[HIGH COURT OF AUSTRALIA.]

VARAWA . . . . . APPELLANT;
PLAINTIFF,

AND

HOWARD SMITH COMPANY LTD. . . RESPONDENTS;
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 1, 4, 5, 6, 7, 8 11, 12, 13, 25.

Griffith C.J., O'Connor and Isaacs JJ.

Malicious arrest—Arrest under process of foreign Court—Termination of proceedings in favor of plaintiff before action brought—Setting aside of order to hold to bail and writ of ca. re.—Reasonable and probable cause—Fraud—Abuse of process of Court—Conduct of trial—Arrest on Mesne Process Act 1902 (*N.S. W.*) (*No.* 24 *of* 1902), *secs.* 5, 6.

The respondents had commenced an action in the Supreme Court of New South Wales against the appellant for breach of an alleged contract for the sale of a ship by the respondents to the appellant, and on the same day had procured from a Judge of that Supreme Court, under sec. 5 of the *Arrest on Mesne Process Act* 1902 (*N.S.W.*), an order directing that the appellant should be held to bail for a certain sum. A writ of capias had been accordingly issued and under it the appellant had been arrested and imprisoned and held to bail. Final judgment in the action was subsequently obtained by the appellant against the respondents. Before final judgment was obtained the appellant brought an action in the Supreme Court of Victoria against the respondents, and in the statement of claim, which was served after such final judgment, the appellant alleged in addition to the above facts, that the proceedings in respect of the *capias* were taken, not for the purpose of securing payment of money which the respondents believed to be due to them by the appellant, but for the purpose of terrifying the appellant and forcing him to pay money to which the respondents did not in good faith believe themselves entitled, and to which they were not in fact entitled, and that such proceedings were an abuse of the process of the Court; that the order to hold to bail was procured by means of affidavits containing statements which were false to the knowledge of the respondents; and that the respondents falsely and

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maliciously and without reasonable and probable cause caused the appellant to be arrested and imprisoned and held to bail. The appellant claimed damages accordingly. By their defence the respondents (*inter alia*) objected that the statement of claim disclosed no cause of action inasmuch as it was not alleged that the order to hold to bail and the writ of *capias* were set aside or determined in the appellant's favour.

Held, that the respondents were entitled to judgment. By *Griffith* C.J. and *O'Connor* J., on the ground that the appellant had failed to establish the want of reasonable and probable cause. By *Isaacs* J. on the ground that the appellant's action was premature.

Semble, *per Griffith* C.J., that neither the fact that the previous action in the Supreme Court of New South Wales was not determined when the appellant brought his action, nor the existence of the order to hold to bail nor of the writ of *capias* was a bar to the bringing of the appellant's action in the Supreme Court of Victoria.

Per Isaacs J.—No action is maintainable for the malicious use of legal process in a suit instituted in any Court of competent jurisdiction, whether local or foreign, until that suit, in so far as it relates to the matter complained of, has terminated in the plaintiff's favour, where such a termination is legally possible.

Per curiam.—Where the conduct of a party at the trial has been such that certain questions have been left to the jury and have been determined, one of the parties cannot on appeal raise totally different questions which upon the pleadings and evidence might have been open to him.

Decision of the Supreme Court of Victoria : *Varawa* v. *Howard Smith Co. Ltd.*, (*No.* 2), (1911) V.L.R., 509 ; 32 A.L.T., 72, affirmed, but on a different ground.

APPEAL from the Supreme Court of Victoria.

In November 1904, while the war between Russia and Japan was in progress, negotiations took place between Peter Fedorovitch Varawa, the appellant, a Russian subject, and the Howard Smith Co. Ltd., the respondents, for the sale by the respondents to the appellant of the steamship *Peregrine*.

On 21st January 1905 the respondents issued a writ in the Supreme Court of New South Wales against the appellant, claiming damages for breach of an alleged contract to purchase the s.s. *Peregrine*. On the same day the respondents applied to *Pring* J. for an order under sec. 5 of the *Arrest on Mesne Process Act* 1902 that the appellant should be held to bail in the sum of £4,000, and an order was made and a writ of *capias* was

accordingly issued under sec. 6 of the Act, under which the appellant, who was then about to leave Australia was arrested on board a steamer, imprisoned, and held to bail under the writ. He remained in prison several days and then having deposited £4,000 he was released. Before his release a summons was taken out on his behalf to have the writ of *capias* set aside, but the summons was subsequently dismissed by consent, and the writ was never at any time set aside. The action in which the writ of *ca. re.* was issued came on for trial in August 1905 before *Pring* J. and a jury who gave a verdict for the respondents and judgment was entered accordingly. This verdict was, however, set aside by the Full Court of New South Wales, whose decision was on appeal affirmed by the High Court, and judgment was entered for the appellant: *Varawa* v. *Howard Smith & Co. Ltd.* (1).

On 2nd March 1905 the appellant issued the writ in the Supreme Court of Victoria in the present action against the respondents, but the statement of claim was not delivered until 17th December 1908, and it was subsequently on 27th July 1909 amended. The amended statement of claim was as follows :—

"1. On 21st January 1905 an action was commenced by writ of summons in the Supreme Court of New South Wales by the present defendants, claiming from the present plaintiff the sum of £8,000 as damages for breach of an alleged contract for the sale of the s.s. *Peregrine* by the present defendants to the present plaintiff, and final judgment therein was afterwards obtained by the present plaintiff against the present defendants.

"2. On the said 21st January 1905 the present defendants procured from his Honor Mr. Justice *Pring*, one of the Judges of the said Court, an order that a writ of *capias ad respondendum* should issue in such action out of the said Court against the present plaintiff endorsed to hold the said plaintiff to bail in the sum of £4,000.

"2*a*. The proceedings mentioned in paragraphs (1) and (2) hereof were had and taken by the defendants not for the purpose of enforcing or securing the payment of money which they believed to be due to them by the plaintiff by way of damages or

(1) 5 C.L.R., 68.

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otherwise, but for the purpose and in the hope of terrifying the plaintiff and forcing him to pay them, or to procure the Russian Government to pay to them, money to which they did not in good faith consider themselves entitled, and to which they were not in fact entitled, and such proceedings were an abuse of the process of the Court in which they were had and taken.

"3. The said order (*i.e.* for the *ca. re.*) was falsely and maliciously procured by the defendants by means of affidavits containing representations which were to the knowledge of the defendants wholly false and misleading.

"4. In pursuance of the said order a writ of *capias ad respondendum* issued out of the said Court on the said 21st January 1905.

"5. On the said 21st January 1905 the defendants falsely and maliciously and without reasonable and probable cause, caused the plaintiff to be arrested by the Sheriff of the said Court on the said writ, and imprisoned and kept imprisoned, and held to bail in the sum of £4,000.

"6. The plaintiff was so kept imprisoned for a period of eleven days and until he made deposit of the said sum of £4,000, together with £10 for costs, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending the said action.

"7. Alternatively the plaintiff says that on 21st January 1905 the defendants assaulted the plaintiff and imprisoned him, and kept him in prison for a long time, to wit the period of 11 days, whereby the plaintiff suffered great pain of body.

"8. The acts complained of in paragraphs (1) to (6) (both inclusive) and in paragraph (7) hereof were and are wrongful and unlawful both according to the law of New South Wales and according to the law of Victoria, and afford the plaintiff causes of action in each of such States."

The appellant claimed £20,000.

By their amended defence the respondents (*inter alia*) admitted the commencement of the action in New South Wales, the making of the order for a writ of *ca. re.*, and the issue of the writ thereunder. They denied each and every other allegation in the

statement of claim. They pleaded the issue of the summons by the appellant and that it was dismissed, and contended that therefore the appellant was not entitled to recover anything in respect of the matters alleged in paragraphs (1) to (6) of the statement of claim. They objected that the matters alleged in paragraphs (1) to (6) of the statement of claim disclosed no cause of action inasmuch as it was not alleged that the order for a writ of *ca. re.* and the writ itself were set aside or determined in favour of the appellant.

The action was tried before *à Beckett* J. and a jury. The jury found that the allegations contained in paragraphs 2 (*a*) and 3 of the statement of claim were substantially true and that the respondents falsely and maliciously caused the plaintiff to be arrested, and they assessed the damages at £5,000. *à Beckett* J. thereupon entered judgment for the appellant for £5,000 and costs.

On appeal to the Full Court by the respondents the judgment for the appellant was set aside and judgment was entered for the respondents. (*Varawa* v. *Howard Smith & Co. Ltd.* (*No.* 2) (1).

From this decision the appellant now appealed to the High Court.

Other facts are stated in the judgments hereunder.

Arthur, for the appellant. In an action for malicious arrest the requirement that the order of *capias* shall have been set aside or proceedings shall have terminated in favour of the plaintiff is a matter of procedure only and is not a part of the cause of action: *Atkinson* v. *Raleigh* (2); *Coburn* v. *Collidge* (3); *Read* v. *Brown* (4). This is shown by the fact that the *Statute of Limitations* would run from the doing of the wrongful act and not from the time when the order was set aside or the proceedings terminated in the plaintiff's favour: *Darby and Bosanquet on the Statute of Limitations* 2nd ed., p. 45; *Violett* v. *Sympson* (5); *Battley* v. *Faulkner* (6); *Metropolitan Bank Ltd.* v. *Pooley* (7).

(1) (1911) V.L.R., 509; 32 A.L.T., 72.
(2) 3 Q.B., 79.
(3) (1897) 1 Q.B., 702.
(4) 22 Q.B.D., 128.
(5) 8 El. & Bl., 344.
(6) 3 B. & A., 288, at p. 291.
(7) 10 App. Cas., 210.

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That rule does not apply where the proceedings in respect of which the action is brought were taken in a foreign country.

Assuming that the general rule is that the writ of *capias* must have been set aside or the proceedings terminated in favour of the plaintiff before the bringing of the action for malicious arrest, that rule does not apply where the order has been obtained *ex parte* and under such circumstances that it is impracticable for the plaintiff to set it aside, or where it has been obtained by the fraud of the party obtaining it. There are no means provided by the *Arrest on Mesne Process Act* 1902 (N.S.W.) for setting aside this order, the only application provided for being one to discharge the defendant from custody.

[O'CONNOR J. referred to *Steward* v. *Gromett* (1).

ISAACS J. referred to *Johnstone* v. *Sutton* (2).]

The order could not be set aside by an action: *Ronald* v. *Harper* (3); *Flower* v. *Lloyd* (4); *Birch* v. *Birch* (5).

The existence of the order is only matter of estoppel preventing the plaintiff from proving the absence of reasonable and probable cause, and, having been obtained by fraud, it should be treated as a nullity: *Duchess of Kingston's Case* (6); *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter-House Co.* (7); *Fitzjohn* v. *Mackinder* (8); *Metropolitan Bank* v. *Pooley* (9); *Huffer* v. *Allen* (10).

[ISAACS J. referred to *Wyatt* v. *Palmer* (11); *Nixon* v. *Loundes* (12); *Vadala* v. *Lawes* (13); *Abouloff* v. *Oppenheimer & Co.* (14).]

Fraud is an *a fortiori* answer to a foreign order: *Price* v. *Dewhurst* (15); *Ochsenbein* v. *Papelier* (16); *Machado* v. *Fontes* (17); *Scott* v. *Lord Seymour* (18). A *ca. re.* does not stand in the same position as a final judgment after hearing the parties, and the rule does not apply to it: *Steward* v. *Gromett* (1); *Daniels* v. *Fielding* (19); *Venafra* v. *Johnson* (20).

(1) 7 C.B.N.S., 191; 29 L.J.C.P., 170.
(2) 1 T R., 510.
(3) 11 C.L.R., 63, at p. 77.
(4) 6 Ch. D., 297; 10 Ch. D., 327.
(5) (1902) P., 130.
(6) 20 How. St. Tr., 355; II. Sm. L.C., 11th ed,, p. 731, at p. 738.
(7) 120 U.S., 141, at pp. 149-151, 159.
(8) 9 C.B.N.S., 505.
(9) 10 App. Cas., 210, at p. 217.
(10) L.R. 2 Ex., 15.
(11) (1899) 2 Q.B., 106.
(12) (1909) 2 I.R., 1.
(13) 25 Q.B.D., 310.
(14) 10 Q.B.D., 295.
(15) 8 Sim., 279.
(16) L.R. 8 Ch., 695, at p. 698.
(17) (1897) 2 Q B., 231.
(18) 1 H. & C., 219.
(19) 16 M. & W., 200.
(20) 10 Bing., 301.

[ISAACS J. referred to *Bryant* v. *Bobbett* (1); *Graham* v. *Sandrinelli* (2).]

The order for a *ca. re.* is simply evidence of reasonable and probable cause and is not conclusive on that matter. It is *ex parte* and not final, and there is no reason for setting it aside because it is exhausted once its object is attained.

The facts establish a cause of action for a malicious abuse of process of Court. The addition of fraud and extortion to an ordinary action for malicious arrest gives a cause of action for abuse of process: *Gilding* v. *Eyre* (3); *Grainger* v. *Hill* (4); *Varawa* v. *Howard Smith & Co. Ltd.* (5); *Bayne* v. *Baillieu* (6); *R.* v. *Henderson* (7). To allege falsely that a debt is owing and thereby to obtain process of the Court to be issued for the purpose of extortion, is an abuse of process. In an action for abuse of process it is not necessary to show that the proceedings have terminated in the plaintiff's favour or that there was an absence of reasonable and probable cause: *Grainger* v. *Hill* (4); *Heywood* v. *Collinge* (8); *Parton* v. *Hill* (9). The fact that the plaintiff was entitled to get the *ca. sa.* is irrelevant: *Gilding* v. *Eyre* (10). This is not limited to cases where the act complained is an act of the party, but applies generally to action for abuse of process.

[ISAACS J. referred to *Chitty's Archbold*, 12th ed., p. 795; *Pegler* v. *Hislop* (11).]

As to actions for abuse of process counsel also referred to *Steward* v. *Gromett* (12); *Churchill* v. *Siggers* (13); *Savil* v. *Roberts* (14); *Wren* v. *Weild* (15); *Webster* v. *Haigh* (16); *Quartz Hill Gold Mining Co.* v. *Eyre* (17); *Ducy* v. *Stevens* (18); *Osborne* v. *Robison* (19); *Cadaval (Duke of)* v. *Collins* (20).

This action may be supported on the count for false imprisonment, and the allegation that the *ca. sa.* was obtained by fraud

(1) 11 Jur., 1021.
(2) 16 M. & W., 191.
(3) 10 C.B.N.S., 592, at pp. 595, 598.
(4) 4 Bing. N.C., 212.
(5) 10 C.L.R., 382.
(6) 6 C.L.R., 382, at p. 394.
(7) (1898) A.C., 720, at p. 730.
(8) 9 A. & E., 268.
(9) 10 L.T.N.S., 414; 12 W.R., 753.
(10) 10 C.B.N.S., 592.
(11) 1 Ex., 437.
(12) 7 C.B.N.S., 191.
(13) 3 El. & Bl., 929, at pp. 937, 939.
(14) 1 Salk., 13; 1 Raym. (Ld.), 374.
(15) L.R. 4 Q.B., 730.
(16) 3 Lev., 210.
(17) 11 Q.B.D., 674.
(18) 6 N.S.W. L.R., 100.
(19) 7 N.S.W. L.R., 193.
(20) 4 A. & E., 858.

