

No doubt it may be assumed that at the date of the agreement of 10th April, 1899, Mrs. Lucy Kingston was acquainted with the trusts of the testator's will and with the fact that the trustees were being charged by her husband with waste and breach of trust; and if nothing more had happened except a conveyance of the properties to her in pursuance of the agreement, it may well be that her title would have been open to serious attack. But between the date of the agreement and the execution of the conveyances in her favour there had intervened the action of 1899; and in that action the question of breach of trust having been clearly raised and having been considered both by the Master and by Boucaut, J., the Court had held in effect that the agreement could not be impeached on the ground of breach of trust, and notwithstanding the vigorous opposition of Mrs. Lucy Kingston had ordered that it should be carried into effect. Whether, as a matter of law, the decree for specific performance should have been granted in the absence of the present appellants or of some person appointed to represent them, may be doubtful. It is true that Ludovina Kingston, one of the plaintiffs in that action, was at that time executrix and trustee of the will of Hester, through whom the infants claimed; but she did not sue in that capacity and, having regard to her adverse interest as a trustee against whom a charge of breach of trust was being made, she cannot be held to have represented her beneficiaries in the transaction. It is true also that the South Australian Rules of Court provide (by Order LXXIII., rule 14) that where a compromise is proposed between some of the beneficiaries in a trust and a trustee sought to be charged, a Court or a Judge may, if they or he consider the compromise to be for the benefit of all such beneficiaries, order that the compromise shall be binding upon any of such beneficiaries who are not before the Court; and it may be that Boucaut, J., had that provision in mind when he referred the matter to the Master and acted on the Master's certificate. But, however that may be, the rule was not in fact applicable to the case, and the order did not follow the terms of the rule. But assuming that the order was not binding on the infant beneficiaries, the present appellants, it was undoubtedly binding upon the parties to the action, including Mrs. Lucy Kingston, and was a sufficient assurance to her that the conveyances which the Court directed to be made and accepted would be free from objection. In these circumstances Mrs. Lucy Kingston, who merely obeyed the order of the Court, cannot possibly be held to have been guilty of wilful participation in a breach of trust, still less of fraud; and it appears to their Lordships that the transaction did not give rise to any equity against the properties in her hands. No doubt the decree for specific performance was founded on the agreement which Mrs. Lucy Kingston had made, but Boucaut, J., in granting the decree did not treat the agreement as sufficient to conclude the case. He rightly assumed that, if the agreement had been made

in breach of trust, it could not be enforced against the defendants; and his decision that there had been no breach of trust, and that the agreement was therefore binding upon Mrs. Lucy Kingston, was properly and necessarily accepted by her. In short, if her knowledge of the trust matters in 1899 was sufficient to put her upon inquiry as to a breach of trust having been committed, the decree in the action of 1899 was sufficient to satisfy that inquiry.

Upon the above view of the facts Mrs. Lucy Kingston was entitled in respect both of sec. 489A and of "Marino" to the protection given by the Courts to a purchaser for value taking the legal estate without notice of any equity in favour of other persons; and, this being so, it is unnecessary to consider the questions which have been raised as to the effect of the plaintiffs' delay in taking proceedings and as to the construction and effect (as regards "Marino") of secs. 69 to 72 and 249 of the South Australian "Real Property Act 1886." Their Lordships, therefore, express no opinion upon these questions.

For the above reasons their Lordships will humbly advise His Majesty that the appeal of the plaintiffs fails and should be dismissed, and that the cross-appeal should be allowed and the order of Angas-Parsons, J., restored. The appellants will pay the costs of all parties (other than Kathleen Pittar Kingston) of the appeal to the High Court and of the present appeal and cross-appeal, except that, as it was unnecessary that the Public Trustee should be represented on the hearing before the Board, no order will be made as to the costs of his appearance on these appeals. The respondent Kathleen Pittar Kingston will take her costs as between solicitor and client out of the trust estate.

High Court of Australia.

FULL COURT—(Isaacs, A.C.J., } Oct. 3, 6, Dec.
Gavan Duffy and Starke, JJ.) } 18, 1924.
(Melbourne and Sydney.)

DAVIS, Defendant Appellant v. GELL, Plaintiff Respondent.

Malicious prosecution—Nolle prosequi—Innocence of plaintiff—Assumption—Proof—Misdirection.

Where on the trial of an action for malicious prosecution the prosecution complained of is shown to have been terminated by a *nolle prosequi*, no assumption of innocence is to be made in the plaintiff's favour by reason of that fact. In order to succeed in such an action the plaintiff must prove his innocence of the offence with which he had been charged.

APPEAL FROM THE FULL COURT OF VICTORIA.

Clarence Norman Gell brought an action in the

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County Court against William Henry Davis, claiming £499 damages for malicious prosecution. The plaintiff had been prosecuted on an information laid by P. O'Dwyer, a constable of police, who had acted, in part at least, upon statements made by the defendant. The charge was that Gell "did unlawfully and maliciously kill twenty-two pigs, one cow, twenty fowls, the property of William Henry Davis." At the hearing before the Police Court Gell was committed for trial. When the charge came on for trial the Crown entered a *nolle prosequi*. He then brought this action for malicious prosecution.

At the trial the County Court Judge, in directing the jury, said—"You may assume the plaintiff was an innocent man, because proceedings ended in the plaintiff's favour. . . It is fair to assume for the plaintiff that he is an innocent man. . . You are not trying the question of Gell's innocence or guilt; you should assume for the purposes of this action that Gell is innocent." The jury returned a verdict for the plaintiff, and awarded him £380 damages, including £80 special damage. An application for a new trial was then made by the defendant to the trial Judge, on the ground of misdirection, and was refused. The defendant appealed to the Full Court. The Full Court, although it considered the direction in question wrong, came to the conclusion that it had not affected the verdict, and refused to grant the new trial. From this decision the defendant now appealed.

Latham, K.C., and *O'Bryan* for the defendant appellant.—It is impossible to say that a misdirection as to the innocence or guilt of the plaintiff had no effect on the jury. A new trial should therefore be directed.

