quitclaim unto the said —— ——, his heirs, executors and administrators, the said several trespasses in the said declaration mentioned, and each and every of them, and all sum and sums of money then due and owing, or thereafter to become due, together with all and all manner of action and actions, cause and causes, suits, bills, bonds, writings obligatory, debts, dues, reckonings, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both at law and in equity, or otherwise howsoever, which he, the said —— ——, then had, or which he should or might at any time or times thereafter have, claim, allege or demand against the said —— —— for or by reason or means [*give the language of the release*]. And this he is ready to verify. Wherefore, etc., if, etc.[1]

(8) TENDER OF AMENDS.[2]

[*Actio non.*] Because he says that after the committing of the said several supposed trespasses in the complaint mentioned, to wit, on, etc., at, etc., according to the statute in such case made and provided, he tendered and offered to pay to the plaintiff the sum of —— dollars, as amends for the

[1] Yates' Pleadings, 155.

[2] In many states a tender may be made in these actions. As an illustration we quote the statute of Illinois: Section 6. Whoever is guilty of a trespass or injury, or whoever owes another unliquidated damages or demands arising out of a contract, may, at any time before or after suit is brought, tender what he shall conceive sufficient amends for the injury done, or to pay such unliquidated damages or demands; and if suit has been commenced, also the costs of suit up to the time of making such tender; and if it shall appear that the sum tendered was sufficient amends for the injury done or to pay the damages, and if suit has been commenced was also sufficient to pay such costs, the plaintiff shall not be allowed to re-

said supposed trespasses, the same then and there being a sufficient amends for the same; and also then and there tendered and offered to pay to the said plaintiffs the further sum of —— dollars for the costs of this action to the time aforesaid of making such tender as aforesaid, which said two sums of —— dollars and —— dollars the plaintiffs then and there refused to accept and receive from the said —— —— and —— ——, to wit, at the place aforesaid, in the county aforesaid. And this he is ready to verify. Wherefore, etc., if, etc.[1]

§ 25. The plaintiff's course after the defendant has answered.— In all actions of the nature here discussed, the plaintiff may, where there are two or more defendants, dismiss the action, or, as it is called in some jurisdictions, enter a *nolle prosequi* as to one or more of the defendants and proceed against the others. If the defendants plead severally the plaintiff may demur to some of the pleas and join issue on others, and he may afterwards enter a *nolle prosequi* on his demurrer and proceed against the other defendants, or if several issues are joined he may still enter a *nolle prosequi* to one or more before or after judgment.[2] If the defendants join in a plea they should not sever in the rejoinder; and they cannot unite in the latter pleading if they did not concur in the plea or answer to the declaration or complaint.[3] The replication is, in general, governed by the plea, and most frequently denies it. When the plea concludes to the country, the plaintiff must, in general, if he desires to join issue upon it, add the *similiter;* but when the plea concludes with a verification, the replication must either —

1. Conclude the defendant by matter of estoppel.
2. Deny the truth of the matter alleged in the plea either in whole or in part.
3. Confess and avoid the plea.
4. In case the plea is evasive, new assign the cause of action.[4]

In the succeeding section the subject is illustrated by precedents of the different replications applicable to the form of action under consideration.

cover any cost incurred after such tender, but shall be liable to the defendant for his costs incurred after that time. Laws Illinois, 1891, 206.

[1] Yates' Pleadings, 156.

[2] 1 Chitty's Pleadings, 568; Tidd, Practice, 631; 1 Saund., 285, note.

[3] 1 Chitty's Pleadings, 568; Stephens on Pleading, 298.

[4] 1 Chitty's Pleadings, 551; Arch. Civ. Pleading, 258; 2 Bouvier's Law Dic., 450.

§ 26. Precedents of replications.—

(1) A General Replication Under the New York Code.

And the plaintiff denies each and every material allegation in the answer contained.[1]

(2) A Modern English Form.

The plaintiff joins issue with the defendant upon the defense herein.[2]

(3) An American Common-law Form.

And the plaintiff says that he, by reason of anything in the plea alleged, ought not to be barred from having his aforesaid action, because he says that the defendant at the time when, etc., in the said declaration mentioned, of his own wrong and without the cause by him in his plea mentioned, did commit the said several grievances in the said plea mentioned, in manner and form as the plaintiff has in his said declaration thereof complained against him. And this he prays may be inquired of by the country, etc.[3]

(4) To Plea of the Statute of Limitations.

Because he says that the said several causes of action in the said several counts of said declaration mentioned, and each of them, did accrue to the plaintiff within [*five*] years before the commencement of this suit, in manner and form as the plaintiff hath thereof above complained against the defendant; and this he prays may be inquired of by the country, etc.[4]

(5) Defendant Out of the State During Part of the Time.

Because he says that the defendant, at the time the said cause of action accrued, was out of the state of ——, to wit, at, etc., and there resided until he afterwards, to wit, on, etc., returned to this state, and that the plaintiff within the [*five*] years of the residence of the defendant in this state, after the said causes of action in the said counts mentioned accrued, commenced his action against the defendant in due manner and form as aforesaid; and this the plaintiff is ready to verify. Wherefore, etc., if, etc.[5]

(6) Replication that the Amends Tendered Were Not Sufficient.

Because he says the said sum of $200 in the said plea by the defendant pleaded in bar, so tendered and offered by him to the plaintiff, as and for amends for the said several trespasses in the said declaration mentioned, were not nor are a sufficient amends for the same trespasses, as the said defendant has in his said plea alleged; and this the plaintiff prays may be inquired of by the country, etc.[6]

[1] Howard, N. Y. Code, § 158, p. 270.
[2] Odgers on L. & S., 647.
[3] Puterbaugh's Common Law (Ill.), 488 (1888).
[4] Puterbaugh's Common Law (Ill.), 176 (1888).
[5] Puterbaugh's Common Law (Ill.), 176 (1888).
[6] 9 Wentw., 349, 351; Yates' Pleading, 162.

§ 27. **Conclusion.**— It is not within the scope of this work to further discuss the rules of pleading relating to actions for malicious prosecution, false imprisonment and the abuse of legal process in the various courts of the United States. These rules depend largely upon local statutes, in most instances modifying the rules of the common law, and in some entirely abolishing them. Reference must therefore be had to local laws, and to works devoted especially to this subject.

CHAPTER XII.

DEFENSES.

§ 1. Defenses — The term defined.— In general practice the term defense signifies a denial of the truth or validity of the matters set out in the complaint or declaration as constituting the plaintiff's cause of action.[1] In actions of trespass for false imprisonment and the like, general defenses may be divided into several classes, viz.: (1) A general denial of the matters contained in the complaint. (2) Justification. (3) Waiver of the imprisonment. (4) Release of the right to sue. (5) Estoppel. (6) Payment by one of several wrongdoers. (7) Accord and satisfaction.

§ 2. The general denial, commonly so called, is a plea which denies or traverses at once the whole complaint, without offering any special matter to evade it.

It is called the general issue because, by importing an absolute and general denial of what is alleged in the complaint, it amounts at once to an issue.[2] In the early manner of pleading the general issue was seldom used except where the party meant wholly to deny the charges alleged against him. When he intended to excuse or palliate the charge, a special plea was used to set forth the particular facts.

But now, since special pleading is generally abolished, the same result is secured by requiring the defendant to file notice of special matters of defense which he intends to set up on trial, or obliging him to use a form of answer adapted to the complaint, the method varying in different systems of pleading.

In actions for malicious prosecution and false imprisonment the general issue is, not guilty in manner and form as charged in the complaint.[3]

§ 3. What can be shown under the plea of the general issue.— In trespass to the person the defendant can, under the general issue of not guilty, give in evidence any matter which directly controverts the fact of his having committed the acts complained of; as, in trespass for an assault and battery with a tearing of clothes, a plea of not guilty of the assault *modo et forma* was held to operate as a denial of the battery and tearing of the clothes (*laceravit*) as well as the

[1] 3 Black. Com., 296; Co. Litt., 127; Bouvier's Law Dic., 495.

[2] 2 Black. Com., 305.

[3] Bouvier's Law Dic., tit. "General Issue."

assault, and no person is bound to justify who is not *primæ facie* a trespasser. The plea of not guilty, therefore, is proper in trespass to persons if the defendant committed no assault, battery or imprisonment.[1] But where the acts complained of would at common law *prima facie* appear to be a trespass, and the facts stated in the complaint cannot be denied, any matter of justification or excuse, or if done by virtue of a warrant or authority, must in general be specially pleaded, and therefore such matters of defense cannot be given in evidence under the plea of the general issue.[2]

§ 4. **Joint trespassers may sever in their pleas.**— Persons engaged in committing the same trespass are joint and several trespassers, and not joint trespassers exclusively. Like persons liable on a joint and several contract, they may all be sued in one action, or one may be sued alone and cannot plead the non-joinder or the misjoinder of the others in abatement; and so far is the doctrine of several liability carried, that the defendants, when more than one is sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages.[3]

§ 5. **Justification — The term defined.**— Justification in legal practice is the allegation of any matter of fact by the defendant to establish his legal right to do the act complained of by the plaintiff. As a plea in actions for false imprisonment it admits the commission of the acts as charged in the complaint, and alleges a right to commit them by the defendant, in effect denying that the commission of the acts constitutes a wrong. In form it is an excuse, showing some legal reasons why the defendant should not respond in damages for the injury which the plaintiff claims to have suffered from his hands. As, where an officer,[4] having a warrant regular on its face and issued by a court of competent jurisdiction, makes

[1] 1 Chitty's Pleadings, 500; Tidd's Practice, 652.

[2] 1 Chitty's Pleadings, 501; Waters v. Silley, 4 Pick. (Mass.), 145 (1827); Butterworth v. Soper, 13 Johns. (N. Y.), 443 (1816); Co. Litt., 282*b.*; 2 Roll. Abr., 682; Com. Dig., Pleader, E., 15, 16, 17; Stephen on Pleading (2d ed.), 377; Tidd's Practice (3d Am. ed.), 652 (1840).

[3] Lovejoy v. Murray, 3 Wall., 1 (1865).

[4] 2 Bouvier's Law Dic., 32.

an arrest, the warrant is a complete justification to the officer to whom it is directed for obeying its command, whether it be really valid or void. But where the warrant is absolutely void, or apparently irregular in an important respect, or where the act done under it is one which is beyond the power conferred by the warrant, it is no justification.[1] When the fact of the plaintiff's imprisonment is established, the burden of proving a justification is on the defendant.[2]

APPLICATIONS OF THE LAW.—

(1) *Justification under erroneous judgment.*

Brown *et al.*, as trustees of a school district, had obtained a judgment against Crowl for $3.36 for a school tax. After the judgment Crowl obtained a discharge as an insolvent debtor, exempting his body from imprisonment, and subsequent to obtaining such discharge he was called on by a constable, who held an execution against him on the judgment, to pay it. He told the constable he would pay it as soon as he got able. The constable informed the plaintiffs of the new promise, and they directed him to obtain a summons and serve it on Crowl. The summons was obtained and served; Crowl appeared and pleaded his insolvent discharge. Brown appeared in behalf of himself and co-plaintiffs, and insisted that they were entitled to a general judgment under the new promise, so that they might have an execution against the body of the defendant. After the evidence was closed, Brown told the justice that, if it was illegal, he did not want a judgment or execution against the body of the defendant. The justice entered a general judgment and issued execution thereon, by virtue of which Crowl was arrested. For this arrest an action for false imprisonment was brought by Crowl against Brown and his co-plaintiffs, Lyon and Howard. On the trial these facts appeared in evidence. Defendants insisted that the justice having jurisdiction to render a general judgment, if such judgment was erroneous, it was not void, and was therefore a protection to the defendants. A verdict being rendered for the plaintiffs, the defendant prosecuted a writ of error.

Savage, C. J.: "The only question is whether the second judgment was a protection to the parties. It was valid until reversed, although erroneous. The justice had jurisdiction of the cause and of the person, and in admitting or excluding any defense which affected the plaintiffs' remedies he acted judicially. The defendant before the justice had a perfect remedy either by appeal or by *certiorari*. The question was agitated and judicially decided. . . . The liability of the defendant's imprisonment was the point before the justice. It was judicially decided by him, though erroneously, but the error should have been corrected, either by appeal or *certiorari*, according to the circumstances of the case. I am of opinion, therefore, that the judgment while unreversed justified the execution, and

[1] 2 Bouvier's Law Dic., 33.

[2] Bassett v. Porter, 10 Cush. (Mass.), 418 (1852); Holroyd v. Doncaster, 8 Bing., 492.

that no action lies for false imprisonment." Brown et al. v. Crowl, 5 Wend. (N. Y.), 298 (1830). Cited in 69 N. Y., 241; 5 Lans., 108; 24 Hun, 82; 61 How. Pr., 355.

(2) *Illegal order of superior officer no justification.*

In the summer of 1878 Mr. Swart, the plaintiff in error, was in the employ of the state land department in looking after trespassers on state lands, and was informed by reports of his predecessor, then on file or of record in the land office, that a trespass had been committed by Kimball, the defendant in error, in the county of Alpena. He went to Alpena, partly to inquire into this trespass, and while there claims to have obtained evidence of a further trespass by Kimball, committed more recently. He went to see Kimball and endeavored to make him settle for the alleged trespasses, but did not succeed. The accounts given by the two parties as to the interviews between them differ very considerably; that of Swart only showing an endeavor in a proper way to obtain a settlement for the timber cut, while Kimball gave evidence tending to show that he denied having committed any trespass, and that Swart made threats of criminal prosecution against him, with the evident purpose to extort money from him whether innocent or guilty. The attempts at a settlement failed, and Swart proceeded to institute a prosecution. He went to Lansing, two hundred and fifty miles or so from the county of the alleged trespass, and there procured an information to be drawn against Kimball, to which the land commissioner appended an order to the prosecuting attorney of Ingham county, directing him "to prosecute the foregoing information in the county of Ingham, and state of Michigan." Kimball was discharged on a writ of *habeas corpus*. He then sued Swart for false imprisonment and recovered $350. Swart removed the case to the supreme court on error.

In affirming the judgment Cooley, J., said: The justification of Swart having failed utterly, it remains to be seen whether he was injured by any rulings of the circuit judge which could affect the amount of the recovery. There is no room for saying that Swart was protected in what he did because he acted under the orders of his superior officer. The land commissioner could lawfully give no such orders, and Swart could lawfully obey none.

The award which the jury made was the very moderate one of $350, and this gives abundant evidence that the jury viewed the conduct of the defendant in the most favorable light. If, therefore, the evidence was improperly received, we should think the case a proper one for applying the rule that error without injury shall not reverse a judgment. Cummings v. Stone, 13 Mich., 70; Sinclair v. Murphy, 14 Mich., 392; Sherman v. Dalrymple, 19 Mich., 239; Slocomb v. Thatcher, 20 Mich., 52; Hill v. Robinson, 23 Mich., 24. But my brethren all think the evidence was competent. The judgment will be affirmed. Swart v. Kimball, 43 Mich., 443; 5 N. W. Rep., 371.

(3) *An officer who justifies puts in issue the title to his office.*

J. D. Teague was a trial justice in Maine. After his commission had expired, but not being aware of this fact, he issued a warrant upon a

proper complaint against Michael Grace, who was arrested, and brought before him for trial, found guilty and required to pay a fine and costs. Grace then sued Teague for a false arrest. On the trial it was agreed that if defendant was liable, it being conceded he acted in good faith, damages, not to exceed $36, might be assessed. The presiding justice gave judgment for plaintiff, and assessed the damages at $36. Defendant excepted and moved for a new trial.

Libbey, J.: The law is well settled that when an officer sets up his title to an office in defense of an action against him for his acts, he puts in issue his title to the office; and, to justify, must show that he has a legal title. It is not sufficient for him to show that he is exercising the duties of the office as an officer *de facto*. The ruling of the court below on this point is correct. Pooler v. Reed, 73 Me., 129; Andrews v. Portland, 79 Me., 488; 10 Atl. Rep., 458, and cases there cited.

Exceptions and motion overruled. Grace v. Teague, 81 Me., 559; 18 Atl. Rep., 289 (1889).

(4) *Justification for arrest.*

A private individual may arrest a person guilty of crime when it is necessary to prevent the escape of the accused, and have him taken before the proper officer for examination. But such a person cannot justify such arrest upon the ground of a suspicion of guilt only — guilt in such a case must be shown. It is otherwise with a peace officer authorized to make arrests, as he may arrest without a warrant where all the facts show that there was strong probable cause to believe that the accused was guilty. When a number of persons suspect a person of being guilty of crime, and induce a peace officer to make an arrest without a warrant, they cannot justify their action by showing probable cause to believe him guilty; to do so they must show guilt. In such a case the officer would, it seems, be justified. When a crime has been committed, and the party arrested is guilty, and private individuals induce a peace officer to make the arrest, they, as well as the officer, will be justified by showing the guilt. Dodds et al. v. Board, 43 Ill., 95 (1867).

§ 6. Arrests without process — Justification. — If an arrest is made without process, in order to justify the act it must be shown that an offense punishable criminally had been committed, and that the defendant had reasonable ground to suspect the plaintiff guilty of the same,[1] or either that there was a breach of the peace at the time or had been one, and there was danger of its renewal.[2] An officer may lawfully enter a house to quell a breach of the peace, and may arrest and detain for a reasonable time any person engaged in the affray or

[1] Hogg v. Ward, 3 H. & N., 417; Allen v. Wright, 8 C. & P., 522; Boylston v. Kerr, 2 Daly, 220 (1867); 6 Wait's Act. & Def., 117.

[2] Wooding v. Oxley, 9 C. & P., 1; Grant v. Mosier, 5 M. & Gr., 123; Price v. Seeley, 10 Cl. & Fin., 28.

in committing an assault therein, but he cannot do so after the disturbance has wholly ceased.[1]

§ 7. **Duty of an officer.**— An officer cannot justify an arrest made without a warrant when he arbitrarily detains the prisoner in custody instead of taking him immediately before a magistrate as required by law.[2] If the defendant seeks to justify an arrest made without process on the ground of suspicion, he must state in his plea what offense had been committed, and set forth the facts which caused the suspicion;[3] and where the arrest was made to preserve the peace, he must set out the circumstances which he claimed to have justified the course pursued by him.[4]

§ 8. **Waiver — The defense of — The term defined.**— A waiver is the act of relinquishing or refusing to accept a right. In practice it is required of every one to take advantage of his rights at a proper time; and neglecting to do so will be considered a waiver. If, for example, a defendant who has been named in a writ and declaration pleads over, he cannot afterwards take advantage of the error by pleading in abatement, for his plea to the merits amounts to a waiver.[5]

§ 9. **Waiver of the right to sue.**— That the right to bring an action of trespass for false imprisonment or an action of case for a malicious prosecution may be waived there can be no question, but the law will presume nothing in favor of the surrender of the right to redress the wrongs in question; the burden of showing the waiver rests upon the party asserting it. The matters relied upon as constituting the waiver must show clearly the intention of the party to waive his rights, so as to warrant a jury in finding that there was such a waiver as clearly amounts to a release of all damages occasioned by the wrongful acts complained of.[6]

[1] Prell v. McDonald, 7 Kans., 426; 12 Am. Rep., 423 (1871); 1 Hale's P. C., 587.

[2] Green v. Kennedy, 46 Barb. (N. Y.), 16 (1866); Brock v. Stinson, 108 Mass., 520; 11 Am. Rep., 390 (1871).

[3] Brown v. Chadsey, 39 Barb. (N. Y.), 253 (1863); 6 Wait's Act. & Def., 118.

[4] Grant v. Moser, 5 M. & Gr., 123; Wheeler v. Whiting, 9 C. & P., 262; Bayner v. Brewster, 1 Gale & D., 669.

[5] 2 Bouvier's Law Dictionary, 796.

[6] Joyce v. Parkhurst, 150 Mass., 243; 22 N. W. Rep., 899 (1889); Caffrey v. Drugan, 144 Mass., 294; 11 N. E. Rep., 96 (1887); Nowak v. Waller, 10 N. Y. Sup., 199 (1889).

APPLICATIONS OF THE LAW.—

(1) *Waiver of imprisonment.*

The plaintiff was arrested for being drunk and disorderly. He was too drunk to be tried on the day of his arrest. When sober, he begged the officer to let him off, which was done. He then brought a suit against the officer for false imprisonment. On the trial he was defeated.

On exceptions in the supreme judicial court, Morton, C. J., said: "The jury found that the plaintiff, when arrested, was in a state of intoxication, committing a breach of the peace or disturbing others by noise. His arrest, therefore, was legal. But he contends that the failure of the officer to make a complaint against him for drunkenness on the next morning makes the officer liable in this action. The object of the provision (Stat. Mass. 1882, ch. 207, § 25) requiring the officer to make a complaint is the protection of those arrested without warrant, by insuring that they shall be promptly brought before a court; and it has been repeatedly held that a party thus arrested may waive this provision, and that if he requests his discharge, with the understanding that he is to release any damages to which he might otherwise be entitled by reason of the failure of the officer to make a complaint, he cannot afterwards hold the officer responsible. Citing Caffrey v. Drugan, 144 Mass., 294; 11 N. E. Rep., 96. The evidence tended to show that on the morning after the arrest the defendant was about to take the plaintiff before the district court to make complaint against him; that the plaintiff asked him "not to do it, but to let him go;" and further said that "he had nine children, and did not want defendant to take him before the court, but wanted to go home and take care of his family;" and that thereupon the defendant let him go. Such a request shows the intention of the plaintiff to waive his rights, and fairly implies an understanding that he shall not hold the defendant responsible for granting the request, and would warrant the jury in finding that there was a release of damages by the plaintiff on account of the failure by the officer to take him before the court and make complaint. The plaintiff has no ground to complain. Joyce v. Parkhurst, 150 Mass., 243; 22 N. E. Rep., 899 (1889).

(2) *What does not amount to a waiver of arrest.*

The attorney for the Akron Sewer Pipe Company procured the arrest of John Carleton on the ground that he had been duly notified to appear before a master in chancery for examination concerning his personal effects and had refused and neglected to appear. Carlton recognized for his appearance in the usual form, and after examination, having performed all the conditions of his recognizance, took the oath for the relief of poor debtors, and was discharged. Before discovering that the proceedings were irregular and his arrest illegal, he brought an action against the company for false imprisonment, the verdict being for the defendant. On a motion for a new trial in the supreme court, Soule, J., said: "It is argued, however, that the conduct of the plaintiff in recognizing with surety before the magistrate, and submitting to examination on his application

to take the oath for the relief of poor creditors, and taking that oath amounted to a waiver of the false imprisonment. This is not so. While it is true that the plaintiff must be presumed to know the law, and to know that his arrest was unlawful, and that he was not bound to submit to any examination under it in order to be entitled to a discharge, the fact that he did these things is in no way an indication of any surrender of his right to redress for the wrong done to him by the false imprisonment. Carleton v. The Akron Sewer Pipe Co., 129 Mass., 40 (1880).

(3) *False imprisonment — Who liable — Complaint — Liability of magistrate — Opinion of magistrate — Objections waived.*

Action for false imprisonment, brought by Anton Nowak against George F. Waller, George W. Jeffrey and Egbert Benjamin. Defendant Waller was a justice of the peace; the defendant Jeffrey an overseer of the poor; and defendant Benjamin a constable. The court dismissed the complaint as against all defendants. Plaintiff appealed.

Pratt, J.: Defendant Jeffrey went before the magistrate, Waller, and made a statement of what he regarded as constituting a criminal charge. It does not appear that he made any false statement, or that he entertained any malice against the plaintiff, or that he asked that a warrant should issue, or that he gave any direction or took any part in its service. These facts did not make him liable to an action for false imprisonment. The justice was authorized by law to receive an information or complaint, and issue a warrant in such a case; and it is not material whether the facts sworn to were in law sufficient to establish the crime attempted to be charged. We conclude, therefore, that defendant Jeffrey was not liable, and that the warrant was a protection to the constable, Benjamin.

The question as to defendant Waller requires a short statement in explanation of the decision to which we have arrived. The justice had jurisdiction of the subject-matter presented to him, to wit, the arrest of persons charged with a violation of the excise laws. When the matter was presented to him he was required to decide what was his duty respecting it. The general rule is that where a judge, who has jurisdiction of the subject-matter, errs in his judgment as to whether the facts presented do or do not confer jurisdiction, he is not liable to an action of false imprisonment by a person arrested through an error of judgment. Ayers v. Russell, 3 N. Y., 335. The justice here simply made a mistake in failing to take an examination of the complainant and the witnesses, and reducing the same to writing, as required by the code of criminal procedure (section 148). The test seems to be that there is no liability to civil action if the act was done "in a matter within his jurisdiction." The case of People v. Nowak, 5 N. Y., 240, is cited by appellant as authority for reversing this judgment. In that case it was held simply that the affidavit was not sufficient to authorize the issuance of the warrant.

It is enough to protect both Benjamin and Jeffrey that the justice so held. Lewis v. Rose, 6 Lans., 209; Gardner v. Bain, 5 Lans., 257. It was no part of the duty of either of these defendants to examine the record made by the magistrate, and it was impracticable for them to do so. The warrant was regular upon its face. The mistake in the date injured no

one. If a wrong direction was given by the magistrate as to its return and the production of the prisoner, it was not obeyed, as the constable made an amicable arrangement with the prisoner that he should appear upon the 21st of September before the justice, and was thereupon paroled. A party cannot, for his own benefit, make a stipulation to appear at a future day for his own convenience, and receive a parol, and then complain that he was not immediately taken before a magistrate. Judgment affirmed. Nowak v. Waller, 56 Hun, 647; 10 N. Y. Sup., 199 (1889).

§ 10. Release — The defense of — The term defined. — A release is the act of giving up or abandoning a claim or right to the person against whom the claim exists or the right is to be exercised or enforced. In the sense used here it signifies the giving up, discharging or abandoning a right of action. It may be either express, as where the release is directly made in terms, by deed or other suitable means, or implied, where it arises from the acts of the party.[1]

§ 11. A release of the right to sue. — There can be no question as to the right of a party to release his right of action in all cases, and where an agreement is made by the parties that no further proceedings are to be had in the matter, the party injured cannot afterwards maintain a suit. A plea of the release is a good plea to such an action.[2]

APPLICATIONS OF THE LAW.—

(1) *What is a sufficient release of the right to sue for false imprisonment.*

Charles N. Phillips brought an action against Thomas Fadden, a constable, for false imprisonment. Fadden, the defendant, arrested the plaintiff without a warrrant for being intoxicated in a public place. While the officer was taking him to the lock-up the plaintiff asked to be let off, and promised if released he would go home peaceably and would not drink any more; the officer consented and suffered him to go at large, and did not in fact afterwards take him into custody upon this charge, or make a complaint against him, or take him before the court, as required by the statute in such cases. There was also evidence tending to show that the defendant, when he released the plaintiff, told him to be on hand to go to court the next morning; that the defendant wrote to the clerk of the district court, who lived in an adjoining town, for a warrant, but was told by the clerk that he had no blank warrants with him, and came away without procuring a warrant; and that he did not take any further steps in the matter. On the trial the court instructed the jury on the question of release as follows: After an officer has, without a warrant, once arrested a person for

[1] 2 Bouvier's Law Dictionary, 530. [2] Phillips v. Fadden, 125 Mass., 198 (1878).

being intoxicated in a public place, he is bound to carry him before a proper court; and if he fails to do so he is liable, unless it is shown that the person arrested requested or consented to the discharge; and in order to release the officer from liability upon this ground, the jury must be satisfied that it was understood and agreed between the parties at the time that no further proceedings were to be taken in the matter. The jury found for the plaintiff in the sum of $50. On exceptions it was held that the defendant had no reason to complain of the instruction, and the judgment was affirmed. Phillips v. Fadden, 125 Mass., 198 (1878).

(2) *Officer neglecting to remove goods attached, locked up with them, cannot complain.*

An officer after attaching in a broker's office the desk and law books of an attorney, not more than one hundred dollars in value, and placing a keeper over them, neglected to remove them during nearly five hours of daylight, and then, after demanding of the attorney and of the broker, and being refused, a key to the lock on the door of the office, for the purpose of continuing his possession, obtained one from a blacksmith. It being then near sunset, the broker put another lock on the door, and after giving the officer notice to remove the attached, chattels immediately, and leave the office and receiving a reply that he could not remove them that night for want of means to transport or a place to store them, but would do so early in the morning, proceeded to secure the door for the night, locking in the officer and the keeper, where they remained until about nine o'clock next morning. In the supreme judicial court on exceptions it was held that the officer delayed for an unreasonable time to remove the chattels; that he abused his authority and became a trespasser; that he could not maintain an action against the broker for false imprisonment. Williams v. Powell, 101 Mass., 467 (1869). Citing Rowley v. Rice, 11 Met., 337; Spoor v. Spooner, 12 Met., 285; Pratt v. Farror, 10 Allen, 521; Malcolm v. Spoor, 12 Met. 279.

§ 12. The defense by estoppel.— An estoppel is defined to be the preclusion of a person from asserting a fact by previous conduct inconsistent therewith, on his own part, or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question; a preclusion in law, which prevents a party from alleging or denying a fact, in consequence of his own previous act, allegation or denial of a contrary tenor.[1]

§ 13. A satisfaction is an estoppel.— A tort committed by several persons is in the United States regarded in law as joint and several. The remedy is by suit against each of the wrong-doers separately, or against all of them jointly;[2] and

[1] 1 Bouvier's Law Dictionary, 607; Stephen on Pleading, 239.

[2] Sessions v. Johnson, 95 U. S., 347 (1877); Stone v. Dickinson, 5 Allen

hence a recovery of judgment against one will not estop another to deny the cause of action against him;[1] but if the judgment against one is satisfied, then it becomes a satisfaction of the original cause of action in favor of all, and the doctrine of estoppel applies; and the same is true of a *pro tanto* or partial satisfaction.[2] A judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party, and, therefore, until then, it cannot operate to change any other collateral concurrent remedy which the party may have.[3] He may bring separate suits against the wrong-doer, and proceed to judgment in each, and no bar arises as to any of them until satisfaction is received.[4]

§ 14. The law stated by Miller, J. — "No matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the actions, except the costs, and is a bar to any other action for the same cause."[5]

APPLICATION OF THE LAW.—

(1) *Satisfaction received from one joint trespasser estops the injured person from suing others.*

Henry D. Stone sued William Dickinson to recover damages for false imprisonment. On the trial it appeared that on the 7th of June, 1858, the

(Mass.), 29 (1862); Lovejoy v. Murray, 3 Wall., 1 (1865); Brown v. Cambridge, 3 Allen (Mass.), 374 (1862); Sheldon v. Kibbe, 3 Conn., 214 (1819); Knott v. Cunningham, 2 Sneed, 210 (——); United Society v. Underwood, 11 Bush (Ky.), 265 (1875); Morgan v. Chester, 4 Conn., 387 (1822).

[1] Bigelow on Estoppel, 71 (1882).

[2] Stone v. Dickinson, 5 Allen (Mass.), 29 (1862); United Society v. Underwood, 11 Bush (Ky.), 265 (1875); Herman on Estoppel, 101 (1871).

[3] Drake v. Mitchell, 3 East, 258; Lovejoy v. Murray, 3 Wall., 1 (1865).

[4] Livingston v. Bishop, 1 Johns. (N. Y.), 290 (1806); Elliott v. Porter, 5 Dana (Ky.), 299 (1837); United Society v. Underwood, 11 Bush (Ky.), 265 (1875); Elliott v. Hayden, 104 Mass., 180 (1870); Knight v. Nelson, 117 Mass., 458 (1875); Griffie v. McClung, 5 W. Va., 131 (1872); Morgan v. Chester, 4 Conn., 387 (1822); Ayer v. Ashmead, 31 Conn., 447 (1863); McGee v. Shafer, 15 Tex., 198 (1855); Turner v. Hitchcock, 20 Iowa, 310 (1866); Stewart v. Martin, 16 Vt., 397 (1844); Sanderson v. Caldwell, 2 Aik., 195 (1827).

[5] Lovejoy v. Murray, 3 Wall. (U. S.), 1 (1865); Vigent v. Scully, 35 Ill. App., 44 (1889).

plaintiff was arrested by the same officer on nine different writs in favor of different creditors, one of which was in favor of the defendant, which were all served at the same time, by arresting the plaintiff and committing him to jail, where he was held in confinement upon them all till the 10th of February, 1860, at which time he obtained a discharge on *habeas corpus* on account of defects in the affidavits upon the writ. Stone v. Carter, 13 Gray, 575. The defendant offered to prove that the plaintiff in several of the said actions had, since the date of the discharge of the plaintiff from jail, given up to him their notes upon which their suits were brought, and in consideration thereof the plaintiff discharged them "from all claim and demand for false imprisonment by reason of the arrest of June 7, 1858," for which suits were pending against them, respectively. The judge excluded the evidence.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

In discussing the exceptions, Bigelow, C. J., said: Several questions were raised at the trial of this case, upon which it seems to be unnecessary to express an opinion, inasmuch as we are satisfied that, on the facts offered to be proved, the defendant established a good defense to the action, and that the jury should have been instructed accordingly. There can be no doubt of the rule of law that co-trespassers are jointly as well as severally liable for the damages occasioned by their wrongful acts; and, as a consequence of this, that a release to one joint trespasser, or satisfaction from him for the injury, discharges all. Brown v. Cambridge, 3 Allen, 474, and cases cited. This principle is applicable to the case at bar. In the opinion of the court, the several persons on whose writs and by whose order the plaintiff was committed to jail, and held in confinement from June, 1858, to February, 1860, must be regarded in law as co-trespassers. Evidence was offered at the trial to prove that he had received satisfaction from some of them for his alleged wrongs, and had given to them in writing a discharge for the damages he had suffered by reason of his arrest and false imprisonment. This satisfaction and discharge in legal effect operate as a release of the present cause of action against the defendant.

It cannot be denied that the parties who were plaintiffs in the original action, in suing out their writs against the present plaintiff, and causing him to be arrested and imprisoned, acted separately and independently of each other, and without any apparent concert among themselves. As a matter of first impression, it might seem that the legal inference from this fact is, that the plaintiff might hold each of them liable for his tortious act, but that they could not be regarded as co-trespassers, in the absence of proof of any intention to act together, or of knowledge that they were engaged in a common enterprise or undertaking. But a careful consideration of the nature of the action, and of the injury done to the plaintiff for which he seeks redress in damages, will disclose the fallacy of this view of the case. The plaintiff alleges in his declaration that he has been unlawfully arrested and imprisoned. This is the wrong which constitutes the gist of the action, and for which he is entitled to an indemnity. But it is only one wrong, for which in law he can receive but one compensation. He has not in fact suffered nine separate arrests or undergone nine separate

terms of imprisonment. The writs against him were all served simultaneously by the same officer, acting for all the creditors, and the confinement was enforced by the jailer on all the processes contemporaneously during the entire period of his imprisonment. The alleged trespasses on the person of the plaintiff were therefore simultaneous and contemporaneous acts committed on him by the same person acting at the same time for each and all of the plaintiffs in the nine writs upon which he was arrested and imprisoned. It is then the common case of a wrongful and unlawful act, committed by a common agent acting for several and distinct principals. It does not in any way change or affect the injury done to the plaintiff, or enhance in any degree the damage which he has suffered, that the immediate trespassers, by whom the tortious act was done, were the agents of several different plaintiffs, who, without preconcert, had sued out separate writs against him. The measure of his indemnity cannot be made to depend on the number of principals who employed the officers to arrest and imprison him. We know of no rule of law by which a single act of trespass committed by an agent can be multiplied by the number of principals who procured it to be done, so as to entitle the party injured to a compensation graduated, not according to the damages actually sustained, but by the number of persons through whose instrumentality the injury was inflicted.

The error of the plaintiff consisted in supposing that the several parties who sued out writs against him and caused him to be arrested and imprisoned cannot be regarded as co-trespassers, because it does not appear that they acted in concert or knowingly employed a common agent. Such preconcert or knowledge is not essential to the commission of a joint trespass. It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the person injured. Whether the act was done by the procurement of one person or of many, and, if by many, whether they acted with a common purpose and design in which they all shared, or from separate and distinct motives, and without any knowledge of the intentions of each other, the nature of the injury is not in any degree changed, or the damages increased which the party injured has a right to recover. He may, it is true, have a good cause of action against several persons for the same wrongful act, and a right to recover damages against each and all therefor, with a privilege of electing to take his satisfaction *de melioribus damnis*. But there is no rule of law by which he can claim to convert a joint into a several trespass, or to recover more than one satisfaction for his damages, when it appears that he has suffered the consequences of a single tortious act only. Take an illustration. Suppose that several persons have a grudge or spite against the same individual, but that neither of them is aware of the existence of this feeling in the others, and that each of them, for the purpose of gratifying his malice, without concert or co-operation with any one, and in ignorance of a similar intent on the part of others, employs the same person — a hired pugilist or bully — to inflict on the common object of their ill-will a severe personal castigation. In such a case no one would doubt that all the persons who incited to the commission of the assault and battery would be regarded as co-trespassers. They, each and all, would be

responsible for procuring the act to be done. They would be severally as well as jointly liable to an action in favor of the party injured. But no one would contend that he could recover satisfaction from each of the persons liable to an action. When the damages suffered by him had been once paid by any one of those who procured the commission of the trespass, he could not claim to recover them again from each of the others. The law will not permit a party to receive anything more than a compensation for an injury. Where there has been only one wrongful act, there can be but one full and complete indemnity. When that is obtained, the party injured has exhausted his remedy.

Another illustration, more analogous to the case at bar, will serve to show the soundness of this conclusion. If, instead of the arrest and imprisonment of which the plaintiff complains, the nine writs against him had been served simultaneously by the same officer, by making an attachment of personal property belonging to him — his horse, for example — in such case it could not be doubted that, if for any reason, the attachments were irregular and void, the plaintiff would be entitled to recover and to receive from one or all of the parties by whose order the attachments were made the full value of the horse. But it is equally clear that he could not rightfully claim to receive this sum in damages from each of them, or nine times the value of the animal. And yet such would be the result, if the attaching creditors are not to be regarded as co-trespassers. Nor is this the only absurd result which would follow from such a doctrine. If each attachment or each arrest and imprisonment on the several writs is to be deemed as a distinct trespass, for which the creditors are separately and not jointly liable in like manner as if made on one writ only, without any reference to those which were served simultaneously, we can see no reason why the officer might not be held liable to pay to the plaintiff damages as many times as there were writs served by him. He certainly must be regarded as a joint trespasser with each creditor whose writ he served; and if the service of each writ constituted a distinct trespass, for which the party injured might receive separate damages from each creditor, then the officer would also be subject to a like liability.

These views have led us to the conclusion that the evidence offered at the trial by the defendant to show that the plaintiff had received full satisfaction for the arrest and false imprisonment to which he had been subjected, and for which he claimed damages in this action, from some of his creditors by whose order he was committed to jail, ought to have been admitted, and that the jury should thereupon have been instructed that the plaintiff could not maintain this action. Exceptions sustained. Stone v. Dickinson, 5 Allen (87 Mass.), 29 (1862).

Estoppel — False representations of plaintiff.

If an officer, after attaching property on a writ which may be served either by attachment of property or arrest of the person, is induced to abandon the attachment by false representations of the defendant that the property is not his, and thereupon to make service by arrest, such representations estop the defendant, in a subsequent action by him against the officer for false imprisonment, to say that his property was attached; and

it is immaterial that the property remained in the custody of the officer at the time of the arrest, if he surrendered possession of it within a reasonable time. Ladrick v. Briggs, 105 Mass., 508 (1870).

§ 15. What is a satisfaction.— We have seen that the recovery of a judgment is but a security for the original cause of action. It does not operate as an estoppel until it is in some legal manner satisfied. As to just what is a sufficient satisfaction the authorities in the United States are not quite uniform. In Connecticut it has been held that an unsatisfied judgment on which execution against the defendant's body has been issued and by virtue of which he has been imprisoned is no bar to an action against other persons liable for the same trespass.[1] The same rule seems to prevail in England.[2] And notwithstanding the defendant's imprisonment, until a payment or discharge of the execution, the original cause of action exists unimpaired.[3]

§ 16. What is a satisfaction, etc.— The subject continued.— As the plaintiff can enforce only one satisfaction for the same injury, where there are several judgments he must of necessity elect against whom he will proceed to execution for the satisfaction of his damages. Such election, followed by actual satisfaction of the particular judgment, will preclude the plaintiff from proceeding against either of the other defendants upon the judgments recovered against them except for the costs.[4]

[1] Sheldon v. Kibbe, 3 Conn., 222 (1819); Morgan v. Chester, 4 Conn., 388 (1822).

[2] Drake v. Mitchell, 3 East, 258; McDonald v. Bovington, 4 T. R., 825; Blumfield's Case, 5 Coke, 87.

[3] Sheldon v. Kibbe, 3 Conn., 214 (1819); Morgan v. Chester, 4 Conn., 388 (1822). It was held in New Jersey under a judgment in trespass against several defendants, if one is arrested on a *ca. sa.* and discharged by the plaintiff, or by his counsel, the court will discharge the other defendants from custody, and order satisfaction to be entered on the record upon their stipulating to bring no action on account of their arrest and imprisonment. Allen v. Craig, 2 Green (N. J.), 102. In this case it appeared that the plaintiff instructed the sheriff to discharge the defendant out of custody and let him go at large on his payment of $30. The defendant paid the amount to the sheriff, who discharged him from custody and handed the money over to the plaintiff. Then a co-defendant, who was in custody also, moved to have satisfaction of the judgment entered of record and to be discharged out of custody himself, when the order above referred to was made.

[4] Cooley on Torts, 139 (1879).

In some states it is held that where execution is taken out on one judgment the plaintiff has thereby made his final election. Hence a final judgment and execution or an order for an execution against one of several joint trespassers is a discharge of all the others.[1]

§ 17. The rule which prevails in a majority of the states.— The defendant's liability must remain, in morals and on principle, until he has discharged himself from the obligation which the law imposes upon him, to make compensation. A judgment against his co-trespasser does not affect him so as to release him on any equitable consideration. But where the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages. It is not easy to see how he is so affected until he has received full satisfaction or that which the law must consider as such; hence nothing short of satisfaction or its equivalent can make good a plea of the former judgment in trespass offered as a bar in an action against joint trespassers, or offered as a bar against another joint trespasser who was not a party to the first judgment.[2]

§ 18. Payment, settlement, discharge and satisfaction by one of several joint trespassers.— The rule stated by Hinman, C. J.: "It is the settled law that a release, discharge or satisfaction of one or more of several joint trespassers is a discharge of them all, in the same manner that a discharge of one of several joint debtors, or a payment and satisfaction of the joint debt by one, is a satisfaction as to all, since a party injured by a trespass committed by several can have but one satisfaction for his injury, no more than one who has a debt against several can be entitled to be more than once paid."[3]

[1] Fleming v. McDonald, 50 Ind., 278 (1875); White v. Philbrick, 5 Me., 147 (1827); Blaine v. Crocheron, 20 Ala., 320 (1852); Page v. Freeman, 19 Mo., 421 (1854); Boardman v. Acer, 13 Mich., 77 (1865).

[2] Lovejoy v. Murray, 2 Cliff., 191; 3 Wall. (U. S.), 1 (1865); Cooley on Torts, 139.

[3] Hinman, J., in Ayer v. Ashmeath, 31 Conn., 452 (1863). Citing Cocke v. Jennor, Hob., 66; Livingston v. Bishop, 1 Johns. (N. Y.), 290; Brown v. Marsh, 7 Vt., 320 (1835); Sheldon v. Kibbe, 3 Conn., 214 (1819); Knickerbocker v. Colver, 8 Cow. (N. Y.), 111 (1828); Lewis v. Jones, 4 B. & C., 506; Bird v. Randall, 3 Burr., 1345.

§ 19. The rule in the time of Lord Coke.—"Also if two men doe a trespass to another, who releases to one of them all actions personalls, and notwithstanding sutch an action of trespasse against the other, the defendant may wel shew that the trespasse was done by him and by another, his fellow, and that the plaintife, by his deed (which he sheweth forth), released to his fellow all actions personalls, and demanded the judgment, &c., and ye sade deed belongeth to his fellow and not to him. But because hee may have advantage by the deed, if hee will shew the deed to the court hee may wel plead this."[1]

§ 20. The subject continued.— If divers persons commit a trespass, though this be joint and several at the election of him to whom the wrong is done, yet if he releases one of them, all are discharged, because his own deed should be taken most strongly against himself. Also such release is a satisfaction in law, which is equal to a satisfaction in fact.[2] A release of one of several joint tort-feasors is equivalent to a satisfaction, and inures to the benefit of all.[3] And this has been the settled rule of law since the days of Coke and Bacon. Although it was the intention of both parties that the discharge should affect only the cause of action against the defendant, and that it should not affect the plaintiff's right of recovery against the other defendants, it will yet operate as a discharge of the entire cause of action against all. There can be no recovery against the other defendants, either of nominal damages or of costs.[4]

APPLICATION OF THE LAW.—

A release for one is a release for all.

Ayer brought an action of trespass against Ashmead. The defendant pleaded the general issue and two special pleas in bar, one of which alleged that the trespass was commited by him, if at all, jointly with John F. Grumley, and that it had since been agreed between the plaintiff and said Grumley that the former should pay and the latter receive $3.50 in full satisfaction and discharge of the trespass and of all damages and costs therefor, and that the money was therefore paid and received for that purpose. The other plea alleged that the plaintiff had executed a release discharging Grumley and the defendant from all damages on account of the

[1] Coke on Littleton, 232.
[2] 5 Bacon's Abridgment, 702.
[3] Brown v. Marsh, 7 Vt., 320 (1835).
[4] Ayer v. Ashmead, 31 Conn., 447 (1863).

trespass. On the trial the defendant admitted the commission of the trespass complained of, but claimed and offered evidence to prove that it was a joint trespass committed by him and Grumley, and offered in evidence the following written instrument admitted to have been signed by the plaintiff, but without seal:

"Received by John F. Grumley, November 5, 1860, $3.50, in full of damages and costs in a case of trespass by the said Grumley on my land, October 31, 1860. E. Ayer." With it he offered evidence to prove that after the commission of the trespass the plaintiff commenced this action against him, and also another action for the same trespass against Grumley, returnable at the same time, and that during the pendency of both suits and before the trial of either of them, the plaintiff and Grumley agreed to settle the suit between them by his paying the $3.50, which he did, taking the receipt aforesaid, and the suit was withdrawn. It was admitted that the settlement did not include and was not understood or intended to include the suit against Ashmead, and that the sum paid was not paid or intended or understood to be paid on account of the damages or costs claimed in the suit against Ashmead, and that the release was not given or received for the purpose of discharging or in any way affecting the suit against Ashmead or the plaintiff's right of recovery in it, but for the sole purpose of discharging Grumley alone, and that it was expressly understood between Ayer and Grumley that the suit against Ashmead should go on as if the settlement had not been made.

The plaintiff objected to the admission of the instrument on the ground that it was not under seal, and therefore, as he claimed, could not operate as a release, but the court overruled the objection and admitted it.

The defendant requested the court to charge the jury that if they should find that the trespass complained of in this suit and that complained of in the suit against Grumley were one and the same joint trespass committed by this defendant and Grumley together, and that the plaintiff had accepted and received from Grumley $3.50 in satisfaction for the damages claimed of him in the suit against him and the costs of that suit, such payment and acceptance would operate in law as a full satisfaction for such trespass and a bar to the plaintiff's recovery in this suit, and their verdict should be for the defendant. This the court declined to do, but did charge the jury in substance that for a single trespass committed by two persons the injured party had a right to but one satisfaction, but that he had a right to sue both of the trespassers together in one suit or each of them in a separate suit, at his election, and if he brought a several suit against against each one he had a right to prosecute them both until he obtained one satisfaction for the trespass and his costs in both suits. That although they should find such joint trespass and the payment by Grumley of $3.50, and the receipt given therefor and the acceptance thereof in satisfaction of the damages claimed of Grumley and the costs of the suit against him, yet if this suit was then pending, and costs had accrued thereon and were unpaid, and this suit was not included nor intended to be included in such settlement, and nothing had been paid or received on account of such costs, then the verdict should be for the plaintiff to recover of the defendant nominal damages and his costs.

The jury returned a verdict for $1 damages and costs, and being inquired of by the court at the request of the defendant, the jury said that they found that the trespass was a joint one committed by the defendant and Grumley. The defendant moved for a new trial. In granting the motion Hinman, C. J., of the supreme court of errors, said: "We think the closing part of this instruction was incorrect. It is, as we suppose, settled law that a release, discharge or satisfaction of one or more of several joint trespassers is a discharge of them all, in the same manner that a discharge of one of several joint debtors, or a payment and satisfaction of the joint debt by one, is a satisfaction as to all, since a party injured by a trespass committed by several can have but one satisfaction for his injury, no more than one who has a debt against several can be entitled to be more than once paid. It is true, undoubtedly, that for a joint trespass they may all be sued jointly, or separate suits may be brought against each, because trespasses committed by several, while they are in fact the joint act of all, are also the separate acts of each individually, each being liable in law for whatever was done by them all or any of them; and if suits are separately brought against each they may be all pursued to final judgment, and the plaintiff may elect which of the separate judgments he will enforce and collect. But having received the damages recovered against any one, and his costs recovered against all, he must be content with that, as otherwise he would recover more than one satisfaction for his injury. . . . The principle upon which this case turns was adopted by this court in the case of Canfield v. The Eleventh School District, 19 Conn., 529, where it was held that when a debt was paid there was nothing left for which nominal damages or costs could be recovered, though the payment was subsequent to the commencement of the suit. . . . In this case the issue upon the second plea should, we think, have been found for the defendant, which would have disposed of the case, and no doubt would have been so found but for the charge which allowed the jury to render their verdict for the plaintiff for nominal damages, although the injury resulting from the trespass had been settled and satisfied." Ayer v. Ashmead, 31 Conn., 447 (1863). Citing Bird v. Randall, 3 Burr., 1345; Davis v. Jones, 4 B. & C., 506; Cocke v. Jannor, Hob., 66; Livingston v. Bishop, 1 Johns., 290; Brown v. Marsh, 7 Vt., 327; Sheldon v. Kibbe, 3 Conn., 214; Knickerbocker v. Colver, 8 Conn., 111.

