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What Constitutes a Termination in Favor of the Plaintiff in Order to Successfully Maintain an Action for Malicious Prosecution in South Carolina?

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WHAT CONSTITUTES A TERMINATION IN FAVOR OF THE PLAINTIFF IN ORDER TO SUCCESSFULLY MAINTAIN AN ACTION FOR MALICIOUS PROSECUTION IN SOUTH CAROLINA?

Background of Malicious Prosecution

Malicious prosecution had a very early beginning in the courts of England. An early form of this action preceded defamation by some centuries, appearing as early as the reign of Edward I (1274-1307), in an old writ of conspiracy aimed at combinations to abuse legal procedure. This writ fell into decay and disuse in the sixteenth century, partly because of its narrow application to abuse by two or more persons, and it was replaced by an action on the case in the nature of a writ which would lie against a single person. From the beginning, malicious prosecution was established as a separate cause of action.[1] Malicious prosecution covers a somewhat broader field than mere harm to reputation, which accounts for one reason why it was not included in the tort of defamation.[2]

In actions for malicious prosecution, it is the interest in freedom from unjustifiable litigation that receives direct and primary protection. The action for damages lies only because the defendant has set in motion the judicial processes against the plaintiff under circumstances which are regarded as improper and unjustifiable and which, therefore, unduly subject the plaintiff to the inconvenience, expense, and, in some instances, the disgrace of coping with legal proceedings.[3] However, it has been said that the action for malicious prosecution is an action not favored in law.[4] In the consideration of actions seeking to recover damages for malicious prosecution, it is to be remembered that, while individuals are to be protected against rash and baseless prosecution, the public interests demand that courts shall not frown upon the honest efforts made in attempts to bring the guilty to justice, and the juries which try actions for malicious prosecution should ever keep in mind these principles.[5] Such actions are not encouraged because the law recognizes the right of everyone to sue for that which he honestly believes to be his own, and the payment of costs incident to the failure to maintain the suit is or-

1. F. V. Harper, *Malicious Prosecution, False Imprisonment and Defamation;* 15 Texas Law Review, 157 (1937).
2. Prosser, *Law of Torts,* 860 (1941).
3. Harper, *Law of Torts,* 581 (1933).
4. Staley v. Rife, 109 W. Va. 701, 156 S.E. 113 (1930).
5. Jennings v. Clearwater Mfg. Co., 171 S. C. 498, 172 S.E. 870 (1934).

dinarily considered a sufficient penalty.[6] Public policy requires that all persons shall freely resort to the courts for the redress of wrongs, and the law protects them when they act in good faith and upon reasonable grounds in commencing either a civil or a criminal proceeding.[7]

As a result of this seemingly unfavorable view, the action has been hedged in by limitations stricter than those in almost any other act which involves damage to another, and the courts have strictly complied with the ruling in allowing recovery only when the requirements limiting it have been fully met.[8] In general, to authorize the maintenance of an action for malicious prosecution, the following elements must be shown: (1) The institution or continuation of original judicial proceedings, either criminal or civil; (2) by, or at the instance of, the defendant; (3) the termination of the proceeding in the plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceedings; and (6) the suffering of injury or damage as a result of the action or prosecution complained of.[9] Strict compliance with all of the above elements must be shown before an action may be maintained.

SUCCESSFUL TERMINATION

A successful termination is one of the prime requirements for maintaining this action. Several reasons have been advanced for such a rule. One is that a conviction of an accused is sufficient to establish that there was probable cause for the prosecution; another, that the courts will not tolerate inconsistent judgments upon the same question between substantially the same parties.[10] Any disposition of the case which does not terminate it but permits it to be renewed cannot serve as the foundation for this action. However, it will be sufficient if the proceeding has terminated in such a manner that it cannot be revived, and the prosecutor, if he proceeds further, will be put to a new cause of action.

What is meant by a favorable termination? It becomes apparent that there must be a favorable termination of the prior legal proceeding before the action may be brought. The courts, however, differ as to what constitutes such a favorable termination. Only eight cases involving this question of favorable termination have

6. 7 Annotated Cases, 452.
7. Harper, *Law of Torts*, 582 (1933).
8. Staley v. Rife, *supra*, Note 4.
9. 34 AMERICAN JURISPRUDENCE, 706.
10. Harper, *Readings in the Law of Torts*, 1270 (1941).

appeared before the court of last resort of South Carolina since 1934. However, from these and the few cases prior to 1934 there can be sketched a clear-cut, though somewhat meager, picture of the requirements for a successful termination in favor of the plaintiff in this State.

