WILLIAM N. ROSS, Appellant, *v.* H. ARRIVETS, Agent for C.F.A.O., a French Firm doing mercantile business in Monrovia and elsewhere in Liberia, Appellee.

APPEAL FROM JUDGMENT IN ACTION FOR MALICIOUS PROSECUTION.

Argued January 23–25, 1940. Decided February 9, 1940.

1. In an action for malicious prosecution, advice of counsel is a good defense if it is shown that there was lack of malice, i.e., that the private prosecutor acted in good faith on the advice of counsel given after a full and fair statement of the facts of the case was made to the attorney.
2. In order to sustain an action for malicious prosecution, it must be shown not only that there was a lack of probable cause for the prosecution, but also that it was instigated maliciously.

Appellant brought an action for damages for malicious prosecution and recovered a verdict in his favor. On motion in arrest of judgment filed in the court below, the trial judge set aside the verdict and dismissed the case for want of a cause of action. On appeal to the Supreme Court, *judgment affirmed.*

C. Abayomi Cassell for appellant. *H. Lafayette Harmon* for appellee.

MR. JUSTICE TUBMAN delivered the opinion of the Court.

This action grew out of a writ of arrest that was issued against W. N. Ross, appellant, in connection with a theft of seven hundred and fifty pounds stolen from C.F.A.O. by one Aku who was cashier for said firm and another man named Jeffery L. Orimoloye, alias Jefferys, who represented himself as a magician and a "money doubler."

A search warrant was issued against the two persons named and their premises, which search resulted in the finding of two hundred pounds of said amount, together with several promissory notes given by sundry persons for large sums of money, amongst which was a promissory note given by said appellant to the said Jefferys for one hundred pounds sterling.

Upon the discovery of this amount in cash and the notes aforesaid, a warrant of arrest was issued against all makers of said notes, including the appellant, and they were apprehended and held to answer as accessories after the fact upon the presumption, it would appear, that, as the amount stolen was seven hundred and fifty pounds and the amount found was only two hundred pounds, the said notes were given in lieu of some of the stolen money. W. N. Ross, the appellant, alleged and apparently succeeded in convincing the police that he had not given the promissory note of one hundred pounds for any amount loaned him, but rather as a security to the said Jeffery L. Orimoloye, a black magician, in order that he might invoke his genii and have them expand the one hundred pounds to one thousand pounds by some species of black magic, a sort of art Orimoloye was wont to practice until convicted of fraud and sentenced to imprisonment where he is now serving said sentence. But, at all events, the police appear to have given Ross the benefit of the doubt and the prosecuting officer was induced thereby to enter a *nolle prosequi* in favor of Ross whereupon he was discharged. Almost immediately after said *nolle prosequi* had been entered, Ross filed this action for damages for malicious prosecution against the agent of the appellee company who had sworn out the warrant upon which appellant had been arrested and held to bail.

The action for damages for malicious prosecution was originally dismissed upon some of the demurrers filed. Upon appeal to this Court, that judgment was reversed

at our November term, 1938, and the cause was remanded for trial upon the mixed issues of law and fact involved. 6 L.L.R. 364 (1939). Said second trial resulted in a verdict in favor of appellant. But, upon motion in arrest of judgment, the verdict was set aside. The case is now a second time before us for review, principally upon the issue contained in the bill of exceptions, the relevant portion of which reads as follows:

> "Because the trial Jury returned a verdict in open court in favour of appellant awarding him Damages in the sum of Three thousand one hundred and twenty and no/100 ($3,120.00) dollars found upon the issue joined as above indicated, whereupon appellee filed a Motion in arrest of Judgment, and the trial Judge entertained, and sustained said Motion dismissing appellant's case after setting aside the verdict, and ruling him to pay all costs of court, to which the appellant excepted as appears from the records in this case."

The motion in arrest of judgment alleges substantially that the appellant, who was plaintiff in the trial court, had no cause of action against appellee, who was defendant in the said trial, because there was want of malice in that the appellee, in suing out said writ, acted in good faith upon the advice of his counsel, Counsellor T. Gibli Collins of the law firm Barclay & Barclay, which law firm is a reputable one and Counsellor Collins a practicing lawyer of twenty years standing.

Appellant's counsel, resisting the motion, contended that this issue was not raised by appellee in his answer in this case and that therefore he is legally barred from raising same in a motion in arrest of judgment.

After very exhaustive arguments on both sides, the question has come to the point where we are to express our opinions thereon and thereby dispose of the same.

