I find any "regret" of the nature that a court should take cognisance of in the conduct of the respondent.

I have already indicated that I do not think the complaint that the learned trial judge wrongly exercised his discretion in connection with the breach of covenant regarding the rates is well founded, but, in my view, in the circumstances of this case, the trial judge was clearly wrong in exercising his discretion in favour of the respondent on the breach of the covenant to repair.

I would, therefore, allow this appeal with costs to be taxed, and set aside that portion of the judgment of the court below which grants relief from forfeiture and direct that the respondent deliver up to the appellant the premises at Nos. 3 and 3A Kissy Street, Freetown, within three calendar months from December 31st, 1952.

SMITH, C.J. (Sierra Leone) and COUSSEY, J.A. concurred.

Appeal allowed.

KHOURY *v.* TABBARA

WEST AFRICAN COURT OF APPEAL (Foster-Sutton, P., Coussey, J.A. and Kingsley, J. (Sierra Leone)): January 12th, 1953
(W.A.C.A. Civ. App. No. 16/52)

[1] **Criminal Procedure—withdrawal of prosecution—nolle prosequi—entry of nolle prosequi sufficient termination of proceedings in plaintiff's favour to support action for malicious prosecution:** Proof of the entry of a *nolle prosequi* is sufficient evidence of the termination of proceedings in the plaintiff's favour to support an action for malicious prosecution (page 283, lines 5–22).

[2] **Tort—malicious prosecution—essentials of action:** In an action for malicious prosecution it is necessary for the plaintiff to prove that the proceedings were brought against him by the defendant maliciously and without reasonable or probable cause, and that the proceedings terminated in his favour (page 280, lines 36–40).

[3] **Tort—malicious prosecution—essentials of action—termination of proceedings in plaintiff's favour—entry of nolle prosequi regarded as termination in plaintiff's favour:** See [1] above.

[4] **Tort—malicious prosecution—essentials of action—termination of proceedings in plaintiff's favour—proceedings need not be prosecution if plaintiff given opportunity to appear and dispute complaint:** Proceedings of a criminal nature which do not amount to a prosecution

can nevertheless support an action for malicious prosecution if they are capable of being terminated in the plaintiff's favour; and they are so capable if the plaintiff can appear and give evidence and dispute what is said by the complainant (page 280, line 40—page 282, line 18).

The appellant brought an action against the respondent in the Supreme Court to recover general and special damages for malicious prosecution.

The respondent preferred a charge of obtaining money by false pretences against the appellant in a magistrate's court. The appellant was committed to the Supreme Court for trial, but the proceedings against him were terminated by a *nolle prosequi* entered by the Solicitor-General. The appellant instituted the present proceedings against the respondent to recover damages for malicious prosecution.

The Supreme Court held that the entering of a *nolle prosequi* was not termination of the proceedings in the appellant's favour so as to support an action for malicious prosecution, and therefore dismissed the appellant's claim. On appeal, the West African Court of Appeal considered the effect of the *nolle prosequi.*

Cases referred to:

(1) *Basébé* v. *Matthews* (1867), L.R. 2 C.P. 684; 16 L.T. 417.

(2) *Bynoe* v. *Bank of England,* [1902] 1 K.B. 467; (1902), 86 L.T. 140.

(3) *Castrique* v. *Behrens* (1861), 3 E. & E. 709; 4 L.T. 52, *dicta* of Crompton, J. applied.

(4) *Everett* v. *Ribbands*, [1952] 1 Q.B. 112; [1951] 2 All E.R. 818; on appeal, [1952] 2 Q.B. 198; [1952] 1 All E.R. 823, considered.

(5) *Gilchrist* v. *Gardner* (1891), 12 N.S.W.L.R. 184; 8 N.S.W.W.N. 21, followed.

(6) *Goddard* v. *Smith* (1704), 6 Mod. Rep. 261; 87 E.R. 1007, not followed.

(7) *Steward* v. *Gromett* (1859), 7 C.B.N.S. 191; 141 E.R. 788, distinguished.

Edmondson for the appellant;
R.W. Beoku-Betts for the respondent.