KINDS OF TERMINATIONS IN SOUTH CAROLINA

Ostensibly, South Carolina is in accord with most other jurisdictions as to the various methods of terminating a proceeding in favor of the plaintiff. The only real handicap to a compilation in this area of the law of Torts is that there is not a plethora of decisions from which a complete overall picture or survey may be derived. Therefore, this is an attempt to propone a synthesis of the existing law in this field, leaving the skeletal outline to be expanded and completed through the media of more extensive litigation and enlightened judicial processes.

A dismissal of a criminal charge has been held to be a successful termination.[11] The viewpoint has been adopted by the South Carolina Court: "the remedy accorded a citizen of damages for a malicious prosecution is intended to prevent and redress the malicious abuse of the process of the law, and that, when the particular proceeding instituted in malice had been legally terminated, the remedy of the injured party had matured; he is not required to await an acquittal, an adjudication of his innocence, which may never come, and may be purposely prevented."[12] It has been held that, if a prosecution is terminated by an agreement between the parties, or at any instance of, or upon the consent of, the accused, there is no legal termination as will support an action for malicious prosecution.[13] *Whaley v. Lawton*[14] states that a dismissal and discharge by a ministerial magistrate who has no power to try the case is insufficient to support an action for malicious prosecution. The implication is strong, however, that if the ministerial magistrate had had such authority, his discharge would have constituted an end of the prosecution.

The discharge of a defendant by a magistrate, upon preliminary investigation, is such termination as will supply that necessary element in a subsequent action for malicious prosecution.[15] A con-

11. Jennings v. Clearwater Mfg. Co., 171 S. C. 498, 172 S. E. 870 (1934).
12. Harrelson v. Johnson, 119 S. C. 59, 111 S.E. 882 (1921).
13. Jennings v. Clearwater Mfg. Co., 171 S. C. 498, 172 S.E. 870 (1934).
14. 57 S. C. 256, 35 S.E. 558 (1899).
15. Harrelson v. Johnson, 119 S. C. 59, 111 S.E. 882 (1921).

trary ruling would permit a maliciously inclined prosecutor to carry the defendant before every magistrate in the State or institute manifold actions before the identical magistrate and remain immune from damages by allowing the case to be dismissed by the magistrate. If the examining magistrate finds that there is not sufficient cause to hold the accused to answer and therefore discharges him, that prosecution is thereby ended and the consideration that other prosecution may be brought against him on the same charge cannot prevent the action of the magistrate from having its effect as a termination of the proceedings before him.[16] In the case of *Caldwell v. Bennett*,[17] the plaintiff was arrested and carried before a magistrate, who, on a preliminary hearing, dismissed the prosecution for insufficiency of evidence. The party proceeded against then brought an action for malicious prosecution. In sustaining the refusal of a non-suit, the Court said: "For it is quite clear that there was testimony that the prosecution had ended . . . ." In *Clemmons v. Nicholson*,[18] an order was issued by the magistrate that the case against the defendant be dismissed. It is generally held that where a court order is granted to dismiss the criminal case and to discharge the defendant, it is at least prima facie evidence that the criminal case was legally ended by the Court. The case of *Glover v. Hayward*[19] appears to be absolutely conclusive of the magistrate's discharge as a successful termination.

The weight of authority in this country is to the effect that the entry of a *nolle prosequi* without the procurement or consent of the defendant is such a termination as will support an action for malicious prosecution;[20] however, this is not the law in the State of South Carolina. The case of *Heyward v. Cuthbert*[21] early laid down the rule that a *nolle prosequi* on the information by the solicitor is not such a termination of the matter as would support an action for malicious prosecution. The reason put forth is that, as a prosecution, it could not have a termination because it never had a legal commencement. Admitting that the information in this case could be regarded as the commencement of a prosecution there is no evidence of a legal termination. For that reason, this, as an action for malicious prosecution, must fail. In *Shackelford v. Smith*,[22] the hold-

16. 26 AMERICAN STATE REPORTER, 123.
17. 22 S. C. 1 (1884).
18. 188 S. C. 486, 198 S.E. 180 (1938).
19. 108 S. C. 486, 94 S. E. 878 (1917).
20. Wilkinson v. Wilkinson, 159 N.C. 265, 74 S.E. 740, 39 LRA (NS) 1215 (1912).
21. 4 McCord, 354 (1827).
22. 1 Nott and McCord, 36 (1817).

ing was reached that a *nolle prosequi* entered by the solicitor upon the warrant without taking an order of discharge was not a termination of the prosecution, for the plain reason that the solicitor could have recalled his entry and subsequently tried the defendant.