Dixon, K.C., and *Gorman* for the plaintiff respondent.—The direction of the presiding Judge was right. Cases where the prosecution was terminated by a *nolle prosequi* cannot be distinguished from those where there was an acquittal. The real guilt or innocence of the plaintiff is irrelevant, or, at least, is not relevant as a separate issue, but merely as part of some other issue, as the termination of the proceedings in plaintiff's favour or the absence of reasonable and probable cause. If innocence be relevant it is proved for purposes of this action by entry of the *nolle prosequi*.

Latham, K.C., in reply.—A conviction differs from an acquittal, in that a conviction is a demonstration of guilt, but an acquittal is not a demonstration of innocence. It may amount merely to a verdict of "not proven." There is nothing inconsistent in a jury in a criminal case returning a verdict of "not guilty," and a jury in the corresponding civil case finding that in fact the plaintiff was guilty. Even if an acquittal is evidence of innocence, this does not apply to a *nolle prosequi*. The plaintiff must prove his innocence; it cannot be assumed.

During argument the following authorities were referred to:—Taylor on *Evidence* (11th ed.), pp. 115, 116; Archbold, *Criminal Pleading and Practice* (26th ed.), p. 125; Salmond on *Torts* (4th ed.), 536, ch. 7, sec. 4; *Heslop v. Chapman*, 23 L.J. Q.B. 49; *Turner v. Ambler*, 10 Q.B. 252; *Abrath v. North-Eastern Railway Company*, 11 Q.B.D. 440; *Varawa v. Howard Smith and Company*, 17 A.L.R. 499; *Johnson v. Emerson*, L.R. 6 Ex. 329; *Bynne v. Bank of England*, (1902) 1 K.B. 467; *March v. March*, 28 L.J. (P. & M.) 30; *White v. White*, 21 A.L.T. 76; *In re Crespin*, (1911) P. 108; *Delegal v. Highley*, 3 Bing. N.C. 950; *Basebe v. Matthews*, L.R. 2 C.P. 684; *Sutton v. Johnstone*, 1 Term. Rep. 493.

Cur. adv. vult.

The following judgments were given:—

ISAACS, J.—This is an action for malicious prosecution. The appellant, William Henry Davis, and the respondent, Clarence Norman Gell, are neighbouring farmers at Glenmaggie. In November, 1921, some pigs belonging to Davis died from poisoning after eating maize fed to them from a certain maize crib on his property. Davis informed the police that he had seen Gell under suspicious circumstances the night before on Davis's property about thirty-five yards from the maize crib and walking in a direction away from it. The police instituted a prosecution, with the result that Gell was committed for trial. He was presented at the Supreme Court in March, 1922, for maliciously killing twenty-two pigs and one cow the property of Davis. The respondent pleaded "not guilty," and the prosecutor for the King entered a *nolle prosequi*.

Thereupon this action was brought in the County Court at Sale, and was heard before Judge Woinarski and a jury of four. The damages claimed were £499, of which £80 were legal expenses. The defences stated were—(1) Defendant denies he was prosecutor. (2) Defendant denies that proceedings terminated in favour of the plaintiff. (3) No malice. (4) What he did, he did with reasonable and probable cause. (5) Does not admit the innocence of the plaintiff.

The jury found a verdict for the plaintiff, with £380 damages. As the only expense proved was the sum of £80, it is clear the balance of £300 was given for general damages, necessarily on the ground that the prosecution was on an indictment "involving either scandal or reputation or the possible loss of liberty to the person"—per Bowen, L.J., in *Quartz Hill Gold-Mining Co. v. Eyre*, 11 Q.B.D. at 691. This is a very material circumstance, because unless the plaintiff's innocence be properly established in the action such general damages are obviously impossible.

The present appellant then took out a summons before the learned Judge of the County Court for a new trial. Several grounds were included, but only one of them is now directly in issue, namely, in effect misdirection by directing the jury that they should, for the purposes of the action, assume that the plain-

tiff was innocent. In the affidavit of Mr. Wise the appellant's solicitor, it is (*inter alia*) stated the learned Judge said—"You may assume the plaintiff was an innocent man because proceedings ended in the plaintiff's favour. . . It is fair to assume for the plaintiff that he is an innocent man. . . You are not trying the question of Gell's innocence or guilt. You should assume for the purposes of this action that Gell is innocent." When the jury retired, Mr. O'Bryan, for the defendant, asked the learned Judge to redirect the jury, and Mr. Gorman contended the direction as given was correct. The learned Judge declined to redirect the jury.

In deciding the application for a new trial the learned Judge said—"Mr. O'Bryan relied on duty of a plaintiff to prove his innocence, and that the direction I gave denied the necessity of that duty, and that it was too favourable to plaintiff in that I told the jury they were to assume plaintiff was innocent and that they were to deal with the action on that basis. Well, I don't think it is a material issue for plaintiff to prove his innocence. All the law requires is that he show a favourable determination in his favour, and passages cited by Mr. O'Bryan are merely introductory to what is material. I think the passages correctly state what I say, but they were only introductory to other matter that I put to the jury *re* the heavy burden the plaintiff had to sustain. On the whole, with some discretion to assist to notice of motion, I dismiss it with costs £3 3s." I emphasise the point that the directed assumption of innocence was for the purposes, not of the single issue of reasonable and probable cause, but of the whole action, which includes the assessment of damages.

The defendant appealed to the Supreme Court, which dismissed the appeal. From that dismissal the present appeal to this Court is brought.

The learned Judges of the Supreme Court held that the direction to assume the respondent innocent for the purposes of the action was wrong, but that, in view of all the circumstances, there was no substantial miscarriage of justice, and therefore the new trial was rightly refused. That conclusion is arrived at by reasoning that I may, I think, properly put into the form of three propositions—

1. The termination of the criminal proceedings in favour of the respondent by *nolle prosequi* was evidence of his innocence.

2. It was, however, only *prima facie* evidence of innocence.

3. In the circumstances, the jury having found quite independently of the direction complained of that the appellant's statement as to seeing the respondent in a suspicious situation was a concocted story, there was no evidence to disturb the *prima facie* effect of the determination of the criminal case, and that his innocence was therefore established.

Mr. Latham, on behalf of the appellant, contended that a judgment in a criminal cause, even if it be one of acquittal, is *res inter alios acta*, and not, as between the parties here, any evidence whatever of the plaintiff's innocence.