FOSTER-SUTTON, P.:

In this case the appellant claimed general and special damages against the respondent for malicious prosecution and averred in his statement of claim, firstly, that the respondent falsely and maliciously

and without reasonable and probable cause preferred a charge before a magistrate against the appellant of having obtained the sum of £3,500 by false pretences; secondly, that the appellant was arrested on August 4th, 1951, and duly appeared before the magistrate's court on August 6th, 1951 and on several other days, and that after the respondent and his witnesses had given evidence the appellant was on September 27th, 1951 committed for trial before the Supreme Court; and, thirdly, that on October 19th, 1951 the Solicitor-General entered a *nolle prosequi* whereby the criminal proceedings against the appellant were brought to a close.

The respondent, relying on the decision in the case of *Goddard* v. *Smith* (6), maintained that the entering of a *nolle prosequi* was not a termination of the criminal proceedings in favour of the appellant, and that there was, therefore, no cause of action.

In *Goddard* v. *Smith* (6), it was held (6 Mod. Rep. at 261; 87 E.R. at 1008–1009) that a declaration for maliciously indicting the plaintiff for barratry without probable cause, which stated that he was in due manner thereupon discharged, was not maintained by evidence that he was discharged by means of a *nolle prosequi* entered by the Attorney-General. The question was reserved for the opinion of the court by Holt, C.J., who doubted whether the evidence maintained the declaration and strongly inclined to the view that it did not. He went on to say (*ibid.*, at 261–262; 1009) that it was hard to allow a man who gets off by a *nolle prosequi* to maintain an action for malicious prosecution; that he who gets off on a *nolle prosequi* does not at all get off on the merits of the case; and that, to maintain a conspiracy, it was necessary to lay and prove an acquittal. After discussion as to the effect of a *nolle prosequi* the report goes on to state (*ibid.*, at 263; 1009) that the court seemed clear that the action did not lie, but gave no rule. That case arose in the year 1704 and would appear to be the only reported English case on the point.

The learned Chief Justice who tried this action felt himself bound by the decision in *Goddard* v. *Smith* (6), and he dismissed the appellant's claim with costs.

It is a recognised rule of law that in an action for malicious prosecution it is necessary for the plaintiff to prove that the proceedings, which he complains were brought against him by the defendant maliciously and without reasonable and probable cause, terminated in his favour. This rule is, however, not without exception, and this was recognised by Crompton, J. in his judgment in the

case of *Castrique* v. *Behrens* (3), an action for conspiring with certain persons fraudulently and unlawfully to procure an attachment and condemnation of a ship by a proceeding *in rem* in a foreign court, where he said (3 E. & E. at 721; 4 L.T. at 53):

> "But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if, from its nature, it be capable of such termination. The reason seems to be that if, in the proceeding complained of, the decision was against the plaintiff and was still unreversed, it would not be consistent with the principle on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause."

The exception is to be found in the words "if from its nature, it be capable of such termination." That case was followed in *Basébé* v. *Matthews* (1) and it is referred to with approval by Collins, M.R., who delivered the judgment of the Court of Appeal in the case of *Bynoe* v. *Bank of England* (2).

An example of an exception to the general rule occurs in the case of *Steward* v. *Gromett* (7), which was an action for maliciously and without reasonable and probable cause going before a magistrate and procuring the plaintiff to be held to bail to keep the peace, and it was held that it was not necessary, as in the ordinary case of an action for malicious prosecution, to aver that the proceeding before the magistrate was determined in favour of the plaintiff, such a proceeding being *ex parte* and the truth of the statement made by the application to the magistrate not being controvertible.

This case, however, was decided before the Summary Jurisdiction Act, 1879, s.25 of which altered the law as regards the procedure before justices for sureties of the peace and for good behaviour. The Summary Jurisdiction Acts now apply to such proceedings and the complainant and defendant and witnesses may be called and examined and cross-examined.