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prevents the defendants relying on the *ca. sa.* as a defence: *Brooks* v. *Hodgkinson* (1); *Phillips* v. *Eyre* (2); *Collett* v. *Foster* (3). The provisions in sec. 18 of the *State Laws and Records Recognition Act* 1901 that judicial proceedings of a State are to have "such faith and credit given to them in every Court" within the Commonwealth as in the Courts of that State does not prevent the proceedings in New South Wales from being treated in this action as proceedings in a foreign country: *Hampton* v. *M'Connel* (4); *Ross* v. *Hixon* (5).

[ISAACS J. referred to *M'Elmoyle* v. *Cohen* (6); *Hanley* v. *Donoghue* (7); *Fall* v. *Eastin* (8); *Christmas* v. *Russell* (9).]

Mitchell K.C. and *Starke*, for the respondents. Where the thing complained of is an arrest under a Judge's order, the order must be got rid of before the plaintiff can bring his action, and until it is got rid of, what was done under it must be deemed to have been rightly done: *Addison on Torts*, 8th ed., p. 184; *Lees* v. *Patterson* (10); *Bayne* v. *Baillieu* (11); *Craig* v. *Hasel* (12); *Encyclopædia of the Laws of England*, 2nd ed., vol. VIII., p. 518; *Metropolitan Bank Ltd.* v. *Pooley* (13); *Stone's Justices' Manual*, 1911, p. 1183. The only exception to this rule is in the case of an *ex parte* order which there is no means of setting aside: *Basébé* v. *Matthews* (14). Even if it be not necessary to get rid of the order the plaintiff cannot bring his action until he has obtained a final judgment in his favour in the original action: *Webb* v. *Hill* (15); *Norrish* v. *Richards* (16). This also applies to an action for abuse of process: *Parker* v. *Langley* (17). Since the *Service and Execution of Process Act* 1901, New South Wales is not a foreign country for the purpose of this action, for by sec. 21 a judgment obtained in New South Wales can as a matter of right be immediately registered in Victoria and execution issued upon it. The rule that an action for false

(1) 4 H. & N., 712.
(2) L.R. 6 Q.B., 1.
(3) 2 H. & N., 356.
(4) 3 Wheat., 234.
(5) 26 Am. St. R., 123.
(6) 13 Pet., 312.
(7) 116 U.S., 1.
(8) 215 U.S., 1, at p. 13.
(9) 5 Wall., 290, at p. 305.
(10) 7 Ch. D., 866, at p. 870.
(11) 6 C.L.R., 382, at p. 391.
(12) 4 Q.B., 481.
(13) 10 App. Cas., 210, at p. 216.
(14) L.R. 2 C.P., 684.
(15) Moo. & M., 253.
(16) 3 A. & E., 733.
(17) Gilb., 163, at p. 177.

imprisonment cannot be brought until the proceedings have terminated in the plaintiff's favour applies to proceedings in a foreign country: *Castrique* v. *Behrens* (1).

[ISAACS J. referred to *M'Henry* v. *Lewis* (2).]

The facts alleged in paragraph 2*a* of the statement of claim do not constitute a claim for an abuse of process as distinguished from a claim for a malicious arrest. An action for abuse of process only lies where process lawfully issued is used for a purpose to which it cannot be lawfully applied, or to enforce payment of a larger sum of money than is legally recoverable: *Grainger* v. *Hill* (3); *Gilding* v. *Eyre* (4). There is no evidence to support the claim for an abuse of process. As to the claim for malicious arrest, there is evidence of reasonable and probable cause, and no evidence of malice. The respondents were entitled to enforce the contract if it had been made, for it was not illegal. The fact that after the contract was made the respondents found out the vessel was to be used for belligerent purposes does not prevent them from enforcing payment: *Hodgson* v. *Temple* (5); *Waugh* v. *Morris* (6).

[ISAACS J. referred to *R.* v. *Sandoval, Baird & Call* (7).

GRIFFITH C.J. referred to *Leake on Contracts*, 4th ed., p. 544.]

The facts in connection with the proposed use of the vessel for belligerent purposes were never put forward as showing that the respondents were not ready and willing to perform the contract, but only as showing that no contract was ever entered into, and the appellant cannot now say that the verdict can be supported on that ground.

[ISAACS J. referred to *Nevill* v. *Fine Art and General Insurance Co. Ltd.* (8); *Paquin Ltd.* v. *Beauclerk* (9).

GRIFFITH C.J. referred to *Browne* v. *Dunn* (10).]

[Counsel also referred to *Huffer* v. *Allen* (11); *Coburn* v. *Colledge* (12); *Scott* v. *Lord Seymour* (13); *Westlake's Private International Law*, 4th ed., p. 261; *Hart* v. *Gumpach* (13).]

(1) 3 El. & El., 709.
(2) 22 Ch. D., 397, at p. 400.
(3) 4 Bing. N.C., 212.
(4) 10 C.B.N.S., 592.
(5) 1 Marsh., 5; 5 Taunt., 181.
(6) L.R. 8 Q.B., 202.
(7) 3 T.L.R., 411.
(8) (1897) A.C., 68.
(9) (1906) A.C., 148, at p. 149.
(10) 6 R., 67.
(11) L.R. 2 Ex., 15.
(12) (1897) 1 Q.B., 702.
(13) 1 H. & C., 219.
(14) L.R. 4 P.C., 439, at p. 465.

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Arthur, in reply. The fact that the respondents acted upon the advice of their solicitors is not sufficient to establish reasonable and probable cause, but they must also prove that they *bonâ fide* believed that they had a good cause of action: *Ravenga* v. *Mackintosh* (1); *Stewart* v. *Sonneborn* (2); *Corea* v. *Peiris* (3). Even if the point that the respondents were not ready and willing to perform the contract was not clearly put at the trial, that point is not so far apart from the way in which the case was put that the Court will not now give effect to it. [He referred to *Foote's Private International Law*, 2nd ed., p. 580; *Dicey's Conflict of Laws*, 2nd ed., p. 234: *Harris* v. *Quine* (4); *Garcias* v. *Ricardo* (5); *Watt* v. *Watt* (6).]

Cur. adv. vult.

The following judgments were read:—

Sept. 25.

GRIFFITH C.J. The statement of claim in this action began by alleging the commencement of an action in the Supreme Court of New South Wales on 21st January 1905 by the respondents against the appellant, claiming £8,000 damages for breach of an alleged contract for sale of the s.s. *Peregrine* by the respondents to the appellant, and that final judgment was afterwards obtained by the appellant against the respondents.

It then alleged that on the same 21st January the respondents procured from one of the Judges of the Supreme Court an order that a writ of *capias ad respondendum* should issue in the action against the appellant indorsed to hold him to bail for £4,000 (paragraph 2), and that a writ was issued accordingly (paragraph 4). As to these allegations there is no contest. Paragraphs 2*a*, 3 and 5 were as follows:—

"2*a*. The proceedings mentioned in paragraphs 1 and 2 hereof were had and taken by the defendants not for the purpose of enforcing or securing the payment of money which they believed to be due to them by the plaintiff by way of damages or otherwise but for the purpose and in the hope of terrifying the plaintiff and forcing him to pay to them or to procure the

(1) 2 B. & C., 693.
(2) 98 U.S., 187.
(3) (1909) A.C., 549.
(4) L.R. 4 Q.B., 653.
(5) 14 Sim., 266.
(6) (1905) A.C., 115, at p. 122.

Russian Government to pay to them money to which they did not in good faith consider themselves entitled and to which they were not in fact entitled and such proceedings were an abuse of the process of the Court in which they were had and taken.

"3. The said order was falsely and maliciously procured by the defendants by means of affidavits containing representations which were to the knowledge of the defendants wholly false and misleading.

"5. On the said 21st day of Jannary 1905 the defendants falsely and maliciously and without reasonable and probable cause caused the plaintiff to be arrested by the Sheriff of the said Court on the said writ and imprisoned and kept imprisoned and held to bail in the sum of four thousand pounds."

The case is presented in two aspects: (1) as an action for what is commonly spoken of as "a malicious arrest" (paragraph 5), and (2) as an action for a malicious abuse of the process of the Court in issuing a writ of *capias* for the purpose of extorting money upon a claim which the defendants knew to be unfounded (paragraphs 2*a* and 3).

I am very much disposed, however, to think that paragraphs 2*a* and 3 are only statements of particular facts which, if proved, would establish the conclusion of fact necessary to be established in an action for malicious arrest. Every malicious arrest is, in a very real sense, an abuse of the process of the Court, and calling it by that name and alleging *alia enormia* does not alter its real character.

At the trial of the New South Wales action the presiding Judge directed a verdict for the plaintiffs, but on appeal to the Full Court the verdict was set aside, and judgment was entered for the defendant. An appeal to this Court was dismissed in September 1907 (1).

The writ in the present action was issued from the Supreme Court of Victoria on 2nd March 1905, but the statement of claim was not delivered until 17th December 1908, after the New South Wales action had been finally determined in favour of the appellant.

The respondents in their defence objected that the statement of claim disclosed no cause of action, inasmuch as it was not

(1) 5 C.L.R., 68.

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alleged that the order and writ (*i.e.*, the order to hold to bail and the capias) were set aside or determined in favour of the plaintiff. The point that the New South Wales action was pending at the *commencement* of the action was not taken.

The action came on to be tried before *à Beckett* J. with a jury. At the close of the evidence, Mr. *Mitchell*, for the respondents, asked the learned Judge to direct a verdict for the defendants, which he declined to do. Amongst other objections taken were that the action was brought prematurely, inasmuch as the action in which, and the proceedings under which, the arrest was made had not been terminated in favour of the plaintiff before the commencement of the action. I doubt whether this point was open to them on the defence as pleaded, without amendment, and I think that under the circumstances an amendment would properly have been refused. Under the old pleading rules in England the point was not raised by the plea of not guilty.

The appellant had a verdict with £5,000 damages, but on appeal to the Full Court judgment was ordered to be entered for the defendants.

Many questions of law and fact were argued, but the only point upon which the Full Court expressed an opinion at length was as to the premature commencement of the action. They thought that if the appellant's cause of action was founded (as it was) upon the absence of reasonable and probable cause for alleging his indebtedness to the respondents he could not sue until the question of that indebtedness had been determined in the New South Wales action, and that if his claim was founded upon the allegations as to his intended departure from New South Wales and consequent defeat of the plaintiff's claim, he could not sue until the order to hold to bail had been set aside. I understand that, apart from this objection, they thought that the verdict should not be disturbed.

The appellant maintains that this decision was erroneous, and further that, even if it was right as to the claim in respect of a malicious arrest *simpliciter*, it was wrong as to the alternative cause of action.

It is necessary to refer briefly to the history of the action for malicious arrest and to the established rules by which it was

governed, and also to the reasons for these rules as far as they can now be discovered.

It was long ago settled that an action for maliciously setting the criminal law in motion could not be brought until the proceedings had terminated in favour of the accused.

The reason for the rule is thus stated in the considered judgment of the Court of Common Pleas in *Gilding* v. *Eyre* (1):—"It is a rule of law, that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination, or other final event of the suit in the regular course of it. That is the reason given in the cases which established the doctrine, that, in actions for a malicious arrest or prosecution, or the like, it is requisite to state in the declaration the determination of the former suit in favour of the plaintiff, because the want of probable cause cannot otherwise be properly alleged: *Waterer* v. *Freeman* (2); *Parker* v. *Langley* (3); and *Whitworth* v. *Hall* (4), *per Parke* B." The probability of a conflict of decision was also adverted to as a ground for this rule. If an accused person was actually guilty—a question which could only be properly determined in the prosecution—it could not be said that the proceedings were unfounded. And it would have been a scandal to allow an accused person to impeach in advance the competence of the appointed Court of criminal jurisdiction by an action brought in a civil Court.

The same reasons applied to an action for malicious arrest. For before the Act 1 & 2 Vict. c. 110 a *capias ad respondendum* was original process and issued as of course. The real complaint, therefore, was that the plaintiff had brought an unjust action, that is to say, that a still depending suit was unjust, which, it was thought, should not be allowed. Moreover, an action would not lie for merely bringing an action: *Cotterell* v. *Jones* (5); *Quartz Hill Gold Mining Co.* v. *Eyre* (6).

But by the Act 1 & 2 Vict. c. 110 a great change was made in the nature of the action, as was pointed out by *Rolfe* B. in *Daniels* v. *Fielding* (7). By that Act arrest on mesne process

(1) 10 C.B.N.S., 592, at p. 604.
(2) Hob., 267.
(3) 10 Mod., 209, at p. 210.
(4) 2 B. & Ad., 695, at p. 698.
(5) 11 C.B., 713, at p. 724.
(6) 11 Q.B.D., 674.
(7) 16 M. & W., 200.

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was abolished, but by sec. 3 it was enacted that if a plaintiff should by affidavit show to the satisfaction of a Judge that he had a cause of action against the defendant to the amount of £20 or upwards and that there was probable cause for believing that the defendant was about to quit England, it should be lawful for a Judge by special order to direct the defendant to be held to bail, and that thereupon the plaintiff might sue out a writ of *capias* in a prescribed form. A defendant having been arrested was to remain in custody until he had given bail or made a deposit to secure the debt and costs. The order might be made at any stage of the proceedings. Sec. 6 enacted that the party arrested might apply to "a Judge of one of the Superior Courts at Westminster or to the Court" for a rule or order calling on the plaintiff to show cause why he should not be discharged from custody, and the Judge or Court might make such order therein as might seem just, and any such order made by a Judge might be discharged or varied by the Court.

After referring to these provisions, *Rolfe* B. went on to say (1):—". . . . This very important alteration in the law has of necessity materially altered the nature of the action for a malicious arrest. The foundation on which such an action must now rest is, that the party obtaining the *capias* has imposed on the Judge by some false statement, some *suggestio falsi* or *suppressio veri*, and has thereby satisfied him, not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor is about to quit the country." And again (2):—"It is essential, under the present Statute, that the plaintiff in an action for a malicious arrest should allege falsehood or fraud in obtaining the original order. The action is in its character similar to an action for a malicious prosecution on a criminal charge, and the declaration ought therefore, in analogy to the course of pleading in such actions, to state what the false charge or statement was by which the Judge has been misled."

The New South Wales Statute (No. 24 of 1902) is in effect a transcript of the Act 1 & 2 Vict. c. 110, except that it does not, of course, refer to "any superior Court," and that the plaintiff is

(1) 16 M. & W., 200, at p. 206. (2) 16 M. & W., 200, at p. 207.

required to satisfy the Judge that if the defendant is allowed to depart from the State his remedy will be defeated. But the meaning of the Statute in other respects is the same.

Under this Statute, therefore, a person who is arrested may have three separate grounds of complaint, (1) that the plaintiff falsely alleged the existence of a debt, (2) that he falsely alleged the defendant's intention to depart, and (3) that he falsely alleged that his claim would thereby be defeated. It is obvious that in the two latter cases the existence or non-existence of the debt is quite irrelevant to the complaint, and the pendency of the action in which that existence is the only question to be determined cannot be any reason for not preferring the complaint. In the first case different considerations might arise, since the action would, in one aspect, involve a complaint that a still depending action is unjust, and it may be that a similar rule to that laid down in the old cases before the Act should be applied. But these authorities no longer govern the case as such, and, if a new rule analogous to the old one is to be laid down to govern it, it may well be a rule that the second action shall not be tried until the old one has been determined. In other words, that the objection should be treated as being in form, as it is in substance, in the nature of a dilatory plea, to which effect may be given by a stay of proceedings. If it were necessary to decide the point, and if it is open, I should strongly incline to take this view, which is consistent with justice, does not depend upon any technicality, and excludes the possibility of two conflicting decisions on the same question between the same parties.

