no violation of principle in a court, even if thereby it does set aside its former decision as inapplicable, and adopt a new one as suited to the new phase of the controversy:" Wells, *op cit.* sect. 619; *Yates* v. *Smith*, 40 Cal. 671; *Dodge* v. *Gaylord*, 53 Ind. 365.

X. AFFIRMANCE BY EQUALLY DIVIDED COURT.—Where the deliberations of the appellate court result in an affirmance of the judgment of the trial court, in consequence of an equal division of opinion among the judges, no binding precedent is thereby established. The judgment in such a case, although it is as conclusive upon the rights of the parties to the litigation as any other would be (*Durant* v. *Essex Co*, 7 Wall. 107), is not considered as settling the questions of law as to cases which may arise between other parties: *Morse* v. *Goold*, 11 N. Y. 285; *Bridge* v. *Johnson*, 5 Wend. 342.

H. CAMPBELL BLACK.

Williamsport, Pa.

RECENT ENGLISH DECISIONS.

House of Lords.

ABRATH *v.* NORTHEASTERN RAILWAY COMPANY.

In an action of malicious prosecution, the burden of proving malice and the absence of reasonable and probable cause is on the plaintiff.

The facts in this case held to warrant a finding of the presence of reasonable and probable cause and the absence of malice on the part of the defendant.

Per Lord BRAMWELL: An action for malicious prosecution does not lie against a corporation aggregate; such a corporation being incapable of malice or motive.

APPEAL from a decision of the Court of Appeal.

The facts are set out in the report of the case before the Court of Appeal, 11 Q. B. D. 440. For the present purpose the following brief statement will suffice: one McMann recovered from the respondents a large sum as compensation for personal injuries in respect of a railway collision. Information having been given to the company's directors they caused inquiries to be made by the company's solicitor. The results of those inquiries were laid before counsel, who advised that the appellant, Dr. Abrath, should be prosecuted for conspiring with McMann to defraud the company by falsely pretending that McMann had been injured in the collision and by artificially manufacturing symptoms of injury. The respondents accordingly prosecuted appellant, who was acquitted. In an action brought by him

against the respondents for malicious prosecution, CAVE, J., directed the jury that it was for the plaintiff to establish a want of reasonable and probable cause and malice, and that it lay on him to show that the defendants had not taken reasonable care to inform themselves of the true facts of the case, and asked the jury whether they were satisfied that the defendants did take reasonable care to inform themselves of the true facts, and that they honestly believed in the case which they laid before the magistrates. The jury answered both questions in the affirmative, and CAVE, J., entered judgment for the defendants.

The Divisional Court, GROVE and LOPES, JJ., ordered a new trial on the ground of misdirection (11 Q. B. D. 79). The Court of Appeals (BRETT, M. R., and BOWEN and FRY, L.JJ.) reversed this decision and ordered the judgment of CAVE, J., to stand (11 Q. B. D. 440). From this decision the plaintiff appealed.

Sir C. Russell, A. G. and *MacClymont* (*H. Adkins* with them), for the appellant.

Digby Seymour, Q. C., *Sir Henry James*, Q. C., *Gainsford Bruce*, Q. C., and *J. Lawson Walton*, for the respondents were not heard.

EARL OF SELBORNE: My Lords, the argument of the learned counsel for the appellant has cleared up any difficulty which there might have been as to the real grounds on which we should decide this case. The question is really one of the weight of evidence, and nothing else. The burden of satisfying the jury that there was no reasonable and probable ground for the prosecution lies upon the plaintiff. It is not now seriously disputed that it does.

The learned judge having left two questions of fact to the jury, they found, first, that proper care had been used by the prosecutors to inform themselves of the facts; and, secondly, that the prosecutors honestly believed the case which they laid before the magistrates.

In my judgment, the learned judge did not misdirect the jury, and the Court of Appeal were right in their view of the law; and the only question is, is there any ground for saying that upon the weight of evidence, the jury miscarried, and that a new trial ought to be directed? Speaking for myself, I cannot imagine a more hopeless case in that point of view. The railway compa[illegible]

determine whether or not they would institute this prosecution; and the evidence given by the gentleman who was acting for them in the matter is, to my mind, as completely sufficient to negative the idea of the absence of reasonable and proper care on the part of the company to inform themselves of the facts as anything for the purpose of an action of this sort can be.

