ment with Richardson & May for advances and supplies for that year, executing a mortgage as before. This mortgage was sent by Richardson & May to Brewer, to be by him executed and recorded in the county where the land was situated. He did not file it for record immediately, nor until sometime in May or June, when he sent it to the clerk of the county to be recorded, either unsigned or not properly acknowledged, and the clerk did not record it. During the spring the plaintiff desired to make an arrangement with defendants similar to the one he had made before, and, according to defendants' contention, promised to make to them a mortgage on the Malone place, which he told them was not included in the Richardson & May mortgage of that year, and to have the tenants of that place join in the mortgage, as he was to get the supplies for them. According to the plaintiff's contention, he only promised, with Richardson & May's consent, to ship to defendants the cotton grown on the Malone place. The defendants refused, as they contend, to advance on any other terms than security for the old balance as well as new advances, but, under pressure and a promise to send up the mortgage, advanced $75, and agreed to advance $125 additional when the mortgage was made.

The plaintiff drew some small orders, which were refused payment by defendants. The parties became involved in an acrimonious controversy as to the terms of the agreement, the details of which it is not necessary to report, except that the plaintiff tendered a check on Richardson & May for $75, for the money paid him, and offered to abandon the agreement, which was refused for some reason, and afterwards offered, as he contends, a mortgage on cotton-seed, if not included in Richardson & May's mortgage, but ultimately signed a mortgage drawn up by defendants before a notary, which they did not take because of some complaint of a want of Richardson & May's consent.

These negotiations for settlement and compromise, about which there was great conflict in the proof, as well as about the original agreement, all failed. The Richardson & May unexecuted mortgage fell into the hands of defendants, and observing that the Malone place was included in it, the defendants, as they contend, conceived this to be a fraud upon them, and applied to their lawyer, stating the facts and showing the unexecuted mortgage. There was a contention in the proof as to whether all the material facts were stated, but the lawyer advised an attachment. The defendants made the necessary affidavits under the attachment laws of Arkansas that the plaintiff was about to fraudulently convey his property, and on July 16, 1881, the attachment was levied on the growing crops of the plaintiff, cultivated by day labor, on his horses and mules and gin-stands, and by garnishment on the shares of crops due the plaintiff from the croppers on share. The horses and mules were left with the plaintiff by the sheriff, and an agent was appointed to watch the

crops, some of which were afterwards seized on an execution in favor of defendants for their debt, and sold to satisfy it.

There was much proof and conflicting testimony as to the conduct of the sheriff and a brother of one of the defendants about the business of making the levy, and the subsequent proceedings in watching the crops. The attachment suit was removed by the plaintiff from the state court to the federal court in Arkansas, where, on the trial, it was decided in his favor. He therefore brought this suit for the wrongful suing out of the attachment, maliciously and without probable cause, alleging that the negro laborers were so demoralized by the levy of the attachment that they abandoned the crops, which fell short for want of work which he could not supply, under the circumstances of loss of credit, time of the season, want of confidence in his ability to carry out his contracts with them, want of supplies for their support, etc. Damages were also claimed for excessive levies.

About all this there was much conflict in the proof, the defendants contending that the property was left with the plaintiff; that the desertion of the laborers proceeded from the plaintiff's bad management and conduct towards them, if there was any desertion at all, which was denied. There was a verdict of $2,250 for the plaintiff.

When the case was called for trial, counsel for defendants stated that they had an arrangement with one of the counsel for plaintiff, who was a member of congress, to pass it until his return from Washington, but that if the plaintiff insisted on a trial the defendants would be ready on a day named, to which the trial was adjourned. On that day the plaintiff moved to amend his declaration by adding a more specific allegation of special damages, to which the defendants objected unless the case was continued. To avoid a continuance, plaintiff withdrew his motion to amend and the trial proceeded, a large number of witnesses being examined on both sides.