Mr. Dixon, for the respondent, maintained that in an action for malicious prosecution, the innocence of the plaintiff is never a separate distinct issue, but is part of some other issue, as, for instance, the termination of the proceedings or want of reasonable and probable cause.

I am unable to assent unreservedly to any of the three divergent views stated. It is therefore obviously a matter of serious difficulty. Among the intricacies of the case are some expressions in cases of great authority, such as *Delegal v. Highley*, 3 Bing. N.C. 950; *Heslop v. Chapman*, 23 L.J. Ex. 49; *Abrath v. North-Eastern Railway Company*, 11 Q.B.D. 440, and 11 A.C. at 252; and *Bank of New South Wales v. Piper*, (1897) A.C. 383. Up to a certain point these proceedings permit of a comparatively easy solution. Without investigating the problems of law that have been presented, I may at once say I cannot agree with the third proposition of the Supreme Court. Its basis is that the guilt of the plaintiff depended entirely on whether the defendant's story of the plaintiff's presence on Sunday night in suspicious circumstances was concocted. Innocence or guilt was the conclusion sought. Concoction or non-concoction was the necessary premise. If the premise were found the conclusion followed, because they were inseparably connected. The Supreme Court thought that, notwithstanding the jury were told they might assume the conclusion, their search for the premise was independent. The jury, having the contradictory evidence of Davis on the one side, and Gell on the other—Buchanan being a tainted witness—and the jury having to determine whether Gell or Davis was lying as to Gell's presence at the place and time stated, it is plain to me that once they were told they should assume Gell's innocence it was equivalent to assuming Gell's absence, and the consequent corroboration of Buchanan, and the disbelief of Davis. It is impossible, to my mind, to regard the directed assumption of innocence as entirely separate from and independent of the issue of concoction. Consequently we are compelled to consider the case from the standpoint of the effect in law of a termination of the prosecution by *nolle prosequi*.

Unless it be conclusive evidence of innocence there must be a new trial. But in that case there remain the three distinct diverse positions, and, as I think, a fourth, to be considered, and unless this matter be determined now the ruling of the Supreme Court would necessarily be followed, and the new trial would be only the source of further and possibly prolonged litigation. That I regard as my duty to endeavour to avoid.

I am unable, except arbitrarily, to express my final opinion on the case without reference to some fun-

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damental considerations of the history and nature of the action for malicious prosecution, and by having regard to a line of important decisions. This I can do without, I hope, undue prolongation, particularly in view of the fact that to a very great extent I have already expressed my views in *Varava v. Howard Smith and Company*, 17 A.L.R. 515, and to these I refer as part of this judgment. The all important feature to bear in mind for present purposes is, that the essentials, as they are called, of the action of "malicious prosecution"—a term I shall use to include the setting the law in motion in matters sufficiently analogous to a criminal prosecution—are not a number of independent and disintegrated requirements. The result of a careful estimation of the history of the action and the various expressions of the Judges is that the recognised essentials are the combined outcome of a well-established and gradually developed public policy, that of permitting members of the public who may have, as Lord Shand said in *Lightbody's Case*, (1882) 9 Rettie at p. 940, "not only a duty but a right" to take steps to vindicate the law, but not oppressively. In assisting that public policy, the Common Law, adapting itself to social advance, has laid down limitations and safeguards, which it thinks, taken together, properly adjust, in harmony with the circumstances of the time, the right of the prosecutor and the correlative right of the accused party to fair protection from unnecessary accusation. Unless these limitations and safeguards are considered as one scheme by which the mutual rights are balanced in the scale of justice, there is great danger of misconception of their nature and of giving either too great or too little weight to any one of them. They may, I think, be conveniently thus enumerated—(1) The defendant must be the prosecutor. (2) The prosecution must have been groundless. (3) It must have produced damage. (4) It must have terminated favourably to the plaintiff so far as such termination was possible. (5) It must have been without reasonable and probable cause. (6) It must have been malicious. I omit reference to special cases, such as naval and military proceedings, which depend on considerations here immaterial, and I take the above in order.

1. *Prosecutor*.—For the purposes of this form of action the law looks beyond theory, and regards the person in fact instrumental in prosecuting the accused as the real prosecutor. It enables the person innocently accused to treat his virtual accuser as party to the criminal charge, a circumstance bearing directly on the question of the effect in the civil action of the judicial termination of the criminal proceedings. The substance and not the legal form must in all cases govern, and while on the one hand a person giving information to the police is not necessarily the prosecutor, yet on the other the mere fact that the police conduct the prosecution does not exclude him from that position.

The law is stated by Sir Andrew Scoble (for Lord Robertson, Lord Atkinson, Lord Collins, Sir Arthur Wilson and himself), in *Gaya Prasad v. Bhagat Singh*, (1908) 30 All. 525, in terms as appropriate to Australia as to India. His Lordship says—"In India "the police have special powers in regard to the investigation of criminal charges, and it depends very "much on the result of their investigation whether "or not further proceedings are taken against the "person accused. If, therefore, a complainant does "not go beyond giving what he believes to be correct "information to the police, and the police, without "further interference on his part (except giving such "honest assistance as they may require), think fit to "prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the police "by bringing suborned witnesses to support it; if he "influences the police to assist him in sending an "innocent man for trial before the magistrate—it "would be equally improper to allow him to escape liability because the prosecution has not technically "been conducted by him. The question in all cases "of this kind must be, who was the prosecutor? and "the answer must depend upon the whole circumstances of the case. The mere setting of the law "in motion is not the criterion; the conduct of the "complainant before and after making the charge "must also be taken into consideration. Nor is it "enough to say the prosecution was instituted and "conducted by the police. That again is a question "of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but "in practice this duty is often left in the hands of "the person immediately aggrieved by the offence, "who *pro hac vice* represents the Crown."

As already stated, this doctrine is one of the mutually balancing considerations, and prevents the application of the principle *res inter alios acta*.