We find from the pleadings that appellee did plead the absence of malice in count five of his answer, which is as follows:

"And also because plaintiff is without cause of action in support of the action brought, in that the ARREST complained of has not been shown by the complaint to be wanton or malicious, but, on the other hand defendant avers that said arrest was made on reasonable and probable cause growing out of the plaintiff's suspected illicit contact with one Jeffery L. Orimoloye who is now before the courts on a charge of commission of a heinous crime, the fact of plaintiff's being discharged from the arrest a few days after without going into trial as admitted in count two of his complaint evidently breaks down the allegation and the gist of his action that he was maliciously prosecuted. Defendant now prays the dismissal of this false and pretended suit for the sole purpose of obtaining money by improper means, with costs against the plaintiff. And this the defendant is ready to prove."

Under the allegation in the answer of absence of malice, although the advice of counsel was not specifically mentioned, proof was admitted in evidence, without objection of appellant, to show that the defendant acted upon the advice of counsel and that he had no malicious intent.

The correctness of our position is borne out by the fact that to establish the question of advice of counsel as a defense, evidence would be necessary to enable the court and jury to pronounce with certainty whether the defendant acted upon the advice of counsel and whether or not the particular circumstances furnish a sufficient and complete defense to relieve him from responsibility. It is therefore a mixed question of law and fact.

In this case from beginning to end the evidence of appellant and appellee conclusively shows that the appellant acted upon the advice of his counsel; and the appellant when in the witness box for himself so testified. Here is what he said insofar as is relevant:

"I proceeded to Mr. Faulkner and asked him to take a

bail; he consented and then to Mr. Tetteh who also consented. I said, 'Well, I don't want to be hauled over the streets by the police.' In the meantime I met Mr. Alford C. Russ who told me that he had heard about the writ that was being prepared for me and that he was going to tell the French agent not to swear to that writ because they had no action against me. He went over to the French agent as a friend and advised him so. So intense was the agent with his malicious desires against me, he did not follow the advice of Mr. Russ but he told me afterward that he was acting upon the advice of his counsel because his counsel told him that he was sure to incriminate me."

The appellant himself testified to the fact that appellee acted on advice of his counsel, as shown from the excerpt of his testimony quoted above, but nevertheless appellant went on and endeavored to show that the appellee's not adhering to the advice of Mr. Alford C. Russ, who was not shown to have been a lawyer and not shown to have had any professional relationship with said appellee, but adhering instead to the advice of his legal counsel, was evidence that appellee was intent on a malicious design against the appellant.

These deductions made by appellant seem absurd to us and contrary to the universal principles of law and reason, for it is expected and generally required that a client should respond to the advice of his counsel in matters of a legal character and not to the advice of laymen, and so the law of malicious prosecution protects clients who act upon the advice of reputable counsel, for in such case the law considers the act of the client as not being malicious.

Equally ridiculous in our opinion is the argument advanced by counsel for appellant that appellee did not submit all the facts to his counsel when obtaining advice, but rather acted upon instructions of appellee's solicitor voluntarily given without any request. In spite of ap-

pellant's argument, the record shows that the facts found against Ross, who had given the promissory note to Orimoloye, the black magician, were discovered by Mr. Collins, appellee's solicitor, in the line of his duty while endeavoring to discover who were *particeps crimines* in the theft of his client's money; and hence, for a stronger reason, the advice so given by appellee's counsel and upon which Arrivets acted was ample protection to Arrivets against any suit for malicious prosecution. We hereby endorse the reasoning which obviously impressed the trial judge who decided, in ruling on the motion in arrest of judgment, "that the entire evidence points at Counsellor T. G. Collins, one of the legal representatives of defendant, who, according to the records in this case, advised defendant in the original action, Counsellor Collins not being a party to this case, a verdict and judgment against him would not lie."

We write in this opinion the law thereon from *Ruling Case Law:*

> "It is the general rule that advice of counsel is a complete defense to an action for malicious prosecution either of civil or criminal actions where it appears that the prosecution was instituted in reliance in good faith on such advice, given after a full and fair statement to the attorney of all the facts, and the fact that the attorney's advice was unsound or erroneous will not affect the result. If the defense is worth anything to a party it must be available when through error of law, as well as of fact, his action has failed. The lawyer's error will not deprive his client of the defense. . . ." 18 R.C.L. *Malicious Prosecution* § 27, at 45 (1917).

Again, when in the witness box, Mr. Ross, the appellant, as witness for himself on the cross-examination was asked the following question:

> "Q. So that Mr. Arrivets, swearing to the writ for the arrest of these parties was upon the advice of

the Counsel or some of them handling the prosecution, is it not so?

