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THE ACTION FOR THE MALICIOUS PROSECUTION OF A CIVIL SUIT.

(*Continued from p.* 290, *ante.*)

VI. *The American Adjudications. The Action not sustained.*—We turn now to the American adjudications on the subject; and here we find a conflict. We shall first review chronologically the cases in which the English doctrine has been followed, passing afterwards to those where the action has been sustained.

The earliest case in which the question was presented to the courts of this country seems to be *Taylor* v. *Wilson*, Coxe 362, determined in the Supreme Court of New Jersey in the year 1795. The report is very brief, the following being a complete copy: "Taylor against Wilson. On *certiorari*. It appeared from the return in this case, that Taylor, the defendant below, had been summoned to answer Wilson in a plea of damage; Wilson's action appeared to have been in part to recover from Taylor certain costs and expenses which he had incurred in defending himself in a suit brought against him by Taylor before Justice TATEM, in which the justice decided there was no cause of action. PER CURIAM.—This judgment must be reversed; no action lies for such expenses, though there can be no doubt Wilson has been injured." The reporter's *syllabus* to the case is in these words: "No action lies to recover the expenses to which a party has been put by being improperly sued."

The report of *Woodmansie* v. *Logan*, 1 Penn. (N. J.) 68, decided in New Jersey in 1806, contains this quaint head note: "Action lies not for bringing and failing in a suit." The demand was evidenced by the following bill:

SAMUEL WOODMANSIE,

TO ROBERT LOGAN, DR.

For expense going to Monmouth	$20.00
For my damage on the same account	50.00
	$70.00

There was a judgment below in favor of the plaintiff for $50 and costs, which was reversed on appeal. "There are sundry errors in the form of proceeding in this case," said KIRKPATRICK, C. J., "but I think there is also one which goes to the ground of the action itself. The second reason assigned for reversal is in substance, that Woodmansie, as administrator of Penelope Woodmansie, had brought an action against Logan for a debt said to be due to the estate, before a justice at Freehold; that Woodmansie, in that action, became nonsuited, and that Logan, for the damages he had sustained by that prosecution, brought this action and obtained judgment. And upon inspecting the case filed, this reason appears to be well founded. The statement is indeed very vague and uncertain, but if anything can be drawn from it, it is the train of facts set forth in this reason, and nothing more. There is contained in it no pretence of Logan's having been held to bail oppressively, or of his having been imprisoned, or any other special grievance. Now it is clearly established in our books, that for commencing a civil action, though without sufficient cause, no action on the case for a malicious prosecution will lie. Every man is entitled to come into a court of justice and claim what he deems to be his right; if he fails he shall be amerced according to the old principle for his false claim, and the defendant is entitled to his costs, and with those he must be content. It was formerly held, it is true, that if a plaintiff procured the defendant to be held to excessive bail, or to be imprisoned for want of such bail, by any false declarations or representations, an action would lie against him for special damages on account of these false representations or declarations; but never merely because he prosecuted an action of law in which he failed. And indeed, now the doctrine of bail

is more precisely fixed by statute, and in most cases it is put beyond the power of the plaintiff to oppress in this respect, which too is eminently the case in justices' courts; it is much to be doubted whether actions for malicious prosecutions in civil cases will lie at all. Be that, however, as it may, no such thing is pretended here."

In *Thomas* v. *Rouse*, 2 Brev. 75, a South Carolina case, decided in 1806, BREVARD, J., said: "To bring a civil action, though there should be no ground for it, is not actionable unless for consequential damages. It is a claim of right, and the plaintiff may sue at the peril of costs. If it appeared the action was vexatious and malicious, or with a view to oppress the party, by holding him to unreasonable bail, the plaintiff would be entitled to recover."

Ray v. *Law*, 1 Pet. C. C. 207, arose in the federal court in Pennsylvania, in 1816, and Mr. Justice WASHINGTON said: "This is an action for what is called a malicious prosecution. The grounds of the action are a vexatious suit, brought against the plaintiff maliciously and without probable cause, and holding him to excessive bail. The law in relation to actions of this nature is not disputed in this case. Demanding excessive bail, although the plaintiff has a well-founded cause of action, or holding to bail when the plaintiff has no cause of action, if done for the purpose of vexation, entitles the party aggrieved to an action for a malicious prosecution. If bail be not demanded, it is unimportant how futile and unfounded the action may be, as the plaintiff is punished by the payment of costs, and the defendant is not materially injured."