2. *The Groundless Prosecution*.—This essential requires, as does the next, a reference to the origin of the action. It sprang from the very early and technical form of action of conspiracy. The gist of that primitive action was not the prosecution, but the conspiracy of the defendants—for two were necessary—to procure the plaintiff to be indicted for treason or felony so that his life was in danger. To maintain that action it was necessary to show that the plaintiff had been acquitted of the crime with which he was charged, upon a good indictment, and by verdict, so that he, if again prosecuted for the crime, could plead *autrefois acquit*. But out of this, and in the development of the public policy referred to, there grew an action superficially resembling the true action of conspiracy, but gradually becoming essentially different, viz., that which is now the action comprehensively called the action for malicious prosecution. It differed in several ways from the

older action. One way was that it was an action, not for a conspiracy, but for setting the criminal law in motion. The gist of the action was the damage resulting from a groundless prosecution. The authorities for this, down to 1871, are to be found in Selwyn's *Nisi Prius* (11th ed.), pp. 1062 and following; and in 1 *William Saunders*, pp. 271 and following.

Logically it is appropriate to quote first what Gibbs, J., said in *Reed v. Taylor*, 4 Taunt. at p. 618, an action for malicious prosecution for perjury, the plaintiff having been acquitted. Reasonable cause was shown in the civil trial for some of the charges, but not for others. Gibbs, J., said—"The charge here is not that 'the defendant imputed perjury without probable cause, but that he preferred that indictment without probable cause.'"

What must be shown as to the indictment, or other analogous proceeding, appears from various decisions covering a very long period. In *Waterer v. Freeman*, (1617) Hob. at 267, it is said that it must appear in the second action "that the first was unjust," a reason, says the Court, that had been given by the Judges in 2 Rich. 3. In *Johnson v. Emerson*, L.R. 6 Ex. at p. 344, Cleasby, B., refers to the prosecution as "wholly unfounded" and "really without foundation." Martin, B. (at p. 373), uses the expression "groundless and without foundation in law." In *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, (1876) L.R. 4 I.A. 23 at p. 38, Sir Montague E. Smith, for the Privy Council, refers to "the principle that the 'prosecution of legal proceedings which are instigated 'by malice and are at the same time groundless, is a 'wrong to the person who suffers damage in consequence of them.' In *Allen v. Flood*, (1898) A.C. at p. 173, Lord Davey speaks of "a causeless prosecution." In the case already cited of *Gaya Persad v. Bhagat Singh* (*supra*), the Privy Council (at p. 536) speaks of "innocent persons aggrieved by such 'unfounded charges.' This accords with what Watson, B., says in *Weston v. Beaman*, 27 L.J. Exch. at p. 59. The second essential then means that the plaintiff in the civil action is innocent, because the prosecution being groundless, there was, when all the circumstances are known, no real cause for it. The proof of innocence must be made in accordance with the ordinary rules of evidence, there being nothing special in this respect by reason of the nature of the action, once it is realised that by reason of the defendant being the prosecutor, the criminal proceedings are not *res inter alios acta*.

3. *Damages*.—As already stated, one of the differences between the earlier action and the later action was that, in the latter, the gist was damage. The leading case is *Saville v. Roberts*, 1 Lord Raym. 374, which recognised the action as one requiring damage to support it, a principle stated nearly eighty years before—Hob. 266. Three possible classes of damage are enumerated by Holt, C.J., viz., damage to (1) person, (2) reputation, (3) property. It matters

not whether the damage is such as the law imports or needs to be specifically proved. But that some damage is necessary and that the plaintiff can recover only for such damage as is proved expressly or impliedly is conclusively established, not only by the leading case referred to, but by the later cases of *Byne v. Moore*, 5 Taunt. 187; *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 2 A.C. p. 186, approving on this point *Cotterell v. Jones*, 11 C.B. at p. 735; *Quartz Hill Company v. Eyre*, 11 Q.B.D. 674; and *Wiffen v. Bailey*, (1915) 1 K.B. 600. The materiality of this in the present case is that unless the innocence of the plaintiff is a distinct issue, it is difficult to see how the jury can approach the question of damage to reputation.

4. *Termination*.—A third difference between the older and the later actions was in the requirement of termination. What the action of conspiracy needed has been stated. The later action, being adopted not for technical reasons but on a broad ground of social justice, limited the accused neither to cases of treason and felony nor to termination by rigorously formal and complete acquittal. Henceforth the termination need not be an acquittal, but might be by the *ignoramus* of the grand jury, or by the indictment being shown to be *coram non iudice* or defective. This clearly appears from *Selwyn*, *loc. cit.* The extensions referred to were stated by the learned author to be circumstances which preclude the possibility of such an acquittal, that is an acquittal supporting a plea of *autrefois acquit*—see, also, *Williams Saunders*, at p. 3. There was no departure from the general rule laid down in *Parker v. Langly*, 10 Mod. 209, resting on the reason, which Parker, C.J., says is as old as the time of Richard III., namely, "*non interrigitur quousque terminetur* that the action 'was unjust.' He adds—"No man can say of an 'action still depending that it is false or malicious." So in *Whitworth v. Hall*, 2 B. & Ad. at 698; *Gilding v. Eyre*, 10 C.B. N.S. at 604; and *Johnson v. Emerson*, L.R. 6 Ex. at 344, *per* Cleasby, B.

It is extremely important for the decision of this case, as well as for a general comprehension of the matter, to observe that the law in its quest of justice between the parties moulds and modifies its requirement as to termination according to the necessities of the situation. In *Bynoe v. The Bank of England*, (1902) 1 K.B. 467 at 470, Collins, M.R., quotes the words of Crompton, J., in an earlier case—"It is 'essential to show that the proceeding alleged to be 'instituted maliciously and without probable cause 'has terminated in favour of the plaintiff, if from 'its nature it be capable of such a termination." In *Stewart v. Gromett*, 7 C.B. N.S. 191, which is a landmark in the development of the action, the principle was clearly established—obviously on the broadest ground of inherent justice—that where a judicial determination of innocence was impossible by reason of the form of proceeding, the plaintiff was not bound to produce such a termination.

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It follows necessarily from the principles adverted to that a *nolle prosequi* entered by the prosecuting authority, on its own responsibility and discretion, creates a position in which an accused person, afterwards plaintiff in an action for malicious prosecution, may properly say the proceeding was not capable of a complete termination in his favour by way of acquittal. But though so far absolved, it does not follow that the termination by way of *nolle prosequi* in any way establishes innocence. "The effect of a '*nolle prosequi* when obtained'—Chitty's *Criminal Law*, vol. I., p. 480—"is to put the defendant 'with-' 'out day,' but it does not at all operate as an 'acquittal.'" And see *R. v. Mitchell*, 3 Cox. C.C. 93. Its evidentiary effect depends on other considerations, to which I shall later advert.