In some jurisdictions, the termination of a prosecution sufficient to authorize an action of malicious prosecution is the returning of a "no bill" by the grand jury. In *Thomas v. DeGraffenreid,*[23] it was held that the return of a "no bill" without an order of the court is not a termination of the prosecution, for another bill could be issued. The mere production of an indictment, with the finding of the grand jury thereon, does not prove that the prosecution is at an end. There is dicta to the effect that if the party bound over has been discharged by the order of the court, this is a valid termination.[24] It is contended that it is not sufficient to state that he was discharged or that the grand jury returned a "no bill", but that it should have been stated *expressly* that the plaintiff was discharged by the order of the court.[25] Thus, the return of a "no bill" by the grand jury, without the statement of how the plaintiff was discharged, is not a sufficient basis to be regarded as a termination in favor of the plaintiff in South Carolina.

A compromise and settlement of a criminal action as a bar to an action for malicious prosecution does not depend on the validity of the settlement, but upon the fact that the defendant, by securing the dismissal of the criminal action, estops himself from asserting that the action was instituted without probable cause.[26] The reason for the rule where the termination of a case is brought about by compromise and settlement between the parties, is that in such a case there is an admission of probable cause and the plaintiff cannot afterwards retract this admission and try the question waived by the settlement.[27] The case of *Jennings v. Clearwater Mfg. Co.*[28] holds that a dismissal of the prior action as the result of compromise would bar the action for malicious prosecution. Yet the general rule that compromise and settlement of the original proceedings will defeat the action for malicious prosecution is not unqualified. To have the above mentioned effect, the compromise must be voluntary and not one made under duress.[29] The rule "is not applied in cases where

23. 2 Nott and McCord, 143 (1819).
24. Thomas v. DeGraffenreid, 2 Nott and McCord 143 (1819).
25. Teague v. Wilks, 3 McCord, 461 (1826).
26. Leonard v. George, 178 F. 2d 312 (1949).
27. White v. International Text Book Co., 156 Iowa 210, 136 N.W. 121, 42 LRA (NS) 346 (1912).
28. 171 S. C. 498, 172 S.E. 870 (1934).
29. Jennings v. Clearwater Mfg. Co., 171 S. C. 498, 172 S.E. 870 (1934).

the settlement was not voluntarily and understandingly made, but was made under duress or coercion; nor where the dismissal is not shown to have been the result of a valid compromise or settlement."[30] A recent casenote in the *South Carolina Law Quarterly*[31] treats the effect of compromise as a favorable termination in order to maintain an action for malicious prosecution. This article adequately covers the issue that, in the absence of coercion or duress, compromise made to secure a release of a prior action will estop the accused from later bringing an action for malicious prosecution.

There are several factual situations with respect to what constitutes a successful termination which have not come as formal issues before the South Carolina Bench. Consequently, the construction to be placed upon these terminations in this jurisdiction can only be assumed. However, they are of such significance in litigation of malicious prosecution in other jurisdictions that they warrant attention and consideration here. Practically all American courts agree that there is a sufficient termination when an appeal ends in the accused's favor although he was convicted in the lower court.[32] A discharge of a writ of *habeas corpus* has also been held to be a valid termination.[33] Likewise, there is a valid and substantial termination of the proceedings if the indictment is quashed by the judgment of the court.[34]

CONCLUSION

In recapitulation, the decisions are few in South Carolina concerning terminations favorable or unfavorable. Briefly, it can be stated that dismissal of criminal charges, discharge by a magistrate, compromise and settlement under duress or coercion and judgment for or acquittal of the defendant in the original action, are all sufficient grounds for a favorable termination in order to institute a proceeding for malicious prosecution. It appears that these four terminations conclude to a degree what in South Carolina constitutes a successful termination. It also becomes apparent from an analysis of the existing cases that the entrance of a *nolle prosequi,* refusal of a grand jury to act, and voluntary compromise and settlement are considered insufficient terminations by the Supreme Court of South Carolina.

30. 67 A.L.R. 519.
31. Volume 2, p. 434 (June, 1950).
32. Desmond v. Fawcett, 226 Mass. 100, 115 N.E. 280, L.R.A. 1917, 408 (1917).
33. Zelby v. Storey, 117 Pa. 478, 12 A. 569 (1888). Contra: Vorce v. Oppenheim, 37 App. Div. 69, 55 N.Y.S. 596 (1899).
34. Lytton v. Baird, 95 Ind. 346 (1883); Wilkinson v. McGee, 265 Mo. 574, 178 S.W. 421 (1915).

It is to be observed that the South Carolina Court has adopted a line of strict approach as to determining whether a termination is of sufficient validity to be deemed successful. This jurisdiction from 1817 to the present day has consistently rejected the more lenient types of factual situations as grounds for successful terminations. All other types of terminations presented in the future would be ones of novel impression to the South Carolina Bench, but undoubtedly the established stricter view would prevail and subsequent decisions would be dealt with accordingly.

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