After the argument was commenced, the jury was retired, and plaintiff renewed his motion to amend the declaration on the ground that, after the time and expense of the trial, it was probable the result would be, at most, only a nominal verdict for the plaintiff or a verdict for the defendants, because of the want of sufficiently full allegations of the special damages relied on in the proof. The court stated that the proof had developed a substantial controversy between the parties which mainly depended on the view to be taken by the jury of the facts as they should find them in the great conflict of testimony, and that, as the case had progressed so far, it seemed better to submit it to the jury on a declaration sufficient to raise the issues than to force a nonsuit which the plaintiff could take, under the practice, at any time before the case was submitted to the jury, or to enter a mistrial and continue the case, as the defendants insisted should be done. But as the plaintiff had deliberately gone to trial on his declaration, it was doubtful whether he should be allowed to now amend, notwithstanding the liberal provisions of the statute,

except under the penalty of a continuance and costs; and therefore the amendment would be permitted for the sole purpose of reaching the judgment of the jury on the facts, but reserving to the defendants, on the motion for a new trial, every question they could make on the motion to amend, as if this course had not been taken. Whereupon the amendment was made, and there was a verdict for the plaintiff.

On motion for a new trial, the defendants produced affidavits of many witnesses, not examined at the trial, to show that they could have made a better case if the declaration as amended had been originally filed in that form, or if they had been made at an earlier stage of the proceedings. The plaintiff presented counter-affidavits, and insisted that the large number of witnesses produced at the trial and the fullness of the proof showed that they were fully aware of the real issues, and were not surprised or taken at a disadvantage by the amendment.

Another ground of a motion for a new trial was that one of the jurors, James Gray, was a minor, and disqualified, under the statute, as a juror; that James Gray, Sr., had been really drawn from the box, and this James Gray, Jr., had in some way become substituted for the other; that the defendants were not aware of these facts till after the trial, and that they did not challenge him because of their ignorance of the fact, and because, by the practice of the court, each juror was examined when called as to his qualifications, and they were relying on truthful answers by the jurors at the time they were received for the term by the court. Affidavits were presented to sustain this ground of the motion.

On the trial of the case, the court, HAMMOND, J., charged the jury as follows:

1. *The Affidavit.*

Gentlemen of the Jury: Apart from any question of the effect of the judgment of the court in Arkansas against the attachment there can be no doubt, on the facts proved in this case which are not at all disputed, that the statements of the affidavit for attachment were untrue, and the plaintiff has shown by the proof here that there was no legal ground for the attachment of his property under the laws of Arkansas.

2. *Probable Cause.*

The court does not hesitate to assume the responsibility of saying to you that—on the facts proved in the case about which there is no dispute, and taking them to be just as the defendants claim they were, where there is any conflict—there was no probable cause whatever for the attachment.

3. *Malice.*

But the entire absence of probable cause for the attachment does not of itself entitle the plaintiff here to recover damages against the defendants for suing the attachment. The law requires more than this. There must be also malice on the part of the defendants proved to your satisfaction. The want of probable cause and malice must co-exist to sustain the action. You will have observed that the declaration charges, as it must, that the attachment was maliciously and without probable cause prosecuted by the defendants. The court has on the facts determined that there was no probable cause, and you

alone must determine whether there was any malice; with that question the court has nothing to do. It is a mere question of fact, and the court can do no more than point out to you the process of resolving it when you come to consider it. The first inquiry you will naturally make is, what does the law mean by malice? Ordinarily, we use this word to designate general malevolence, ill will, or unkindness towards a particular individual; but in law it signifies rather the intent from which flows any unlawful and injurious act committed without legal justification. It is the conscious violation of the law to the prejudice of another. It is express malice where the party evinces an intention to do the wrong, and implied, where it is inferred from the character of the facts proven. As applied to controversies like this we are now trying, where a party is sued for the malicious prosecution of a suit against another, without probable cause for bringing the suit, the term does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but includes as well conduct injurious to another, though proceeding only from an ill-regulated mind, not sufficiently cautious before it occasions an injury to another, and bent on the attainment of some desired end; such, for example, as the collection of a just debt, without due regard to the lawful rights of that other. Juries may infer this kind of malice from facts and circumstances proven in the case which show that the party acted with a reckless disregard for the rights of others, and was willing, in order to accomplish the desired end, to inflict a wanton injury. Malice is never in my judgment inferred as a matter of law in cases like this,—if it be in any case,—be the facts what they may. It is always a question solely for the jury to say whether it existed in the particular case, and they alone are authorized to make the inference, according to their judgment, and their experience and knowledge of human affairs. The court does not intend to review the facts in this case, resting as they do in the testimony of many witnesses on both sides, nor to present them to you by suggesting the conflicting views taken of them by counsel. They have been thoroughly and well argued before you, and the court might by inadvertence or omission give undue weight to one side or the other by such a process. The question for you to determine is whether there existed on the part of the defendants that kind of malice which the court has endeavored to explain. If it did, the defendants are liable in this action for damages. And you can readily see how important the injury is to the parties, and how careful you should be in deciding it. The court has adjudged that there was no probable cause for bringing the attachment, because, taking the defendants' own testimony to be absolutely true, there was no ground under the statutes of Arkansas for the attachment; and, besides, the plaintiff has proved that the alleged ground set out in the affidavit was untrue, and there is no pretense of any other. But, inasmuch as this absence of probable cause is only one element of the plaintiff's case, he cannot recover unless his other averment of malice is found by you to be true. If, therefore, you find there was no malice, your verdict must be for the defendants. If you find there was malice, your verdict must be for the plaintiff.