CHAPTER XIII.

EVIDENCE.

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§ 1. Malicious prosecution — Burden of proof.— In order to maintain an action for a malicious prosecution, the burden of proof under the plea of the general issue is upon the plaintiff to show by a preponderance of the evidence these propositions:

I. That he has been prosecuted by the defendant either in a criminal or civil proceeding, and that the prosecution is at an end.

II. That the prosecution complained of was instituted maliciously and without probable cause.

III. That he has by reason of such prosecution sustained damages.[1]

§ 2. I. The prosecution of the plaintiff.— As a general rule in the order of proofs before malice or want of probable cause is shown, the plaintiff should prove the fact of the prosecution complained of. This is usually done by duly authenticated copies of the record and proceedings in the prosecution complained of, and for this the record is competent.[2] But it seems that it is not sufficient to give in evidence the original indictment; because it does not prove the caption, which is a material averment in the declaration.[3] If the prosecution was by means of a charge preferred before a magistrate, the proceedings should be produced; or, in case they have been lost, secondary evidence should be given. And where the proceedings have been laid aside as useless, secondary evidence will be admissible, after slight proof of their destruction.[4] In case the suit is for causing the plaintiff to be maliciously arrested and detained until bail is given, it is sufficient for him to show a detention without proving that he gave bail, for the detention is the principal *gravamen*, and is in itself *prima facie* evidence of an arrest,[5] though the mere giving of bail is not such evidence.[6] If, however, the action is brought for maliciously causing the plaintiff to be held to bail, evidence of a previous arrest is unnecessary.[7]

§ 3. Identification of the defendant as the prosecutor.— Some evidence of the identity of the defendant must also be given, and that he was the prosecutor in the proceedings which are charged to be malicious. One of the grand jury before whom a bill of indictment has been preferred may, it has been said, be called to prove the fact that the defendant was the

[1] 2 Greenl. Ev., § 449; Baylie's Onus Probandi, 184; Abbott's Tr. Ev., 652; 3 Phillips' Ev., 567; Bloss v. Gregor, 15 La. Ann., 421 (1860).

[2] Granger v. Warrington, 8 Ill. (3 Gil.), 299; 2 Greenl. Ev., § 450; Abb. Tr. Ev., 652.

[3] 3 Phillips' Ev., 568; Edwards v. Williams, 2 Esp. N. P., 37.

[4] Freeman v. Arkell, 2 B. & C., 496; 2 Greenl. Ev., § 450.

[5] 2 Greenl. Ev., § 451; Bristow v. Haywood, 1 Stark., 48; Whaley v. Pepper, 7 C. & P., 506.

[6] Berry v. Adamson, 6 B. & C., 528; 2 C. & P., 503; 2 Greenl. Ev., § 451.

[7] 2 Greenl. Ev., § 451; Small v. Gray, 2 C. & P., 605; Berry v. Adamson, 6 B. & C., 528; 2 C. & P., 503.

prosecutor.[1] The indorsement of the defendant's name on a bill of indictment which has been laid before the grand jury shows that he was sworn to the bill, though it is not the only competent proof of that fact; but it is not any evidence of his being the prosecutor.[2] It may also be shown that the defendant employed counsel or other persons to assist in the prosecution, or that he gave instructions, paid expenses, procured witnesses, or was otherwise active in forwarding the prosecution.[3] But it is not sufficient to show that the defendant was a member of the grand jury and employed counsel to prosecute the plaintiff.[4]

§ 4. The end of the prosecution.—

(1) *In criminal cases:* The prosecution which is charged to be malicious must be shown to have been determined; otherwise it may possibly happen that the plaintiff may recover in the action, and yet, if the prosecution is not determined, may be afterwards convicted of the original charge.[5] If the bill of indictment was returned by the grand jury not a true bill, or if the plaintiff was acquitted on the trial of the prosecution, these facts can only be proved by the original record, or by an examined copy of the record.[6] An allegation that the plaintiff was duly and in a lawful manner acquitted by a jury of the country is proved by the record, from which it appears that the jury found the plaintiff not guilty, and thereupon judgment was entered that the plaintiff should go acquitted;[7] and the action will not be defeated by showing that the plaintiff was acquitted on a defect in the indictment. An entry of a *nolle prosequi* by the attorney-general is held in England not to be such a termination of the prosecution as will enable the plaintiff to maintain the action; and this doc-

[1] Sykes v. Dunbar, Selw. N. P., p. 1305; Freeman v. Arkell, 1 C. & P., 137; 3 Phillips, Ev., 568; 2 Greenl. Ev., § 450.

[2] Bull. N. P., 14, per Holt, C. J.; Johnson v. Browning, 6 Mod., 216; Girlington v. Pitfield, 1 Vent., 47; 3 Phillips, Ev., 568, 569; 2 Greenl. Ev., § 450.

[3] 2 Greenl. Ev., § 450; Bitting v. Ten Eyck, 82 Ind., 421; 42 Am. Rep., 505 (1882).

[4] Barrett v. Choteau, 94 Mo., 13 (1887).

[5] Mills v. McCoy, 4 Cow. (N. Y.), 406 (1825); Watts v. Clegg, 48 Ala., 561 (1872); John v. Bridgman, 27 Ohio St., 22 (1875); Brewer v. Jacobs, 22 Fed. Rep., 217 (1884).

[6] 3 Phillips, Ev., 575; 2 Greenl. Ev., § 452.

[7] 2 Greenl. Ev., § 452; 3 Phillips, Ev., 568.

trine has been followed in many of the states of our Union, but in others it has been held to be a sufficient termination of the prosecution to maintain the action for malicious prosecution.[1] If the plaintiff was arrested and bound over on a criminal charge which was ignored by the grand jury, proof of this fact is not sufficient without also showing that he was regularly discharged by an order of the court; for the court may have power to detain him for good cause until a further charge is preferred for the same offense.[2] But in other cases the return of a bill ignored by the grand jury has been held sufficient.[3] A memorandum made by a justice of the peace, at the time of the trial before him, showing the judgment rendered by him, is admissible to show the termination of the prosecution.[4]

(2) *In civil cases:* The termination of the prosecution in civil cases may be shown by proof of a rule to discontinue on payment of costs, and that the costs were taxed and paid, without proof of judgment or the production of the record,[5] but an order to stay proceedings is not alone sufficient.[6] Civil suits are usually terminated by a judgment, which is most easily shown by the record.[7] It has been held that it is not sufficient to show a compromise of the suit in question,[8] nor that the prosecuting officer refused to proceed to trial.[9]

(3) *Abuse of process:* Where the action is brought for abusing the process of the law illegally to compel a party to do a collateral thing, such as to give up his property, it is not necessary to aver or prove that the process improperly employed

[1] See chapter "End of the Prosecution," 2 Greenl. Ev., § 452.

[2] 2 Greenl. Ev., § 452; Thomas v. Graffenreid, 2 Nott & McC., 143 (1819); Weinberger v. Shelly, 6 W. & S., 336; 3 Phillips, Ev., 568, 575.

[3] 2 Greenl. Ev., § 452; Morgan v. Hughs, 2 T. R., 225; Atwood v. Monger, Sty., 372; Jones v. Givin, Gilb. Cas., 185, 220; 3 Phillips, Ev., 568. 575.

[4] Long v. Rogers, 19 Ala., 321 (1851).

[5] 2 Greenl. Ev., § 452; Bristow v. Haywood, 4 Camp., 213; 1 Stark., 48; French v. Kirk, 1 Esp., 30; Watkins v. Lee, 6 M. & W., 270; Brook v. Carpenter, 3 Bing., 297.

[6] 2 Greenl. Ev., § 452.

[7] Steph. Ev., 48; Leggett v. Tollervey, 14 Exch., 301; Abbott's Tr. Ev., 654; Mills v. McCoy, 4 Cow. (N. Y.), 406; Caddy v. Barlow, 1 Man. & Ry., 277; Watts v. Clegg, 48 Ala. (N. S.), 561.

[8] McCormic v. Sisson, 7 Cow., 715 (——).

[9] Thompson v. De Motte, 9 Abb. Pr. (N. Y.), 242; 18 How. Pr. (N. Y.), 529 (——); Abbott's Tr. Ev., 654.

is at an end, nor that it was sued out without reasonable or probable cause.[1]

(4) *False imprisonment:* In actions for false imprisonment it is wholly unnecessary to allege or prove that the prosecution has been determined, as the action depends wholly upon the illegality of the detention.

§ 5. The record is conclusive evidence of acquittals or convictions.— A record is a memorial history of the judicial proceedings in a case, commencing with the writ or complaint, and terminating with the judgment; and the design is not merely to settle the particular question in difference between the parties, or the government and the subject, but to furnish fixed and determinate rules and practices for all future like cases. A record, therefore, must be precise and clear, containing proof within itself of every important fact on which the judgment rests; and it cannot exist partly in writing and partly in parol. Its allegations are facts, and not the subject of contradiction. They are received as the truth itself, and no averment can be made against them, nor can they be varied by parol.[2] A departure from this rule, in permitting the introduction of parol testimony to add to the record in cases where it professed not to contradict it, would not only lead to uncertainty and confusion, but would end in the subversion of the excellent system of law which rests upon established precedents.[3]

§ 6. Contents of lost records may be shown by parol evidence.— Records, like other documents, are exposed to casualties, and like them, may also be misplaced and lost; or owing to the accidents which continually occur, the record may not, in a given instance, have been extended from the minutes of the proceedings; and the cases are abundant to show that a lost record, like a lost deed, may be proved by parol, and

[1] 2 Greenl. Ev., § 452; Granger v. Hill, 4 Bing. N. C., 212; 3 Scott, 561; Mayer v. Walter, 64 Pa. St., 283 (1870).

[2] Coke on Littleton, 260*a*; Comyn's Digest, Record, A. F.; Sayles v. Briggs, 45 Mass., 421 (1842).

[3] Sayles v. Briggs, 45 Mass., 421 (1842). On the trial of an action for malicious prosecution, the justice's docket showing the plaintiff's discharge is properly admissible, even though it should appear that it was not written up at the time when it should have been. The plaintiff should not be prejudiced by the justice's neglect of duty. Ames v. Schneider, 69 Ill., 373 (1873).

that the minutes may be introduced, where the record has not been drawn out *in extenso*, as containing the elements of the record, and, in truth, for the time being, the record itself.[1]

If this were not the rule, substantial injustice might be done to innocent parties, who had no duty to perform in making up the records, and were not charged with the care of their preservation.

APPLICATIONS OF THE LAW.—

(1) *Loss of the complaint before the magistrate — Parol evidence.*

On the trial of an action for the malicious prosecution of the plaintiff before a justice of the peace on a charge of maliciously breaking down and leaving open a fence inclosing the lands of the defendant, for the purpose of proving proceedings before the justice, the fact of the prosecution and its termination, the justice was called, and testified that a complaint was made before him and a warrant issued. He made no record of the proceedings except some minutes on the back of the complaint and warrant. He was not in the habit of making any other record of criminal cases tried before him; that he could not find the original complaint and warrant, although he had supposed they were among his papers, and had looked for them and made a thorough search. That a year or two before, on the request of the plaintiff's counsel, he found the complaint and warrant and caused a copy thereof to be made, which he then examined and compared with the original, and found it to be correct; that his impression was that a paper, produced by the plaintiff, purporting to be a copy of the complaint and warrant, and of a memorandum thereon of a continuance and of the discharge, was the copy he made, but he was not sure. He did not know that he had seen the original since he compared the copy with it. He then, while in court, made a certificate on the back of the paper, that it was a copy of the complaint and warrant, and the plaintiff offered it in evidence. It was admitted although the defendant objected.

Before a full court Bigelow, J., said: "The evidence of the magistrate proved that there was an original complaint and warrant which had been lost, and that minutes of the proceedings thereon against the plaintiff were made by him on the back of the papers in conformity with his usual practice. This was satisfactory proof that a record had once existed, and it being shown to have been lost by the testimony, which seems to us amply sufficient, secondary evidence of its contents was clearly admissible." Tillotson v. Warner, 69 Mass., 574 (1854). Citing Davidson v. Slocumb, 11 Pick., 464; Pruden v. Allen, 23 Pick., 184; Sayles v. Briggs, 4 Met., 421; Read v. Sutton, 2 Cush., 115; 1 Greenl. Ev., § 501.

(2) *Evidence of matters not appearing in the record not admissible.*

In an action for malicious prosecution the plaintiff is required to show, by the record or a copy thereof, the proceedings in the prosecution against

[1] 2 Saund. Pl. & Ev., 661; Davidson v. Slocumb, 18 Pick., 466 (1836); Sayles v. Briggs, 45 Mass., 421 (1842).

him, and his acquittal; and where the plaintiff counted on three distinct prosecutions on the same day, before a justice of the peace, and three acquitals, but the justice's record showed an arraignment and discharge of the plaintiff in one case only, it was held that parol evidence was not admissible to show that the plaintiff was prosecuted, arraigned and discharged on three complaints, although the justice was no longer in office and had declined to take up any further record of the proceedings, the two other prosecutions not appearing in his record. Sayles v. Briggs, 45 Mass., 421 (1842).

§ 7. **II. Malice and want of probable cause.**— In actions for malicious prosecution the burden of proof is upon the plaintiff to show that the prosecution of which he complains was instituted with malice and without probable cause.

A. *Maliciously instituting the prosecution:* Another point to be proved in this action is the defendant's malice in instituting the proceedings. Malice may be implied from the want of probable cause where there are no circumstances to rebut the presumption that malice alone could have suggested the prosecution;[1] and malice may be inferred where the defendant's conduct will admit of no other interpretation, except by presuming gross ignorance.[2] Express malice is shown by proof of expressions of ill-will, old grudges, etc. Where the defendant had published an advertisement of the finding of the indictment, together with other scandalous matter, it was held that the plaintiff might give this fact in evidence to show the defendant's malice;[3] and the evidence of the defendant, on the occasion of the preceding trial, is admissible for the same purpose.[4]

[1] Stancel v. Cleveland, 64 Tex., 660 (1885); Lyon v. Hancock, 35 Cal., 373 (1868); Forbes v. Hagman, 75 Va., 168 (1881); Doemlinger v. Tschechtelin, 12 Daly (N. Y.), 34; Brown v. Willoughby, 5 Colo., 1 (1879); Motes v. Bates, 80 Ala., 382 (1885); Wheeler v. Nesbitt, 24 How. (U. S.), 544 (1860); Walker v. Pittman, 108 Ind., 341 (1886); 3 Phillips' Ev., 570, 572; 2 Greenl. Ev., § 453; Crozer v. Pilling, 4 Barn. & Cress., 26; by Gibbs, C. J., 5 Taunt., 583; Turner v. Turner, 1 Gow., 50; Saville v. Roberts, 1 Salk., 14; 1 T. R., 540. See chapter on "Malice."

[2] 3 Phillips' Ev., 572; 2 Greenl. Ev., § 453; Brooks v. Warwick, 2 Stark. N. P. C., 389.

[3] Flickinger v. Wagner, 46 Md., 581 (1877); Dietz v. Langfitt, 63 Pa. St., 234 (1869); Mowry v. Whipple, 8 R. I., 360 (1866); Bloss v. Gregor, 15 La. Ann., 421 (1860); McKnown v. Hunter, 30 N. Y., 625 (1864); 2 Greenl. Ev., § 453; 3 Phillips' Ev., 572, 573; Chambers v. Robinson, 1 Stra., 691; Knight v. Jermin, Cro. Eliz., 134; Straus v. Young, 36 Md., 246 (1872).

[4] Buller's N. P., 13.

Malice must be proved in the same manner as other essential facts that go to make up the requisites of an action. It may be inferred from the activity and zeal displayed by the defendant in matters relating to the prosecution in question.[1] Want of probable cause is evidence of malice, and in the absence of evidence the contrary is sufficient to justify the jury in finding for the plaintiff on that question.[2] The existence of malice may be proved by direct evidence or it may be inferred from circumstances.[3]

APPLICATION OF THE LAW.—

(1) *Malice and want of probable cause not inferred from the discharge of the accused — Essential ingredients in the action.*

The plaintiff and the defendant owned contiguous urban lots, on part of the dividing line of which no fence had been erected. In pursuance of the direction of a surveyor, whom he had consulted, the defendant, after notice to plaintiff, caused an inclosure to be built on part of what he had been informed was the true division line between the lots. Plaintiff then had the spot examined by a different surveyor, who reported that the fence thus put up by defendant encroached some six inches on his (plaintiff's) lot. Plaintiff then began to inclose that portion of the division line which defendant had left open; but, while at work, discovering that the fence thus being constructed was continuing the encroachment begun by defendant, he undertook to have it removed further off, to what he had been advised was the proper boundary. While plaintiff's men were engaged in the act, defendant appeared, remonstrating against the displacement, an ax in hand, evidently to demolish the fence; but his protest remained unheeded. Naturally, words passed, but no personal conflict followed. Thereupon defendant telephoned to the nearest police station, charging a breach of the peace by plaintiff. The patrol wagon arrived, drawing attention, as is usual. Defendant then directed the arrest of plaintiff and of his men; but matters were so arranged that the latter were let alone. The police officer dispatched and on duty, and plaintiff, then went in a street-car to the recorder's office, where defendant made an affidavit against plaintiff for a breach of the peace, while plaintiff, retaliating, made a counter-complaint

[1] Dietz v. Langfitt, 63 Pa. St., 234 (1869); Bloss v. Gregor, 15 La. Ann., 421 (1860); Flickinger v. Wagner, 46 Md., 581 (1877); McKnown v. Hunter, 30 N. Y., 625 (1864); 2 Greenl. Ev., § 453; 3 Phillips' Ev., 572; Abbott's Tr. Ev., 654.

[2] Forbes v. Hagman, 75 Va., 168 (1881); Stancel v. Cleveland, 64 Tex., 660 (1885); Walker v. Pittman, 108 Ind., 341 (1886); Wheeler v. Nesbitt, 24 How. (U. S.), 544 (1860); Motes v. Bates, 80 Ala., 382 (1885); 2 Greenl. Ev., § 453; 3 Phillips' Ev., 570, 572; Brown v. Willoughby, 5 Colo., 1 (1879).

[3] 2 Greenl. Ev., § 453.

against the defendant; both being paroled to appear on an early fixed day. After trial both were discharged.

The plaintiff then brought a suit to recover damages for a malicious arrest and prosecution, without probable cause, under a charge of breach of the peace. The defense was a negation of malice, and an averment of probable cause. The case was tried by a jury, who returned a verdict for $750 in plaintiff's favor. From the judgment rendered in conformity with the verdict, the defendant appeals.

Bermudez, C. J.: "The record fails to show malice and want of probable cause, which are essential ingredients in controversies of this kind, on the part of either party, who, under the circumstances, had authority to believe, in good faith, that he had a right to do what he had done,—the plaintiff, to remove the fence: the defendant, to protest against the displacement, and to invoke the law. It is the malice composed of bad feeling, and the knowledge of having no just cause of action, which create liability. Kearney v. Holmes, 6 La. Ann., 373. Public interest, and a proper administration of justice, require that actions for malicious prosecution should not be maintained without clear proof of malice and want of probable cause. Maloney v. Doane, 15 La., 278; McCormick v. Conway, 12 La. Ann., 53.

"We do not think that, from the fact that the plaintiff was discharged by the recorder and that the defendant was likewise released, malice and want of probable cause on the part of either must necessarily be inferred.

"If the discharge in each case be viewed as *prima facie* evidence of malice, the proof adduced by both parties rebuts that presumption. It was well said in an analogous case: 'It would be of the worst example to punish this defendant for resorting to law for the protection of his rights, rather than taking the chances of a resort to arms, or tamely abandoning the field to an usurper.' Sisk v. Mathis, 11 La. Ann., 419. See, also, Godfrey v. Soulat, 33 La. Ann., 915; Coleman v. Insurance Co., 36 La. Ann., 92; Dearmond v. St. Amant, 40 La. Ann., 374; 4 So. Rep., 72." Judgment reversed. Girot v. Graham, 6 So. Rep., 815; 41 La. Ann., 511 (1889).

(2) *Maliciously suing out a peace warrant, evidence of probable cause.*

Action by Helen J. Wright against Walter S. Church for malicious prosecution. Defendant was the assignee of a judgment in ejectment for the non-payment of rent of a farm held under a Van Rensselear lease. The judgment was against Caleb Nelson, who formerly occupied the premises, and was rendered in 1865. Upon notice to defendant in 1883, leave was granted to issue execution, which was done. M. Nelson, father of Caleb, was the owner of the farm, but allowed Caleb to reside on a portion of it for many years, but never conveyed it to him. About the time the execution issued M. Nelson conveyed the land to Hannah Nelson, wife of Caleb, who conveyed to plaintiff. Upon going to execute the writ of possession a quarrel ensued, in which plaintiff claimed the land, and refused to be dispossessed under the writ against Nelson; and told the officer that, if he attempted to dispossess her, there would be trouble. Defendant procured a peace warrant, and caused plaintiff to be arrested, for which this action

was brought. The referee found for the plaintiff, and assessed her damages at $510; and judgment was entered thereon, and on appeal to general term was affirmed. From that judgment defendant again appeals.

In delivering the opinion of the court of appeals Danforth, J., said: "The defendant, while on the stand as a witness in his own behalf, was asked by his own counsel, 'Had there been occasions frequently before this occurrence, and in that section of the country, in the process of enforcing writs in what is commonly known as "anti-rent proceedings," for resistance to be offered against the enforcement of such writs on the part of those in possession of the premises, including both women and men, under claim of some superior title to that which was to be enforced in the writ, and were you familiar with such facts, and had you been present yourself when such resistance had been offered, and had such occurrences taken place within a brief period of the occurrence in question, and had such resistance been carried to the point of killing the officers in the execution of the writs?' and, this being excluded, 'offered to show all the facts embraced in the affirmative part of that question.' To the ruling there was an exception, and it is now relied upon. The defendant went upon the plaintiff's premises with no process against her, and was informed that she had the title under Hannah Nelson; and, as the referee finds, 'the defendant thereupon, in a violent and threatening manner, informed the plaintiff, while in her house and upon her premises, that he would throw her out of said house and premises, under said writ of possession, on the next day; in reply to which the plaintiff informed the defendant that, if he attempted to remove her under the writ of possession against Caleb Nelson, there would be trouble.' Of what materiality was it that upon other occasions there had been resistance and trouble. As against the plaintiff, the defendant had no writ; and as against that which he had, and the assault which he threatened, she might make lawful resistance. The unfortunate state of affairs to which the question alludes seems wholly foreign to the defendant's case in this action. If he believed there was from this plaintiff danger of an assault, he must also have known that it could only happen upon his own instigation, and that, unless he or his agent trespassed, they were safe from interference. The referee finds 'that, on learning that the plaintiff was lawfully in the possession of the premises, he knew as matter of fact, and was bound to know as matter of law, that he could not remove the plaintiff therefrom under said writ or execution, for possession, against Caleb Nelson; that the only threat made by the plaintiff was that of resistance against the execution of the writ against Nelson, and from that threat there was no probable reason to apprehend a breach of the peace or a violation of law;' and there is no view of the evidence which requires any other conclusion, or which tends to show that the facts suggested by the question, if they existed, could have had any material or just operation upon the defendant's mind. As against the plaintiff he had, so far as the record shows, no right, and, neither for himself nor the sheriff in whose favor the arrest appears to have been made, any cause for apprehension. We think the judgment should be affirmed." Wright v. Church, 39 Hun, 652; 110 N. Y., 463; 18 N. E. Rep., 259 (1888).

(3) *Evidence of matter arising after the prosecution of the alleged malicious suit.*

Where a wife, after a decree of divorce against her, continued to occupy an apartment in her husband's house without his consent, and brought her sister to stay with her, and he, after notifying them to leave, in their absence locked the door and fastened up the windows, and on their return the wife broke the windows, and thus forced an entrance for herself and sister, the latter standing by, and one of them concealing the instrument used, and the husband, on the advice of counsel, had them all arrested for malicious mischief, and, on the trial of the action brought by one of the sisters for malicious prosecution, the court admitted in evidence the petition of the wife for alimony, filed after the divorce and after the criminal prosecution, for the purpose of showing that she claimed an interest in the house, on appeal Justice Breese said: "We think the ruling of the court by which the petition for alimony was admitted in evidence, in which Mrs. Brown claimed an interest in these premises in her own right, was well calculated to prejudice the jury against appellant. It had nothing to do with the matter then in controversy, and should have been excluded." Brown v. Smith, 83 Ill., 291 (1876).

(4) *Evidence on the question of probable cause and malice.*

Where a state's attorney was indicted for malfeasance in office and neglect of official duty, and was acquitted, and brought suit against the parties who caused the indictment to be found for malicious prosecution, and one of the grounds of the criminal prosecution was that the state's attorney took a plea of guilty of certain parties indicted for a riot, and failed to bring the facts of the case to the attention of the court showing the enormity of the offense, it was held error to refuse to allow one of the parties thus sued for malicious prosecution to testify as to the facts and circumstances in the indictment for riot, as communicated to him by the prosecuting witness in that case. In the same case, a party who signed the petition for investigating certain charges against the state's attorney which resulted in his indictment, it was held error not to allow the defendant to state, as a witness, the facts that induced him to sign the petition, as the testimony had a bearing upon the question of probable cause and good faith. Harpham v. Whitney, 77 Ill., 32 (1875).

B. *And without reasonable cause:* The want of probable cause is obviously not to be inferred as a necessary consequence from the most express malice. A man, from a malicious motive, may take up a prosecution for real guilt; or, from circumstances which he really believes, he may proceed upon apparent guilt; in neither case is he liable to this kind of action. And it seems to be essentially necessary for the plaintiff, in every case, to give some evidence of want of

probable cause, independently of the proof of malice.[1] Where, indeed, there is proof of express malice, and the cause of the former proceedings is peculiarly within the knowledge of the party originating them, slight evidence of the want of probable cause will maintain the action.[2] It will not, however, be sufficient merely to prove that, on the trial of the indictment, the defendant, who was the prosecutor, did not appear, and that the plaintiff was consequently acquitted.[3] Nor is it sufficient to prove that the defendant, after commencing a prosecution, did not proceed to prefer a bill of indictment;[4] or that the bill of indictment, on being preferred, was returned by the grand jury not a true bill.[5]

The want of probable or reasonable cause is in form a negative averment, but the burden of proving it is upon the plaint-

[1] 2 Greenl. Ev., § 453; 3 Phillips, Ev., 570; Legalle v. Blaisdell, 134 Mass., 473 (1883); Calef v. Thomas, 81 Ill., 478 (1876); Hamilton v. Smith, 39 Mich., 222 (1878); John v. Bridgman, 27 Ohio St., 22 (1875); Scott v. Shelor, 28 Gratt (Va.), 891 (1877); Stone v. Crocker, 24 Pick. (Mass.), 84 (1832); Vinal v. Core, 18 W. Va., 1 (1881); Abrath v. N. E. R. Co., 4 Q. B. D., 440; Abbott's Tr. Ev., 653. See Lord Mansfield and Lord Loughborough, in Johnstone v. Sutton, 1 T. R., 544; 2 T. R., 231; Incledon v. Berry, 1 Campb. N. P. C., 203, note; Turner v. Turner, 1 Gow, 50; Arbuckle v. Taylor, 3 Dow., 160; Reynolds v. Kenneday, 1 Wils., 232; Bull. N. P., 14; Caudell v. London, 1 T. R., 520, note. It seems that where the judge is of opinion, either on the plaintiff's showing, or on the uncontradicted evidence of the defendant, that there is a probable cause, it is usual to nonsuit the plaintiff. Davis v. Hardy, 6 Barn. & Cress., 225; Hill v. Yates, 2 B. Moore, 80; Bull. N. P., 14; Fish v. Scott, Peake's C., 135; Isaacs v. Brand, 2 Stark. N. P. C., 167; Brooks v. Warwick, 2 Stark. N. P. C., 389; Ravenga v. Mackintosh, 2 Barn. & Cress., 693; Nicholson v. Coghill, 4 Barn. & Cress., 21.

[2] 2 Greenl. Ev., § 453; 3 Phillips, Ev., 570, 571; Incledon v. Berry, 1 Campb. N. P. C., 203, n. See Nicholson v. Coghill, 4 Barn. & Cress., 21. It has been said that, where the facts are within the knowledge of the defendant, the *onus* is upon him to show a probable cause. Bull. N. P., 14; by Bailey, J., 4 Barn. & Cress., 24. But the case of Parrot v. Fishwick, 9 East, 362, referred to by Buller, does not warrant this position. And see by Lord Kenyon, Sykes v. Dunbar, 1 Campb. N. P. C., 202, n.; 9 East, 362; Purcell v. Macnamara, 9 East, 361; 1 Campb. N. P. C., 203, n.

[3] Purcell v. Macnamara, 1 Campb. N. P. C., 199. So ruled by Lord Ellenborough, and confirmed by the court of king's bench, 9 East, 361.

[4] Wallis v. Alpine, 1 Campb. N. P. C., 204, n.

[5] Byne v. Moore, 5 Taunt., 187; Freeman v. Arkell, 1 C. & P. 138. See a dictum of Holroyd, J., *contra*, 4 Barn. & Cress., 28.

iff. It requires but little evidence, however, to establish it.[1] It may be shown by the character of the evidence on the trial of the prosecution complained of,[2] or by the suspicious behavior of the party.[3] In order to sustain the action the plaintiff must show affirmatively by circumstances or otherwise, as best he can, that the defendant had no reasonable or probable ground for commencing the prosecution alleged to be malicious.[4]

APPLICATIONS OF THE LAW.—

(1) *Evidence — Pleadings in former suit between the parties — Letters and account books between the parties competent, etc.*

Peden owned a large farm in Greene county, and formed a copartnership with Mail in the fall of 1881, in pursuance of which the latter moved on to the Greene county form in the spring of 1882. At the time the agreement was entered into each owned certain live-stock, which it was agreed should be put into the partnership as firm property, and Peden was to furnish money with which to purchase other stock for the firm. He was to have his money back, with interest, and the profits were to be divided equally. Some differences arose between the parties, and on January 1, 1883, a new agreement was signed. Peden claimed that by the terms of this last agreement he became the owner of the stock, and that he had the exclusive right to make sales; while Mail insisted that the partnership in the stock continued as before, and that the effect of the new agreement was nothing more than to give the former a lien on all the stock to secure him for advances of money theretofore made by him. While this last agreement was in force and under the claim that Peden was indebted to him on partnership account, Mail sold seven steers owned as above, and appropriated the money. After learning of the sale Peden demanded the money, which Mail refused to pay over. Under his claim of exclusive ownership the former then drove off all of the stock which re-

[1] Sutton v. Anderson, 103 Pa. St., 151 (1883); Strauss v. Young, 36 Md., 246 (1872); Grant v. Deuell, 3 Rob. (La.), 17, 38 Am. Dec., 228 (1842); Williams v. Van Meter, 8 Mo., 339; 41 Am. Dec., 644 (1844); McCormick v. Sisson, 7 Cow. (N. Y.), 715 (1827); Stone v. Crooker, 24 Pick. (Mass.), 81 (1832); 2 Greenl. Ev., § 454; 3 Phillips, Ev., 570, 571.

[2] John v. Bridgeman, 27 Ohio St., 22.

[3] McRae v. O'Neal, 2 Dev. (N. C.), 166 (1829).

[4] Skidmore v. Bricker, 77 Ill., 164 (1875); Heyne v. Blair, 62 N. Y., 19 (1875); Foshay v. Ferguson, 2 Dev. (N. Y.), 617 (1846); Caperson v. Sproule, 39 Mo., 39 (1866); Sharpe v. Johnson, 76 Mo., 660 (1882); Hull v. Hawkins, 5 Humph. (Tenn.), 357 (1844); Travis v. Smith, 1 Pa. St., 234 (1845); Marable v. Mayer, 78 Ga., 710 (1887); Good v. French, 115 Mass., 201 (1874); Bell v. Pearcy, 5 Ired. (N. C.), 83 (1844); Molane v. Murphy, 2 Kan., 250 (1864); Wheeler v. Nesbitt, 24 How. (U. S.), 544 (1860); Levi v. Brannan, 39 Cal., 485 (1869).

mained, which was of the value of about $1,500. Thereupon Mail instituted a civil suit against Peden for an accounting, claiming that the latter was indebted to him in a large sum. He afterwards recovered a judgment for some $1,800. In a few days after the civil suit had been commenced by Mail, Peden consulted the prosecuting attorney, upon whose advice, as he claims, he afterwards instituted a criminal prosecution against Mail, charging him, in one count, with the larceny of the seven head of cattle sold as above mentioned, and in another count with embezzling the money arising from the sale. After a trial Mail was acquitted. An action was then commenced by Mail against Peden to recover damages alleged to have resulted by reason of criminal prosecution, which, it is charged, he maliciously and without probable cause instituted and caused to be prosecuted against him. Upon evidence tending to prove facts of which the foregoing presents but a brief summary, the plaintiff below recovered a judgment, from which an appeal was prosecuted.

Mitchell, J.: The appellant complains that the court admitted in evidence the pleadings in the civil suit instituted by the plaintiff against him a short time prior to the commencement of the criminal prosecution, which gave occasion for this suit. There was no error in admitting these in evidence. It was a part of the plaintiff's case to show that the criminal prosecution was instituted against him without probable cause. The verdict and judgment of acquittal were sufficient to raise the presumption that the plaintiff was not guilty of the crime charged against him, but it was incumbent on him to go further, and by putting all the facts and circumstances which led up to the prosecution before the jury, make it appear that it was instituted without probable cause.

If, as a matter of fact, a criminal prosecution is instituted for some collateral purpose, and as a means of coercing another to surrender some right or claim which he makes, regardless of whether or not the person against whom it is commenced has committed a criminal offense, the prosecution so begun is without probable cause. Paddock v. Watts, 116 Ind., 146; 18 N. E. Rep., 518; Kimball v. Bates, 50 Me., 308. It was therefore competent to show the institution of the civil suit a few days before the criminal prosecution was commenced in order to show a motive for the prosecution other than the belief that the plaintiff was guilty of a criminal offense.

The judgment rendered in the civil suit was also admitted in evidence, but as this was afterwards withdrawn or stricken out by the court, there was no error. Indeed, it is not entirely clear that the judgment was not competent evidence.

Before the civil or criminal suit had been instituted, the plaintiff wrote a letter to the defendant, in which he complained that the latter had not kept the partnership account correctly; that he had failed to give the writer credits for about $1,200 to which he was entitled, and asking for an itemized account. He also complained of the refusal of the appellant to correct the books, or to give him a statement of his account, and claimed that there was money due him from the appellant. He also informed the appellant that he had sold the seven head of cattle already mentioned, and explained the reasons for selling them. This letter was admitted in evi-

dence as part of the plaintiff's case. In this there was no error. The letter was admissible as tending to show that the appellant knew, at the time he instituted the criminal prosecution for the larceny of the cattle referred to in the letter for embezzling the money received for them, that the plaintiff was acting in good faith and under a claim that he had a right to dispose of the cattle.

There was no error in admitting the evidence of Huston in relation to an attempted settlement or statement of the partnership account. It was not an attempt to compromise a threatened or pending law-suit. His testimony related simply to what occurred at a time when the account as kept by the appellant was being stated. Nor was there any error in permitting the jury to examine the appellant's book in which the partnership account was kept, with a view to determine whether or not the account had not been erased and interlined to the plaintiff's disadvantage. The plaintiff's claim was that he had a right to sell the cattle and appropriate the proceeds of the sale to his own use, because the appellant was indebted to him on partnership account.

He claimed further that the appellant had so erased and changed the account which he kept in his book as to show that there was nothing due him, and these changes and erasures appeared on the book. It was therefore competent to introduce the book in evidence and submit it to the inspection of the jury. Judgment affirmed. Peden v. Mail, 118 Ind., 560; 20 N. E. Rep., 446 (1889).

(2) *Entries of public prosecutors may be explained or disputed—Variance.*

Where in an action for malicious prosecution it appeared that the defendant had caused the plaintiff to be twice indicted, and that the attorney of the commonwealth had entered a *nolle prosequi* on the second, "it appearing that the accused had been formerly acquitted of the offense charged against him in this indictment," it was held that the defendant might notwithstanding show that the second indictment was for a different offense from the one first charged, and that so there was probable cause for the second accusation. There is a material variance between an indictment "for drawing and depositing in and across a highway a quantity of stones," and one "for building a stone wall in and upon the same highway;" and in an action for a malicious prosecution brought against the prosecutor of the last-mentioned indictment, it being proved that the plaintiff was guilty of the offense therein charged, and it not appearing, upon proper averments, that the two indictments were for the same offense, it was held that the defendant had shown probable cause for the prosecution. White v. Ray, 25 Mass., 467 (1829).

(3) *Want of probable cause not established.*

Want of probable cause for a prosecution for perjury is not established, in an action for malicious prosecution, by proof that the plaintiff was acquitted upon a trial, that the defendants were interested as members of a committee of a town in defending the action in which the perjury was alleged to have been committed, and which was pending on exceptions at

the time when the prosecution was instituted; that they presented to the grand jury a complaint containing a statement of their belief that the plaintiff had been guilty of perjury, and that an indictment was found by the first grand jury to which it was thus presented, and that the plaintiff's testimony which was alleged to be false was not precisely as stated in the complaint of the defendant, if it also appears to the satisfaction of the court that the plaintiff's testimony in relation to the matter in question was incorrect, and that various other persons besides the defendant believed the charge of perjury to be well founded. Kidder et ux. v. Parkhurst et al., 85 Mass., 393 (1862).

§ 8. Character — Plaintiff need not rely upon the presumption of good character — He may prove it affirmatively — Particular instances of bad conduct incompetent. There is some conflict of authority as to the competency of evidence of the reputation of the plaintiff in a trial of an action for malicious prosecution. There are many cases in which it is held that in actions of this kind, as in actions of slander, the general bad reputation of the plaintiff may be shown in mitigation of damages. There are also decisions that in suits for malicious prosecution such reputation may be shown to meet the allegation of want of probable cause.[1] But none of the cases go so far as to permit proof of particular instances of bad conduct. In determining whether there is probable cause for a prosecution for the commission of a crime, the known character or general reputation of the person suspected is always an element of some importance; for, as was said by Chief Justice Shaw: "The same facts which would raise a strong suspicion in the mind of a cautious and reasonable man against a person of notoriously bad character for honesty and integrity would make a slighter impression if they tended to throw a charge of guilt upon a man of good reputation." In suits of this kind, where the prosecution complained of was for an offense implying moral turpitude, the plaintiff's general reputation at the time of the prosecution, if the defendant was where he would be likely to know it, is always involved in the issue, and the defendant may properly be permitted to show that it was bad. We see no good reason why the

[1] M'Intire v. Levering, 148 Mass., 546; 20 N. E. Rep., 191 (1889); Bacon v. Towne, 4 Cush., 241; Pullen v. Glidden, 68 Me., 559; Barron v. Mason, 31 Vt., 189; Rodriguez v. Tadmire, 2 Esp., 721; Gregory v. Thomas, 2 Bibb, 286; Bostick v. Rutherford, 4 Hawks, 83; Gregory v. Chambers, 78 Mo., 294; Rosenkrans v. Barker, 115 Ill., 331; 3 N. E. Rep., 93.

plaintiff should not be permitted, on the other hand, to show affirmatively that it was good. It is true that every one is presumed to be of good character until the contrary appears, and this presumption ordinarily saves the necessity of proof. Indeed, in civil cases, as a general rule, evidence of reputation is not competent upon a question as to liability for a particular act. But whenever character is in issue the rule is different. One charged with a crime is not obliged to rest upon a presumption of good character. *In favorem libertatis* he may prove the fact, if he can, by a weight of evidence far more effective than any mere presumption. A plaintiff in a suit for a malicious prosecution upon a criminal charge has the burden of proving that the prosecution was without probable cause. In defending against the prosecution he would have the right to show his good reputation, although his character was not attacked otherwise than incidentally by the prosecution itself. The same incidental attack upon his character necessarily appears in the suit for the malicious prosecution. To prove that the attack was originally made without probable cause, we think he should be permitted to show his good reputation, known to the defendant when the prosecution was commenced.[1]

§ 9. **The rule stated by Taylor, J.**— Upon this question the authorities are somewhat in conflict. The question seems to us to be this, in determining the probability of the guilt of a party charged with a crime: Has his previous good character any bearing on the question? We think this question must be answered in the affirmative. The fact that it has weight in determining the question of guilt in all cases where there is any doubt of the guilt of the accused party is the basis of the rule in criminal actions, that the defendant may, in all such cases, and perhaps in all cases, give in evidence his previous good character. The fact that he has such character is some evidence, and often very conclusive evidence, of the innocence of the accused. When, therefore, a person is about to make criminal complaint against a citizen of previously known good character and reputation, it is reasonable that he should con-

[1] M'Intire v. Levering, 148 Mass., 546; 20 N. E. Rep., 191 (1889); Woodworth v. Mills, 61 Wis., 44; 20 N. W. Rep., 728; Blizzard v. Hays, 46 Ind., 166; Israel v. Brooks, 23 Ill., 575; Miller v. Brown, 3 Mo., 127; Scott v. Fletcher, 1 Overt. (Tenn.), 488.

sider that fact with the other facts and circumstances in determining the question of the probability of the guilt of the accused. If I lose my horse under circumstances which indicate that he had been stolen, and shortly after he is found in the inclosure of a man who has the reputation of being a horse-thief, I might have probable cause for believing that that man had stolen him; but if he was found under like circumstances in the inclosure of a man whom I knew to have sustained a good reputation for many years, there would be a question, at least, whether I would have probable cause to believe such man guilty of the theft. There are many cases which hold that in a civil action the character of the plaintiff is not in issue until the same is attacked by the defendant, and that until so attacked it is presumed to be good, and therefore there is no necessity or propriety in giving affirmative proof of such character. This, as a general rule, is undoubtedly the true rule; but in an action for the malicious prosecution of a criminal action, where the main question in the case is whether the defendant had probable cause for instituting such proceedings, an exception should be made. In such action the plaintiff must prove a negative,— that is, prove that the prosecutor did not have probable cause to believe him guilty of the offense charged, and, as bearing upon that question, he ought to be permitted to give evidence of his previous known good reputation.[1]

APPLICATIONS OF THE RULE.—

(1) *Character of informant in criminal cases — Bearing on the question of probable cause — Specific instances of bad conduct, etc.*

Delia McIntire sued William Levering for malicious prosecution for stealing wine. The defendant's evidence tended to show that on the day of the offense he was absent, and that on his return on the following

[1] Woodworth v. Mills, 61 Wis., 44; 20 N. W. Rep., 728 (1884). See Blizzard v. Hays, 46 Ind., 166; Israel v. Brooks, 23 Ill., 575; Wade v. Walden, id., 425; Miller v. Brown, 3 Mo., 127; Bacon v. Towne, 4 Cush., 217-240; Rodriguez v. Tadmire, 2 Esp., 722. It appears to have been the rule in England that in actions for malicious prosecution evidence that the plaintiff bore a bad reputation generally was admissible, but not the grounds of it. Rodriguez v. Tadmire, 2 Esp., 721 (1799); Cornwall v. Richardson, Ry. & M., 305 (1825); Downing v. Butcher, 2 Moo. & R., 374 (1841).

morning one Madden, his hired man, informed him that his (Madden's) wife had confessed to him that she, in company with the plaintiff and another, had stolen the wine; that one Hewett, a boy, also informed him that he saw an axe, which was found on the premises, in the hands of the plaintiff's daughter on said day; that said Madden and Hewett went to the office of a justice and related said facts and confession, and that said justice informed Madden that the defendant was the proper person to make complaint, which Madden communicated to the defendant; whereupon he appeared before said justice and swore to the complaint, Madden and Hewett being present. The defendant offered to introduce as testimony, and to show by the justice as part of his case, the statements of said Madden and Hewett to the justice, but such statements were excluded, not being made in the presence of the defendant. In rebuttal the plaintiff was allowed to put the following question to the plaintiff's husband who was a witness: "*Question.* In conversation with Levering, defendant, before the complaint, did he say that he had heard that Mrs. Madden had been in Dedham jail. *Answer.* Yes,"— to which question and answer the defendant excepted. The defendant had stated on cross-examination that he had not stated to any one that he had heard that Mrs. Madden had been in Dedham jail. Verdict for plaintiff, and the defendant excepts.

Knowlton, J.: Testimony of statements by Madden and Hewett to the justice, made in the absence of the defendant, was rightly excluded. The statements cannot be treated as facts tending to show the plaintiff's guilt, and competent evidence for that purpose, which the defendant may be presumed to have known, even though his knowledge of them is not distinctly shown. They are mere declarations of third persons, which do not appear to have been communicated to the defendant, and which have no bearing upon either of the questions at issue in the case.

The other exception presents a question of more difficulty. To show that the prosecution was not without probable cause, the defendant relied upon a statement of Mrs. Madden, communicated to him by her husband, that she, accompanied by the plaintiff and another, broke into the defendant's premises, and stole his wine. It became a question for the jury to determine how far the defendant was warranted in believing her statement, and how far he did in fact believe it.

It is quite clear that it would not be competent to attack the credibility of a witness in a trial by proving that he had been confined in jail, or that he had been guilty of any unlawful or criminal act. Nothing less than proof of conviction of a crime would be admissible. But this rule rests upon considerations of public policy, which forbid the introduction of evidence of particular acts, involving a trial of new and unexpected issues, for which the opposing party could not be expected to be prepared. There can be no doubt that one's own acts of misconduct, indicating his character, may properly be considered in determining his credibility.

A witness was permitted to testify that the defendant, before the complaint was made, said "that he had heard that Mrs. Madden had been in Dedham jail." If that statement tended to show, as against the defendant, that she was less credible than other persons, it was competent evidence upon the question whether there was probable cause for the prose-

cution. If it had no proper bearing upon his credibility, but at the same time indicated distrust of her on the part of the defendant, it was competent on the question whether the prosecution was malicious. It may be argued with much more force that the one who should say colloquially of another that he had been in jail would probably mean that he had been there under such circumstances as to affect his reputation, and to indicate that he was untrustworthy. So to say of another that one has heard that he has been in jail implies some degree of credence in the story.

The evidence in the present case seems to have been of little importance, yet it purported to show what was in the defendant's thoughts before the complaint was made. Upon the facts disclosed we cannot say that the jury might not properly consider it.

Exceptions overruled. McIntire v. Levering, 148 Mass., 546; 20 N. E. Rep., 191 (1889).

(2) *Bad character of the mother not competent for the defendant in a suit by the son for malicious prosecution.*

On the 22d day of October, 1887, Tyler caused Milo Bruce to be arrested jointly with Sarah E. Bruce, his mother, and taken before a justice of the peace on a charge made by him against them of stealing turkeys. On a preliminary examination before the justice they were recognized to appear in the circuit court to answer said charge. In the circuit court Tyler charged Milo Bruce by affidavit, sworn to, with the same crime, and an information was also filed. On the trial in the circuit court they were both acquitted. Milo Bruce was at the time about thirteen years of age and lived with his parents. An action for malicious prosecution was then brought by Milo Bruce against Tyler. On the trial the evidence tended to show that Sarah E. Bruce owned about one hundred turkeys and Tyler owned about sixty-five. On the 20th day of October, 1887, Sarah E. Bruce sold twelve turkeys; her son Milo was present when she sold them. They were turkeys of her own raising, and by her order her son caught them on the day they were sold and drove them to town. Tyler lost no turkeys, and had as many after the arrest as he had before, but he claims to have lost thirty-three turkeys on the 20th day of October, 1887. Sarah E. Bruce was not called nor sworn as a witness on the trial. "The appellee, to sustain the issues on his part, called as a witness one Caroline Dipert, who was duly sworn as a witness, and thereupon the appellee asked her the following question: 'Question. You may state, Mrs. Dipert, if you are acquainted with the general reputation of Mrs. Bruce, the old lady, in the neighborhood where she is known; was you acquainted with her reputation say the 20th of October, 1887, for honesty?' And she answered: 'Yes, sir.' The witness was asked the further question to state what 'that reputation was, good or bad,' and she answered, it was 'bad.'" Objection was made by counsel for the appellant at the proper time as to the competency of the evidence. The objection was overruled. A motion was also made to strike out the evidence, which was also overruled, and exceptions reserved to the rulings of the court. The trial resulted in judgment for the appellee. The cause went to the supreme court upon a reserved question of law.

In granting a new trial, Olds, C. J., said: "This evidence is clearly incompetent, and it was error to admit it. The parents are the natural custodians of a child of the age of the appellant. His association with his mother cannot be said to be of his own volition. His parents, who were living together, had the lawful right to his custody, and it was his duty to confide in them, and obey all reasonable and lawful commands which they might give. The fact that the mother with whom he lived might have a bad reputation for honesty constituted no grounds for the arrest of the son for the crime of larceny. In some instances the general bad character of the party himself might, when considered with other facts, tend to establish probable cause for his arrest; but to hold that the bad reputation of the mother of a boy thirteen years old, with whom he lived, may be proven as tending to establish probable cause for the arrest of such boy for the crime of larceny, is carrying the doctrine of proof as to character entirely too far to be permitted. It is very doubtful, even in a case where persons of mature years voluntarily associate themselves together and a crime is committed, and they are arrested charged with the commission of it, and acquitted, and one of them brings suit for damages for malicious prosecution, whether it would be proper to consider the reputation of the other defendant in determining whether the person instituting the prosecution had probable cause for so doing; but certainly such evidence is not proper in such a case as the one at bar. See Armstrong v. Grogan, 5 Sneed, 108; 1 Hil. Torts, p. 454, § 19; Brainerd v. Brackett, 33 Me., 580; Holburn v. Neal, 4 Dana, 120; Peck v. Chouteau, 91 Mo., 138; 3 S. W. Rep., 577; Patterson v. Garlock, 39 Mich., 447; Falvey v. Faxon (Mass.), 9 N. E. Rep., 621; Walker v. Pittman, 108 Ind., 342; 9 N. E. Rep., 175; Oliver v. Pate, 43 Ind., 132; Peden v. Mail, 118 Ind., 560; 20 N. E. Rep., 446; Adams v. Bicknell (Ind.), 25 N. E. Rep., 804; Cottrell v. Cottrell, id., 905; Winemiller v. Thrash, id., 850 (Oct. 11, 1890). The court erred in admitting the evidence. Judgment reversed." Bruce v. Tyler (Ind.), 26 N. E. Rep., 1081 (1891).