The statements of certain persons were obtained, carefully considered and laid before counsel, and counsel advised a prosecution upon those materials. A prosecution having been instituted, it was thought by the magistrates, that the preponderance of evidence was such that they ought to send the case for trial. Taking the evidence as it was presented to the railway company, to those who advised them, and to the magistrates, it was a body of evidence which it believed tended to prove the charge, and justified those who believed it in making the charge in perfect good faith. How can it be said that taking such a body of evidence as that, without the suggestion, much less proof of the use of any fraudulent or improper means to obtain it, shows a want of reasonable care on the part of the company to inform themselves about the facts, I cannot imagine. I connot conceive better *prima facie* evidence of reasonable care in that respect.

[His Lordship then discussed the evidence in detail, and concluded thus:] So far from thinking that there is a preponderance of evidence against reasonable and probable cause, my doubt is rather on the other side, whether on the whole evidence there was really anything to go to the jury in favor of that conclusion.

I move your Lordships that the order appealed from be affirmed and the appeal dismissed with costs.

LORD BRAMWELL: My Lords, I am of opinion that no action for a malicious prosecution will lie against a corporation. I take this opportunity of saying that as directly and peremptorily as I possibly can; and I think the reasoning is demonstrative. To maintain an action for malicious prosecution, it must be shown that there was an absence of reasonable and probable cause, and that there was malice or some indirect and illegitimate motive in the prosecutor. A corporation is incapable of malice or motive. If the whole body of shareholders were to meet and in so many words to say, "prosecute so and so, not because we believe him guilty, but because it will be for our interest to do it," no action would lie against the corporation, though it would lie against the shareholders who had

given such an unbecoming order. If the directors even, by resolution at their board, or by order under the common seal of the company (I am putting the case plainly in order that there may be no mistake about it), were maliciously, with the view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect and improper motive, no action would lie against the corporation, because the act on the part of the directors would be *ultra vires;* they would have no authority to do it. They are only agents for the company; the company acts by them, and they have no authority to bind the company by ordering a malicious prosecution. I say, therefore, that no action lies, even if you assume the strongest case, namely, that of the very shareholders directing it, or the very directors ordering it, because it is impossible that a corporation can have malice or motive; and it is perfectly immaterial that some subordinate officer or individual or individuals of the company have such malice or motive. In the case which I put an action would lie against the directors personally who had ordered an improper prosecution. It may be that no action would lie against any subordinate who had malice and who had not ordered or caused or procured the prosecution; because although the two ingredients existed which are necessary for the maintenance of such an action, that is to say, malice and the absence of reasonable and probable cause, yet in the case which I surmise the man would not be a prosecutor; and unless you find the absence of reasonable and probable cause and malice in him who is the prosecutor an action is not maintainable. It is not enough, therefore, to show that there was an absence of reasonable and probable cause, and that the subordinate had malice, not that I for a moment suggest that that is the case here.

In my opinion this is not merely what is commonly called a technical point; although, if a point were untechnical it would be very objectionable. This is a substantial objection; because every one, or every counsel or solicitor listening to me, knows that the only reason why a railway company is selected for an action of this sort, is, that a jury would be more likely to give a verdict against a company than against an individual. Everybody knows it: and perhaps there is a sort of hope of confusion. It is said, "the man was innocent: somebody ought to be punished for it: here is a railway company: there was an improper motive;" and so there is a jumble; the case

gets before a jury, and a railway company is exactly the party to have damages awarded against it. If ever there was a necessity for protecting persons, it is in an action for malicious prosecution, and for two reasons; first of all, a prosecutor is a very useful person to the community. We have something in the nature of a public prosecutor, but everybody knows that the greater number of prosecutions in this country, are undertaken not by the state, but by private persons, or, as in this case, corporations.

One may venture to quote Bentham even upon this matter. He said that laws would be of very little use, if there were no informers, and that it is necessary for the benefit of the public, that people when they prosecute, and prosecute duly, should be protected. There is an additional reason: A man brings an action for malicious prosecution; he gives evidence which shows or goes to show, that he is innocent. You may tell the jury over and over again that that is not the question, but they never or very rarely can be got to understand it. They think that it is not right that a man should be prosecuted when he is innocent, and in the end they pay him for it. It is, therefore, all important that these actions should not be permitted to be brought against persons or bodies, or others who are not properly liable in respect of them.