4. *Advice of Counsel.*

But it is the duty of the court to instruct you as to one fact in this case more specifically than it has been indicated will be done as to others. It is proved, indisputably, that before bringing the attachment the defendants consulted a reputable lawyer, who advised the attachment. What is the effect of that fact to have with you in determining whether there was malice? Like all other facts in the case it is to have just that effect which you, taking all the facts together, choose to give it. It is for your wisdom to determine its weight and value, under the circumstances of this case as bearing on the question of malice. No isolated fact is to determine that issue, but on all the facts as proved, you are to determine it. Now, take the fact of an entire ab-

sence of probable cause, for example, and consider it. It is sometimes said that the law infers malice from the want of probable cause, but it would be better to say that any jury, acting on its own experience of human nature and on the experience of all men, is apt to decide, where a man injures another without probable cause, that he acts either malevolently or with a reckless disregard of the rights of others, and therefore maliciously, in the eyes of the law. But if the other facts in the case show that this is not a fair and just inference, the jury will not make it, even though there was no probable cause for the suit complained of, and even though it has been so decided by the court trying the case, or the court trying the subsequent case for malicious prosecution. In other words, it is for the jury to say, on all the facts, whether the want of probable cause shows malice. Precisely in the same way, to take another example, do the jury consider the fact of advice of counsel. Acting on their own and the experience of all men, the jury is apt to decide that where a party, contemplating an attachment of his debtor, takes the pains to inform himself of all the facts which, by reasonable diligence, he can obtain, lays them all truthfully before his counsel, a reputable lawyer, omitting none, and, taking his advice, brings the suit, in the honest belief that he has probable cause for the attachment, and acts *bona fide* on that belief, there is no malice, although the suit fails, and, as a matter of fact, the advice was erroneous, and there was no probable cause. But if the other facts in the case show that, notwithstanding this advice of counsel, there was malevolent intention to injure, or any unreasonable and reckless disregard of the rights of others; that the true facts were not stated, but false statements made; that there was no honest belief in the existence of a cause of attachment and no *bona fide* reliance on the erroneous advice, but that it was sought or instigated merely as a cloak to do a wrong and thereby obtain an advantage for himself,—the jury is not apt to permit the advice to override all the other facts and protect the wrong-doer. The advice of counsel in such cases, when taken, as indicated, under circumstances which may fairly be presumed to have led to the bringing of the attachment suit, *prima facie* relieves the party from the imputation of malice, and imposes the duty on the other party—the plaintiff here—to remove by proof those presumptions flowing from the seeming situation of the parties, and to require him to bring home to the defendants the existence of malice as the true motive of their conduct. Beyond this extent no presumption can be permitted to operate, much less to be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms and the advice of counsel. In other words, where the jury finds in all the facts that malice exists, notwithstanding the advice of counsel, that advice is no protection where there is an absence of probable cause. If there be probable cause for the suit, of course, malice is immaterial, for a man may always prosecute a suit if he has probable cause, no matter how malicious he may be, and it is only where there is no probable cause, as in this case, that malice is material. You see, then, gentlemen of the jury, how important your functions are in determining this controversy. You should act cautiously, deliberately, and wisely, with that impartial care that gives weight to your verdict, and the more so because under our constitution and laws you are the sole tribunal to decide this controversy, and when you so act no court is authorized to disturb your verdict.

