

The divergence of opinion in this case between the Court of Appeal of the Queen's Bench Division and the Court of Appeal arose in a misconception, on the part of the former, as to the mode of proof. The Court of Appeal of the Queen's Bench Division held that the burden of proof was on the part of the defendants to establish probable and reasonable cause, since the facts necessary for such proof would lie peculiarly within their knowledge. That if it rested with the plaintiff, he would be called upon to prove a negative. Before this it was contended by many that when the plaintiff had proved the prosecution and that it had terminated favourably to himself, the burden was shifted upon the defendant, and consequently the plaintiff would be entitled to recover, unless the defendant could shew reasonable and probable cause for having prosecuted.

The result of this decision establishes the principle, that in actions of malicious prosecution the burden of proof throughout rests upon the plaintiff, as well to shew want of reasonable and probable cause, as to prove malice, although the knowledge of its existence lies peculiarly within the knowledge of the defendant.

Further, this case demonstrates how small a part the fact that defendants took the opinion of counsel before prosecuting played in its ultimate decision. It would seem, however, to follow as a legitimate inference, that taking the opinion of counsel as a precautionary measure may have been a material factor in leading the jury to find as they did.

It is only when the prosecutor acts bona fide upon the legal advice or opinion of counsel on facts apparently credible and fully disclosed to his counsel, and with a mind free from the taint of malice, his defence can be said to be assured. While the onus of proving malice rests upon the plaintiff, the jury may infer it from the want of reasonable or probable cause. Yet they are not bound so to do. On the other hand, however, the want of reasonable or probable cause cannot be inferred from proof of malice.

In *Aex v. Stewart*, 6 M.L.R., p. 264 (1889), Chief Justice Taylor is thus reported: "The law certainly seems to be now settled, that if a party lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel, he is not liable to an action."

In *St. Denis v. Shoultz*, 25 O.A.C., p. 131 (1898), the court held that notwithstanding the prosecution was instituted on the advice