It may be said, "Well, but this is rather hard upon a man who has been prosecuted, and improperly prosecuted." That is to say, the corporation is innocent but its officers are guilty. But the same thing happens in the case of an individual prosecutor. A man receives false information: he prosecutes upon that information. The person who gave him the information is not liable, because he did not prosecute. He may be liable for the untrue statement, because it may be slander, in the same way as he would be liable if he charged an indictable offence against a person; or possibly, he may be liable for having procured the prosecution; and it may be that in such a case as this, some of the people employed by the company were actuated by an indirect motive; I do not say that they were—it is impossible to say so—but what I say is, that it is no harder upon a man that he has no remedy against a public company that has prosecuted him, when the servants of the company have been malicious, than it is that there is no remedy against any individual man who has prosecuted, he having no malice, but somebody who gave him information, having malice.

It is said that this is an old-fashioned sort of notion. It is: but

this opinion is one that I have entertained ever since I have known anything about the law; and although it is an old-fashioned one, I trust that it is one that will not die out, for the reasons which I have given.

But it is said, "Well, but a variety of actions have been allowed against corporations, which formerly did not exist." I deny it. It is certain that a corporation may order a thing to be done which is a trespass, because there the act of those who act for the corporation, is not *ultra vires;* for instance, take the case of false imprisonment; a railway company gives somebody power to take up persons who, it believes, are doing some wrong to the company. If a person is so authorized, that is an authority which may be unreasonably exercised. You cannot give an authority, maliciously, to prosecute, but you may give an authority to take up persons who are cheating a railway company. If that person to whom authority is given, makes a mistake and takes up a person who is not cheating, it may, in such a case, be said properly to be the act of the company, and they are properly liable. But in that case there is neither malice nor motive, in question. So, also, they may be liable for the publication of a libel. That unfortunate word "malice," has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore, the case is not the same as where actual or real malice is necessary. Take the case where a person may make an untrue statement of a man, in writing, not privileged on account of the occasion of its publication; he would be liable, although he had not a particle of malice against the man. So would a corporation. Suppose that a corporation published a newspaper or printed books, and suppose that it was proved against them, that a book so published had been read by an officer of the corporation, in order to see whether it should be published or not, and that it contained a libel; an action lies there, because there is no question of actual malice or ill-will or motive.

For these reasons, which I dwell upon at no great length, more particularly as Mr. *MacClymont* did not cite any cases upon this point, or go into it at all, I am clearly of opinion that this action does not lie against this company.

But assuming that that difficulty did not exist, there is no absence of reasonable and probable cause in this case. I doubt very much whether CAVE, J. needed to have left to the jury, the question,

whether reasonable care had been used. I doubt it very much, indeed. I doubt very much whether he might not have said, I will not say ought not have said to the jury, "If you are of opinion that these directors honestly believed the statements that were laid before them, and honestly acted upon the opinions that were given to them, there was not only no absence of reasonable and probable cause, but it existed in abundance." However, he did put the question, and the jury did answer it: and it does seem to me, I must say, to be one of the strongest cases of an unfounded action, that ever was brought, even for a malicious prosecution.

EARL OF SELBORNE.—My Lords, my noble and learned friend opposite (Lord BRAMWELL) has raised a question which has not been argued before your lordships, a question of the greatest importance, as to whether it is of the essence of an action of this sort that malice should be proved in a sense not imputable to a corporation. The importance of that question would certainly have led me, before I could arrrve satisfactorily at an opinion of my own upon it, to desire to have it argued. It has not been argued at your Lordship's Bar. It was not, as far as I can see, a ground of decision in the court below. What has been said by my noble and learned friend I am sure, will have the weight due to all opinions of his whenever the question comes to be solemnly examined; but I do not think that your lordships' decision in the present case can properly be regarded as determining that question.

Order appealed from affirmed; and appeal dismissed with costs.

The position maintained so vehemently by Lord BRAMWELL in this case, that a corporation cannot be liable for torts involving intention, brings this important question once more into prominence. Lord BRAMWELL admits that actions of tort, like trespass or trover, will lie against a corporation; his point is, that a corporation cannot be guilty of torts which involve a wrongful intention, such as deceit or malicious prosecution, because a corporation, being an imaginary person or entity, is incapable of a wrongful intention.

