

hand, that proof of the existence of a certain mental condition justifies the inference of malice, and asserts, on the other hand, that proof of malice is entirely inadmissible to establish a conclusion which is conceded to follow at once when that very mental condition is shown to have existed. Under these circumstances, the mere fact that the absence of belief is not the sole evidence by which malice may be shown is hardly a sufficient ground for wholly denying its competence for that purpose. The difficulties involved in the accepted doctrine and the extremely fine distinctions which it necessarily entails are indicated by a case in which the court, after laying it down that malice is not evidence of want of probable cause, conceded that, where an accusation is made upon information received from a dismissed servant of the plaintiff, and the facts stated by the informant are highly improbable, when the social position and antecedents of the plaintiff are taken into account, the jury are entitled to consider whether the defendant acted on the information owing to the state of feeling between him and the plaintiff, and not from any belief. (*j*)

3. The existence or absence of probable cause is a material question in every action, the object of which is to recover damages for any use of legal process which either imputes moral turpitude to the person against whom it is used or which has the special effect of impairing his financial standing in the community. (*a*) As regards the former class of actions, it is enough to say that the large majority of them relate to formal accusations of some positive breach of the criminal law, though, as the general principle requires, a remedy is also accorded where the act complained of is the procuring of the merely preliminary writ known as a search warrant, (*b*) which is tantamount to an expression of belief, or at all events strong suspicion, that the person against whom it is procured is implicated in the crime under investigation. The imputation of guilt being the essence of the injury which is supposed to result from the proceedings, it is quite immaterial, so far as the right to maintain the action is concerned, that

(*j*) *Wright v. Greenwood* (1852) 1 W.R. 393. See also the argument of Cockburn, C.J., in *Fitzjohn v. Mackinder* (Exch. Ch. 1861) 9 C.B.N.S. 505, for an interesting example of the manner in which the fact that belief is an element both in probable cause and in malice.

(*a*) According to Holt, C.J., in *Savil v. Roberts*, 1 Ld. Rayon 374, there are three heads of damage which will support an action for malicious procedure: (1) damage to a man's person, as when he is taken into custody, whether that be on mesne or on final process, or on a criminal charge; (2) damage caused by putting a man to expense; (3) damage caused by injuring a man's fair fame and credit.

(*b*) *Elsee v. Smith* (1822) 2 Chitty 304; *Young v. Nichol* (1885) 9 Ont. R. 347; *McNellis v. Garlshore* (1853) 2 U.C.C.P. 464.