However this may be, it is clear that the new cause of action is not, as was the old, the wrongful issue of original process, but the issue of mesne process, that is, the doing of something in the course of an action the mere pendency of which did not authorize the act complained of. Logically, it would seem to follow that the mere pendency of the former action is equally irrelevant in all three cases, and that the defence must be based upon the order to hold to bail and the writ of *capias*. Such an action might not inaptly be described as an action for abuse of the process of the Court.

I shall have occasion to advert to this point again in consider-

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ing how far, if at all, the alleged rule has application to an action pending in a foreign Court.

I proceed to consider the objection that the order to hold to bail and the writ have not been set aside. This is an entirely different point, and is governed by different considerations. The foundation of the objection is that the order while it stands is conclusive proof of the existence of reasonable and probable cause.

It was suggested that the termination of the action in which the order was made had not the effect of terminating its operation as a protection to the respondents. It is, however, obvious that it could not be set aside after that termination, so that the argument would lead to the absurd result that if the circumstances are such that the defendant cannot get it set aside pending the action he is forever without redress.

The order itself is made *ex parte*. The Act 1 & 2 Vict. c. 110 provided that the arrested defendant might apply to any Judge of a Superior Court, *i.e.*, to the Chancellor, Master of the Rolls, or a Vice-Chancellor, as well as to any Judge of the Queen's Bench, Common Pleas or Exchequer, or to the Court in which the action was brought, for his discharge from custody. It is suggested that this is the same thing as setting aside the order. It is in fact and in principle quite different. The proceeding directed was exactly analogous to proceedings by *habeas corpus*, and was founded upon the assumption that the order was on the face of it right, but that by reason of additional facts the defendant was entitled to his discharge. The notion of allowing a Judge of one Court to set aside an order made by a Judge of another would not have occurred to any lawyer in those days. As I have said, the order itself was *ex parte*. In my opinion the principles laid down in the case of *Steward* v. *Gromett* (1) govern the matter, except so far, if at all, as the present case is distinguishable by reason of the opportunity to ask for a discharge from custody. In that case it was held that, in an action for maliciously procuring the plaintiff to be imprisoned in default of finding sureties of the peace, it is not necessary to show a determination of the proceedings complained of in favour of the

(1) 7 C.B.N.S., 191.

plaintiff. The reason given is that the charge before the justices was not controvertible, and that they were bound to make the order if the necessary facts appeared before them. In the present case the Judge was, in the same sense, bound to make the order if the necessary facts were sworn to. The respondents contend, however, that that case is distinguishable on the ground that the appellant was at liberty to controvert the allegations of the plaintiffs, either by an application for discharge, or by an application to set aside the order in the exercise of the general jurisdiction of the Court to set aside *ex parte* orders. It is important to inquire, therefore, what was his real and substantial opportunity of obtaining redress in the method suggested.

It was the settled practice of the Courts in England that they would not interfere to discharge from custody a defendant who had been arrested on *capias* under the Act 1 & 2 Vict. c. 110 unless it most distinctly appeared that the plaintiff had no cause of action against the defendant or that the defendant did not intend to quit the realm. If there was a conflict of evidence (which was very likely if the plaintiff's case was false and fraudulent) the defendant could obtain no redress by these means. In the case of a conflict of evidence the only tribunal which could finally determine the question would be a jury, and, if the respondents' contention is correct, he could not even initiate proceedings to enable him to get that redress until the action was determined and the effect of the order had consequently expired by effluxion of time (although they contest even that termination of its effect). In two of the three cases already mentioned it would be quite immaterial whether the action were determined in favour of the plaintiff or the defendant. If the defendant could obtain a decision of the jury in his favour on those points before the determination of the action itself he would of course obtain his immediate discharge from custody, and this might be his only means of obtaining such discharge.

In the case of *Gilding* v. *Eyre* (1), already cited on another point, the Court said :—" The Court, on an application for a discharge from custody, will no doubt look at affidavits of the facts, for the purpose of informing its conscience in the exercise of its

(1) 10 C.B N.S., 592, at p. 604-605.

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equitable jurisdiction; but the Court, by its order either discharging or refusing to discharge a party from custody, does not necessarily decide or affect to decide any disputed question of fact, so as to preclude the parties from having that fact subsequently ascertained by the verdict of a jury. No conflict of decision, therefore, could occur in the present case; nor could the want of probable cause be affected by an order not necessarily decisive of any question involved in it.

"The plaintiff in this action, upon the facts stated in his declaration, might doubtless have obtained his discharge from custody by an order of the Court; but he was not bound to do so; and his yielding (in order to obtain his liberty) to the extortion practised upon him, not by the act of the Court, but by the act of the defendant, cannot deprive him of his legal remedy for the wrong he has sustained."

These observations were made with reference to an application for discharge from custody under a writ of *capias ad satisfaciendum*, but the reason is applicable to all cases in which the Court deals with an application on the principles I have stated.

The rule, as I understand it, is that the plaintiff must show that the proceedings have terminated in his favour if from their nature they are capable of such termination (*Castrique* v. *Behrens* (1); *Basébé* v. *Matthews* (2)). In the last-mentioned case *Montague Smith* J. pointed out that in cases to which the rule applied it was intended that the decision of the Court which had made the order relied on should be final.

The law does not mock a victim of oppression by telling him: "You might have asked for redress. True, no Court would have given it to you, but the fact that you could have made a futile attempt to obtain justice bars you from obtaining it." In my opinion this is not the meaning of the words "capable of such termination."

In my judgment the existence of an *ex parte* order of a Court is only a bar to an action based on its injustice in cases in which the Court by which the order is made is the appointed tribunal for deciding finally the question of fact on which the propriety of the order depends.

(1) 3 El. & E., 709, at p. 721. (2) L.R. 2 C.P., 684.

All the cases cited before us (*e.g.*, *Whitworth* v. *Hall* (1)) are consistent with this view, with the possible exception of that before *Fry* J. (*Lees* v. *Patterson* (2)), in which the point was not argued, and the cases leading to a contrary conclusion were not cited.

I think, therefore, that the only effect of an order to hold to bail is to enable the plaintiff, at his option, to issue a writ of *capias*, which is then his act, and not the act of the Court, in the same sense as the issue of a writ of execution on a judgment is said to be the act of the party, and not the act of the Court.

It follows, also, from the reasoning in *Gilding* v. *Eyre* (3), that in such a case the fact of the defendant's yielding, in order to obtain his liberty, to the extortion practised upon him, not by the act of the Court but by the act of the plaintiff, cannot deprive him of his legal remedy for the wrong he has sustained.

For these reasons I am of opinion that neither the existence of the order to hold to bail, or that of the *capias*, was a bar to the commencement of the present action.

I have already dealt to some extent with the question whether the old rule under which the mere pendency of the former action should be adopted, or another rule adapted to the altered conditions, where, as in this case, the plaintiff's complaint is not of the representation that he intended to leave New South Wales, or, that if he did, the respondents' claim against him would be defeated, but of the assertion of a claim known to be unfounded.

I will assume that a rule in the terms of the old rule should be held to be applicable to such a case. For, as Lord *Halsbury* once remarked, the English law is not always logical. On that assumption, the question arises whether such a rule would be applicable to an action pending in a foreign Court? In my opinion, the rule, if it now exists, is founded upon the inconvenience of having two actions pending at the same time between the same parties, in which there may be conflicting decisions.

The rule of comity has never, so far as I know, been extended to the recognition of foreign litigation other than a final judgment upon the merits (see the cases cited in *Foote*, 2nd ed., p.

(1) 2 B. & Ad., 695.
(2) 7 Ch. D., 866.
(3) 10 C.B.N.S., 592.

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580), unless the case of *Taylor* v. *Ford* (1), can be regarded as an instance.

The foreign decision which was in question in the case of *Castrique* v. *Behrens* (2) was a final judgment by which the parties were bound, and which it was not sought to impeach. In the case of *Taylor* v. *Ford* (3) the cause of action was the issue of original process in a District Court in the State of Pennsylvania for the attachment of a ship of which plaintiffs were owners. *Blackburn* J. is reported as stating the rule that "for the purpose of avoiding conflicts of jurisdiction and other unseemly consequences, you never can maintain an action for putting a Court of competent jurisdiction in motion until the matter before it has been finally decided in favour of the defendant."

The case is not reported in the authorized reports, and is not mentioned in the text-books. The point was taken for the first time by the Court itself. The authorities as to the effect to be given to a foreign *lis pendens* were not cited, and the distinction between the effect of a foreign and of an English *lis pendens* was not considered. Unless the case can be distinguished on the ground that the complaint was of issuing original process I am unable to reconcile it with the other authorities. If, as would appear, it is based on the inconvenience of a possible conflict of decisions it is quite inconsistent with them. As already said, this action is not based on a wrongful issue of original process.

The point may also be regarded in another aspect. Is the requirement a matter pertaining to the right or to the remedy? When was the plaintiff's cause of action complete? When did the *Statute of Limitations* begin to run? The law applicable to the case is the common law of England, which, *quoad hoc*, prevails both in New South Wales and Victoria. In my judgment the termination of the previous action is not part of the cause of action, any more than the delivery of a signed bill of costs is part of a solicitor's cause of action (*Coburn* v. *Colledge* (4)). It is really an obstacle placed in the way of bringing an action to enforce an existing right, and may be properly described as a positive suspensory rule of procedure established by judicial

(1) 29 L.T.N.S., 392.
(2) 3 El. & E., 709.
(3) 29 L.T.N.S., 392, at p. 394.
(4) (1897) 1 Q.B., 702.

decision, while the rule applicable to a solicitor's bill of costs is established by Statute. The case of *Scott* v. *Lord Seymour* (1) affords an instance of a similar suspensory rule prescribed by the law of a foreign State, which was held not to be applicable to an action brought in England for a wrong committed in the foreign State. I am unable to distinguish that case from the present on this point.

I will only add that there is a very real distinction between an action for wrongfully issuing original process and an action for improperly obtaining an order for the issue of mesne process. The burden is upon those who insist that the technical rule applicable to the first class of action should be applied to the second. *Cessante ratione cessat ipsa lex.* Technical rules of procedure ought not, any more than fictions of law, to be applied to cases not within the reason of the rule.

On the whole, therefore, I think that the preponderance of reason is against the objection, and that there is no authority binding this Court to give effect to it.

For these reasons I am strongly disposed to think that the action, regarded as an action for malicious arrest in the original sense of that term, was properly brought in the Supreme Court of Victoria without waiting for the termination of the New South Wales action. The same considerations are, of course, applicable to the effect of the order to hold to bail and the *capias*.

I do not think it necessary to deal fully with the interesting argument founded on the alleged "abuse of the process of the Court" as distinct from malicious arrest. That term has been used in different senses. In *Grainger* v. *Hill* (2) it was used of an action founded upon a use of original process for purposes foreign to the scope of the process itself, that scope being merely to obtain security for enforcing the payment of an alleged debt. In *Gilding* v. *Eyre* (3) it was used of an action founded upon the use of process which the party had a formal right to issue for the purpose of obtaining payment of money which to his knowledge had been already paid. In another sense, any civil proceedings taken maliciously and without reasonable and probable cause may be called an abuse of the process of the

(1) 1 H. & C., 219. (2) 4 Bing. N.C., 212. (3) 10 C.B.N.S., 592.

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Court. Reference was made to some old cases: *Webster* v. *Haigh* (1); *Savil* v. *Roberts* (2), from which, if they are good law, a distinction might be drawn between actions according to the intent with which the process misused was issued, just as in the criminal law there is a disinction between a common assault and an assault with intent to do grievous bodily harm.

As at present advised, I am disposed to think that the true distinction is between cases in which the real complaint is of an act which is within the scope of the process and cases in which the complaint is of an act which would be equally outside the scope or operation of the process itself whether that process was rightfully or wrongfully issued. But I need say no more on this question.

I am therefore, as at present advised, unable to agree with the Supreme Court in their reasons for entering judgment for the defendants.

The appeal from the verdict was not, however, based on that ground alone. The defendants also maintained that there was no evidence in support of the plaintiff's case. At the trial they asked the learned Judge to direct a verdict for them, and, if they were entitled to it then, they are still entitled to it. It is necessary, therefore, to consider the evidence and the manner in which the case was presented to the jury.

The alleged contract upon which the New South Wales action was founded was sought to be made out from two series of cablegrams which had passed between the company in Victoria and a Captain Miles at Manilla, and between Captain Miles at Manilla and a Mr. Moller at Hong Kong, in the months of November and December 1904. At the trial of the action the only question raised was whether there was a complete contract. Mr. Justice *Pring*, who presided, thought that the contract was made out, and so directed the jury. The Supreme Court of New South Wales and this Court were of a contrary opinion. The point was one of considerable difficulty, and involved mixed questions of law and fact.

In the present case it was incumbent upon the plaintiff to establish affirmatively (1) the absence of reasonable and probable

(1) 3 Lev., 210.

(2) 1 Salk., 13; 1 Raym. (Ld.), 374.

cause for asserting the claim in the New South Wales action, and (2) malice, as it is called, on the part of the defendants. His case was that the defendants' agents when the action was brought did not really believe that any such contract had been made. Before this Court another point was set up for the first time, with which I will afterwards deal, to the effect that they knew that the plaintiff had a good defence to the action even if a contract had been made.

A brief statement of the facts is necessary in order to appreciate the case made by the plaintiff. In the negotiations which were alleged to have resulted in a complete contract Miles had acted as the intermediary, to use the plaintiff's own and apt word, on behalf of the company, but he had no authority to conclude any contract for them. All that the company know of the real facts up to the end of 1904 was what appeared from the cablegrams between him and themselves, except that on 20th December, apparently in answer to a cable from the company to Miles asking who were the buyers, Moller had cabled to them "Are buyers *Peregrine*." On 18th January 1905 plaintiff and Moller arrived in Melbourne, and called on defendants' managing director, Mr. Newman, to whom Moller gave copies of all the cable messages which had passed between himself and Miles. Defendants were then informed that plaintiff was Moller's principal in the transaction, being himself an agent for the Chinese Eastern Railway Company. Defendants thereupon offered to deliver the ship, which was lying in Melbourne, at once, and plaintiff and Moller visited her. Plaintiff said he could not accept her until he had communicated with his principals by cable. On the following day, 19th January, Moller and plaintiff returned to Mr. Newman and definitely refused to complete the purchase. On the afternoon of that day they left by express for Sydney *en route* for China.

On the afternoon of the same day Mr. Newman sent a telegram to the company's Sydney manager, Mr. Howell, as follows:—

"Confidential. Purchaser '*Peregrine*' refuses continue negotiations. Moller and Purchaser leaving to-night's express. Croker has dictated letter for Sly. Wish you give Sly copies cablegrams

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exchanged between Miles and ourselves. We are forwarding copies cables between Miles and Moller. Writing."

On the same day Newman wrote to Howell, enclosing a hurriedly dictated draft of a letter from Mr. Croker, their Melbourne solicitor, to their Sydney solicitors, Messrs. Sly & Russell, together with copies of all the cablegrams (with one or two exceptions to which I will afterwards refer), and saying:—

"We wish to be guided entirely by Dr. Sly in this matter. Varawa the Agent of the Chinese Eastern Railway Company who are the purchasers intends leaving Sydney by the German Steamer on the 21st inst. Fortunately the purchase money was to be nett to us, we therefore have nothing to do with Captain Miles or anyone else's commission, but we have been put to certain expenses in connection with the transfer of the freight, obtaining special coal for trial, cables, etc., but against this (although actually on account of expenses of voyage to Singapore) we have the £2,000 at credit, which we do not intend to hand over until compelled.

