

V. PROBABLE CAUSE CONSIDERED WITH REFERENCE TO THE  
PENDENCY OR TERMINATION OF THE PROCEEDINGS  
COMPLAINED OF.

**16. Pendency of the previous proceedings usually a bar to the action**—The general principle is, that the question whether there was reasonable and probable cause for instituting the previous proceedings cannot be raised as long as these proceedings are still in progress.

"The averment of want of reasonable and probable cause is of no use, unless it is averred that no cause of action really existed, and the general rule is that this can only be shown by alleging a judicial termination, or other final event, of the suit in the regular course of it. . . .

"If the action is well grounded, you cannot have an action against the person bringing it, because it is spiteful; and the question whether it is well grounded or no cannot be tried until the first action is terminated." (a)

"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 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." (b)

"An action for malicious prosecution cannot be maintained until the result of the prosecution has shown that there was no ground for it." . . .

"It is manifestly a matter of high public policy that it should be so: otherwise the most solemn proceedings of all our Courts of Justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety challenged by an action of this kind." (c)

(a) Blackburn, J., during argument of counsel, in *Parton v. Hill* (1864) 12 W.R. 753.

(b) Willes, J., in *Gilding v. Eyre* (1861) 10 C.B.N.S. 592, citing *Waterer v. Freeman*, Hob. 266; *Parker v. Langley*, 10 Mod. 209; *Whitworth v. Hall*, 2 B. & Ad. 695, p. 698.

(c) *Metropolitan Bank v. Pooley* (H.L. 1885) L.R. 10 A.C. 210, per Lord Selborne. To the same effect see *Jones v. Gvin* (1712); Gilbert's K.B. 185 (201); Lord Tenterden in *Webb v. Hill* (1828) 1 Moo. & M. 253; *Munce v. Black* (1858) 7 Ir. C.L. 475 (p. 479). "There is no distinction in this respect between an action for malicious prosecution by indictment, or for malicious arrest, and one for maliciously suing out a commission, if bankrupt": Littledale, J., in *Whitworth v. Hall* (1831) 2 B. & Ad. 695 [the court declining to accept the contention that the fact of its being in the discretion of the bankruptcy judge to determine the suit or not at his pleasure by superseders was not a sufficient reason for introducing an exception to the general rule. In *Munce v. Black*, *supra*, Pigot, C.B., distinguished the case (one