5. *Reasonable and Probable Cause*.—This is really a question of fact. It is often said to be a matter of law, because its determination is for the Judge, upon facts to be found by the jury. The exact position is stated by Lord Macnaghten, for the Judicial Committee, in *Pestonji M. Mody v. The Queen Insurance Co.*, (1900) I.L.R. 25 Bombay 332 at 336, in these terms—"It is quite true that, according to English law, it is for the Judge and not the jury to determine what is reasonable and probable cause in an action for malicious prosecution. The jury finds the facts. The Judge draws the proper inference from the findings of the jury. In that sense the question is a question of law. But where the case is tried by a Judge without a jury there is really nothing but a question of fact, and a question of fact to be determined by one and the same person." The ultimate fact, which is to be inferred from the constituent facts, is whether the defendant had reasonable and probable cause for instituting the proceedings, or actively forwarding them. The crucial questions for consideration are stated along with that for malice by Lord Atkinson, in *Corca v. Peiris*, (1909) A.C. at 555. The ascertainment of this ultimate fact depends, as one would naturally expect in view of the object and policy of the law, in protecting persons reasonably and *bonâ fide* pursuing their duty or their right, not on the actual guilt of the plaintiff, but on the reasonable *bonâ fide* belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of. "It is not essential in any case that facts should be established proper and fit, and admissible as evidence to be submitted to the jury upon an issue as to the actual guilt of the accused"—*Hicks v. Faulkner*, 8 Q.B.D. at 173."

In short, as Lord Atkinson says in *Corca v. Peiris* (*supra*, at 555), both as to reasonable and probable cause and malice, "the pivot upon which almost all such actions turn is the state of mind of the prosecutor at the time he institutes or authorises the prosecution." For the purpose of reasonable and probable cause the circumstances as known to the defendant—*Delegal v. Highley*, 3 Bing. N.C. 950—may

be proved, but not, as will be seen, for the purpose of controverting a judgment of acquittal.

The case of *Heslop v. Chapman*, 23 L.J. Ex. 74 and 18 Jur. 348, was cited, principally for passages in the judgments of Jervis, C.J., and Pollock, C.B., upholding the charge of Coleridge, J., that if the plaintiff had in fact sworn falsely, there was reasonable and probable cause for preferring the indictment. Reading the case as a whole, that appears to be merely intended as a truism and introductory to the real question. If a man is guilty there is real cause for indicting him, and the minor "reasonable and probable cause" does not really arise, because the greater includes the less. This is illustrated by *Piper's Case* (*infra*). But what the Court was engaged on in *Heslop v. Chapman* (*supra*) was to point out that, even apart from actual guilt, the defendant was not liable where he had reasonable and probable cause for believing him guilty and was not malicious. I do not regard that case as intended to affirm that, although the plaintiff produces a verdict and judgment of acquittal, perhaps, as in *Abrath's Case*, without a blemish on his character, he may be retried and found actually guilty by the civil tribunal. That would, as will be seen, be contrary to very powerful and direct authority, as well as to all notions of fairness.

6. *Malice*.—The nature of malice in this connection is well understood. It is only necessary, in pursuance of the plan I have traced, to say that the interrelation of the various essentials of the action is evidenced in this instance also. In the case cited of *Gaya Prasad v. Bhagat Singh* (*supra*), the Privy Council (at p. 534), with reference to the issue of whether the defendant was the prosecutor, say—"In India a private person may be allowed to conduct a prosecution under section 495 of the Criminal Procedure Code, which provides that 'any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police. . . Any person conducting the prosecution may do so personally or by a pleader.' When this is permitted, it is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives. The foundation of the action is malice, and malice may be shown at any time in the course of the inquiry." It now remains to apply to the considerations stated in the ordinary rules of evidence.

One well recognised rule of evidence—and we now arrive at the real crux of this case—is that a judgment *inter partes* is conclusive as between them, in respect of what it decides. "The object of the rule of '*res judicata*' is always put upon two grounds—the one public policy, that it is in the interest of the State there should be an end of litigation, and the other, the hardship on the individual that he should be vexed twice for the same cause"—per Lord Blackburn, in *Lockyer v. Ferryman*, 2 A.C. at 530.

Effect of Termination.—As already observed, the law as a rule demands of a plaintiff in malicious prosecution that the proceeding of which he complains shall have terminated in his favour. That is, that it shall have terminated, and without adverse consequences to him. But, on the principle *lex non intemdit aliquid impossibile*—12 Co. 89—that requirement is not made where, either from the nature or course of the proceeding, such a termination was impossible. If possible, the rule stands. A prosecution may terminate by—(1) Conviction, (2) acquittal, and (3) otherwise than by conviction or acquittal, as for instance by defect of indictment—*Pippet v. Hearn*, 5 B. & Ad. 635, only *nolle prosequi*. If by conviction it is definitely settled that in the civil action it cannot be questioned. That is established by such cases as—*Vanderbergh v. Blake*, Hard. 194; *Barber v. Lesiter*, 7 C.B. N.S. 175; *Castrique v. Behrens*, 3 E. & E. 709; *Metropolitan Bank v. Pooley*, 10 A.C. 210; *Basebe v. Matthews*, L.R. 2 C.P. 684; *Bynoe's Case*, (1902) 1 K.B. 467; and *Turley v. Daw*, 94 L.T. 216. On what principle is that judgment unquestionable in the civil action? First a judgment in the criminal case is admissible in evidence in the civil case, because, and only because, the defendant by hypothesis is shown to be the prosecutor, and so the parties are taken to be the same. Next, being admissible, it is because a judgment incontrovertible as to what it decides. Collins, M.R., has stated the law in *Bynoe's Case* (*supra*).