"What we want you to understand is that we do not wish to be inveigled into any claim for detention, but we certainly consider the Chinese Eastern Railway Company should be made to pay something. Mr. Croker spoke to Messrs. Moller and Varawa of a claim of £5/6,000 and suggested they should give a bank guarantee for this amount in order to be allowed to leave your city."

On receipt of this letter in Sydney on the following morning Howell placed the whole matter before Dr. Sly, the head of the firm of Sly and Russell, and a gentleman of large experience and high reputation, and asked his advice whether an action at law would lie and against whom. Dr. Sly, after considering the cables, arrived at the conclusion that they disclosed a contract between plaintiff and defendants for the purchase of the ship. Mr. Schrader, another member of the firm of Sly and Russell, also considered the matter, and arrived at the same conclusion. Time was pressing, and Schrader prepared an affidavit to be sworn by Howell, setting out the necessary facts for obtaining an order to hold the plaintiff to bail. This affidavit first set out (paragraph 2), in the form of a count in a declaration for breach

of contract, the agreement which Dr. Sly and Schrader thought was evidenced by the documents (we are told that in New South Wales this is common form required in such an affidavit), and then went on to say (*inter alia*) that the plaintiffs were the owners of the *Peregrine*, and through the agency of Miles had arranged with Moller, as the agent for the defendant, for the sale of the ship to him for £28,000 to be delivered in Sydney, the price to be paid on delivery; that the ship was subject to a speed trial of 17 knots; that the plaintiffs were ready and willing to deliver; that the defendant had repudiated the contract, and declined to pay the purchase money; and that the deponent believed that the plaintiffs had lost by reason of the defendant's breach of contract £8,000. It then went on to state facts showing the defendant's intention to leave for Shanghai on 21st January, and the deponent's belief that the action would be defeated if the defendant were not apprehended. Mr. Schrader also prepared an affidavit, which was sworn by Moller, to the effect that he as agent for the defendant had purchased the *Peregrine* from the plaintiffs for £28,000.

It appeared that Howell at first hesitated at paragraph 2, but on being advised by Mr. Schrader that the practice of the Court in New South Wales required that the affidavit should contain such a statement he was content.

On these affidavits *Pring* J. made an order to hold to bail for £4,000 and £10 costs, and the present plaintiff was arrested. Before the writ was issued he and Moller had called upon Sly and Russell and repeated their refusal to carry out the alleged contract. The only position which the plaintiff took up was that his own principals were the only persons liable.

The appellant by his pleas in the action formally denied that the respondents (plaintiffs in the action) were ready and willing to deliver the ship, but at the trial the only question contested was the existence of a valid contract. I have already stated the result of that action.

The present action came on for trial in Melbourne before *à Beckett* J. and a jury in May 1910, the plaintiff being represented by Mr. *Duffy* K.C. and Mr. *Wise* K.C., leaders at the Victorian and New South Wales Bars respectively. It may be

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assumed that those learned counsel fully understood the case they intended to put before the jury.

Before further referring to what occurred at the trial I will read extracts from the speeches of Lord *Halsbury* and Lord *Bowen* in the case of *Browne* v. *Dunn* (1) in the House of Lords. That was an action for libel contained in a document purporting to instruct the defendant to take proceedings to have the plaintiff bound over to keep the peace, and which the defendant had exhibited to the signatories of it. The case made by the plaintiff at the trial was that the whole matter was a sham, that the defendant had no information that the plaintiff had been guilty of any such conduct as alleged, and that the transaction was merely carried out for the purpose of annoyance and injury to the plaintiff. In other words, the plaintiff endeavoured to establish malice in that particular way. He had a verdict, but the Court of Appeal set it aside and entered judgment for the defendant on the evidence. The plaintiff then appealed to the House of Lords and sought to set up other grounds for alleging malice. Lord *Halsbury* said (2):—

"My Lords, I cannot but think that this case, although the amount involved is small, raises very important questions indeed. Amongst other questions, I think it raises a question as to the conduct of the trial itself, and the position in which people are placed, when, apart altogether from the actual issues raised by the written pleadings, the conduct of the parties has been such as to leave one or more questions to the jury, and those questions being determined, they come afterwards and strive to raise totally different questions, because, upon the evidence, it might have been open to the parties to raise those other questions.

"My Lords, it is one of the most familiar principles in the conduct of causes at Nisi Prius, that if you take one thing as the question to be determined by the jury, and apply yourself to that one thing, no Court would afterwards permit you to raise any other question. It would be intolerable, and it would lead to incessant litigation, if the rule were otherwise. I think Dr. *Blake Odgers* has, with great candour, produced the authority of *Martin* v. *Great Northern Railway* (3) which lays down what

(1) 6 R., 67. (2) 6 R., 67, at p. 75. (3) 16 C.B., 179.

appears to me to be a very wholesome and sensible rule, namely, that you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another question, and have fought it, and have been beaten upon it.

"My Lords, so far as regards the conduct of the trial, it appears to me that nothing could be stronger than what the learned Judge himself said at the very commencement of his remarks in the presence of the learned counsel, who, if it is not accurate, were bound then and there to intervene and say so. The learned Judge says at the commencement of his summing up, after he has introduced the facts to the jury: 'We have to deal with the law in this matter, and the case is fairly put by Mr. *Willis* in the only way in which he could put it. He cannot ask you to treat this as a libel, unless you are satisfied that the whole thing was a sham got up by the defendant for the mere purpose of disparaging the character of the plaintiff.' My Lords, after that statement by the learned Judge, which is at the commencement of his summing up, the learned counsel, not intervening at all, but allowing the learned Judge to leave that as the one question to the jury, it appears to me that it is absolutely hopeless, in any other Court, afterwards to attempt to raise any other question than that which the learned counsel deliberately elected to allow the learned Judge at all events to leave to the jury as the only one which was to be put to them."

Lord *Bowen* said (1):—

"I think, as the Lord Chancellor and my noble and learned friends who have preceded me have said, that it would be *pessimi exempli*, and contrary to all one's experience at Nisi Prius, and contrary to the best interests of justice, if a plaintiff, who had obtained a verdict from a jury upon one issue which he had presented to them, were allowed to sustain it by fishing out various causes of action, which he had not presented to the jury, and upon which their verdict was not asked for, and upon which damages unquestionably were not given."

The case made by Mr. *Duffy* in opening and by Mr. *Wise* in reply was that the defendants at the time when they issued the

(1) 6 R., 67, at p. 80.

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writ and obtained the *capias* in the New South Wales Court did not believe that there was a valid subsisting contract between them and the plaintiff, and that Howell's affidavit was false to his knowledge in that respect, and also in stating that the contract was made through the agency of Miles and that the contract price was £28,000. These three points were emphasized again and again by Mr. *Wise* in his reply, from the shorthand notes of which long extracts were read to us.

It was not disputed that if the defendants fairly submitted the facts to Messrs. Sly and Russell, and honestly acted on the advice given by them, the issue of malice was not proved (*Ravenga* v. *Mackintosh* (1)), whether there was or was not an absence of reasonable and probable cause.

Plaintiff's counsel therefore endeavoured to show that the facts were not fully and fairly laid before Sly and Russell. They said, first, that three cable messages were not included in the batch submitted. One of these, dated 8th December 1904, from Miles to defendants, was as follows:—"Confirm the sale *Peregrine*. If we accept delivery Townsville when must delivery be made." It was contended that this was material on the question whether Miles was agent for the defendants or for the purchaser, and that the word "we" showed that he was agent for the (then unknown) purchaser. But it appeared that amongst the cables submitted to Sly and Russell was the reply from the defendants of the same date which was in the words:—"If you accept delivery Townsville must be taken before Friday afternoon," in which the word "you" would lead to the same inference. The true, and, as I should think, the obvious, inference to be drawn was that at that point defendants treated Miles as the representative of the purchasers for the purpose of the communication. But, in my opinion, the question whether Miles was agent for the vendor or for the purchasers or for both was, having regard to the other documents, quite irrelevant to the question of the existence of a completed valid contract between plaintiff and defendants. Mr. Croker, their Melbourne solicitor, had in his draft letter insisted upon the view that Miles was agent for the purchaser. Dr. Sly and Mr. Schrader thought that he was not, and so advised.

(1) 2 B. & C., 693.

I do not think that this omission affords any warrant for the contention that defendants did not place the facts fully and fairly before Sly and Russell.

The other messages not submitted were two, of 23rd and 24th November respectively, from Moller to Miles, in which it was suggested that the price to be offered was to be sufficient to cover 10 per cent. for "outside commissions here." I entirely fail to see what bearing they could have had upon the question whether a contract had or had not in fact been concluded.

It was, however, contended that they had a bearing on the question whether the agreed price was £26,000 or £28,000. There is no doubt upon the documents that the defendants stipulated for a price of which they would retain £26,000 net for themselves, and that the full amount to be disbursed by the purchasers was to be £28,000. It was open to argument whether the proper construction was that the defendants were to receive the £28,000 in the first instance, subject to a liability to disburse £2,000 by way of commission to Miles, or whether they were only to receive £26,000. This was no doubt an important matter for consideration in deciding what the exact terms of the contract were. It was considered by Dr. Sly and Mr. Schrader, who thought that the former was the true construction. But I fail to see what bearing these two telegrams could have had on that question. Nor was the question whether the true purchase money was in the eye of the law £26,000 or £28,000 at all material to the plaintiff's right of action or to the amount of damage recoverable. At most it would be matter of variance in pleading.

Plaintiff's counsel further contended that a letter dated 27th December 1904, from Miles to defendants, which might possibly have been, but was not shown to have been, received by them late in the afternoon of 19th January 1905, was not submitted to their solicitors with the telegrams. They expressly waived any argument that might be based upon its not having been communicated to them during plaintiff's continuance in custody. In my opinion the letter (whenever received) was immaterial to the question of the existence of a contract. The minutes of the

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meetings of the company's directors were, in my opinion, equally immaterial to that question.

Plaintiff's counsel also contended that certain facts on what was called the "belligerency question" were not submitted to Sly and Russell.

The Russo-Japanese war was going on, and a Proclamation had been made by the Governor-General under the Foreign Enlistment Act. On 13th December 1904 the Comptroller of Customs and the Secretary to the Attorney-General's Department had an interview with Mr. Newman, in which the Comptroller informed Newman that he had been informed that the company intended to sell one of their ships and that he wanted to be satisfied that the vessel was not going to be sold for the purposes of a belligerent. The *Peregrine* was then trading on the Queensland coast, more than a thousand miles from Melbourne. The result of the interview was that Mr. Newman undertook in writing that the ship should come back to Melbourne, which she did.

On the same day defendants cabled to Miles, asking who were the principals to whom she was to be transferred in Sydney. The reply came from Moller on 20th December, as already stated.

This episode might perhaps have been used to show that the defendants would not have been willing to deliver the ship from fear that by doing so they would expose themselves to some liability. But it was not so used. It was never suggested in the course of the whole case that the defendants at the time of making the alleged contract (which was certainly before 13th December) had any knowledge or notice of the purchaser's intention to use the ship for belligerent purposes. On the contrary, Mr. *Wise* refused, though he had every opportunity to do so, to use it for any such purpose. He, however, strongly relied on it as showing that the defendants could not have intended to enter into a contract (*i.e.* I suppose, after that date) which they knew they could not lawfully perform.

In my opinion these facts were quite irrelevant to the only questions submitted to Sly and Russell, which were whether the cables disclosed a completed contract, and if so against whom the action should be brought.

It follows, in my judgment, that the plaintiff failed to prove

that the defendants' managers did not honestly believe that the company had a good cause of action against the plaintiff, whether or not there was reasonable and probable cause for such belief.

It appears to be the rule in the United States that when a Judge of first instance has held that there is actual good cause, that finding is conclusive as to the existence of reasonable and probable cause.

I express no opinion on that question, or on the other, left open in *Ravenga* v. *Mackintosh* (1), whether the opinion of a legal adviser, honestly believed, is conclusive on the subject.

After the close of the evidence, as already said, Mr. *Mitchell,* for the defendants, asked the learned Judge to direct a verdict for them, which he refused to do. In his summing up he first invited the attention of the jury to paragraph 3 of the statement of claim, which he explained as meaning in substance that Howell and Moller had made false affidavits. He called special attention to Howell's hesitation as to the formal statement of the cause of action, and asked the jury to consider whether he was justified in swearing as he did because a responsible person who had considered the facts told him he might do so. His Honor then referred to the question whether Miles was the agent of the defendants, and to the amount of the price, with which I have already dealt, and told the jury that the falseness alleged was in recklessly asserting as a fact that which was merely in other persons' opinion a legal conclusion arrived at upon facts admittedly in doubt up to the last moment, and at variance with opinion that had recently been formed by Mr. Croker in Melbourne (*i.e.*, as to Miles' agency). The learned Judge then went on to the other allegation in Howell's affidavit, and said:—"I do not know that there is any other paragraph but paragraph 2 that is open to that charge, but we will go through them. 'The said sale was subject to a speed trial.' There is nothing wrong there. 'The plaintiffs were willing and ready to deliver.' There is nothing shown to be false in that. Then the statement about sending the vessel to Singapore and motives, and so on, and that defendant repudiated his contract. I do not think there is anything that can be fastened upon and certainly said to be false. Supposing that the

(1) 2 B. & C., 693.

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primary statement with which the affidavit starts were left out, I do not know that there is anything which can be fastened upon in the rest of the affidavit as false."

He then referred to Moller's affidavit, in which he could not see anything false.

The learned Judge then dealt with paragraph 2*a* of the statement of claim; and told the jury that he could not see any evidence to support it, in which opinion I entirely concur, but he did not give a formal direction to that effect.

With regard to paragraph 5 he directed the jury as to the meaning of "falsely and maliciously," and told them that his opinion on the question of reasonable and probable cause would depend on the answer to the specific questions he would leave to them.

No objection was taken by the plaintiff to the direction of the learned Judge.

The following questions were left to the jury:—

1. Are the allegations in paragraph 3 of the statement of claim substantially true?
2. As to both, or if only as to one, to which one of the affidavits referred to?
3. Are the allegations contained in paragraph 2*a* substantially true?

all of which the jury answered in the affirmative (as to both affidavits), and they awarded £5,000 damages.

It follows from the reasons which I have already given that the verdict cannot stand. But it is now suggested—and it is right to say that the suggestion came from the Bench and not from the bar, where however it was naturally welcomed and adopted—that the defendants are not entitled to have judgment entered for them (1) because there was evidence upon which the jury might have found that the defendants were not in fact ready and willing to deliver the ship, and (2) because they were by law prohibited from delivering it under the circumstances.

As to the first point, it is abundantly clear that no such point was raised at the trial. The words of the learned Judge already quoted from his summing up are conclusive:—"'The plaintiffs were ready and willing to deliver.' There is nothing shown to

be false in that." I read again the words of Lord *Halsbury* (1):— "My Lords, after that statement by the learned Judge, which is at the commencement of his summing up, the learned counsel, not intervening at all, but allowing the learned Judge to leave that as the one question to the jury, it appears to me that it is absolutely hopeless, in any other Court, afterwards to attempt to raise any other question than that which the learned counsel deliberately elected to allow the learned Judge at all events to leave to the jury as the only one which was to be put to them."

Further answers to the new suggestions appear upon the facts. Of course, if the defendants were not ready and willing to deliver the ship, they had no cause of action, and they knew it, and the proper direction to the jury would have been that if that was the fact the jury should find for the plaintiff, but no such direction was asked for. I listened attentively to the long extracts read from the speeches of counsel, which prove that the belligerency matter was never present to their minds as relevant to such a question. They no doubt thought, as I think, that the allegation of readiness and willingness referred to the actual fact, and not to the effect of any Statute law which might make the delivery unlawful.

