

PRESTON v. COOPER.

[1 Dill. 589.]¹

Circuit Court, D. Iowa.

1871.

MALICIOUS PROSECUTION—ACTION FOR DAMAGES—EVIDENCE—PROOF.

1. Where a writ of attachment is sued out maliciously and without probable cause, and damage ensues, the defendant has a remedy on common law principles, aside from the remedy on the attachment bond.
2. To sustain an action at common law for maliciously suing out an attachment, it is not enough to show merely that the writ was wrongfully sued out because there was no debt due. The plaintiff must show malice, want of probable cause, and damage.

[Cited in *Thompson v. Gatlin*, 7 C. C. A. 351, 58 Fed. 535,536.]

[Cited in *Burton v. St. Paul. M. & M. Ry. Co.*, 22 N. W. 300, 33 Minn. 193.]

At law.

Phillips & Phillips, for plaintiff.

N. M. Hubbard, for defendant.

Before DILLON, Circuit Judge, and LOVE, District Judge.

PER CURIAM. 1. Where a writ of attachment is sued out maliciously and without probable cause, and damage ensues, the defendant has a remedy on common law principles, aside from the remedy on the attachment bond.

2. The only remedy of the attachment defendant, it seems, is upon the bond, or by an action for malicious attachment, in which latter case it is not sufficient to allege that the writ was wrongfully procured, but there must be allegations of malice and want of probable cause.

3. Where by statute no bond in attachment was required, and none given, the defendant, in the

absence of legislation giving the right, cannot maintain an action against the plaintiff in attachment, by showing merely that the writ was wrongfully sued out, because there was no debt due from him, but he must show malice, want of probable cause, and damage, as required by the principles of the common law in actions for malicious prosecution.

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