§ 10. Advice of counsel.—If the defendant acted under the advice or opinion of legal counsel, this fact is relevant both to show probable cause and absence of malice. To render such opinion or advice competent for such purposes, it must be shown that it was given before the prosecution was commenced; and the statement of facts which was laid before the counsel, and upon which such opinion or advice was given, must be shown. The learning or ability of the counsel need not be shown, as it will be presumed from the evidence that he was a duly licensed attorney and counsel.

If the defendant is able to show that a full and fair statement was made by him to a respectable attorney, and that he acted on his advice, it will require strong evidence to show

that the defendant did not believe that there was reasonable or probable cause for the prosecution.[1]

AN ILLUSTRATION.—

Advice of counsel—Its sufficiency as a defense, a question for the jury.

In an action for malicious prosecution, brought by Charles W. Finn against Joseph P. Manning, based upon the allegation that Manning caused Finn to be prosecuted upon the charge of embezzlement, one ground of defense was the advice of counsel. Manning, the defendant, testified as follows: "Q. Did you ever have any settlement with Mr. Finn? A. No, sir. We never had any settlement at all. He came and pretended that he wanted to settle, and denied having the goods. Q. Failing to get a settlement with Mr. Finn, did you take counsel in the matter, and, if so, who did you speak to or consult? A. E. F. Smythe and Mr. Stull. Gen. O'Brien and I had a talk with a man named Bennett, and had a talk with Mr. Burnham. Q. State the substance of what you said. A. I said that I furnished Mr. Finn this money, as my agent, to do this work with; that the stipulation was that he was to have a per cent., one-third of the profits, after the expenses were paid; I stated that I employed him as an agent; that he had received the goods, and failed to report to me or give me any account whatever of the proceeds, or what he had done with them. Q. State whether you showed that memorandum book to any or all of the attorneys. A. I did, and those papers that are there (referring to a bundle of papers). These blue papers were shown to Mr. Burnham, Col. Smythe and Mr. Stull. Q. State what Mr. Smythe advised you as to the proper course to pursue, and what he said as to the probable cause, if any, as to Mr. Finn's being guilty of any crime. A. He advised me to go to the district attorney. He said I had a good cause, and there was no doubt of his guilt of embezzlement, or a breach of something about bailee. Q. State what conversation you had with Mr. Burnham in this matter. A. I stated to Mr. Burnham that I had Finn employed, and furnished so much money for agent. He had disposed of this property, and refused to settle or account for it. That I employed him as my agent to do these things, and I was deficient. I showed him the account book that I had, and the date of everything. I showed him receipts and agreement made between Mr. Finn and myself. I showed all the papers that I had, and the books, and took them all to him. Q. State what Mr. Burnham said to you. A. Mr. Burnham said it was a good case, and he would attend to it. Q. When did you next see Mr. Burnham? A. I saw him the next Monday following. Q. State if you ever saw that paper (referring to the original complaint) before, and who prepared it. A. I signed that paper, and saw it, of course. It was prepared at Mr. Burnham's office by Baylett, and read over to Mr. Burnham, and Mr. Burnham said it was right. Q. State if you went to the police court, and swore to that, and under whose directions? A. Mr.

[1] Abbott's Tr. Ev., 655, 656; Skidmore v. Brecker, 77 Ill., 164 (1875); Horne v. Sullivan, 88 Ill., 82 (1876); Jackson v. Mather, 7 Cow., 301 (1827); Laird v. Taylor, 66 Barb., 139 (1868).

Burnham's. Mr. Baylett, deputy district attorney under Mr. Burnham, appeared there on behalf of the state. There was an examination and trial had there, and the case was sent up to the district court."

N. J. Burnham testified that he was district attorney from January 1, 1881, to December 31, 1882; that the complaint of defendant in the police court was in the handwriting of his former partner, Samuel A. Baylett. Q. "State whether you had anything to do with the getting up of this complaint? A. I have no distinct recollection of drawing, or of having anything to do with the drawing, of the complaint. Q. In relation to this complaint, did you not tell him that it seemed to be a clear case, and you would turn it over to Baylett to prepare the complaint? A. I do not believe that I could have said that. I do not believe that I did. I left it to the grand jury, and it was very thoroughly examined. Q. Did you not say to Mr. Manning that there was probable cause for the prosecution of this case? A. I have no recollection of saying anything of the kind."

George M. O'Brien testified that he was an attorney-at-law, resident of Omaha since 1866. Q. State whether or not J. P. Manning consulted you and asked your advice in regard to a criminal matter in which Finn has since been charged with embezzlement, and what was then and there said and done? A. In the early part of 1882 he consulted me, a short time before Finn was arrested, or probably about the time of his arrest. He brought to my office an account book, and made a statement that he and Watson were in partnership in the truck business, buying and dealing in truck, which they got southeast somewhere. That they employed Charles Finn as agent to purchase it, and bring it here to be disposed of, and for that purpose he had furnished him money from time to time amounting to over $1,000. That the money was paid out for the purchase and transportation of apples, butter and chickens. That Finn was to continue as agent for the selling of them, and that for his pay for his services as such agent, he was to have one-third of the profits. I asked him, "Why one-third of the profits," for my information; he said they could not get at the days he worked, and that was the way he was getting pay for his services. I examined his account book, and cross-examined him upon it. He asked me what he should do. I said, "Mr. Manning, this statement of yours leaves Mr. Finn, if true, guilty of embezzlement." He said, "It's God's truth, and I want your opinion on it." I said that my opinion is that the statement that you made to me is embezzlement, and he ought to be prosecuted. He said, "What shall I do about it?" I told him that the matter in my judgment was sufficient, if true, to send Mr. Finn to the penitentiary, and that it was his duty to go and lay the matter before the district attorney. Then he said, "Your advice is to go to the state's attorney." I told him it was my opinion and judgment, that, on the statement he made to me, Finn was guilty of embezzlement.

After an exhaustive trial of eight days and an impartial charge, the jury returned a verdict for the plaintiff, assessing his damages at $900. upon which judgment was rendered. Mr. Manning took the matter to the supreme court on a writ of error.

In affirming the judgment Cobb, J., said: "The defendant below is not sufficiently corroborated by his own witness, the former district attorney,

as to having been legally advised that he had probable cause for the criminal prosecution; but the testimony of that witness tends to the want of advice and the contrary opinion. He is but partially corroborated in that important fact by his counsel on the trial, whose advice was that 'if his statement of all the facts and circumstances was true the defendant was guilty of embezzlement.' This advice, given carefully and subjunctively, was not conclusive, for through its fatal 'if' it destroyed the proposition that he was justified, on his statement, in commencing the prosecution. He was to undertake it on that advice only if his facts and the circumstances were true. For the certainty and sufficiency of the premises he alone must be responsible, a question, at least, for the jury to decide. The essential ground of recovery for malicious prosecution is that it was carried on without probable cause, which is a mixed proposition of law and fact. Whether the circumstances to show it probable are true is a matter of fact to be tried; but, if true, that they make a probable cause, is a question of law to be decided." Manning v. Finn, 23 Neb., 511; 37 N. W. Rep., 314 (1888). Citing Trevor v. Trevor, 1 H. L. Cas., 263.

§ 11. Malice.— For the purpose of disproving malice in making a criminal charge the defendant may testify as a witness in his own behalf as to whether, when he made the charge, he believed that the plaintiff was guilty of the charge.[1] And the declarations of the defendant, made as a part of *res gestæ* of an act in proceedings alleged to be malicious, are, it seems, competent in his own favor to negative malice,[2] but the declarations of his agent or attorney, unless brought home to him, are not.[3]

§ 12. Malice and the want of probable cause must concur.— The burden of showing that the prosecution complained of was instituted maliciously and without probable or reasonable cause is, as we have seen, upon the plaintiff, and both of these elements must concur or the suit will fail; for if the prosecution were malicious and unfounded in matters of fact, but yet there was probable cause, the action for malicious prosecution can not be maintained.[4]

[1] McKnown v. Hunter, 30 N. Y., 625. But the rule on this subject is not uniform. See, *contra*, Sawyer v. Loomis, 3 Sup. (T. & C.), 393.

[2] Wood v. Barker, 37 Ala., 60 (1860); Abbott's Tr. Ev., 655.

[3] Floyd v. Hamilton, 33 Ala., 235 (1858).

[4] 2 Greenl. Ev., § 453; 3 Phillips, Ev., 568, 569; Farmer v. Darling, 4 Burr., 1791; Stone v. Crocker, 24 Pick. (Mass.), 83 (1832); Bell v. Graham, 1 Nott & McC., 278 (1818); Hall v. Suydam, 6 Barb. (N. Y.), 83 (1849); Richey v. Davis, 11 Iowa, 124 (1860); Kirkpatrick v. Kirkpatrick, 39 Pa. St., 288 (1861); Arbuckle v. Taylor, 3 Dowl., 160; Turner v. Turner, Gow, 20.

§ 13. Actions against magistrates.— If an action is brought against a magistrate for a malicious conviction, the question is not whether there was any actual ground for imputing a crime to the plaintiff, but whether there appeared to be any ground upon the hearing before the magistrate; and this can only be shown by proving what passed upon the hearing when the conviction took place. If the depositions of witnesses were taken down in writing at the hearing before the magistrate, they ought to be produced on the part of the plaintiff.[1]

APPLICATION OF THE LAW.—

Testimony before magistrate on the preliminary examination competent.

The defendant, in an action for a malicious prosecution, may prove by a magistrate before whom the prosecution was instituted what the testimony before him was on the part of the government, in order to show probable cause and rebut the allegation of malice; and it is not necessary, for this purpose, that the witnesses by whom the testimony was given, or their depositions, should be produced: but if produced, and the witnesses or deponents are unable to recollect what their testimony was, it may nevertheless be proved by the magistrate. So, for the same purpose, the defendant may prove what a certain person communicated to another, with a request that the latter would make it known to the defendant, the fact that the former saw the plaintiff do the criminal act of which he was accused, and that this information was communicated to the defendant before the complaint against the plaintiff was made. Bacon v. Towne, 58 Mass., 217 (1849).

§ 14. Magistrates are bound by the records they keep.— The great leveling principles which have been so long known and recognized as making the distinction between the different degrees of evidence, and holding the weaker and more uncertain to be incompetent when a higher degree of evidence is shown to exist, cannot be too strictly enforced. No principle in law is more firmly established than that which excludes oral testimony when offered to control, contradict or vary written evidence, especially that species of evidence denominated records.[2] Under the statutory provisions of nearly all if not all of the states, every justice of the peace is required to keep a record of all his judicial proceedings in

[1] 3 Phillips, Ev., 571, 572; Parker v. Huntington, 2 Gray (Mass.), 124; Bailey v. Bethune, 5 Taunt., 580; Else v. Smith, 2 Chitty, 304.

[2] Sayles v. Briggs, 45 Mass., 421 (1842); Kendall v. Powers, 45 Mass., 553 (1842).

civil and criminal cases. These provisions secure to all concerned, to the parties as well as the justice, the benefit of this species of evidence as to all the proceedings in a cause. The duty imposed on the justice to keep a record undoubtedly applies to everything which is necessary to exhibit fully the final disposition of the cause on his part. Having this duty enjoined upon him, and consequently having the opportunity afforded to him of furnishing, by his own record, the strongest case in his power, which the truth will warrant, public policy as well as the rules of law forbid that a justice of the peace should be allowed to introduce parol evidence to add to or in any manner contradict the record as made up by him. As a defendant in suits growing out of his official acts, he has the right in law to be tried by his record; but by it, as originally made, he must stand or fall.[1]

APPLICATIONS OF THE LAW.—

(1) *Justice of the peace — Matters outside of his record inadmissible.*

In an action against a magistrate for false imprisonment of the plaintiff in the house of correction, it appeared on the defendant's record that the plaintiff was duly convicted before him of being a common drunkard, and was thereupon sentenced to said house. The plaintiff appealed from the sentence to the court of common pleas, and upon his failure to procure sureties for the prosecution of his appeal, the defendant issued a *mittimus* pursuant to the sentence. It was held that the defendant could not be permitted to show by parol evidence, in justification of his proceeding, that the plaintiff, after failing to procure sureties, waived and withdrew his appeal. Kendall v. Powers, 45 Mass., 553 (1842).

(2) *The papers should be produced, etc.*

In an action for the conversion of personal property, the defendant, Alonzo King, claimed title under a bill of sale from the plaintiff, Alfred Hackett. Hackett replied that the bill of sale was obtained by duress and fraud. Hackett was in the employ of King, and was arrested for stealing money from his employer. He was taken to King's house and then to the marshal's office, where, after considerable talk, he executed the bill of sale and was discharged without being taken before the magistrate; the warrant was never returned. On the trial the defendant offered to prove facts and certain circumstances which were the basis of his complaint to the marshal, tending to show that the defendant had stolen money at various times from his money drawer. To this evidence the plaintiff objected, on the ground that, it appearing that he had been discharged from the imprisonment without being taken before a magistrate, the defendant ought

[1] Kendall v. Powers, 45 Mass., 553 (1842).

not to be allowed, without producing the warrant, to go into parol proof to show probable cause, or that the warrant was justifiable in its inception, the warrant not having been returned into court and not having been produced. The court overruled the objection and allowed the defendant to introduce in evidence, as circumstances tending to the taking of money, that the defendant was spending more than his honest income, etc. Upon exceptions, the supreme court granted a new trial, holding that the admission of parol evidence to prove the issuing of the warrant against the plaintiff and his arrest thereon was illegal, and that the warrant could be legally proved by producing it or a verified copy of it, unless upon showing that neither it nor such copy of it could be produced. Hackett v. King, 6 Allen (88 Mass.), 59 (1863).

§ 15. **Actions for malicious arrest.**— In an action for a malicious arrest, the plaintiff will have, in the first place, to prove the fact of arrest. Where the arrest is in consequence of civil process, the return of the sheriff upon the writ is evidence of the truth of the fact stated in the return.[1] If the plaintiff has been held to bail, this will sufficiently appear from the indorsement on the writ.[2] Where the action is for a malicious arrest on criminal process, and the warrant under which the arrest was made is lost, it seems that parol evidence of it will be received, especially if it does not appear that any information has been taken.[3] An actual or constructive arrest must be shown. In a case where a sheriff's officer, to whom a warrant upon a writ against the plaintiff had been delivered, sent a message to the plaintiff and asked him to fix a time to give bail, in consequence of which a time was fixed and bail given, it was held that an action for a malicious arrest could not be sustained against the party suing out the writ, although he had no cause of action, because neither an actual nor constructive arrest had been proved. Where the plaintiff averred

[1] 3 Phillips' Ev., 574; Gyfford v. Woodgate, 11 East, 296. In Lloyd v. Harris, Peake's C., 231, it was considered that it was necessary to prove the sheriff's warrant on the writ. See Jackson v. Burleigh, 3 Esp. C., 84.

[2] Bull. N. P., 14; Rogers v. Ilscombe, 2 Esp. Dig., N. P. C., 38. It is unnecessary to prove the affidavit to hold to bail, unless it is averred. Webb v. Hearne, 1 Bos. & Pull., 281. The affidavit, if alleged to have been made generally, may be proved by an office copy. Bull. N. P., 14; Casburn v. Reed, 2 B. Moore, 60. On the evidence of arrest under process of the sheriff's court, see Arundell v. White, 14 East, 216; 3 Phillips' Ev., 574, 575.

[3] Newsam v. Carr, 2 Stark. C., 69. That the action should be case, see Elsee v. Smith, 2 Chitt., 508.

that the defendant detained him in custody until he found bail, it was held that he was entitled to recover damages, on proving some detention, although no bail was put in.[1]

§ 16. **Want of probable cause in actions for malicious arrests.**— With respect to the proof of a want of probable cause for arresting the plaintiff, and of malice, it is not sufficient to show that the defendant suffered judgment of *non pros.* in his action against the plaintiff;[2] nor that the plaintiff was arrested after payment to the defendant of debt and costs, the writ having issued previous to the payment,[3] unless the defendant has refused to sign an authority to the sheriff to discharge the plaintiff out of custody.[4] Where the defendant has been the actor in putting an end to the former proceedings, as by voluntarily discontinuing them, and there has been a very short interval between the arrest and the abandonment of the action, the absence of probable cause and malice on the part of the defendant may properly be left for the consideration of the jury.[5] But the mere circumstance of the discontinuance of a former action does not exclude the existence of a probable cause.[6]

§ 17. **Proof of damages.**— The plaintiff is entitled to damages for the peril in which his life or liberty has been placed, for the injury which his reputation has sustained, and the expense to which he has been put. The plaintiff's right to damages cannot be resisted on the ground that the proceedings against him were defective, because he is equally subjected to the disgrace of a criminal charge and put to the same expense in defending himself against it.[7] The questions which occur in this action respecting the recovery of damages have been heretofore fully considered in treating of the general subject of damages.[8]

[1] 3 Phillips' Ev., 574, 575, 576.

[2] 3 Phillips' Ev., 576; Sinclair v. Edred, 4 Taunt., 7.

[3] Payne v. Wyfle, 8 East, 314; Gibson v. Chasters, 2 B. & P., 129; Scheible v. Fairbarn, 1 B. & P., 388.

[4] 3 Phillips' Ev., 576; Crozier v. Pilling, 4 B. & C., 26.

[5] Bessen v. Southard, 10 N. Y., 236; McKeller v. Cauch, 34 Ala., 330; Spengler v. Dasy, 15 Gratt. (Va.), 381; 3 Phillips' Ev., 576.

[6] Brown v. Lakeman, 12 Cush., 482; Bristors v. Haywood, 1 Stark. N. P. C., 50; 3 Phillips' Ev., 576.

[7] 3 Phillips' Ev., 573; 2 Greenl. Ev., § 456; Goldsmith v. Picard, 27 Ala., 142; Pippett v. Hearn, 5 B. & Ald., 634.

[8] See chapter on "Damages."

§ 18. Evidence on the part of the defendant.— The defense in actions for malicious prosecution usually consists in (1) disproving the charge of malice, or in (2) showing the existence of probable cause for the prosecution in question. If the defendant succeeds in satisfying the court or jury either of the want of malice or the existence of probable cause, his defense must succeed, for if he acted maliciously, but had reasonable or probable cause, or if he acted without malice in good faith supposing he had reasonable cause when he had none, he is not liable to an action for malicious prosecution. Hence when the burden of the plaintiff has been discharged, and a *prima facie* case established, the defendant may, if he can, overcome it by showing either probable or reasonable cause for the alleged malicious prosecution or the absence of malice.[1] The subjects of malice, and what is reasonable or probable cause, have been fully discussed in chapters relating to such matters, as well as the subject of advice of counsel as an element of reasonable or probable cause, to which the reader is referred.

§ 19. Evidence admissible under the general issue.— Under the general issue, the defendant is ordinarily permitted to give evidence of any matter *ex post facto* which shows that the cause of action has been discharged, or that in equity and conscience the plaintiff ought not to recover;[2] thus a release, a former recovery, or a satisfaction may be given in evidence;[3] the plea of not guilty operates as a denial only of the wrongful act alleged to have been committed by the defendant,[4] and not of the facts stated in the inducement of the complaint.[5] No other defense than such denial is admissible under it. All other pleas in denial take issue on some particular matter of fact alleged in the declaration.[6] The defendant under the plea of not guilty, the general issue, may justify the proceedings against the plaintiff and show that he had probable or reasonable cause for the instituting of them; and where the alleged prosecution was for a felony, the defendant has been allowed in his defense, after giving some evidence

[1] Bailey's Onus Probandi, 187, 188.
[2] 3 Burr., 1353; 1 Head (Tenn.), 626.
[3] Yelv., 174, note 1; Stephen's Pl., 182, 183; 2 Bing., 377.
[4] 1 Chitty's Pl., 518.
[5] 1 Bing. N. C., 588; 3 Dowl., 619, S. C.
[6] 1 Chitty's Pl., 518.

of probable cause, to prove the general bad character of the plaintiff; for in this case, where the point in issue is whether the defendant acted from malice and without probable cause, it may be thought material to inquire into the situation of the parties, and whether the defendant had any reasonable ground for suspecting the plaintiff. The notoriety of the plaintiff's character for dishonesty is a circumstance of general suspicion not to be disregarded.[1] In certain cases especially, if the plaintiff's conduct has been suspicious on the particular occasion in question, a man with the fairest and best intentions might be justified in acting upon such grounds and might have strong reasons for proceeding against a person of such notorious character, but a mere inquiry into particular facts, with a view to reflect on the plaintiff's character, is not to be allowed.[2]

§ 20. **Matters not relevant to the issue.**— It is a well-settled rule of law that upon the trial of all actions, civil as well as criminal, matters of evidence not relevant to the issue are prohibited and inadmissible.

THE RULE ILLUSTRATED.—

Matters having no relevancy to the issue.

In an action for malicious prosecution to recover for damages to the plaintiff by reason of his arrest under a *capias ad respondendum* sued out in an action on the case brought by the defendant against the plaintiff for slanderous words alleged to have been uttered and spoken by the latter, imputing to the former adulterous intercourse with a certain woman, the plaintiff sought to prove a want of probable cause for the prosecution by establishing the truth of the alleged slanderous words. It was held that evidence offered by the plaintiff of indecent exposure on the part of the defendant to the woman with whom the alleged adulterous intercourse was charged, and her sister, was inadmissible, as having no relevancy to the issue. Mitchell v. Cross, 58 Ill., 366 (1871).

§ 21. **The credibility of witnesses and weight of testimony, questions for the jury.**— The credibility of a witness is a question exclusively for the consideration of the jury; and where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of

[1] 3 Phillips' Ev., 574, 575; Rodriguez v. Tadmire, 2 Esp. N. P. C., 720; Newman v. Carr, 2 Stark. N. P. C., 69.

[2] 3 Phillips' Ev., 573.

evidence as evenly balanced. They have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit, and to give credit accordingly.[1]

AN ILLUSTRATION.—

Credibility of witnesses, the province of the jury.

Meyers sued Schoonover for malicious prosecution, the latter having caused him and two of his infant children to be arrested for the larceny of a bee-hive. Meyers was ill at the time the officer came after him, but he subsequently appeared before the justice and waived examination, and gave bail for his appearance. The two children were acquitted and discharged after five days' imprisonment. At the circuit court Meyers was discharged by the state's attorney, the grand jury having found no bill against him. Under the plea of not guilty there was a trial and a judgmen for Meyers of $4,500. Schoonover appealed. The case turned upon the testimony of a boy fifteen years old named Brill, who had been living in Schoonover's family eleven years and who was examined before the justice. On the trial he testified that he had been confined and ill-treated in various ways by Schoonover to induce him to testify falsely. The evidence was contradicted in many particulars, and an attempt was made to impeach him. The supreme court affirmed the judgment. In the opinion, Caton, C. J., said: "This case presents a most extraordinary spectacle. Rarely have we met, either in the books or in our other experiences, so revolting a case of conspiracy, subornation of perjury, and perjury, as this record presents; and the difficulty in the case is to determine which is the guilty party, and which is the victim. We have carefully studied all the evidence in the light of the very lucid arguments on both sides, and we shall have doubts hanging about us whether the boy is an abandoned, perjured little villain, as one party insists, or a friendless waif cast upon the world, whom the defendant, by the most inhuman cruelty, sought to mold to his own wicked purposes. The whole case really depended on the credibility of this witness, and the jury believed him, and in this case we cannot say they were wrong, nor could we have reversed their finding had they disbelieved him and found the other way, though we should have been as much inclined to do so then as we are now." Schoonover v. Meyers, 28 Ill., 308 (1862).

§ 22. False imprisonment.— In actions for false imprisonment, the burden of showing the imprisonment to be illegal and without authority of law is upon the plaintiff; but he need

[1] Wallace v. State, 28 Ark., 531; Holloway v. Com., 11 Bush, 344; Stampofski v. Steffens, 79 Ill., 303.

not show that the defendant used violence, or shut him up in a jail or prison, or even laid hands on him: it is sufficient to show that he was restrained of his liberty, detained from going where he wished or doing as he desired.[1] Upon proof of the imprisonment being made, it will be presumed to have been against the plaintiff's will.[2]

§ 23. Burden of proof, when upon the plaintiff to show the imprisonment false.— As a general proposition of law, it is only necessary for the plaintiff in actions for false imprisonment to show that he has been restrained of his liberty. The presumption then arises that his restraint was unlawful, and the burden of proving a justification, if any exist, is upon the defendant. But when the plaintiff goes further than this and shows that such imprisonment was caused by a complaint before a magistrate, the issuing of a warrant upon such complaint, and a trial and examination under it, the burden of proof is upon the plaintiff to show that the proceedings were invalid or irregular, the presumption of law being in favor of the regularity of judicial proceeding even in courts of limited jurisdiction.[3]

AN EXCEPTION TO THE RULE ILLUSTRATED.—

The plaintiff must show the imprisonment false, when.

Barker sued Anderson for false imprisonment. Anderson was mayor of the city of Iron Mountain, and made complaint against Barker before a justice of the peace. Upon this complaint Barker was arrested, tried, found guilty and fined $20 and costs or thirty days' imprisonment in the county jail. He was taken to the jail and confined twelve days, when he was released on *habeas corpus*. Before he went to jail he was locked up in the city lock-up about two hours. The complaint was for peddling without a license from the city of Iron Mountain. This suit resulted in a verdict and judgment for $1,000. On that trial no attempt was made to justify the arrest and imprisonment, and no testimony was offered on the part of the defense. The plaintiff testified substantially that he was arrested in April, 1889, in the city of Iron Mountain, by a person whom he thought was a police officer, and was taken before a justice of the peace. He asked to have the case continued until the next day, which was granted.

[1] Cooley on Torts, 169; Buller's N. P., 22; 2 Leigh, N. P., 1437; Hawk v. Ridgeway, 33 Ill., 473 (1864); 2 Saund. Pl. & Ev., 520; Underhill (Moak's), Torts, 177, rule 8; 2 Addison, Torts, §§ 798, 799, 843.

[2] Saund. Pl. & Ev., 516; Bailey's Onus Probandi, 123.

[3] Love v. Wood, 55 Mich., 451; 21 N. W. Rep., 887; Barker v. Anderson, 81 Mich., 508; 45 N. W. Rep., 1108 (1890).

Afterwards, in the course of an hour or so, he went back and said: "I have changed my mind, and if it is convenient I will proceed at once with the trial," and it was done. The complaint was signed by Anderson, and plaintiff was told that he was mayor of the city. It was not shown that he had anything to do with the proceedings except to make the complaint. The justice testified that Anderson made the complaint. On the trial the judge instructed the jury that the plaintiff made out his case by showing the arrest and imprisonment; that it was then the duty of the defendant, if he had any justification, to show it. "He has not done so, so that he stands here as liable for the false imprisonment, and the only question for you, therefore, is to assess the damages." On appeal it was assigned as error that the court erred in stating that the plaintiff made out his case by showing the arrest and imprisonment as above quoted.

In delivering the opinion of the supreme court, Morse, J., said: "As a general proposition, it must be admitted that it is only necessary for the plaintiff, in an action of this kind, to show that he has been imprisoned or restrained of his liberty. The presumption then arises that he was unlawfully imprisoned, and it is for the person who has committed the trespass to show that it was legally justified. But the counsel for the defendant contends that the plaintiff having shown 'that he was imprisoned as the result of legal proceedings, that a complaint was made, a warrant issued, the form of a trial gone through with, resulting in his conviction and the issuing of a commitment, under the color of which he is imprisoned, the jury should have been instructed to find a verdict for defendant,' as the presumption is in favor of the regularity of judicial proceedings even in courts of limited jurisdiction; citing, in support of his contention, the case of Love v. Wood, 55 Mich., 451; 21 N. W. Rep., 887.

"Under the circumstances of the plaintiff's proofs we think the defendant was entitled to a verdict. In actions of this kind it is for the plaintiff to show, not only that he was restrained of his liberty, but that the restraint was unlawful. The name of the action implies that the imprisonment is false, and no action could be supported against any restraint which was lawful. The mere fact that a person has been imprisoned is sufficient in itself, standing alone, to raise the presumption that it was illegal; but when the plaintiff goes further, and shows, as he did in this case, that such imprisonment was caused by a complaint before a magistrate, the issuing of a warrant upon such complaint, and a trial and conviction under it, and that the chief damages resulted from the imprisonment under the commitment of the magistrate upon such conviction, the burden must be on the plaintiff to show that the complaint was invalid." Judgment reversed. Barker v. Anderson, 81 Mich., 508; 45 N. W. Rep., 1108 (1890).

§ 24. Irregularities and informalities of proceedings — Process, etc.— In cases where the action is founded upon irregularities or informalities in the process or proceeding, the burden of showing the same is upon the plaintiff.[1] For

[1] Bradstreet v. Furgeson, 23 Wend. (N. Y.), 638 (1840); 7 Am. & Eng. Ency. Law, 689; Bailey's Onus Probandi, 122, 123; Abbott's Tr. Ev., 657.

example, if he relies upon the failure of the judgment to support the process against him, he must show the judgment, the defect relied upon, and that the process was issued upon the judgment in question.[1]

§ 25. **Want of reasonable cause.**— It is not quite clear from the authorities that the burden of proving a want of probable cause for his arrest and imprisonment is upon the plaintiff in actions for false imprisonment. The proof, if necessary, however, is made by evidence of the restraint itself, it being a negative averment, and the means of justification more peculiarly within the possession or knowledge of the defendant.[2] It seems to have been held in New York that the want of probable cause is an essential element of the plaintiff's case in actions for false imprisonment; but if such a principle is applicable to this action, it is difficult to see why it is not also applicable to actions for assault and battery.[3]

§ 26. **The rule stated.**— Whenever an arrest has been made without authority of law the offense of false imprisonment is complete; and while many cases speak of probable cause or reasonable grounds of suspicion as affording justification, it will be found that these cases discuss the right of magistrates, officers or others to arrest or cause arrests on suspicion merely, and in which reasonable suspicion is a sufficient authority for the arrest.[4]

§ 27. **Malice in actions for false imprisonment.**— Malice is not an essential element to be proven in actions for false imprisonment, although it is always competent to be shown in aggravation of damages.[5]

§ 28. **General damages.**— Upon making out a *prima facie* case the plaintiff is entitled to some damages. The amount

[1] Barhydt v. Valk, 12 Wend. (N. Y.), 145 (1834); Brown v. Dement, 9 Cow. (N. Y.), 263 (1828); Bailey's Onus Probandi, 657; Abbott's Tr. Ev., 123.

[2] Martin v. Fabrigas, 1 Smith L. C., 340; Bailey's Onus Probandi, 128; Haupt v. Pohlman, 16 Abb. Pr. (N. Y.), 301 (1863).

[3] Hawley v. Butler, 54 Barb. 490 (1868); Farnham v. Feeley, 56 N. Y., 451 (1874); Carl v. Agers, 53 N. Y., 14 (1873); Abbott's Tr. Ev., 657; Bailey's Onus Probandi, 123.

[4] 7 Am. & Eng. Ency. Law, 688 note 8. And see Hawley v. Butler, 54 Barb. (N. Y.), 490 (1868); Gorton v. De Angelis, 6 Wend. (N. Y.), 418 (1831); Boaz v. Tate, 43 Ind., 60 (1873).

[5] Plat v. Niles, 1 Edm., 230; Abbott's Tr. Ev., 657.

depends upon the facts and circumstances attending the transaction.[1] The restraint being shown to be illegal, the plaintiff has always a right to recover such damages as shall fully compensate him, keeping in mind that they are not too remote.[2]

The amount of damages to be recovered depends upon the peculiar circumstances of each particular case, and no rule can be laid down. Of the amount the jury are the exclusive judges under the evidence, and their findings will not in general be disturbed, unless they are so extravagant as to make it probable that their action is the result of passion or prejudice rather than clear deliberation.[3]

§ 29. **Compensatory damages.**— As elements of compensatory damages, the plaintiff may, on the trial, introduce in evidence:

(1) Expenses reasonably incurred to procure his release from imprisonment.[4]

(2) Reasonable attorney fees,[5] though the rule is not uniform in all the states.[6]

(3) Loss of time; interruption of business; bodily and mental suffering occasioned by the imprisonment;[7] suffering from cold and want of food in jail; shame, humiliation, etc.

(4) Insult and humiliation.[8]

[1] Bailey's Onus Probandi, 123.

[2] Bonesteel v. Bonesteel, 30 Wis., 511 (1872); Newton v. Lacklin, 77 Ill., 103 (1875); Cary v. Shuts, 60 Ind., 17 (1877); Van Dusen v. Newcomer, 40 Mich., 90 (1879); Bradlaugh v. Edwards, 11 C. B., 377; 7 Am. & Eng. Ency. Law, 690.

[3] Schlenecker v. Risley, 3 Scam. (Ill.), 483; 38 Am. Dec., 100 (1842); Woodward v. Glidden, 33 Minn., 108 (1884); Ogg v. Murdock, 25 W. Va., 139 (1884).

[4] Blythe v. Thompkins, 2 Abb. Pr. (N. Y.), 468 (1856): Pritchett v. Boevey, 1 Cro. & M., 775; Ocean S. S. Co. v. Williams, 69 Ga., 251 (——); 7 Am. & Eng. Ency. Law, 690.

[5] Krug v. Ward, 77 Ill., 603 (1875); Bonesteel v. Bonesteel, 30 Wis., 511 (1872); Parsons v. Harper, 16 Gratt. (Va.), 64 (1860); Blythe v. Thompkins, 2 Abb. Pr. (N. Y.), 468 (1856).

[6] Strang v. Whitehead, 12 Wend. (N. Y.), 64 (1834); Ocean S. S. Co. v. Williams, 69 Ga., 251 (——); Gibbs v. Randlett, 58 N. H., 407 (1878).

[7] Parsons v. Harper, 16 Gratt. (Va.), 64 (1860); Abraham v. Cooper, 81 Pa. St., 232(1876); Fenelon v. Butts, 53 Wis., 344; 10 N. W. Rep., 501 (1881); Stewart v. Madden, 63 Ind., 51 (1878); Jay v. Almy, 1 Woodb. & M., 262; 7 Am. & Eng. Ency. Law, 691.

[8] Catlin v. Pond, 101 N. Y., 649 (1886); 7 Am. & Eng. Ency. Law, 691.

(5) Loss of employment up to the time of suit, if by reason of his arrest he failed to get the work he otherwise would have obtained.[1]

(6) Loss of employment and damages not accrued at the time of suit, when they are certain to follow, and can be fairly estimated.[2]

(7) Injury to the feelings and anxiety of mind.[3]

(8) Condition of the plaintiff's family during his imprisonment, etc.[4]

(9) Malice, bad motives in making the arrest, or in continuing the imprisonment, wantonness, oppression, negligence, and a careless regard for another's rights may be shown for the purpose of recovering exemplary or punitive damages beyond what is in law considered compensatory damages.[5]

§ **30. Special damages.**—If the plaintiff claims special damages, the burden is upon him to show the same by competent evidence in line with the allegations of his complaint, but he may show matters in aggravation of damages whether stated in his complaint or not.[6]

§ **31. The defendant's evidence.**—If the defendant relies upon the plea of the general issue alone, the burden of proof is upon the plaintiff; but if he relies upon a plea of justification, he confesses and avoids the cause of action, and the burden is upon him to prove his defense by competent evidence.[7]

[1] American Express Co. v. Patterson, 73 Ind., 430 (1881); Thompson v. Ellsworth, 39 Mich., 719 (1878); 7 Am. & Eng. Ency. Law, 691.

[2] American Express Co. v. Patterson, 73 Ind., 430 (1881).

[3] McCall v. McDowell, Deady, 233 (1867).

[4] Fenelon v. Butts, 53 Wis., 344; 10 N. W. Rep., 501 (1881); Dodge v. Alger, 53 N. Y. Sup. Ct., 107 (——); 7 Am. & Eng. Ency. Law, 691.

[5] Hamlin v. Spaulding, 27 Wis., 360 (1870); Floyd v. Hamilton, 33 Ala., 235 (1858); Kolb v. Bankhead, 18 Tex., 228 (1856); Marsh v. Smith, 49 Ill., 396 (1868); Josselyn v. McAlister, 22 Mich., 300; 25 Am. Dec., 48 (1871); McCarthy v. De Aemett, 99 Pa. St., 63 (——); Sorenson v. Dundas, 50 Wis., 335 (1880); Hall v. O'Mally, 49 Tex., 70 (1878); Curry v Pringle, 11 Johns. (N. Y.), 444 (1814); Bissell v. Gold, 1 Wend. (N. Y.), 210; 19 Am. Dec., 480 (1828); Fellows v. Goodman, 49 Mo., 62 (1871); Comer v. Knowles, 17 Kan., 436 (1877); Ogg v. Murdock, 25 W. Va., 139 (1884).

[6] Abbott's Tr. Ev., 657; 2 Saund. Pl. & Ev., 520; 2 Leigh, N. P., 1430, 1431; Staunton v. Seymour, 5 McLean, 267 (1851); Hatchell v. Kimbrough, 4 Jones' L. (N. C.), 168 (1856); 2 Addison on Torts, 845.

[7] Bailey's Onus Probandi, 123.

§ 32. What may be shown under the plea of the general denial.—

(1) *In bar of the action:* Any matters which amount to a denial of the commission of the acts complained of as alleged in the complaint or declaration; as that the act was accidentally done, or by a superior agency, without any fault of the defendant.[1] Under this plea the defendant may give in evidence any matter tending to disprove the facts shown by the plaintiff in making out his case.[2] But evidence of every defense which admits the defendant to have been *prima facie* a trespasser cannot be given under this plea. It must be specially pleaded. Thus, for example, if the injury was occasioned by the plaintiff's own negligence, or was done by the defendant from any other cause, short of such extraneous force as deprived him of all agency in the act, it cannot be shown under this issue, but must be specially pleaded;[3] but any matters which go to show that the defendant never did the acts complained of may be given in evidence under the general issue.

Evidence of all matters in discharge or justification must be specially pleaded;[4] as, a former recovery,[5] accord and satisfaction,[6] or the statute of limitations,[7] must be specially pleaded. So an officer wishing to justify under legal process must plead it specially.[8] And matters in mitigation of the wrong and damages may be given in evidence under the general issue.[9]

(2) *In mitigation of damages:* Under the general issue the defendant may rely upon any part of the *res gestæ* for the purpose of mitigating damages, though he might have pleaded them in justification, and this, notwithstanding the general rule that whatever is shown in justification must be specially

[1] 2 Greenl. Ev., § 92.

[2] 2 Greenl. Ev., § 625; 1 Chit. Pl. (11th Am. ed.). 500.

[3] 2 Greenl. Ev., § 625; 1 Chit. Pl. (11th Am. ed.), 501; 2 Camp., 500.

[4] Id.; 12 Ill., 80; 31 Vt., 433; 19 N. H., 562; 3 Hurl. & Nor., 276; 32 Barb., 293.

[5] 1 Chit. Pl. (11th Am. ed.), 501, 506; 12 Ill., 80; 1 Blackf., 169; 6 Cow., 691.

[6] 1 Chit. Pl. (11th Am. ed), 506. See 2 Gilm., 252.

[7] 1 Chit. Pl. (11th Am. ed.), 506. See 23 Ill., 399.

[8] 1 Chit. Pl. (11th Am. ed.), 501, 506, 534.

[9] 2 Greenl. Ev., § 625; 3 Hurl. & Nor., 276; 31 Vt., 433, 624. See 6 Adol. & El., 174 (N. S.).

pleaded. Everything which took place at the time is part of the transaction on which the plaintiff's action is founded, and therefore he cannot be surprised by the evidence;[1] but the evidence should be offered for the purpose of mitigating damages, and not as a justification of the acts complained of.[2] Where the action was for an assault and false imprisonment, evidence of *a reasonable suspicion of felony* has been held admissible as a mitigation of damages.[3] A justification which is not in issue is not admissible in bar under a denial, unless the facts may be available if offered solely in mitigation of damages.[4] To show good faith, the defendant may give in evidence any communication actually made to him before he acted, and which influenced his action.[5]

[1] 2 Greenl. Ev., § 93; Abbott's Tr. Ev., 657; 3 Phillips' Ev., 518.

[2] Brown v. Chadsey, 39 Barb. (N. Y.), 253 (1863); Abbott's Tr. Ev., 657.

[3] 2 Greenl. Ev., § 93.

[4] Brown v. Chadsey, 39 Barb. (N. Y.), 253 (1863).

[5] Abbott's Tr. Ev., 658; Thomas v. Russell, 9 Ex., 764. See chapter on "Damages."

CHAPTER XIV.

DAMAGES.

III. MITIGATION OF DAMAGES.

IV. AGGRAVATION OF DAMAGES.

V. NOMINAL DAMAGES.

VI. COMPENSATORY DAMAGES.

VII. EXEMPLARY DAMAGES.

§ 1. Damages.—

The term defined: A sum of money adjudged to be paid by one person to another person as compensation for a loss sustained by the latter in consequence of an injury committed by the former[1] or the violation of some legal right.

The measure of damages: The test by which the amount of damages is ascertained is called the measure of damages.[2]

§ 2. Damages, right of recovery — The law stated by Greenleaf.— Whether the plaintiff has been prosecuted by indictment, or by civil proceedings, the principle of awarding damages is the same, and he is entitled to indemnity for the peril occasioned to him in regard to his life or liberty, for the injury to his reputation, his feelings, and his person, and for all the expenses to which he necessarily has been subjected;[3] and if no evidence is given of particular damages, yet the jury are not therefore obliged to find nominal damages only.[4] Where the prosecution was by suit at common law, no damages will be given for the ordinary taxable costs, if they were recovered in that action; but if there was a malicious arrest, or the suit was malicious and without probable cause, the extraordinary costs, as between attorney and client, as well as all other expenses necessarily incurred in defense, are to be taken into the estimate of damages.[5] Whatever was admissible in evidence to defeat the original malicious suit is admis-

[1] Coke on Littleton, 257*a*; Mayne on Damages, 1; Rap. & L. Law Dic., tit. Damages (1888).

[2] 1 Rap. & L. Law Dic., 336 (1888).

[3] 2 Greenl. Ev., §—; Buller's Nisi Prius, 13, 14; Thompson v. Mussey, 3 Greenl., 305.

[4] Trip v. Thomas, 3 B. & C., 427.

[5] Sandback v. Thomas, 1 Stark., 306; Gould v. Barratt, 2 M. & Rob., 171; 2 Greenl. Ev., § 456. And see Doe v. Davis, 1 Esp., 358 (——); Norvell v. Roake, 7 B. & C., 404 (——); Sinclair v. Eldred, 4 Taunt., 7 (——); Webber v. Nicholas, Ry. & M., 417 (1825).

sible for the plaintiff in this action to maintain his right to recover for the injury sustained.[1]

§ 3. Damages in actions for malicious prosecutions.—The elementary books in treating of damages in actions for malicious prosecution lay down the rule that there are three descriptions of damages, either of which is sufficient to support the action, and some one of them must appear or the action will fail. These different kinds kinds of damages are —

I. To the person by imprisonment.

II. To the reputation by scandal.

III. To the property by expense.

This rule of damages was evidently established after the enactment of the statute of Marlbridge, giving to a defendant his costs in the event the plaintiff was nonsuited or failed in his action, for at common law prior to that enactment, actions for malicious prosecutions could always be maintained, whether the property of the defendant had been seized or not, or whether he had incurred expense in defending it; and regarding them as now, the bringing of a civil action to be a matter of right, the plaintiff was liable in damages for the malicious institution and prosecution of such an action without probable cause.[2]

§ 4. Damages in actions for false imprisonment.—The injured party, in actions for false imprisonment, even though the act complained of be done without malice, is entitled to recover the expenses reasonably incurred to procure his discharge from the restraint, for his loss of time, interruption of his business, and the suffering, bodily and mental, which the wrong may have occasioned.[3] Where the arrest is unlawful it is unnecessary to prove malice,[4] and probable cause is only admissible in mitigation of damages.[5]

[1] Hadden v. Mills, 4 C. & P., 486 (——).

[2] Woods v. Finnell, 13 Bush (Ky.), 628 (1878); 2 Cooley's Blackstone, 126 and notes; Selwyn's Nisi Prius; Saville v. Roberts, 1 Ld. Raymond, 374.

[3] Kindred v. Still, 51 Ill., 401 (1869); Abrahams v. Cooper. 81 Pa. St., 282 (1876); Fenelon v. Butts, 53 Wis., 344 (1881); 8 Sutherland on Damages, 732 (1883).

[4] Painter v. Ives, 4 Neb., 122 (1874); Chesman v. Carney, 33 Ark., 316 (1878).

[5] Brown v. Chadsey, 39 Barb., 253 (1863); Norman v. Marsciette, 1 Sawyer, 484 (1871); Sleight v. Ogle, 4 E. D. Smith, 445 (1855).

§ 5. **The subject of this chapter.**— The subject of damages will be discussed in this chapter as relating especially to actions for malicious prosecution and false imprisonment. For the sake of convenient reference the subject may be divided into topics as follows:

I. Elements of damages.
II. Assessments of damages.
III. Mitigation of damages.
IV. Aggravation of damages.
V. Nominal damages.
VI. Compensatory damages.
VII. Exemplary damages.
VIII. Excessive damages.
IX. Consequential damages.
X. Measure of damages.

I. Elements of Damages.

§ 6. **Elements of damages in false imprisonment.**— The plaintiff may recover for loss of work not only up to the time of the suit, but also for time lost after the suit, if by the arrest he can show he failed to get the work he otherwise would have obtained.[1] He may show the filthy condition of the prison in which he was confined or any other deprivation of the comforts or necessaries of life, or mental anguish, for the purpose of enhancing his compensatory damages.[2] He may show that the defendant was actuated by actual malice in causing the arrest for the purpose of aggravating his damages.[3]

§ 7. **Absence of malice.**— The absence of malice and proof of good faith in making the arrest or of the imprisonment can never be a justification for an unlawful imprisonment, nor exempt the defendant from the payment of actual damages,[4]

[1] Thompson v. Elsworth, 39 Mich., 719 (1878).

[2] Abrahams v. Cooper, 81 Pa. St., 232 (1856); Fenelon v. Butts, 53 Wis., 344 (1881); Kindred v. Stett, 51 Ill., 401 (1869).

[3] Josselyn v. McAllister, 22 Mich., 300 (1871); Fellows v. Goodman, 49 Mo., 62 (1871); Gold v. Bissell, 1 Wend., 210 (1828); Codrington v. Lloyd, 8 A. & El., 449; Baker v. Braham, 3 Wils., 368; Turner v. Telgate, 1 Lev., 95; Parsons v. Harper, 16 Gratt., 64; Parsons v. Lloyd, 3 Wils., 341; 2 W. Bl., 845; Curry v. Pringle, 11 Johns. (N. Y.), 444 (1814); Warwick v. Foulkes, 12 M. & W., 507; 3 Sutherland on Damages, 732 (1883).

[4] Comer v. Knowles, 17 Kan., 440

but may be shown for the purpose of mitigating exemplary damages. Exemplary damages, as they are sometimes called, are not allowed against a person who makes an illegal arrest, unless it is shown that he has acted in bad faith or is guilty of some oppression or misconduct;[1] but where it is shown that the defendant has acted in bad faith, the jury will be warranted in allowing liberal damages.[2] As malice may be shown to enhance the damages, so the absence of malice may be shown to reduce them.[3] Evidence of good faith is therefore competent and generally admissible in mitigation of damages.[4]

§ 8. **Elements of damages in actions for malicious prosecution.**— For this wrong the injured party is entitled to adequate compensation covering all the elements of the particular injury. It is the duty of the jury to consider the nature of the prosecution, and its natural effect on the reputation of the person injured, his credit and private feelings; the incidental consequences of an arrest, holding to bail, or of interference with property; the consequential loss of time, and any other loss, such as the expense of defending one's self and the like. Malice is the gist of this action, and the damages for other than pecuniary items may be greatly increased or diminished by the evidence on that subject.[5]

§ 9. **Elements of damages — Examples.**— The damages for malicious prosecutions may consist in the personal labor and trouble imposed on the injured party in procuring an acquittal or discharge, the pain and anxiety of mind naturally occasioned by the pendency of a criminal charge; the time imprisoned, his expenses, situation and circumstances;[6]

(1877); Newton v. Locklin, 77 Ill., 103 (1875); Carey v. Sheets, 60 Ind., 17 (1877); Van Deusen v. Newcomb, 40 Mich., 90 (1879); McCrell v. McDowell, Deady, 233 (1867); Painter v. Ives, 4 Neb., 122 (1874).

[1] La Roe v. Rosser, 8 Mich., 537 (1860); Dinsman v. Wilke, 12 How., 405 (1851); Hamlin v. Spaulding, 27 Miss., 360 (1868).

[2] Marsh v. Smith, 49 Ill., 399 (1868); Fellows v. Goodman, 49 Mo., 62 (1871).

[3] 3 Sutherland on Damages, 733 (1883).

[4] Fenelon v. Butts, 53 Wis., 344 (1881); Brown v. Chadsey, 39 Barb., 262 (1863).