In *Potts* v. *Imlay*, 1 South. 330, the question came before the Supreme Court of New Jersey in the year 1816. The facts were these: Potts commenced a suit against Imlay in an inferior court, on June 10th 1813, the summons being made returnable June 19th. On that day, at the request of Potts, the cause was adjourned until July 10th, on which day he did not appear, but suffered a nonsuit. On July 17th he commenced another action against Imlay, in the same court and for the same sum as before, the summons being made returnable July 27th. On that day he obtained a continuance till August 7th, when he discontinued the suit. Thereupon Imlay brought an action for malicious prosecution, and obtained a judgment for damages in the sum of $50. The case was then removed to the Supreme Court by *certiorari*, the principal reason

relied on for reversal being that the action was not maintainable. Of this opinion were a majority of the court. Said KIRKPATRICK, C. J.: "There are several reasons assigned for the reversal of this judgment, but the one principally relied upon, and the only one of which I shall take notice, is the fourth, that is to say, because the state of demand is illegal and insufficient, and contains no lawful cause of action. The cause has been twice argued at the bar upon this reason, the last time at the request of the court, and with much ability. The books have been searched for four hundred years back, and upon that search it is conceded, even by the counsel for the plaintiff below himself, that no case can be found in which this action has been maintained in circumstances similar to the present. It is true that there are general expressions made use of by some of the annotators which might seem, at first view, to embrace the case, as in Hargrave's Notes upon Co. Lit. 161, and some others; so, also, in some of the reporters. But these general expressions, by fair rules of construction, are to be limited and compared with the adjudged cases themselves, and not to be carried beyond them. With such limitation, of which too they will very fairly admit, they are perfectly consistent with general principles, but without it they are not law. Formerly the amercement, now the costs, are the only penalty the law has given against a plaintiff for prosecuting a suit in a court of justice in the regular and ordinary way, even though he fail in such prosecution. The courts of law are open to every citizen, and he may sue, *toties quoties*, upon the penalty of lawful costs only. These are considered as a sufficient compensation for the mere expenses of the defendant in his defence. They are given to him for this purpose, and he cannot rise up in a court of justice and say the legislature have not given him enough. If we were legislators, indeed, perhaps we should be inclined to say that the costs, in all cases where costs are given, should completely indemnify the party for all his necessary expenses, both of time and money; but those to whom this high trust is committed in this state, have thought, and we will presume, have wisely thought, otherwise. In England it is believed that costs are in some measure discretionary with the court, and are apportioned to the circumstances of the case; but here it is not so. They are fixed by statute; they can neither be increased nor diminished, but, *ceteris paribus*, are precisely the same in all cases. Perhaps a greater latitude given to the courts

of justice ought, in some degree, to alleviate the hardships now complained of. Besides, if we go to the very equity of the thing, which seems to be the ground of argument here taken, the same reasoning which is here used to prove that the defendant ought to have damages upon a false claim, would also prove that the plaintiff ought to have damages upon a false plea. He is put to all the expense of a trial upon such plea, and yet he can recover nothing therefor but his lawful costs; though surely all experience teaches us that the plea of the defendant is not less frequently false than the claim of the plaintiff. But to what excesses would this lead us? Where would litigation end? The truth is that merely for the expense of a civil suit, however malicious and however groundless, this action does not lie, nor ever did, so far as I can find, at any period of our judicial history. It must be attended, besides ordinary expenses, with other special grievance or damage, not necessarily incident to a defence, but superadded to it by the malice and contrivance of the plaintiff; and of these an arrest seems to be the only one spoken of in our books. * * * Upon the whole, upon the strength of these authorities, I think it may be laid down as law that this action cannot be maintained for prosecuting a civil suit in a court of common law having competent jurisdiction, by the party himself in interest, unless the defendant has, upon such prosecution, been arrested without cause and deprived of his liberty or made to suffer other special grievances different from and superadded to the ordinary expense of a defence. The case before us is for a suit commenced by summons where there could be no arrest, nor does the state of demand set forth any grievance or damage, other than or different from the common expenses of making defence in suits of this kind. That the litigation was protracted as far as the rules of the court would admit, that it was renewed and ultimately discontinued by the party does not alter the case. These circumstances are, at most, only evidence that the prosecution was malicious and without probable cause; but this is not enough. There must be a special grievance, and that specifically charged in the complaint filed." ROSSELL, J., dissented, saying: "The reason why but few cases of malicious prosecution are found in the English reports is, that the costs are sufficiently great to deter men from bringing suits there merely for vexation. So, in our courts of more extensive jurisdiction, perhaps no case can be shown of a person, from malice only, prose-