5. Damages.

If you conclude that the defendants acted maliciously, your verdict will be for the plaintiff; and the question of damages arises, and must, also, be decided by you, like the other, on all the facts in the case pertinent to that subject. No expenses of the attachment suit, outside of the regular costs of it, or of this suit outside of the regular costs and outside of counsel fee, have been proved, and therefore there is no consideration to be given to any supposed

damage on that score. The whole damage sought to be established consists in injury to the plaintiff's crop by demoralizing the tenants and laborers on his plantation. If you find that the levying of the attachment created a distrust among the plaintiff's tenants and laborers of his ability to carry out his contract with them, and that on that account they left the place or neglected the crop so that it was injured; that the levying of the attachment impaired the plaintiff's financial credit and embarrassed him in procuring supplies and laborers to take the place of the others or to furnish those that remained, and that by reason of this loss of labor and credit his crop was injured, you should estimate the damage from due proof, and allow it in your verdict. If, however, you find that the attached mules and other property were left in plaintiff's possession with freedom to use, as before the attachment; that the officers and agents of the plaintiff were careful to obviate any distrust among the laborers and tenants by explaining to them that they were not to be disturbed, and as a fact they did not abandon the crop or neglect it, or neglected and abandoned it for other causes, such as the conduct of the plaintiff towards them, or from their own laziness and want of a sense of obligation to contracts; or that the crop was short—if short it was—from drouth or other cause except demoralization by the attachment,—the damages can be at most only nominal; that is, for a small sum, which, while it vindicates the law, shows that the plaintiff was not, in fact, damaged. If he sustained no damage, your verdict should be only for this small and nominal sum, although the attachment was malicious and wrongful; and if other causes combined to injure his crop he should be allowed damages only for so much of the injury as was caused by the attachment. If you find, however, that there was actual damage more than nominal, then you are not confined, in your verdict, in a case like this, to actual damage, but may add such further sum as you may determine to compensate the plaintiff for the wrong done him. The law books call this additional sum by various names, such as punitive, exemplary, or vindictive damages, and sometimes "smart money." And it is sometimes said the jury may use this power to award damages to vindicate the law and deter others from wrong, and hence these names for the additional damages; but you should not be misled by these terms, or the principle of punishment, into an unjust verdict. Even in courts punishing crimes, our constitution forbids excessive fines and cruel or unusual punishments, and certainly in civil damages the jury should not exercise its undoubted power of assessing them oppressively or excessively; and this court would not, for a moment, tolerate an excessive verdict for damages awarded by way of punishment. If you find there was no injury, your verdict will be nominal, as you cannot assess punitive damages where there was no injury, or only one too small for the law to notice; but if you find actual damages, you may allow these alone, or such additional reasonable sum as you choose. If you find there was no malice, your verdict will be for defendants, no matter how great the injury may have been.

L. Lehman and *Geo. Gantt*, for the motion.

Young & Martin and *Luke E. Wright, contra.*

HAMMOND, J. The exceptions to the charge of the court are not, in my judgment, well taken. We may lay aside the doubtful question of the precise probative value of the record of the proceedings of the United States court in Arkansas in its relation to the issue of a want of probable cause in this suit. All agree that it may be used to prove —and that fact must be always so proven—that the attachment suit resulted in favor of the plaintiff here. Whether it can have any further effect, and be considered as tending to prove that there was no probable cause for the attachment, it is now immaterial to inquire,

because the court confined it to the certain use, and did not consider it in the other connection. Under the statutory regulations concerning the wrongful suing out of attachments in Tennessee, such a record has a conclusive effect to establish a want of probable cause in a suit for the statutory damages; but this is not that kind of suit, nor are we aware of any similar statute in Arkansas. But, aside from the judgment in that court, it is absolutely proved in this case that there was not the shadow of a cause for the attachment. The affidavit was wholly false. Brewer was not about to fraudulently convey his property. It is conceded that there was no other conveyance about to be made except the Richardson & May mortgage, and the affidavit was based alone on that. But that mortgage was a perfectly fair and honest one, and is the same kind in universal use in this valley between the planter and his supply merchant, and has been, time and again, sustained by the courts of Arkansas. This being so, it was plain to the court that there was no probable cause for suing out the attachment. There was no doubt a confusion of ideas on the part of the defendants and their then counsel. They conceived that Brewer had misrepresented and deceived them, and was acting dishonestly about their agreement with him, and this, coupled with a belief that if the defendants could levy an attachment before the Richardson & May mortgage was properly executed their lien would be the better, no doubt instigated the attachment. This deceit, however, even if it existed, was no ground for attachment; and it requires but little discrimination to see that the issue of probable cause is not in the least aided by these facts. It depends entirely upon the validity of the Richardson & May mortgage, which was the conveyance alleged to be fraudulent.