In case of conviction neither the facts nor the law on which the judgment rests can be contested in the civil action. Perhaps the most complete statement of the reason is by Lord Selborne, L.C., in *Pooley's Case* (*supra*, at p. 217), where he says—"Otherwise the most solemn proceedings of all our Courts of Justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety challenged by actions of this kind." The judgment has the effect stated even where it is not evidenced by record. That is familiar. But it is not out of place to recall the words of Brett, M.R., in *Re May*, 28 Ch. D. at p. 518—"The doctrine of *res judicata* is not a technical doctrine applicable only to records. It is a very substantial doctrine, and it is one of the most fundamental doctrines of all Courts, that there must be an end of litigation, and that the parties have no right of their own accord, after having tried a question between them and obtained a decision of a Court, to start that litigation over again on precisely the same questions."

If the termination be by acquittal the same rules apply. It would be strange indeed if the law were not so. It would be directly contrary to the very first principles of our law if a man convicted were shut out from establishing his innocence by an action for malicious prosecution, and yet a man declared innocent in a prosecution instigated or conducted by the defendant could be retried and found guilty in such

an action. It would moreover be quite contrary to the scheme of adjustment I have referred to. There are some very distinct pronouncements on the point. In *Johnson v. Emerson*, L.R. 6 Exch. at p. 345, Cleasby, B., says—"As regards the first" (that is the first necessary element of the action) "viz., the proceeding being unfounded (or, as it is called in the declaration, false), the judgment of Lord Justice James annulling the bankruptcy is conclusive." I understand that to be based on the view of the learned Baron that "the adjudication was entirely erroneous, and was afterwards annulled by Lord Justice James on appeal"—p. 339. The opinion, for instance, of Martin, B., that the adjudication was set aside on grounds other than the merits—see p. 374—is not opposed to the opinion of Cleasby, B., but it assists on the question here of *nolle prosequi*.

There is, however, decisive authority as to the effect of acquittal in *Pestonji M. Mody v. Queen Insurance Co.* (*supra*). That case is one of those I cited in *Tarawa's Case* (*supra*, at p. 520). It was a Privy Council case, heard by Lords Hobhouse, Macnaghten and Lindley, Sir Richard Couch and Sir Henry de Villiers, in 1900. The plaintiff, in an action for malicious prosecution, had been acquitted on trial for cheating. As to that Lord Macnaghten, in delivering judgment, said (at p. 335)—"M. Mody was acquitted of the charge made against him. It must therefore be taken that he was innocent." That is all that was said as to innocence, but it is enough. The learned Lord then proceeds to deal with malice and reasonable and probable cause. I take that to be a clear pronouncement that, for all purposes of the action, there is in such a case an irrebuttable presumption of innocence.

But, thirdly, suppose the termination, while favourable to the plaintiff, to fall short of acquittal—as in the present case. What then is its evidentiary effect? I see no reason, technical or substantial, either in the general law or in the special scheme of adjustment, appropriate to this class of action, for giving to it any weight on the meritorious issue of innocence. The suggestion of Lord Tenterden, C.J., in *Wilkinson v. Howell*, (1830) M. & M. at p. 496, that "the termination must be such as to furnish *prima facie* evidence," cannot, in view of later cases, be sustained. In *Gilding v. Eyre*, (1861) 7 Jur. N.S. at p. 1106, Williams, J., in *arguendo*, observes of *Wilkinson v. Howell* (*supra*)—"It is difficult to reconcile the reasoning in that case with other cases." The true rule appears to be that it must appear that the plaintiff may succeed in the civil action consistently with there being no "conflict of decision," as is said in *Gilding v. Eyre* (*supra*, p. 1107), between the two Courts. Acquittal connotes (a) termination of the proceedings, and (b) innocence of the accused. *Nolle prosequi* connotes the first only. This effect it must have on the civil action. But innocence in that case still remains to be proved in order to maintain the

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action, and cannot be assumed. This is strongly exemplified in *Bank of New South Wales v. Piper*, (1897) A.C. 383. That was an action by Piper against the bank for malicious prosecution. The declaration—17 N.S.W. L.R. at p. 54, alleged that the plaintiff was committed for trial at Quarter Sessions, "and "afterwards the Attorney-General refused to file a bill "against the plaintiff, and the said prosecution was "so ended." There was a plea of not guilty in the action. The Privy Council (at p. 386) mentioned the fact that "the Attorney-General refused to prosecute." At p. 388 reference is made to the contention that upon the plaintiff's own evidence he was guilty of the offence, and that therefore on the admitted facts there was reasonable and probable cause. This contention their Lordships proceeded to examine, and they held that the facts constituted the statutory offence, and therefore the Judge ought to have ruled there was reasonable and probable cause, and should have directed the jury to find a verdict for the defendants.

But that shows only—(1) The favourable termination of the criminal charge by *nolle prosequi* made the civil action possible. (2) It was not treated as affording any evidence that the plaintiff was innocent. (3) Guilt is consistent with that mode of termination. (4) Where there is guilt and therefore real cause there is necessarily reasonable and probable cause quite apart from any belief in the mind of the prosecutor, the questions as to that being held (p. 390) to have been unnecessary and improper. The final effect of the decision is that—(a) Where there is termination but no acquittal, the question of guilt is open; and (b) where guilt appears the plaintiff must fail. The ground seems to be that then the charge was not, as Lord Davey expressed it in *Allen v. Flood* (*supra*), "causeless." Only now do I feel at liberty to express my opinion as to the controlling effect of the passage in Lord Justice Bowen's judgment in *Abrath v. North-East Railway Co.*, 11 Q.B.D. at p. 455, repeated in *Cox v. English and Scottish Bank*, (1905) A.C. at 170, namely—"In an action for malicious prosecution the plaintiff has to prove, first, that he "was innocent and that his innocence was pronounced "by the tribunal before which the accusation was "made."

