

to defend his right against an unjust claim. The money expended, then, by the plaintiff in the defence of that suit must be considered as expended for his own use, and not for that of the defendant, and this count is not sustained by the evidence 4 *Esp. N. P. C.* 223; 5 *do.* 3; 1 *Chitty's Pl.* 340; 7 *D. & E.* 204; 2 *Starkie's Ev.* 93.

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There are cases, in which a promise to repay money advanced, or to be advanced, would afford a sufficient ground to presume that it was advanced, or to be advanced, at the request and on account of the promisor. But here the promise was to bear a portion of the expenses which the plaintiff might incur in defending a suit brought against himself—and it seems to us that the promise alone does not, under all the circumstances disclosed in this case, afford any ground to presume that the money expended by the plaintiff in his own defence, was expended at the request or on account of the defendant. For aught that appears, her promise may have been an unlawful act of maintenance. And before the action is sustained on this count, it ought not only to appear that the money was advanced on account of the defendant, but that it was lawfully advanced on her account.

For these reasons, the

Verdict is set aside and a new trial granted.

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A declaration in an action for maliciously commencing a suit against the plaintiff where nothing was due should allege that fact, or in some terms set forth substantially a want of probable cause, and that the suit is terminated.

In an action for maliciously suing out process for a larger sum than was due to the creditor, in order thereby to oppress the plaintiff and require him to obtain bail in a greater amount, the declaration ought to set forth the sum actually due, or aver that it was not beyond a certain sum.

CASE. The declaration alleged that the defendant, at, &c.,

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“maliciously intending to oppress, injure, and imprison the plaintiff,” purchased out of the clerk’s office a writ, (which it set forth at large,) and afterwards, on, &c., “caused the plaintiff, by force of the same writ, to be arrested, and for want of sufficient bail to the same writ, which the plaintiff could not obtain, to be committed, &c., to our gaol,” &c., “where the plaintiff was detained for the space of twelve days; and the plaintiff in fact says that the said Clough procured and prosecuted his said writ against the plaintiff for the purpose of oppressing the plaintiff, and holding him to bail for a much larger sum than was due from the plaintiff to said Clough; and was guided in the premises by wanton malice and a desire to oppress and injure and defraud the plaintiff; and that if said Clough had only prosecuted his writ aforesaid for what was due from the plaintiff to said Clough, he could have procured good and sufficient bail to such a writ of the said Clough against the plaintiff.”

The defendant demurred specially, and assigned, among others, the following causes, viz :

1. That it was not alleged that the arrest was made without just and sufficient cause.

2. That the declaration did not set forth what sum was due and owing from said Davis to said Clough, for which his action was brought.

3. That it was not alleged that said action has ever been in any way terminated.

Joinder in demurrer.

S. Fletcher, and Kent & Hutchins, for the defendant, cited 2 *Chitty’s Pl.* 246, note e; 1 *Salk.* 15, *Robins vs. Robins*; *Doug.* 215, *Fisher vs. Bristow*; 1 *Esp. Rep.* 80, *Kirk vs. French*; 4 *Burr.* 1974, *Farmer vs. Darling*; *Com. Dig., Action on the case for a conspiracy, C. 5*; 1 *Gwil. Bac.* 95.

Bartlett, and D. Steele, Jr., for the plaintiff.

PARKER, J. The grievance stated in the plaintiff's declaration is, that the defendant, maliciously intending to oppress and imprison him, purchased out a certain writ from the office of the clerk, and caused the plaintiff to be arrested, and for want of sufficient bail, to be committed to prison, and there detained;—that this was done for the purpose of holding him to bail for a much larger sum than was due from the plaintiff,—and that the defendant acted from malice, and a design to oppress and defraud.

It is not alleged that the defendant had not a legal demand against the plaintiff, or that he had not a lawful right to commence a suit in the court to which the writ was returnable, or that the plaintiff might not have been lawfully imprisoned on the demand which the defendant held against him. Nor is it stated that any certain sum was due, so that the excess might appear, or that the plaintiff was not indebted beyond a certain sum. Nor does it appear from the declaration that the action is terminated.

It seems to be well settled, that in order to sustain an action for a malicious prosecution, the declaration should set forth that the former suit is determined. 1 *Saund.* 228, *b*, note; 2 *Chitty's Pl.* 299, note *d*; *Hobart's Rep.* 267, *a*, *Waterer vs. Freeman*; *Gilb. Cases in Law and Equity*, 214, *Jones vs. Givin*; 1 *Esp.* 80, *Kirk vs. French*; *Doug.* 215, *Fisher vs. Bristow*; 2 *D. & E.* 225, *Morgan vs. Hughes*. And if there was no debt, the better opinion is that the declaration should allege that fact, or in some terms set forth, substantially, a want of probable cause. *Metcalf's Yelverton*, 105, *a*, note 2; 2 *Wils.* 302, *Goslin vs. Wilcock*; 2 *Chitty's Pl.* 298, note *y*; 1 *D. & E.* 544, *Johnstone vs. Sutton*; 4 *Mass.* 435, *White vs. Dingley*; 3 *Day's Rep.* 432, *Starling vs. Adams*. *Contra—Gilb. Cas.* 189; 2 *Wils.* 147, *Chapman vs. Pickersgill*.

It may be understood, however, that in this case something was due, and that this is intended as an action for maliciously suing out a writ for a larger sum than was due to

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the creditor, when something was in fact due, and requiring him to procure bail to answer for such larger sum. But it is not sufficient to state, in general terms, that the defendant maliciously purchased a writ for the purpose of holding the plaintiff to bail for a larger sum than was due to him. The declaration in such case should allege how much was due, or aver that there was no probable cause of action beyond a certain amount, and then set forth the process which the defendant maliciously purchased. 1 *Salk.* 14, *Savil vs. Roberts*; 2 *Wils. Rep.* 376, *Smith vs. Cattel*; 1 *Camp. Rep.* 295, *Wetherden vs. Embden*; 3 *Barn. & Cres.* 139, *Austin vs. Debnam*; 1 *Ld. Raym.* 503, *Robbins vs. Robbins*. And it is said in some books that such declaration, also, should show that the suit was terminated. 1 *Salk.* 15, *S. C.*; 2 *Chitty's Pl.* 294, note e.

Considered either as an action for a malicious prosecution of a suit when nothing was in fact due, or as a suit for maliciously holding to bail in an excessive sum, the declaration is insufficient, and the demurrer well taken

Judgment for the defendant.

FELLOWS, Libt., vs. FELLOWS.

In case of a libel for divorce, the libellant must reside within this state to give the court jurisdiction; and the libel must be filed and made returnable within the county where the libellant resides, except where the libel, having been filed in such county, a notice has been ordered, returnable in some other county, or where the court has permitted the libel to be filed in some other county, and has ordered a notice returnable in the county of the residence.

Where extreme cruelty is alleged as the cause of divorce, there should be a specification of the acts of cruelty complained of; and when such acts have not recently transpired, the evidence furnished should show some cause for the delay in making the application.