[5] 3 Sutherland on Damages, 707 (1883); Parkhurst v. Mastellar, 57 Iowa, 474 (——); McWilliams v. Hoban, 42 Md., 56 (——); Wanzer v. Bright, 52 Ill., 35 (1869).

[6] 3 Sutherland on Damages, 704 (1883).

the unlawful arrest and imprisonment, expenses of making a defense, injury to his fame and reputation;[1] the ignominy of being arraigned at the bar of justice as an offender against the laws;[2] annoyance, injury to his feelings;[3] the costs and expenses of defending a groundless suit, including counsel fees,[4] and all consequential damages which naturally and proximately result therefrom. In an action for maliciously and without probable cause procuring a merchant to be adjudged a bankrupt, under which adjudication, before the proceeding was dismissed, he was deprived of his entire stock of goods and his store shut up for three months, it was held he was entitled to recover the actual damage to his goods, for the breaking up of his business and the destruction of his credit, the value of his own time, as he was obliged to give his attention to the proceedings instituted against him, and was not able to pursue any other business, and his expenses for lawyers' fees in following up and setting aside the proceedings in bankruptcy.[5] In another case a party holding a lease of a mine for a specified time was ejected under a judgment in an action of forcible entry and detainer which was afterwards reversed. In an action for malicious prosecution, it was shown that the forcible entry and detainer proceedings were instituted maliciously and without probable cause. The measure of damages was held to be the reasonable value of the use of the premises for the time the plaintiff had been kept out of possession; and for any permanant injury to his leasehold interest sustained by reason of the mine getting out of repair through the failure of the defendant to use ordinary care during the time he held possession.[6]

But in assessing the damages the expenses of prosecuting the action for malicious prosecution are not deemed the natural and proximate consequence of the wrong complained of,

[1] Sheldon v. Carpenter, 4 N. Y., 579.

[2] Thompson v. Massey, 3 Greenl., 305; Fagan v. Knox, 40 N. Y. Super. Ct., 41.

[3] Rowland v. Samuels, 11 Q. B., 39.

[4] Classon v. Staples, 42 Vt., 209; Woods v. Finnell, 13 Bush (Ky.), 628 (1878).

[5] Sonneborn v. Stewart, 2 Woods, 599. But see same case, 98 U. S., 187; Fullenweider v. McWilliams, 7 Bush, 389; 3 Sutherland on Damages, 706.

[6] Moffatt v. Fisher, 47 Iowa, 473.

and cannot be taken into consideration.[1] In cases of this nature there is no settled rule as to the amount to be recovered. The jury are not confined to the actual pecuniary loss sustained, but may take into consideration the character and position of the parties and all the circumstances attending the transaction.[2]

APPLICATIONS OF THE LAW.—

(1) *Evidence of plaintiff's treatment in prison, when not competent.*

John W. Storey brought an action against John Zebley, Jr., for a malicious prosecution. The first trial resulted in a verdict for the plaintiff, but it was set aside and a new trial granted. At the second trial there was a disagreement of the jury. The third trial resulted in a verdict and judgment for the plaintiff, and this the defendant brought to the supreme court on a writ of error. On the trial in the supreme court it was claimed that the trial court erred in overruling the defendant's objection to the plaintiff's offer to show the condition of the cell and all that occurred there, and his surroundings there. The plaintiff was arrested upon a charge of obtaining certain merchandise from the defendant's firm by means of false pretenses. At the hearing before the alderman he was committed to the county prison in default of bail, where he was confined for twenty-seven days, when he was brought up on a writ of *habeas corpus* before Judge Brewster, and discharged. Upon the trial below the plaintiff was allowed to testify, against the objection of the defendant, as to his treatment while there. He said: "When I went to prison I received two very narrow blankets, and tin dishes, no knife or fork. I slept on the floor. I was there twenty-seven days. . . . Got nothing to eat from time I left boarding-house till next morning. Room was filthy. Stool with no cover to it. The men made water in it at night, and it ran over." The witness had previously said that he had been sent down in the van with two other prisoners, "one drunk and spewing."

In discussing this assignment, Paxson, J., said: "This testimony could hardly fail to inflame the minds of the jury and enhance the damages. And if the treatment referred to had been the act of the defendant, he would have no reason to complain of the admission of the evidence. But it is a matter with which he had nothing to do. He is not responsible for the way in which the county of Philadelphia, acting through its officials, treats persons confined in the county prison. He is responsible for the unlawful restraint of the plaintiff's liberty, if he has so restrained it, but it would be unreasonable as well as unjust to hold him liable for the acts or conduct of public officials over whom he had no control. We are of the opinion that it was error to admit this testimony." Zebley v. Storey, 117 Pa. St., 478; 12 Atl. Rep., 569 (1888).

[1] Stewart v. Sonneborn, 98 U. S., 187; Good v. Mylin, 8 Pa. St., 51; Stopp v. Smith, 71 Pa. St., 285; Hicks v. Foster, 13 Barb., 668.

[2] Weaver v. Page, 6 Cal., 681.

(2) *Merchant — Loss of credit, etc., as an element of exemplary damages.*

In 1884 Biering was doing business in Galveston, Texas, as a merchant. In June his stock of merchandise was destroyed by fire. At that time he was indebted to the bank in the sum of $15,270, and held policies upon his burned stock for about $44,000, about $29,000 of which was with the insurance agency of Beers & Kennison. After the fire, the bank endeavored to get him to transfer to it enough of the insurance to secure its debt, no part of which was then due, but he refused to make such transfer; and the bank immediately sued out a writ of attachment upon the ground that Biering was "about to convert his property into money for the purpose of placing it beyond the reach of his creditors." The writ was returned on the day it was issued, "no property found," and on the same day the bank sued out seven writs of garnishment and had them served on Beers & Kennison, as agents for the various companies carrying the insurance on the destroyed stock. The writ of attachment was never levied. Biering paid his indebtedness to the bank, and on the 24th of September, 1884, the garnishment suits were dismissed. On the 26th Biering brought suit to recover damages, actual and exemplary, for the alleged wrongful and malicious suing out writs of attachment and garnishments. The case was tried by a jury, and there was a verdict and judgment for $227.44 in favor of the plaintiff. Biering not feeling satisfied with the judgment made a motion for a new trial, and upon its being refused took an appeal.

In discussing the question of the injury to Biering's credit, as an element of damages, Acker, J., said: "Appellant insists that 'the court erred in its charge, because the charge excludes from the consideration of the jury the damages to appellant's credit as a merchant as actual damages, and restricts actual damages to interest on the insurance money tied up by the garnishments.' The charge of the court directed the jury, if they believed from the evidence that the affidavit for attachment was not true, to find as actual damages interest upon the insurance money detained by the garnishment proceeding at eight per cent. for the length of time that it was so detained. Upon the subject of injury to plaintiff's credit the court charged the jury: 'If you believe from the evidence that the said affidavit was not true, and that the garnishments were without probable cause and with malice, then the plaintiff would not only be entitled to his actual damages, but you would, in addition thereto, be authorized to award to the plaintiff exemplary damages also, the amount of which to be determined by you from all the facts and circumstances in evidence, the motives for the garnishments and the injury to plaintiff's credit, if any, by the garnishments; but if there was probable cause for the issuance of the writs, then there could be no exemplary damages.' The jury is authorized and instructed by this charge to find damages for plaintiff for injury to his credit if they should find from the evidence, not only that the affidavit for attachment was not true, but also that the writs of garnishment were sued out without probable cause and with malice, and we think it can make no difference to appellant, nor in any way affect his rights, whether the damages thus authorized to be awarded are called actual or exemplary damages; the law upon which he would be entitled to recover damages for injury to his

credit being correctly given. We think the charge sufficient, and that the objection here urged is not well taken." Biering v. First Nat. Bank, 69 Tex., 599; 7 S. W. Rep., 90 (1888).

(8) *Pecuniary circumstances of the parties may be shown by plaintiff, when.*

Allen mortgaged to Coleman a mule and wagon. Coleman foreclosed the mortgage. A *fi. fa.* was issued; search was made for the property but it was not found. Certain information came to Coleman indicating that the property had been disposed of by Allen. Coleman took the advice of counsel, and made the requisite affidavit to impute an offense under section 4600 of the code of Georgia, charging that the property had been fraudulently disposed of; procured a warrant and Allen was arrested, detained in custody upon the streets of Macon a few hours, and was then permitted to go home on his promise made to the sheriff to return and give bond. He returned and gave a bond for his appearance. At a subsequent term of the court another affidavit was made by Coleman, charging that the property had been fraudulently sold and disposed of. Upon that affidavit an accusation was framed, and Allen was tried and acquitted; after which he brought his action against Coleman for malicious prosecution. The jury found for the plaintiff $1,000. The defendant moved for a new trial.

On the question of the pecuniary circumstances of the parties, both plaintiff and defendant, Bleckley, C. J., said: The code of Georgia, section 2986, declares, "The recovery shall not be confined to actual damages sustained by the accused, but shall be regulated by the circumstances of the case." That not only allows but constrains the jury to look beyond actual damages, and for this reason we uphold the ruling of the court admitting evidence as to the pecuniary circumstances of the defendant in the action. Such evidence, under many authorities, is admissible wherever punitive damages may be recovered; but what we rule at present is that it is admissible in this class of actions, where the very essence of the injury is that it proceeded from malice. We think that under all the authorities the pecuniary condition and worldly circumstances of the defendant may be received in evidence, to be considered by the jury, in this particular class of actions. Wealth of defendant considered: 1 Suth. Dam., 743–745; 3 Suth. Dam., 727; Belknap v. Railroad Co., 49 N. H., 358; Johnson v. Smith, 64 Me., 553; Humphries v. Parker, 52 Me., 507, 508; Stanwood v. Whitmore, 63 Me., 209; Jones v. Jones, 71 Ill., 562; McCarthy v. Niskern, 23 Minn., 90; Winn v. Peckham, 42 Wis., 493; Birchard v. Booth, 4 Wis., 67; Barnes v. Martin, 15 Wis., 240; Hunt v. Railroad Co., 26 Iowa, 363; Guengerech v. Smith, 34 Iowa, 348; Dailey v. Houston, 58 Mo., 368; McNamara v. King, 2 Gilman, 432; Clements v. Maloney, 55 Mo., 352; Rowe v. Moses, 9 Rich. Law, 423.

Some authorities hold that where the pecuniary circumstances of the defendant are admissible in evidence to be considered in graduating damages, those of the plaintiff are also admissible for the like purpose. This precise question need not be decided in the present case, as there was another object for which the plaintiff's pecuniary circumstances were clearly admissible; that is, to throw light upon his dealings with the mortgaged property and the motive that actuated the same. While wealth will not

screen from punishment for a fraud actually committed, it may be of great consequence in illustrating the question whether or not a fraud was intended, and also the further question whether an accuser had reason to believe that a fraud was intended. Coleman v. Allen, 79 Ga., 637; 5 S. E. Rep., 204 (1888).

(4) *Attorney fees, an element of damages.*

Miss Ann E. Ward commenced a prosecution for bastardy against Krug. It was finally compromised upon his giving her his note for $300. Two years afterwards he procured his wife to go before a justice of the peace and swear to a complaint against Miss Ward for committing perjury in swearing that he was the father of her child. The warrant was issued and Krug took it to a constable of the county, and together they went to Miss Ward's residence in another county. There at Krug's instance the constable arrested her and brought her back to the county and before the justice who issued the warrant. After some delay she was tried and acquitted. She then brought an action against Krug. The declaration contained a count for malicious prosecution, one for false imprisonment and one for slander. On the trial it appeared that at her residence Krug told her he had an officer who had a warrant to arrest her because she had sworn falsely, but if she would give up the note he would let her go. Otherwise she might have to go to the penitentiary. The constable testified that when they arrived at her residence she was in the wash house. When she came in Krug said, "Annie, this is an officer. He has a warrant to arrest you. You have sworn falsely. You know I never done anything to you. That child is not mine." She said: "Mr. Krug, it is yours. I never swore falsely, for no one ever touched me but you." He then said: "You did swear falsely. Don't you know it will penitentiary you?" She was crying and seemed to be scared. He told her if she did not give up the note she would have to go to the penitentiary; and then he ordered me to arrest her and I did." There was some evidence that Krug was a man of considerable wealth.

There was also evidence admitted that Miss Ward's step-father had paid for her the sum of $20 for attorney fees and for witnesses in her defense on the charge of perjury. The jury returned a verdict in her favor for $2,750, upon which judgment was rendered, and Krug appealed to the supreme court. The judgment was affirmed.

In speaking of the item of damages for attorney fees and expenses Justice Scholfield said: The evidence of the payment of the $20 for attorney's fees and expenses of witnesses for plaintiff, in her defense in the trial for perjury, was competent. The expenses were incurred for her, in consequence of the prosecution, and she was entitled to recover the amount of the defendant. Krug v. Ward, 77 Ill., 603 (1875).

(5) *Attorney's fees — Another application.*

Powell sued Ziegler for malicious prosecution. Ziegler, it was claimed, had charged Powell with having stolen a game chicken and had caused him to be arrested on the charge; that he had a hearing before the justice

and was acquitted. It was alleged that the plaintiff became liable to pay the sum of $25 as attorney fees in defending himself against the charge.

The trial resulted in a verdict for the plaintiff for $100, from which the defendant appealed. It was assigned for error that the court instructed the jury that they might include as an item in making up the aggregate of the damages, if the evidence justified, a reasonable attorney's fee for defending the malicious prosecution, for which the plaintiff might have become liable, but which he had not paid.

Perkins, J.: We think the authorities justify the instruction; the judgment is affirmed. Ziegler v. Powell, 54 Ind., 173 (1876). Citing Field on the Law of Damages, 544; Munns v. Dupont, 1 Hare & W., Leading Cases, 5th ed., 249, 276; Sedgwick on Damages, 6th ed., 110.

(6) *Attorney fees — Traveling expenses to and from court — Attending trial — Loss of time.*

Woods brought an action against Finnell for malicious prosecution. The declaration contained the following statement of damages: "By reason of the malicious institution of said action, and its malicious prosecution without any cause, the plaintiff alleges that he expended large sums of money other than the costs of the action allowed by law, in paying the expenses of himself and witnesses to and from Mercer county to Lanesville and while attending the trial, amounting to $——; also paid $—— attorney's fees to defend said action and loss of time, etc., amounting in all the damages to $1,500," etc. A demurrer having been sustained to the declaration the plaintiffs appealed. In passing upon the question, etc., Pryor, J., said:

"The elementary books treating of the action for malicious prosecution lay down the rule that there are three descriptions of damages, either of which is sufficient to support that action, and some of them must appear or the action will fail. 1. To the person by imprisonment. 2. To the reputation by scandal. 3. To the property by expense (2 Cooley's Blackstone and notes, 126; Selwyn's Nisi Prius)." After a general discussion of the question as to whether an action lies for maliciously prosecuting a civil suit where there has been no arrest of the person or seizure of the property, the judge continued: "Following the doctrine of the common law that for every injury there is a remedy, we see no reason for denying a remedy to the plaintiff in the case; and where a party seeks a judicial tribunal for the purpose alone of gratifying his malice, he should be made to recompense the party injured for the damages actually sustained, and the court should see that a remedy is afforded for that purpose." Judgment on demurrer reversed. Woods v. Finnell, 13 Bush Ky., 628 (1878).

(7) *Insanity and mental aberration an element of damages.*

On the complaint of Braunsdorf a warrant was issued by a justice against Rosina Flaig, on which she was arrested, brought before the justice and examined on a charge of perjury. The examination resulted in her discharge. In an action brought against Braunsdorf by Plath, the guardian of Rosina Flaig, she having become insane, special damages were al-

leged as follows: "That at the time of the arrest and examination aforesaid the said Rosina Flaig was of sound mind and physically strong and healthy; that in consequence of the arrest and examination aforesaid, the said Rosina Flaig is not only greatly damaged in her good name, fame and credit, but her reason is dethroned, and her physical system is greatly injured and her health prematurely impaired, to her damage of, etc., and that for several months last past she has been confined as an insane person in the Northern Hospital," etc. On the trial the jury returned a verdict for $3,000, and the defendant appealed.

Lyon, J.: "On the question of damages, it is enough to say that, under the testimony, the jury may have found, and probably did find, that the criminal prosecution complained of greatly injured Rosina's health and rendered her insane, besides creating a predisposition to mental aberration. This was and is a great personal calamity, and would of itself uphold a verdict for very considerable damages, even were the plaintiff's recovery limited to actual or compensatory damages; but when, in addition to this, we consider that the jury were authorized to give exemplary damages also, we are quite unable to say that a verdict for $3,000 damages is excessive. Under all of the circumstances of the case we do not feel authorized to disturb the judgment on that ground." Judgment affirmed. Plath, Guardian, etc., v. Braunsdorf, 40 Wis., 107 (1876).

(8) *Mental anxiety, trouble and distress an element of damages.*

O'Hern leased to Deslonde a dwelling-house for one year for $480, at $40 per month; that he was paid in advance $320, equivalent to eight months' rent; that in the month of December following date of contract (October 1st) he was paid $20 more, but notwithstanding these payments he was sued for the instalments of the rents, and had the furniture of the lessee seized under a writ of provisional seizure; that he also sued to have the tenant evicted, and obtained judgment against him ordering his eviction; that he agreed not to execute this judgment and to permit the lessee to remain on the premises if he (Deslonde) would pay costs and the entire rent; that the lessee did pay all the costs and also the entire rent, except $40 thereof, and offered to pay this, and would have done so, but that the lessor declined to produce the rent notes, and refused to accept subsequent offers of payment; that, in violation of his agreement and in spite of the willingness manifested by the lessee to comply with that agreement to the very letter, and in utter disregard of Deslonde's rights, O'Hern persisted in the execution of his writ of ejectment and in his determination to evict the lessee from the premises, until Deslonde compelled him to desist therefrom by writ of injunction. Deslonde then brought a suit for damages. The amount claimed was $2,500. There was judgment in his favor for $100. The defendant appealed, and the plaintiff prayed to amend the judgment by increasing the same to the amount demanded, $2,500.

Todd, J., in delivering the opinion of the court, said: "In all these proceedings the conduct of O'Hern was harsh and without the slightest justification. It can only be explained on the hypothesis that he was determined to wrest the property leased to the lessee, Deslonde, and at the same time force him to pay the rent. If O'Hern stood on his judgment of eviction,

then that judgment dissolved the lease, and only debarred him from claiming rents falling due after that time; but while O'Hern was thus engaged in harassing Deslonde with his writs,— which was in May, and the lease did not expire till October,— the entire rental of the year had been paid, except for a single month. There was such an entire lack of justifiable cause for O'Hern's acts and proceedings against Deslonde that the law would impute them to be prompted by malice. Villey v. Jarreau, 33 La. Ann., 292; Butchers' Union, etc., Co. v. Crescent City, etc., Co., 37 La. Ann., 881.

"It seems that the jury in the court below, and the judge likewise, reached the conclusion we have announced touching the conduct and acts of the defendant, and as being of a character to render him liable for damages, but the judge by his decree evidently limited the damage to the actual loss and expense sustained by the plaintiff from the acts and proceedings complained of. He made no allowance for the trouble, mental anxiety and distress caused thereby to the plaintiff, which this court in the case of Byrne v. Gardner, 33 La. Ann., 6, held to be actual damage, although of that nature which could not be precisely measured or determined by money or a moneyed value; that they were of that kind of damage the estimate of which is left largely to the discretion of the judge or jury under article 1934 of the Civil Code. We think the judge erred in thus restricting the liability of defendant. To a man of average sensibility, under the circumstances attending this case, the expense or pecuniary outlay to which he was subjected by the acts complained of would doubtless seem of little significance when weighed with the inconvenience, mental suffering and humiliation experienced by the plaintiff from causes stated, aggravated, as they must have been, by the serious domestic trouble which, according to the evidence, was weighing upon him at the time. These considerations induce us to grant the prayer for the amendment of the judgment, and to increase the same by the additional sum of $250 to that awarded by said judgment, making the entire amount $350." Deslonde v. O'Hern, 39 La. Ann., 961; 1 So. Rep., 286 (1887).

(9) *Character of the plaintiff an element of damages.*

The action of malicious prosecution is of kin to an action of slander, and, as in that, the damage consists in part in injury to character by a criminal charge, and not wholly in the mere physical injury consequent on the imprisonment on the charge, although in theory they are equal. He who has a fair character among his acquaintances and in the neighborhood generally is entitled in an action for defaming it to greater damages than one suing on a doubtful character. Walker et al. v. Martin, 43 Ill., 515 (1867).

II. Assessment of Damages.

§ 10. Assessment of damages — The term defined.— The term "assessment of damages" signifies nothing more than the act of fixing the amount of the compensation a person is entitled by law to have of another for an injury sustained at

the hands of the latter. In actions for malicious prosecution and false imprisonment, the damages being wholly unliquidated, it is the province of the trial jury to ascertain and fix the amount from the evidence in the case.

Damages are assessed —

(1) Upon the trial of the issue.

(2) Upon the default of the defendant, or demurrer overruled.

(1) *Upon trial of the issue:* The first question to be determined by the trial jury, in the trial of actions for malicious prosecution and false imprisonment, is the guilt or innocence of the defendant of the offense charged in the complaint. If the defendant is found guilty, the ultimate question to be determined is the amount of the plaintiff's compensation. A party suing for an injury can only recover such damages as naturally flow from, and are the immediate result of, the act complained of. In assessing the amount the jury should be governed solely by the evidence before them: they have no right to indulge in conjectures and speculations not supported by the evidence.[1]

(2) *Upon default or demurrer:* The default of the defendant or the overruling of his demurrer is considered in law a confession which admits the plaintiff's right to nominal damages. But the confession does not admit any amount of damages; it admits only the offense charged so far as to entitle the plaintiff to maintain his action;[2] not, however, that it was committed at the time or with the circumstances of aggravation as may be stated in the declaration.[3] The damages must be proved and assessed by a jury, as in other cases, under the rules of practice of the jurisdiction in which the action is pending.[4]

§ 11. What the defendant may show.— Upon the assessment of the damages upon a default, overruling of a demurrer

[1] Sackett's Instructions (2d ed.), 342 (1888); I., B. & W. R. R. Co. v. Birney, 71 Ill., 391 (1874).

[2] 1 Sutherland on Damages, 778 (1883); Bates v. Loomis, 5 Wend. (N. Y.), 134 (1830).

[3] Havens v. H., etc., R. R. Co., 28 Conn., 69 (1859). See, also, Hyde v. Moffatt, 16 Vt., 271 (1844).

[4] Goff v. Hawks, 5 J. J. Marsh. (Ky.), 341 (1831); Logan v. Jennings, 4 Rawle, 355 (1834); Langdon v. Bullock, 8 Ind., 341 (1856); Kennon v. McRae, 3 Stew. (8 Port.), 249 (1833); 1 Sutherland on Damages, 773 (1883).

or under a like state of the record, the defendant is entitled to appear, cross-examine the plaintiff's witnesses, and to introduce witnesses of his own on the question of mitigation of damages.[1] He may show the whole facts and circumstances surrounding or accompanying the offense complained of, even though it may establish the fact that the plaintiff had no legal claim to damages; but under the state of the record it will have the effect to mitigate the damages only.[2] It is generally held that evidence denying the cause of action or tending to show that no right of action exists, is not admissible in mitigation of damages.[3]

§ 12. Assessment of damages — Discretion of the jury.— The amount at which general damages are to be assessed lies almost entirely in the discretion of the jury. The courts will never interfere with the verdict merely because the amount is excessive. A new trial will only be granted where the verdict is so large as to satisfy the court that it was perversely in excess, or the result of some gross error on a matter of principle; it must be shown that the jury either misconceived the case or acted under the influence of undue motives. And so, too, where the damages awarded appear strangely inadequate, a new trial will not be granted, unless it is clearly proved that the jury wholly omitted to take into their consideration some essential element of damage; or unless the smallness of the amount shows that the jury made a compromise, and did not really try the issue submitted to them.[4] But where the plaintiff is entitled to substantial damages, and the verdict in his favor cannot be impeached except on the ground that the damages are excessive, the court has power to refuse a new trial, on the plaintiff's entering a *remittitur* as to a portion of

[1] Mizer v. McDonald, 25 Ark., 88 (1867); Cairo, etc., R. R. Co. v. Holbrook, 72 Ill., 419 (1874); Ewing v. Codding, 5 Blackf., 433 (1840); 1 Sutherland on Damages, 776 (1883).

[2] Turner v. Carter, 1 Head, 520 (1858); Carey v. Day, 36 Conn., 152 (1869); 1 Sutherland on Damages, 776 and notes (1883).

[3] Faust v. Burton, 15 Mo., 619 (1852); Garrard v. Dollar, 4 Jones L., 175 (1856); Curry v. Wilson, 48 Ala., 638 (1887); 1 Sutherland on Damages, 777 (1883).

[4] Falvey v. Stanford, L. R., 10 Q. B., 54; 44 L. J., Q. B., 7; 23 W. R., 162; 31 L. T., 677; Kelly v. Sherlock, L. R., 1 Q. B., 686, 697; 35 L. J., Q. B., 209; 12 Jur. (N. S.), 937; Forsdike v. Stone, L. R., 3 C. P., 607; 37 L. J., C. P., 301; 16 W. R., 976; 18 L. T., 722.

the amount found, or by his consenting to the damages being reduced to such an amount as the court considers not excessive, had they been given by the jury.[1]

APPLICATION OF THE LAW.—

An inquest set aside for allowing evidence in justification, etc., after default.

Foster brought an action against Smith and others for false imprisonment. On the inquisition taken on the writ of inquiry, after the defendants were defaulted, the plaintiff proved the breaking into his house in the night-time, his arrest, and that he was carried to a camp-meeting, where he was tried for keeping an unlicensed huckster's shop within the prohibited limits of the camp-meeting, and fined $15, which he was compelled to pay to obtain his discharge. The defendants offered to prove that the plaintiff had been guilty of the offense charged against him, and to show the regularity of the proceedings had in the matter. The evidence was received under objection. The jury assessed the damages at six cents, and the plaintiff moved to set aside the inquisition. In allowing the motion, Nelson, J., said: "We are of opinion the testimony was inadmissible. The default admitted all the material averments properly set forth in the declaration, and of course the false imprisonment and everything essential to establish the right of the plaintiff to recover. The only debatable question left for the examination or consideration of the jury was the amount of the damages, and that ought to have been examined and decided on the assumption that the false imprisonment had been committed by the defendants. Any evidence tending to prove that no right of action existed, or denying the cause of action, was irrelevant and inadmissible.

"The evidence in this case would have been inadmissible under the general issue in justification, without notice or special plea, were it not for the provisions of the statute for the more easy pleading of public officers, and those acting in aid of them, and the reasons given to prevent surprise upon the plaintiff on the trial, and to enable him to meet the defendants upon equal terms with respect to the evidence. 1 Chitty's Pleadings, 498. The reasons are equally strong against allowing the evidence without notice in mitigation of damages, besides the inconsistency of having evidence in contradiction to the legal effect of the record, which is not pertinent to any issues presented by it. If this practice is tolerated it would enable defendants to have substantially the benefit of a justification in every case in which evidence could be procured to establish it, without notice to the plaintiff of such defense; for if admissible, and the justification should be proved, the least effect that could reasonably be given to it would be to reduce the inquest to nominal damages. This would be the standard of damages in all cases upon such proof. As we are of the opinion the evidence in justification was wholly inadmissible in this case, it is unimportant to inquire as to the competency of that which was offered and allowed." Inquest set aside. Foster v. Smith et al., 10 Wend. (N. Y.), 377 (1833).

[1] Belt v. Lawes (C. A.), 12 Q. B. D., 356; 53 L. J., Q. B., 249; 32 W. R., 607; 50 L. T., 441.

§ 13. The rule in actions for false imprisonment.— In actions for false imprisonment it is not admissible to show that the plaintiff had been guilty of the offense charged against him. The default admits all the material averments properly set forth in the declaration, and of course the false imprisonment and everything essential to establish the right of the plaintiff to recover. The only debatable question for the examination or consideration of the jury is the amount of the damages to be assessed, and that ought to be examined and decided upon the assumption that the false imprisonment had been committed by the defendants.[1]

§ 14. Damages must be assessed jointly against all defendants.—"It is the general rule that, where an act is done by the co-operation of several persons, they may be sued jointly or severally; but one is never liable for the injury of another unless they act in concert; and several will not be held liable for the acts of one without co-operation, or their conduct naturally produced the acts which resulted in injury. Where the acts of different persons are entirely distinct and separate as to any aid, counsel or countenance from one to the other, there can be no joint liability."[2] Where several are sued in tort and some are not guilty, the plaintiff must make his election to either enter a *nolle prosequi* against the defendants not guilty, dismiss his suit as to them, or to have the jury find them not guilty; and so the damages in these suits cannot be severally assessed. There can only be one assessment of damages. If they are assessed against two or more when only one is guilty, the irregularity can only be cured by entering a *nolle prosequi* against all who are not guilty, and this may be done after verdict.[3]

III. Mitigation of Damages.

§ 15. Mitigation of damages —The term defined.— Mitigation of damages is what the term denotes, a reduction of the damages; not by proof of facts which are a bar to a part of

[1] Foster v. Smith, 10 Wend. (N. Y.), 377 (1833); 1 Sutherland on Damages, 778 (1883).

[2] Thornton, J., in Yeazel v. Alexander et al., 58 Ill., 262 (1871).

[3] Yeazel v. Alexander et al., 58 Ill., 264 (1871); Sedgwick on Damages, 581 (1880); Mayne on Damages, 329 (1879); 2 Arch., Nisi Prius, 54 (1845); Holly v. Mix, 3 Wend. (N. Y.), 350 (1829); Mitchell v. Millbank, 3 Tenn., 199 (1790).

the plaintiff's cause of action, or a justification, nor yet of facts which constitute a cause of action in favor of the defendant; but rather of facts which show that the plaintiff's conceded cause of action does not entitle him to so large an amount of damages as the showing on his side would otherwise justify the jury in allowing him. Matters in mitigation of damages are addressed to the equity of the law, and are admitted to assist in the application of that paramount rule of law that damages should not exceed just compensation, unless the case, when fully disclosed, calls for severity in the form of exemplary damages.[1] The law mercifully makes concessions for the errors of persons acting in good faith, as well as to the weakness and infirmities of human nature, which sometimes lead it unwittingly astray or subject it to uncontrollable influences; but it wholly discountenances that cruel disposition which for a long time broods over acts hastily done or words unguardedly spoken, and seeks, where opportunity offers, to make them an excuse for brutal behavior.[2]

§ 16. Mitigation of damages — "Circumstances may alter the case." — If the jury are to consider all the circumstances attending the transaction complained of, evidence of those circumstances and of the conduct and demeanor of the actors therein is admissible. If these acts indicate the existence of right rather than of wrong motives, if a person behave with the caution and kindness of a man disposed to respect the rights of others when called upon in a court of record, he is surely entitled to introduce evidence to that effect before the jury and urge upon them that his is not a case for exemplary damages, and to convince them, if he can, that, although his conduct might have been illegal, it was not prompted by improper motives.[3]

APPLICATIONS OF THE LAW.—

(1) *What matters attending the arrest may be shown in mitigation of damages.*

It was shown that the plaintiff was insane and that it was dangerous to permit him to go at large; that his own safety and that of his family

[1] 1 Sutherland on Damages, 226 (1882).

[2] 1 Sutherland on Damages, 227 (1882); Gaither v. Blowen, 11 Md., 536.

[3] Colby v. Jackson, 12 N. H., 526 (1842).

and the public required his confinement; that defendant was one of the selectmen and overseers of the poor of the town. He was called upon to aid the plaintiff's family in supporting the plaintiff as a pauper, and did so. Assuming to act officially, he caused the plaintiff to be confined in a cage from the 1st day of January, 1840, to the 12th day of March, 1840. In an action for false imprisonment it was held that he had not by virtue of his office the right to exercise any restraint or control over the person of the plaintiff. But in order to show that he acted with the assent of the plaintiff's family, he offered the deposition of Colman Colby, a son of the plaintiff, who testified that "the selectmen inquired of the friends and some neighbors who were present, if they were willing for my father to come home and have his liberty as usual," and it was my opinion and the unanimous opinion of those present that it would not be safe. It was then proposed to build a cage with joists and poles in one of the rooms in my father's house and confine him in it. Three of my brothers were there and assisted in making the cage. The selectmen appeared desirous to take the best course for my father and the family." The court ruled that if it were not dangerous to permit the plaintiff to go at large the assent of the family would be immaterial, but permitted the deposition to be read in mitigation of damages. The plaintiff recovered $1. He moved for a new trial.

Gilchrist, J.: The plaintiff has moved for a new trial on account of the evidence admitted by the court in mitigation of damages. The evidence tended to prove that the defendant did not proceed wantonly and inconsiderately. He inquired of friends whether it would be safe for the plaintiff to be at large and was told that it would not. He appeared desirous to take the best course for the plaintiff and his family. The defendant having committed an unlawful act may surely be permitted to prove that his intentions were good; that they were actuated by no ill-will against the plaintiff, and that his demeanor was that of a person who meant to do a kindness rather than a wrong. If an act be in itself unlawful and the party do not justify or excuse it, the law will imply a criminal intent (Rex v. Woodfall, 5 Burr., 2667; Rex v. Topham, 4 T. R., 127); and an unlawful act done wilfully and purposely to the injury of another, is, as against that person, malicious. Com. v. Snelling, 15 Pick., 340. But if the defense fall short of a legal justification or excuse, it may still show facts which prove the absence of any malicious intent; and it has been held that in actions for false imprisonment the jury are to look to all the circumstances attending the imprisonment, and not merely to the time for which the party was imprisoned, and give damages accordingly. And all the circumstances are admissible which accompany and give character to the trespass. Bracegirdle v. Axford, 2 M. & S., 77. So either party may, with a view to the damages, give evidence to prove or to disprove the existence of a malicious motive in the mind of the publisher of defamatory matter. Pearson v. Lemaitre, 5 Man. & Gr., 700. And for trespass and entry into the plaintiff's house, the jury may consider not only the mere pecuniary damages sustained by the plaintiff, but also the intention with which the act was done, whether for insult or injury. Motion for a new trial is overruled. Colby v. Jackson, 12 N. H., 526 (1842).

(2) *Motive in making affidavit for the arrest.*

Nicholas Roth had been a lieutenant in the Twelfth Regiment of Illinois Volunteers. While at his home he had an altercation with one Bradner Smith, in which Smith charged him with cowardice. Some of Roth's neighbors suspected him of discouraging enlistments, and requested the sheriff to arrest him. This the sheriff declined to do unless an affidavit was made. After the altercation between Roth and Smith occurred, some of these neighbors went to Smith and got him to make an affidavit. Smith complied with their request, and made an affidavit stating that Roth had stated in his presence that he had advised his friends not to enlist in the war, and that he understood from admissions and statements that he was using exertions to discourage and prevent enlistments in the army. Upon this affidavit being presented to the sheriff Roth was arrested, and, after being confined some twenty days in the jail, was turned over to the United States marshal, who conveyed him to Chicago and detained him for a few weeks at Camp Douglas. After his release Roth sued Smith for false imprisonment. The jury found for the defendant, and the plaintiff appealed. It was urged that the trial court erred in admitting evidence that the plaintiff had in fact discouraged enlistments. "This evidence," says Chief Justice Lawrence in delivering the opinion, "was admissible, not in bar of the action, but in mitigation of damages, as it explained the circumstances of the alleged arrest, and tended to show that the defendant, so far as he participated in it, was not actuated by malice. . . . Admitting that upon proofs the plaintiff would have been entitled to a verdict for some amount, he certainly would not have been entitled to nearly as large a sum in the way of damages if the affidavit was true as he should have received if it had been false. If the affidavit was not true, and if the arrest was by procurement of defendant, the jury should presume malice and award heavy vindictive damages. If the affidavit in fact was true, and the jury could see that the defendant in making it, even though he voluntarily furnished it to the marshal and advised the arrest of the plaintiff, was acting without malice and in the belief that the public good required the arrest of plaintiff, and that he could be legally arrested, and that in causing his arrest, so far as the defendant could be said to cause it, he believed himself to be in the performance of his duty as a citizen, it would clearly, in such a case, be the duty of the jury to give only compensatory, and not vindictive, damages." Roth v. Smith, 54 Ill., 431; 41 Ill., 314 (1870).

(3) *Persuaded by another to make an affidavit, etc.*

A defendant in an action for false imprisonment may show that he was persuaded by others to make an affidavit upon which the alleged illegal arrest was made, for the purpose of showing the animus with which he acted and to avoid vindictive damages. And evidence is admissible for this purpose where it does not tend to establish a bar to the action. Roth v. Smith, 41 Ill., 314 (1866).

(4) *Person making an arrest under a void warrant may show it in mitigation of damages.*

Edward Jackson having made oath before Hedgman Triplett, a justice of the peace, that he had just cause from their threats to fear that "—— Wallas, of Brooke county, sawyer, —— Wells, of said county, yeoman, and their associates," would burn his house or beat and abuse his person, the said justice issued his warrant against them, by the above description, to cause them to be brought before him, etc. The warrant had been originally directed to John McCully, a constable, or Major John Jackson, to execute, but the prosecutor, without the knowledge of the magistrate or Black, struck out the name of Jackson and inserted that of Black, so that it stood directed to the constable or Major John Black to execute. The latter, taking with him the other defendants to assist, proceeded to execute it on "—— Wallas, of Brooke county, —— Wells, of said county, yeoman, and their associates, Stephen Gapin, of the state of Pennsylvania, and —— Wells, in said county," who were brought before the justice on the same day the warrant was issued, at which time the substitution of Black was made known to the justice, who said it would do as well; and failing to find sureties they were committed to jail by the above description and names.

On the trial of a suit for false imprisonment brought by William Wells, the foregoing facts appearing, the court instructed the jury as to the substitution of Black, that, if the defendants were ignorant of that circumstance, the warrant as to them was not void, but justified the arrest. The jury found for the defendants and an appeal was taken.

In discussing the appeal, Brooke, J., said: "The objection that the name of Jackson, one of the persons authorized to execute the warrant, was stricken out, and the name of Black, one of the defendants, inserted, has more force, and my present impression is that that circumstance put an end to the authority of the warrant. In that view it was certainly not a justification, but might have been given in mitigation of the damages, as it appears the defendants were ignorant of the alteration."

Fleming, J., said: I am clearly of the opinion that the warrant under consideration is illegal in its origin and was illegally executed, and that the instruction given to the jury by the court was erroneous. Wells v. Jackson, 3 Munf. (Va.), 458 (1811).

§ 17. Facts tending to show probable cause in mitigation of damages.— In actions for malicious prosecution, if it appear that there were probable cause, that is, as we have seen, a complete defense. But if the evidence tending to show probable cause fail of its purpose, to the extent that it affords ground for belief that the party prosecuted was guilty, so far it tends to rebut malice, and may mitigate exemplary damages; that is, such damages as might otherwise be awarded,

based solely on malice.[1] For example, the fact that the defendant acted upon the advice of counsel learned in the law, given after a full and fair statement of all the facts known, will be a complete defense, because, when so advised that the cause is sufficient for his exoneration, it will be deemed probable cause.[2] But advice from any person other than a counselor at law will not have the same effect.[3] Yet the fact that advice has been given by a person not a counselor at law, as by magistrates and police officers, is always admissible to show the circumstances under which the prosecution was instituted to mitigate damages, because it tends to show the absence of malice.[4]

§ 18. Plaintiff's general bad reputation in mitigation of damages.— It seems, according to the weight of authority, that the defendant may show the general bad reputation of the plaintiff, both to rebut the proof of want of probable cause and in mitigation of damages. The same facts which would raise a strong suspicion in the mind of a cautious and reasonable person against a man of notoriously bad character for honesty and integrity would make a lighter impression if they tended to throw a charge of guilt upon a man of good reputation.[5]

APPLICATIONS OF THE LAW.—

(1) *General bad reputation of the plaintiff proper to rebut the proof of want of probable cause and in mitigation of damages.*

On the trial the defendants, as preliminary to proving the general bad reputation of the plaintiff in the place where he resided, asked a witness the following question: "Do you know the general reputation of the plaintiff, Mr. Barker, among his friends and neighbors and acquaintances, in the city of McGregor, Iowa, as it existed in December and January and February, 1882 and 1883, for honesty and fair dealing in business?" —

[1] 3 Sutherland on Damages, 708 (1883); Bacon v. Towne, 4 Cush., 238 (1849); Bell v. Pearcey, 5 Ired., 83 (1844).

[2] Ravanna v. Mackintosh, 2 B. & C., 693; Stanton v. Hart, 27 Mich., 539 (1873); Burgett v. Burgett, 43 Ind., 78 (1873).

[3] Stanton v. Hart, 27 Mich., 539; Murphy v. Larson, 77 Ill., 172.

[4] 3 Sutherland on Damages, 708 (1883); Hirsh v. Feeney, 83 Ill. 550 (1876); White v. Tucker, 16 Ohio St., 468 (——).

[5] 3 Sutherland on Damages, 709 (1883); Pullen v. Glidden, 68 Me., 563 (1878); Bostick v. Rutherford, 4 Hawks, 83 (1826); Blizzard v. Hayes, 46 Ind., 166 (1874); Israel v. Brooks, 23 Ill., 575 (1860); Fitzgibbon v. Brown, 43 Me., 169 (1857); Bacon v. Towne, 4 Cush. (58 Mass.), 217 (1849).

which was objected to, objection sustained, and exception taken by defendants.

Justice Craig: "We think that evidence of the general bad reputation of the plaintiff was admissible. In 8 Sutherland on Damages, p. 708, it is said: 'According to the better authorities, the defendant may prove the general bad reputation of the plaintiff, both to rebut the proof of want of probable cause and in mitigation of damages.' In Israel v. Brooks, 23 Ill., 575, an action for a malicious prosecution, it was held that previous good character may be shown as one evidence of want of probable cause, and bad character may be shown as a reason for probable cause. . . . If the witness knew the general reputation of the plaintiff in the place where he resided, we think it was proper evidence for the consideration of the jury to rebut the proof of want of probable cause and also in mitigation of damages." Rosenkrans et al. v. Barker, 115 Ill., 331 (1885). Citing Bacon v. Tonwe, 4 Cush., 240; Pullen v. Glidden, 68 Me., 563.

(2) *Plaintiff's character, in regard to a particular trait, inadmissible unless involved in the charge against him.*

C. F. Moore brought an action against Ryburn, the sheriff of Ellis county, Texas, for false imprisonment. The petition alleged that in June, 1887, in Ellis county, Ryburn assaulted plaintiff, and with force compelled him to quit his business and go to jail in Waxahachie, and then and there imprisoned plaintiff, and kept him a prisoner, without any probable cause or lawful authority, for the space of nine days. The case was tried without a jury, and judgment was rendered for the plaintiff for $85. The sheriff appealed.

On the trial below the court sustained objections, because immaterial and improper, to the question asked by defendant of a witness on cross-examination: "Was it not a fact that plaintiff, Charley Moore, in June, 1887, and long before that time, was regarded by the public generally where he lived as a dead-beat, a violator of law, and a fugitive from justice, and had he not been frequently confined in the calaboose and jail for violations of law?" Appellant insisted that, inasmuch "as the gist of the plaintiff's action being that he had been wrongfully arrested and suffered mental damage, etc., the question was germane both to show good faith in making the arrest and upon the question of damages."

Walker, J.: "The question excluded was simply to prove the general bad character of the plaintiff, and facts warranting it, totally independent of the transaction. In civil cases, evidence of character is not admitted unless the nature of the action involves the general character of the party, or goes directly to affect it. The character of a party in regard to a particular trait is not in issue, unless it be the trait which is involved in the matter charged against him. If it should even be conceded that, to show good faith in the officer arresting the plaintiff under the charge of theft, his character for honesty was involved, still the general sweeping questions asked were irrelevant. If asked with reference to the measure of damages, there is no shadow of relevancy. The question, and all parts of it, were properly excluded. The judgment will be affirmed." Moore v. Ryburn, 72 Tex., 85; 10 S. W. Rep., 393 (1888). Citing 1 Greenl. Ev., §§ 54, 55.

§ 19. Plaintiff's bad character competent in mitigation of damages.— In actions for malicious prosecution evidence of the general bad reputation of the plaintiff for honesty and integrity is competent in mitigation of damages.[1]

§ 20. What kind of damages are the subject of mitigation.— Most of the books mention but two kinds of damages: (1) compensatory or actual damages, (2) exemplary or vindictive damages.

All damages which in any event may be recovered in actions for malicious prosecution and false imprisonment are either compensatory or exemplary.

Compensatory damages are those which may be recovered for the actual personal or pecuniary injury and loss; the elements of which are: loss of time, bodily pain and suffering, impaired mental or physical powers, mutilation and disfigurement of the body, necessary expenses of surgical and other attendants, and the like; and also those damages which may be recovered for injuries to the feelings, the elements of which are: the insult, the indignity, the public exposure, contumely, and the like.

This class of damages depends upon the actual injuries sustained and not upon the malice or bad motives of the wrongdoer, and hence are not the subject of mitigation. Upon the other hand, exemplary damages depend entirely upon the malice of the defendant, and as evidence of such malice may be given to increase this kind of damages, so it is competent to show the absence of malice and the existence of good faith on the part of the defendant for the purpose of mitigating or even defeating exemplary damages.[2]

§ 21. Compensatory damages not subject to mitigation.— In cases where the plaintiff disclaims the right to recover exemplary damages, the introduction in evidence of matter going only in mitigation of damages is improper.[3] Whatever may have been the confusion, if not the contradiction, of the decisions on this general question, it was finally put at rest by

[1] Bacon v. Towne et al., 4 Cush. (58 Mass.), 240 (1849).

[2] Prentiss v. Shaw, 56 Me., 427; 8 Am. Law Rep. (N. S.), 712; Fenelon v. Butts, 53 Wis., 344; 10 N. W. Rep., 501 (1881); Craker v. C. & N. W. R'y Co., 36 Wis., 657.

[3] Fenelon v. Butts, 53 Wis., 344; 10 N. W. Rep., 501 (1881).

the able and elaborate opinion of Mr. Justice Lyon of the supreme court of Wisconsin.[1] In that opinion the previous decisions of his court and of other courts were critically examined and reviewed, and the principle brought to the test of reason, and the doctrine in this class of cases was established, that compensatory damages were not subject to mitigation by proof of good faith, provocation, or other mitigating circumstances, but that exemplary damages were. In that opinion, however, a distinction is drawn between compensatory damages for bodily and mental injuries, or injury strictly *corporeal* and to the *feelings*, and it is held that "damages for injury to the feelings and exemplary damages both entirely depend upon the malice of the defendant, and these may be mitigated;" and it is further held: "that damages for injury to the feelings are *actual* or *compensatory* in their nature cannot well be doubted."

This decision, in the above distinction only, falls short of a settlement of the whole question, and this distinction was afterwards so considered and fully withdrawn, by the learned justice who made it, in a later case,[2] and the damages for injury to the feelings are classed strictly and unexceptionally with compensatory damages, and not subject to mitigation any more than other compensatory damages. These two cases, taken together, are conclusive of the whole matter, and the question is no longer an open one for discussion or review, at least in the state of Wisconsin.

APPLICATION OF THE LAW.—

(1) *What kind of damages are subject to mitigating circumstances.*

George W. Prentiss was in a blacksmith shop near Newport, Maine, having his horses shod. News of the assassination of President Lincoln was received. Prentiss said he was glad of it. One Gilman, who was present, told him he would be glad to take those words back. Prentiss said he would not. Gilman then informed him that he should report him. Gilman told Putnam Wilson, and together they went into the village and informed Elisha W. Shaw, a deputy-sheriff, Oliver B. Rowe, Hollis J. Rowe and Daniel Dudley of what Prentiss had said.. About two hours afterwards they went to the blacksmith shop, where they forcibly seized Prentiss, and, putting him into a wagon, transported him a prisoner three

[1] Wilson v. Young, 31 Wis., 574. [2] Craker v. C. & N. W. R'y Co., 36 Wis., 657.

miles distant, and shut him up in a room at a hotel, where they kept him for five hours, when they took him in a carriage to the town house, all the time threatening him with extreme personal injuries. At the town house a public meeting was organized. A vote was passed that Prentiss should be discharged upon taking the oath of allegiance.

Prentiss brought an action for false imprisonment. He claimed damages for (1) the actual injury to his person, and for the detention and imprisonment; (2) the injury to his feelings, the indignity and public exposure and contumely; (3) punitive or exemplary damages in the nature of punishment, and as a warning to others not to offend in like manner. On the trial the judge instructed the jury that the defendants had shown no legal justification for their acts, and must be found guilty. The only question was the amount of damages; they were bound to give damages for the injuries to the plaintiff's person and for detention, to the full extent of said damages; that they could not consider the testimony put in by the defendants in mitigation of such actual damages, but must render a verdict for matters named under the first head to the full amount proved, without diminution on account of any matters of provocation or in extenuation.

The judge also instructed the jury that they might consider the testimony of provocation, etc., put in by the defendants under the second and third heads stated in mitigation of any damages they might find that the plaintiff had sustained under either or both of said grounds.

On exceptions, Kent, J., held that the plaintiff was entitled to recover full pecunary indemnity for the actual corporal injury and for the actual damages directly resulting therefrom, such as loss of time, expense of care and the like; that the declarations of the plaintiff, made prior to the unlawful arrest and tending to provoke the same, not being a legal justification, are inadmissible in mitigation of the actual damages. But such declarations, made on the same day and communicated to the defendants prior to such arrest, together with all the facts and circumstances fairly and clearly connected with the arrest indicative of the motives, provocations and conduct of both parties, are admissible upon the question of damages claimed upon the other two grounds. Prentiss v. Shaw, 56 Me., 427 (1869).

