

Am. Rep. 316, and adds: Counsel also cited *Page v. Cushing*, 38 Mo. 523; *Cox v. Taylor's Adm'r*, 10 B. Monr. 17. Cooley approves the present doctrine, Torts, 187, 188. Underhill (Torts, 99) lays down the same doctrine. Mr. Moak considers his definition defective because it "does not include an ordinary civil suit," and cites Cooley on Torts, 180; but on examination it will be found that Judge Cooley limits his remarks at that place to criminal proceedings (p. 181), and afterwards says: "There is much good reason in what has been said in a Pennsylvania case"—*Mayer v. Waller*, *supra*—"that 'if the person be not arrested, or his property seized, it is unimportant how futile and unfounded the action might be; as the plaintiff, in consideration of law, is punished by the payment of costs.' If every suit may be retried on allegation of malice, the evil would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first."

To the same effect, in *Potts v. Imlay*, *supra*, the court said: "The courts of law are open to every citizen, and he may sue, *toties quoties*, upon the penalty of lawful costs only. These are considered as a sufficient compensation for the mere expenses of the defendant in his defence. They are given to him for this purpose, and he cannot rise up in a court of justice and say the Legislature have not given him enough." "Merely for the expenses of a civil suit, however malicious and however groundless, this action does not lie, nor ever did so far as I can find, at any period of our judicial history. It must be attended, besides ordinary expenses, with other special grievance or damage, not necessarily incident to a defence, but superadded to it by the malice and contrivance of the defendant; and of these an arrest seems to be the only one spoken of in our books."

And in *McNamee v. Mink*, 49 Md. 122, it was held that an action is not maintainable for a false and malicious prosecution of an ordinary action of ejectment wherein the plaintiff failed to recover all that he claimed, and that such action is generally maintainable only where there has been an alleged malicious arrest of the person, or a groundless and malicious seizure of property, or the false and malicious placing the plaintiff in bankruptcy, or the like. The court said: "It is true, a party may be held liable for a false and malicious prosecution of either a

criminal or civil proceeding; but when it has been attempted to hold a party liable for the prosecution of a civil proceeding, it has generally been in cases where there has been an alleged malicious arrest of the person, as in the case of *Turner v. Walker*, 3 Gill & Johns. 377, or a groundless and malicious seizure of property, or the false and malicious placing the plaintiff in bankruptcy, or the like. In the case of *Goslin v. Wilcox*, 2 Wils. 302, which was an action for a malicious prosecution of a civil proceeding wherein the party was arrested, it was said by Lord Camden, C.J., that 'there are no cases in the old books, of actions for suing where the plaintiff had no cause of action; but of late years, when a man is maliciously held to bail, where nothing is owing, or when he is maliciously arrested for a great deal more than is due, this action has been held to lie, because the costs in the cause are not sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due.' But there is a clear and well defined distinction between the actions for a false and malicious prosecution of a civil proceeding, and a false and malicious prosecution of a criminal proceeding. This distinction is stated in 1 Bac. Abr., tit. Action on the Case (H) page 141, where it is said: 'But it must be observed, that there is a great difference between a false and malicious prosecution by way of indictment, and bringing a civil action; for in the latter, the plaintiff asserts a right, and shall be amerced *pro falso clamore*; also the defendant is entitled to his costs; and therefore for commencing such an action, though without sufficient grounds, no action on the case lies.' For this the author cites Salk. 14; 3 Lev. 210; Hob. 266; 3 Leon. 138 and Cro. Jac. 432. But if the plaintiff declares that he has been falsely and maliciously arrested, or that by reason of a false claim maliciously asserted by the defendant, he was required to give bail, and upon failure he was detained in custody, or his property was attached, there the action lies, because of the special damage sustained by the plaintiff. It is not enough however for the plaintiff to declare generally that the defendant brought an action against him *ex malitia et sine causa*, *per quod* he put him to great charge, etc.; but he must allege and show the grievance specially.