As to that fact, the only relevant evidence was against them. It was proved that the defendants offered delivery in Melbourne, that the plaintiff asked for and obtained time to communicate with his principals in China, and then formally refused to take the ship. Moller, who was examined on commission by the plaintiff, swore that Newman asked him if he would give an undertaking not to employ the ship for belligerent purposes, and that after referring to the plaintiff he agreed to do so. Plaintiff, however, who was at that time very imperfectly acquainted with the English language, said that he did not hear this. It was also proved that he was again asked to take delivery in Sydney, and again refused, and that after his discharge from arrest fresh negotiations were opened for the sale of the ship to him, which went off because he would not offer more than £24,000. It is now suggested that all this might have been a mere sham. I do not wonder that the plaintiff's very learned and experienced counsel declined to set up such a case.

(1) 6 R., 67, at p. 76,

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As to the other point, that the defendants could not lawfully have made delivery, I do not think that it is the law, and, if it is, I do not think that it would be material. As I have already said, it was nowhere alleged that the contract was void as being made with the knowledge of the defendants in order to effectuate an illegal purpose. The performance of the supposed contract was to be by delivery and transfer in Sydney, which could only be to a British subject. I fail to see that the defendants would have incurred any liability by making such a transfer, even if they had known that the transferee intended to transgress the law, since there was no illegality in the contract itself (*Waugh* v. *Morris* (1)), and it was not likely that the purchasers would be able, or under the circumstances would attempt, to use the ship for any illegal purpose. It certainly could not be assumed that they would do so.

But, even if they had such an intention, it is, I think, quite clear that this would not have afforded a defence to an action for damages for breach of contract lawful in its inception. When such a question is raised in a country which still retains the old common law form of pleading interesting questions may arise as to the proper form of declaration, but they are irrelevant to the question whether the defendants believed that they had a good cause of action for damages against the plaintiff. A plea that the defendant refused to perform the contract on the ground that he intended, to the plaintiff's knowledge, to break the law would be absurd. There is nothing in the case to suggest that this point (which was raised for the first time from the Bench in this Court) was present to the minds of the defendants. If it was not, it is irrelevant on the question of malice.

For these reasons I am of opinion that these new points are not now open to be raised, and that if they were there is nothing in either of them.

If they were good, and a new trial could be granted, it could only be as a favour, and on payment of all the costs up to date.

It may be that the defendants' action was high-handed, and opinions may differ as to the justice of a law which allows a casual visitor to a State to be arrested on a claim for damages for

(1) L.R. 8 Q.B., 202.

breach of contract entered into with him abroad, and without any anticipation of his coming to the State. It may also be doubted whether in such a case a Judge ought to come to the conclusion that the plaintiff's action would be "*defeated*" by the departure of the defendant. But, in face of the interpretation which has hitherto been put upon this enactment, it would be impossible to found a case of malice on this ground. We must take the law as we find it.

It follows that the judgment which has been entered for the defendants cannot be disturbed.

O'CONNOR J. The appellant's right to hold the judgment entered for him at the trial must depend upon whether he can establish that his causes of action for malicious prosecution and for abuse of the process of the Court are well founded. In respect of both causes of action the alleged wrongs were committed in New South Wales, and the appellant's right to sue for them in a Victorian Court rests upon well recognized principles of international law, it being clear, for the purpose of the present discussion, that the proceedings in the Courts of New South Wales stand on the same footing as proceedings in the Courts of a foreign country. In the course of the argument it was contended that, since the passing of the Commonwealth *State Laws and Records Recognition Act* 1901, no proceedings in a State Court can be treated in the Court of another State as proceedings in a foreign Court. In my opinion that Statute has no bearing on the matters under consideration in this appeal. The 18th section, which is the section relied on, is really an evidence section, and does not affect the principles on which the Courts of one State take cognizance of wrongs committed in another State. That principle is well recognized, and may be thus stated. Where an act is wrongful both by the law of the State in which it was committed and by the law of the State in which the wrongdoer is being sued, the action will lie. The material inquiry therefore is in respect of each of the plaintiff's causes of action what is it that really constitutes the wrongful act for which the laws of New South Wales and the laws of Victoria give a remedy. I shall take the charge of malicious abuse of process first, because

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in respect of that cause of action, by reason of its nature, it is not, and cannot be, necessary for the plaintiff to establish want of reasonable and probable cause, termination of the action in the plaintiff's favour, or the setting aside of the proceedings under which the writ of *ca. re.* was issued. It is an unusual form of action, and few cases can be cited to illustrate the principles upon which it is founded. The earliest is *Grainger* v. *Hill* (1). There process regularly obtained was wrongfully used by way of pressure to extort from the plaintiff property to which the defendant had no right. Lord Chief Justice *Tindal* describes the cause of action as being a complaint by the plaintiff that the process of the law "had been abused to effect an object not within the scope of the process." In the next case, *Gilding* v. *Eyre* (2), the cause of action is thus described by Mr. Justice *Willes*:— "The defendant has maliciously employed the process of the Court in a terminated suit, in having by means of a regular writ of execution extorted money which he knew had been already paid and was no longer due on the judgment." In *Parton* v. *Hill* (3) Mr. Justice *Blackburn*, referring to the plaintiff's contention that the action was not for malicious prosecution but was an action for abusing the process of the Court, lays it down that to support the latter form of action according to the doctrine laid down by *Tindal* C.J. in *Grainger* v. *Hill* (4) the complaint must be that the process of the Court has been abused to effect an object not within the scope of the process. That statement expresses in as few words as possible what is necessary to constitute the cause of action for malicious abuse of process, and being founded on the principles of the common law it is the same in New South Wales as in Victoria. It follows that, if the *ca. re.* proceedings were taken in New South Wales merely with the object of more effectively securing payment of the amount claimed by the ordinary processes of the law, there would be no cause of action for malicious abuse of process even though the claim were unfounded to the plaintiff's knowledge and the application for the order to hold to bail were supported by false affidavits. The cause of action in that case would be for malicious arrest. The

(1) 4 Bing. N.C., 212, at p. 221.
(2) 10 C.B.N.S., 592, at p. 604.
(3) 10 L.T.N.S., 414.
(4) 4 Bing. N.C., 212.

plaintiff, in my opinion, could establish his cause of action only by showing that the order had been obtained and the writ issued in respect of a claim false to the respondent's knowledge and solely for the purpose of arresting the plaintiff, as a means of extorting from him payment of moneys which the respondents well knew were not due. In paragraph 2*a* of the statement of claim the appellant has stated the facts on which he relies in that form, and in that form the jury have found them. Now, assuming that the facts so stated and found would constitute the cause of action alleged, I agree with the learned Judges of the Supreme Court that there was no evidence to go to the jury in respect of the case attempted to be made in paragraph 2*a*. Conceding, for the sake of argument, that the respondents acted maliciously and without reasonable and probable cause, there are no facts from which in my opinion the jury could have reasonably drawn the inference that the object of the writ and proceedings was any other than to ensure payment of the claim by the ordinary processes of the law. As the verdict of the jury and the judgment entered for plaintiff were general, the damages attributable to the cause of action with which I am dealing cannot be separated from those attributable to the cause of action for malicious prosecution. It is impossible therefore that the verdict for the plaintiff can stand. Whether the remedy will be a new trial or the entry of judgment for the defendants must depend upon what is the right view to take of the questions raised in respect to the cause of action for malicious arrest. The first of these is, was it essential to the plaintiff's action to prove that the order for *ca. re.* had been set aside, or at all events that the original action had been determined in his favour, before the issue of his writ? The learned Judges of the Supreme Court held that it was essential, and, having determined that the plaintiff had not made out his case for malicious abuse of process, directed a verdict to be entered for the defendants on the whole claim: the question now to be determined is whether that order was right. The action for malicious arrest rests upon common law principles and its essentials are the same in New South Wales and in Victoria. If the person suing in a Victorian Court founds his claim on malicious proceedings taken in a Victorian Court it

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is clear that he must show that the proceedings complained of terminated in his favour, if they were capable of being so determined, before the issue of the writ. If the proceedings were criminal he must show that he was acquitted or that the conviction was set aside. If they were in bankruptcy he must show that the adjudication was set aside as in *Metropolitan Bank Ltd.* v. *Pooley* (1). Generally speaking it is not actionable to institute civil proceedings without reasonable and probable cause even though maliciously. But where the proceedings are of a kind that necessarily involve damage to a person's credit or reputation or to his property or an invasion of his personal liberty, an action will lie if the proceedings were taken maliciously and without reasonable or probable cause: *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (2), *per Bowen* L.J. In England before the enactment of 1 & 2 Vict. c. 110, which is substantially identical with the Victorian and with the New South Wales Acts regulating the issue of writs for arrest on mesne process, the plaintiff in a civil action was entitled as a matter of right to the issue of a writ of *capias ad respondendum* on making an affidavit of debt. The writ was issued to him, if he wished to take it out, without any judicial leave or intervention. But on the debtor's complaint that the proceedings had been taken out maliciously and without reasonable and probable cause, it was always necessary for him to show that the action had terminated in his favour before the issue of his writ, because the gist of his claim was that the action of debt had been instituted maliciously and without reasonable and probable cause. In *Daniels* v. *Fielding* (3) Baron *Rolfe* explains the change in the nature of proceedings for arrest on mesne process brought about by 1 & 2 Vict. c. 110. Since that Statute became law the action is for maliciously and without reasonable and probable cause obtaining the Judge's order to hold to bail, and the obtaining of the order maliciously and without reasonable and probable cause is the gist of the action. Before the order can be issued the Judge must be satisfied of three things—(1) that there is a good cause of action; (2) that the defendant is about to depart

(1) 10 App. Cas., 210.
(2) 11 Q.B.D., 674, at pp. 690-1.
(3) 16 M. & W., 200.

out of the jurisdiction; (3) that his departure will defeat the plaintiff's remedy. Where the debtor afterwards complains that the order has been obtained maliciously and without reasonable and probable cause, the requisites of his cause of action will depend upon the nature of his grievance. Where he does not deny the existence of a cause of action, but charges that the allegations that he was about to depart out of the jurisdiction and that his departure would defeat the creditor's remedy were false and malicious, the question whether it would be necessary to show that the Judge's order had been set aside before the commencement of his action is one not free from difficulty. On the one hand it is contended that the proceedings to obtain the *ca. re.* are *ex parte*, and therefore come within the principle laid down in *Steward* v. *Gromett* (1). In other words, as the debtor cannot on the application obtain a determination of the matters in issue in his favour, the proceedings must be regarded as *ex parte* within the rule laid down in that case, and the debtor is therefore not bound to set the order aside before the commencement of his action. On the other hand, it is urged that as the debtor may obtain from any Judge an order for his discharge from custody which involves a reversal of the determination, he is bound to show that the order has been set aside. It is not, however, necessary to further consider these contentions because that aspect of the facts is not material on this appeal. In the present case it is not denied that the debtor was about to depart out of the jurisdiction, and it is clear that his departure would have defeated the creditor's remedy. The debtor's complaint is that his creditor had wronged him in that he had maliciously and without reasonable and probable cause falsely alleged that there was a debt or cause of action upon which the proceedings could be founded. The question therefore to be determined is whether the debtor, in afterwards attacking those proceedings in an action for malicious arrest, was bound to show that before the issue of his writ he had set aside the Judge's order, or that at least the action had terminated in his favour. As to setting aside the Judge's order the principle of *Steward* v. *Gromett* (1) is clearly applicable, and the question at once arises whether the Judge, in granting

(1) 7 C.B.N.S., 191.

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the order to hold to bail, had any jurisdiction to finally determine between the parties whether there was or was not a cause of action. It is quite clear that he had no jurisdiction to finally decide that issue. It is familiar practice, as stated in *Chitty's Archbold*, that the Judge, before making the order, will not inquire into the existence of the cause of action any further than is necessary to satisfy himself that the claim is not obviously without foundation. If the debtor's case is, on the face of it, credible, and discloses *primâ facie* a cause of action, the Judge on any subsequent application to set aside the order cannot do otherwise than hold that there is a good cause of action for the purposes of that proceeding, no matter how strong a case the debtor might make out to the contrary. Under these circumstances it is clear that the proceedings, in so far as that issue is concerned, could not terminate in the debtor's favour, and that he was therefore under no obligation to set aside the order as a condition precedent to the commencement of his action.

The other requirement, compliance with which is insisted upon by the respondents, involves a much more difficult question. It has always been the law that where the wrongfulness alleged is absence of reasonable and probable cause in the bringing of the action the debtor was bound to show the determination of the action in his favour before the issue of his writ, and that was so as well before as after the passing of the 1 & 2 Vict. c. 110. In *Gilding* v. *Eyre* (1) Mr. Justice *Willes* states the reason of the matter as follows :—

"It is a rule of law, that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination, or other final event of the suit in the regular course of it. That is the reason given in the cases which established the doctrine, that, in actions for a malicious arrest or prosecution, or the like, it is requisite to state in the declaration the determination of the former suit in favour of the plaintiff, because the want of probable cause cannot otherwise be properly alleged."

It must, therefore, be taken as established that, if the appellant's complaint had been of *ca. re.* proceedings wrongfully

(1) 10 C.B.N.S., 592, at p. 604.

taken in Victoria, it would have been necessary to show that before the issue of his writ the action had terminated in his favour. Similarly in an action for malicious prosecution brought in New South Wales, where the complaint was with respect to proceedings in a New South Wales Court similar proof would be required. But the proceedings complained of in this case were not proceedings in a Victorian Court, but proceedings in a New South Wales Court, and as I have already pointed out, the proceedings in a New South Wales Court must be regarded in the Courts of Victoria as proceedings of a foreign Court, and their recognition and effect in the Victorian Courts must be regulated by the principles of international law. Speaking generally, the State in which the action is brought will recognize and give full effect to the judgments of a foreign Court, that is to say, judgments on the merits which it was within the jurisdiction of the foreign Court to pronounce, and which are in the foreign Court final and conclusive between the parties; but it will not recognize the pendency of proceedings in the foreign Court otherwise than in exercising its discretion to control the conduct of the parties before it, nor will it give effect to the merely procedural requirements of the foreign Court. (*Foote's Private International Law* 2nd ed., p. 580; 1st ed., p. 477). Of this *Huber* v. *Steiner* (1) affords one illustration. It was there held that an action would lie in England on a promissory note made in France and payable in France, although the action in France would not have been maintainable by reason of a French Statute of Limitations, the limitation of time for bringing the action being procedural only. *Scott* v. *Lord Seymour* (2) affords another illustration. In that case an action was brought in England for an assault committed in Naples. In substance the pleas were, first, that penal proceedings had been taken by the plaintiff in the Courts of Naples against the defendant, and were still pending secondly, that according to Neapolitan law, an action would not lie for the assault until penal proceedings had been instituted and determined in Naples. *Pollock* C.B., in deciding on demurrer in the Court of Exchequer that the pleas were bad, held that the pendency of proceedings in a foreign Court was no answer

(1) 2 Bing. N.C., 202.

(2) 1 H. & C., 219.