IV. Aggravation of Damages.

§ 22. Aggravation of damages.— In actions for malicious prosecution and false imprisonment, where the damages cannot be measured by any legal standard, all the facts of the case, the circumstances surrounding and accompanying the commission of the tort, may be proved; and though there be a legal standard of damages for the principal wrong, if aggravations exist they may be shown in evidence for the purpose of enhancing the damages, both compensatory and exemplary. Every case must necessarily go to the jury upon its own peculiar facts.[1]

[1] 1 Sutherland on Damages, 745 (1883).

§ 23. **What may be shown in aggravation of damages.**— Circumstances of the wrong, malicious motives, negligence, bad faith, wilfulness, wantonness, the age and sex of the parties, their standing in the community where they reside, wealth of the defendant, etc.,[1] may be shown for the purpose of enhancing the damages, whether the case is one for compensation only or for vindictive damages.[2]

V. Nominal Damages.

§ 24. **Nominal damages defined.**— Nominal damages are damages of such small amount as to show that they are not intended as an equivalent or satisfaction to the party recovering them. They are given when the plaintiff, in an action for an invasion of his legal rights, establishes his right but does not show that he has sustained any damage.[3]

§ 25. **Discussion of the subject.**— The law recognizes the fact that for any actionable injury there is an absolute right to damages. An actionable injury is the violation of a legal right. A legal right is one recognized and protected by the law. Every invasion of a legal right imperils its existence, and to some extent imperils its enjoyment. The logical sequence of the invasion of a legal right is the legal sequence — a legal injury, and thus entitles the injured party to compensation.[4] For this invasion, in abstract principle, the person whose right is invaded is entitled to compensation, but always in proportion to the injury, as the evidence shows the extent or circumstances of the invasion. If there is no injury as to actual damages, or none appear upon the inquiry, the legal implication of damages nevertheless remains. This implication requires some practical expression, as the compensation for a technical injury and nominal damages are given; a sum of money which can be spoken of, but which has no existence in point of quantity.[5]

[1] Lyon v. Hancock, 35 Cal., 372 (1868); Craker v. C. & N. W. R. R. Co., 36 Wis., 657 (1875); Jones v. Jones, 71 Ill., 562 (1874).

[2] 1 Sutherland on Damages, 746 (1883).

[3] Beaumont v. Greathead, 2 Com. B., 494; 1 Rap. & L. Law Dic., 336 (1888); Leake, Cont., 567.

[4] 1 Sutherland on Damages, 9 (1883).

[5] 1 Sutherland on Damages, 9 (1883).

APPLICATIONS OF THE LAW.—

(1) *Imprisonment under two commitments, one valid, one void—Nominal damages.*

Patrick Doherty was brought before Garry Munson, trial justice, on two complaints. One charged him with keeping a disorderly house. Upon this charge he was convicted and sentenced to imprisonment for twelve months. The other complaint was for illegally selling intoxicating liquor, and upon this charge also he was convicted and sentenced to pay a fine of $50 and costs and to stand committed until the sentence was performed. He did not pay the fine and costs, and the trial justice thereupon issued two warrants of commitment, which he delivered to the same officer at the same time, who committed Doherty to the house of correction, delivering both warrants to the master of the house, who held Doherty under both warrants during the whole time of his imprisonment. The judgment of the justice upon the first-named complaint was erroneous because the power of a trial justice extended only to an imprisonment for a term not exceeding six months. Mass. Gen. Sts., ch. 120, § 87. But the judgment and commitment upon the other complaint were in all respects legal. Mass. St. 1875, ch. 99, § 13. Doherty brought an action for false imprisonment against Munson, the trial justice. The trial seems to have proceeded upon the assumption that the plaintiff was entitled to recover, the defendant contending that the recovery must be for nominal damages only. The question of the justice's liability to an action for an erroneous judgment in imposing the sentence in a case when he had jurisdiction was not raised at the trial. The case being reported to the supreme court no opinion was expressed on this point.

Morton, J.: "We are of the opinion that the defendant, if liable at all, is liable for nominal damages only. . . . The judgment and commitment upon the complaint for illegally selling intoxicating liquor were legal and valid. The plaintiff during the whole time of this imprisonment was therefore held upon a legal warrant. The fact that the master of the house of correction also held another warrant, which was illegal, did not affect the character of his imprisonment, and he sustained no damage thereby." Judgment was rendered for $1. Doherty v. Munson, 127 Mass., 495 (1879).

(2) *Illegal arrest made through misleading statements of the person arrested.*

Under a statute requiring proof to be made that the defendant was about to depart from the county, or that he was in danger of losing his debt, to authorize the issuing of a warrant against a man with a family living in the county, in the first instance, a warrant was issued by a justice of the peace, at the instance of one Pringle, without oath or such preliminary proof, against one Curry, as an inhabitant of the county having no family. Pringle and Curry lived in the same county, but in towns distant some twenty-six miles from each other. Some time before his arrest Curry had declared that he was not a man with a family; but after his arrest he declared he was a man with a family; upon which Pringle, to

avoid the danger of being nonsuited in case the last declaration was true, discharged him from arrest. Curry then sued Pringle for false imprisonment.

On the trial the judge directed the jury to find a verdict for the plaintiff for nominal damages, subject to the opinion of the court on the facts stated. If the court should be of the opinion that the defendant was not liable, a nonsuit was to be entered; but if he was liable, the verdict was to stand. It was held that, as the plaintiff was an inhabitant of the county in which the defendant and the justice resided, that to authorize the issuing of the warrant the defendant ought to have made the proof required by the law. The imprisonment was illegal, and judgment for the plaintiff was ordered. Curry v. Pringle, 11 Johns. (N. Y.), 444 (1814). Cited in 106 Mass., 504; 38 Barb., 347; 17 Abb. Pr. (N. Y.), 247; 5 Lans. (N. Y.), 259; 10 Wend. (N. Y.), 362; 6 Wend. (N. Y.), 601; 7 Cow. (N. Y.), 252.

(3) *Nominal damages, when improper.*

A citizen of Alabama was traveling through Georgia going to Florida. In passing a county town he was noticed, and happened to be compared with the description of an escaped convict who was under sentence in the state of Louisiana. The sheriff having that description, and thinking, from the almost perfect fit of the same to the unknown traveler, that he was the man described, arrested him, and carried him before a justice of the peace, and the justice of the peace advised that he be detained. No warrant was sued out against him. The sheriff handcuffed him and carried him to the jail of an adjoining county and imprisoned him several days, until some one came from Louisiana, inspected him and determined that he was not the escaped convict; and then he was turned out of jail and permitted to pursue his way. He brought his action for this outrage against the sheriff, which was tried, and the jury found a verdict is his favor for $25 damages. Not being satisfied with the result, the plaintiff took the case to the supreme court on a writ of error.

In reversing the judgment Bleckly, C. J., said: "Though an arrest without warrant be justifiable, yet to detain the prisoner longer than a reasonable time for suing out a warrant, then to handcuff him, carry him out of the county, and there incarcerate him for days, under no warrant whatever, is false imprisonment, if not kidnaping, and a finding by the jury of $25 is no compensation for the injury. Kidnaping is defined in section 4367, Georgia code, and seems to be a close neighbor to this transaction. The very least that could be made out of the facts would be a gross case of false imprisonment. Code, § 4364; Lavina v. State, 63 Ga., 513. The statute authorizes the jury, in certain cases (and this is one of them), to give exemplary damages, by way of deterring the defendant from repeating the tort, or committing similar torts. Code, § 3066. But here, as it would seem, the jury attempted to teach the plaintiff, by sad experience, not to bring any more such actions. We think they looked exactly to the contrary of the direction in which they should have looked. Their object seems to have been to discourage men from asking legal redress for grave injuries, instead of making the violators of law smart for injuries inflicted. It is plain that, although this arrest may have been justifiable,

the sheriff deliberately, and apparently thoughtfully, declined to observe the law, which commanded him, if not expressly, by clear implication, to obtain a warrant within a reasonable time. Code, § 4725; id., § 56; Lavina v. State, 63 Ga., 513. He went before a justice of the peace, and that proves that he had a reasonable time. He declined even to apply for a warrant, and took this man to an adjoining county, handcuffed like a criminal, put him in jail, and confined him there a number of days. It is obvious that he had no more right to treat the plaintiff in that manner than the plaintiff had to treat him so. It would have been just as much a $25 case for damages if the Alabama citizen had captured the sheriff and carried him to Albany, handcuffed, and put him in jail. Even if this man had been guilty, if he had been the escaped convict that he was supposed to be, he ought to have had heavy damages, or at least full compensatory damages, for such an outrageous violation of law on the part of the sheriff. If anybody ought to keep the law, it is those who are engaged in its administration. What excuse can an officer have for not obtaining a warrant when he has made a legal arrest without one? If officers of the law can be tolerated in violating the law in this manner, what inducement has anybody to abide by that law?

"2. We think such a verdict could hardly have been rendered by an impartial jury but for an error committed by the court in its charge. The court instructed the jury that, under the declaration, they might find for the plaintiff any amount from one cent to $5,000, the limit of the damages alleged in the declaration. This was equivalent to telling the jury they might give nominal damages, or compensatory damages, or exemplary damages, just as they thought proper. These were not appropriate instructions in such a case. It is no place for nominal damages. It is no case for one cent, or any small number of cents, under the evidence, and the jury ought not to have been turned loose, by the charge of the court, to consider the question of nominal damages at all. Possibly, if that error had not been made, the verdict would not have been so grossly inadequate. The case, in any view of it, not being one for nominal damages only, it was error even to suggest to the jury that a finding of one cent was legally possible under the evidence." Potter v. Swindle, 77 Ga., 419; 3 S. E. Rep., 94 (1887).

VI. Compensatory Damages.

§ 26. Compensatory damages defined.— Compensatory damages are those allowed as a recompense for the injury actually received.[1] The theoretical idea of damages is that they are to be compensation and satisfaction for the injury sustained.[2] Practically, however, a case can seldom occur in which they are completely so.

An example: The simplest instance which can occur under our laws is the non-payment of a debt. Put out of the question every element of

[1] 1 Bouvier's L. Dic., 467 (1884). [2] 2 Black. Com., 438.

mental suffering caused by the delay, there may be a clear amount of pecuniary loss flowing from it in the most direct manner. Under our commercial system the creditor may become insolvent and be permanently ruined. He may have to borrow money at an extravagant rate of interest. If he brings a suit to collect his debt, his taxed costs cannot repay him for the amount he has expended in the action; but for none of these can he be compensated under the law: the amount of his debt with interest and costs is all he can recover.[1]

VII. Exemplary Damages.

§ 27. Punitive, exemplary or vindictive damages—Smart money — The terms defined.— Exemplary damages, or, as they are frequently called, punitive or vindictive damages or smart money, are damages given not merely as a pecuniary compensation for the loss actually sustained by the plaintiff, but likewise as a kind of punishment to the defendant with the view of preventing similar wrongs in the future, as in actions for malicious injuries, etc.[2]

There is much authority for allowing damages beyond compensation for torts whenever a case shows a wanton invasion of the plaintiff's rights, or any circumstances of outrage or insult, whenever there has been oppression or vindictiveness on the part of the wrong-doer, or a wilful, malicious or reckless tort to person or property.[3]

In actions for trespasses juries are authorized to give exemplary, punitive or vindictive damages, or, as it is sometimes called, *smart* money. If wrong-doers were bound to pay in damages no more than the exact value of the property forcibly taken and converted by them, or the actual damage sustained by reason of a wrongful act, there would be no motive created by the operation of law to induce them to desist and abstain from invading the rights of others. To furnish such a motive this class of damages is allowed.[4] But this rule is not uniform in all of the states of our Union.[5]

[1] Wayne on Damages, 8 (3d ed., 1877).

[2] Broom, Com. L., 855; 2 Smith's Lead. Cas., 549; 1 Rop. & L. Law Dic., 336 (1888).

[3] 1 Sutherland on Damages, 716 (1883); Ames v. Longstreth, 10 Pa. St., 184; Nagle v. Mattison, 34 Pa. St., 48. See Railroad Co. v. Cobb, 68 Ill., 53; Cutler v. Smith, 57 Ill., 252.

[4] Tyson v. Ewing, 3 J. J. Marsh. (Ky.), 186 (1830).

[5] 1 Sutherland on Damages, 717 (1883).

§ 28. **The law stated by Mr. Justice Grier.**—"It is a well-established principle of the common law, that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages, upon a defendant; having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common law, as well as by statute law, men are often punished for aggravated misconduct or lawless acts by a civil action, and the damages inflicted by way of penalty or punishment given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages assessed by way of example may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction."[1]

[1] Day v. Woodworth, 13 How. (U. S.), 371 (1851); Milwaukee, etc., R. R. Co. v. Ames, 1 Otto, 489 (1875).

§ 29. **The law stated by McAllister, J.**— "The principle of the rule allowing exemplary, vindictive or punitory damages, as they are called, has been severely questioned by many very able jurists, among whom was Professor Greenleaf, upon whose sturdy, accurate, profound intellect and wonderful legal attainments it is unnecessary to pass any encomiums. In his definition of damages, and upon which it would be difficult to improve, there is little countenance to the doctrine of punitory damages. He says: 'Damages are given as a compensation, recompense or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be precisely commensurate with the injury — neither more nor less.'[1]

"The principal grounds upon which the doctrine of exemplary damages has been assailed is that it is a false theory, and inconsistent with the nature of the proceeding, to mix the supposed interests of society with those of an individual in the pursuit of purely private redress for private injury, and is subject to great abuses, which in most cases the courts can correct only by the exercise of the delicate power of setting aside a verdict as corrupt, partial or passionate. The doctrine of exemplary, vindictive or punitory damages is, however, too firmly rooted in our jurisprudence to be disturbed. But, while still recognizing the doctrine within its proper scope, the arguments which may be urged with great if not unanswerable force against it ought to be influenced in begetting a high degree of watchfulness on the part of courts to prevent it from being perverted — from being extended beyond the real principle upon which it is said to be based — by allowing plaintiffs, though the instrumentality of instructions to the jury, to characterize the acts of the defendant with degrees of enormity and turpitude which the law does not affix to them, and demand punishment for fictitious offenses, and thereby put money in their own pockets under the guise of protecting society."[2]

§ 30. **The general rule.**— In the actions treated of in this work the conduct and motives of the defendant are open to inquiry for the purpose of ascertaining the amount of dam-

[1] 2 Greenl. Ev., § 253, and note 2. [2] McAllister, J., in Holmes v. Holmes, 44 Ill., 168 (1867).

ages. If in committing the wrongs charged he has acted recklessly, or wilfully and maliciously with a design to injure or oppress the plaintiff, the jury in fixing the damages may disregard the rule of compensation; and, beyond that, may as a punishment of the defendant, and as a protection to society against a violation of personal rights and social order, award such additional damages as in their discretion they may deem proper.[1]

§ 31. **Exemplary damages — A question for the jury — The law stated by Walker, J.**— In an action for false imprisonment the question of whether the acts complained of were wantonly or wilfully committed is important to be considered in measuring the damages. Where the wrong is wanton, or it is wilful, the jury are authorized to give an amount of damages beyond the actual injury sustained, as a punishishment and to preserve the public tranquillity. But when the wrong-doer acts in good faith, with honest intentions, and with prudence and proper caution, and he shall invade the rights of others so as to render himself liable to the action, punitive or exemplary damages are improper. "Whether the acts complained of are committed under circumstances of aggravation is a question for the consideration of the jury."[2]

§ 32. **There can be no exemplary damages where no actual damages exist.**— Where no actual damage is suffered, no exemplary damages can be allowed. Exemplary damages can never constitute the basis of a cause of action. They are never more than incidents to some action for real and substantial damages suffered by the plaintiff; and, when given, they are given only in addition to the real and actual damages suffered and recovered by him; and, when given, they are not given upon any theory that the plaintiff has any just right to recover them, but are given only upon the theory that the defendant deserves punishment for his wrongful acts, and that it is proper for the public to impose them upon the defendant as punishment for such wrongful acts, in the private action brought by the plaintiff for the recovery of the real and actual damages suffered by him. No right of action for exemplary damages, however, is ever given to any private individual

[1] 1 Sutherland on Damages, 720 (1883), and cases cited.

[2] Hawk et al. v. Ridgway, 33 Ill., 473 (1864).

who has suffered no real or actual damages. He has no right to maintain an action merely to inflict punishment upon some supposed wrong-doer. If he has no cause of action independent of a supposed right to recover exemplary damages, he has no cause of action at all.[1]

§ 33. Corporation liable in exemplary damages.— It is a well-established principle of jurisprudence that corporations may be held liable for torts involving a wrong intention, such as false imprisonment; and exemplary damages may be recovered against them for the wrongful acts of their servants and agents done in the course of their employment, in all cases and to the same extent that natural persons committing like wrongs would be held liable. In such cases the malice and fraud of the authorized agents are imputable to the corporations for which they act. This principle is too well settled to require argument, and the authorities sustaining it are numerous and well-nigh unanimous.[2]

§ 34. The right to exemplary damages does not depend on the existence of malice in its ordinary sense.— The right of the jury to assess exemplary or punitive damages in actions for false imprisonment does not necessarily depend upon the existence of malice, using that term in its ordinary sense.

[1] Schippel v. Norton, 38 Kan., 567; 16 Pac. Rep., 804 (1888); Gilmore v. Mathews, 67 Me., 517; Stacy v. Publishing Co., 68 Me., 279; Freese v. Tripp, 70 Ill., 496; Meidel v. Anthis, 71 Ill., 241; Ganssly v. Perkins, 30 Mich., 492; Maxwell v. Kennedy, 50 Wis., 645, 648, 649; 7 N. W. Rep., 657.

[2] Wheeler & Wilson Manuf'g Co. v. Boyce, 36 Kan., 350; 13 Pac. Rep., 609 (1887); Railroad Co. v. Slusser, 19 Ohio St., 157; Atlantic & G. W. R. Co. v. Dunn, 19 Ohio St., 162; Goddard v. Grand Trunk Ry., 57 Me., 202; Railroad Co. v. Quigley, 21 How., 213; Railroad Co. v. Arms, 91 U. S., 489; Railroad Co. v. Bailey, 40 Miss., 395; Railroad Co. v. Blocher, 27 Md., 277; Hopkins v. Railroad Co., 36 N. H., 9; Railroad Co. v. Hammer, 72 Ill., 353; Reed v. Home Sav. Bank, 130 Mass., 443; Fenton v. Sewing-machine Co., 9 Phila., 189; Goodspeed v. East Haddam Bank, 22 Conn., 530; Boogher v. Life Ass'n of America, 75 Mo., 319; Wheless v. Second Nat. Bank, 1 Baxt., 469; Jordan v. Railroad Co., 74 Ala. 85; Williams v. Insurance Co., 57 Miss., 759; Vance v. Railway Co., 32 N. J. Law, 334; Cooley, Torts, 119; 3 Suth. Dam., 270, and cases cited; 2 Wait, Act. & Def., 447, and cases cited; Railroad Co. v. Rice, 10 Kan., 437; Missouri, K. & T. Ry. Co. v. Weaver, 16 Kan., 456; Kansas Pac. Ry. Co. v. Kessler, 18 Kan., 523; Kansas Pac. Ry. Co. v. Little, 19 Kan., 269; Western News Co. v. Wilmarth, 33 Kan., 510; 6 Pac. Rep., 786.

These damages may be awarded when a wrongful act is done wilfully, in a wanton or oppressive manner, or when it is done recklessly,— that is to say, in open disregard of one's civil obligations and of the rights of others. The cases on the subject show that in the matter of assessing damages for a false imprisonment, or for an assault or trespass, it is the duty of the jury to consider not only all the circumstances of aggravation attending the wrongful act, but in some measure, at least, the nature of the right that has been invaded, and the effect upon social order of permitting a wrong-doer to escape without substantial punishment, in case of a flagrant violation of the law and the rights of others.[1]

APPLICATIONS OF THE LAW.—

(1) *$2,750 not excessive.*

Miss Ann E. Ward commenced a prosecution for bastardy against Krug. It was finally compromised upon his giving her his note for $300. Two years afterwards he procured his wife to go before a justice of the peace and swear to a complaint against Miss Ward for committing perjury in swearing that he was the father of her child. The warrant was issued and Krug took it to a constable of the county and together they went to Miss Ward's residence in another county. There, at Krug's instance, the constable arrested her and brought her back to the county and before the justice who issued the warrant. After some delay she was tried and acquitted. She then brought an action against Krug. The declaration contained a count for malicious prosecution, one for false imprisonment and one for slander. On the trial it appeared that at her residence Krug told her he had an officer who had a warrant to arrest her because she had sworn falsely, but if she would give up the note he would let her go, otherwise she might have to go to the penitentiary. The constable testified that when they arrived at her residence she was in the wash-house. When she came in Krug said: "Annie, this is an officer; he has a warrant to arrest you; you have sworn falsely; you know I never done anything to you; that child is not mine." She said. "Mr. Krug, it is yours; I never swore falsely, for no one ever touched me but you." He then said, "You did swear falsely; don't you know it will penitentiary you?" She was crying and seemed to be scared. He told her if she didn't give up the note she would have to go to the penitentiary; and then he ordered me to

[1] Frothingham v. Adams Express Co., 36 Fed. Rep., 252 (1888); Huckle v. Money, 2 Wils., 205; Beardmore v. Carrington, id., 244; Merest v. Harvey, 5 Taunt., 442; Conrad v. Insurance Co., 6 Pet., 268; Day v. Woodworth, 13 How., 363; Voltz v. Blackmar, 64 N. Y., 440; Drohn v. Brewer, 77 Ill., 280; Sherman v. Dutch, 16 Ill., 283; McBride v. McLaughlin, 5 Watts, 375; Turnpike Co. v. Boone, 45 Md., 344; McWilliams v. Bragg, 3 Wis., 424; Green v. Craig, 47 Mo., 90.

arrest her, and I did. There was some evidence that Krug was a man of considerable wealth. The jury gave the plaintiff $2,750, upon which judgment was entered. Krug appealed.

In affirming the judgment, Justice Scholfield said: "The verdict in this case, though large, we cannot regard as so excessive as to justify the granting of a new trial. The defendant is shown to be a man of considerable wealth. It is fitting that, in him, an example should be made to vindicate the law and teach others that the criminal code cannot be resorted to for the gratification of personal malice, or the attainment of dishonorable personal ends, without surely bringing upon him who thus resorts to it the most serious consequences. What might be a severe punishment, in the way of a judgment, against a very poor man, to him would, doubtless, be trifling and insignificant. While it is important to guard against wholesale confiscations in suits of this character, it is equally important that it should be understood that the possession of wealth gives to him who would override the law with strong hand, no advantage over his less fortunate neighbor in the acquisition of property." Krug v. Ward, 77 Ill., 603 (1875).

(2) *$1,000 held proper.*

The Wheeler & Wilson Manufacturing Company was engaged in business at Topeka, Kansas, and C. S. Baker, was its general agent. It sold a sewing-machine to Mary Hatfield, who subsequently married J. F. Boyce. She paid a part of the purchase-money and signed a contract that the title of the machine should remain in the company until the balance was paid. Afterwards the company directed its general manager to bring an action of replevin against her to recover the machine, claiming that a balance of the purchase-money remained unpaid, a claim which she denied. The constable to whom the writ was delivered reported that he could not find the machine. The general agent of the company then directed the constable to make an affidavit before a justice that Mary Boyce and her husband were in possession of the machine and had refused to deliver it to him, and to obtain a warrant for their arrest. Upon making the affidavit the justice issued a warrant directing the constable to arrest Mrs. Boyce and her husband and commit them to the county jail, there to remain until they should deliver the machine. The constable obeyed the writ, and informed the general agent that he had arrested and committed Mr. Boyce to jail, and without taking him before the justice and without any examination, hearing or trial. The agent replied: "Now I guess he will give up the machine." The replevin suit resulted in a judgment in favor of Mrs. Boyce. Her husband remained in jail ten days, and was finally discharged at the instance of the company. He was never taken before any court for trial or examination. He became sick in consequence of his confinement. After his discharge he sued the company for false imprisonment. He recovered $1,000. The company took the case to the supreme court on error.

In the supreme court it was claimed that the damages were excessive. In passing upon this question, Johnston, J., said: "The case is an aggravated one, and the conduct of the plaintiffs in error exhibited a wanton and reckless disregard of the rights of the defendant in error. He was not

a party to the replevin action, and the testimony is that the machine in controversy was purchased long before he was married to the plaintiff in that action, and that he had no interest in or control over it. He was thrust into jail, without warning or trial, when there was no civil or criminal suit pending against him, and kept there for ten days with seventeen or eighteen prisoners who were either charged with or convicted of crimes. The sewing-machine sought to be recovered from his wife had been paid for, and belonged absolutely to her; and plaintiffs in error, with knowledge of this fact, undertook to compel the payment of money not due, or the recovery of property which they did not own, by the arrest and incarceration of the defendant in error, without cause, and in a manner that was clearly illegal. Apart from the loss of time and interruption to his business, as well as the humiliation and indignity suffered by him by being thrust into jail upon a false charge, it appears that the confinement resulted in his sickness; and when we consider the malicious and oppressive conduct of the plaintiffs in error, and that the case is one which calls for the infliction of exemplary or punitive damages, we can only conclude that the verdict of $1,000 in favor of the defendant was fully justified, if not too small. We can say without hesitation that an award of a larger amount would not have been disturbed on the ground that it was excessive.

"It follows that the judgment must be affirmed." Wheeler & Wilson Manuf. Co. v. Boyce, 36 Kan., 350; 13 Pac. Rep., 609 (1887).

(3) *Exemplary damages — Pecuniary condition of the defendant.*

Hoover sued Sexson for a malicious prosecution, and recovered a judgment. Hoover appealed.

In deciding the case Crumpacker, J., said: "Upon the trial Hoover was permitted, over objections, to introduce evidence showing Sexson's financial condition, and complaint is made of this. In actions where the jury would be authorized in awarding compensatory damages only, ordinarily, evidence of the pecuniary condition of the defendant would be grossly improper. In suits for damages resulting from malicious prosecutions, however, inasmuch as the wrong-doer is not amenable to the penal laws of the state, it is within the discretion of the jury, under proper instructions, to award damages by way of punishment in addition to compensation for the injuries sustained. It seems to be the policy of the law to authorize the infliction of punitive damages upon the defendant in all cases for malicious torts which are not punishable by the state. While much might be said in condemnation of the policy that authorizes the merging of the rights of the public into those of the individual, and permits penalties to be recovered in private suits, its virtues are discovered in its salutary effect upon society, and it is now the settled law of this state, supported by generations of judicial wisdom. Lytton v. Baird, 95 Ind., 349: Farman v. Lauman, 73 Ind., 568; Meyer v. Bohlfing, 44 Ind., 238; Taber v. Hutson, 5 Ind., 322. Evidence of the pecuniary condition of the defendant has been held admissible by a majority of the courts of last resort in this country in suits for malicious prosecution, and in cases in-

volving analogous questions; but the reasons given therefor by the various courts are not uniform. Some hold that such evidence is admissible upon the theory that it tends to prove a wide range of influence upon the part of the defendant, and that a slander published, or a criminal charge falsely and maliciously preferred, by one with a large social and financial influence, would likely inflict a more serious injury than if published or preferred by one whose influence was less extensive; while upon the other hand, it is held by many courts that this kind of evidence is admissible only in cases where punitive damages may be assessed, and upon the theory that the imposition of a pecuniary penalty against one of limited means might be oppressive, while, if the same amount were assessed against one possessed of large wealth, it would be but lightly felt, and the stern vengeance of the law would be practically lost, so the jury should be advised of the condition of the fleece borne by the lamb, and temper the wind accordingly. A considerable number of reputable authorities deny the competency of such evidence in all cases except where some essential right of the plaintiff may be involved in the defendant's financial circumstances. A large majority of the best-considered cases, however, is in favor of its competency upon the one theory or the other.

"In the following cases it was decided to be competent in malicious prosecution suits: Johnson v. Smith, 64 Me., 555; Humphries v. Parker, 52 Me., 502; Winn v. Peckham, 42 Wis., 493; Whitfield v. Westbrook, 40 Miss., 311; Peck v. Small, 35 Minn., 465; 29 N. W. Rep., 69; Coleman v. Allen, 79 Ga., 637; 5 S. E. Rep., 204; Weaver v. Page, 6 Cal., 681; Bump v. Betts, 23 Wend., 85. See, also, Abb. Tri. Ev., p. 654; Sedgw. Dam., p. 38. Suits for malicious prosecution, in so far as the measure of damages is concerned, are closely analogous in principle to suits for seduction and slander, and in the latter classes of cases proof of the defendant's financial standing has been held competent in the following cases: Brown v. Barnes, 39 Mich., 211; Hayner v. Cowden, 27 Ohio St., 292; Bennett v. Hyde, 6 Conn., 24; Buckley v. Knapp, 48 Mo., 153; Hosley v. Brooks, 20 Ill., 115; Karney v. Paisley, 13 Iowa, 89; Clem v. Holmes, 33 Grat., 723; Lavery v. Crooke, 52 Wis., 612; 9 N. W. Rep., 599; Wilson v. Shepler, 86 Ind., 275; Shewalter v. Bergman, 123 Ind., 155; 23 N. E. Rep., 686. In harmony with this array of authorities we are constrained to hold that the trial court committed no error in admitting the evidence. The evidence was elicited from the appellant upon his cross-examination, and his counsel make the objection that it was not proper, because the subject had not been inquired into in the examination in chief. This ground of objection was not stated in the court below, therefore it cannot be considered on appeal. Besides, it is rarely held reversible error to admit competent evidence upon cross-examination, though in violation of the usual rules governing the examination of witnesses. A wide discretion is accorded to trial courts upon such questions, and it is only in instances showing a wanton or reckless abuse of discretion that appellate courts feel justified in interfering. The damages were assessed by the jury at $400, and, considering the circumstances of the case and the fact that the jury was not limited to mere compensation for the injury, we do not deem the assessment excessive. The judgment is affirmed." Sexson v. Hoover (Ind.), 27 N. E. Rep., 105 (1891).

§ 35. The rule in some states.— The rule of law allowing the infliction of exemplary damages is not uniform in all of the states. In some it exists in a modified form,[1] and in others it does not exist at all.[2] In some it is abolished by statutory enactments. But it is not within the province of this work to enter upon more than a cursory discussion of the question; reference must be had to works treating upon the subject of damages in general.[3]

VIII. Excessive Damages.

§ 36. Excessive damages defined.— Excessive damages are damages assessed by a jury in an amount unreasonably large and beyond the warrant of law.[4] If there is a legal measure of damages which the jury has deviated from, either by finding less or more than the plaintiff is entitled to by a clear preponderance of the evidence, the trial court will, in the exercise of a sound judicial discretion, entertain a motion for a new trial on behalf of the party injured by the finding.[5]

§ 37. Motion for new trial for excessive damages.— Lord Mansfield said: "I should be sorry to say that in cases of personal torts no new trial should ever be granted for damages which manifestly show the jury to have been actuated by passion, partiality or prejudice. But it is not to be done without very strong grounds, indeed, and such as carry internal evidence of intemperance in the minds of the jury. It is by no means to be done where the court may feel that, if they had been on the jury, they would have given less damages, or where they might think the jury themselves would have completely discharged their duty in giving a less sum. Of all the cases left to a jury, none is more emphatically left to their sound discretion than such a case as this, and, unless it appears that the damages are flagrantly outrageous and extravagant, it is difficult for the court to draw the line."[6]

[1] Barnard v. Poor, 21 Pick., 380 (1826).

[2] Bayer v. Barr, 8 Neb., 68 (1875).

[3] See Sutherland on Damages, a most excellent treatise upon the subject.

[4] 1 Rap. & L., Law Dic., 475 (1888).

[5] Berry v. Vreeland, 21 N. J. L., 183; Nutter v. J. R. R. Co., 13 Ind., 479; McDonald v. Walker, 40 N. Y., 551; Walker v. Smith, 1 Wash. C. C., 152; 1 Sutherland on Damages, 810.

[6] Gilbert v. Burtenshaw, Cowp., 230.

Mr. Justice Story said that a verdict should not be set aside for excessive damages, in cases of tort, "unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated."[1] This language of Mr. Justice Story is quoted with approval, several of the many other cases on the subject are reviewed, and the court, by Mr. Justice Matthews, adds: "In no case is it permissible for the court to substitute itself for the jury and compel a compliance on the part of the latter with its own view of the facts in evidence as the standard and measure of that justice which the jury itself is the appointed constitutional tribunal to award."[2]

APPLICATIONS OF THE LAW.—

I. In cases where the damages have been held to be excessive.
II. In cases where the damages have been held not to be excessive.

I. CASES WHERE THE DAMAGES HAVE BEEN HELD TO BE EXCESSIVE.

(1) *$1,000 — On a technical arrest.*

Flemming was a detective on the police force in the city of Augusta when the Fire Association of Philadelphia had issued a policy of insurance upon the house of a man named Goss. The house was burned, and the company, believing it was burned for the purpose of getting the insurance, refused to pay. Litigation followed. Flemming was employed to work up the case. He worked upon it a while, and then removed to Savannah. Then a detective named Bagby took it up. While the grand jury were investigating the matter, Flemming returned to Augusta on business; after attending to which he started to return. Mr. Carroll, counsel for the company, informed Bagby that he wanted Flemming before the grand jury, and requested him to go and stop him. Bagby found Flemming at the depot, about to leave, and said to him, "I want you in that Goss case," or something to that effect. Flemming considered it an arrest by Bagby. No authority to make the arrest was shown or demanded. Flemming expressed regret, saying he had paid his fare to the city of Savannah, and was anxious to get there. Bagby went to the ticket agent, who refunded Flemming's fare. Flemming then accompanied Bagby down the street to the police headquarters. On the way, Flemming said to a person he met. "I am under arrest." Before reaching the police headquarters, he met

[1] Whipple v. Manufacturing Co., 2 Story, 661 (1841).

[2] Barry v. Edmunds, 116 U. S., 550; 6 Sup. Ct. Rep., 501; Clarke v. American Dock & Improvement Co., 35 Fed. Rep., 479 (1888).

Mr. Carroll, who had been in conference with him about the arson case frequently before this time. Flemming mentioned to him that he was disappointed in not going to Savannah. Mr. Carroll told him that he would make that all right; but nothing was said as to his having been arrested by Bagby. When he got to police headquarters, however, he informed the chief of police that he was under arrest; and Bagby said, "Yes." Christian, the chief of police, said, "I will be responsible for him." Bagby then went up stairs in the same building to see the solicitor-general, from whom he procured a subpœna, which was immediately served upon Flemming; and after the subpœna was served upon him, he went at large. Flemming did not think, until after all this had occurred, to ask by what authority he was arrested. He sued these corporations, and obtained a verdict of $1,000 for malicious arrest and false imprisonment. A motion for new trial was made, and overruled.

On the question of damages, Hall, J., said: "The provisions of law relating to malicious arrest are intended to protect and remunerate those who have been wantonly abused under color of authority. If such authority is assumed for purposes of oppression and wrong, such action should be upheld. But we seriously doubt whether any case was made here at all; and we are not very well satisfied that any damage was incurred on account of the action complained of. It is clear that if any arrest was made at all, or if there was any compulsory detention of the party alleged to have been arrested, it was constructive rather than an actual arrest and detention. It certainly does not appear, from the beginning to the end of this transaction, that any arrest was ever contemplated by Mr. Bagby; and if he did make an arrest, it was a trespass for which he alone was personally responsible. Flemming had never been charged with any crime in connection with this burning that the grand jury was investigating; and he knew, or ought to have known, that he was wanted only for one purpose, which was to testify. He had never disobeyed any subpœna, because he had never been served with one to appear and testify before the grand jury, and was therefore not in contempt of any process of the court. If Bagby acted in this way, he was acting beyond the scope of his instructions and the business he was employed to transact. We do not very clearly perceive how his conduct in this matter was ratified by this company or any of its agents. Flemming was kept away from his home only a single day. He was not treated with any indignity, or placed under any unusual restraint, even for a small portion of that day. It was not shown that his character was in the least affected; and we certainly think that, if this company was liable at all, the finding against it was so excessive as to betray bias in favor of the plaintiff, or prejudice against the defendant in the original suit, or else show that the jury misapprehended the law applicable to the transaction." Fire Ass'n v. Flemming, 78 Ga., 733; 3 S. E. Rep., 420 (1887).

(2) *$1,055.55 — Prosecution for malicious mischief.*

Phœbe Thomas rented land to Morgan S. Thomas, which he cultivated in corn in the summer of 1872, his term expiring March 1, 1873. In August, 1872, he entered into a contract whereby he sold his part of the crop to

Rufus Calef, to be delivered in the shock on the ground. Delay occurred in estimating the quantity of the corn, so that the transaction was not finally closed between Calef and Morgan until March, 1873. Phœbe rented the land on which the corn was to John Thomas for the year 1873, his term commencing March 1st of that year. Calef neglected to remove the corn until late in May (whether by the consent of John or not was in controversy), and then commenced to remove it with ox teams. Phœbe objected to the use of ox teams in removing the corn, insisting that they would damage her land more than horses; but no heed was given to her objection. John commenced plowing for the spring crop before the corn was all removed, and made frequent complaints to Phœbe that Calef was not removing his corn sufficiently fast to enable him to progress with his work. Calef had been notified previously to remove the corn, and there was evidence tending to show that the two teams employed for that purpose by him, and which were constantly engaged at it, were not sufficient to remove the corn fast enough to keep out of the way of the teams in plowing. Finally Phœbe burned, on one occasion, several of the shocks of corn, and shortly afterwards a number more, in all sixty shocks. Calef, after the burning, saw her, and she acknowledged that she had burnt it; he went to the state's attorney and made a statement in regard to the matter. He was advised that she be prosecuted for malicious mischief. The state's attorney prepared an affidavit charging her with burning the corn, which Calef took to a justice of the peace, swore to it and obtained a warrant for her arrest. She was arrested, went before the justice, waived an examination, and gave bail for her appearance at the next term of the circuit court, to answer to an indictment, etc. At the next term of the court the case was presented to the grand jury, who ignored the bill and she was discharged. She then brought an action against Calef for malicious prosecution. On the trial the jury returned a verdict for $1,055.55, upon which judgment was entered, and Calef appealed to the supreme court. In delivering the opinion reversing the judgment Scholfield, J., said: "We are by no means satisfied that the defendant did not show probable cause for the prosecution. The plaintiff was guilty of conduct which, if not malicious, certainly was exceedingly reckless, and we are unable to appreciate upon what basis so large a verdict can be predicated. We are not satisfied that the evidence shows that the defendant withheld from the attorney the knowledge of any material facts affecting the question of the plaintiff's guilt, and if not, the verdict should be for the defendant on the ground that he acted under the advice of competent counsel." Calef v. Thomas, 81 Ill., 478 (1876).

(3) *$6,000 — Illegal arrest.*

A creditor bid off the personalty of his debtor at a sale on execution, took actual possession of it, and put it into the hands of an agent to be sold under an agreement with the debtor that after the debt and costs were realized from the proceeds of the sale the debtor should have the balance. Before the debt was paid under this agreement the debtor broke into the place where the goods were kept and removed and disposed of them. He was thereupon arrested for larceny on the complaint of his

creditor, who acted upon the advice of counsel. He was confined only a few hours and was admitted to bail. Afterwards he brought an action for malicious prosecution against his creditor and on the trial was awarded $10,000 by the jury. A *remittitur* of $4,000 was entered and judgment for $6,000 rendered on the verdict. It was held so grossly excessive as to evince prejudice, passion or misconception on the part of the jury, and a *remittitur* of $4,000 would not cure the error. The remainder was also grossly excessive. Lowenthal v. Strong, 90 Ill., 74 (1878).

(4) *$9,000 — Arrest on charge of treason.*

The defendant, in August, 1813, commanded the United States army at Burlington, and caused the plaintiff to be confined five days. He was then brought to a trial by a court-martial instituted by the defendant on a charge of treason, having been in company with two British officers and with having given information to the enemy. He was acquitted. The evidence exhibits the defendant as having made violent declarations as to what he would do with the plaintiff. He was a witness before the court-martial and stated that the plaintiff made communications relative to the enemy which were false. One witness, however, testified before the court-martial that he believed the communications were true. On the other hand it appeared that the defendant had strong grounds for believing the plaintiff to be a suspicious character. One witness stated that the plaintiff was at Alsburgh, about a mile this side of the line, at the time the British were coming to Plattsburg; that two British officers had come into the house where the plaintiff was, and that the plaintiff was a trader back and forth and had been for some time. The defendant was shown to be a man of liberal education with a yearly income of about $60,000. On these general facts the jury gave $9,000 damages. A motion was made for a new trial on the ground of excessive damages. The motion was allowed. Spencer, J., said: "Although it be true the defendant possesses a large fortune, I cannot but believe that the verdict proceeded from intemperance and passion and that the damages are enormously disproportioned to the case as shown by the testimony." McConnel v. Hampton, 12 Johns., 234 (1815).

(5) *$20,000 — Illegal arrest on charge of stealing coal.*

A warrant was issued against Hugh Martin on the 17th day of March, 1886. Twelve days later he was arrested on a charge of stealing coal and brought before the justice. On the examination he was required to give bail in the sum of $300, in default of which he was sent to jail. On the 5th day of April he sued out a writ of *habeas corpus* and was discharged. After his release he brought an action for malicious prosecution against Martin O. Walker and Guy H. Cutting. On the trial the jury found for the plaintiff, assessing his damages at $20,000. The defendant appealed.

In delivering the opinion of the supreme court reversing the judgment, Breese, J., said: "It seems to us the jury did not give proper weight to the evidence of respectable men; that the plaintiff's character was not good; that he was not an object on which they should lavish so much generosity; that nothing which the appellants did, however malicious, de-

manded at the hands of the jury such a vengeful bolt as they hurled at them. The conduct of one of them while attending the trial, though evincing a high degree of malice, though it manifested a reckless disregard of the feelings of the appellee, and a spirit of bravado and persecution, not to be tolerated, and most unjustifiable, yet, with all this, the verdict for the wrong is outrageous. No impartial, unprejudiced man can, for a single moment, indulge in the supposition that appellee was entitled to $20,000. The judgment is reversed and the cause remanded, that a new trial may be had. It is eminently a fit case for the consideration of another jury." Walker et al. v. Martin, 43 Ill., 508 (1857).

II. Cases Where the Damages Have Been Held Not to be Excessive.

(1) *$125 — False imprisonment.*

Culver was a merchant at Rock Falls and procured Bispham to assume the office of constable and arrest Clarence E. Bailey, a young lad, for breaking the glass of his show-case. The boy was about crossing the river, when Bispham, who claimed to be a constable, arrested him, and took him to a shop where Price was, and told the boy that Price was a justice of the peace. Price told Bispham to take him to his house and he would go down and get Culver, which was done, and soon after Culver came in. There was then a trial. Culver was sworn and claimed damages for his show-case, which he swore the boy had broken. Judgment was then rendered against him for about $3. Price then said he would have to pay or he would have to send him to jail. Culver then said he would have to settle it or go to the jug. Price said he could give bond with two respectable men for signers. The boy told him he would have to go over the river to get signers. Price then wrote out a bond, and Bispham took it and the boy across the river, where he obtained one man to sign his bond, then they recrossed the river and got another man on the bond, and the boy was released. He was in custody about two hours. He had never refused to pay for the show-case. After his release the boy brought an action for false imprisonment against Price, Bispham and Culver, and the jury found for the plaintiff $125.

On appeal Justice Breese said: "This case shows a transaction of an atrocious character. If the boy broke the show-case, it is not pretended he did it wilfully. He was only responsible as for a trespass. Yet he was dealt with as a criminal, and by men, two of whom assumed falsely to be officers of the law. . . . It was a wanton invasion of his rights under the cloak of the law, and without any palliating circumstances, and had the jury found a larger verdict we would not have disturbed it." Price et al. v. Bailey, 66 Ill., 48 (1872).

(2) *$750 — Wrongfully causing an attachment to be levied upon exempt goods.*

John Nelson sued out a writ of attachment and caused it to be levied upon the goods of Sigvart O. Danielson, exempt from levy and sale, upon an affidavit that Danielson was indebted to him in a certain sum then due,

and that he was about to leave the state with the intention of having his effects removed from the state, when, in fact, a part of the indebtedness was evidenced by a promissory note not then due, and Danielson was at that time seeking employment, and was making no preparations to leave the state, which facts were known to Nelson when he sued out the writ, and Danielson had offered to give a mortgage to secure the indebtedness, which Nelson had agreed to accept, but sued out the attachment before the time agreed upon for the giving of the mortgage. It was held in an action for malicious prosecution at the suit of Danielson that a jury would be authorized to find that Nelson sued out the writ without probable cause and was actuated by malice, and that a verdict for $750 was not excessive. Nelson v. Danielson, 82 Ill., 545 (1876).

(3) *$825 — Justice perverted for the purpose of private oppression.*

Burt sued Place in an action for malicious prosecution. On the trial it appeared that on June 13, 1826, the defendant obtained three warrants to be issued against the plaintiff by a justice of Oswego county, and upon which he was arrested and brought before the justice on June 25, 1826. The defendant then declared on three causes of action. The plaintiff denied all of them and asked for an adjournment, but being unable to give bail the adjournment was refused, the causes tried and a judgment rendered in each suit for damages and costs, etc. Upon obtaining these judgments another warrant was procured against the plaintiff, which being returned forthwith, judgment was rendered and an execution issued, on which the plaintiff was arrested and committed to jail. He appealed and the judgments were reversed. To prove malice it was shown that the defendant, after obtaining the warrants, put them into the hands of a constable of Oswego county, telling him that the plaintiff was at work in Onondaga county, and hiring him to decoy the plaintiff into Oswego county so that he might arrest him. The constable went after him but found he had left the place. About two months afterwards he happened in Oswego county and was arrested. When the defendant put the warrants into the constable's hands he told him that the plaintiff had got a verdict against him at Whitestown for almost $300 and he wanted to get some judgments to offset it, and if he would give up that judgment he would let him go clear. When he was arrested the defendant retained an attorney to prevent him from being employed by the plaintiff, telling him, "I have a fellow coming that I am going to train, and I want to buy you to hold your tongue;" adding that if he did not engage for the plaintiff the latter would not be able to obtain counsel, as there was no one else he could get, he having employed every other attorney in the place; and telling him further: "He has got a judgment against me for $275, and now I've got him I'll train him until he gives that up, that judgment." On the next day the attorney asked him if he had obtained his judgments and if they were for the same property which he set off on the former trial; to which he answered: "If it is, that is my business." The jury, under the direction of the judge, found a verdict for $825. It was objected that the verdict was excessive. In the supreme court Marcy, J., said: "It is true that the jury gave liberal dam-

ages, but the conduct of the defendant was such as seemed to call for strong reprobation. The sacred functions of a tribunal of justice were perverted to the purposes of private oppression. He who is proved guilty of this desecration should, for example's sake, meet with unstinted justice." Judgment for plaintiff. Burt v. Place, 4 Wend., 591; 10 L. C. P. Co., 718 (1830).

(4) *$900—Larceny of a saw-handle of the value of twenty-five cents.*

Bennett Carson charged that Leopold A. Jenner, Luke G. Butterfield and Mary L. Barr wrongfully, maliciously, and without probable cause, instituted a criminal prosecution against him before a justice, by wrongfully, maliciously, and without probable cause, charging him in an affidavit which the defendant Jenner signed, at the instigation of his co-defendants, with the larceny of a saw-handle of the value of twenty-five cents, and a certain saw-log of the value of $5, the property of Mary L. Barr. The complaint charges that the defendants, without probable cause, maliciously caused the plaintiff to be arrested and prosecuted on such charge, and that the latter was duly acquitted thereof, and discharged. Upon trial there was a verdict and judgment for the plaintiff, assessing his damages at $900. From this he appealed.

Mitchell, J.: The amount of the verdict seems to us quite out of proportion to any injury which, so far as appears, the appellee could have sustained; but as we can discover nothing which raises a suspicion that the jury acted from prejudice, partiality or other improper motives in making their assessment, and as their verdict met the approval of the court in which the judgment was pronounced, we do not feel warranted in disturbing their conclusion. Judgment affirmed. Jenner et al. v. Carson, 111 Ind., 522; 13 N. E. Rep., 44 (1887).

(5) *$1,000—Arrest without reasonable grounds of suspicion.*

Cawrey rented a house of Chapman for a month and paid the rent. One Saturday afternoon after the expiration of the term, Cawrey was temporarily absent, leaving his furniture in the house. Upon his return he found it fastened up, whereupon he forced open the door and entered. Then Chapman ordered him to leave the premises, but he refused and told Chapman not to enter, threatening violence to him if he did so. Chapman then made an affidavit to the effect that Cawrey did break into his store-house and threaten to kill him if he (Chapman) interfered with him (Cawrey). Upon this affidavit a warrant was issued the same night by a justice of the peace, which Chapman gave to an officer and ordered Cawrey to be arrested after he had gone to bed, and, without allowing him an opportunity to procure bail, had him taken to the jail and there imprisoned until Monday morning, thirty-six hours, when upon examination he was discharged. Cawrey then brought an action for malicious prosecution against Chapman. On the trial the jury gave him $1,000. On appeal the question of excessive damages was raised.

In affirming the judgment, Chief Justice Breese said: No reasonable ground of suspicion supported by any circumstances existed at the time

of this transaction, or linked with it, to warrant a cautious and prudent man to believe that appellee was guilty of any criminal offense. . . . Then why this harsh and hasty proceeding against him, at that unusual hour of the night, of all of which appellant was the causeless instigator, and in all of which he was such an active participant? . . . Malice crops out in every part of this transaction. . . . Were then the damages excessive? One thousand dollars, in a case like this, so far from being outrageously excessive, as claimed by appellant, are moderate. Chapman v. Cawrey, 50 Ill., 512 (1869).