In ordinary prosecutions for crime, or in ordinary process for civil suits, what is a probable cause of action or prosecution has, perhaps, a much wider scope of inquiry than in suits where the grounds of action by extraordinary process are defined by statutory law. The inquiry here is whether defendants had probable cause to believe that they had good statutory ground of attachment, and this depended wholly on that mortgage and on nothing else, since no other ground was pretended to exist or be set up in the proof. There could be no probable cause of action in a case like this, unless there was a probable ground for attachment under the statute prescribing that remedy.

The only question, then, for the jury was that submitted to them—whether the attachment was sued out maliciously. No exception was taken to the definition of malice which was given to the jury, but great complaint was made that the question of probable cause, as based upon the advice of counsel that an attachment would lie, was not submitted to them. In effect, this exception is that the court refused to adopt the theory of defendants, to support which there is no doubt some authority, that the advice of counsel furnishes probable cause for proceeding by attachment, and that, when given under the

conditions laid down in the authorities, it is an absolute protection in a suit for damages. I do not think so; nor are we committed to this doctrine by the expressions used in *Kennedy* v. *Meacham*, 18 FED. REP. 312. There the plaintiff was suing for the statutory damages allowed by the attachment laws of Tennessee for wrongfully suing out the writ, and the court was excluding from the jury the claim for punitive damages. There was no doubt that the ground of attachment in that case was perfect, the defendant being a non-resident, and the consideration was whether the attachment plaintiff was maliciously suing on a false claim of debt or pursuing a lawful remedy to collect a debt in good faith believed to exist. The court was stating a general principle, and was not called on and gave no attention to its precise character or limitations.

Here the contention is that in all cases where there is no concealment or omission of material facts, the advice of counsel furnishes probable cause for the suit. It may furnish a reasonable belief in the existence of a cause or ground of attachment which would show a state of mind in the attachment plaintiff that would altogether negative the existence of that condition of his mind which the law denominates malice. But how can the ill-considered, erroneous, ignorant, or, it may be, sound advice of a lawyer strengthen or add anything to the cause or ground of attachment? That depends on the facts, and wholly on them. Generally, it depends wholly on the situation and conduct of the defendants. If that situation and conduct be well and accurately known or defined, and susceptible of satisfactory proof of facts sufficient to maintain the plaintiff's suit, there would be a good cause of action; while if they be doubtful and equivocal, or proof of them difficult and uncertain, there would be a probable or possible cause of action. It is in this direction we must look for a solution of the issue of probable cause, and the advice of lawyers can neither add to nor take from the other facts of the case their force in the process of reasoning necessary to determine it. The cause of action is neither better nor worse after advice of counsel is taken. The client may not understand the bearing of the facts on his legal rights, nor whether he has a cause of action at all, and being advised that he has, by counsel of repute, may reasonably believe that it is so, and safely bring his suit if the facts plausibly support it. But this surely can neither enlarge nor diminish his legal right as found in the facts, nor so affect, let us say, the statute by which his cause of action is precisely defined, as in this case. If the facts do not fall within it, the statute gives no ground of attachment, and a reasonable belief that his lawyer will properly construe the statute, or wisely determine the application of the facts to it, can give the client no other ground of attachment than he had before,—neither one that is probable nor of any other degree.

In the very nature of the case, it seems to me, the advice of counsel is properly referred to its influence on the plaintiff's state of

mind on the issue of malice or no malice on his part, and not to the grade or degree of plaintiff's cause of action on the issue of its being probable or improbable as a ground for the attachment. It is an important distinction, because in the one view it becomes, on admitted facts, a question of law for the court, with the result that whenever the court sees that reputable counsel was sought, that all facts were stated, and nothing was concealed which due diligence would develop, it must direct a verdict for the defendant upon the ground that probable cause has been shown *as a matter of law*, no matter what the other facts may be, or how preposterously wrong was the advice of the lawyer or grievous the damage done the plaintiff. This is a very shocking result, to my mind, and seems to be offering a premium for ignorance, to say nothing of the unsatisfied wrongs of the injured defendant in attachment; for the attaching plaintiff would be wiser to seek an ignorant, careless, or reckless lawyer, and bring his malicious suit for the advantage of probable success in the lottery of litigation or the coercion of a compromise, or to gratify his malice pure and simple, than to seek a more prudent counselor who would carefully advise him against the attachment. On the principle contended for, he would be equally safe in the hands of either against any claim for damages by the injured adversary party, and he might as well take the chances of gaining something by the attachment.