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to an action in an English Court for a wrong committed in the foreign country if the wrong was actionable by the laws of both countries; secondly, that the requiremement of Neapolitan law that a penal adjudication for the assault must precede the institution of civil proceedings was procedural only, and was no answer to the action. The case was afterwards taken on error to the Exchequer Chamber, and although the learned Judges there differed as to the construction of the pleadings, they all agreed with the Chief Baron's statement of law on the points I have mentioned. The appellant contends that, in applying the principles illustrated by these cases to the matter now under consideration, the facts essential to constitute the cause of action in New South Wales must be examined in order to separate those which constitute the wrongful act for which the laws of both States give a remedy from those which merely concern the procedure by which in each State the wrongfulness of the act must be proved. The wrongful act, it is argued, is the obtaining of the *ca. re.* order maliciously and without reasonable and probable cause; the termination of the action in the debtor's favour is a fact entirely distinct from that, having no relation to the wrongful act which gives the right to damages; it is not a constituent of the wrongful act, but merely a rule of evidence prescribing the mode in which the absence of reasonable and probable cause for the bringing of the action must be established. If the matter could be determined solely by the application of the principles which I have been considering I should find little difficulty in assenting to the appellant's reasoning. But the question cannot be considered apart from authority. No decision directly in point was cited during the argument, but the case of *Taylor* v. *Ford* (1), to which my brother *Isaacs* has called attention, demands consideration. The proceeding there complained of was the issue out of the District Court of Pennsylvania of a writ of attachment against a ship in an action brought in that Court against the shipowner. The latter afterwards in the English Courts sued the plaintiff in the Philadelphian action for damages in respect of that proceeding. He was nonsuited with leave reserved. The Court of Queen's Bench, consisting of Mr. Justice

(1) 29 L.T.N.S., 392.

Blackburn, Mr. Justice *Quain* and Mr. Justice *Archibald* refused a rule *nisi* to set aside the nonsuit, and one of the grounds of decision was that the plaintiff had failed to prove the determination of the Philadelphian suit in his favour before the commencement of his action in England. It is thus on the face of it an authority against the appellant's contention, but I venture to think that it stretches the principle of recognizing the proceedings of a foreign Court by the comity of nations further than is warranted by the authorities. It is true that in the Philadelphian proceedings the right to issue the attachment arose without judicial intervention out of the writ in the action, just as the right to issue the writ of *ca. re.* arose in England before the enactment of 1 & 2 Vict. c. 110. But, as the English Courts have always held, no doubt by way of analogy to the old practice, that since the enactment of 1 & 2 Vict. c. 110, just as before it, a termination of the action in the debtor's favour must be shown before he can bring his action for malicious arrest, I do not see any sound ground for distinguishing the case of a writ for the attachment of a ship, though it follows as a right from the initiation of the action, from the case of a writ to arrest the debtor by virtue of an order to hold to bail under the New South Wales Statute. It follows that, though I cannot assent to the reasoning in *Taylor* v. *Ford* (1), I cannot disregard it, and if it were necessary to decide the point on the present appeal I should be obliged to determine whether I should follow it. But, having regard to the view which I take of the facts of this case in the aspect which I shall next mention, it becomes unnecessary for me to determine the question.

It was essential to the plaintiff's cause of action for malicious arrest to establish the absence of reasonable and probable cause. He has, I think, failed to give any evidence upon which a jury could lawfully find absence of reasonable and probable cause, and on that ground the defendants are entitled, in my opinion, to hold the judgment entered by the Supreme Court in their favour. My brother the Chief Justice has dealt so fully with the facts necessary to be considered on this view of the case that I do not think it necessary to do much more than express my concurrence

(1) 29 L.T.N.S., 392.

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in his reasoning and in his conclusions. Whether there was or was not reasonable and probable cause depended upon whether there was a completed contract on the letters and telegrams that had passed between the parties by themselves or their agents. That was a question of law upon which the defendant company took the opinion of their solicitor. There was no evidence of fraud or concealment in laying their case before him, nor any ground for suggesting that they did not honestly believe that the advice he gave them was right. I agree that the telegrams and letters which were not put before the defendant company's solicitor, and to which my brother the Chief Justice has referred in detail, were immaterial to the question upon which the solicitor was called upon to advise. One argument of the appellant's counsel on this part of the case deserved specially full consideration. He contended that there was evidence to go to the jury on the issue that the defendants were never really ready and willing to carry out the contract on their part by delivery of the ship, and, in support of that view, the communications oral and written between the defendants' representatives and certain officers of the Commonwealth were relied on. This incident, described as the belligerency incident, was not brought to the knowledge of the defendant company's solicitor, and the argument in respect of it was put in two ways. It afforded evidence, it was said, first, that the contract was illegal; secondly, that the defendants could not have been really ready and willing to deliver the ship to the plaintiff.

The first ground is clearly not tenable, inasmuch as there is no evidence that the defendants or their agents had any knowledge, until after the completion of the contract, of the plaintiff's alleged intention to use the ship after she was delivered to him in breach of the laws of neutrality. Knowledge thus coming to a seller after the contract was complete that a ship sold under a contract lawfully made was intended by the purchaser to be used for an unlawful purpose could not make the contract unlawful or take away from the seller his right to its enforcement by action.

The other ground on which the belligerency incident was put forward stands on a different footing. It was I think open to the plaintiff to have contended at the trial that the belligerency

incident furnished evidence from which the jury might lawfully infer that the defendant company, although they had after the happening of that incident formally offered the ship to the plaintiff and asked him to take her over, did not really intend to hand her over, were not ready and willing to perform the contract on their part, and therefore to their own knowledge had no cause of action against him. But the plaintiff did not at the trial raise that contention. Every reference made at the trial to the "belligerency incident" by the plaintiff's counsel and by the presiding Judge were examined during the course of the argument before this Court, and I entirely agree with the conclusion of my brother the Chief Justice that the only use made of the incident at the trial was to found the argument that the contract for the sale of the ship was to the defendant company's knowledge illegal and incapable of being enforced. The appellant is now therefore seeking to hold his judgment upon a view of the facts which he did not put before the jury, although he had the opportunity of doing so, with reference to which the Judge in his summing up told the jury no question was raised and upon which they have made no finding. I agree that the plaintiff cannot do that. *Browne* v. *Dunn* (1) is directly applicable to the position which has arisen on this appeal. It would be, as the learned Judges in that case decided, to use the language of Lord *Bowen* (2), "*pessimi exempli*, and contrary to all one's experience at Nisi Prius, and contrary to the best interests of justice, if a plaintiff, who had obtained a verdict from a jury upon one issue which he had presented to them, were allowed to sustain it by fishing out various causes of action, which he had not presented to the jury, and upon which their verdict was not asked for, and upon which damages unquestionably were not given." The principle there laid down is well worthy of adoption, and on this appeal the defendant company is in my opinion entitled to ask that this Court shall consider the facts only as they were presented by the plaintiff at the trial. Upon the facts as so presented it is clear to my mind that there was no evidence upon which the Judge could determine, or the jury under his direction could find, absence of reasonable and probable

(1) 6 R., 67.

(2) 6 R., 67, at p. 80.

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cause. Upon that ground I base my conclusion that at the trial judgment should have been entered for the defendant company, and that they are entitled now to hold the judgment entered in their favour by the Supreme Court.

ISAACS J. I agree that this appeal should be dismissed and the judgment for the defendants allowed to stand. I do so entirely by reason of the premature commencement of this action.

From the decided cases I deduce a rule of English common law, part of our own municipal legal system, upon which I act and which may, I believe, be stated in these terms:—No action is maintainable for the malicious use of legal process in a suit instituted in any Court of competent jurisdiction whether local or foreign until that suit, in so far as it relates to the matter complained of, has terminated in the plaintiff's favour where such a termination is legally possible.

That rule if correctly enunciated answers every argument with respect to malicious arrest advanced in support of the appeal.

Every inch of the rule as I have stated it is in my opinion covered by authority.

Its first step is that the action is not "maintainable." Error has arisen from overlooking the force of the word "maintain." It excludes on the one hand the idea that the termination of the former proceedings at any time before proof at the trial is sufficient, which was the view of *à Beckett* J., and on the other, the notion that the termination is a part of the cause of action, which was the opinion of the majority of the Full Court.

To the latter opinion, there apparently contributed some confusion between the meaning of "cause of action" in the sense of the wrongful act, and that of "right of action" in the sense of the legal right to sue for redress in respect of the wrongful act.

It cannot be that the termination of the proceedings is part of the wrongful act.

That would be absurd both in principle and in result. In principle, because it would require the plaintiff to take some step to complete the wrongful act against himself,—a step perhaps opposed by the defendant, and nevertheless to be imputed to

him; and in result, because the plaintiff would either be entitled to compensation for an act not yet wrongful, or else be excluded from all compensation, because no damage could accrue from the act of terminating the process, or from any subsequent event.

The true position is that, though the plaintiff's cause of action in the sense of injury and damage, and the consequent obligation of the defendants to make reparation may be complete in point of fact, yet no English Court will entertain the action unless the condition referred to is satisfied.

The judgment of Lord *Selborne* L.C. in *Metropolitan Bank Ltd.* v. *Pooley* (1) is important not merely to show that the former proceeding must be terminated before the second is commenced, but also to show the meaning of the rule and the consequences of failure. It is not that it leaves the cause of action incomplete. He says:—"An action for malicious prosecution cannot be maintained until the result of the prosecution has shown that there was no ground for it." The rule means that the matter must be first cleared of actual ground for prosecution. The reason of the rule he states to be public policy, and not the private rights of the parties. Indeed the termination of the earlier proceedings does not and could not alter a single fact in their relations *inter se* or make anything wrongful that was not wrongful before. In *Watkins* v. *Lee* (2), the Court drew a sharp distinction between the wrongful act and the termination of the former suit. The question was as to the effect of the plea of not guilty. Lord *Abinger* C.B. said (3): "the action cannot be maintained until the former suit is terminated"; and *Alderson* B. said (3): "the wrongful act only is put in issue."

The word "maintained" was doubtless advisedly used by Lord *Selborne*. The case of *Whitworth* v. *Hall* (4), which the Lord Chancellor took as his authority, was one in which Lord *Tenterden* C.J., following the language of *Gibbs* C.J. in an earlier case, said (5):—"An action cannot be supported for maliciously holding to bail without showing that the proceedings were at an end." And from the earliest times that has been the opinion of the Judges.

(1) 10 App. Cas., 210, at p. 216.
(2) 5 M. & W., 270.
(3) 5 M. & W., 270, at p. 272.
(4) 2 B. & Ad., 695.
(5) 2 B. & Ad., 695, at p. 697.

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In *Parker* v. *Langley* (1) *Parker* C.J. says that if the first action is deserted the second would be maintainable, but if the first action is still going on, the second is "brought too soon"—not that a cause of action in the strict sense has not accrued. And he gives the reason which, as he says, is as old as the time of Richard III., namely, "*non intelligitur quousque terminetur* that the action was unjust." The Chief Justice adds:—"No man can say of an action still depending, that it is false or malicious;" which is the practical basis of the whole question. The reason so given has been constantly adhered to. In *Whitworth* v. *Hall* (2) *Parke* B. says:—"It seems to be involved in the proposition, that the commission was sued out without reasonable and probable cause, that such commission must be superseded before the action be commenced, for *the very existence of the commission would be some evidence of probable cause.*" The learned Judge, of course, meant evidence that no other fact could be allowed to countervail.

In *Gilding* v. *Eyre* (3) the Court said:—"It is a rule of law, that no one shall be allowed to allege of a still depending suit that it is unjust." In *Craig* v. *Hasell* (4) where Lord *Denman* C.J., referring to a discharge of the writ of extent, said:—"Such a termination of the case negatives no fact essential to maintaining the action." The fact that is essential is indicated by the next quotation. In *Johnson* v. *Emerson* (5) *Cleasby* B. says the plaintiff must show the proceedings complained were really without foundation, and adds:—"This must be evidenced by the proceedings having finally terminated in favour of the plaintiff." That evidence, at all events, is indispensable.

The reason so established for over four hundred years shows that the rule of law is one to regulate the conduct of the second action, by regarding the continued existence of the first as evidence of probable cause of so high a nature as to create a legal presumption of the fact, and so debar the plaintiff from alleging the contrary. It requires, therefore, the termination of the first proceeding before the second is commenced in order to satisfy the

(1) 10 Mod., 209.
(2) 2 B. & Ad., 695, at p. 698.
(3) 10 C.B.N.S., 592, at p. 604.
(4) 4 Q.B., 481, at p. 492; 3 G. & D., 299.
(5) L.R. 6 Ex., 329, at p. 344.

Court that the first was in fact unjust. The rule consequently appertains *ex necessitate* to the Court in which the second action is brought.

The result so far—and this I regard as the key to nearly the whole position—is that the common law of England guards the Court in which the second action is brought from the false position of conflict in the second action with the judicial act which is the medium of the wrong complained of.

That act may be the act of the same Court or of another Court, but the rule is the same. What the law avoids is conflict, and the consequent scandal, of diverse judicial determinations existing at the same time between the same parties and in respect of the same facts, and not merely conflict between Courts.

The second step in the rule is that it applies to all cases where the first suit is instituted in a Court of competent jurisdiction, whether local or foreign.

I have already indicated why, apart from authority, the rule should so apply. But there is authority to support it. One case is *Castrique* v. *Behrens* (1) in which the Court of Queen's Bench in 1861 applied, to an action in that Court for fraudulently obtaining process of attachment and a sale of a ship in France, the same rule as would obtain if the first process were in England. The French action resulted in a judgment *in rem*, and not *in personam*, but the decision did not turn upon any such distinction. The Court held that being *in rem*, it bound the plaintiff in the English action, just as much as if it had been against him *in personam*, and therefore as long as it stood unreversed the ordinary principle applied, that no other Court, not being a Court of Appeal, could hold that the decision was come to without reasonable and probable cause. The reason as stated by the Court covers only part of the ground occupied by the rule. That is obvious because, if the former judgment had been given in the Court of Queen's Bench instead of the French Court, the result would have been the same. The point of the reason given by the Court lies rather in the words "not being a Court of Appeal" indicating that it is only by way of appeal, which connotes identity of suit, that the yet unreversed judgment of a

(1) 3 El. & E., 709.

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competent Court can be challenged. I exclude from this observation the consideration of fraud, to which I shall presently refer.

Blackburn J. was one of the four eminent Judges who determined that case. In 1873 the same learned Judge delivered the leading judgment in another case which I have found, and which was not cited during the argument or in the Supreme Court. In *Taylor* v. *Ford* (1), the plaintiffs sued for the false and malicious attachment of their ship by an order of a Philadelphia Court in an action instituted against them there, whereby they were compelled to pay the sum claimed in order to release the ship. The case is interesting as raising several of the points relied on by the appellant here, and deciding them all against him. No allegation was made and no evidence was given as to the termination of the process; and what is very important, no evidence appears to have been given as to whether the American law in an action for malicious process required a prior termination of that process in favour of the party complaining. That is, the effect of non-termination was decided purely on the requirement of English law in English actions.

The action was in respect of an *ex parte* order by way of mesne process attaching the plaintiffs' ship to answer whatever judgment might be found against them, so as to compel appearance. The ground of action was to recover money lent to a third person to clear the ship and for which it was alleged the plaintiffs in the second action were responsible. They had to pay the amount claimed in order to release the ship: the Court officers then withdrew from the ship. No appearance was entered to the action, which rested there, neither side proceeding to judgment. This takes away the last point upon which *Castrique* v. *Behrens* (2) was sought to be distinguished.

