REASONABLE AND PROBABLE CAUSE IN ACTIONS FOR MALICIOUS PROCEDURE.

(*Continued from p. 608.*)

In the following pages we purpose to supplement the monograph published last month on "Reasonable and probable cause," by summarizing, from the special standpoint of trial practice, the rulings which bear upon that subject. The numbering of the sections is continuous with that of the previous article.

22. Forms of action—Under the old rules of pleading, putting the law in motion falsely and maliciously without any probable cause, was deemed to be the subject of an action on the case, and not of trespass (*a*).

The question of probable cause is not affected by any technicality in regard to the form of the action. Hence, though the covenant upon which the action in which a debtor was arrested is expressly several in its terms, the absence of probable cause is not shewn by the fact that the action was brought against the debtor and another jointly. (*b*)

23. Declaration—The want of probable cause, being a matter of substance must be expressly alleged. (*a*)

A declaration is not demurrable which alleges that the defendant maliciously and without reasonable or probable cause detained the plaintiff in custody upon a second arrest for the same cause of action in respect of which he had already been duly discharged out of custody. Under such circumstances the words "reasonable and probable cause" will be taken to mean that the defendant knew he had no ground for the second arrest and could derive no advantage from it. (*b*)

In an action for malicious arrest, under a statute giving a creditor authority to sue out a ca. sa., upon swearing that he has reason to believe that the debtor has made some secret or fraudulent conveyance of his property, it is sufficient prima facie to charge that the defendant maliciously sued out a ca. sa. when he had no reason for such a belief. The plaintiff need not aver that he had not made such a conveyance. (*c*)

(*a*) *Ysee* v. *Smith* (1822) 2 Chitty 304; 1 Dow & R. 97.

(*b*) *Whalley* v. *Pepper* (1836) 7 C. & P. 506. "Probable cause," said Tindal, C.J., "means a probable cause of action, and not probable cause for any particular form of action."

(*a*) *De Medina* v. *Grove* (1846) 10 Q.B. 152; *Barbour* v. *Gettings* (1867) 26 U.C.Q.B. 544. Contra, see *Jones* v. *Gwin* (1710) Gilb. K.B. 185 (1889).

(*b*) *Heywood* v. *Collings* (1838) 9 Ad. & E. 208.

(*c*) *McIntosh* v. *Demeray* (1848) 5 U.C.Q.B. 343