probable cause depends upon considerations which are thus set forth by one of the most eminent of modern judges:

"In its very nature the presentation or the prosecution of an indictment involves damage, which cannot be afterwards repaired by the failure of the proceedings to the fair fame of the person assailed, and for that reason, as it seems to me, the law considers that to present and prosecute an indictment falsely, and without reasonable or probable cause, is a foundation for a subsequent action for malicious prosecution." (*b*)

A corollary from this principle is that, although a plaintiff must fail unless he shows that the use of process was both malicious and without reasonable and probable cause, (*c*) or, in other words, that it should have been without reasonable ground and from a bad motive, (*d*) the demonstration of each of these facts is by no means of equal importance to him. Want of probable cause is competent, (*e*) though not conclusive (*f*) evidence of the malice of

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(*b*) Bowen, L.J., in *Quartz Hill, &c., Co.* v. *Eyre* (1883) 11 Q.B.D. 674 (p. 691).

(*c*) *Chambers* v. *Taylor* (1598) Croke Eliz. 900: *Anon* (1702) 6 Mod. 73: *Anon* (1702) 6 Mod. 25: *Jones* v. *Givin* (1712) Gilbert's K.B. 185 (p. 189): *Golding* v. *Crowe* (1751) 1 Sayer's Rep. 1: *Farmer* v. *Darling* (1776) 4 Burr. 1971: *Johnstone* v. *Sutton* (1786) 1 T.R. 493 (p. 543): *Mitchell* v. *Jenkins* (1833) 5 B. & Ad. 588. *Broad* v. *Ham* (1839) 5 Bing. N.C. 722: *Brown* v. *Hawks* (C.A. 1891) 2 Q.B. 718, and cases cited throughout this article, *passim*.

(*d*) *Johnson* v. *Emerson* (1871) L.R. 6 Exch. 329, per Cleasby B. (p. 342).

(*e*) "Every other allegation may be implied from this [i.e., the want of probable cause]; but this must be substantively and expressly proved, and cannot be implied." *Johnstone* v. *Sutton* (1786) 1 T.R. 493, per Lords Mansfield and Loughborough (p. 543). See also p. 545 of the same judgment. To the same effect see *Purcell* v. *McNamara* (1808) 9 East 363: *Phillips* v. *Naylor* (1850) 4 H. & N. 565: *Busst* v. *Gibbons* (1861) 30 L.J. Exch. 75: *Quartz Hill, &c., Co.* v. *Eyre* (1883) 11 Q.B.D. (C.A.) 674, per Brett, M. R. (p. 687): *Wilson* v. *Winnipeg* (1887) 4 Man. L.R. 193: *Vincent* v. *West* (1868) 1 Hannay (N.B.) 290: *Seary* v. *Saxton* (1896) 28 Nov. Sc. 278: *Larocque* v. *Willett* (1874) 23 L.C. Jur. (Q.B.) 184. In a recent case in the Court of Appeal, Bowen, L.J., remarked that the doctrine by which the non-existence of reasonable and probable cause is some evidence from which the jury may infer malice is based on the idea that, if there is an absence of reasonable and probable cause, the jury may think that the defendant knew there was no such cause: *Brown* v. *Hawks* [C.A. 1891] 2 Q.B. 718 (p. 727). See also the remarks of Hawkins, J., at p. 723. A single sentence in a charge: "If you find an absence of reasonable and probable cause, you can infer malice," is not a sufficient explanation of the doctrine that malice in fact may be inferred from all the circumstances which led to the institution of the prosecution: " *Hawkins* v. *Snow* (1895) 27 Nov. Sc. 408.

(*f*) *Mitchell* v. *Jenkins* (1833) 5 B. & Ad. 588: *Huntley* v. *Simson* (1857) 2 H. & N. 600, per Channell, B. (p. 602): *Tulley* v. *Corrie* (1867) 10 Cox C.C. 584. Want of reasonable cause does not justify an inference of malice on the defendant's part where a prosecution was instituted by his agent, without his authority and while he was living at a distance, and he only became cognizant of the facts when he attended the first hearing before the magistrate: *Weston* v. *Beeman* (1857) 27 L.J. Exch. 57. Where a man prosecutes unsuccessfully without believing in the guilt of the accused, and simply for the reason that there are circumstances of suspicion so great that he may have felt it his duty to