cuting a suit, the costs of which would inevitably fall on himself. But since the jurisdiction of justices' courts has been increased, many instances have arisen of persons being summoned from their homes, thirty or more miles, to defend themselves against a groundless demand, maliciously contrived to harass and perplex them. Unprincipled men have frequently boasted, on some real or imaginary injury, that they would be revenged on their antagonists by harassing them with feigned demands, before justices thirty or forty miles distant, as the costs would amount to a few cents only. If, then, not a solitary case could be found in any English reporter, nor even the principle in terms hinted at, I should not hesitate to say the action was maintainable on principles of common sense, common right and common justice." But the third member of the court concurred with KIRKPATRICK, C. J., and the action was dismissed.

"I agree," said SOUTHARD, J., "in opinion with the chief justice. The positions laid down by him I believe are law, and I cannot add to their elucidation. Originally when a false claim was made and a vexatious suit carried on, the plaintiff was subject to amercement, but he was not subject to damages in addition. That was considered sufficient, and it was not the notion of those days to prevent men from applying to courts for a redress of their grievances. After the amercement fell into disuse, the legislature interfered and gave costs; but for what purpose? To compensate the party for his ordinary and regular expenses in his suit, but not for any injury out of the usual and common course of proceeding in courts of justice. For such it did not pretend to apply a remedy. The legislature no doubt supposed that it had given costs enough to effect the purposes which it had in view. It did not intend that the party should come in, say that the provision was not ample enough, that the costs did not satisfy his expenses, and therefore claim damages by suit to correct the miscalculation of the legislature. It was alleged, however, in the argument at the bar, that in the court for the trial of small causes no costs are really received by the defendant for his own benefit and to pay his expenses; and therefore that he must be entitled to sue where he has been put to cost in that court. The reasoning is fallacious. In this as in every other court, the legislature have fixed what costs shall be given. If it was thought best that these costs should amount only to so much as the party was obliged to pay to

the officers and witnesses, &c., still it is a legislative determination of the matter, and parties have no right to object to it. Besides quite as much money does go into the pockets of the parties in that court as in any other. Parties nowhere put money into their pockets by bills of costs; they never remunerate them for time, labor or expense; they only amount to the sums lawfully due to the officers and witnesses. In every suit, no matter how regular or correct in law and justice, both plaintiff and defendant are compelled to submit to a considerable amount of expenses, which bills of costs can never reach nor ever were designed to reach. I cannot believe that the defendant can recover these expenses by suit, where he can prove that the plaintiff maliciously sued him. This would neither be lawful nor expedient. He must be able to show something more, as arrest or special grievance. Those cases which were cited to show that expense alone was sufficient to maintain the action, do not contradict this position. They are all criminal cases, or refer to and are founded on them. * * * It is not unlikely that some of the inconveniences which have been mentioned at the bar will result from the doctrine now established in the court for the trial of small causes. Unprincipled men are often to be found in every society who, for the sole purpose of vexing and harassing a neighbor who they dislike, will bring many malicious suits, if the only evil they are to suffer is the payment of costs in that court. But the contrary doctrine would lead to consequences not less unpleasant; and if this were not so we cannot here remedy the evil. By enlarging the jurisdiction of justices and giving almost nominal costs, the legislature have offered temptations to the malignant to bring vexatious suits. Higher costs would repress this feeling. It is only in that court that such suits are heard of. But the law I conceive to be clear, and if remedy be necessary it must come from a different authority from this court." See also *Allgore* v. *Stillwell*, 6 N. J. (Law) 166 (1822).