Admitting a general liability in tort on the part of corporations, he denies that a corporation can ever, under any circumstances, make itself liable for a tort involving intention, even though the entire body of directors or shareholders unanimously order or ratify the tortious act, for the simple reason that it is incapable of any wrongful intention whatever.

Lord BRAMWELL admits that the point discussed by him was not raised in the argument of the case, and he cites none of the authorities bearing upon it. Let us, then, in the first place, see how the views expressed by him stand in the light of precedent, taking up first the English precedents, and then the American.

In *Stevens* v. *Midland Counties Ry.*, 10 Ex. 352, it was sought to hold a corpora-

tion liable in an action of malicious prosecution. Baron ALDERSON said, "It seems to me that an action of this description does not lie against a corporation aggregate: for, in order to support the action, it must be shown that the defendant was actuated by a motive in his mind, and a corporation has no mind." PLATT and MARTIN, BB., did not decide this point, but held that the corporation was not liable, because its servant who prosecuted did not act within the scope of his authority in so doing.

In *Green* v. *London General Omnibus Co. (limited)*, 7 C. B. (N. S.) 290, the action was case against a company established for carrying passengers in omnibuses, for maliciously and vexatiously obstructing plaintiff in the carrying on of a similar business. The declaration was demurred to on the ground that a corporation cannot be guilty of an act involving malice or bad intent. But the court say, "we are clearly of opinion that the action lies; and there are abundant authorities to warrant that opinion. The whole course of the authorities from *Yarborough* v. *Bank of England*, 16 East 6, down to *Whitfield* v. *Southeastern Ry.*, E., B. & El. 115, which was in reality an action against the Electric Telegraph Company —shows that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if done by an individual. The doctrine relied on by Mr. *Gifford*, that a corporation having no soul, cannot be actuated by a malicious intention, is more quaint than substantial.

In *Goff* v. *Great Northern Ry.*, 3 El. & El. 672, it was held that false imprisonment would lie against a corporation, if the person imprisoning plaintiff had authority from the company to do so. In this case the point discussed by Lord BRAMWELL was not distinctly raised, but BLACKBURN, J., delivering the opinion of the court says, "A railway company, though it be a corporation, is liable in an action for false inprisonment, if that imprisonment be committed by the authority of the company; and it is not necessary that that authority be under seal."

In *Barwick* v. *English Joint Stock Bank.* L. R., 2 Exch. 259 (1867), it was held that an action of deceit would lie against a joint stock banking company for the fraudulent misrepresentation or concealment of its manager. The point of the inability of a corporate body to have a wrongful intention was not raised. The court however say: "But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

In *Western Bank of Scotland* v. *Addie*, L. R., 1 Sc. App. 145, which was an action by a shareholder to rescind his sharetaking contract, on the ground that he was induced to enter into the contract by the fraudulent misrepresentations of the directors, the court, at p. 157, draw the following distinction: "Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract, on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally."

See, also, *New Brunswick & Canada Ry.* v. *Conybeare*, 9 H. L. C. 725.

Moore v. *Metropolitan Ry.*, L. R., 8 Q. B. 36 (1872), follows *Goff* v. *Great Northern Ry.*, 3 El. & El. 672, *supra*, and holds that a corporation may be liable for a malicious prosecution instituted by its agent.

In the case of *Henderson* v. *Midland Ry.*, 20 W. R. 23, BRAMWELL, then a Baron of the Court of Exchequer, said, *obiter*, "Further, I am of opinion that this form of action will not lie against a corporation. I cannot understand how malice can exist in a body corporate; a corporation aggregate must necessarily be destitute of malice. The other Barons decline to express an opinion on this point. KELLY, C. B., says: "A railway company must, from time to time, prosecute, and may commit acts of oppression if they are not liable for not prosecuting without reasonable and probable cause; if such be the law, it will require amendment."