(6) *$1,000 — Maliciously procuring an indictment.*

Mr. Charles A. Montross signed a bond for costs with one Ward in a suit of his against Henry C. Bradsby, whereupon Bradsby filed an affidavit stating that Montross was insolvent. Montross, feeling indignant at Bradsby, went before the grand jury, then in session, and procured an indictment against him for perjury. Previous to going before the grand jury Montross applied to his attorney, but he declined to give him any advice as to Bradsby's guilt, but referred him to the state's attorney. Montross, however, did not advise with that officer, but acted on his own responsibility. At the same term of the court a *nolle prosequi* was entered and Bradsby discharged. He then brought an action against Montross for malicious prosecution. On the trial it appeared that Montross was in reality insolvent. The jury found for the plaintiff $1,000. Upon an appeal the supreme court affirmed the finding. "Under the evidence we do not think this a case where the verdict is so excessive that it ought to be disturbed." Montross v. Bradsby, 68 Ill., 185 (1873).

(7) *$1,000 — Abuse of process.*

The plaintiff, who was a trader, found himself falling behind, and in December, 1883, sold out his entire stock to Mr. Braastad, a responsible merchant in the vicinity, and took his note at short time for the amount. He notified his creditors of his condition, and offered to pay them thirty cents on the dollar. There was testimony tending to prove this a fair offer. Defendant Delamater, as agent for one of the creditors, went to him and endeavored to get a better offer, but did not succeed. He then, on Saturday, swore to an affidavit for arrest before the defendant Bassett, who was a justice of the peace, under the fraudulent-debtor act, and late on Saturday night,— as sworn to by Bassett.— about 11 o'clock, a warrant was issued, plaintiff was brought before Bassett and committed, and under this commitment imprisoned. The testimony tended to show that the proceedings of Delamater and Bassett were such as to involve intimidation and oppression of a very gross kind; that the action of the justice was taken after midnight, or on Sunday morning. It also tended to prove that Bassett was acting as adviser and counsel for Delamater, and was for this reason disqualified thereby from acting judicially. The jury returned a verdict for $1,000, and defendants appealed.

In delivering the opinion of the supreme court, Campbell, J., said: "If plaintiff's testimony was true, the case was one of very aggravated malice. The time of night, and the fact of the arrest being made near midnight and

on the eve of Sunday, would necessarily aggravate the grievance to a man who has no accessible means of relief, counsel or deliverance at hand. Most of the worst facts were in immediate connection with the preparation and issue of the commitment itself. So the anomalous position of Bassett as at once counsel and judge was proper to be shown, not only to show malice, but to show want of jurisdiction. West v. Wheeler, 49 Mich., 505; S. C., 13 N. W. Rep., 836. A justice cannot act both as magistrate and counsel. It would be very absurd to hold, as is urged, that in such an action as this the justice's entries are conclusive in his favor, and that the surrounding facts must be shut out. The verdict was not large enough to indicate that the jury found anything in the charge to influence their minds. The judgment must be affirmed." Stensrud v. Delamater, 56 Mich., 144; 22 N. W. Rep., 272 (1885).

(8) *$800 — Arrest upon charge of conspiracy.*

The plaintiff's daughter, Jane Burtis, was employed for a short time as a servant in the defendant's family, and about that time she became pregnant, and afterwards was delivered of a still-born child. It was claimed by her that the defendant was the father of the child. Her father, the plaintiff, reported that the defendant was the father of his daughter's child, whereupon the defendant caused the plaintiff to be arrested upon the charge of conspiracy with his daughter to obtain money from him, and injure him in his business and reputation. Upon a preliminary examination the plaintiff was discharged. He now claims that the prosecution was malicious. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff for $800. The defendant appealed. Judgment affirmed. Burtis v. Chambers, 51 Iowa, 645; 2 N. W. Rep., 503 (1879).

(9) *$1,200 — Arrest on charge of burglary.*

Where a party who had always borne a good character, and was employed and trusted by a wholesale firm with their goods and the key of their establishment, was arrested on a charge of burglary, under circumstances not sufficient to raise a shadow of suspicion, and imprisoned, his house searched, and the prosecutor refused to make reparation by publishing an article exonerating him from the charge, it was held by the supreme court of Illinois that a judgment for $1,200 was not excessive. Hirsh v. Feeney, 83 Ill., 548 (1876).

(10) *$1,272 — Malicious arrest and imprisonment for larceny.*

In January, 1878, Roy sold a farm to Goings, giving him a bond for a deed when certain payments were made. Goings gave Roy his note for $278.47, a part of the purchase-money, payable on the 1st day of March, 1879. To secure the payment of this note, Goings and his son executed a chattel mortgage on all the crops that should be raised on the farm in 1878, with a clause that Roy might foreclose it at any time he should feel that the debt was insecure. Goings planted a crop of corn and tobacco. Among the corn he planted some pumpkins and beans. Goings did not live on the farm; his home was about two miles away. There were no

buildings on the farm suitable to secure the crops, and when matured he cut the tobacco and removed it to his home, where there were suitable buildings to cure it. Goings had paid $110 on the mortgage. After the tobacco was cured he returned it to the farm where it was raised. Roy tried to buy the corn crop, but they could not agree upon the price. When the beans were ripe Goings hauled a load of them home for the purpose, as he claimed, of threshing them. The next morning Roy heard of this, and posted a notice on a tree in the vicinity, that he had taken the crop and would offer it for sale under the mortgage. Goings gathered and hauled away another load, and when Roy learned this he went to Goings' home and told him that he had advertised the property for sale, and that he would put him in jail if he did not quit gathering the beans. Goings insisted that Roy had no right to foreclose the mortgage, and he should gather the beans, as he had a right to. Three days afterwards, while Goings and his children were gathering the beans, Roy had him arrested for larceny. Being unable to give bail, he was confined in the county jail for twenty-seven days, and discharged after the grand jury had refused to indict him. In an action for malicious prosecution a judgment for $1,272 was sustained. Roy v. Goings, 112 Ill., 656 (1885).

(11) *$1,500 for malicious prosecution — $500 for slander.*

One day a stranger stepped into Mr. Wall's shop in Charlestown and bought a cigar. He had a $20 bill changed. As Wall was changing the bill another stranger entered by the rear door and asked him a question about some real estate. He answered the question and then discovered that his till had been robbed and the stranger had disappeared. Naturally enough he concluded they were in collusion. He filed a description of the man who bought the cigar in the office of the chief of police. A few days afterwards, being in Boston, about noon he saw a person whom he thought he recognized as the man who bought the cigar. He followed him a short distance and then caused his arrest, upon information, by a policeman. All three of them went to the station. Here Wall repeated the story of the robbery, adding that the man was a sharp thief and he had left a description of him with the chief of police. The captain in charge of the station examined the description and found it did not correspond with the man under arrest. Then the captain sent for two of his acquaintances whom the man under arrest claimed to know. When they came in they recognized the man as a respectable citizen, and requested Wall, who was present, to go ahead with the examination, but he refused. He stated the charges, but declined to answer any question, saying he knew his man and that he was the smartest thief in the state. The police captain was now satisfied it was a case of mistaken identity, but he detained him until Wall could return to Charlestown and procure a warrant for his arrest. Wall soon returned with two officers, who took the man to Charlestown, and, having searched him, took his watch and money from him and committed him to a cell in the police prison. Here Wall again repeated his charges, and the man's friends arriving soon afterwards, and being known to one of the officers, assured them that the man was a respectable citizen. He was brought out of the cell and permitted to sit in the marshal's office.

Two persons were then brought who had seen the man in Wall's shop. One said, upon looking at him, "He is not the man;" the other thought he was. Wall persisted in saying that he knew his man and would give $10,000 rather than have him get away. Towards night his friends procured bail for his appearance the next morning and he was released. He appeared next morning. The person who on the previous day thought he identified him was present as a witness, but upon reflection he stated that he was not the man. Wall then requested that he be discharged, and it was done. No complaint was made and no warrant was ever issued in the case. The man's name was Mitchell, and he sued Wall for false imprisonment and slander. He recovered $1,500 for the former and $500 for the latter. Mitchell v. Wall, 111 Mass., 498 (1873).

(12) *$1,700 for an aggravated false imprisonment.*

Charles A. Renoe, without the slightest foundation, charged Robert Wilson with the larceny of a load of coal and procured his arrest. He appeared as prosecutor. His conduct seems to have been to gratify bad passions, causelessly excited. The arrest was attended with the most degrading and humiliating circumstances; Wilson, "a reputable young man, being confined all night with miserable creatures, offscourings of the slums and alleys of a large city, picked up by the policemen in their daily rounds, in a room crowded and filthy, with no bed but sawdust, and no food but scanty bread and cold water; taken thence to a police magistrate, through the public streets to a police office, exposed to the gaze of the populace, and to the jests and ribaldry of passers-by, who might think proper to indulge in them. And this, too, where there was no semblance of criminal conduct and no act done which could be tortured into crime. To say, under these circumstances, that $1,700 damages was so outrageously excessive as to require us to set aside the verdict is what we cannot say, though we are free to say we should have been better satisfied with a less verdict; but as the jury have the right to give exemplary or punitive damages, for which no very definite rule can be prescribed, the verdict must stand." Chief Justice Breese, in Renoe v. Wilson, 49 Ill., 95 (1868).

(13) *$2,000 — Maliciously suing out a writ of attachment.*

Hagerman brought an action against Lawrence to recover damages for maliciously suing out a writ of attachment without probable cause and causing the same to be levied upon four carloads of hogs which he had shipped to Chicago. A long litigation followed, in which the attachment was not sustained. At the date of the levy Hagerman was doing a prosperous business, with a good and advantageous credit. His business was utterly broken up and his credit impaired by the ill-advised and inconsiderate act of Lawrence. On the trial the jury returned a verdict for $2,000, to which on appeal the defendant objected as excessive.

Mr. Justice Scott, in delivering the opinion of the court, said: "We cannot regard the verdict as being excessive, in view of all the consequences that followed from suing ont the writ, if it was in fact malicious and without probable cause, as the jury have found." Lawrence v. Hagerman, 56 Ill., 68 (1870).

(14) *$3,000 — Illegal arrest for refusing to give up child.*

In April, 1888, the defendant procured an absolute divorce from the plaintiff. The decree awarded the custody of the children to the defendant. He had two of them, but the plaintiff kept from him the possession of the youngest. In August, 1888, the defendant found his child with the plaintiff, her mother, in a restaurant in New York. He had the decree which entitled him to his child, and the wife (the plaintiff) refused to give her up. A policeman was called, and the dispute drew a crowd of people. The policeman finally, by direction of defendant, arrested the plaintiff, and conducted her to the station-house. The sergeant in charge took a minute of some charge, it does not appear what, and, the wife still refusing to give up the child, she was locked up in the station-house all night with the little daughter, the subject of the dispute. On the next morning the police justice gave up the child to the defendant, and discharged the plaintiff. On the trial the plaintiff recovered $3,000; the defendant appealed.

Barnard, P. J.: The only dispute is as to the fact whether the arrest and detention was caused by defendant's order, and the jury have found for the plaintiff upon the issue. The defendant mistook his remedy. He could have taken the child by force, if the decree allowed, in a gentle manner, but he could not arrest the plaintiff because she refused to voluntarily give up the child. Assuming an illegal arrest, the damages are not excessive. The plaintiff was taken in a public place, and conducted through a public street to the station-house, and detained in a lock up or cell under surroundings which would humble and humiliate her. There was no evidence tending to show that the arrest was made for a breach of the peace, or for acts which tended to a breach of the peace. The arrest was a mistake in the law on the part of the police officer, and the only question was whether the defendant directed it. The judgment should be affirmed. Montjo v. Montjo, 53 Hun, 145; 6 N. Y. Sup., 132 (1889).

(15) *$4,000 — Illegal arrest for forcibly entering a house.*

In an action for malicious prosecution and false imprisonment the jury found a verdict for the plaintiff, with $4,000 damages. The defendants moved for a new trial solely because of excessive damages.

Wheeler, J., said: "At the trial it appeared that the plaintiff was, so far as was shown or claimed, a respectable woman, the wife of a ship-carpenter, and the mother of a family of six daughters, some of whom were grown up and away, and others were small and at home. She was arrested at the instigation of the defendants on what the jury found to be false charges of forcible entry into a house of one of the defendants, where she had been living with her family, and of an assault upon the other defendant, and of a gross breach of the peace, and taken before a police court, and committed to jail with disorderly women, in default of bail immediately required under pretense of awaiting trial, and afterwards required to give sureties of the peace without trial, without any reasonable or probable cause, for the purpose of getting and keeping her away from the house until the defendant could put out her things and tear down the house. The actual pecuniary damages might be small; but the disgrace,

humiliation and shame of being arrested and sent to jail on such charges, for the sense and suffering of which she was entitled to recover damages, might be great. What would be adequate compensation could be measured by no standard, and the amount might properly be enhanced by the wanton disregard of the plaintiff's personal rights in taking such proceedings. Day v. Woodworth, 13 How., 363. It must rest in the judgment and discretion of the jury, and remain there, unless the jury are clearly made to appear to have departed from the exercise of their judgment and discretion. There is nothing shown nor claimed in that discretion unless it is to be inferred from the amount of the verdict. That is not so very great, in view of all the circumstances of the case, as to show that it was reached otherwise than by considerate estimate. The motion cannot be granted but by an arbitrary exercise of the judgment of the court over that of the jury. On a matter purely of fact, confined by the law to that of the jury, this would be manifestly improper. Motion denied." Clarke v. American D. & I. Co. et al., 35 Fed. Rep., 478 (1888).

(16) *$5,000 — On charge of burning warehouses.*

The defendant and his son were the owners of two warehouses, in which were stored a quantity of woodenware. On the night of July 7, 1883, they were set on fire, and, with their contents, were destroyed. On the 13th of the same month the defendant made a complaint to a justice of the peace, charging that the plaintiff, his wife, and one George L. Haney, set the fire. A warrant was issued, and they were arrested and brought before the justice.

In the meantime the defendant sent for the district attorney, who, accompanied by the sheriff, reached him on the evening of the 13th. The district attorney found the complaint defective, and thereupon dismissed the prosecution then pending, drew another complaint, and instituted another prosecution against the same parties for the alleged burning. The constable transferred the custody of the plaintiff to the sheriff, who held him under the warrant issued on the second complaint. The accused parties waived an examination before the justice, and were committed to the jail for want of bail. They were detained there for several weeks. They finally procured bail and were released. An information charging them with the burning was filed against the accused parties by the district attorney, and they were subsequently tried in the circuit court for the crime charged and were acquitted.

Spear then brought an action to recover damages for such prosecution, and his consequent imprisonment. The jury found for the plaintiff, $5.000. A motion for a new trial was denied. The defendant appealed.

Lyon, J., said: It is said that the damages are excessive. The testimony tends to show that the plaintiff was greatly wronged by the defendant in the matter of the criminal prosecution, in that his reputation was wantonly assailed and his rights entirely disregarded. We do not say these things were proved, but the testimony is sufficient to uphold a special verdict to that effect. Besides, it is now a verity in the case that the prosecution of the plaintiff by the defendant for a serious crime was malicious and without probable cause. Considering these circumstances, which makes the

case a proper one for the infliction of punitory damages, and considering also that the defendant has large wealth (as appears by the testimony), we are unable to say that the damages awarded by the jury are so large as to justify the interposition of this court. The judgment must be affirmed. Spear v. Hiles, 67 Wis., 350; 30 N. W. Rep., 500 (1886).

(17) *$8,000 — Prosecution of witnesses against the company in damage suits for perjury.*

W. W. James brought an action for a malicious prosecution against the Gulf, Colorado & Santa Fe Railway Company, Webster Snyder, its general manager, and James Spillane, his clerk, in causing his arrest and prosecution for perjury. A trial resulted in a verdict for the plaintiff against the railroad company alone, for the sum of $8,000 actual damages, upon which judgment was rendered. The defendants Snyder and Spillane were discharged.

The affidavit made by Spillane, upon which the arrest and prosecution of James were had, charged that in a civil cause pending in the district court of Galveston county, wherein one A. W. Fly was plaintiff and appellant was defendant, brought to recover damages for personal injuries caused by the derailment and wreck of a passenger train of appellant, the said James testified by deposition falsely, wilfully and knowingly as follows: "I saw a loose wheel on a hind passenger coach, with a hot box" (referring to a passenger train of appellant at Rosenberg, about the 20th or 25th of April, 1884), "and the car inspector of appellant packing said box. The wheel had slipped from its proper bearings, and the axle had worn bright by the friction of the wheel. The car inspectors of the company and the Sunset route were both present, and saw the condition of the wheel; and while the box was being packed the inspector of the Sunset route remarked, 'That if the car was on his line he would set it out.' This remark was made in my hearing. Cannot remember the exact conversation that took place, but it was to the effect that it was dangerous to send that car on. I was under the impression that the car would be set off; but when I saw the train go on, remarked to the inspector of the company, 'It was a d—d bad job.' He remarked, 'I guess she'll run.' I saw the train on its arrival at Rosenberg depot. It was not in a condition to proceed on its journey with safety, in consequence of the wheel of one of the coaches being loose. Am satisfied that the train was wrecked in consequence of the condition of the wheel. The company's inspector afterwards told me he was required to report the condition of the train on the morning of the accident, and asked me what he should say. I told him to tell the truth. He said he would do no such thing; he would report only a few hot boxes. On the morning of the day of the accident one of the coaches had one loose wheel. My attention was attracted by the condition of the wheel. It was so glaring I could not pass it unnoticed. I did not ask Snyder, the general manager, for a position on his road or intimate that I desired one." An appeal was taken to the supreme court, in which it was claimed that the damages were excessive.

In discussing the question, Hobby, J., said: "In the case of Railroad Co. v. Gordon, 70 Tex., 90; 7 S. W. Rep., 695, it is said 'that if the verdict in

one material respect was the result of prejudice, passion, or other influence, not arising from a dispassionate consideration of the evidence, the inference is very strong,' when it was for a large sum, that that feature of it was similarly controlled. In the case cited special issues were submitted to the jury, directing them to respond in their findings as to whether the accident was caused by a defective road-bed, or was the result of a defective locomotive. There was an affirmative reply to each issue thus submitted. The objection was made to the verdict in that case, as in this, that it indicated passion and prejudice, and was contradictory. The court recognized it as being inconsistent, so far as it held that both were the efficient cause of the accident. But it was said that this did not furnish a sufficient reason for a reversal if, by looking to the entire case, it was ascertained that the verdict was uninfluenced by other improper motive. It was ascertained, in looking to the assignment in that case as to the excessive verdict, that the amounts sued for — $25,000 actual, and $25,000 exemplary, damages for personal injuries — were assessed by the verdict.

"Pursuing the rule adopted in the case cited, and considering the assignment in this case complaining of the verdict being excessive, we find the amount sued for as damages caused by the alleged malicious prosecution of appellee for the offense of perjury to be $15,000 actual, and $15,000 exemplary, damages, and the amount found in his favor to be $8,000 actual damages,— but little in excess of one-half of the actual damages claimed, and under evidence to the effect that the result of the prosecution was to break the appellee up; prevented him in a measure from obtaining employment: required him to perform labor he had not previously done; and estranged from him those, or many of them, with whom he had associated in his business vocation. It will be seen, then, that in looking to the amount of damages assessed, and considering it in connection with the inconsistency of the verdict with respect to the feature of it referred to, it cannot, we think, be said that it shows that the verdict was the result of improper influences, or is contrary to law, or indicative of that misconduct which would authorize a reversal upon that ground." Gulf, C. & S. F. R'y Co. v. James, 73 Tex., 12; 10 So. Rep., 744 (1889).

(18) *$10,000 — Illegal arrest for embezzlement.*

The plaintiff, as cashier, had been in the defendants' employment four years and had an established character for honesty. During that time the daily receipts of defendants' firm averaged $1,500 per day, not a dime of which was unaccounted for by the plaintiff. A charge was made against him of a debt due to the firm from his brother, which they claimed was to be paid by him and which they sought to set up against his salary. Plaintiff denied any understanding that his brother's debt was to be charged against his salary, and upon leaving the establishment he appropriated to the payment of the salary due him the sum of $166 out of moneys of the firm in his hands. This was known to the defendants and they knew he claimed the right to do so, and that he made the proper entry in the book against himself, insisting that he had the right to do this. For this act he was arrested for embezzlement upon the complaint of one of the firm, gave bail for his appearance on a subsequent day, and was

examined and discharged. The jury, in the action brought by him against the members of the firm upon the third trial, found for the plaintiff and assessed his damages at $10,000. The defendants appealed.

In delivering the opinion of the supreme court, Breese, J., said: "The facts go far to show that the defendants had formed a determination to prosecute the plaintiff at all hazards for a crime which they had every right to know he had not committed. The evidence fully establishes malice. After his discharge by the magistrate one of the defendants said: 'If anybody comes to me to inquire after plaintiff's character, I will say that he stole $166 from me and that he is a thief and liar.' . . . To judge from the amount of damages assessed whether the jury have acted from prejudice or passion, the circumstances of the case must be well considered. Here, in this case, was a causeless attempt, by a wealthy house, to blast forever the character of a young man just entering upon the active pursuits of life, with no endowment but his talents, fair character and uniform integrity. To him these were a priceless possession, in comparison with which the amount awarded by the jury is trifling indeed. We cannot perceive, in the amount assessed, sufficient indications that in finding it the jury were actuated by prejudice or passion or any unworthy motive. It was a powerful house, making a heavy charge against a poor and friendless young man, placed in peculiar circumstances, which, if true, would have consigned him forever to a doom more dreadful than the grave, and forced him to become a wandering outcast on the face of the earth. There is no standard by which damages in such a case shall be measured. Much is committed to the intelligence of the jury. Much faith is reposed, and must be, in their sense of right and justice. We cannot say they have gone astray, and cannot, therefore, disturb this verdict." Ross v. Innis, 35 Ill., 487 (1864).

§ 38. New trials for excessive damages.— The rule for granting a new trial on the ground of excessive damages in actions for malicious prosecution and false imprisonment is well settled. To justify the exercise of this power the damages must be flagrant, outrageous and extravagant, evincing intemperance, passion, partiality or corruption on the part of the jury.[1]

IX. Consequential Damages.

§ 39. Consequential damages defined.— Consequential damages are, as the term implies, those which the cause in question naturally but indirectly produces.

An example: The defendant was liable for killing a mare. The plaintiff suffered an injury in the loss of the animal to the extent of her value, but circumstances gave her an additional value to him. The mare had an un-

[1] Walker et al. v. Martin, 43 Ill., 508 (1867); McConnell v. Hampton, 12 Johns., 234 (1815).

weaned colt, and she was suckling the colt of another mare which had died. The direct consequence of the killing of the mare was her loss — the necessity of employing other means to raise the colts was consequential.[1]

§ 40. The rule in actions for malicious prosecution and false imprisonment stated by Sutherland.— When the action is for a tort committed with no bad motive, the damage which the injured party is entitled to recover are such as will compensate such injury as might reasonably have been expected under the particular circumstances, to ensue; such as, according to common experience, and the usual course of events, might reasonably be anticipated. The consequential injury must proceed from and be caused by the wrongful act of the defendant; but the matter is not to be tested metaphysically or by any occult principles of science, but rather as persons of ordinary intelligence apprehend cause and effect, and see one fact proceed from another.[2]

APPLICATION OF THE LAW.—

(1) *Attorney fees, not consequential.*

Sonneborn sued A. T. Stewart for maliciously instituting proceedings in bankruptcy against him. On the trial the defendant asked the court to instruct the jury that if they found for the plaintiff they could not, in estimating the damages, consider the fees of counsel in prosecuting the case. This instruction was refused.

On error to the supreme court of the United States it was held to have been erroneously refused.

Strong, J.: "The fees of counsel in prosecuting this case were no part of the consequences naturally resulting from the action of the defendant in suing out the warrant in bankruptcy." Such fees are not recoverable. Stewart v. Sonneborn, 98 U. S., 187 (1878). Citing Good v. Ingliss, 8 Pa., 51; Alexander v. Herr, 11 Pa., 537; Stopp v. Smith, 71 Pa., 285; Hicks v. Foster, 13 Barb. (N. Y.), 663.

(2) *Imprisonment of pregnant woman — Effect on offspring, too remote.*

Hiles was the owner of two warehouses in which was stored a large quantity of woodenware. One night in July, 1883, they were set on fire and burned with their contents. A week later Hiles made a complaint before a magistrate charging that one Spear, his wife and George L. Haney were guilty of the crime of burning his warehouses. A warrant was issued

[1] Teagarden v. Hetfield, 11 Ind., 522 (1858); 1 Sutherland on Damages, 20 (1883).

[2] 1 Sutherland on Damages, 21 (1883); Hoadley v. N. Trans. Co., 115 Mass., 304 (1874).

and the parties arrested and brought before the magistrate for examination. The prosecuting attorney of the county, having examined the complaint, found it insufficient and dismissed the prosecution. He however drew another complaint for the same offense. A second warrant was issued and they were again arrested. They waived an examination, and being unable to give bail were committed to jail. Here they remained for several weeks, when they were able to procure bail and were released. An information was filed against them by the prosecuting attorney, upon which they were ultimately tried and acquitted in the circuit court. Spear's wife then brought an action against Hiles for a malicious prosecution. On the trial the jury rendered a verdict for $9,000. The defendant appealed.

At the time plaintiff was confined in prison she was with child, and was delivered thereof in the following December. Dr. Robinson attended her in prison, and officiated at the birth of her child. He testified that he found her in prison, suffering nervous prostration, followed by indigestion and debility; and the drift of his testimony is that in his opinion such condition was produced by the nervous shock caused by her arrest and incarceration, and still continues to some extent; and that, while she may recover, he does not look for a speedy recovery. He also testified that a pregnant woman in that condition would be liable to give birth to a monstrosity or a deficiency; also that the plaintiff's child, when born, was perfect so far as he then knew, but that, at the time of the trial, nearly two years later, it was defective in the brain, spinal cord, and nervous system. Dr. Robinson went to Europe in April, 1884,— about four months after the birth of the child,— and did not return to Wisconsin until May, 1885. It does not appear that he knew or suspected the child was deficient until after his return. He was permitted to testify, against the objection of defendant, that in his opinion the cause of the deficiency in the child was the nervous, prostrate condition in which he found the plaintiff in July, 1883.

In discussing this question Lyon, J., said: Dr. Robinson was a competent witness to the condition of the plaintiff when he saw her in jail, and afterwards. He was competent, also, to give his opinion, as an expert, as to the nature and probable future effects of her condition upon herself, and, perhaps, upon her unborn child. But, in view of the facts that it is common knowledge that there are numerous causes for physical, mental or nervous deficiency in children; that healthy women do sometimes give birth to deficient children; that nervous or otherwise unhealthy women often bear healthy children; and that Dr. Robinson detected no defect in the plaintiff's child until it was nearly a year and a half old, we think the authorized limits of expert testimony was greatly exceeded when he was allowed to give his opinion that the deficiency in the plaintiff's child was caused by the nervous prostration of the plaintiff during her pregnancy. The testimony should have been excluded. This testimony may have been, probably was, prejudicial to the defendant. The deficiency of the child is not a proper element of damages in this case: yet the very large sum at which the damages were assessed raises the apprehension — almost the presumption — that the damages were materially increased by reason of the admission of such improper testimony. The judgment was reversed. Spear v. Hiles, 67 Wis., 356; 30 N. W. Rep., 511 (1886).

(3) *Disposition of assets after dissolution of attachment too remote.*

In April, 1874, the plaintiffs in this action, who had been for several years established in partnership business in Le Sueur, in this state, purchased a stock of hardware of the defendant, Livingston Quackenbush, and gave him their joint note therefor for the sum of $1,902, payable in two years, with interest. The note was afterwards transferred to defendant Peter Quackenbush. Thereafter, in the year 1875, the plaintiffs sold to defendant Halsey one-third interest in their partnership business and stock in trade, and the business then proceeded under the joint firm name of Cochrane, Cosgrove & Halsey. Afterwards, in the spring of 1876, negotiations were entered into between plaintiffs and Halsey for a transfer to him of their entire interest in the partnership stock and business. While these negotiations were pending, and about May 17, 1876, the defendant, Peter Quackenbush, acting through the defendant, Livingston Quackenbush, as his agent, brought an action against the plaintiffs, and caused a writ of attachment to be issued therein, upon an affidavit and bond made and filed by the defendant Livingston, under which the sheriff proceeded to levy upon the joint property of the plaintiffs, and also the stock and partnership property of Cochrane, Cosgrove & Halsey, and took possession of the same. The attachment was soon afterwards vacated. This action is brought by the plaintiffs jointly for damages resulting from the issuance of the attachment, which they allege was sued out maliciously and without probable cause. In addition to the facts above recited, the complaint alleges that the defendants Quackenbush acted in collusion and in conspiracy with Halsey in causing the attachment to be issued, and with the design to destroy the credit and business of plaintiffs, and to compel them to sell out their interest in the stock and business of the firm to Halsey at less than its value. Defendant Halsey did not answer. The action was dismissed at the trial as to Peter Quackenbush, and the plaintiffs had a verdict against the defendant, Livingston Quackenbush, who appealed.

Vanderburgh, J.: "On the question of damages the evidence was improperly received, against the defendant's objection, of the disposition of the partnership subsequent to the attachment, including the appointment of a receiver (in a suit by the plaintiffs for a dissolution of the partnership), the inventory of the stock and the loss and shrinkage in the assets on the receiver's sale. Whether the plaintiffs were constrained to take this course by the influence of creditors or otherwise, it was of their own election, and this particular disposition of the assets was not the proximate result of the attachment, and was too remote to be considered. Donnell v. Jones, 13 Ala. (N. S.), 509 et seq. Judgment reversed." Cochrane v. Quackenbush, 29 Minn., 376; 13 N. W. Rep., 155 (1882).

X. Measure of Damages.

§ 41. Measure of damages in actions for malicious prosecution and false imprisonment.— In actions for personal wrongs it is difficult and indeed impossible precisely to estimate the measure of damages which is supposed to repair the damages complained of. This must be to a certain extent matter of

sentiment and feeling, under the guidance of sound judgment, duly weighing all the circumstances of the case. Hence we can find but very little satisfaction in the examination of the reported cases on this subject. It is a question not susceptible of any fixed and definite rule. If the jury is, however, guilty of an abuse of its power, the court will set aside the verdict. But, according to the language of the English and American adjudications, to justify the court in doing this, the damages assessed ought to appear at first blush outrageous, or manifestly to exceed the injury, and such that all mankind would at once pronounce unreasonable, so as to induce the court to believe that the jury have acted from prejudice or partiality, or were influenced by some improper consideration. It is not necessary that the court should believe that the jury acted corruptly. It is sufficient to set aside their finding if it appears that their feelings were so excited or their passion inflamed as to mislead their judgments and induce them to give a verdict which their own sober reflection would not approve.[1]

§ 42. Measure of damages — The law stated by Greenleaf. "Whether the plaintiff has been prosecuted by indictment, or by civil proceedings, the principle of awarding damages is the same; and he is entitled to indemnity for the peril occasioned him in regard to his life and liberty, for the injury to his reputation, his feelings and his person, and for all the expenses to which he necessarily has been subjected. And if no evidence is given of particular damages, yet the jury are not therefore obliged to find nominal damages only. Where the prosecution was by suit at common law, no damages will be given for the ordinary taxable costs, if they were recovered in that action; but if there was a malicious arrest, or the suit was malicious and without probable cause, the extraordinary costs, as between attorney and client, as well as all other expenses necessarily incurred in defense, are to be taken into the estimate of damages."[2]

Discussion of the subject — Maliciously suing out a writ of attachment: In this instance the amount of money actually

[1] Walker et al. v. Martin, 43 Ill., 508 (1867); McConnell v. Hampton, 12 Johns., 234 (1815).

[2] 2 Greenleaf on Evidence, § 456.

paid out in and about the defense of the suit, and the depreciation of the stock, are not the only damages sustained, if a person wrongfully, unjustly and maliciously and without probable cause sues out a writ of attachment and causes it to be levied upon the property of another. If the business of the person whose property is attached had hitherto been prosperous, his credit and financial reputation good, and have been destroyed by the malicious acts of the person suing out the writ, can it be said that the law will afford him no redress for the destruction of his financial credit and reputation, and mete out no measure of punishment to the guilty party who wantonly and maliciously destroys them? The reputation and credit of every man, especially men in business, is of great value, and is as much within the protection of the law as property or other valuable rights. It may be laid down as a safe rule of law, that where one person has maliciously and by his wrongful act destroyed the business, credit and reputation of another, the law will require him to make good the loss sustained.[1]

APPLICATIONS OF THE LAW.—

(1) *Measure of damages — Voluntary submission to imprisonment under a void writ.*

Edwin L. Shedd was a constable of Lowell, Massachusetts. He arrested Curtis L. Allen, and committed him to jail on an execution in favor of one J. L. Kenniston, issued from the court of common pleas, and dated September 5, 1849, and returnable to said court on the second Monday of December, 1849, which was more than three months from its date. Allen then gave a bond for the prison limits, conditioned to surrender himself to the jailer in ninety days, etc. At the expiration of the time, he appeared with his counsel, and offered to surrender himself to close confinement, but the jailer informed him that he had received no order to confine him, and he went away. Allen then brought an action against Shedd and Kenniston for false imprisonment. On the trial, the foregoing facts appearing, the presiding judge ruled that the plaintiff was bound to know the law, and that the execution was void under Revised Statutes, chapter 97, section 9; that he was not entitled to compensation for remaining within the prison limits during the ninety days, although he acted in good faith; but that he was entitled to reasonable compensation for going to the jailer to surrender himself, and then to discharge his sureties on the bond. The verdict was for $4.75. The plaintiff excepted to the ruling, but the supreme court overruled his exceptions, saying, "He was under no obligation to stay upon

[1] Lawrence v. Hagerman, 56 Ill., 68 (1870); Chapman v. Kerby, 49 Ill., 211 (1868).

the limits on a void execution. It was voluntary if he did so stay, and for his detention during that period he could recover no damages." Allen v. Shedd et al., 10 Cush. (64 Mass.), 375 (1852).

(2) *Measure of liability — Prosecutors acting in good faith but in ignorance of the law — Unconstitutional statutes.*

Hill prosecuted Taylor for false imprisonment in being concerned in an unlawful arrest, and obtained a judgment against him for damages, which was brought up on writ of error.

The proceeding under which he claimed to have been arrested was on a complaint made before a justice of the peace in Washtenaw, for an alleged embezzlement in Wayne county. This action was based on section 7605 of the Compiled Laws of Michigan, which authorizes embezzlement by various public agents, or by private agents under written instructions or agreements as to disposal of property, to be prosecuted in the county where the complainant's principal place of business may be.

Campbell, J.: Although there are some cases where by the rules of law that might be deemed the *locus delicti*, it cannot be seriously claimed that the prosecution can be had in a county where the crime was not actually or in contemplation of law perpetrated. The constitutional guaranty on this subject is too plain to be controverted. Swart v. Kimball, 43 Mich., 444; 5 N. W. Rep., 635. And the warrant in this case was on its face invalid, as issued for an offense beyond the jurisdiction of the justice who issued it.

But we think the court below, while properly holding it void, went too far in holding that if the warrant was illegal the defendant would be liable substantially to the same extent, whether he believed it valid or not. It is undoubtedly true that every one is bound to know the law, and is liable for actual damages for his trespass, though honestly committed. But there is no such conclusive presumption of an actual knowledge of the law as will make a party guilty of malice when he is acting in reliance upon what he has reason to believe and does believe is lawful. If a man actually believes a statute to be constitutional which is unconstitutional, the case must be a very plain one which would make such ignorance of the law culpable. Black v. Ward, 27 Mich., 191. A man in the pursuit of legal remedies may lawfully do things which cannot be justified by any high sense of honor. If he does the same things unlawfully, but with not only an actual but also a reasonably founded belief in their lawfulness, while he is responsible for wrongs done, it would be very unjust to hold him to the same measure of liability as if the acts done were in known defiance of law. This particular statute has never been passed upon by this court, although there is reason to believe that it has been acted on. There are cases to which it may lawfully apply. See People v. McKinney, 10 Mich., 54. The defendant ought not to have been put on the footing of an intentional law-breaker, when he had the concurrence of the regular criminal authorities of Washtenaw county in his proceeding, unless it was shown — and we find no evidence of this — that he was conscious of the illegal quality of his act and did it in knowing disregard of law. Hill v. Taylor, 50 Mich., 549; 15 N. W. Rep., 899 (1883).

CHAPTER XV.

THE JURY AND ITS FINDINGS.

§ 1. **The verdict defined.**— In the practice of the law a verdict signifies the unanimous decision made by a jury and reported to the court, in matters lawfully submitted to them in the course of the trial of a cause.[1]

§ 2. **Verdicts are of three kinds.**—

(1) General.

(2) Special.

(3) Special findings.

§ 3. (1) **A general verdict.**— A general verdict is one by which the jury pronounce at the same time on the fact and the law, either in favor of the plaintiff or defendant.[2]

§ 4. (2) **A special verdict.**— A special verdict is one by which the facts of the case are put on the record, and the law is submitted to the judges.[3] The jury have an option, instead of finding the negative or affirmative of the issue, as in a general

[1] 2 Bouvier's Law Dic., 622.

[2] Coke on Littleton, 228; 4 Black. Com., 461; La. Code of Practice, art. 519; 2 Bouvier's Law Dic., 622.

[3] 2 Bouvier's Law Dic., 623; Lit. Sel. Cas., 376; Bertrand v. Morrison, Breese (Ill.), 175 (1827).

verdict, to find all the facts of the case as disclosed by the evidence before them, and, after so setting them forth, to conclude to the following effect: "That they are ignorant, in point of law, on which side they ought, upon those facts, to find the issue; that if upon the whole matter the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, etc.; but if the court are of an opposite opinion, then they find *vice versa*." This form of finding is called a special verdict. In practice they have nothing to do with the formal preparation of the special verdict. When it is agreed that a verdict of this kind is to be given, the jury merely declare their opinion as to any fact remaining in doubt, and then the verdict is adjusted without their further interference. It is settled under the correction of the judge, by the counsel and attorney on either side, according to the state of the facts as found by the jury, with respect to all particulars on which they have delivered an opinion, and, with respect to other particulars, according to the state of facts which it is agreed that they ought to find upon the evidence before them. The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered on record; and the question of law arising on the facts found is argued before the court in bank, and decided by the court as in case of a demurrer. If either party be dissatisfied with their decision, he may afterwards resort to a court of error.[1]

§ 5. **Rules of law as to special verdicts.**— It has been competent for juries at common law, since the statute of 13 Edward I., to find a general verdict, or, when they have any doubt as to the law, to find a special verdict, and refer the law arising thereon to the decision of the court. By a special verdict, the jury, instead of finding for either party, find and state all the facts at issue, and conclude conditionally that if upon the whole matter thus found the court should be of the opinion that the plaintiff has a good cause of action, they then find for the plaintiff, and assess his damages; if otherwise, then for the defendant.[2] The rules of law as to special verdicts and their requisites have long been settled both in this

[1] 2 Bouvier's Law Dic., 623.

[2] 2 Tidd's Practice (Am. ed.), 897, and note; C. & N. W. R'y Co. v. Dunleavy, 129 Ill., 132; 22 N. E. Rep., 15 (1889).

country and in England. Thus, it is held that they should find facts, and not the mere evidence of facts, so as to leave nothing for the court to determine except questions of law.[1] To authorize a judgment upon a special verdict, all the facts essential to the right of the party in whose favor the judgment is to be rendered must be found by the jury; finding sufficient evidence, *prima facie*, to establish such facts, is not sufficient.[2] If probative facts are found from which the court can declare that the ultimate facts necessarily result, the finding is sufficient.[3] A special verdict cannot be aided by intendment, and therefore any fact not ascertained by it will be presumed not to exist.[4]

§ 6. **(3) Special findings.**— In cases in which the jury render a general verdict they may be required by the court, upon the request of either party, to find specially upon any material question of fact stated to them in writing. This practice seems to be an innovation upon the common law and exists in many of the states of our Union by virtue of statutory enactments. As an illustration of the subject under discussion, we present the statute of Illinois, which, we think, may be taken as a fair example of this class of modern legislation.

Verdicts of juries.

§ 1. General or special verdicts in civil cases.
2. Submitting, or refusing to submit fact, may be excepted to.
3. Special shall control general verdict.

AN ACT in relation to verdicts of juries in civil cases.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That in all trials by jury in civil proceedings in this state in courts of record, the jury may render, in their discre-

[1] C. & N. W. R'y Co. v. Dunleavy, 129 Ill., 132; 22 N. E. Rep., 15 (1889); Vincent v. Morrison, Breese, 227; Brown v. Ralston, 4 Rand., 504; Seward v. Jackson, 8 Cow., 406; Henderson v. Allens, 1 Hen. & Mun., 235; Hill v. Covell, 1 N. Y., 522; Langley v. Warren, 3 id., 327; Kinsley v. Coyle, 58 Pa. St., 461; Thompson v. Farr, 1 Spears, 93; Leach v. Church, 10 Ohio St., 149; La Frombois v. Jackson, 8 Cow., 589.

[2] C. & N. W. R'y Co. v. Dunleavy, 129 Ill., 132; 22 N. E. Rep., 15 (1889); Blake v. Davis, 20 Ohio, 231; Hambleton v. Dempsey, id., 168.

[3] C. & N. W. R'y Co. v. Dunleavy, 129 Ill., 132; 22 N. E. Rep., 15 (1889); Alhambra Addition Water Co. v. Richardson, 72 Cal., 598; Coveny v. Hale, 49 id., 552.

[4] Lee v. Campbell, 4 Porter, 198; Tunnell v. Watson, 2 Munf., 288; Lawrence v. Beaubein, 2 Bailey, 626.

tion, either a general or a special verdict; and in any case in which they render a general verdict they may be required by the court, and must be so required on request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury.

§ 2. Submitting or refusing to submit a question of fact to the jury when requested by a party as provided by the first section hereof may be excepted to and be reviewed on appeal or writ of error as a ruling on a question of law.

§ 3. When the special finding of fact is inconsistent with the general verdict, the former shall control the latter and the court may render judgment accordingly. Laws of Illinois, 1887, 251.

Decisions.

In an action for malicious prosecution, where the jury renders a special verdict, the plaintiff cannot recover, unless such special verdict finds all the facts essential to a recovery. Waymire v. Lank (Ind.), 22 N. E. Rep., 735.

Where interrogatories fully cover all the controlling questions of fact, others are properly refused. Interrogatories should call for material and substantive facts, and not mere items of evidence, and should be clear and as few in number as will elicit the material facts. Louisville, N. A. & C. R. Co. v. Hubbard (Ind.), 18 N. E. Rep., 611.

Interrogatories as to the existence of isolated facts which would not affect the general verdict, however answered, are properly refused. Hablichtel v. Yambert (Iowa). 39 N. W. Rep.. 877.

It is the duty of the trial court to submit all special questions requested by a party when such questions are pertinent under the issues and evidence; but where no evidence has been given upon which the jury could intelligently answer the questions asked, it is not error to refuse to submit them. Leroy & W. R'y Co. v. Anderson (Kan.), 21 Pac. Rep., 588.

A demand for a special verdict is made too late after the testimony is closed and plaintiff has commenced his argument to the jury. United States Exp. Co. v. Jenkins (Wis.), 41 N. W. Rep., 957.

Special interrogatories must ask a response as to the existence of some particular fact, and not embrace a series of facts which are necessarily included in a determination of the general verdict. Whalen v. C., R. I. & P. R'y Co. (Iowa), 39 N. W. Rep., 894.

It is improper to submit interrogatories to the jury which are designed to elicit matters of evidence. Louisville, N. A. & C. R'y Co. v. Cauley (Ind.), 21 N. E. Rep., 546.

It cannot be said the court erred in refusing a request for a special finding, where the record does not show any evidence on which to base such special finding. Darrah v. Gow (Mich.), 43 N. W. Rep., 851.

Where an interrogatory is requested to be submitted to the jury, within the issues joined by the pleadings and the evidence introduced, asking for a more explicit answer to another interrogatory submitted, it is error for

the court to refuse to submit it to the jury. American Cent. Ins. Co. v. Hathaway (Kans.), 23 Pac. Rep., 428.

Where a party does not insist on having the jury answer a special interrogatory at the time the verdict is returned, the omission to answer it is not available on appeal. Mack v. Leedle (Iowa), 42 N. W. Rep., 636.

§ 7. **"Material questions of fact" defined.**— In giving construction to these statutes, the first, and perhaps most important question, relates to the scope and meaning of the phrase, "material question or questions of fact." May such questions relate to mere evidentiary facts, or should they be restricted to those ultimate facts upon which the rights of the parties directly depend? Evidently the latter. Not only does this conclusion follow from analogy to the rules relating to special verdicts, but it arises from the very nature of the case. It would clearly be of no avail to require the jury to find mere matters of evidence, because, after being found, they would in no way aid the court in determining what judgment to render. Doubtless a probative fact from which the ultimate fact necessarily results would be material, for there the court could infer such ultimate fact as a matter of law. But where the probative fact is merely *prima facie* evidence of the fact to be proved, the proper deductions to be drawn from the probative fact presents a question of fact and not of law, requiring further action by the jury, and it cannot therefore be made the basis of any action by the court. Requiring the jury to find such probative fact is merely requiring them to find the evidence and not the facts, and results in nothing which can be of the slightest assistance to the parties or the court in arriving at the proper determination of the suit.[1]

§ 8. **When the special finding is inconsistent with the general verdict the former controls — In what such inconsistency consists — The law stated by Justice Bailey.**— When a special finding of fact is inconsistent with the general verdict, the former shall control. This necessarily implies

[1] C. & N. W. R'y Co. v. Dunleavy, 22 N. E. Rep., 15 (1889); 129 Ill., 132. This is the doctrine and rule of practice laid down by the supreme court of the state of Illinois. In some states a rule of practice of submitting a multitude of questions, covering every imaginable phase of the evidence, seems to prevail, but the practice must be condemned as tending to obstruct the administration of justice and as subserving no useful purpose.

that the fact to be submitted shall be one which, if found, may in its nature be controlling. That can never be the case with a mere evidentiary fact. A fact which merely *tends* to prove a fact in issue, without actually proving it, cannot be said to be, in any legal sense, inconsistent with a general verdict, whatever that verdict may be. Such inconsistency can arise only where the fact found is an ultimate fact, or one from which the existence or non-existence of such ultimate fact necessarily follows, and that is never the case with that which is only *prima facie* evidence of the fact sought to be proved. The common law requires that verdicts shall be the declaration of the unanimous judgment of the twelve jurors. Upon all matters which they are required to find, they must be agreed. But it has never been held that they must all reach their conclusions in the same way and by the same method of reasoning. To require unanimity, not only in their conclusions, but in the mode by which those conclusions are arrived at, would in most cases involve an impossibility. To require unanimity, therefore, not only in the result, but also in each of the successive steps leading to such result, would be practically destructive of the entire system of jury trials. To illustrate, suppose a plaintiff, trying his suit before twelve jurors, should seek to prove a fact alleged in his declaration by giving evidence of twelve other facts, each having an independent tendency to prove the fact alleged. The evidence of each probative fact, or the conclusions to be drawn from it, might appeal with peculiar force to the belief or judgment of some one of the jurors, but less so to his fellows. The cumulative effect of all the evidence might be such as to leave no doubt in the mind of any member of the panel as to the truth of the fact alleged, still, if the jury were required to find specially as to each probative fact, no one of the twelve facts would be at all likely to meet with unanimous concurrence of the entire jury. As to each they would be compelled to confess their inability to agree, or what would be its equivalent, say they did not know or could not tell; which, if we apply the rules governing special verdicts, would be tantamount to a finding that the fact was not proved or did not exist. If such finding should be required, and should be given the effect of controlling the general verdict, the re-

sult would be that under such system of trial general verdicts could but seldom stand. However natural the curiosity parties may have to know the precise course of reasoning by which jurors may arrive at verdicts either for or against them, they have no right, under guise of submitting questions of fact to be found specially by the jury, to require them to give their views upon each item of evidence, and thus practically subject them to a cross-examination as to the entire case. Such practice would subserve no useful purpose, and would only tend to embarrass and obstruct the administration of justice.[1]

Decisions.

Where answers to special interrogatories cannot be reconciled with the general verdict, and such as find the facts are not inconsistent with one another, they will control the general verdict, notwithstanding there may be an inconsistent answer to one of them which consists merely of a legal conclusion. Beckdolt v. Grand Rapids & I. R. Co. (Ind.), 15 N. E. Rep., 686.

Where special questions are submitted to and answered by a jury, and such answers are irreconcilable with each other, such answers cannot be allowed to stand and uphold a verdict and judgment apparently against the facts as shown by the record. Aultman, Miller & Co. v. Mickey (Kan.), 21 Pac. Rep., 254.

The verdict will not be disturbed because immaterial interrogatories were submitted to the jury, where the findings in answer thereto are not in conflict with the general verdict, and the general verdict could not have been influenced thereby. Sage v. Haines (Iowa), 41 N. W. Rep., 366.

Findings are not contradictory when made according to the allegations of the complaint, which states that the services sued on were rendered at defendant's request, and in one count that he promised to pay a certain sum therefor, and in another that he promised to pay what they were reasonably worth, and that they were reasonably worth a certain sum, the same amount claimed in the first count. Allen v. Haley (Cal.), 20 Pac. Rep., 90.

Though it may be implied from the answer to one interrogatory that the jury find that certain representations were made, yet, if it appears from all their findings that they did not intend to so find, the implication will not be allowed to govern. Seekell v. Norman (Iowa), 43 N. W. Rep., 190.

Where there is no necessary conflict between the several findings of a jury, the court will not strain the language of a finding to make out a case of conflict. Al. Add. W. Co. v. Richardson (Cal.), 14 Pac. Rep., 879.

If a discrepancy exists in findings of fact by the trial court, the more specific findings of particular facts must control. Warder v. Enslen (Cal.), 14 Pac. Rep., 874.