"A. As far as I observed, it is my candid belief and opinion that it was upon the permission and advice of T. G. Collins."

Here Mr. Ross gave emphasis to his previous statement with reference to the appellee having acted upon the advice of his counsel.

> "It is the general rule that in an action for malicious prosecution defendant may make out the complete defense of probable cause by showing that he submitted to proper counsel a statement conforming to legal requirements concerning the guilt of the accused; that in good faith he received advice justifying the prosecution and acted on that advice in instituting the proceedings complained of; and that if he showed these things he is entitled to immunity from damages, although it may appear that the facts did not warrant the advice nor the prosecution, or that the accused was innocent." 26 Cyc. of Law & Proc. *Malicious Prosecution* 31–32 (1907).

From this last citation it may be concluded that advice of counsel may support the existence of probable cause; and where there is want of probable cause, which appellee pleads in the fourth count of its answer and which is a demurrable defect and as such is a proper ground for arrest of judgment, such want cannot be cured by a verdict.

But let us go further in our investigation of the question raised in the motion in arrest of judgment, and we find that Counsellor T. G. Collins, a partner in the law firm of Barclay & Barclay, who advised his client to sue out the writ, took the witness stand and in answer to a question respecting his advice to his client confirmed the statement of Mr. Ross that it was upon his advice that his client acted. We quote the question and answer hereunder:

"Q. It has been put in evidence here during the trial

of this case that H. Arrivets, agent for the French Company, swore to the writ upon your advice as one of his legal representatives. Please say whether this is correct.

"A. Yes, it is practically correct."

The law firm of Barclay & Barclay, of which Mr. Collins was a partner at the time of the issuance of the writ of arrest against the appellant, was the regular retained legal adviser of appellee, is still, and had been such, as was brought out in the records, for many years previous to the said incident. It was not specially selected or retained to advise appellee in the particular matter, but was acting within the scope of its authority and duty when called upon by its client to give him advice, and, upon such advice given, the agent swore to the writ.

> "The rules as to who are proper counsel to give advice, what statement of facts must be made to such counsel, in what spirit the advice must be asked and given and acted upon are substantially identical in civil cases with those which are applicable in criminal cases. If the testimony shows conformity with them, probable cause is made out and defendant is relieved from responsibility for the prosecution instituted by him, and this, it has been held, is the case no matter how erroneous or mistaken the advice may be." 26 Cyc. of Law & Proc. *Malicious Prosecution* 44–45 (1907).

Appellant's counsel argued strenuously and persistently that the evidence did not show that appellee gave his counsel a fair and full statement of the facts in the case, but that the counsel, without any facts being stated to him, proceeded to advise the arrest of appellant.

In the first instance it appears to us that if what appellant's counsel argued in this respect were true, appellant would not be relieved of liability, as the law requiring a client to make a fair statement of the facts in the case to his counsel is intended to serve as a guide to the counsel

as to what legal advice to give, and if it is found that the client gave an unfair or an incorrect statement of the facts to his counsel and, upon such unfair or incorrect statement of facts, the counsel gave advice which resulted in injury to another, the client would not be relieved of liability. But this is not the case in this cause, for the record shows that Mr. Arrivets made a statement to his counsel of his firm having been robbed of seven hundred and fifty pounds by his cashier who had admitted the robbery but had stated that he had given the money to the Jefferys above referred to who represented himself as being able to double the money but had failed either to double the money or to give the cashier back the amount he had handed Jefferys.

It was upon this statement of facts that the counsel advised the issuance of a search warrant for the premises of the said cashier and of Jefferys, and as a result of said search two hundred pounds of the money and several promissory notes, amongst which was a note from Mr. Ross, were discovered with the said Jefferys. It was upon this discovery that Mr. Collins advised his client to swear out a writ of arrest against all of those whose notes were found with Jefferys and also against the cashier.

Mr. Arrivets, the agent of appellee, stated that he objected to swearing out these writs as he felt that, he having complained to the police of the loss his company had sustained, the police should proceed to do whatever else was necessary to apprehend any other offenders; but his counsel pointed out that under the laws of Liberia he was required to swear out the writs, and upon this he did so, with no malice against Mr. Ross or any of the rest of the persons arrested. We quote that part of his statement:

> "In September, 1937, I reported to the police that a sum of money was stolen from the safe of the French Company. Our cashier Aku was arrested and brought to court. After investigation a search warrant was issued and the result of it was to bring to light several

notes of hand for moneys received by Jefferys. At the request of our counsel Barclay & Barclay, represented by Mr. Collins, I was requested to go to court to swear on the writs against the persons who had signed the note of hand for money received found by the police. At the time I objected to Mr. Collins that it seems to me that it was the duty of a police officer or the county attorney to do the necessary to have the investigations to go forward. I was answered by Mr. Collins that it was a rule and I had to swear to the writ against the persons. I went to court. All the writs were already prepared and I swore one time on a bunch of documents against all the persons which were reported by the chief of police to the police magistrate. And I went. Those are the facts."

