

I would here make one other general remark on this case: that it is evidently one of those actions in which malice and want of probable cause must be combined before the defendant can be condemned. He might be acting beyond the scope of his jurisdiction, and unless he did so knowingly he must be absolved, so far as the action complains of the legal proceedings; this was decided in 1786 in the case of *Johnstone & Sutton* (1 T. R. 545) Lords Mansfield and Loughborough distinguished cases of trespass and manifest wrong-doing from arrest on process. They then went on to say: "A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action." (See also, in 1833, *Mitchell & Jenkins*, 5 B. & Ad. p. 588; and, in 1839, *Porter v. Weston*, 5 Bing. N. C. 715.) The law, as laid down in the case of *Reg. v. Neale*, appears to me to recognize the same principle in so far as regards that portion of the action which is based on the alleged short-comings of the Mayor.

Now, before proceeding to examine the evidence, there is one fact which strikes one forcibly on reading the declaration, and it is that, by the very acts of which appellant now complains, respondent secured him the protection that he so urgently and directly required at his hands, and preserved him from being assaulted, beaten, ill-treated, and possibly murdered. Of course, this does not completely repel the idea of the existence of malignity in Mr. Beaudry's mind. It is possible he may not have desired the immediate slaughter of Mr. Grant, but rather that he should be preserved as a subject for his malice. Such refinement will not, however, be readily presumed; and when a Court perceives that a man in the position of Mayor of a municipality so exercises his functions that a beneficial result is attained—a result specially beneficial to the complainant—it will be slow to arrive at the conclusion that malice is the main-spring of his actions. It has also been urged that the Mayor should have taken active proceedings against those who threatened the Orangemen. I fancy there never has been a doubt that those who threatened the Orangemen formed an unlawful assembly; but the reason why the Mayor did

not attempt to arrest them or disperse them by force is fully explained by the appellant's own witnesses, and particularly by Mr. Paradis, the Chief of Police, who, in answer to the question, "If twelve men are going to attack six, is it against the six or the twelve you would take precaution?" says, "If we can persuade the six not to expose themselves, we do so, but there is no comparison between an affair of five or six and an affair of thousands."

Turning to the evidence of appellant for special proof of this malice, we find it totally wanting. Nay, more, it seems to me that appellant has exercised some ingenuity in establishing that no such malice existed. It is impossible for any candid person to read the evidence without arriving at the conclusion that the Mayor was actuated by no other motive than that to which he swears when he says, p. 51, "I declare that I acted as Mayor, to the best of my abilities, in maintaining the peace, to prevent bloodshed." This is fully borne out by the evidence of Alderman Mercer, by Abraham Mackey, and, I think, by another witness, who prove the perfect fairness of the *Witness* report of what took place between the Mayor and the appellant on the 12th. By that report, it appears that after the Mayor had been most peremptorily and, I may say, almost authoritatively, assured that the Orange Association was illegal, he implored appellant to abandon the procession, and finally told him of the proceedings to which recourse would be had, namely, his arrest, if he persisted.

There is only one point on which it appears to me appellant's strictures are founded, namely as to the formation of the body of special constables. The magistrates acted very properly, under the circumstances, in refusing to swear in as a special constable any member of a secret association. To say the least, it is unfortunate that they had not exercised their discretion so as to prevent so large a number of Irish Roman Catholics from being sworn in, considering the occasion. I may also add that it is not usual to swear in a body of special constables drawn from the class to which these people seem to belong—an unknown throng in the street. Special constables are generally selected from among people whose position in society compensates, in some measure, for the lack of long training and discipline. The evil of failing to