The English action was rested on two grounds—trespass and malicious process. The plaintiffs contended no termination was necessary, because it was an *ex parte* order—a point already overruled in the earlier case; and further because (see the report in the *Weekly Reporter*) there was a distinction between a final order and mesne process. The Court decided against both con-

(1) 29 L.T., 392; 22 W.R., 47. (2) 3 El. & E., 709.

tentions and the claim for trespass failed, for reasons which I shall state directly. As to the necessity of terminating the American process *Blackburn* J. who delivered the leading judgment says (1):—"Then arises the other question as to whether he acted maliciously and without reasonable and probable cause in putting the American Court in motion, which he ought not to have done. The general rule is laid down, and I think it is very good sense, that for the purpose of avoiding conflicts of jurisdiction and other unseemly consequences you never can maintain an action for putting a Court of competent jurisdiction in motion until the matter before it has been finally decided in favour of the defendant. Here, if the plaintiff in this case had appeared in the American Court, and had, as I think probably he would have done, without any difficulty, obtained judgment against the people who put in the process there, I think he would be in a position to prove that there was a want of reasonable and probable cause, and would have succeeded probably; but as he did not do that, he cannot maintain this action, because it might be said that the American Court, according to the American jurisdiction, was acting with reasonable and probable cause."

Archibald J. said (2):—"Until a suit be terminated in favour of the defendant, he cannot bring an action for malicious prosecution against the person who set the suit in motion." The point to be specially emphasized is that the Court did not stop to inquire whether in America the law regarded such a termination as necessary. They did not treat the requirement as one which formed part of the foreign cause of action, and was brought into England by the plaintiff, nor as a condition precedent in America; but they applied the principle as one of internal English law, designed for the protection of English Courts from the incongruous and ridiculous situation of conflicting with a judicial order, still standing in full force and operation, and of declaring that the pending suit was destitute of even probable cause, while the competent Court charged with its decision might yet declare the cause of action, not only probable, but real.

This renders it altogether unnecessary to enter into the merits

(1) 29 L.T., 392, at p. 394.

(2) 29 L.T., 392, at p. 395.

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of the international problem referred to and discussed in the judgments given in the Supreme Court.

Scott v. *Lord Seymour* (1), which I ought to refer to, does not appear to me to militate against what I have said. On the contrary, it seems inferentially to support it. The action was for assault at Naples, that is a direct act of the defendant. The plaintiff was not making a claim which included as a necessary part of his cause of action any judicial proceedings in Naples. His case was quite free from the problem we are considering, and rested on a pure personal trespass. The defendant pleaded, first, *lis alibi pendens*. As to this, *Pollock* C.B. said (2) that even if the other proceedings had been taken in an inferior Court in England it would have afforded no legal answer either in bar or in abatement, and then he very pertinently asks, "how in law or in reason can it be, that it is pending in a foreign Court, when the action is in no sense local?" If analogy is to prevail this cuts against the appellant.

The defendant also pleaded that by the Neapolitan law successful penal proceedings were a condition precedent to the plaintiff's right to maintain an action. It was held such a condition is part of the *lex fori*. And the language of the Chief Baron (3) is strongly confirmatory of the force of the word "maintain" already mentioned. He says of the 2nd and 3rd pleas they alleged in affect this, "that by the law of Naples, until the defendant has been criminally condemned for the matters complained of, no action can be *maintained* against him for damages, and that he has not been so condemned."

He held that such a condition is a mere matter of procedure. In this he was confirmed by the Court of Exchequer Chamber, and as no such condition existed by the *lex fori*, the plea failed.

If the condition precedent of a successful issue of the former action could be regarded merely as a requirement of New South Wales law, with no such requirement existing in Victoria, of course it would help the appellant; but if it be, as it is, a condition existing in Victoria, and imposed by the *lex fori* for itself,

(1) 1 H. & C., 219.

(2) 1 H. & C., 219, at p. 229.

(3) 1 H. & C., 219, at pp. 229, 230.

independently of a similar rule elsewhere should any exist, the reasoning of the case is fatal to him.

I may observe in passing that in any aspect the case shows clearly such the condition is not part of the cause of action in the true sense. *Pollock* C. B. says in so many words (1) "the plaintiff's cause of action is the assault and battery."

The third step is as to the termination required. Before the Act of 1 and 2 Vict. c. 110 the suit itself had to be at an end. See, for instance, *Pierce* v. *Street* (2). It had to be ended in some way, no matter how so long as its end was in the new plaintiff's favour. *Parke* J. said in the last mentioned case (3):—"When the cause is out of Court, it must be considered as determined."

So long as the first suit itself was determined in favour of the plaintiff in the second, it mattered not that any or all of the issues and controversies raised between the parties remained undecided. Thus it was sufficient if the plaintiff were nonsuited, see *Parker* v. *Langley* (4); or if the action were withdrawn, *Arundell* v. *White* (5), or were discontinued, *Nicholson* v. *Coghill* (6), or if the plaintiff merely failed to declare within a year, *Pierce* v. *Street* (7); or the mere discharge of the process by arrangement and by consent, *Craig* v. *Hasell* (8).

In the words of *Cleasby* B. in *Johnson* v. *Emerson* (9) already quoted, it is the *proceedings* that must have finally terminated. So too, *Blackburn* J. in *Parton* v. *Hill* (10) says:—"It need not be a final determination of the *cause of action*, as in the case of a nonsuit; but it must be final so far as the suit or *proceeding* itself is concerned."

The fact that the cause of complaint arises in connection with mesne process does not affect the matter. What does affect it is whether that cause of complaint is open to conflict with another decision in the pending suit. The words of Lord *Selborne* may again be adverted to, in order to prevent obscurity, namely, that the result of the first proceeding must show there was no ground for it. The root of the whole matter is that the absence of

(1) 1 H. & C., 219, at p. 230.
(2) 3 B. & Ad., 397, at pp. 398, 399.
(3) 3 B. & Ad., 397, at p. 399.
(4) 10 Mod., 209.
(5) 14 East, 216.
(6) 4 B. & C., 21.
(7) 3 B. & Ad., 397.
(8) 4 Q.B., 481, at p. 492; 3 G. & D., 299.
(9) L.R. 6 Ex., 329.
(10) 12 W.R., 753, at p. 754.

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reasonable and probable cause necessarily implies *the absence of real cause*, and so long as a decision exists or is open, as to real cause, whether the matter of complaint be the final issue or one by the way, the suit is *pro tanto* not finally determined in plaintiff's favour, and the second action is not maintainable in respect of that cause.

Craig v. *Hasell* (1), above cited, and particularly on this point as reported in *Gale and Davidson*, is a valuable authority. Lord *Denman* C.J. pointed out the difficulty of making all the expressions in particular cases consistent with each other, but the heart of his judgment is in the words—"Such a termination of the case negatives no fact essential to maintaining the action."

That means that the Court will examine whether after such a termination a further decision is or is not pending in relation to the matter complained of. During the argument, *Wightman*, J. said (2):—"Suppose an affidavit that a party was going abroad to be made maliciously, in order to procure a Judge's order for his arrest, would it be necessary to show that the action itself had been altogether determined, before an action could be brought against the party making the affidavit?" And *Patteson* J. said (3):—"The setting aside a *capias ad respondendum*, because an affidavit that the defendant was going abroad is false, would be altogether independent of the debt which might be the subject matter of the suit."

The order, though an intermediate and ancillary order—like an order for interlocutory injunction, or for a receiver, or for a commission to examine witnesses—is still part of the action; and indeed the section under which the order for arrest in the present case was made only allows such order to be made "in any action" &c.

Consequently I conceive the formula is correct, including the statement that the suit must be terminated so far as it relates to the matter complained of. And if set aside, the action for malicious procedure may proceed on any ground not still subject to decision in the first action. The position so stated answers the objection taken by Mr. *Mitchell* that the order itself must

(1) 4 Q.B., 481; 3 G. & D., 299, at p. 309.

(2) 3 Ga. & Da., 299, at p. 306.

(3) 3 Ga. & Da., 299, at p. 307.

always be directly and *eo nomine* got rid of. Sec. 8 of the Act says that the order may be made and the defendant arrested at any time after the commencement of the action and before final judgment. With the termination of the action in favour of the defendant the order, which is only a precautionary measure for the plaintiff's security in case he gets judgment, necessarily falls with all the other efforts on the plaintiff's part to obtain redress. No specific order is required to efface it. If no earlier termination be made to its existence, it ends then. The case of *Lees* v. *Patterson* (1), which was cited as showing the contrary, is not in point. In that case the defendant counterclaimed for damages by reason of arrest under a writ *ne exeat regno* issued in that very action, but as he could not show that the writ had been set aside, and as the action itself was, of course, in existence, the proceedings he complained of were not terminated in any way.

The last step of the rule is that the plaintiff is absolved from showing the termination of the former proceedings in his favour where such an event is not legally possible. *Lex non cogit ad impossibilia*; and however strongly the Court will strive against conflicting determinations, it will stop short of denying to the party complaining at least one opportunity of proving there was no real ground for setting the law in motion against him. If he has no opportunity of doing so prior to the action he brings, he shall have it then.

The rule as to this and the exception have been clearly stated in several cases cited and affirmed by the Court of Appeal in *Bynoe* v. *Bank of England* (2), where *Collins* M.R. quoted (3) the following 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."

It was sought to establish that an order to hold to bail was an exception for two reasons. First, that it was *ex parte*, reliance being placed on some words in *Steward* v. *Gromett* (4). But in the sense in which it may come within the exception, the term

(1) 7 Ch. D., 866.
(2) (1902) 1 K.B., 467.
(3) (1902) 1 K.B., 467, at p. 470.
(4) 7 C.B.N.S., 191.

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"*ex parte*" means that it is always so, the injured party having no opportunity to contest the proceeding at any stage before the action he brings. *Erle* C.J. (1) refers to the defendant's statement being incontrovertible, and that the magistrates had no discretion; and on these points the other Judges agreed. In *Parton* v. *Hill* (2), where the objection was raised, *Cockburn* C.J., referring to *Steward* v. *Gromett* (3), says:—"That was a case where no further termination could be arrived at"; and adds that "under the old law, you could not have brought an action for maliciously holding to bail without alleging a termination of the action favourable to the plaintiff; yet that was an *ex parte* proceeding, and the affidavits could not be contradicted."

It is manifest that if the exception includes all proceedings which from reasons of necessity or convenience are *ex parte* in the first place, the other party having a subsequent right to question them, a strange result would be obtained. Insolvency petitions and receiving orders, petitions to wind up companies, *ex parte* interim injunctions, and so on, would comprise a formidable array of opportunities to intercept and try, by what would be thought a more favourable tribunal, the very question raised in the earlier proceeding. See also *Johnson* v. *Emerson* (4), referring to *ex parte* proceedings.

The second reason urged for making an order for *capias* an exception was that there was no real opportunity to set it aside.

But the authorities are overwhelming to the contrary. The defendant might move in one of at least three different ways to get rid of the order on the merits. He could apply to set it aside, as in *Walker* v. *Lumb* (5), and see *Needham* v. *Bristowe* (6). He could get the order rescinded if the Judge had not properly exercised his discretion: *Heath* v. *Nesbitt* (7).

Failing these applications, which enure under the Court's general power of control over single Judges, he could apply to a Judge for his discharge under the special provisions of the Act, and if refused could appeal from that refusal to the Court. *Graham* v. *Sandri-*

(1) 7 C.B.N.S., 191, at pp. 202, 204.
(2) 12 W.R., 753, at p. 754.
(3) 7 C.B.N.S., 191.
(4) L.R. 6 Ex., 329, at p. 340.
(5) 9 Dowl., 131.
(6) 4 M. & Gr., 262, at pp. 264, 265.
(7) 11 M. & W., 669.

nelli (1); *Needham* v. *Bristowe* (2); *Pegler* v. *Hislop* (3) are some of the cases.

The opportunities are manifestly numerous to obtain a successful ending to the proceedings complained of, even before the action itself comes to an end, and the fact that the Court, not losing sight of the object of the Statute, namely, to prevent a judgment being rendered abortive by the departure of the defendant, would be wary in discharging him, is not a reason for denying to the opportunity the character of reality. If the defendant cannot succeed by any of those immediate means he must wait until the process expires as part of a terminated suit. If in the meantime he can get discharged, then, as *Wightman* J. said in *Craig* v. *Hasell* (4) he might recover in an action for maliciously and falsely holding to bail on the pretext that he was leaving the jurisdiction.

The plaintiff's action having commenced while the original action was pending and the order for bail being, until that action ended, always in full force and operation, I am of opinion, for the reasons given, that he must fail as to his claim for malicious arrest.

Then the appellant urges that this may be regarded as an action for abuse of process. Such an action is well known. In the sense requisite to sustain an action, the term "abuse of process" connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse of process for this purpose, and as *ex hypothesi* the final judgment however given will have no reference to the ulterior purpose, there is no necessity to await the irrelevant determination.

In *Grainger* v. *Hill* (5) *Tindal* C.J. described the process as being abused "to effect an object not within the scope of the process." This is supported by *Parton* v. *Hill* (6), and the observation of *Williams* J. in *Gilding* v. *Eyre* (7).

(1) 16 M. & W., 191.
(2) 4 M. & Gr., 262, at p. 265.
(3) 1 Ex., 437.
(4) 4 Q.B., 481, at p. 488.
(5) 4 Bing. N.C., 212, at p. 221.
(6) 10 L.T., 414; 12 W.R., 753.
(7) 10 C.B.N.S., 592, at p. 598.

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I am of opinion the evidence here does not support any case upon which the jury could find there was in the necessary sense an abuse of legal process. The purpose which the respondents had in view, however otherwise the facts could be reasonably regarded by a jury, was to get from Varawa, wherever he got it from, money as compensation for the alleged loss of a bargain the right to which was clearly within the scope of the action.

Then the appellant fell back upon his claim for trespass for false imprisonment. The line of demarcation between false imprisonment and malicious prosecution is defined by *Willes* J. in *Austin* v. *Dowling* (1), in the illustration he gives of a magistrate ordering one person to be taken into custody upon a charge made by another. The learned Judge says:— "The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment."

In *Taylor* v. *Ford* (2) the distinction was acted on, the same contention being rejected. And in *Daniels* v. *Fielding* (3), Baron *Rolfe* bestows much attention on explaining that in the action for malicious arrest the gist of the action is not the arresting by the defendants at all, but the defendants' imposition on the Judge by some false statement which satisfied him of the existence of the conditions necessary to grant the order. That is the way in which, since 1 & 2 Vict. c. 110, a plaintiff sets the law in motion, and damage resulting, a cause of action may arise under the general doctrine which states the rule of law in the widest form that an action lies for maliciously and without reasonable and probable cause setting the law in motion against another and producing damage, express or implied: *Quartz Hill Gold Mining Co.* v. *Eyre* (4). If the appellant's contention were correct that it amounted to trespass, there never would be an action brought for malicious prosecution; it would always be for false imprisonment.

Then another point was urged with stoutness. It was said the

(1) L.R. 5 C.P., 534, at p. 540.
(2) 29 L.T., 392.
(3) 16 M. & W., 200, at pp. 206, 207.
(4) 11 Q.B.D., 674.

respondents were guilty of fraud, and that that vitiated the order to hold to bail, which should be regarded as a nullity. When urged in connection with a claim for malicious arrest, it would, if sound, be destructive of the claim itself because it would eliminate an essential feature, the judicial action.

When urged as a reason to repel the answer to the claim for false imprisonment it fails for two reasons. The first is, that the occasion to raise the defence of the order does not arise. To show the defendants' connection with the arrest at all the plaintiff must necessarily bring into evidence the Judge's order as part of his own case, whence it immediately appears that the defendants' denial that it was they who arrested the plaintiff is proved. The imprisonment was not by them but by an officer of the Court, directed not by them, but by a Judge. But as so much was urged about the effect of fraud I would say a few words in the matter.