[1] Bailey, J., in Chicago & N. W. R'y Co. v. Dunleavy, 129 Ill., 132; 22 N. E. Rep., 17 (1889).

§ 9. What degree of inconsistency is required.— In determining whether the special findings are inconsistent with the general verdict, so that the latter must be held to be controlled by the former, courts cannot look at the evidence. All reasonable presumptions will be entertained in favor of the verdict, while nothing will be presumed in aid of the special findings of fact. The inconsistency must be irreconcilable, so as to be incapable of being removed by any evidence admissible under the issues.[1]

Decisions.

Where the findings of fact are contradictory, a judgment rendered upon them will be set aside. Ellsworth, M. N. & S. E. R'y Co. v. Maxwell (Kan.), 18 Pac. Rep., 819.

Answers to special interrogatories cannot control the general verdict, unless there is an irreconcilable conflict between them; and, while there is no presumption in favor of the answers, every reasonable intendment will be made for the verdict. City of Greenfield v. State (Ind.), 15 N. E. Rep., 241; Cincinnati, H. & I. R. Co. v. Clifford, id., 524.

Where the general verdict of a jury, and their special findings of fact, can be harmonized and made to agree by taking into consideration the entire record of the case, and construing the same liberally for that purpose, it is the duty of the court to so harmonize them. Bevins v. Smith (Kan.), 21 Pac. Rep., 1064.

Contradiction and inconsistency in special findings is no ground for reversal, unless it is impossible to render an intelligent judgment upon the facts thus found. German Ins. Co. v. Smelker (Kan.), 16 Pac. Rep., 735.

The special findings of a jury are inconsistent with their general verdict when the former, as a matter of law, will authorize a different judgment from that which the latter will. Lowenburg v. Rosenthal (Oreg.), 22 Pac. Rep., 601.

If there is any reasonable hypothesis whereby a general verdict and the special finding can be reconciled, judgment must follow the general verdict. Grand Rapids & I. R. Co. v. Ellison (Ind.), 20 N. E. Rep., 135.

§ 10. Special findings inconsistent with the general verdict — Practice.— When the answers by the jury to the special interrogatories are so inconsistent with the general verdict as to overrule it, the proper practice, before moving to set the verdict aside, is to make a motion for judgment on the special findings *non obstante veredicto* notwithstanding the verdict.[2]

[1] Pennsylvania Co. v. Smith, 98 Ind., 42; McComas v. Haas, 107 Ind., 512; 8 N. E. Rep., 579; Redelsheimer v. Miller, 107 Ind., 485; 8 N. E. Rep., 447; Chicago & N. W. R'y Co. v. Dunleavy, 129 Ill., 132; 22 N. E. Rep., 15 (1889).

[2] Louisville, N. A. & C. R'y Co. v. Stommel (Ind.), 25 N. E. Rep., 868 (1890).

Decisions.

Questions arising upon a special verdict are properly raised by motion for judgment on the facts found, and where distinct causes of action are presented by the complaint, there should be a motion for judgment on each cause. Johnson v. Culver (Ind.), 19 N. E. Rep., 129.

A motion to strike out portions of a special verdict is not proper practice. Louisville, N. A. & C. R'y Co. v. Hart (Ind.), 21 N. E. Rep., 753.

Special findings of a jury must be consistent with each other upon material questions, and inconsistent with the general verdict, before a trial court will be justified in rendering judgment upon them rather than upon the general verdict. Williams v. Eikenbury (Neb.), 34 N. W. Rep., 373.

The question of the insufficiency of a special verdict to cover the issues so as to entitle the party to a judgment must be raised on motion for a new trial or by motion for judgment upon the verdict, and not by motion for a *venire de novo*. Louisville, N. A. & C. R'y Co. v. Hart (Ind.), 21 N. E. Rep., 753.

When the special findings of a jury are in conflict with the general verdict, are inconsistent and so uncertain that this court cannot render judgment on them, it is not error in the trial court to grant a new trial. Chicago, I. & K. R. Co. v. Townsdin (Kan.), 15 Pac. Rep., 889.

§ 11. Special findings in actions for malicious prosecution and false imprisonment.— The practice of requiring special findings is peculiarly adopted to the defense in actions for malicious prosecution and for false imprisonment.

To maintain an action for a malicious prosecution, two essential elements must concur — malice and a want of probable cause. The inference of malice may be drawn from a want of probable cause; but such inference is subject to be rebutted by proof that the prosecutor, though not able to show probable cause, instituted the prosecution under an honest belief that the plaintiff was guilty of the offense charged; provided such belief is founded on facts and circumstances which would produce in the mind of a reasonable and prudent man such serious suspicion of the plaintiff's guilt as to repel the idea that the prosecutor was actuated by malice.[1]

It may be that the complainant in the criminal prosecution complained of did not rely upon his own judgment, but took the advice of counsel learned in the law, and acted upon such advice in good faith. A prudent man is expected to take such advice, and when he does so and places all the facts within

[1] Long v. Rodgers, 19 Ala., 326; Ewing v. Sanford, 21 Ala., 157; McLeod v. McLeod, 73 Ala., 42; Lunsford v. Deitrich (Ala), 5 So. Rep., 461 (1889).

his knowledge before his counsel fully and fairly, withholding no material facts, proof of this makes out a case of probable cause.[1]

§ 12. Form of a submission for special finding in actions for malicious prosecution.—

STATE OF ——, County of ——. } ss. —— Court, —— Term, 18—.

A. B. vs. C. D. } In case for malicious prosecution.

Upon request of the —— the following questions of fact are by the court specially submitted to the jury for their determination and report thereof to the court:

(1) Was the motive of the defendant, in instituting the prosecution complained of, malicious?

(2) Did the defendant, in procuring the warrant in question to be issued, act maliciously and without any reasonable cause for so doing?[2]

(3) Did the defendant, in commencing the criminal prosecution against the plaintiff, act without reasonable cause and with malice?[2]

(4) Did the defendant, before commencing the criminal prosecution against the plaintiff, make a full, fair and honest statement of all the material facts bearing upon the question of the plaintiff's guilt to his attorney for the purpose of procuring legal advice thereon?

(5) Did the defendant, in making his statement to the attorney, withhold from him any material fact in his knowledge bearing upon the question of the plaintiff's guilt?

(6) Did the defendant, in commencing the criminal prosecution in question, act in good faith upon the advice of counsel, or did he act upon his own judgment?

(7) Did the defendant commence the criminal prosecution against the

[1] Humphreys v. Parker, 55 Me., 502; Driggs v. Burton, 44 Vt., 124; Heyne v. Blair, 62 N. Y., 19; Travis v. Smith, 1 Penn. St., 234; Cooley on Torts, 181.

[2] In framing these interrogatories the practitioner will bear in mind that the existence of a probable cause is a mixed question of law and fact. It is for the jury to determine what facts are proved, and for the court to say whether or not they amount to probable cause; but its existence along with malice, that is, malice and the absence of probable cause, it is believed may be for the jury. Moore v. Northern Pac. R. Co. (Minn.), 33 N. W. Rep., 334; Burton v. St. Paul, M. & M. R. Co. (Minn.), 22 N. W. Rep., 300; Johnson v. Miller (Iowa), 29 N. W. Rep., 747, and 17 N. W. Rep., 34, and 19 N. W. Rep. 310; Ross v. Langworthy (Neb.), 14 N. W. Rep., 515; Castro v. De Uriarte, 16 Fed. Rep., 93; Gee v. Culver (Ore.), 6 Pac. Rep., 775; Sartwell v. Parker (Mass.), 5 N. E. Rep., 807; McNulty v. Walker (Miss.), 1 South. Rep., 55; Bell v. Keepers (Kan.), 14 Pac. Rep., 542; Bell v. Matthews (Kan.), 16 Pac. Rep., 97.

plaintiff under the honest belief that the plaintiff was guilty of the offense charged?

(8) Was such belief founded upon facts and circumstances sufficient to produce in the mind of a reasonable and prudent man such a serious suspicion of the plaintiff's guilt as to repel the idea that he was actuated by malice?[1]

§ 13. Form of the special findings.—

STATE OF ——,
County of ——. } —— Court, —— Term, 18—.

A. B.
vs. } In case for malicious prosecution.
C. D.

We, the jury, to whom was submitted the questions hereinafter set forth for special findings of the facts thereon in this case, do hereby return the same into court with our findings thereon, in writing, as required by the court.

(1) To the question, Was the motive of the defendant, in instituting the prosecution complained of, malicious?

We answer, "Yes."

(2) To the question, Did the defendant, in procuring the warrant in question to be issued, act maliciously and without any reasonable cause for so doing?

We answer, "Yes."

(3) To the question, Did the defendant, in commencing the criminal prosecution against the plaintiff, act without reasonable cause and with malice?

We answer, "Yes."[2]

APPLICATIONS OF THE LAW.—

(1) *Statement of facts.*

Turner had been acting as the agent of the Phœnix Insurance Company, of Hartford, Connecticut, at East Saginaw, Michigan, and in that capacity had collected some premiums which he refused to pay over when it was demanded by a special agent, claiming at the time the money was not due when demanded. Thereupon he was complained of by a local agent named McClintock, residing at East Saginaw, and arrested for embezzlement. A hearing was had before a magistrate, and he was discharged. He then brought a suit for malicious prosecution against the company, seeking to hold it liable for the acts of its agents. The plea was the general issue. On the trial he recovered a verdict for $3,070. The evidence showed that H. M.

[1] The questions to be submitted to the jury must depend very much upon the peculiar circumstances of each case and the ingenuity of counsel.

[2] In order to preserve the record properly, it is recommended that attorneys prepare the questions to be submitted in duplicate, one set to be embodied in the submission, and the other to be used by the jury in the return of the special findings.

Magill was the general agent for the company in Michigan, having the general charge of its agencies and business, and had his office in Cincinnati, Ohio. T. F. Spear was his assistant and resided at Cincinnati. H. H. Heaford was a special agent for the state of Michigan and resided at Jackson. All agents were authorized to make collections and remittances for the company, and might employ an attorney when specially authorized so to do by the general agent, Mr. Spear. Turner and McClintock had been in business together at East Saginaw, but some time previous to the prosecution complained of their business relations had been dissolved, McClintock continuing to act as the local agent for the company. There still remained due from the plaintiff to the company on the 11th day of January, 1878, a balance of about $50, and judgment was obtained a short time thereafter against the plaintiff and McClintock for such balance, and it was because of the non-payment of this balance when demanded that the criminal prosecution complained of was instituted. McClintock made the complaint upon which the warrant was issued, and the case was prosecuted at his request in behalf of the people by Michael Brennan, a lawyer, who had his office with Wisner & Draper, and who had formerly been their law student, and at that time occasionally received claims from their office to collect. The claim against the plaintiff had been sent to Wisner & Draper for collection by the company, and they had turned it over to Brennan. Brennan, in his correspondence with Turner, in his efforts to collect, had signed the name of Wisner & Draper to his letters, in which a criminal prosecution was alluded to. Turner claimed that the defendant authorized the criminal prosecution against him, and sought to hold it responsible for the acts of its local agents and attorneys at Saginaw, who, he insists, advised and took part in the criminal prosecution; and further claims that if the defendant did not authorize commencement of the prosecution, it subsequently ratified what the local agents did, and the defendant is therefore liable for the alleged illegal act. It is not claimed by the plaintiff that the criminal prosecution was authorized, aided or abetted, or even ratified, by the general office of the company, but by its general and special agents at Cincinnati, and by Heaford, its special agent in this state.

Submission for special findings.

On the trial, after the testimony in the case was closed, the circuit judge, on request of defendant's counsel, submitted to the jury five requests for specific findings, which requests and findings appear in the record as follows:

"1. Was plaintiff prosecuted criminally by any agent of defendant?

"Answer. Yes.

"2. If you say yes to above, name the agent.

"A. Wisner & Draper, Heaford and Magill.

"3. If you say yes to No. 1, state who, if any one, acting for defendant, authorized or directed the prosecution.

"A. Wisner & Draper, Heaford and Magill.

"4. Was the act of the person commencing the prosecution subsequently adopted or ratified by defendant's agents?

"A. Yes.

"5. If you say yes to the fourth, state what agent so ratified or adopted it.

"A. Heaford and Magill."[1]

(2) *The special finding controls the general verdict.*

Under the law providing for special findings by juries a case for malicious prosecution was tried in Saline county, Kansas. On December 27, 1879, Norton, Wagstaff and another, through mistake of boundary lines, went upon the land of one Schippel and cut and carried away one or more trees standing thereon. The prosecution was commenced, after consulting the county attorney, before a justice of the peace. A few days after the suit was begun the county dismissed it, and on the same day began a new prosecution in the district court against the same parties for the same offense. While this prosecution was still pending in the district court Norton begun his suit for malicious prosecution.

The case was tried before the court and a jury, and the jury rendered a general verdict in favor of Norton and against Schippel for $1 exemplary damages, and also made special findings of fact showing the foregoing facts, and also showing that the $1 was for exemplary damages, and that nothing was allowed for actual or compensatory damages. The general verdict reads as follows: "We, the jury impaneled and sworn in this action, do, upon their oaths, find for the plaintiff, and do assess his damages in the sum of one dollar and —— cents exemplary." Among the special findings are the following:

"6. What number of other trees were cut about the same time and place on defendant's land?

"Answer. We don't know.

"9. At the time Mr. Schippel instituted the prosecution complained of before E. L. Norton, did he believe that the plaintiff, Wright Norton, was guilty of cutting some of his timber, as charged in said complaint, without right or legal excuse?

"A. He may have believed so.

"11. At the time defendant, Schippel, verified the complaint before E. L. Norton upon which plaintiff and others were arrested, did he have reason to believe that such complaint was true as to the cutting or carrying away of one or more trees on his land?

"A. No, except the cottonwood and hackberry stub.

"12. Before making and verifying said complaint, did defendant make a statement of the facts of the case, as then known by him, to the county attorney, John G. Spivy?

"A. Yes.

"13. Was such statement substantially full and correct?

"A. Yes.

"15. Did Mr. Schippel, in good faith, go to the county attorney for the purpose of obtaining his advice in the case, and of placing in his control any prosecution that might be had?

"A. Not absolutely.

[1] Turner v. Phœnix Ins. Co., 55 Mich., 236; 21 N. W. Rep., 327 (1884).

"17. Did the county attorney, upon being informed of the facts as then understood by Mr. Schippel, advise Mr. Schippel that John I. Norton, Wright Norton and Alonzo Wagstaff were guilty of a criminal trespass, and liable to such prosecution as was instituted against them?

"A. Yes.

"20. Upon the statement of the case made by Mr. Schippel to the county attorney, and upon the information the county attorney had of the facts, did the county attorney take control of said prosecution, as to its being commenced, and as to the disposition that was made of it?

"A. He did, as attorney.

"23. Was the county attorney's action in said prosecution based upon a knowledge of the facts substantially as they existed, and as known to Mr. Schippel at the time?

"A. Yes.

"28. Did the county attorney dismiss the case before E. L. Norton, intending to immediately prefer the same in the district court?

"A. He did, as attorney.

"29. Did the county attorney, immediately after the dismissal of said case before Justice Norton and on the same day the case was dismissed, file an information against John I. Norton, Wright Norton and Alonzo Wagstaff for the same offense in the district court?

"A. Yes.

"30. Was the case upon such information pending in the district court when this action was commenced?

"A. Yes.

"31. If the jury should find for the plaintiff, state separately the amounts allowed for actual and exemplary damages, and the several items of each?

"A. One dollar exemplary damages."

Some of the findings with reference to Schippel's good faith were apparently in conflict with some of those above given. Judgment was rendered upon the verdict and the finding of the jury in favor of Norton and against Schippel for $1 and costs of suit. And to reverse this judgment, Schippel, as plaintiff in error, took the case to the supreme court.

Valentine, J., said: "The judgment of the court below will be reversed, and cause remanded, with the order that judgment be rendered on the special findings of the jury in favor of the defendant below, and against the plaintiff below." Schippel v. Norton, 38 Kan., 567; 16 Pac. Rep., 804 (1888).

CHAPTER XVI.

CHARGING THE JURY.

§ 1. Preliminary discussion — Instructions and requests for instructions.— There are few questions of law more difficult of apprehension by the average trial juror than those which govern the trials of actions for malicious prosecutions. This is the experience of every trial lawyer. It seems difficult for them to realize that under our law a person, in fact innocent of the offense for which he has been prosecuted, has no remedy against the prosecutor who has caused his arrest and imprisonment, unless he can show affirmatively that the prosecutor was actuated by malice and without probable cause. All men are more or less at all times the victims of circumstances; and where circumstances combine in such a way as to induce the prosecutor, acting honestly and in good faith, to draw conclusions of guilt, the victim must suffer for the public good.[1] There is perhaps no branch of the law of procedure in which the members of the bar, especially the younger members, feel the need of assistance so much as in the preparation of their instructions in those jurisdictions where it is the practice for the attorneys to prepare them, and the requests for instructions where they are given orally from the bench. It is not the design of the author to enter upon any general

treatise of this branch of the law, however. It will serve his purpose to present some useful suggestions, and a few forms as precedents, prefixed by brief statements of the facts upon which they are based, which have been held to state the law correctly. They may be easily modified so as to render them applicable to other cases; always bearing in mind that an instruction is never proper unless it is based upon the evidence in the particular case on trial.

In many of our states the law requires the charge to the jury or "the instruction," as it is called, to be in writing. In other states the charge is given orally from the bench, but in all jurisdictions, whether the charge is required to be in writing or given orally, the rule regarding requests for instructions is the same. The request must always be in writing, and for this purpose the precedents given in this chapter may always be used.

Illustrations: Here is an instruction on the question of probable cause.

"If you believe, from the facts and circumstances as given in evidence, that the defendant had not probable cause for the arrest and imprisonment of the plaintiff, then and in such case you may infer malice from such want of probable cause."

If the plaintiff's attorney wishes the court to give this instruction he will use the precedent, prefixing the request as follows:

"The plaintiff requests the court to charge the jury as follows: 'If you believe, from the facts and circumstances as given in evidence, that the defendant had not probable cause for the arrest and imprisonment of the plaintiff, then and in such case you may infer malice from such want of probable cause.'" Roy v. Goings, 112 Ill., 662.

§ 2. The instructions should be clear, accurate and concise.— Instructions should, in a clear, concise and comprehensive manner, inform the jury as to what material facts must be found in order to recover, or to bar a recovery. They should never be argumentative, equivocal or unintelligible.[1]

They should always be accurate statements of the law as applicable to the facts of the case. But it was never contemplated that the court should be required to give a vast number of instructions, amounting in the aggregate to a lengthy address; such a practice is mischievous, and ought to be dis-

[1] Moshier v. Kitchel, 87 Ill., 19; Loeb v. Weis, 64 Ind., 285; Sackett's Instructions (2d ed.), 15, § 6.

countenanced. A few concise statements of the law applicable to the facts is all that can be required, and all that can serve any practicable purpose in the elucidation of the case.[1]

MALICIOUS PROSECUTION.

§ 3. An oral charge to the jury in the federal courts.[2]—(1) *Preliminary remarks — Injustice of the law — A remedy:* "The case, which has been tried before you with very full detail of facts, is one of importance, not merely to the parties involved here, but also to the general public, and by reason of that fact it deserves at your hands the most careful consideration. Both sides have presented the testimony fully and fairly; and it certainly is a pleasure to try a case when it is tried, as this has been, so well, and so pleasantly, by counsel. At the very outset I want to notice and comment for a moment upon an obvious infirmity in our laws — at least, so it strikes me. One of you is entirely innocent of crime. Some one files a complaint; causes your arrest; you are tried and acquitted. In making your defense you have spent time and money; possibly have been incarcerated in jail; and yet, after your perfect vindication by a jury of your countrymen, there is no provision for any compensation to you for the time and money that you have lost. Now, as I have often had occasion to say, I think that this is an injustice; but it is an injustice that we cannot remedy — only the legislature can. The only remedy which a party may have, in a case where he has been unjustly charged with a crime, is when the prosecution is one which comes within the legal definition of a malicious prosecution; and then he can recover from the prosecutor fair and reasonable damages."

(2) *The jury to decide all questions of fact from the evidence in the case:* "In this case I may have occasion to comment upon the testimony somewhat, and I may express an opinion as to the effect of this or that portion of testimony, or as to the proof of this or that fact. If I do so, I want to say at the

[1] Adams v. Smith, 58 Ill., 417; Trish v. Newell, 62 Ill., 196; State v. Mix, 15 Mo., 153; Kraus v. Thieben, 15 Ill. App., 482; Sackett's Instructions (2d ed.), 15, § 6.

[2] Brewer, J., in Blunk v. Atchison, T. & S. F. R. R. Co., 38 Fed. Rep., 311 (1889).

outset that my opinion upon a question of fact does not control. You are to decide all questions of fact. And I want to say another thing, too, and that is, that we are to try this case upon the testimony that we have, and not upon that which might have been, or that we guess might have been, offered. If a witness known to have some connection with the circumstances of this case is not present, you may not guess that he would have testified so and so if he were present. Our inquiry is limited to the testimony that we have, and we cannot speculate upon what might have been."

(3) *The termination of the prosecution claimed to be malicious:* I observe again that we are not here to try the question of the guilt or innocence of this plaintiff of the train robbery and murder at Coolidge. That is not the question before us. If it were, I think I should have no hesitation in saying that, conceding all that you may in reference to suspicions, there are no sufficient facts before you that would justify you in saying that he was connected with that robbery. I observe again that the proceedings which were initiated by the complaint filed before the justice of the peace, followed up by the requisition and information, are at an end. That prosecution is finished.

(4) *The duty of all persons to make fair and reasonable effort to ferret out and punish crime:* Again, if not conceded, it is, I think, a fact beyond dispute from the testimony that the prosecution of this plaintiff, Blunk, was initiated by the defendant railroad company. It caused, practically, those proceedings to be commenced and prosecuted; and in that respect I may also observe that when a crime like the attempted robbery of the train at Coolidge, and the murder of the engineer and the wounding of the fireman, has been committed, then common decency and every man's sense of justice demands that the company whose property has thus been threatened, and whose employee has thus been killed, should make every fair and reasonable effort to bring the criminal or criminals to justice; and that it is not to be taken as any evidence of misconduct on the part of the railroad company that it has used its employees and spent its money in an effort to ferret out and bring to justice the criminals. Every man, for that matter, owes a duty to society to do what he can to ferret out

and punish crime; and when the relations exist that existed between this defendant and the man who was killed, there is a more imperative duty on it to do what it can in that direction. While that is true, of course it is also true that in prosecuting its inquiries and making its efforts it is not at liberty to act wantonly, to act with malice, to act in disregard of the rights of others. All that it may do — and it is that which it ought to do — is to make fair and reasonable efforts to ferret out and prosecute the criminals.

(5) *The question of reasonable and probable cause:* It being therefore not a question of whether that prosecution is ended, nor a question whether this plaintiff was guilty of the crime charged in that prosecution, the inquiry naturally arises, what is this case, and what is it that you are to try? In the technical language of the law, this is a case in which the defendant is charged to have maliciously prosecuted this plaintiff — "maliciously prosecuted;" and the elements of the case, as well settled, are — *First*, it must appear that there was no probable cause existing at the time of the commencement of the prosecution for its commencement; and, *secondly*, that it was a prosecution with malice. Those are the two ingredients. As frequently stated, there must be a want of probable cause and there must be malice. Those are the questions you are to try — whether in this prosecution this railroad was actuated by malice towards this plaintiff, and acted without any probable cause to believe him guilty. The question of what constitutes probable cause is a question for the court to settle. What the facts are the jury are to determine; but what constitutes probable cause is for the court to determine. It appears in this case that, without any solicitation or any suggestion from the defendant, news was communicated to the officers of the company that a convict in the Missouri penitentiary knew something about the Coolidge train robbery and was ready to confess. On the strength of that information the ordinary officer of the defendant proceeded to the Missouri penitentiary and interviewed that convict. From him he got a statement in writing, written partly by the agent of the company and partly by the convict. That statement, according to the testimony, was a confession of his own — that is, the convict's own — connection with the crime. More than

that, it detailed the circumstances immediately preceding and subsequent to the crime; named the three parties engaged in it, and detailed some preliminary matters, then mapped out their course of travel to Coolidge and return, giving individual facts connected therewith. Now I say to you, that if a reputable citizen — if one of you, or any man of known integrity — makes an affidavit in which he details his own knowledge of a crime, and a person acts upon that affidavit, he acts with probable cause in instituting a prosecution for the offense. But where a person like this convict, of confessed criminality — confessed both by the adjudication against him and by his own confession in this statement — makes a statement in respect to crime, not merely in reference to himself but implicating others, then common prudence requires that the truth of that statement should be investigated before the persons named in it are charged with crime. If, however, in a confession from a man himself a convict — from a man confessing his own criminality and charging others with participation — the confessor makes a detailed statement of facts preceding, attending and following the crime, and the party to whom that confession is made investigates those particular statements, and finds that they are substantially accurate, and acts upon that information thus verified by personal investigation and information, he is acting upon probable cause. Take the case before us. If Mr. Higgins — after receiving this statement, which has been read to you, detailing the place from which they started, the prior relationships between the convict, Mr. Blunk and Mr. Waller, the places they visited on their way to Coolidge, what took place at Coolidge, the places they visited in the vicinity of Coolidge and on the return — if Mr. Higgins, taking that statement as presented to him, implicating the convict himself, and Mr. Blunk and Waller, went over and verified so far as was possible the details of the information thus conveyed and found that the details were correct — details which could not have been known except by a party who was cognizant of the offense and participated in the crime — then he is justified in acting upon that confession as a true statement, or at least as probable cause for further prosecution. In this respect I quote the language of a case cited by the counsel for plaintiff from *Cole v. Curtis*, 16 Minn.,

182 (Gil., 161), itself a quotation from Hil., Torts: "Probable cause for instituting a prosecution is held to be such a state of facts known to and influencing the prosecutor as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably and without prejudice, upon the facts within the party's knowledge, to believe or entertain an honest and strong suspicion that the person accused is guilty." Now if the defendant, through its agent, after this investigation, with this sworn statement of the convict, found that the details of the facts therein stated were substantially true, and from the possession of that knowledge — that is, from the possession of the confession and the verification of the details by personal examination — entertained an honest and strong suspicion that the convict and the persons named as assistants with him were the three guilty persons, then the action was with probable cause and the plaintiff has failed to make out his case.

(6) *Not necessary that the accused should have notice of the investigation:* It is not necessary, where an investigation of this kind is started, that the persons suspected or accused should, before the prosecution is instituted, be notified of the accusation. It is not even necessary that the persons investigating the matter should so far continue their investigations as to put the accused upon notice of an investigation or lead him to believe that an investigation is being had, because, for the obvious reason that, if he be guilty, the moment he knows or suspects that an investigation is being had, he disappears. Those investigations are fairly and reasonably conducted if they are conducted up to the point where the possibility of notice to the accused may arise.

(7) *The question of malice:* It is also necessary, in a case of this kind, that the defendant in the civil action — one pending like this — shall have acted maliciously. A satisfactory definition of that term may not be easy. Of course, it covers a case where a prosecutor has an ill-will against the accused, as if, for instance, I had a personal grudge against one of you, and should, by reason of that personal grudge, file a complaint against you. There you can see that I have malice, I have ill-will — a grudge. But the law goes a little further than that. It is not always necessary to prove such personal, actual

ill-will and grudge by reason of past trouble. A jury may sometimes infer from the absence of any probable cause that there was malice even where the testimony fails to show any prior trouble, difficulty, ill-will or grudge. Wherever there is a wanton, a gross, reckless disregard of the rights of another, as where confessedly there is no excuse for it — no reasonable ground — and a complaint is filed, then, although there may be no direct testimony as to any prior trouble, ill-will or grudge, the jury may be justified in finding that the action was malicious. But, while that is true, yet the jury must be satisfied from the testimony that the thing was maliciously done. In this case the question for you to consider in this respect is whether this railroad company or any of its officials had any feeling, any malice, any desire to prosecute or punish this plaintiff. Was it to wrong or injure him in any way that this prosecution was instituted? Or was it simply from the belief — a belief, mistaken though it may be — that he was the guilty man? If they acted from probable cause, and without any personal feeling towards him, without any desire to wrong him, then there is no malice shown as against the company defendant.

(8) *Advice of counsel:* It is further insisted by the defendant that whatever information they had they presented to counsel,— their own counsel, the attorney-general of the state of Kansas, and the county attorney of Finney county,— and that all of them agreed that the facts within their knowledge pointed to and justified the prosecution of this plaintiff. Now, if a party in a case like this discloses all the facts that he knows, or that by the exercise of reasonable care he can obtain, honestly, fully and fairly, to counsel, and that counsel advise him that the facts thus stated make out a case, then he is justified in acting upon that advice. Thus, for instance, one of you may suspect that A. has committed a crime. You make inquiries,— all that come within your power reasonably to make,— and you find this fact, and that, and another, and you go to the prosecuting attorney, and tell him these facts, and he says they indicate that the person is guilty of crime, and on the strength of that you file a complaint. The matter is investigated, the case is tried, and it turns out that you were mistaken, and that the defendant is innocent. No cause

of action arises against you. You have gone to the proper party; you have told him all that you know, and all that by the exercise of reasonable care and diligence you could ascertain; and, having made that disclosure, although you were mistaken, although perhaps his advice was incorrect, yet you are shielded from liability. Now, this defendant says that all it knew, all the facts within its knowledge, and all that it could with reasonable care ascertain, were communicated to its own counsel, to the attorney-general, and to the county attorney of Finney county. Not merely that; it says that the attorney-general, on his own motion, went and investigated, so far as he could, by conversation with the confessor and convict, the accusation; and that they all advised that there was enough to justify the commencement of the prosecution. If that be true, if nothing was withheld, if full disclosure was made, if all was done honestly, conscientiously and fairly, and all the facts that the company did have within its knowledge, or could by the exercise of reasonable care ascertain, were disclosed to these counsel, and they advised the prosecution, that is a perfect answer to this suit.

(9) *Continuation of the prosecution after knowledge of the innocence of the accused:* On the other hand, it is insisted by the counsel for the plaintiff that, whatever may have transpired before the original filing of the complaint at Garden City by Mr. Black, after that was filed months elapsed before the information was filed upon which the plaintiff was finally to be tried, and that the defendant company in the *interim* between the original commencement and the filing of the information, if it did not have before, had full and satisfactory information of the innocence of this plaintiff, and that, notwithstanding that information, it insisted upon the continuance of the prosecution, and caused the information to be filed. The law in that respect is this: By the statutes of Kansas, whenever a criminal complaint is filed, the county attorney takes charge of the prosecution. From that time until its termination in the trial court it is wholly within his control. It does not lie in the mouth of the person who makes the complaint to say what shall be done, or when it shall be done, thereafter. The law provides that after the filing the complaint before the justice of the peace, the pre-

liminary examination and binding over for trial in the district court, at or before the commencement of the next term of the district court, the county attorney shall investigate the matter. If he finds satisfactory reasons for discontinuing it, he shall file a statement of those reasons with the judge of the district court, who determines the propriety of continuing the prosecution. If he finds no such satisfactory reasons for its discontinuance, then it is his duty to file the information; and the moment the criminal proceeding is initiated by the filing of the complaint, the matter from that time remains absolutely in the control of the county attorney, except as he may be directed by the district court. So that the mere fact that after the prosecution was initiated the railroad company was advised of matters which showed the innocence of the plaintiff — that itself would not justify you in holding the railroad company responsible in this case; that is, provided it was not responsible for the original filing of the complaint. It is true, however, that while the absolute control of the case remains with the county attorney, if, after the filing of the original complaint, the original prosecutor — in this case the railroad company — becomes advised of facts which clearly show the innocence of the accused, and, notwithstanding the possession of the knowledge of those facts, it insists, and urges, and presses the prosecution of the case further, it may be held liable. Its silence, its mere withholding the information, its mere waiting and letting the case take its course, give no cause of action against it; but if it insisted upon, and urged and demanded a continuance of the prosecution when it knew that the party was innocent, then it may still be liable for an action of malicious prosecution. But in order to prove that it must be shown that it was fully advised of the innocence of the accused, and that, notwithstanding its full possession of information in that respect, it insisted upon, urged and demanded the prosecution of the accused. Now, in this case the question is whether there was any such information communicated to the railroad company; whether there was anything more than a doubt thrown upon what information had been received before; and whether, in the possession of such information as it had, the continuance of the prosecution was at its urgency and insistence.

(10) *Elements of damages:* If you find for the plaintiff, the question of course arises, what is his measure of damages? and in respect to that the law is this: Whatever he may have paid out for counsel fees, for expenses in defending himself against the suit that was wrongfully brought against him, and whatever may be the value of the time that was consumed in that defense; and, beyond that, whatever damage may have been done to his reputation by the initiation and prosecution of this unjust charge,—are to be considered in determining the amount of his damages. Of course, so far as the amount of money he may have paid out for expenses and counsel fees is concerned, that is a matter easy of calculation, as is also the value of his time. Those are matters of mathematical calculation. So far as the question of injury to his reputation — damages to his reputation — is concerned, there is no mathematical rule by which that can be determined. It is submitted to the good sense and fair judgment of the jury,—considering all the circumstances of the case, the man he is, his past life, his own character,— to determine as to how much he has been damaged by this unjust accusation.[1]

§ 4. Written instructions in a suit for malicious prosecution approved by the supreme court of Illinois.[2] —

STATEMENT OF FACTS.

William M. Ross & Co., a mercantile firm in Chicago, had had in their employ from four to six years a young man, Adam G. Innis, as cashier; all this time his conduct had been upright and everything had been satisfactory. On the 12th day of December, 1859, when a misunderstanding took place between Innis and John H. Ross, a member of the firm, in relation to the payment of an account owing to the firm by a brother of Innis, it was sought to charge the debt due from the brother to the salary of Innis. Innis claimed that it was to come out of some insurance money. Owing to this misunderstanding Innis was discharged. At the time there was due him the sum of $166; this amount he took from the firm moneys in his possession, as cashier, and charging the amount to himself in the firm's books, calling the attention of some of the firm to the fact, and claiming the right to do as he had done, and that he had been in the habit of doing the same thing before he left the store. One member of the firm now consulted an attorney, and upon stating the facts, was advised to have Innis arrested on a charge of embezzlement. A complaint was drawn up by the attorney and sworn to by the member of the firm,

[1] Blunk v. Atchison, T. & S. F. R. Co., 38 Fed. Rep., 311 (1889).

[2] Ross v. Innis, 26 Ill., 259 (1861).

a warrant issued, and Innis was arrested. Upon the examination before the magistrate he was discharged. He then brought an action against the members of the mercantile firm for malicious prosecution. On the trial it appeared that the firm had a rule that all sums to be paid over $5 must be paid on the check of the firm.

INSTRUCTIONS FOR THE PLAINTIFF.

(1) *Advice of counsel:* "If the jury are satisfied by the evidence that the defendants knew at the time they advised with their attorney, that the plaintiff in good faith claimed and had a *prima facie* right to pay himself the money on his salary, that he had often done so before, and did not state that fact to their attorney, then the attorney's advice is no protection to them, nor was there probable cause for causing the plaintiff's arrest and trial on the alleged charge of stealing the money, if such claim was made honestly and in good faith."[1]

(2) *Material facts to be communicated to counsel:* "The jury are further instructed as matter of law that if they find from the evidence that the fact that the plaintiff in this case disputed the right of the defendants to charge him with his brother's account, and that the defendants knew that fact, and that if they also find that the plaintiff claimed the right to pay himself the $166 for his salary, and that that fact was known to the defendants at the time they consulted their attorney, then the jury are instructed that those were material facts to be communicated to counsel."[1]

(3) *Violation of rules renders them inoperative:* "The jury are further instructed that if they find from the evidence that one of the business rules of the defendant's firm was that all sums over $5 paid out by the firm should be paid on the check of the firm, but that said rule was frequently violated, then the fact that the rule was frequently violated was a material fact to be communicated to counsel when legal advice was sought. And if the defendants knew or remembered the fact, if fact it was, at the time of taking such advice, they should have communicated it to the attorney."[1]

(4) *What facts must be laid before counsel:* "The jury are further instructed, as matter of law, that to entitle the defense of advice of counsel to avail the defendants, all the facts and circumstances known to the party seeking the advice, or which he ought to have ascertained by careful and diligent inquiry, must be fairly and in good faith laid before the counsel for his opinion; and if the jury shall believe from the evidence that any material and important fact known to the defendant, or which he could have ascertained by careful inquiry, was kept back from the counsel, then that the advice given on such a partial statement is not a protection."[2]

[1] Ross v. Innis, 26 Ill., 271 (1861).

[2] Josselyn v. McAllister, 22 Mich., 300; Anderson v. Friend, 71 Ill., 475; Ash v. Marlow, 20 Ohio, 119; Walter v. Sample, 25 Pa. St., 275; Sharpe v. Johnson, 59 Mo., 557; Acton v. Coffman, 36 N. W. Rep., 775; Ross v. Innis, 26 Ill., 259; Sackett's Revised Instructions, 302; Calef v. Thomas, 81 Ill., 478; McCarthy v. Kitchen, 59 Ind., 500; Johnson v. Miller, 29 N. W. Rep., 743; Smith v. Austin, 49 Mich., 286.

(5) *Character as evidence on the question of probable cause:* "If the jury find, from the evidence, that the plaintiff, Adam G. Innis, up to the time of his arrest for embezzlement, bore uniformly a good reputation for honesty, for integrity; and the defendants acknowledged that the plaintiff bore such character, in their estimation, up to the time of his arrest for embezzlement, then that is strong evidence that the defendants had no probable cause for causing the arrest of the plaintiff for embezzlement, unless very strong circumstances of guilt existed to base a criminal charge upon as against plaintiff Innis."

(6) *What acts do not constitute probable cause:* "If the jury believe, from the evidence, that the plaintiff was charged, arrested and treated as stated in his declaration, and that the defendants knew, at the time of making the charge, that the plaintiff, as their cashier, paid himself the money in question for his services, earned to that date, crediting them and charging himself with the same on the books in the usual way, claiming it as his right to do so, then in such case these acts do not constitute probable cause for making said charge and arrest."[1]

(7) *Facts showing no probable cause:* "If the jury believe, from the evidence, that the plaintiff was then and there, and had been several years, cashier for defendants, when he paid himself the money for his services rendered them, and that he had often done so before, with their knowledge and assent, he crediting them and charging himself for the same on their books, kept for the purpose, and when told by one of them he must return the money, or they would have him arrested for stealing it, he claimed his right to pay it to himself; all of which, if the jury find, from the evidence, the defendants knew, when they caused his arrest, then, in such case, there was no probable cause for the arrest."[1]

(8) *A charge made maliciously — Exemplary damages:* "If the jury believe from the evidence that the defendants made the charge of embezzlement falsely, maliciously and without probable cause, to destroy the plaintiff's reputation for honesty, in Chicago, and to prevent his getting employment in Chicago, and that they obtained the opinion of counsel upon a false or partial statement of facts, as they understood them, then such opinion, if so obtained, would offer no protection to them, and the plaintiff, in such case, ought to recover, and the jury, in such case, may give exemplary damages."[2]

(9) *Advice of counsel must be sought in good faith:* "In order to render the advice of counsel any protection to the defendants in this action the jury must be satisfied, from the evidence, that such advice was sought in good faith, and that a fair, full and true statement of all the facts were then submitted to the counsel, and that they, in instituting the prosecution, were induced to act, and acted on such advice, without a previous determination to prosecute the plaintiff, whether so advised or not."[3]

(10) *Instituting prosecution from a fixed determination rather than upon advice of counsel:* "If the jury believe, from the evidence, that the

[1] Ross v. Innis, 26 Ill., 272 (1861).
[2] Ross v. Innis, 26 Ill., 273 (1861).
[3] Ross v. Innis, 26 Ill., 273; Sackett's Instructions (2d ed.), 303; Roy v. Goings, 112 Ill., 668; Logan v. Waytag, 57 Iowa, 107; Porter v. Knight, 19 N. W. Rep., 282.

defendants instituted the criminal prosecution from a fixed determination of their own rather than from the opinion of legal counsel, or that a full, fair and true statement of all the facts was not submitted to the counsel, then, in either case, the opinion given by the counsel is no defense to this action, if the charge was false and made without probable cause."[1]

(11) *Jury not confined to actual damages:* "If the jury, from the evidence, find the defendants, or either of them, guilty, as charged in the declaration, they will assess the plaintiff's damages, and they are not confined to the actual damages proved, but may give reasonable exemplary damages."[2]

INSTRUCTIONS FOR THE DEFENDANT.

(1) *Probable cause:* "If the defendants had any probable cause to institute the criminal proceedings, then the plaintiff cannot recover; probable cause is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged."[3]

(2) *Advice of counsel:* "If the jury believe, from the evidence in this case, that the defendants fully and fairly stated all the facts and circumstances in relation to the criminal prosecution to respectable counsel, and that such counsel advised them to institute the criminal proceedings, and the defendants in good faith acted upon such advice, then the plaintiff cannot maintain his action, whether such advice was correct or not, and whether the defendant in the criminal prosecution was guilty or not."[4]

(3) *Testimony before magistrate on the question of probable cause:* "If the jury believe, from the evidence, that the defendants, or either of them, testified before a magistrate to facts particularly within their knowledge, in the communication of the charge made by them against the plaintiff, that plaintiff had agreed to assume and pay the debt of Alexander Innis, and if they further believe that said defendants, in good faith, believed that the plaintiff had so agreed to pay and assume the same, then the testimony so given by said defendants, or either of them, is evidence in this case as to the existence of probable cause for making the criminal charge complained of by the plaintiff."[5]

(4) *What the plaintiff must show:* This is an action for malicious prosecution, and to entitle the plaintiff to recover he ought to show —

First — "That the prosecution was ended; that the proceeding was malicious; that it was without probable cause. There seems to be no contra-

[1] Ross v. Innis, 26 Ill., 273 (1861).

[2] Ross v. Innis, 26 Ill., 273 (1861); Sackett's Revised Instructions, 299; Bates v. Davis, 76 Ill., 222; Stewart v. Maddox, 63 Ind., 52; Scripps v. Riley, 38 Mich., 10; Fenelon v. Butts, 53 Wis., 344.

[3] Ross v. Innis, 26 Ill., 273 (1861); Galloway v. Burr, 32 Mich., 332; Ames v. Snider, 69 Ill., 376; Smith v. Zent, 58 Ind., 362; Cooley on Torts, 181; Farnam v. Feeley, 56 N. Y., 451; Winebiddle v. Porterfield, 9 Penn. St., 137; Collins v. Hayte, 50 Ill., 353; Fagnan v. Knox, 66 N. Y., 525.

[4] Ross v. Innis, 26 Ill., 273; Sherburne v. Rodman, 51 Wis., 474.

[5] Ross v. Innis, 26 Ill., 274 (1861).

dictory evidence in regard to the termination of the criminal proceedings against the plaintiff, and the jury will need no particular instructions on this point beyond this — that a discharge by the justice of the party arrested would be a sufficient termination of the proceedings, under a warrant issued by such justice."[1]

(5) *The same continued:* "The second proposition necessary to be established by the plaintiff is, that the proceedings were maliciously instituted or set on foot by the defendant. The term malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but of an evilly disposed mind, and as denoting that the party was actuated by improper and sinister motives. The jury will determine, from all the facts and circumstances proven in this case, whether the defendants were actuated by malice in their procuring the arrest of the plaintiff or not."[1]

(6) *The same continued:* "The third point necessary for the plaintiff to establish, in order to entitle him to recover, is, that the criminal proceedings instituted against him by the defendants were without any probable cause. Proof of express malice without showing also the want of probable cause is not sufficient."[1]

(7) *The burden of proof:* "The burden of proof in this case is upon the plaintiff, and the jury ought to presume that the defendants believed in the truth of the information and evidence given by them, and of the statements contained in the affidavit for arrest, unless it clearly appears from the evidence that the evidence of defendants was false, and that the defendants knew it to be so, or by reasonable diligence could have ascertained that it was false."[1]

(8) *Probable cause when the facts are disputed:* "What is probable cause when the facts are not disputed is a question of law, but in this case the facts are disputed, and it is proper for the court to instruct you as to the law concerning probable cause, and the jury should find whether the necessary facts have been proved, on the part of the plaintiff, to make out a want of probable cause. If the plaintiff was cashier of the defendants, and as such cashier received money belonging to the defendants, and without the knowledge or consent of the defendants, or either of them, and against their will and consent, the said plaintiff did feloniously convert and appropriate to his own use and embezzle from the said William M. Ross & Co., the defendants, with an intent then and there to steal the same, the said sum of $166, as stated in the affidavit of said William M. Ross, and that the said money then and there was the property of the said defendants, at the time of said conversion, this would be sufficient probable cause to justify the defendants in causing the arrest of the plaintiff; but if the jury believe, from the testimony, that the plaintiff honestly believed that he had a right to take the money and charge it to himself, and he did so take such money and charge himself with the amount on the books of the defendants, then even if he had guarantied the debt of Alexander Innis, he would not be guilty of embezzlement, and such taking of the money under such circumstances would not constitute a probable cause for the prosecution of the plaintiff criminally, for such taking of the money of the plaintiff from the defendants, even if the plaintiff had verbally

[1] Ross v. Innis, 26 Ill., 275 (1861).

agreed to pay the debt of his brother, Alexander Innis, and took the money belonging to Ross & Co., in his possession, believing that he had a good right to do so, and made the proper entries on the book of Ross & Co., charging himself with the money so taken by plaintiff, he would not be criminally liable, and such conduct would not constitute probable cause for criminal prosecution for embezzlement, unless it appears from the evidence that at the time the defendants commenced the criminal prosecution complained of they honestly and in good faith believed the plaintiff was guilty of embezzlement, as the law does not necessarily require that a crime should have been committed before probable cause can exist."[1]

(9) *Probable cause defined:* "Probable cause is justly defined to be a suspicion or belief, founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. A belief that is groundless, or which could not have been formed without the grossest ignorance or negligence, would not constitute probable cause within the meaning of the law. The jury ought to apply to all the evidence in the case the test — the rule of law given to them by the court. Ask yourselves conscientiously, are the facts and circumstances that you have found to exist so strong in themselves as to warrant an impartial and ingenuous and reasonable man of common capacity, with the caution usually exercised by such a man in the defendants' situation, but under the influence of any improper motive, to believe the plaintiff guilty of the crime charged against him? If they are sufficient to warrant that belief in such a mind, that conclusion, when deliberately arrived at by you, will entitle the defendants to a verdict of not guilty; if you find otherwise, then you will find whether defendants are guilty; and, if guilty, then you will assess the damages for the plaintiff."[1]

(10) *Advice of counsel:* "The defendants claim protection in this case by reason of having been advised to prosecute the plaintiff by counsel. The true rule in this matter seems to be this: That the defendants may give in evidence to show probable cause, and to negative malice, that they proceeded in the case in good faith upon the advice of counsel learned in the law, given upon a full representation of the facts. It must appear, to make this a good defense, that defendants communicated to said counsel all the facts bearing upon the guilt or innocence of the accused, which they knew, or by reasonable diligence could have ascertained, and that they in good faith acted under such advice. If the jury are satisfied from the evidence that the defendants acted in good faith on the evidence given, and did only follow such advice so given, then they are not liable to an action for malicious prosecution."[2]

(11) *Form of verdict:* "If the jury find for the defendants, the form of their verdict may be as follows:

"We, the jury, find the defendants not guilty."

Malice.

§ 5. Malice defined.— The court instructs the jury for the plaintiff that the term malice as used in this trial signifies

[1] Ross v. Innis, 26 Ill., 276 (1861). [2] Ross v. Innis, 26 Ill., 277 (1861).

the intentional doing of a wrongful act without just cause or excuse. There are two kinds of malice: malice in fact or express malice, and malice in law or implied malice. Malice in fact, as its name implies, arises from personal spite, and evinces an evil intention to commit a wrongful act. But malice in law has a somewhat broader meaning. It is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another.[1]

§ 6. Malice may be inferred from want of probable cause. The court instructs the jury that if they believe, from the facts and circumstances proved on this trial, that the defendant had not probable cause for prosecuting the plaintiff, and that he did prosecute him, as charged in the complaint, then the jury may infer malice from such want of probable cause.[2]

§ 7. Defendant's instruction under the general denial — Burden of proof — Malice.—

First. The general issue being pleaded in an action of malicious prosecution, the burden of proving these five facts is upon the plaintiff, viz.: (1) The fact of the prosecution; (2) that the defendants were the prosecutors or instigators of it; (3) that the prosecution terminated in favor of the plaintiff; (4) that the charge was made without reasonable or probable cause; (5) that the defendants in making it were actuated by malice.

Second. To maintain an action for malicious prosecution the plaintiff must show, by a preponderance of evidence, malice and want of probable cause. Therefore, if the jury find from the testimony that the plaintiff has failed to prove, by a preponderance of evidence, that the defendants maliciously and without probable cause commenced said alleged criminal prosecutions against him, you will find for the defendants.

Third. Although the plaintiff may show the want of probable cause by the preponderance of evidence, yet it is not sufficient to support a recovery unless malice may be shown, or may be inferred also, so that the plaintiff must prove that the

[1] Willis v. Miller, 29 Fed. Rep., 238; Ferguson v. Earl, etc., 9 Cl. & F., 321.

[2] Cooley on Torts, 185; Ewing v. Sanford, 19 Ala., 605; Harkrader v. Moore, 44 Cal., 144; Pankett v. Livermore, 5 Clarke (Iowa), 277; Krug v. Ward, 77 Ill., 603; Holliday v. Sterling, 62 Mo., 321; Edgeworth v. Carson, 43 Mich., 241; Wertheim v. Altschuler, 12 N. W. Rep., 107.

defendants were actuated by a malicious desire to injure him. Therefore, if the jury find from the testimony that the plaintiff has failed to show, by a preponderance of evidence, that the defendants commenced the alleged criminal prosecution against him with a malicious intent to injure him, you will find for the defendants; but proof of the institution of a criminal prosecution without probable cause may be sufficient proof from which malice may be inferred.[1]

§ 8. Doing a wrongful act to obtain a lawful end — Ignorance of the law excuses no one — Malice.—

Statement: An action was brought by John Wills against Noyes and others for maliciously attaching and detaining on a writ of replevin the schooner Caroline. The defendants claimed to own but one-half of the vessel. Wills was the owner of the other half and was in possession.