The appellant's contention was that the passage means that the plaintiff in every such action must prove as separate independent facts (a) his innocence to the satisfaction of the civil tribunal, and in addition thereto; (b) that he was pronounced innocent by the criminal tribunal. Such a rule was not called for by the circumstances of the case, and is not involved in the decision at the trial—see 11 Q.B.D. at p. 79; no issue was raised as to innocence, the plaintiff having been acquitted. The judgment of Brett, M.R. (at p. 454), leads to the belief that innocence was conclusively assumed from the acquittal. The appellant's interpretation is certainly inconsistent with the general construction of the whole passage in which those words occur. The Lord Justice stated "three

"propositions," and the words quoted constitute the first. The suggested interpretation would make four propositions. Further, that interpretation is inconsistent with the principle already fully worked out under which such cases as *Steward v. Gromet*, 7 C.B. N.S. 191, were decided, and with the qualification already adverted to of Crompton, J., adopted by Collins, M.R., in *Bynoe's Case*, (1902) 1 K.B. 467 at 470. It is also inconsistent with what Cleasby, B., said in *Johnston v. Emerson*, L.R. 6 Ex. at p. 345; and with Lord Macnaghten's judgment in *Mody v. Queen Insurance Company*, I.L.R. 25 Bomb. at p. 336. It is again contrary to the principle stated as early as *Parker v. Langly*, 10 Mod. 210, by Parker, C.J., that admitting a declaration to be good that did not show what became of the former action, "would introduce "great absurdities, viz., inconsistent and incongruous "verdicts in different actions." Then, to show how deeply the matter had been considered, the Chief Justice adds—"Indeed, if the first action go off by "nonsuit, it may be said that, in another action "brought for the same cause, there may be a verdict "given inconsistent with the verdict given in the present cause. That may be; but the possibility of "such a verdict in a future and not existing action "shall not hinder a man from bringing such an action "as this." The added observations indicate that it is no argument against the principle stated that in a future possible prosecution a different result might be reached. Such a possibility is too remote to affect the existing situation.

In the result, my opinion is that the application for a new trial should have been granted by Judge Woinarski, who, it should in fairness be added, said it was with some doubt and some disquietude that he dismissed it. It follows also that the appeal should be allowed, and a new trial be had to be guided by the considerations I have stated.

GAVAN DUFFY, J.—In my opinion the learned Judge who tried this case misdirected the jury when he told them that they might assume that the plaintiff was an innocent man because the proceedings ended in his favour, and that they should assume for the purpose of the action that he was innocent. I agree with the other members of the Court in thinking that in an action for malicious prosecution the plaintiff must prove his innocence, and that proof that a "*nolle prosequi*" was entered on his trial does not entitle the jury to assume that the plaintiff was innocent. It is unnecessary to discuss what the position would have been if the plaintiff, instead of proving the entry of a "*nolle prosequi*," had been able to prove that he had been acquitted. I also agree with the other members of the Court in thinking that it is impossible to say that no substantial wrong or miscarriage was occasioned by the misdirection.

In my opinion the appeal should be allowed, and a new trial ordered.

STARKE, J.—This is an action for malicious prosecution, the modern development of the action on the case in the nature of a conspiracy, which in turn supplanted the old writ of conspiracy—see *History of Conspiracy and Abuse of Legal Procedure*, by Dr. P. H. Winfield, Cambridge, at the University Press, 1921. The plaintiff alleges that the defendant maliciously and without reasonable and probable cause preferred and prosecuted a charge against the plaintiff of poisoning the defendant's cattle, that the proceeding on that charge terminated in the plaintiff's favour, and that he suffered damage. The defendant denies these allegations, and also puts in issue the plaintiff's innocence; he did not, he said in his formal defence, admit the innocence of the plaintiff. As a matter of fact, the plaintiff was committed for trial on the charge preferred against him, but during the trial a *nolle prosequi* was entered, and he was discharged. And the question we have to determine is, in substance, whether a plaintiff in an action for malicious prosecution must show that the charge preferred against him was unfounded, or, in other words, prove his innocence.

Mr. Dixon, in his interesting argument, contended that the guilt or innocence of the plaintiff was not a separate issue, but was an element in the issue of reasonable and probable cause. A guilty man might, according to this contention, recover in an action for malicious prosecution. The Supreme Court rejected this argument, and the opinions of many learned Judges clearly support its view. It may be that the history of the writ of conspiracy, and the action on the case in the nature of a conspiracy, influenced those opinions, but, whether that be so or not, they are so uniform and so strong, and so well founded in justice, that they must command ready assent from every Court. To take a few instances. Parker, C.J., delivering the opinion of the Court in *Jones v. Givin*, Gilbert Cases (1760) at pp. 201-202—an action for malicious prosecution—said—"The true grounds of these sorts of actions are, on the plaintiff's side, his innocence, and the damages sustained by him through a false accusation; on the defendant's side, that this was not an honest prosecution of justice and a bare mistake; but it was done in downright malice, i.e., merely wickedly and without any cause." Again, Bowen, L.J., in *Abrath's Case*, 11 Q.B.D. at p. 455, said—" . . . In an action for malicious prosecution the plaintiff has to prove, first, that he was innocent, and that his innocence was pronounced by the tribunal before which the accusation was made." And this was approved by the Judicial Committee in *Cox's Case*, (1905) A.C. at pp. 170-171; and by this Court in *Crowley v. Glissan*, 12 A.L.R. 74. Further, the same principle has been adopted by the Supreme Court of the United States. In *Wheeler v. Nesbitt*, (1860) 24 Howard at p. 549, Clifford, J., delivering the opinion of the Court, said that to support an action for malicious criminal prosecution, the plaintiff "must also prove that the charge