The *Duchess of Kingston's Case* (1) was relied on. As appears from that case itself, and from the way in which it was dealt with in *Shedden* v. *Patrick* (2), the *Duchess of Kingston's Case* (1) gives no support to the appellant's argument as applied to this case.

It was not in substance a judicial proceeding at all; it was, as found by the House of Lords, a mere theatrical arrangement by which the parties imposed upon the tribunal deceiving it into thinking there was a real controversy, whereas the whole matter was a mere collusive scheme wearing the mask of a *bonâ fide* litigation, and bringing in the Court as an unconscious participant in an elaborate farce. As *Cranworth* L.C. said in *Shedden* v. *Patrick* (3):—"the suit in the Ecclesiastical Court was a contrivance merely—a link in the chain of fraud; and, in truth, no judgment. According to the phrase used by Lord *Loughborough*; '*Fabula, non judicium, hoc est; in scenâ, non in foro, res agitur.*'"

Lord *Brougham* (4) in a lengthy passage elaborates the position, and says that a fictitious judgment may be treated as a nullity, even if it were the pronouncement of the House of Lords itself.

(1) 20 How. St. Tr., 355; II. Sm. L.C., 11th ed., p. 731.
(2) 1 Macq. H.L. Cas., 535.
(3) 1 Macq. H.L. Cas., 535, at p. 608.
(4) 1 Macq. H.L. Cas., 535, at p. 619.

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But that is fraud of an external nature—making the judgment in Chief Justice *De Grey's* words "impeachable from without"—and for no other fraud that I am aware of has a judgment been regarded as a nullity. In an action founded on the obligation arising from a foreign judgment fraud may be pleaded; but that protects against future demands founded on the judgment considered as an obligation *inter partes*; and does not nullify past acts done by the authority of the judgment as the command of the Sovereign.

In the case of *Boswell* v. *Coaks* (1) in 1894 the House of Lords maintained the distinction to which I have adverted. An action was brought to have it declared that the judgment given by the House of Lords, *Coaks* v. *Boswell* (2) was obtained by fraud and was not binding on the appellant. The fraud alleged was internal and related to concealment of evidence. Lord *Selborne* L.C. said (3):—"There are two classes of cases, perhaps, which ought to be distinguished for this purpose. One is that of which the celebrated case of the *Duchess of Kingston* (4) is an example, in which by the collusion of the parties the process of the Courts has been abused, and the whole proceeding may be described as it was described in language used in that case as *fabula non judicium*. This, at all events, is not a case of that kind. The present case falls within the second class, namely, where it is not sought to treat as a nullity what has passed, but to undo it judicially upon judicial grounds, treating it as in itself, and until judicially rescinded, valid and final."

The appeal therefore entirely fails; and, as I view the case, my observations would end here. The respondents, however, have a cross notice on which the Supreme Court did not pronounce, other than by depriving respondents of their costs after some days' investigation of the facts. Whatever opinion then was held by that Court as to the facts was not favourable to the respondents.

The cross notice asks for judgment for respondents, or failing that, a new trial. So far as that is based on the finding as to damages, it is clear a new trial in any event would be necessary.

(1) 6 R., 167.
(2) 11 App. Cas., 232.
(3) 6 R., 167, at p. 168.
(4) 20 How. St. Tr., 355; II. Sm. L.C., 11th ed., p. 731.

The operation of the unsupported claim for abuse of process by way of aggravation is fairly certain, and it is impossible to gauge the extent or sever the effect.

The other ground relied on was that there was no evidence to support the findings of want of reasonable and probable cause and of malice. In various aspects the discussion of this question gives rise to important and general considerations of law. It appears to me that there is a large body of uncontroverted testimony, which not only satisfies the requirement of sufficiency, but with respect to the issue of want of reasonable cause, entitles the appellant to a direction, or more properly speaking, to a finding that there was an entire absence of such cause.

The issue of reasonable and probable cause or none is one to be determined by the Judge. In that sense, and that sense only, is this a question of law—in the true sense it is a pure question of fact: *per* Lord *Chelmsford* in *Lister* v. *Perryman* (1); *per* Lord *Fitzgerald*, in *Abrath* v. *North Eastern Railway Co.* (2); and *per* Lord *Macnaghten*, in the Privy Council in *Pestronji Mody* v. *Queen Insurance Co.* (3). That fact is an ultimate fact, dependent upon preliminary facts which constitute the surrounding circumstances. If these are contested the jury must find them—if there be a jury—and when they are found, or if they are not in dispute, the Judge proceeds to find by way of inference the ultimate fact constituting the subject of the issue. And so, when it is said that the question of whether or not the respondents were ready and willing to deliver the ship, supposing the contract already existed, was not submitted to the jury, that circumstance becomes unimportant if the matter were completely fought out, and were left, as it was, in such a condition that no man could reasonably find in any but one way, namely, adversely to the respondents. It would then be—as I find it was—within the power and the duty of the presiding Judge, see *Davis* v. *Hardy* (4); *Mitchell* v. *Williams* (5), to find the respondents had no reasonable or probable cause for presenting to *Pring* J. and swearing the cause of action upon which the appellant was arrested. I fully recognize the importance of

(1) L.R. 4 H.L., 521, at p. 535.
(2) 11 App. Cas., 247, at p. 255.
(3) I.L.R. 25 Bomb., 336.
(4) 6 B. & C., 225.
(5) 11 M. & W., 205, at p. 216.

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the principle that parties must be bound by the course they deliberately adopt at the trial. I have clearly expressed my views on this general principle in *Rowe* v. *Australian United Steam Navigation Co. Ltd.* (1), where I cited and acted on *Nevill* v. *Fine Art and General Insurance Co. Ltd.* (2), and *Browne* v. *Dunn* (3). And if this matter required a finding of the jury on a controverted question of fact, or involved a dispute that was not fully fought out, I should consider the branch of the case met by the principle adverted to. But it does not. The case is outside that principle, so far as this point is concerned. The whole of the issues of preliminary facts necessary to enable and require the Judge to settle the issue as to reasonable and probable cause were hotly contested, but those as to which there was diverse evidence have been found by the jury, and the one that was not submitted is established by undisputed evidence, much of which comes from the respondents' own possession.

The learned primary Judge, then, if his attention had been specifically called to it at any time before judgment, would have been bound to hold in appellant's favour, and that being so, this Court must, I apprehend, equally follow that course. An incurable point may be raised by a respondent on appeal to support the judgment, though not raised in the Court below: *Withy* v. *Mangles* (4).

The facts upon which this part of the case depends may be briefly summarized. The New South Wales *Arrest on Mesne Process Act* 1902 empowers a Judge in the cases specified to direct that the defendant be held to bail. But by the express words of sec. 5 of the Statute he must be "satisfied by affidavit *disclosing the facts constituting the ground of the plaintiff's claim* . . . . that the plaintiff has *primâ facie* a good cause of action in respect of his claim against the defendant."

Everything here turns upon the words "disclosing the facts constituting the ground of the plaintiff's claim."

The appellant's case as to this is, first, that the ground of the then plaintiff's claim was a simple contract of sale of the ship, a constant readiness and willingness by respondents to transfer the

(1) 9 C.L.R., 1, at p. 25.
(2) (1897) A.C., 68, at p. 76.
(3) 6 R., 67, at p. 75.
(4) 10 Cl. & F., 215.

ship, followed by a refusal to accept; and next, that the true facts were not disclosed but were knowingly suppressed, because, in truth, the respondents were not willing to transfer the ship, as it would in the circumstances have been a crime, an offence against the Imperial *Foreign Enlistment Act* 1870, that they not only must be taken to have known it, but in fact knew it, and had promised the Federal Government it should not be done. Further, the appellant contended the respondents were not prepared even to take the initial step of binding themselves by contract to do the illegal act; that the cables, afterwards relied on as a completed contract, were not intended by them to be so, and so the jury have found. I think there was ample evidence to sustain that finding, but that is now unimportant, and I pass on to the portion raising the considerations of law. Assuming the respondents were, and thought they were, parties to a completed contract, valid when made—in other words, assuming the full length to which the plaintiff's counsel pressed his contentions was not established, that does not end the matter. Suppose the contract itself stood, still, contract or no contract, the Imperial law forbade a certain act, imperilling Imperial obligations, and the appellant cannot, as I think, lose the benefit of the intermediate step which was in issue and fought, and must be assumed to have been decided by the jury in favour of the appellant, namely, that the respondents at the date of the alleged breach and the appellant's arrest, and ever after, had full knowledge or belief that the *Peregrine* was to be despatched for the military or naval service of the Russian Government in the war with Japan. The appellant Varawa was a Russian subject; this the respondents knew on 18th January. On that date he expressly told them the steamer, which was *ex hypothesi* sold for many thousands of pounds beyond its peace value, was wanted for the Russian Government, and *afterwards* would be used for commercial purposes. A plain, honest, unmistakeable statement, bearing directly on the warning of the Commonwealth Government and the respondents' promise a little over a month before, and there can hardly be a scintilla of doubt that the respondents knew well it would not only be a contravention not only of that promise, but also a step towards contravening the criminal law to

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assist in despatching a boat for that purpose. That the transfer of the vessel with knowledge of the transferee's purpose to utilize it in the military and naval service of the Russian Government would have been improper, seems to me to hardly to admit of argument. Sec. 8 of the *Foreign Enlistment Act* 1870 makes it penal for anyone who "despatches . . . . any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State." The penalty being fine and imprisonment and forfeiture of the ship.

No one can doubt that Varawa, or his alleged nominee, Moller, would have committed an offence if—after transfer by respondents—he had despatched it as intended. Varawa's words, above quoted, bring the case of such a despatch within the prohibition of the enactment. (See *The International*) (1).

Then sec. 12 makes any person who aids, abets, counsels or procures the commission of an offence against the Act liable as a principal offender.

This is only a statutory enactment of what would be the common law, the principal offence being a misdemeanour (See *per* Lord *Russell* C.J. in *R.* v. *Jameson* (2). Supplying the instrument of an intended crime with knowledge of its purpose is inconsistent with innocence, and in the event of crime being committed, complicity follows.

But if a direct authority be wanted to show that a delivery in the circumstances known to the respondents would, in the event of the transferee despatching the ship as intended, make them liable as for procuring the despatch, the case of *Langton* v. *Hughes* (3) affords it. There a druggist sold and delivered drugs to a brewer, knowing the latter was going to use them in the brewery contrary to the statutory prohibition. The Court held the plaintiff not entitled to recover the price. Lord *Ellenborough* C.J. said (4):—"There is a distinct prohibition in the Act against causing or procuring to be mixed any ingredient except malt and hops; and a person who sells drugs with a knowledge that they are meant to be mixed, may be said to cause or procure,

(1) L.R. 3 A. & E., 321.
(2) 12 T.L.R., 551, at p. 587.
(3) 1 M. & S., 593.
(4) 1 M. & S., 593, at p. 596.

quantum in illo, the drugs to be mixed." The other judgments support the view. And even if there were no penal consequences to a person in respondents' position in the circumstances, the principle of *Cowan* v. *Milbourn* (1) would apply. There *Kelly* C.B. said the defendant was bound by law to refuse the use of his rooms for an unlawful purpose, though he had innocently contracted to let them.

Now the law cannot presume a party intends to commit or assist in committing a crime, and therefore the respondents must be presumed not to have been ready and willing to transfer the vessel to Varawa. The demand which they made upon him to take the ship within twenty four hours was not necessarily *bonâ fide* in fact, and the jury have found it was not. The delivery was to be in Sydney if at all: but the ship was then in Melbourne, which made contractual performance impossible—and this quite apart from the difficulties arising from the duty of the respondents to observe the law of neutrality.

Their manager in Sydney swore they were so ready and willing, and the cause of action—the only cause of action relied on, and upon which the appellant was arrested—was based upon that readiness and willingness. It is no answer in my view that possibly another cause of action existed. They have never alleged it or argued it; it has never been tried, and we do not know what might be alleged in answer if it had been set up. But if ever a party should be bound to adhere to the case they made the respondents should be bound to the case they made from first to last in arresting the appellant. The principle of *Browne* v. *Dunn* (2) applies with undiminished force at this point of the controversy and I give it that force. The respondents take shelter in Dr. Sly's advice. But as they suppressed from him (1) their own documents expressing their business views of the non-completion of a contract at all, (2) their own documents referring to the international difficulty, and (3) the interviews and correspondence between the representative of the Commonwealth Government and themselves, all of which materially altered the whole aspect of the transaction, I think no refuge can be found for them in their solicitor's advice.

(1) L.R. 2 Ex., 230.

(2) 6 R., 67.

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The learned Judge at the trial, and we now, ought in my opinion to find that there was an utter want of reasonable and probable cause. Pleaded or not pleaded, argued or not argued, it is I think the duty of the Court to discountenance a claim based on a state of facts which, if true, discloses a step in an intended crime of a high and dangerous character, a crime which would tend to an acute breach of the international obligations of this Empire to friendly foreign States, obligations which the Imperial legislature has stringently endeavoured to preserve.

That the points of belligerency and suppression of that fact from their solicitor was distinctly fought and pressed is shown by the cross-examination of Mr. Schrader the partner of Dr. Sly. I extract one question and two answers. "Q.—Supposing your client came to you and said, 'I have sold a ship. I know she is going to be used by the Russians with the Baltic Fleet. I have undertaken to send her to Singapore and charge agency fee, and I know when she gets to Singapore she will be used for belligerent purposes.' Would you advise your client to do it? A.—'I would say he could do it, but he would be liable to punishment under the laws of England.'"

To another question the same witness said "It never occurred to me they would ever use the *Peregrine* for war purposes."

Of course not, that fact was industriously concealed.

Then during the trial Mr. *Wise*, referring to paragraph 2*a*, said:—"In considering that, clearly the belligerency part of the case is important because, if they knew that they could not sell the ship, could not deliver the goods, to use an American expression, to bring an action for breach of contract is some evidence, and would be very strong evidence that the action was brought for the purpose of getting a *ca. re.* to extort money."

Then as to malice, *Johnstone* v. *Sutton* (1) says:—"From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied." In other words, the want of reasonable and probable cause is always some, though not conclusive, evidence of malice. There may be other evidence countervailing it, and if the jury refuses to act on the first, or prefers to accept the other evidence, the defendant is

(1) 1 T.R., 510, at p. 545.

free: *Brown* v. *Hawkes* (1). But the jury here have found against the respondents, and among the facts submitted as to this, at all events, were the unexplained suppression of important documents and all the facts concerning belligerency, and so the argument that there was no evidence to support the finding cannot, in my judgment, be maintained.

The respondents, as I view the case, escape as by fire.

Appeal dismissed with costs. Judgment of the Supreme Court varied by directing judgment for the defendants, with costs of the action and of the appeal to the Supreme Court.

Solicitor, for the appellant, *J. Woolf.*

Solicitors, for the respondents, *Hedderwick, Fookes & Alston.*

B. L.

[HIGH COURT OF AUSTRALIA.]

POTTER'S SULPHIDE ORE TREATMENT LTD. . . . . Appellants;

Plaintiffs,

AND

SULPHIDE CORPORATION LTD. . . . . Respondents.

Defendants.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Interrogatories—Infringement of patent—Relevant facts.

Any facts relevant to the matter in issue may be the subject of interrogatories.

In a suit for infringement of a patent, the invention was described as an improved process for the separation of metallic sulphides from sulphide ores,

(1) (1891) 2 Q.B., 718.