The latest case in the courts of this country, in which the topic of this article was passed upon, is *McNamee* v. *Minke*, 49 Md. 122, decided by the Court of Appeals of Maryland in 1878. The declaration stated that the defendant sued out an ejectment-writ commanding the sheriff to summon the plaintiff to answer the defendant in an action of ejectment; that in said action the defendant falsely and maliciously claimed of the plaintiff *all* of the

lot sued for (known as lot 6), when in fact he had no probable cause of action against the plaintiff for the whole of that lot; that the trial resulted in a verdict that the defendant should not take the whole of said lot, and that the plaintiff had been put to trouble and expense in defending said suit for which he claimed damages. Various questions of pleading were raised by the defendant. The court after disposing of them said: "But this record is inadmissible upon the broader and more substantial ground that, when considered in connection with the allegations in support of which it is offered, it fails to show such a prosecution as will maintain the present action. It is true a party may be held liable for a false and malicious prosecution of either a criminal or civil proceeding; but 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 and malicious seizure of property, or the false and malicious placing the plaintiff in bankruptcy, or the like. * * * If the plaintiff declares that he has been falsely and maliciously arrested, or that by reason of a false claim maliciously asserted by the defendant he was required to give bail, and upon failure he was detained in custody or his property was attached, there the action lies because of the special damage sustained by the plaintiff. It is not enough, however, for the plaintiff to declare generally that the defendant brought an action *ex malitia et sine causa, per quod* he put him to great charge, &c.; but he must allege and show the grievance specially. Otherwise parties would be constantly involved in litigation, trying over cases that may have failed, upon the mere allegation of false and malicious prosecution."

VII. *The American Adjudications. The Action sustained.*— We pass now to the cases in which the courts of this country have intimated or expressly ruled that the action is maintainable.

Vanduzor v. *Linderman*, 10 Johns. 106, was decided in the Supreme Court of New York in 1813. The plaintiff sued the defendant before a justice for the loss of the service of his son whilst defending a certain suit brought against him by the defendant, and for money paid by the plaintiff in behalf of his son in and about defending the said suit. There was a trial by jury and a verdict for the plaintiff for $3, for which the justice gave judg-

ment. The defendant appealed. PER CURIAM.—"No action lies merely for bringing a suit against a person without sufficient ground. To sustain a suit for a former prosecution it must appear to have been without cause and malicious, and an action for malicious prosecution is not cognizable before a justice. Judgment reversed." It will be observed that though the language of the court is broad enough to include an ordinary civil action, yet the case itself went off on a question of jurisdiction, and the expres sions of the court are therefore *obiter*.

Pangburn v. *Bull*, 1 Wend. 345, which arose in New York in 1828, is the next case. The declaration alleged that P. not having any reasonable or probable cause of action against B., as he well knew, sued him before a justice of the peace in an action of trespass in the case; that B. appearing, P. after one adjournment discontinued the case, but immediately thereafter commenced another suit on the same claim, in which after a trial judgment was rendered against P. for the costs of the suit, whereby he was greatly damnified, &c. It was argued that there having been no arrest or holding to bail the action would not lie. But the Supreme Court thought differently, and affirmed the plaintiff's judgment for $7.25, WOODWARD, J., saying: "From an examination of the cases it appears that an arrest and holding to bail are not indispensably necessary in order to maintain an action for a malicious prosecution. It has been sustained in cases where there was neither an arrest or 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." But all the cases cited by the judge were cases of "arrest or bail."

In *Whipple* v. *Fuller*, 11 Conn. 582, decided in Connecticut in 1836, the plaintiff's property had been attached in an ungrounded and malicious suit for slander, in which the defendant had been nonsuited, and he sued to recover damages. "The defendant," said CHURCH, J., "claims that no action will lie at common law to recover damages sustained in consequence of being maliciously sued and prosecuted in an unfounded civil action, unless the body of the defendant in such action was arrested or holden to bail; neither of which was done in the vexatious suit complained of. This objection requires consideration. It certainly has received plausibility, if not direct countenance, from the remarks of some