Nor does the rule that the advice must be that of a *reputable* lawyer furnish any guaranty against this result. Theoretically it might, but practically it is of little value, for reasons that are plain to all who are acquainted with the looseness with which access to the ranks of the legal profession is guarded, and the difficulty of disrating any lawyer from the character of being *reputable* as to his intellectual and professional acquirements. The effort of any party to prove that the lawyer giving the advice was not, *in fact*, nor reputed to be, one of sufficient knowledge and skill to give reasonable counsel, would be so utterly hopeless that, in effect, the theory fails to furnish any security whatever against incompetent advice.

Criticism may pronounce this a humiliating statement, but that kind of criticism deals, like the theory under consideration, with presumptions and assumptions not altogether founded in fact. A plaintiff in the action for malicious prosecution, who should challenge the reputation of the lawyer giving the defendant the advice, would find himself trying another case than his own, which would at once attract attention by the desperate character of the enterprise, and with a success much more rare than that attending similar attacks on the character of witnesses with respectable surroundings and many friends. The courts have recognized this difficulty, and shrink from the doctrine that advice of counsel is an absolute protection, which accounts for the serious difficulty of determining, in suits like this, precisely what effect the advice of counsel shall have to protect the

defendants from the consequences of a wrongful resort to the process of attachment. When the principle was established the whole number of lawyers was small, and incompetency to give safe advice so rare that the reason for the rule was substantially sound. With increasing numbers and decreasing scrutiny into the qualifications of those "called to the bar," this reason has not so entirely failed as to invoke the maxim that "when the reason of any law ceases, so does the law itself," and the courts cannot abrogate the rule, but they can guard it from abuse by confining its operation within the limits prescribed by law. It never did extend as far as defendants here claim, because this mode of redress for malicious prosecutions was never confined to those cases alone wherein the offending plaintiff did not take the advice of reputable counsel, and the rule cannot be properly construed to offer such a premium for reckless professional advice.

On the other hand, if we refer the advice of counsel to the issue of malice, it becomes a fact to be considered by the court or jury along with other facts in the case in determining that issue. It may or may not conclude the issue in favor of the attaching plaintiff, but in all cases, in the absence of countervailing facts, it affords as absolute protection to him as when referred to the issue of probable cause. The charge presented the case to the jury in this view of the law with the most scrupulous care to give the defendants the fullest possible benefit of the fact that they consulted reputable counsel, but the court refused to charge that this fact of itself and by itself afforded absolute protection. There were other facts which no doubt led the jury to believe that there was malice in the legal sense, if not in a larger sense, and the objection to the charge really is that it did not end the case in favor of the defendants by exaggerating the importance of the advice of counsel into a complete protection.

This view which the court took of the matter is supported by the thoroughly convincing commentary of Professor Tiedeman in his note to *Sharpe* v. *Johnstone*, 21 Amer. Law Reg. (N. S.) 576, 582. He cites the authorities extensively, and it is not necessary to enumerate them here. It is not to be understood that the facts and circumstances relied on to show probable cause must be found always to exist in such a state of certainty as to establish the defendant's probable guilt of the offense or liablity to the cause of action; nor that the element of belief, on the part of the prosecuting plaintiff or his lawyer, is eliminated from the inquiry as to probable cause. It may be that the defendant is not guilty, or that there is no ground of attachment, and that more careful and intelligent minds would readily detect the weakness of the case and groundless character of the accusation, or that better information would have developed such weakness. But still the proper inquiry is—Would a reasonable man have brought this suit? This involves necessarily a judicial inspection of the conduct of the prosecuting plaintiff as to his diligence in ascertaining facts, his intelligent comprehension of them, his fairness in dealing with them,

his prudence in asking professional advice, and all considerations entering into the character of his conduct about the matter, pretty much like the same inspection that goes on in determining the other issue of malice on his part. But we need not confuse the two branches of the case, albeit the processes of adjudging them be the same.

