

Savil v. Roberts, 1 Salk. 13, 14 ; S. C., Ld. Raym. 374; *Goslin v. Wilcox*, 2 Wils. 305 and 306 ; Add. on Torts (3d Eng. ed.), 599 ; 4 Rob. Prac. 670 ; 671. Otherwise, parties would be constantly involved in litigation, trying over cases that may have failed, upon the mere allegation of false and malicious prosecution."

On the other hand, *Whipple v. Fuller*, 11 Conn. 581, it was held that if an action is brought and prosecuted maliciously and without probable cause, so that the defendant suffers damage, an action of malicious prosecution lies, although there was no arrest nor attachment.

That doctrine and decision were followed in *Woods v. Finnell*, 13 Bush; 628. The court said : "After the statute giving costs to the defendant, it was held by the common-law courts that no action could be maintained on account of the institution and prosecution of a civil action without probable cause, and therefore no action could lie for a vexatious ejection. In all such cases the plaintiff must have gone beyond the proper remedy for the enforcement of his claim, such as procuring an illegal order of arrest, or requiring excessive bail before the action could be maintained. This entire doctrine is based on the idea that the plaintiff bringing the action is sufficiently punished, and the defendant fully recompensed by the statute requiring the plaintiff to pay all the costs. We perceive no good reason for following this rule, and denying to the defendant a remedy when his damages exceed the ordinary costs of the action. The fact that a plaintiff has been subjected to the payment of costs *pro falso clamore*, is no recompense to the defendant when the latter has, by reason of the malicious proceeding on the part of the plaintiff, sustained damage. In cases where the plaintiff has mistaken his action, or been nonsuited, or where, by reason of some imaginary claim, he has seen proper to sue the defendant, it is not pretended that any action for damages can be maintained ; but where the claim is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery, for the expenses incurred and damages sustained, should be as fully recognized as if his property had been attached or his body taken charge of by the sheriff. While the damages may be less in the one case than the other the legal right

exists and some remedy should be afforded. If the facts alleged in these petitions are true, and they must be so treated on demurrer, it would be a singular system of jurisprudence that would admit the wrong and still withhold the remedy. * * * Following the doctrine of the common law, *that for every injury there is a remedy*, we see no reason for denying a remedy to the plaintiffs in each of these cases ; and where a party seeks a judicial tribunal for the purpose alone of gratifying his malice he should be made to recompense the party injured for the damages actually sustained, and the court should see that a remedy is afforded for that purpose."

The same doctrine was adopted in *Marbourg v. Smith*, 11 Kans. 554, where the malicious prosecution was for slander. The court said : "We suppose the only question of law arising upon the last assignment of error is, whether an action for malicious prosecution can be maintained in a case like the one at bar where neither the person nor property was seized nor bail nor security required, and the ordinary costs of defending the alleged malicious prosecution have already been allowed. Our opinion upon this question has already been foreshadowed. We suppose that an action for malicious prosecution can be maintained in any case where a malicious prosecution, without probable cause, has in fact been had and determined, and the defendant in such prosecution has sustained damage over and above his taxable costs in the case. *Whipple v. Fuller*, 11 Conn. 581 ; *Classon v. Staple*, 42 Vt. 209 ; S.C., 1 Am. Rep. 316. *Pangburn v. Ball*, 1 Wend. 345. At common law the defendant in such a case always has a remedy. Originally it was an action for malicious prosecution. Subsequently it was amerement of the plaintiff *pro falso clamore*. But now and in this State, as amerement is abolished, the defendant must return to his original remedy of malicious prosecution. It is an old maxim that there can be no legal right without a remedy. And the legal right in such a case has always been recognized. Indeed, it would be strange if the defendants in the case we have heretofore supposed while discussing the second and third assignments of errors should have no remedy."

In *Classon v. Staple*, *supra*, the court say : "But where the damages sustained by the