learned commentators, as well as from the decisions of courts. * * * It seems to be conceded that when anything is done maliciously, besides merely commencing and prosecuting a malicious or vexatious action, a suit for damages sustained by such act may be maintained. And therefore it is that an action is sustainable for a malicious arrest or a holding to bail for too large a sum, and for maliciously suing out and levying a writ of *fieri facias*. Upon the same principle an action may be maintained where the property of a party has been maliciously attached upon *mesne* process, under all jurisdictions where such attachments are known. But we wish to place our decision of this question upon broader principles; principles which we believe have received the sanction of the common law in its earliest ages. Before the statute which was passed in the fifty-second years of Henry III., no costs were recoverable in civil actions. This statute, and others subsequently enacted, gave costs to successful defendants, as it is said, by way of damages against the plaintiff *pro falso clamore*. Whatever might have been true when the several statutes giving costs were enacted, we cannot at this day shut our eyes to the truth known by everybody that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit; and of course this remedy is not adequate to repair the injury thus received; and the common law declares that for every injury there is a remedy. Before the statutes entitling defendants to costs existed, they had a remedy at common law for injuries sustained by reason of suits which were malicious and without probable cause. And this principle is and ought to be operative still in all cases where the taxation of costs is not an ample remedy. It is upon this principle, in part at least, that actions have ever been sustained for malicious criminal prosecutions, in which no costs are taxed in favor of the accused."

Cox v. *Taylor*, 10 B. Mon. 17, was determined in Kentucky in 1849. The action was for maliciously suing out and keeping up an injunction whereby the plaintiff was restrained from the use of his land for several years; but in rendering the judgment of the Court of Appeals, MARSHALL, C. J., said: "The action is essentially for a malicious prosecution, that is for the groundless institution and prosecution of a suit without probable cause. The common law did not give this action merely on the ground that the former plaintiff may have been unable to establish a claim

asserted by suit, although the decision of that suit might conclusively determine the injustice and wrongfulness of his claim. It allowed every man to pursue his claims by the established remedies, subject to no other burthens or penalties but such as were incident to the remedies themselves in case of failure, unless he had resorted to them not only without such actual grounds as would insure success, but without even probable cause or ground for the proceeding, and therefore presumably for the mere purpose of harassing or injuring the other party, either in respect to his life, liberty, property or reputation. And the principle is the same whether the malicious proceeding be a criminal prosecution or a civil suit. In either case the wrong consists not merely in the falsity and consequent injustice of the charge or claim, but in its being made by legal proceedings without probable cause, and therefore as the law decides from malicious motives alone."

In *Closson* v. *Staples*, 42 Vt. 209, decided by the Supreme Court of Vermont in 1869, it appeared that C. had signed a promissory note as surety for one K., payable to S. or bearer. K. paid the note at maturity, but S. failed to deliver it up, alleging that he had lost it, and K. afterwards enlisted in the army and died in another state leaving no property. S., after the decease of K., produced the note, claiming that it had not been paid, demanded payment of C., and threatened trouble if the matter was not settled. Subsequently S. procured one B. to commence a suit against C. on it, in which case judgment was finally rendered against B. on the merits. C. then brought an action against S. on these facts, alleging that he could not recover any of his taxable costs against B. as he was worthless, and that he had been put to "great trouble, annoyance and expense, in looking up witnesses, preparing his defence to said suit, and employment of counsel and attending said court, and other large expenses of time and money and teams." In the Supreme Court it was held that he was entitled to recover, WILSON, J., delivered an exhaustive opinion: "This is an action on the case for malicious prosecution of a civil suit," said the learned judge, "and the first question is whether the court erred in their refusal to charge the jury as requested by the defendant. The case states that the plaintiff introduced testimony tending to prove all the allegations of his declaration, and the necessary facts to entitle him to recover, except it was not proved that the plaintiff in this suit was arrested, or any property attached on the writ