We also quote another question to Mr. Arrivets on this point:

"Q. Please say whether or not, for the benefit of the court and jury, you acted in good faith upon the advice of your counsel, predicated on the evidence, when you swore to the writ against the plaintiff without any malice.

"A. Yes I did it in good faith. I had only Counsellor Collins to advise me.

"Q. Did you have any ill-will against Mr. Ross that gave rise to his arrest, or was it only and solely upon the advice of your counsel upon the facts presented to you?

"A. Without the slightest ill-will. We are in commercial relations with Mr. Ross since 1918 or 1920 and it was only upon the advice of my counsel that I swore to the writ."

The law bearing on this point enunciates the following principle:

"Another general requirement is that the advice of the attorney, to be available to establish probable cause for his client, must be acted on in good faith.

> Such good faith not only requires the honest selection of counsel and a fair statement of the facts to him, but also includes a belief by the prosecutor in his cause and a belief in the soundness of the advice given him by counsel. It has been urged, as against this proposition, that when a client fully and fairly states the case to his attorney for the purpose of receiving his advice and acting upon it, he should be protected by the opinion given him, though it does not meet his concurrence. He consults the attorney because he supposes him to be learned in the law, and capable of forming a more correct opinion than himself, and therefore he ought to be protected while acting upon that opinion, though he does not comprehend it, and is still unable to surrender his own previously formed conclusion upon the same subject. . . ." 18 R.C.L. *Malicious Prosecution* § 30, at 48–49 (1917).

In this case it has been conclusively established by the evidence that the plea raised in count five of the defendant's answer is correct and true in point of fact and of law.

The facts and law brought out seem to correspond exactly to those in the case of *Van Meter* v. *Bass,* 40 Colo. 78, 90 Pac. 637, 18 L.R.A. (n.s.) 49 (1907), the relevant portion of which reads as follows:

> "In order to justify an action for malicious prosecution, it must be shown, not only that there was a lack of probable cause for the prosecution, but that it was instigated maliciously. . . .
>
> "In *Whitehead v. Jessup,* 2 Colo. App. 76, it was held that wherever in criminal prosecutions the plaintiff acts under the advice of counsel, used in good faith and obtained after a full and fair statement of all the facts bearing on the guilt or innocence of the defendant which he knew or by reasonable diligence might have obtained, he has a good defense to an action for malicious prosecution.

"In *Florence Oil & Ref. Co. v. Huff,* 14 Colo. App. 287, it was said:

" 'The cases where the opinion of counsel, given upon a full and candid statement of the facts, may be shown as a defense to an action for malicious prosecution, are those in which the facts disclosed did not constitute probable cause for the prosecution, and the advice that they did, was erroneous. Acting in good faith upon the mistaken opinion of counsel will not subject the prosecutor to liability to the person prosecuted. The advice will shield him from judgment in a suit for malicious prosecution, but we must prove at the trial, that his statements to the attorney embraced all that he knew upon the subject, and that they were true.'

"This seems to be the well-settled rule and as was stated in *Sebastian v. Cheney,* 86 Tex. 502:

" 'We have found no case where it is held that a citizen, who, in good faith, makes a fair statement of the facts as known to him to the prosecuting officer, will be held responsible in damages for the prosecution inaugurated by such officer.'

"In *Laughlin v. Clawson,* 27 Pa. 330, it was said:

" 'If the officers of the state, who are appointed on account of their legal learning, consider that a given state of facts is sufficient evidence of probable cause, how can the private citizen be said to be in fault in acting upon such facts, and how can the state condemn him to damages for so doing? To decide so is to use the machinery of government as a trap to ensnare those who trust in government for such matters, and who ought to trust in it. If such officers make a mistake, it is an error of government itself, and government cannot allow the citizen to suffer for his trust in its proper functionaries.' " *Id.* at 81–82. See also annot., 12 L.R.A. (n.s.) 718 (1908).

In view of the foresaid reasoning and the principles of law in support thereof, we are of the opinion that His Honor Judge Smallwood correctly sustained the motion in arrest of judgment and that said ruling should be affirmed, with costs ordered against appellant; and it is hereby so ordered.

Judgment affirmed.