It was this alteration in the law which led Devlin, J., and subsequently the Court of Appeal, in the case of *Everett* v. *Ribbands* (4), to distinguish the decision in *Steward* v. *Gromett* (7) and to hold that the prosecution against the plaintiff having been successful, he having been ordered to enter into a recognisance and to find two sureties to keep the peace and to be of good behaviour for 12 months, or in default to serve a month's imprisonment, after he had had an opportunity of being heard, no action for malicious prosecution

lay. During the course of his judgment Devlin, J. said ([1952] 1 K.B. at 116–117; [1951] 2 All E.R. at 820) that if the procedure in courts of summary jurisdiction was still the same as it was at the date of the decision in *Steward* v. *Gromett* (7), that decision and the reasoning behind it would be binding upon him, but that the change meant that the proceedings before justices are no longer *ex parte*, though before any order is made both sides are to be heard or to have an opportunity of being heard.

In upholding the judgment of Devlin, J., Somervell, L.J. said ([1952] 2 Q.B. at 202–203; [1952] 1 All E.R. at 825):

> "[I]t seems to me clear, having regard to the change made by section 25 of the Act of 1879, that proceedings of this kind before justices are capable of being terminated in favour of the plaintiff. He can appear and give evidence and dispute what is said by the complainant, and he may be believed and, if so, no order will be made. The question is not, is it a prosecution? but, were the proceedings capable of being terminated in the plaintiff's favour?"

The appellant's counsel relied on an Australian case, *Gilchrist* v. *Gardner* (5), where a contrary view to that taken in *Goddard* v. *Smith* (6) was arrived at. *Gilchrist* v. *Gardner* (5) was an action for malicious prosecution in which the declaration alleged that the plaintiff appeared and was tried upon a charge of uttering a forged receipt, upon which the jury failed to agree, whereupon the Attorney-General declined to proceed further against the plaintiff and he was discharged. It was held upon a demurrer to the declaration, firstly, that this amounts to a statement that a *nolle prosequi* had been entered, and, secondly, that the entry of the *nolle prosequi* was such a termination of the proceedings in the plaintiff's favour as to entitle him to bring the action. In that case Innes, J. said in his judgment (12 N.S.W.L.R. at 188):

> "I have from the commencement of the case been of opinion that the plaintiff is entitled to our judgment, and I may go so far as to say that to hold otherwise would be a scandal upon the administration of justice. Were the entry of a *nolle prosequi* to debar the person charged from bringing an action for malicious prosecution he would be deprived not only of his opportunity of obtaining redress for his grievances, but of his only chance of clearing his character and establishing his innocence in the eyes of the world. He could not take any steps to get put on his trial again, and unless he is permitted

to bring his action in the civil court he must exist for the rest of his days with the taint of an unrefuted charge attaching to him." [These words do not appear in the report of the case at 8 N.S.W.W.N. 21.]

The entry of a *nolle prosequi* by the Solicitor-General in the criminal proceedings we are concerned with on this appeal, in my view, put an end to that prosecution altogether. If the complainant wished to proceed further with the matter he would have to commence *de novo*.

I prefer the reasoning in *Gilchrist* v. *Gardner* (5) to that in *Goddard* v. *Smith* (6), and I am of the opinion that in a case where criminal proceedings have been terminated by the Attorney-General or other law officer entering a *nolle prosequi* justice requires that it be held to be an exception to the general rule that the plaintiff must prove, in an action for malicious prosecution, that the proceedings terminated in his favour, and that proof of the entry of a *nolle prosequi* in a criminal matter is such a termination of the proceedings in the plaintiff's favour that to hold otherwise would amount to a denial of justice. By so holding no injustice is done to the defendant in such a case because it is always open to him to prove reasonable and probable cause, and if he succeeds in so doing the plaintiff's action will fail.

For the reasons I have given I would allow this appeal with costs to be taxed, set aside the judgment of the court below and remit the action to the learned trial judge for him to determine the other issues raised on the pleadings in conformity with this judgment, the parties being at liberty to call such evidence as they may be advised. The costs of the first trial to abide the result of the further hearing.

COUSSEY, J.A. and KINGSLEY, J. (Sierra Leone) concurred.

Appeal allowed.