Instruction: "The plaintiffs in this action of replevin, claiming to own only one-half of the vessel, could not maintain replevin. Yet, that if, acting as rational men, they believed they could maintain that action for the recovery of any real or supposed interest, it would be a justification in the present suit; but if their purpose was to obtain an illegal object in an illegal manner, it would not amount to a justification; that the legal presumption that every one knows the law applied to the present case, and that the plaintiffs in replevin must be presumed to have known that that action would not lie, unless they could show to the contrary. That might be done by proving that they were advised by counsel that replevin was the proper remedy; that it was incumbent on the plaintiff, not only to show that the action of replevin was commenced without probable cause, but that it was malicious; that legal malice might differ from malice in the common acceptation of the term: that to do a wrongful act, knowing it to be such, constituted legal malice; and that the plaintiffs, on replevin, could not justify a wrong or unlawful act, knowing it to be such, upon the ground that they did it to obtain a lawful end."[2]

[1] Casebeer v. Rice, 18 Neb., 203; 24 N. W. Rep., 693 (1885). As we understand the law applicable to the question of malice, these instructions, when applied to the testimony before the jury, contain a fair statement of it, and in substance give all the essential ingredients. But it is not necessary in such cases that express malice be shown. Malice in a prosecution may be inferred from a clear want of probable cause. Holliday v. Sterling, 62 Mo., 321; Newell v. Downs, 8 Blackf., 523; Callahan v. Caffarata, 39 Mo., 136; Harpham v. Whitney, 77 Ill., 32; Mowry v. Whipple, 8 R. I., 360; Straus v. Young, 36 Md., 246. And it may be found by the jury from the same facts which show a want of probable cause. Harkrader v. Moore, 44 Cal., 144; Oliver v. Pate, 43 Ind., 132; Ammerman v. Crosby, 26 Ind., 451. And if the prosecution was wholly without cause, no further evidence of malice is necessary. Hayes v. Hayman, 20 La. Ann., 336; Holburn v. Neal, 4 Dana, 120.

[2] Wills v. Noyes et al., 29 Mass., 324 (1832).

REASONABLE OR PROBABLE CAUSE.

§ 9. The want of it must appear from the evidence.— Although the jury may believe, from the evidence, that the criminal prosecution complained of was made by the defendant through malice, still the jury must not infer want of probable cause from such malice. Want of probable cause must be made to appear from the evidence, or else the jury must find for the defendant, no matter how malicious the jury may find the defendant's motives to have been in instituting the criminal prosecution.[1]

§ 10. What is want of probable cause.— If the jury believe, from the evidence, that the defendant instituted a criminal proceeding against the plaintiff, as charged in the complaint, and if they further find, from the evidence, that there were no circumstances connected with the transaction out of which the prosecution grew, and that no information regarding it came to the knowledge of defendant, which would warrant a reasonable and prudent man in believing that the plaintiff was guilty of the charge made against him, then there was no probable cause for the prosecution.[2]

§ 11. The burden of proof.— The want of probable cause, though negative in its character, must be shown by the plaintiff by affirmative evidence, and the jury have no right to infer it from any degree of malice which may be proved.[3]

§ 12. An honest belief in plaintiff's guilt.— If the jury believe, from the evidence, that the defendant, when he instituted the prosecution complained of, honestly believed the plaintiff was guilty of the offense charged, and that defendant's belief was founded on a knowledge of circumstances tending to show such guilt, and sufficient to induce, in the mind of an ordinarily reasonable and cautious man, the belief in such guilt, then such belief on the part of the defendant negatives the idea of the want of probable cause.[4]

§ 13. Prosecutor acting in good faith.— To warrant a verdict for the plaintiff in an action for malicious prosecution,

[1] Sackett's Instructions (2d ed.), 309.

[2] McWilliams v. Hoben, 42 Md., 56; Harpham v. Whitney, 77 Ill., 32.

[3] Brown v. Smith, 83 Ill., 291; Cottrell v. Richmond, 5 Mo. App., 588; Lavender v. Hodgins, 23 Ark., 763; Smith v. Zent, 59 Ind., 362; Evens v. Thompson, 12 Heisk., 534.

[4] Hirsch v. Feeney, 83 Ill., 548; Brennan v. Tracy, 2 Mo. App., 540.

there must be malice on the part of the prosecutor, and a want of probable cause for believing that the accused is guilty of the offense charged. If the prosecutor acts in good faith, on evidence, whether true or false, which is sufficient to create, in the mind of a reasonably cautious man, a belief of the guilt of the accused, he is protected and justified in commencing the prosecution.[1]

§ 14. **The true inquiry.**—Upon the question, whether the defendant had probable cause for commencing, etc., the jury are instructed that the true inquiry for them to answer is not what were the actual facts as to the guilt or innocence of the plaintiff, but what did the defendant have reason to believe, and what did he believe, in reference thereto, at the time he made the complaint.[2]

§ 15. **Reasonable grounds of suspicion.**—If the jury believe, from the evidence, that the defendant had probable cause to believe that the plaintiff was guilty of the offense charged against him, then it is not material whether the defendant was actuated by proper or improper motives in instituting the criminal proceedings against the plaintiff. To authorize a recovery in this class of cases it must not only appear that the defendant was actuated by malice, but the jury must further believe, from the testimony, that the defendant had no probable cause, or no reasonable ground, to believe that the plaintiff was guilty of the offense charged against him.[3]

§ 16. **Good character on the question of probable cause.** If the jury believe, from the evidence, that the plaintiff, up to the time of his arrest, uniformly bore a good reputation for honesty and integrity, and that defendant knew his reputation to be such up to the time of his arrest, then that fact is a proper one to be considered by the jury, in connection with all the other evidence in the case, in determining whether or not defendant had probable cause to believe, and did believe, in good faith, that the plaintiff was guilty of the crime charged against him.[4]

[1] Sackett's Revised Instructions, 299.

[2] Galloway v. Burr et al., 32 Mich., 332.

[3] Ames v. Snider, 69 Ill., 376; Flickinger v. Wagner, 46 Md., 580; Josselyn v. McAllister, 22 Mich., 300; Carey v. Sheets, 67 Ind., 375.

[4] Woodworth v. Mills, 61 Wis., 44; Sackett's Instructions (2d ed.), 804.

§ 17. Malice and want of probable cause must concur.—The court instructs the jury that, in order to sustain the action for malicious prosecution, it must be proved, by a preponderance of the evidence, that the prosecution complained of was made with malice, and also without probable cause; and if both these requisites are not so proved, the jury should find for the defendant.[1]

§ 18. Existence of facts a question for the jury — Probable cause.—

Statement: C. brought suit against E. for prosecuting him maliciously on two unfounded charges: one for breaking down E.'s shade trees, April 13, 1879, and the other for disturbing a religious meeting on the same day. On the trial the plaintiff, as a witness on his own behalf, gave evidence tending to prove that he was twenty-one years of age and upwards; that one J. T. was fifteen years old; that together they went from their homes in Corunna to Chesaning, April 12, 1879, stopping there over night; that on the next day, which was Sunday, they left Chesaning about 9 o'clock in the morning to go about ten miles northwest, their road passing by a school-house, where a Methodist quarterly meeting was carried on by the presiding elder and three preachers.

Plaintiff, by himself and persons at the meeting, gave evidence tending to prove that plaintiff and T. made no noise or disturbance at or in passing the school-house, and that the religious performance thereat was not disturbed by any noise whatever from without. Plaintiff also gave evidence tending to prove that in passing defendant's house T. stepped to the outside of the road and broke down two small shade trees, the plaintiff then being ten or twelve feet beyond, walking in the road; that he looked around as T. was breaking the trees and remonstrated with him, telling T. to come along and mind his business; that the next day he and T. were arrested near St. Charles by Officer Thayer, defendant being with him; that Thayer refused to tell what it was for; that the officer and defendant then took plaintiff to defendant's house and there locked him up in a room all night.

Plaintiff further gave evidence tending to prove that while so confined in defendant's house, Thayer advised them to settle with defendant, who wanted $25, and they gave him their watches in pledge for the sum the next morning, and were released by the officer, by defendant's order, without being taken before the justice who issued the warrant, which the officer left with the defendant, they being there told by the defendant that he wanted that sum to settle for the shade trees and a buggy spring broken in going to arrest them: that C. demanded his watch, and that defendant then told plaintiff that he knew T. broke the trees, and that plaintiff had done nothing for which he could be arrested, but that he had been in bad company.

[1] Cooley on Torts, 184; Casperson v. Sproule, 39 Mo., 89; Center v. Spring, 2 Clarke (Iowa), 393; Heyne v. Blair, 62 N. Y., 19; Skidmore v. Bricker, 77 Ill., 164.

Instruction: "The declaration charges the defendant with having made a complaint against the plaintiff falsely, without probable cause, and from malice and improper motives. It is very important to be determined by you whether there was in fact a disturbance, and whether there was any reason on the part of the defendant to believe that there was a disturbance, he being present at the time. The complaint was made on the 17th, four days after the occurrence, and after a settlement had been had between the parties on the first complaint. The plaintiff says from wicked and malicious motives, without probable cause to believe the truth of the complaint, this defendant caused his arrest. Is this true? If so, then he is liable to the plaintiff, for all damages which the plaintiff has sustained thereby, such sum as you may find the plaintiff ought to recover under the instructions of the court. If he made this complaint against the plaintiff without probable cause to believe him guilty, and from malicious and improper motives, if for the purpose of compelling him to settle a suit, or extort money from him, or prevent any proceeding being brought against him to recover the watch, then the plaintiff ought to recover. This, then, is the question of fact submitted to you. Determine first whether defendant had reasonable cause to believe that such disturbance had been caused by plaintiff. If you believe the contrary, and that he had no such reason to believe the plaintiff guilty, and that he instituted the complaint from improper, wicked and malicious motives, then they must recover. By malicious it is not necessary that it should be revengeful. Any wicked, malevolent purpose is malicious. It may be to avoid prosecution, or it may be to compel a settlement or extort money, or any other purpose which in law is unlawful, and, if so, it is malicious."[1]

§ 19. Facts constituting probable cause.—

Statement: Section 9173 of Howell's Statutes (Michigan) enacts that every person who shall wilfully commit any trespass on the land of another by carrying away any roots, fruit, or plant there being, in which he has no interest or property, without the license of the owner, of the value of $5 or more, shall be punished by imprisonment in the county jail not more than sixty days, or by fine not exceeding $100.

The defendant made complaint on oath before a justice of the peace that Eliza Wilson, on the 24th of July, 1885, with force and arms, unlawfully did enter upon the land of the said Levi L. Bowen, situated, etc., and did then and there carry away fifty quarts of whortleberries (sometimes called huckleberries) then and there growing upon said land, of the value of $5, without the license of him, the said Levi L. Bowen,—she, said Eliza Wilson, then and there not having any interest or property in said whortleberries,—contrary, etc. A warrant was issued, and Mrs. Wilson was apprehended and brought before the magistrate, when an adjournment was had, and she was released upon her own recognizance to appear. On the adjourned day the prosecuting attorney requested a dismissal of the case, which was done by the justice, and the prisoner discharged. Then she brought an action for malicious prosecution.

[1] Edgeworth v. Carson, 43 Mich., 241; 5 N. W. Rep., 240 (1880).

Instruction: "If the defendant had information, from persons whom he deemed truthful and worthy of credit, that the plaintiff had, during the summer of 1885, been repeatedly, and two or more times when she was positively identified by his informants, seen in his whortleberry swamp picking and carrying away berries, and two or more other times when, though his informant was not able to identify her positively by having seen her face, yet, from dress and size, his informant believed it to be she, and the defendant was satisfied from such information that it was the plaintiff, and such acts of the plaintiff were without his permission and against his will, and such different occasions were in the same season, and within a few days of each other; and that on several occasions when so found picking berries she was seen and fully identified by the informants of the plaintiff; she had several quarts of berries picked and remained in the swamp picking berries for a considerable time after the berries were so seen, and the amount noticed by his informants, and the berries picked were carried away by the plaintiff, and the defendant had no means of knowing what quantity of berries had thus been taken by the plaintiff other than the information so received, and an estimate therefrom, and he actually believed, from such information and estimate, that the quantity so taken by her during the season was over fifty quarts,— this would be probable cause for making such complaint."[1]

§ 20. Facts not constituting probable cause, etc.—

Statement: Rice and others were in the peaceable possession of property, real and personal, near Blue Springs, in Nebraska. Casebeer and others undertook to dispossess them forcibly. With a concert of action which appeared to be the result of an understanding, they appeared upon the premises in dispute and by force removed the property there, turning out stock and removing household property, as well as quantities of grain, etc., until restrained by the presence of the officers, who returned the property in part, and prevented further removals. A fight was the natural result. Casebeer then caused, as it was claimed, the arrest of Rice and five others for a criminal offense, commonly called a rout or unlawful assembly. They were all taken away excepting one woman who gave bail for her appearance. The criminal prosecution was dismissed, and Rice sued Casebeer and others for a malicious prosecution. Verdict for plaintiff.

[1] Wilson v. Bowen, 31 N. W. Rep., 81 (1887). "It is the province of the jury to ascertain what state of facts exists, and it is the province of the judge to decide whether that state of facts constitutes probable cause, and the law intends that these functions shall be kept distinct. But, as the law appropriate to the facts cannot be laid down unequivocally until it is ascertained what the facts are, it is found necessary, where they are in dispute, to submit the whole subject to the jury under proper instructions as to the rule of law to be applied, according as they find one state of facts or another. The law belonging to any state of facts subject to be found being given to them in advance, they are enabled, on coming to an agreement as to what is the true state of facts, to apply the law delivered to them as belonging thereto, and formulate the result." Hamilton v. Smith, 89 Mich., 222.

Instruction: "If you find from the evidence that the defendants, or either of them, brought, or caused to be brought, or aided, advised, or assisted in bringing the prosecution against plaintiffs mentioned and described in plaintiffs' petition, and that the acts and deeds of the plaintiffs, which caused said prosecution to be brought, were committed by plaintiffs in defense of property, of which either or both of them were in lawful possession, either alone or in common with any other person or persons, against the unlawful attempt of defendants to get possession thereof, and that said acts and deeds of plaintiffs were no more forcible and violent than was necessary for the protection of said property against the unlawful attempts of defendants to get possession of said property, then the court instructs you that the defendants had no probable cause for bringing said prosecution; and if you further find that said prosecution was wrongful and injurious to plaintiffs, and known and intended by defendants so to be, you will find a verdict for plaintiffs."[1]

§ 21. Reasonable inquiry as to facts.—

Statement: James W. Watts sued William, Benjamin F., and David E. Paddock, to recover damages for an alleged malicious prosecution instituted by the Paddocks against him. He charged that the defendants unlawfully, wrongfully, maliciously and without probable cause procured an indictment to be found and returned against him by the grand jury, in which he was charged with the crime of embezzlement. It was alleged that he had been arrested and tried upon the charge so preferred, and that he had been found not guilty, and discharged accordingly. The defendants joined in pleading the general issue.

Instruction: (1) Definition of reasonable cause. (2) Now, if you find from the evidence that the defendants, or either of them, instituted the prosecution complained of, and that it was false, and that they or either of them, maliciously, and without first having made reasonable inquiry, and without the existence of such an apparent state of facts as would induce a reasonably intelligent and prudent man to believe that the plaintiff was guilty of the crime charged, then you should find for the plaintiff and assess his damages accordingly.[2]

§ 22. Allowance to be made for injury done to prosecutor.

Statement: Hiles was the owner of two warehouses in which was stored a large quantity of wooden-ware. One night in July, 1883, they were set on fire and burned with their contents. A week later Hiles made a complaint before a magistrate charging that one Spear, his wife, and George L. Haney were guilty of the crime of burning his warehouses. A warrant was issued, and parties arrested and brought before the magistrate for examination. The prosecuting attorney for the county, having examined the complaint, found it insufficient, and dismissed the prosecution. He, however, drew another complaint for the same offense, a second warrant was issued, and they were again arrested. They waived an examination,

[1] Casebeer v. Rice, 18 Neb., 203; 24 N. W. Rep., 693 (1885).

[2] Paddock v. Watts, 116 Ind., 146; 18 N. E. Rep., 521 (1888).

and, being unable to give bail, were committed to jail. Here they remained for several weeks, when they were able to procure bail and were released. An information was filed against them by the prosecuting attorney, upon which they were ultimately tried and acquitted in the circuit court. Spear's wife then brought an action against Hiles for a malicious prosecution. On the trial the jury rendered a verdict for $9,000. The defendant appealed.

Instruction: "In considering that Mr. Hiles had probable cause for instituting the criminal prosecution complained of, you should take into consideration all the facts and circumstances known to Mr. Hiles as appears from all the evidence in the case, and in this connection should consider the interest or loss of Mr. Hiles, as shown by the evidence, as one element or condition upon which to base your finding; for some allowance will be made when the prosecutor is so injured by the offense that he could not likely draw his conclusions with the same impartiality and absence of prejudice that a person entirely disinterested would deliberately do. All that can be required of him is that he shall act as a reasonable and prudent man would be likely to do under like circumstances." [1]

§ 23. Possession of stolen property.—

Statement: The plaintiff and all the defendants except S. D. Potter resided in Jones county, Iowa. Potter is a resident of Greene county. In 1874 Potter purchased about fifty head of calves in Jones county, which he drove to his farm in Greene county. The defendant, Foreman, claimed that four of the number belonged to him and that they had been stolen from him, and he instituted a suit for their recovery before a justice of the peace in Greene county, and on the trial he established his right to them. Potter claimed that he had purchased said calves from plaintiff, and an indictment was subsequently returned by the grand jury in which he was accused of the larceny of the property; but upon the trial of the indictment he was acquitted. He then instituted this suit, alleging that the defendants had conspired together to institute said prosecution, and that it was commenced maliciously and without probable cause.

Instruction: To constitute probable cause for criminal prosecution there must be such reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that the person accused is guilty of the offense charged. The law does not require a certainty that an accused person is guilty before another may proceed against him. It is enough that a felony has been committed, and the circumstances are such as to lead a reasonably prudent and cautious man to believe honestly and without prejudice that the accused is guilty thereof. In determining the question of probable cause for the prosecution of Johnson the following principles of criminal law must be considered by the jury, namely: The possession of personal property which has been recently stolen is *prima facie* evidence that the person in whose possession it is so found

[1] Spear v. Hiles, 67 Wis., 356; 30 N. W. Rep., 511 (1886); Carter v. Sutherland, 52 Mich., 597; 18 N. W. Rep., 375; McCarthy v. De Armit, 99 Pa. St., 63; Law Mag., 206.

or traced stole the property, unless he satisfactorily explains his possession and shows how he came by the property. If such person attempts to explain his possession of property recently stolen by statements that he bought it of an unknown person who cannot be found, and the details of the purchase, as he gives them, are unnatural, unreasonable or improbable, that tends to strengthen, rather than weaken, the presumption of guilt. If his statements as to such purchase from an unknown person are, in material matters, contradictory and inconsistent — that is, not favorable to innocence; and if, after admitting the possession of property recently stolen, and attempting to account for it by purchase from an unknown person who cannot be found, he then denies such possession altogether,— this does not tend to establish his innocence. [1]

§ 24. Probable cause — Accessory to arson.—

Statement: Hiles was the owner of two warehouses in which was stored a large quantity of wooden-ware. One night in July, 1883, they were set on fire and burned with their contents. A week later Hiles made a complaint before a magistrate charging that one Spear, his wife and George L. Haney were guilty of the crime of burning his warehouses. A warrant was issued and the parties arrested and brought before the magistrate for examination. The prosecuting attorney for the county having examined the complaint, found it insufficient, and dismissed the prosecution. He, however, drew another complaint for the same offense, a second warrant was issued and they were again arrested. They waived an examination, and, being unable to give bail, were committed to jail. Here they remained for several weeks, when they were able to procure bail and were released. An information was filed against them by the prosecuting attorney, upon which they ultimately were tried and acquitted in the circuit court. Spear's wife then brought an action against Hiles for a malicious prosecution. On the trial the jury rendered a verdict for $9,000. The defendant appealed.

There was no testimony tending to show that plaintiff was present when the defendant's buildings were set on fire. There was, however, some testimony which tended to show that she was an accessory before the fact to the burning of the buildings; or, at least, that the defendant had probable cause to believe her accessory thereto.

Instruction: "The plaintiff cannot recover in this action if the defendant had probable cause to believe the plaintiff guilty of having set fire to the buildings burned, and it is not necessary to her guilt, or the defendant's belief in her guilt, that he believed she, herself, set the fire; but it is sufficient for the purpose if he had probable cause to believe that she was privy to the criminal act of any other person who may have set the fire, and such act was done with her procurement or advice, or with her consent or knowledge, for any wrongful or unlawful purpose of her own, as to gratify any feeling of revenge, ill-will or spite which she may have had against the defendant." [2]

[1] Johnson v. Miller, 69 Iowa, 562; 29 N. W. Rep., 743 (1886).

[2] Spear v. Hiles, 67 Wis., 356; 30 N. W. Rep. 511 (1886). An accessory before the fact to a felony is said, by a learned author, to be "a

§ 25. Facts to be considered on the question of reasonable cause.—

Statement: Davis sold Wisher some land and gave him a bond for a deed. Wisher failed to make his payments and the bond was forfeited. Davis sent an agent to him to get a conveyance of the land to a third party. An arrangement was effected by which the bond was surrendered to Davis, and a conveyance made as desired for a part of the land, and Wisher was to have the remainder on payment of a certain sum, and a new bond was to be given, which for some reason was not executed and delivered. Prior to this Wisher had made a copy of the original bond, and after the surrender of the original he placed it upon record. Sometime afterwards Davis was notified that Wisher was claiming the land under a contract executed by him. He went to the record; found the contract; examined the signatures, and saw they were not his. Then he obtained the advice of counsel and commenced a prosecution against Wisher for forgery.

Instruction: "If the jury believe from the evidence that the defendant had given to the plaintiff a bond for the conveyance of land which was to be void upon the failure of the plaintiff to comply with certain conditions therein named, and these conditions were not complied with by the plaintiff, and that therefore the bond had become forfeited and void, and had been delivered up to the defendant by the plaintiff or his agent, and that previous to such delivery the plaintiff had copied said bond, or written one

person whose will contributes to a felony committed by another as principal, while himself too far away to aid in the felonious act." 1 Bish. Crim. Law, § 673. It is laid down by Lord Hale that "an accessory before the fact is he who, being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit the felony." 1 Hale, 615. In 2 Hawk., ch. 29, § 16, it is said that "it seems to be generally holden that those who, by showing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, are all of them accessories before the fact, both to the felony intended, and all other felonies which shall happen in and by the execution of it, unless they retract and countermand their encouragement before it is actually committed." One who basely conceals a felony which he knows to be intended is not an accessory. 2 Hawk., ch. 29, § 23. Neither is tacit acquiescence, nor words which imply mere permission, sufficient to constitute the offense. There must be some active proceeding on the part of him who is charged as an accessory, or he is not guilty of the offense. Archb. Crim. Pl., 12, 13. Yet express consent to a proposed felony, especially if the person consenting thereto entertains malice towards the object of the proposed felony, may make such person an accessory to the felony when committed. The distinction between such accessory and the principal felon rests solely in authority, being without foundation either in natural reason or the ordinary doctrines of the law. 1 Bish. Crim. Law, § 673. At common law and under the statutes of nearly all the states the punishment of the principal felon and the accessory is the same.

of similar import signing the defendant's name thereto, or caused the same to be done, with intent to assert rights under said bond to the damage or prejudice of the rights of the defendant, such conduct on the part of the plaintiff may be considered by you in passing on the question whether the defendant had reasonable and probable cause to procure the arrest of the plaintiff on the charge of forgery."[1]

Advice of Counsel.

§ 26. The doctrine announced by the supreme court of Iowa.[2]—

Plaintiff's instruction: "Whether or not the defendant did, before instituting the criminal proceedings, make a full, fair and honest statement to the district attorney of all of the material facts bearing upon the guilt of the plaintiff of which he then had knowledge, and whether, in commencing such prosecution, the defendant acted in good faith, upon the advice of said attorney, are questions of fact to be determined by you from all the evidence and circumstances in the case. And if you believe, from the evidence, that the defendant did not make a full, fair and truthful statement of such facts to the attorney, or that he instituted the criminal proceedings from a fixed determination of his own rather than from the advice of said attorney, then the advice of the prosecuting attorney is not a defense to this action."

§ 27. The doctrine as laid down by Hilliard[3] and Wait.[4]—

Plaintiff's instruction: "Whether or not the defendants, or some of them, did, before instituting the proceedings, make a full, fair and honest statement to the district attorney of all the material facts bearing upon the guilt of the plaintiff of which they had knowledge, and which they could have ascertained by reasonable diligence, and whether, in commencing such prosecution, the defendants acted in good faith upon the advice of said district attorney, are questions of fact to be determined by you from all of the evidence and circumstances in the case. If you believe from the evidence that none of the defendants made a full, fair and truthful statement of such facts to the district attorney, or that they instituted the criminal proceedings from a fixed determination of their own rather than from the advice of said district attorney, the advice of the prosecuting attorney would not be a defense in this action."

§ 28. Advice by counsel mistaken in the law.—

Instruction: "If the jury believe from the evidence that, previous to making said charge, the defendant, being doubtful of his legal rights, had consulted with legal counsel in relation thereto (withholding no material facts from his counsel), and made the charge pursuant to the advice of his

[1] Davis v. Wisher, 72 Ill., 262 (1874).

[2] Johnson v. Miller, 69 Iowa, 562; 29 N. W. Rep., 748 (1886); 1 Hilliard on Torts, 506; 4 Wait's Actions & Defenses, 335.

[3] 1 Hilliard on Torts, 506.

[4] 4 Wait's Actions & Defenses, 335; Roy v. Goings, 112 Ill., 663.

attorney and without malice, then such advice is sufficient probable cause for making the charge, and he is not liable to this action, although his counsel may have mistaken the law; and if such facts be proven, you must find for the defendant."[1]

False imprisonment: The instructions upon the question of probable cause, advice of counsel, etc., as given under the action of malicious prosecution, are equally applicable to actions for false imprisonment. It is not necessary to repeat them here.

§ 29. False imprisonment defined.— The court instructs the jury that, in order to sustain a charge for false imprisonment, it is not necessary for the plaintiff to show that the defendant used violence or laid hands on him, or shut him up in a jail or prison; but it is sufficient to show that the defendant, at any time or place, in any manner, restrained the plaintiff of his liberty, or detained him in any manner from going where he wished, or prevented him from doing what he wished; provided this is done without legal authority, as explained in these instructions.[2]

§ 30. What is an arrest.— To constitute an arrest and imprisonment, it is not necessary that the party making the arrest should actually use violence or force towards the party arrested, or that he should even touch his body. If he profess to have authority to make the arrest, and he commands the person, by virtue of such pretended authority, to go with him, and the person obey the order, and they walk together in the direction pointed out by the person claiming the right to make the arrest, this is an arrest and imprisonment within the meaning of the law. An actual laying on of the hands, or personal violence, is not necessary; it is simply necessary that the arrested party be within the control of the officer or other person making the arrest, and submits himself to such control, in consequence of some claim of right to make the arrest, or threat to make it, by such officer or other person. Any deprivation of the liberty of another without his consent, whether it be by actual violence, threats or otherwise, constitutes an imprisonment within the meaning of the law.[3]

[1] Davis v. Wisher, 72 Ill., 262 (1874).

[2] Cooley on Torts, 169; Brushaber v. Stagemann, 22 Mich., 266; 2 Addison on Torts, 697; Hawk v. Ridgway, 33 Ill., 473; Bonesteel v. Bonesteel, 28 Wis., 245; Harkins v. State, 6 Tex. App., 452; Murphy v. Martin, 58 Wis., 276; Gelzenleuchter v. Neimeyer, 64 Wis., 316, Sackett's Instructions (2d ed.), 530 (1856).

[3] 2 Addison on Torts, § 799; Cooley

§ 31. Duress and threats.—

Statement: George E. McClure, W. G. McClure, and one Kelly were jointly indicted for the false imprisonment of one Wolverton. Wolverton had purchased a barrel from a store in which appellant was a clerk, and driven off with it in his wagon, when appellant went after him and requested the return of the barrel, saying that it had been previously sold to another. Wolverton refused, and a struggle ensued in which McClure obtained possession of the barrel, and took it back to the store. Kelly, who was a police officer, told Wolverton that he must go back to the store, and that he could not leave town until the matter was settled. Wolverton testified that he considered himself under arrest, and went back to the store.

Instruction: "Where the means used are threats, they must be such as are calculated to operate upon the person threatened, and inspire a just fear of some injury to his person or property; and must be sufficient to intimidate and prevent such person from moving beyond the bounds in which he was detained, if he was detained at all. A mere contest and wordy altercation between two persons for the possession of an article of personal property, each in good faith claiming the right thereto, and in which the party in possession, and sought to be dispossessed, voluntarily and of his own accord remained at the place of altercation for the purpose of better protecting his possession, and where he was not detained or sought to be detained by the other, would not constitute false imprisonment. No person disputing the right of possession of another of an article of personal property, and going into a struggle or fight for it, is, when his object is the possession of the property, and not the detention or restraining of the person so in the possession, guilty of false imprisonment: so that if you find that G. E. McClure disputed the right of possession of the barrel with Wolverton, and entered into a contest with him for the possession of the same, and his object was the possession of the barrel and not the detention of Wolverton, and that Wolverton's person was not by him either detained or sought to be detained, you will find him not guilty; and this, though it should appear that Wolverton of his own free will remained upon the ground for the purpose of better asserting his claim to the barrel."[1]

§ 32. Defendant must act upon such information as would induce a reasonably prudent man to believe the person guilty.—

Instructions. The court instructs the jury that the plaintiff must satisfy them by a preponderance of the evidence: (1) That there was no probable cause for the arrest on the part of the defendant, and (2) that it was done maliciously; that "probable cause" was a reasonable ground of suspicion of guilt, supported by circumstances sufficiently strong in themselves to warrant a cautious and prudent man in entertaining an honest belief that a party is guilty; that if the defendant acted upon such information as would induce a reasonable, prudent man to believe the plaintiff guilty, he

on Torts, 169; Sackett's Revised Instructions, 581 (1888).

[1] McClure v. State, 116 Ind., 169; 9 S. W. Rep., 853 (1888).

was not liable, whatever might have been his personal motives; that the question of probable cause did not turn on the actual innocence or guilt of the party, but upon the defendant's belief at the time, upon reasonable grounds; that mere belief occasioned by the defendant's own negligence or want of proper investigation or reflection, would be no justification to him; that if the facts fell short of a legal measure of probable cause, and the defendant was honest in his error and acted in good faith, and from a sense of supposed duty, he would not be liable; that it must therefore be shown that he acted maliciously; that malice in its legal sense means an improper and sinister motive, not necessarily spite and hatred to the plaintiff; that the act need not have been prompted by malevolence or any corrupt design towards the plaintiff; that an act done wrongfully and without reasonable and probable cause, in a wanton disregard of the right of another, was malicious in law; and therefore, if they found that the defendant had acted in this case without probable cause, they might infer malice on his part, but that this inference might be rebutted by any circumstances which showed that the defendant's purpose was a fair and honest one.[1]

§ 33. Estoppel of plaintiff by false representations.—

Statement: An officer, after attaching property under a writ which might have been served either (1) by attachment of property, or (2) by arrest of the person, but not by both, was induced to abandon the attachment by false representations of the defendant that the property was not his, and thereupon to make service by arrest. It was held that such representation estopped the defendant, in a subsequent action against the officer for false imprisonment, to say that his property was attached, and it was immaterial that the property remained in the custody of the officer at the time of the arrest if he surrendered possession of it within a reasonable time thereafter.

Instruction: "An officer has no right to make an attachment of a defendant's property and a subsequent arrest on the same writ; and such arrest would be without justification. But if in the present case the jury find that the plaintiff, in this suit, told the officer that the property he had attached was not his, but belonged to other parties, and that the defendant then said, 'If the property is not yours, I am ordered to arrest you,' and the plaintiff said, 'Then I must go;' and that the officer, relying upon the assertion of the plaintiff, and intending to abandon the attachment, thereupon arrested the plaintiff, the plaintiff is estopped to claim in this suit that his property was in fact attached, and that his assertion was false. The defendant was not bound to omit arrest of the prisoner, to seek out some person authorized to receive the attached property, or to go to the place where it was, to discharge the keeper. If, before the arrest was made, the defendant made up his mind to release the attachment, and did in fact release it as soon as he reasonably could, having regard to all the circumstances of the case, that was sufficient at all events."[2]

§ 34. Persons assisting officers.—

Statement of the facts: Action by Daniel Firestone against Walter J. Rice and Frank Fenn for false imprisonment.

[1] Mitchell v. Wall, 111 Mass., 497 (1873).

[2] Ladrick v. Briggs, 105 Mass., 508 (1870).

This suit was brought to recover damages for false imprisonment alleged to have taken place on the night of August 6, 1885. Rice, at the time, was sheriff of Allegan county, and Fenn was night-watch of the village of Allegan. The arrest occurred in the township of Monterey, in that county. Upon the trial it appeared that Fenn was requested by the sheriff to aid him in the arrest, and did nothing except as ordered by the sheriff. The chief indignity complained of was the handcuffing of plaintiff. Fenn put the handcuffs upon him by direction of the sheriff, who had in his charge at the time one Zeigler, who was arrested at the same time and place as the plaintiff.

Instruction: "If Fenn knew that Rice was sheriff, and acted in obedience to his orders, and only upon his orders, in what he did touching the arrest, he would be justified in so doing, even though the acts of Rice were without authority, and the verdict, as to Fenn, should be, no cause of action. Under the laws of this state, a private citizen is bound, upon the order of the sheriff, to assist in the arrest, and he is not authorized to wait to ascertain the authority of the officer before acting; and unless his act in itself is in some way wanton, and beyond what he is required to do, and thereby a trespass is committed, he will not be liable."[1]

§ 35. Permitting a convicted party to go at large, and a year later arresting him on a capias.—

Statement: A party accused of the crime of assault and battery was tried, convicted and sentenced to pay a fine and costs on the 10th of July, 1850. Thereupon the party thus convicted was permitted to go at large, and no order for his committal was then made. On the 19th of June, 1851, nearly a year after this, the justice issued a *mittimus*, and the party was arrested by an officer and committed to prison. The writ of committal was a common *mittimus*, such an one as would have been appropriate on the day of the conviction if he had failed to pay the fine and costs. After his release he brought an action for false imprisonment against the justice.

Instruction: "If the jury were satisfied that the magistrate voluntarily suffered and allowed the plaintiff to pass from custody before him, and by his order or consent permitted him to go and be at large, the defendant, not having first issued a *capias* or any proper process to bring the plaintiff again before him, had no right to issue the *mittimus* aforesaid, and that, the same so issued being illegal, afforded no sufficient justification for the arrest of the plaintiff. The defendant, by causing his arrest upon such *mittimus*, was rendered liable in an action for false imprisonment."[2]

§ 36. Void warrant, etc., no justification in mitigation of damages, etc.—

Statement: Mrs. Justina Patzack was brought before Von Gerichten, a justice of the peace in St. Louis county, Missouri, on complaint of George Heitz, Jr., for disturbing of complainant and his family and of the neighborhood by loud and unusual noises and by vulgar and indecent language, etc. The justice had jurisdiction to hear the matter on a preliminary ex-

[1] Firestone v. Rice, 71 Mich., 377; 38 N. W. Rep., 885 (1888).

[2] Daggett v. Cook, 65 Mass., 262 (1853).

amination and to release or commit her for trial before the court having jurisdiction of the offense; but the justice proceeded, in excess of his jurisdiction, to hear the case, and finding her guilty he imposed a fine upon her, and in default of the payment he committed her to jail. Upon her discharge in January her husband, with her, then sued the justice, constable and jailor for false imprisonment. Judgment for plaintiff, $217.54.

Instructions for plaintiff: If the jury find from the evidence that Justina Patzack was and is the wife of Adolf Patzack, and was on or about November 13, 1879, imprisoned in the common jail of the city of St. Louis, without her consent, and kept there against her will for about twenty-four hours, then all those defendants aiding or assisting in imprisoning her are liable in damages to plaintiffs herein, and the complaint, warrant or commitment herein read to the jury are no justification to any one of the defendants.

Instruction for defendants: If the jury believe from the evidence that the defendant Von Gerichten was a justice of the peace, that the defendant Decker was a constable, that the defendant Ryan was the jailor, and that the only connection had by these defendants with the matters charged in the petition grew out of the official position so held by them as aforesaid, and that in all that was done by them in the premises they acted under the process read in evidence, in good faith, and without malice or any intention or desire to injure the plaintiff, the jury should take these facts into consideration in determining their verdict.[1]

§ 37. Arbitrary arrest — Joint liability.—

Statement: The plaintiff was living in Chicago and engaged in the grocery business. The defendants, M. and McH., were members of the city police. The evidence tended to show that on the night of the 10th of June, 1882, about 11 o'clock, the plaintiff, while standing on Wells street a little south of his place of business, discovered the defendants on the opposite side of the street dragging a man along the street. On discovering them he went to his own premises, getting there a little ahead of them. The man was in a drunken and helpless condition, making no resistance whatever, so that by a mere looker-on it could not have been told whether he was dead or alive but for the occasional groans that escaped him as he was being rapidly and recklessly dragged over the rough street. As they passed along in front of his premises the plaintiff hailed them and told them it was a shame to treat one as they were treating the man in their custody. The officers retorted in an insulting and abusive manner, whereupon the plaintiff told them he would on the following morning report them. This seemed to exasperate them, so that they came up to him, and M. seized him by the throat and choked him for some time, and then let him go. Then the plaintiff went into a saloon adjoining his premises and called on an acquaintance to come and identify him, stating that he was going along with the officers. The latter had followed him into the saloon, and McH. arrested him. While he was thus under arrest and being held by McH., M. came up and struck him a violent blow upon the head with a club,

[1] Patzack v. Von Gerichten, 10 Mo. App., 424 (1881).

which felled him to the floor in a senseless condition. The blow upon the head produced an ugly wound, from which the blood flowed freely. After some little delay, plaintiff was carried out of the saloon and laid down upon the sidewalk in a helpless and almost senseless condition, the wound still bleeding profusely. Upon reviving somewhat, he was taken to the police-station, where the defendants preferred against him the baseless charge of interfering with an officer, of which he was subsequently acquitted.

Instruction: "If the jury believe, from the evidence and under the instructions herewith given, that the defendants M. and McH. were both engaged in the common purpose of unlawfully arresting the plaintiff, and that McH. had laid hold of the plaintiff, and that M. immediately afterwards, in pursuance of said common purpose of unlawfully arresting said plaintiff, struck said plaintiff with a club, and that said striking was done in the presence of McH., and that he did not try to prevent the same, but on the contrary thereof, adopted and approved said act of said M. in striking said plaintiff, then the jury are instructed that said McH. is as responsible in this action for said striking as is M." [1]

§ 38. Duty of officer making an arrest upon view.—

Statement of facts: The defendant was a constable and arrested the plaintiff for being found in a public place in a state of intoxication. On the way to the lockup the plaintiff begged to be released, promising to go peaceably home and refrain from drinking any more. The defendant consented and suffered him to go at large, and did not in fact afterwards take him into custody on this charge, or make a complaint against him, or carry him before the court as he was required to do by the statute authorizing such arrests. The evidence showed that when the defendant released the plaintiff he told him to be on hand to go to court the next morning; that the defendant went to the clerk of the court for a warrant, but came away without one, and took no further steps in the matter. The evidence on the question of the plaintiff's being intoxicated was conflicting. The jury found for the plaintiff in the sum of $50.[2]

Instructions: (1) An officer who, without a warrant, arrests a person for being intoxicated, does so at his peril; and if it afterwards appears that the person so arrested was not in fact intoxicated, within the meaning of the statute, at the time of the arrest, the officer is liable in trespass, notwithstanding he made the arrest in good faith and under a reasonable belief that the person was intoxicated.[2]

(2) After an officer has, without a warrant, once arrested a person for being intoxicated in a public place, he is bound to carry him before a proper court; and if he fails to do so, he is liable, unless it is shown that the person arrested requested or consented to the discharge; and in order to release the officer from liability upon this ground, the jury must be satisfied that it was understood and agreed between the parties at the time that no further proceedings were to be taken in the matter.

[1] Mullin v. Spangenberg, 112 Ill., 142.

[2] Sustained, Phillips v. Fadden, 125 Mass., 198 (1878).

§ 39. Trespassers are jointly and severally liable.—

Statement: Victor M. Hardin sued William Ously and Thomas Ously in trespass. On the trial the plaintiff produced evidence tending to show that the defendants charged him with having stolen from one of the defendants some money and a watch, and that they tied him and whipped him to get the same back.

Instruction: (1) "The court instructs the jury that, in an action of trespass, if the jury believe, from the evidence, that a trespass has been committed, as alleged in the declaration, and that there was more than one wrong-doer engaged in the trespass, then such wrong-doers are jointly and severally liable, and the plaintiff is under no obligations to sue all who are engaged in the trespass; he may, at his election, proceed against any one or more of such wrong-doers."[1]

(2) "If the jury believe, from the evidence, that A. B., one of the defendants, and he alone, assumed the immediate control and detention of the plaintiff at the time in question, still, if you further believe, from the evidence, that the other defendants, or any of them, were then present, acting in concert with the said defendant A. B., and were wrongfully inciting him to arrest or imprison the plaintiff, then such other defendant or defendants will be equally liable with the said A. B., provided you find him guilty, under the evidence and instructions of the court."[2]

§ 40. When not liable as joint trespasser.— Although the jury may believe, from the evidence, that the defendant C. proved up his claim before the justice of the peace, as testified to by the plaintiff, still, unless you further believe, from the evidence, that the said C. aided, advised or assisted in the arrest of the plaintiff, then you should find the said C. not guilty, unless you further find, from the evidence, that since the arrest he has approved or adopted the acts of those who did cause it.[3]

§ 41. Who are liable as joint trespassers.—

Statement: M. claimed to have purchased a lot of books of F., and while the books were in M.'s possession they were seized on a writ of attachment sued out by B. C. and others against F., and by them directed to be levied upon the books as the property of F.

Instruction: The court instructs the jury that the law is, that all parties who engage in making an illegal or unlawful arrest are trespassers; and if the jury believe, from the evidence, that the defendants, or either of

[1] Ously v. Hardin, 23 Ill., 403; Sackett's Revised Instructions, 532 (1858).

[2] Whitney v. Turner, 1 Scam. (Ill.), 253; Sackett's Revised Instructions, 532 (1888).

[3] Cooley on Torts, 129; Avrill v. Williams, 4 Denio, 295; Abbott v. Kimball, 19 Vt., 551; Snydacker v. Brosse, 51 Ill., 357.

them, restrained the plaintiff of his liberty, as charged in plaintiff's declaration, and without authority of law, as explained in these instructions, then such persons are liable to the plaintiff in this action.[1]

§ 42. Part of defendants only guilty — Form of verdict.— If the jury believe from the evidence, under the instructions of the court, that some of the defendants are guilty of the trespasses alleged in the declaration and some not guilty, then the jury should find, in their verdict, in favor of the plaintiff and against those of the defendants who are so proven to be guilty, and, as to the other defendants, that they are not guilty, and in either case mentioning the defendants by name.[2]

§ 43. Liability of infant — Ratification.—

Statement: William Seaver, as next friend of Herbert Seaverns, a minor, began a suit against Mr. Burnham. Judgment was finally rendered in favor of Mr. Burnham, who thereupon brought an action against Seaverns, he having attained his majority, for malicious prosecution. The defendant's evidence tended to show that the action was brought in his name, without his knowledge, by Seaver, who was his uncle; that he himself took no part in conducting it; and that Seaver paid all the expenses and costs; but that evidence was controverted by the plaintiff. Upon cross-examination the plaintiff testified that he first knew of that action six weeks after it was begun; that he "knew of its pendency" from that time till the final judgment; and that judgment was finally entered therein for this plaintiff because this defendant did not wish to have the action prosecuted further after the death of his sister. The only other evidence of the assent of this defendant to that action was that he never interfered to prevent its prosecution until or except as above stated, and that about six months after it was begun he had an interview with the attorney employed to conduct it.

Instruction: "If the defendant has shown that he was an infant, and that the alleged malicious suit was brought without any authority from him or any consultation with him by his uncle as his next friend, at his own expense and charge, then the defendant was not responsible, even if, on hearing some time afterwards that the suit was brought by Seaver, he did not actively interfere to prevent its being carried out."[3]

Damages.

§ 44. Damages.— The court instructs the jury if they believe, from the evidence, that the defendant maliciously caused the arrest and imprisonment of the plaintiff, without probable

[1] Callaghan v. Myers, 89 Ill., 566; Sackett's Revised Instructions, 532 (1888).

[2] Sackett's Revised Instructions, 533.

[3] Burnham v. Seaverns, 101 Mass., 360 (1869).

cause, as alleged in the declaration, then the jury should find for the plaintiff, and assess his damages at what they think proper, from the facts and circumstances proved. Damages are of two kinds, compensatory damages and exemplary damages. The former are allowed to compensate the plaintiff for the actual injury he has sustained. The latter are given as smart money in the way of pecuniary punishment.[1]

§ 45. **Compensatory damages, when exemplary damages are not claimed.**— In this action the jury should only allow what are known as compensatory damages — that is, such an amount as will make good to the plaintiff the damages actually sustained by him, provided the jury find the defendant guilty; and if the jury find from the evidence, under the instructions of the court, that the defendant is guilty, then in fixing the plaintiff's damages they may include the delay in his business, if proved, also any bodily pain or mental anguish, if they believe, from the evidence, that such pain and mental anguish were suffered by the plaintiff in consequence of the acts complained of, and also any injury to the plaintiff's business, profession, reputation or social position, if they believe, from the evidence, that he has sustained such injury by reason of the wrongful acts complained of, and give the plaintiff such an amount of damages as they believe, from the evidence, will compensate him for the injury thus received.[2]

§ 46. **Exemplary damages defined.**— Exemplary damages mean damages given by way of punishment for the commission of a wrong wilfully or wantonly, or with some element of aggravation. They are not the measure of the actual damage sustained, but they are given as smart money in the way of pecuniary punishment, to make an example for the public good, and to teach other persons not to offend in like manner.[3]

§ 47. **Exemplary damages in false imprisonment.**— If, under the evidence, you find the defendant guilty, and if you believe from the evidence that he was guilty of wilful, gross and wanton oppression of the plaintiff, then, in assessing the

[1] Sackett's Revised Instructions, 299.

[2] Sackett's Instructions (2d ed.), 343 (1888).

[3] Bates v. Davis, 76 Ill., 222; Sackett's Revised Instructions, 343 (1888).

plaintiff's damages, you are not limited to the amount of his actual pecuniary loss, but you may also take into consideration his physical pain or bodily suffering, if any is shown, also his mental suffering, such as anguish of mind, sense of shame, humiliation, or loss of honor, reputation or loss of social position, if you find that these things have resulted from the acts complained of, and allow the plaintiff such compensation therefor as you think will make good the injury sustained.[1]

§ 48. **The same in malicious prosecutions — Pecuniary circumstances of defendant.**— In actions of this kind, if they find the defendant guilty under the evidence, and that the plaintiff has sustained any injury by reason of the charge brought against him, then, in assessing his damages, the jury are not limited to mere compensation for the actual damage sustained by him; they may give him such a further sum by way of exemplary or vindictive damages as the jury may think right in view of all the circumstances proved on the trial, as a protection to the plaintiff and as a salutary example to others to deter them from offending in like manner; and in determining the amount of exemplary damages which would be proper to give, the jury may take into consideration the pecuniary circumstances of the defendant so far as they have been proved.[2]

§ 49. **Defendant's wealth may be considered.**— "If the jury find that the defendant wantonly and maliciously caused the arrest of the plaintiff with the intent to injure his feelings and disgrace him in the estimation of the public, the jury not only may, but they ought to, go further, and give punitory damages in such a sum as will be a warning to the defendant and all other persons not to commit such wrongs and injuries. Punitory damages are given in law as an admonition to the defendant and all other persons not to perpetrate similar wrongs; and consequently such damages, to be effectual, must have some relation to the financial ability of the defendant. A sum in damages which would be a salutary warning to a

[1] Stewart et al. v. Maddox, 63 Ind., 52; Scripps v. Riley, 38 Mich., 10; Fenelon v. Butts, 53 Wis., 344; Sedg. on Dam., 35; Cutler v. Smith, 57 Ill., 252; Ill. & St. L. R. Co. v. Cobb, 68 Ill., 53.

[2] Winn v. Peckham, 42 Wis., 493.

man of limited means would hardly arrest the attention of a millionaire; and it is on that theory alone that the testimony of the financial ability of the defendant was admitted."[1]

§ 50. **Good faith in mitigation of damages.**— If, from the evidence, under the instructions of the court, the jury find the defendants, or any one of them, guilty as charged in the declaration, still, if you further find, from the evidence, that in making the arrest complained of, such parties, in good faith and without malice, were only pursuing what they supposed were their just rights, by legal remedies, then this fact may be considered by the jury in fixing the amount of damages, and as tending to show that only actual damages should be given.[2]

[1] Spear v. Hiles, 67 Wis., 350; 30 N. W. Rep., 500 (1886).

[2] Sackett's Revised Instructions, 533.

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