If the facts and circumstances as proven, including the advice of counsel, would excite belief in a reasonable mind of the existence of a ground of attachment, then there is probable cause for his conduct in bringing the suit, though there be no good ground of attachment, and the question is for the court or jury, or both, according to well-understood circumstances. This does not mean, however, that *unreasonable* belief can be converted into that which is *reasonable* simply by advice of counsel, regardless of all bearing of the other facts on the question. As it was put to counsel at the argument, no amount of reputation on the part of the lawyer would excuse the client if he brought an attachment upon a ground wholly outside of the statute; as if, for example, he should be advised that all conveyances of property while a man was in debt were fraudulent, or that all men who wore blue shirts might be attached. It is not reasonableness to the plaintiff's mind which is a test of the quality, but reasonableness *as a matter of law*, to be determined, not by the strength of that particular mind, nor yet by the nature and character of the advice given to it, but by the legal test in all such inquiries, here as elsewhere. And this is that belief which would be generally entertained by prudent and cautious minds acting with ordinary or average intelligence in such matters on the facts within the knowledge of the prosecuting plaintiff.

The supreme court, in *Wheeler* v. *Nesbit*, 24 How. 544, has defined probable cause to be "the existence of such facts and circumstances as would excite the belief, *in a reasonable mind*, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." Or, negatively, in another place in the opinion, "that he had *no sufficient reason* to believe him to be guilty." A *reasonable* mind is a sensible one, fairly judicious in its action, and at least somewhat cautious in reaching its conclusions. Assuming, then, as was done in charging the jury, that the defendants believed that they had a probable cause of action by attachment, or, to present it specifically, that they believed that Brewer was, in the language of their affidavit, "about fraudulently to convey his property," does that *belief* protect them? Mere belief will not do. It is agreed it must be honest and sincere, but under the above definition it is more important that it should be *reasonable*. However honest or sincere, and whether produced by advice of counsel or otherwise, surely *sincerity* is not synonymous with *reasonableness*. The belief may be never so sincere and yet unreasonable. As we cannot substitute sincerity for reasonableness in the definition, the real question is—Does advice of counsel of itself, under the given con

ditions of the rule, always and conclusively prove *reasonableness* as a quality of a sincere belief in the cause of action? It must be admitted that some cases so hold; some, however, do not. With all deference and presumptiously, perhaps, my mind would not, philosophically considering it, admit the theoretical soundness established by an affirmative answer to this question; but aside from this, as a legal proposition, the answer must be in the negative for the reasons already stated, namely, that the other facts may be of a character to demonstrate conclusively that notwithstanding the advice of counsel the prosecutor was unreasonable in entertaining such a belief. This case fully illustrates this, and the conduct and bearing of the defendant, who instigated and managed the attachment suit, shown in his demeanor, on the witness stand as elsewhere, from the beginning of that suit, plainly indicated that it was he who contrived this scheme to circumvent Brewer and force him to accept his own terms, and that he pursued it with a most reckless energy that needed no advice of counsel to support or stimulate it; and it may well be doubted if it could have tolerated any advice of counsel which would have checked it.

There was no dispute whatever about the facts bearing on the grounds of the attachment. The question of reasonable belief depended wholly on undisputed facts, and was properly determined as a question of law. There was nothing the matter with or suspicious about the Richardson & May mortgage. It was the same as that of the year before. Defendants knew it had been given, and both sides believed it had been properly executed and registered when the agreement about which the controversy arose was made. The accidental circumstance that it had not been properly executed did not invalidate it, nor make its proposed completion a ground to excite reasonable belief that it was fraudulent, or, in the language of the attachment affidavit, that Brewer "was about to fraudulently convey his property." The defendants knew as well as anybody that this mortgage was not fraudulent. They take such mortgages in their own business, and wanted one just like it from Brewer on a part of the same place, and his refusal to give it was their chief cause of complaint. It was unreasonable, then, to believe it a good ground of attachment that Brewer was about to complete the Richardson & May mortgage, and no advice of counsel on the facts of this case could make it more reasonable to entertain such a belief. The alleged misrepresentations, deceit, and bad faith in refusing to carry out his agreement with defendants, did not subject Brewer to attachment, and no reasonable man, with or without the advice of counsel, could say that the alleged deceit furnished any support for the affidavit that Brewer was "about to fraudulently convey his property," which was an entirely different thing, and had no connection with the deceit. The court having determined that this was unreasonable belief, as a matter of law, it had no occasion to submit the question of probable cause to the jury, there being no disputed fact bearing on that question.