Mackay v. *Commercial Bank of New Brunswick*, L. R., 5 P. C. 394. In this case it was held that an action of deceit would lie against an incorporated bank for the fraudulent misrepresentation of its cashier, made while acting within the scope of his employment. The court advert to and decline to follow the distinction suggested in *Western Bank of Scotland* v. *Addie*, *supra*, that a corporation is liable in certain cases in contract but never in tort, for the fraud of its servants. The court expressly hold that a corporation may be liable in deceit for the fraud of its servant, if committed while acting within the scope of his employment; and they point out that the words "scope of employment" are used in a far broader sense than "scope of authority," express or implied.

In *Edwards* v. *Midland Ry.*, 50 L. J., Q. B. 281 (1880), the question whether malicious prosecution would lie against a corporation, was squarely raised. It was argued that the case of *Stevens* v. *Midland Ry.*, *supra*, was a subsisting authority to the effect that a corporation, not being possessed of mind, could not be liable for malicious prosecution which involved mental state. FRY, J., after reviewing the authorities—dwelling especially upon *Whitfield* v. *South Eastern Ry.*, E., B. & E. 115, and *Green* v. *London Omnibus Co.*, 7 Com. B. (N. S.) 290, *supra*, came to the conclusion that the *ratio decidendi* of ALDERSON, B., in *Stevens* v. *Midland Ry.*, *supra*—that a corporation cannot be guilty of a tort involving intention,—had never been followed, and that he was accordingly at liberty to decide according to what he conceived to be the true view of the law. He held that a corporation could be held liable for malicious prosecution. The cases of *Western Bank of Scotland* v. *Addie*, L. R., 1 Sc. App. 145, and *Mackay* v. *Commercial Bank of New Brunswick*, L. R., 5 P. C. 394, *supra*, were not noticed.

As the law stands to-day in England, we have the express decision of one learned judge (ALDERSON, B.), that actions of tort involving a wrongful intent will not lie against corporations, supported by the extra judicial opinions expressed by learned judges of the House of Lords in at least three different cases. On the other hand, we have express decisions of several Courts of Appeal in at least five cases, that actions of this nature will lie against corporations. It would seem that the point must be deemed unsettled in England, in the absence of an express decision of the House of Lords, although the preponderance of authority would seem to be in favor of the liability of corporations for torts involving wrongful intents.

In the United States, the law is perfectly well settled that corporations may be held liable for torts involving wrongful intention.

Thus, in *P. W. & B. Rd.* v. *Quigley*, 21 How. 202, it was held that an action of libel would lie against a corporation. The Court say: "The defendants con-

tend that they are not liable to be sued in this action; that theirs is a railroad corporation, with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that, being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; that this action should have been instituted against the natural persons who were concerned in the publication of the libel. To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and, therefore, that no crime or offence can be imputed to it. That, although legal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by their dominant body, that such acts, not being contemplated by their charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents, and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence of the states of the Union relative to these artificial persons. Legislation has encouraged their organization, as they concentrate and employ the intelligence, energy and capital of the society for the development of enterprises of public utility. * * * * * The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a neeessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives:" *Vinas* v. *Merchants' Mutual Ins. Co. of New Orleans*, 27 La. Ann. 367; *Samuels* v. *Evening Mail Co.*, 75 N. Y. 604; *Evening Journal Ass'n.* v. *McDermott*, 44 N. J. L. 430; *Detroit Daily Post Co.* v. *McArthur*, 16 Mich. 447; accord.

It is universally held that case for malicious prosecution will lie against corporations: *Fenton* v. *Wilson Sewing Machine Co.*, 9 Phila. (Pa.) 189: *Goodspeed* v. *East Haddam Bank*, 22 Conn. 530; *Williams* v. *Planters' Ins. Co.*, 57 Miss. 759; *Wheless* v. *Second National Bank*, 1 Baxt. (Tenn.) 469; *Boogher* v. *Life Association of America*, 75 Mo. 319; *Iron Mountain Bank* v. *Mercantile Bank*, 4 Mo. App. 505; *Copley* v. *Grover, &c. Sewing Machine Co.*, 2 Woods 494; *Vance* v. *Erie Rd.*, 32 N. J. L. 334; *Jordan* v. *Alabama Great Southern Rd.*, 74 Ala. 85; *Ricord* v. *Central Pac. Rd.*, 15 Nev. 167; *Reed* v. *Home Savings Bank*, 130 Mass. 443; *Morton* v. *Metropolitan Life Ins. Co.*, 34 Hun 366; *Krulevitz* v. *Eastern Rd.*, 5 N. E. R. 500.