"preferred against him was unfounded. . . Proof of these several facts is indispensable to support the declaration, and clearly the burden of proof in the first instance is upon the plaintiff to make out his case, and if he fails to do so in any of these particulars the defendant has no occasion to offer any evidence in his defence." And it is settled law that the criminal proceeding must have terminated in favour of the plaintiff before he can maintain an action for malicious prosecution. Consequently a man convicted of the crime charged against him cannot maintain an action for malicious prosecution—*Busebe v. Mattheus*, L.R. 2 C.P. 684; *Bynoe v. Bank of England*, (1902) 1 K.B. 467. Conversely, the acquittal or the termination of the criminal proceedings in favour of the plaintiff establishes, it is said, his "innocence" for the purposes of an action for malicious prosecution. Now, that gives rise to some little difficulty. There are cases in the books of high authority which show that a judgment of conviction or acquittal in criminal cases does not, in subsequent civil proceedings, ordinarily preclude the convicted person from setting up his innocence, or any other person from endeavouring to show that he was guilty—*Castrique v. Imrie*, L.R. 4 H.L. at p. 434, and the cases collected by Mr. Spencer Bower, *Res Judicata*, p. 139. An acquittal no doubt establishes the fact that the proceedings have terminated in favour of the plaintiff, but it also establishes, in my opinion, his "innocence" for the purposes of an action for malicious prosecution—cf. *Crescent, &c., Co. v. Butchers' Union*, 120 U.S. pp. 149-151. It may be that this conclusion can be supported on the technical ground that the plaintiff and the defendant are in substance parties to the criminal proceedings which resulted in acquittal, but it is rested more properly, I think, upon the broad ground mentioned in *Bynoe's Case*—the peculiar and exceptional character of the action for malicious prosecution, and considerations of public policy. "If this were not so, almost every case would have to be tried over again upon its merits;" "the judgment would be blown off by a side wind." But it is necessary to define what is meant by acquittal. Under the old law, evidence of *nolle prosequi* was not sufficient to sustain case for a malicious indictment "*unde legitimo modo fuit acquietatus*," for it "is a discharge of the indictment but no acquittal of the crime"—*Goddard v. Smith*, 1 Salk. 21; cf. *Jones v. Givin*, Gilbert Cases (1760), 185 at pp. 198 *et seq.* In other words, "lawfully acquitted imports such an acquittal as will entitle the plaintiff to plead *auter foits acquit* in case he be afterwards prosecuted for the same crime"—Selwyn, *Nisi Prius* (13th ed.), vol. II., p. 1005; Buller, *Nisi Prius* (7th ed.), p. 14. That seems to me good law and good sense.

Consequently, in my opinion, if the plaintiff in an action for malicious prosecution seeks to prove his innocence by acquittal, then he must establish it in

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the sense already indicated. But it is "not necessary in an action for malicious prosecution that the plaintiff should allege or prove such an acquittal, for it may be brought under circumstances which preclude the possibility of such an acquittal"—Selwyn, *Nisi Prius*, *ibid.* He may show, for instance, that the proceedings terminated in his favour by a *nolle prosequi*, or by the *ignoramus* of a grand jury, or by the refusal of a Justice to commit for trial, or by some want of jurisdiction in the Court, or some technical defect in the indictment or information, and so forth. Proof of these facts would show that the proceedings terminated in favour of the plaintiff, but they do not establish the innocence of the plaintiff, and the burden is upon him in the first instance to make out his case. It is unnecessary, and indeed undesirable, in this case, to discuss what (if any) presumptions in favour of innocence, or other evidence, would satisfy the burden.

The case of *Delegal v. Highley*, 3 Bing. N.C. 950, must be mentioned. It was much relied upon for the respondent. But it is not contrary to the conclusion I have reached. "A man from a malicious motive may take up a prosecution for real guilt, or he may from circumstances which he really believes proceed upon apparent guilt, and in neither case is he liable to this kind of action"—*Johnstone v. Sutton*, 1 T.R. at p. 545. The plea in *Delegal's Case* was not a plea of real guilt, but that the defendant had reasonable cause to believe, and did believe, that the plaintiff was guilty of the accusation made against him. And it was held that the plea was insufficient unless it allege that at the time of the charge the defendant had been informed of or knew the facts on which the charge was made. But if, instead of relying on a plea of not guilty, the defendant had pleaded real guilt on the part of the plaintiff, there is nothing in *Delegal's Case* to show that such a plea would have been demurrable. The question would then have arisen whether "innocence" was an essential of the plaintiff's cause of action, and also whether the real guilt of the plaintiff did not establish a state of facts affording reasonable and probable cause for the prosecution.

It follows from what I have said that the Supreme Court rightly held that the jury were misdirected at the trial. They were told that the *nolle prosequi* conclusively proved that proceedings had terminated in the plaintiff's favour, and that they might "assume the plaintiff was an innocent man because proceedings ended" in his favour, and that they were not "trying the question of the" plaintiff's "innocence or guilt, that they should assume for the purposes of the action that he" was "innocent." But the Supreme Court refused a new trial, on the ground that no substantial wrong or miscarriage was occasioned by this misdirection. The disputed facts were whether the plaintiff entered a paddock and

poisoned feed in a bin whereby the defendant's pigs, &c., were killed. Now, the question whether the plaintiff entered the paddock was critically connected with the question whether he had any motive or purpose for entering it. But the charge had already informed the jury that they should assume that the plaintiff was innocent of the accusation of poisoning the pigs, &c., and practically concluded the question of motive in favour of the plaintiff. And it might easily lead to a miscarriage, for the jury might conclude that a man who was innocent, and had no motive or purpose for being in the paddock, was not in the paddock, and that those who deposed to his presence there had concocted their story. It is safer, I think, upon so material a misdirection as was given in this case, that a new trial should be ordered, and, according to the Statute, before a Judge of the Supreme Court.

Appeal allowed. New trial ordered.

[Solicitors — For the appellant, Madden, Butler, Elder and Graham; for the respondent, A. F. Rice.]

J. W. S. V.

FULL COURT—(Isaacs, A.C.J.,
Gavan Duffy and Starke, JJ.) } Oct. 17, 18;
(Melbourne.) } Nov. 8, 1924.

In the WILL OF DILLON.

MORAN, Defendant Appellant v. HOUSE, Plaintiff,
and KELLY, Defendant Respondents.

Will — Interpretation — "Home Rule Government granted to Ireland"—Whether the event has come to pass—"Government of Ireland Act 1920," 10 and 11 Geo. V., c. 67—Costs — Originating summons—Matters in dispute relating only to realty—Costs falling on realty.

A testator who died in 1922 by his will directed that "one year after a Home Rule Government" was "granted to Ireland" his real estate should be sold and the proceeds given to a named charity.—

Held, that by the "Government of Ireland Act 1920," 10 and 11 Geo. V., c. 67, a Home Rule Government had been granted to Ireland within the meaning of the words of the testator.

Decision of the Supreme Court of Victoria (Weigall, A.J.), unreported, affirmed on this point.

A testator made a will of real and personal estate. The gift of the personality became inoperative by reason of a lapse. The provision of the will relating to the real estate presented difficulties which the executors by an originating summons brought before a Judge for determination without administration of the estate.—

Held (Starke, J., *discentiente*), that as the summons became necessary solely by reason of the disposition of the real estate, the costs of the parties to the summons should be borne by the real estate.

Decision of the Supreme Court of Victoria (Weigall, A.J.), unreported, reversed on this point.