in the suit mentioned in the declaration which S. caused to be prosecuted, but it was served on C. only by the officer delivering him a copy. The defendant requested the court to charge the jury that the action could not be maintained without proof that C. was arrested or his property attached in that original suit. This leads us to consider whether an action for malicious prosecution of a civil suit without reasonable or probable cause will lie where the process in the suit so maliciously prosecuted is by summons only.. In England before the statute of Marlbridge no costs were recoverable in civil actions. It seems that before the statutes entitling the defendant in civil actions to costs, if the suit terminated in his favor, he might support an action at common law against the plaintiff if the proceeding was malicious and without probable cause. But in England, since the statutes which give costs to the defendant in all actions in case of a nonsuit or verdict against the plaintiff and in other stages of the cause, it seems that no action can be maintained merely in respect of a civil suit maliciously instituted, except in some cases under legislative provisions, and perhaps excepting cases where the defendant failed to obtain the ordinary costs owing to the insolvency of a third party in whose name the suit was prosecuted. It is said that those statutes give costs to successful defendants by way of damages against the plaintiff *pro falso clamore.* * * * There does not appear to be any conflict in the authorities that where anything is done maliciously, besides commencing and prosecuting a malicious or vexatious action, a suit for the damages sustained by such act may be maintained. * * * It is said in some of the cases that where the process in the malicious and unfounded suit is by attachment, an action will lie for the damage the party sustains, because in such case no cost is allowed which can be a compensation for the personal injury. But we think the fundamental principles and analogies of the common law, as laid down by the text writers and early decisions of the English courts, do not make the manner in which the service of the process was made essential to maintain the action. The common law declares that for every injury there is a remedy. * * * The early English cases show very clearly that before the statute entitling defendants to costs they had a remedy at common law for injuries sustained by reason of suits which were malicious and without probable cause. It would seem, however, from more recent decisions that the present English rule,

which restricts or limits the right of action for maliciously prosecuting civil suits without probable cause, stands mainly upon the ground that the costs which the statute provides the successful defendant shall recover are an adequate compensation for the damages he sustains, but under their rule it does not appear that the right of action is restricted to those cases where the process is by attachment. The justice or equity of the English rule, as a part of their system of jurisprudence, there is no occasion to consider. But in our own state not only the mode of process in civil actions, but also the general provisions of our statute for taxing costs to the defendant, when the suit terminates in his favor, are opposed to making it essential to sustain an action for the malicious prosecution of a civil suit without probable cause, that his body was arrested or his property attached. * * * Our statute by which the prevailing party recovers certain costs incurred in the prosecution or defence of a civil action, stands upon the ground that certain claims and rights, in respect to the matters in issue, are asserted that in the adjudication of which a civil action, when brought and prosecuted in good faith, is a claim of right; and in order to place the administration of the law upon reasonable grounds, in respect to the rights asserted and recoverable costs, the expenses of litigating the claims of the parties, over and above certain items of costs, which the statute allows the prevailing party to recover, should be borne by the respective parties by whom such expenses are incurred without regard to the result of the suit. But the system of taxing costs under our statute, except in a very few cases, was enacted with reference to suits brought and prosecuted in good faith. In suits so brought and prosecuted the defendant may be subjected, or he may subject himself, to expenses not recoverable, even if the suit terminates in his favor; but of this he has no legal ground to complain when the suit is brought and prosecuted in good faith, because 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 where 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 only, 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 on the case."

In *Marbourg* v. *Smith*, 11 Kans. 554, decided by the Supreme Court of Kansas, in 1873, M. & L., as partners, had sued S. for slander, the case being dismissed at M. & L.'s costs. S. thereupon brought an action for malicious prosecution, and recovered judgment for $75, which was affirmed on appeal. "The only question of law arising upon the last assignment of error," said VALENTINE, J., "is whether an action for malicious prosecution can be maintained in a case like the one at bar, where neither the person nor property was seized, nor bail nor security required, and the ordinary costs of defending the alleged malicious prosecution have been allowed. Our opinion upon this case has already been foreshadowed. We suppose that an action for malicious prosecution can 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, (citing *Whipple* v. *Fuller*, 11 Conn. 582; *Closson* v. *Staples*, 42 Vt. 209; *Pangburn* v. *Bull*, 1 Wend. 345). At common law the defendant in such a case always had a remedy. Originally it was an action for malicious prosecution; subsequently it was amercement of the plaintiff, *pro falso clamore*. But now and in this state an amercement is abolished; the defendant must return to his original remedy of malicious prosecution. It is an old maxim that there can be no legal right without a remedy, and the legal right in such a case has always been recognised."