The only two cases holding that malicious prosecution will not lie against a corporation because it cannot be guilty of a malicious intent, (*Gillett* v. *Missouri Valley Rd.*, 55 Mo. 315; and *Owsley* v. *M. & W. P. Rd.*, 37 Ala. 560), have been expressly overruled by *Boogher* v. *Life Association of America*, *supra*, and *Jordan* v. *Alabama Great Southern Rd.*, *supra*, respectively.

The following authorities hold that a corporation is liable in an action of deceit, for the fraudulent misrepresentation or concealment of its servants or agents: *Lamm* v. *Port Deposit Homestead Ass.*, 49 Md. 233; *Peebles* v. *Patapsco Guano Co.*, 77 N. C. 233; *Erie City Iron*

Works v. *Barber*, 106 Penn. St. 125; *Butler* v. *Watkins*, 13 Wall. 456; *New York*, &c., *Rd.* v. *Schuyler*, 34 N. Y. 30; *National Bank* v. *Graham*, 100 U. S. 699–702; *Western Maryland Rd.* v. *Franklin Bank*, 60 Md. 36.

Having examined the question of liability of corporations for torts, involving intention from the standpoint of authority, let us now discuss it upon logical grounds. It is argued in support of the theory of non-liability of corporations for torts of this class, that a corporation, being an imaginary person, cannot have "intention," because it has no "mind." (See remarks of ALDERSON, B., in *Stevens* v. *Midland Rd.*, *supra*.) But clearly it must be admitted that corporations are not entirely without mind. A corporation can *act*, and acting implies *mind*, *purpose*, *intention*. So it seems, that some degree of mind must be ascribed to that fictitious person called a corporation. It may be claimed that a corporation, being created or authorized by law to perform certain functions only, can be regarded as endowed with mind sufficient for the performance of such functions only.

This conception of a corporation is not universally conceded to be the true one: 2 Morawetz Corp. sect., 648, *et seq.* But even admitting it to be the true one, and as a necessary consequence, that a corporation cannot have a bad or wrongful intention, it does not follow that a corporation cannot be guilty of malicious torts in a large class of cases, *i. e.*, where such torts are committed by its servants or agents while acting "within the scope of their employment." There certainly seems no reason why the principle of *respondeat superior* should not apply as well where the master is a corporation, as where the master is an individual. And it is perfectly well settled, that it does apply in the case where the master is an individual. Now the theory of *respondeat superior* is not that the tortious conduct of the servant is ascribed to or transferred to the master, but rests on the broad ground of public policy. It is an absolute rule of law creating, in certain cases, a liability on the part of a master for the wrongful act of his servant. This plainly appears from the case of *Sharrod* v. *Railway*, 4 Exch. 580, where it was held that the act of an engine-driver in running over sheep of the plaintiff, was not the act of the railway company, and that, therefore, the action of trespass would not lie against the company for killing the sheep.

There would seem to be no reason why the principle of *respondeat superior* should not apply in the case of torts involving wrongful or malicious intention, as well as in the case of other sorts of torts. Indeed, it seem conceded that it does, and that a master is, in general, liable in tort for the deceit, or fraud or malice of his servants: *Hern* v. *Nichols*, 1 Salk. 289; *Comfort* v. *Fowke*, 6 M. & W. 358, 373. Conceding, then, that the principle of *respondeat superior* does not rest on the theory of imputing the acts of the servant to the master, there would seem to be no reason why a corporation should not be held liable for the torts of its servants, involving malice or wrongful intention.

In this connection we may quote the language of the court of Tennessee in *Whelen* v. *Second Nat. Bank*, 1 Baxt. (Tenn.) 469, where the court say: "It would be an abandonment of the well-established principle of '*respondeat superior*' to hold that the agents of a corporation, in discharge of their duties as such, would be guilty of maliciously instituting suits to the damage of third persons, and yet that the corporation should shield itself from the responsibility by relying on its soulless character."

Also the language of the Supreme Court of Massachusetts, in *Fogg* v. *Griffen*, 2 Allen 1: "A corporation can only act through agents. If they, while exercising the authority conferred on them,