

**THE LAW RELATING TO
ACTIONS FOR MALICIOUS
PROSECUTION**

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The law relating to actions for malicious prosecution by Herbert Stephen & Horace M. Rumsey

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HERBERT STEPHEN & HORACE M. RUMSEY

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THE LAW

RELATING TO ACTIONS FOR

MALICIOUS PROSECUTION.

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WITH AMERICAN NOTES

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PREFACE.

THIS book is intended to be, in the first place, a convenient collection of authorities upon the law of malicious prosecution; and, in the second place, a demonstration of the fact that the old doctrine, that the question of reasonable and probable cause is a question for the Court, has lost its vitality, and that the duty of determining that question has, by an ingenious but rather cumbersome process, been transferred from the Court to the jury.

I see no reason—at least no reason in the nature of the subject—why the Legislature should not recognize and indorse the change which, as I have explained in the text, I hold to have been finally consummated by the judgment of the House of Lords in *Abrath v. The North Eastern Railway Company*. I think that a convenient way of doing so would be to enact that in all future actions for malicious prosecution the plaintiff should be entitled to recover on proof that the defendant instituted the prosecution against him either without honestly believing him to be guilty, or without having a reasonable ground for believing him to be guilty; and that whether the defendant's ground for believing the plaintiff to be guilty was reasonable should be—as the judges have made it—a question of fact. In my opinion, this represents the substance of the existing law, and would relieve the judges of the fiction whereby at present they ask the jury whether the defendant took reasonable means to inform himself of the true facts of the case, and whether he honestly believed in the plaintiff's guilt, and on being told by the jury that he did or did not, held that he had or had not reasonable cause accordingly.

I see no reason why the necessity for proving malice should be retained. It is ineffectual, because the jury are at liberty to infer it from the want of reasonable cause, and it is now the jury and not the judge who decide whether or not a want of reasonable

cause has been proved. It is almost impossible to imagine a jury finding that the defendant honestly believed his case, that he had not taken reasonable means to discover the truth, and that he had not been actuated by any "indirect motive."

It might also be convenient to settle by legislation the undecided question whether a corporation aggregate can be liable for malicious prosecution.

Chapter VII., which deals explicitly with the topic of the provinces of the Court and the jury as to reasonable cause, is equally applicable to the torts of malicious prosecution and false imprisonment, and Chapter VI. nearly so. The question what is reasonable cause for suspicion is identical in both torts, but in false imprisonment further questions arise of considerable intricacy, depending upon the rights and duties of constables, and of persons who are not constables, in the matter of arresting suspected persons.

Since the book has been in type the Standing Committee on Law of the House of Commons has introduced into the County Courts Consolidation Bill a clause giving to County Courts jurisdiction to entertain actions for malicious prosecution. Should this provision become part of the law, I hope that it may increase the number of those to whom this book may be useful.

H. S.

TEMPLE,

May, 1888.

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