In *Woods* v. *Finnell*, 13 Bush 629 (1878), 17 Am. Law Reg. (N. S.) 689, decided in Kentucky, in January 1878, the declaration alleged that the plaintiff and defendant were both citizens of the county of Mercer, Ky.; that the defendant, for the purpose of annoying the plaintiff and subjecting him to unnecessary expense and trouble, falsely pretended to change his residence to the state

of Indiana, and that he actually went to that state, not for the purpose of residing there in good faith, but to enable him to institute a suit in the United States Circuit Court for the district of Kentucky, for an assault alleged to have been committed by the plaintiff on the defendant; that claiming his residence in Indiana, he falsely and maliciously, and without reasonable cause, instituted a suit against the plaintiff for the said assault; that a trial was had and judgment rendered against the defendant, and that the plaintiff was thereby put to great expense defending the suit, for which he claimed damages. A demurrer was sustained in the court below, but on appeal the judgment was reversed. Said PRIOR, J., "The action instituted in the United States Circuit Court being a civil action, the sole question in these cases is, can an action for malicious prosecution, or rather an action on the case, be maintained for the institution and prosecution, without probable cause, of a malicious and vexatious suit. The elementary books, in 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 one 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. (3 Cooley's Blackstone, and notes, 126; 2 Selwyn's Nisi Prius 252.) This rule was evidently established after the enactment of the Statute of Marlbridge, giving to the defendant his costs in the event the plaintiff was nonsuited or failed to recover; for at common law, prior to that enactment, such actions could be maintained whether the property of the defendant was seized or not, or whether he had incurred expense in defending it; and regarding, then 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. After the statute giving costs to the defendant, it was held by the common-law courts that no action could be maintained on account of the institution and prosecution of a civil action without probable cause, and therefore no action could lie for a vexatious ejectment. In all such cases the plaintiff must have gone beyond the proper remedy for the enforcement of his claim, such as procuring an illegal order of arrest or requiring excessive bail, before the action could be maintained. This entire doctrine is based on the idea that the plaintiff bringing the action is sufficiently punished, and the

defendant fully recompensed by the statute requiring the plaintiff to pay all the costs. We perceive no good reason for following this rule, and denying to the defendant a remedy when his damages exceed the ordinary costs of the action. The fact that a plaintiff has been subjected to the payment of costs *pro falso clamore*, is no recompense to the defendant when the latter has, by reason of the malicious proceeding on the part of the plaintiff, sustained damage. In cases where the plaintiff has mistaken his action, or been nonsuited, or where, by reason of some imaginary claim, he has seen proper to sue the defendant, it is not pretended that any action for damages can be maintained; but where the claim is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery for the expenses incurred and damages sustained, should be as fully recognised as if his property had been attached or his body taken charge of by the sheriff. While the damages may be less in the one case than the other, the legal right exists and some remedy should be afforded. If the facts alleged in these petitions are true, and they must be so treated on demurrer, it would be a singular system of jurisprudence that would admit the wrong and still withhold the remedy. 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 plaintiffs in each of these cases; 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 courts should see that a remedy is afforded for that purpose."

VIII. *Conclusion.*—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* v. *Wilson*, in New Jersey; *Thomas* v. *Rouse*, in South Carolina, and *McNamee* v. *Minke*, in Maryland—hold that the action is not sustainable *because* it is not; three—*Woodmansie* v. *Logan* and *Potts* v. *Imlay*, in New Jersey, and *Ray* v. *Law*, 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 *Vanduzor* v. *Linderman*, the opinion of the court is *obiter*, and at the same time far from clear, and in the Kentucky case of *Coxe* v. *Taylor*, the defendant complained of the malicious issuing of an injunction which had caused him special damage. In but five cases: *Pangburn* v. *Bull*, in New York; *Whipple* v. *Smith*, in Connecticut; *Closson* v. *Staples*, in Vermont; *Marburg* v. *Smith*, in Kansas, and *Woods* v. *Finnell*, in Kentucky, do the courts recognise 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 the costs of the defence, 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 where nothing of this kind has occurred they say to the debtor, "The law does not fail to recognise that you should be recompensed for the damages you have suffered in resisting a malicious and unfounded suit, and that your persecutor should be made to reimburse you. If you have been damaged beyond the ordinary costs of a lawsuit, this is the tribunal to which you may appeal. But if you have been damaged to that extent and no more, you can not 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 defence: *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.

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