

1989 January 27

(MALACHTOS, DEMETRIADES, STYLIANIDES, JJ.)

ALEXANDROS PAIKKOS,

Appellant-Defendant,

v.

ANTONIS KONTEMENIOTIS,

Respondent-Plaintiff.

(Civil Appeal No. 6783).

Words and phrases: «Criminal Proceedings».

Construction of statutes — Expressions used in various statutes in pari materia — Presumption that they bear the same meaning in all of them.

Mental Patients — The Mental Patients Law, Cap. 252 — Proceedings thereunder — Their nature is not criminal, but akin to criminal proceedings — If unsuccessful, an action for malicious prosecution against the instigator may be brought at common law, provided the other elements of the tort are satisfied. 5

Civil Procedure — Setting down for trial a preliminary issue on a point of law — Test applicable — The Civil Procedure Rules, 0.27, rule 1. 10

Malicious prosecution — The Civil Wrongs Law, Cap. 148, section 32 — Whether it excludes the Common Law in respect of instances not expressly mentioned in it (Criminal Proceedings, bankruptcy or winding up proceedings) — Question determined in the negative — The Mental Patients Law, Cap. 252 — Proceedings thereunder are akin to criminal proceedings and may, if the other prerequisites are satisfied, support an action for malicious prosecution under the Common Law. 15

Malicious Prosecution — Common Law — Historical development — Review of authorities — Test applicable. 20

Common Law — The history of its introduction to Cyprus — When applicable — Review of authorities — The Courts of Justice Law, 1960 (Law 14/60) section 29 (1)(c).

5 The defendant, a practicing advocate, on 4th June, 1982, laid information on oath before a Judge of the District Court of Nicosia, that he had good cause to suspect and believe and did suspect and believe the plaintiff to be mentally afflicted and proper suspect of confinement, under section 3 of the Mental Patients Law, Cap. 252.

On 2nd August 1982, the District Judge, after holding the inquiry envisaged by the Law, found that the plaintiff was not a mentally afflicted person: the plaintiff was not adjudged a mental patient and a proper subject of confinement.

10 The plaintiff thereafter instituted this action whereby he claims against the defendant special and general damages for malicious prosecution.

15 This appeal is directed against an interim decision, whereby it was held that section 32 of the Civil Wrongs Law, Cap. 148, is not exhaustive: that the Common Law is applicable; and laying information on oath before a Judge of the District Court, under section 3 of the Mental Patients Law, Cap. 252, whereby an inquiry starts as to the state of mind of a suspected person, being akin to criminal proceedings, creates a cause of action for damages for malicious prosecution.

20 The decision appealed from was issued after a trial of a preliminary issue on a point of law ordered under O.27, rule 1 of the Civil Procedure Rules.

25 It was argued by counsel for the appellant that in case of malicious prosecution, the legislator intended to confine malicious prosecution within the four walls of the definition of section 32 of our Civil Wrongs Law; that section 32 is an exhaustive and all inclusive definition of what malicious proceedings are and that proceedings that could give rise to malicious prosecution must be criminal proceedings *stricto sensu*. He based his such submission on the wording of the section «malicious prosecution consists» and he endeavoured to make a differentiation between this section and the section which came under judicial consideration in the Vouros case (*infra*.)

35 Section 32 of Cap. 148 reads as follows:

«32. Malicious prosecution consists of actually, maliciously and without reasonable and probable cause instituting or carrying on against any person unsuccessful criminal, bankruptcy or winding-up proceedings, where such proceedings -

40 (a) caused scandal to the credit or reputation of, or possible loss of liberty by, such person, and

(b) terminated, if in fact they were capable of so terminating, in favour of such person.

Provided that no action for malicious prosecution shall be brought against any person by reason only that he furnished information to some competent authority by whom any proceedings were instituted.»

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Held, *dismissing the appeal*: (1) The true test whether the trial of a preliminary issue on a point of law should be ordered under 0.27, rule 1 is where the point of law, if decided in one way, should be decisive on the litigation — The trial Court rightly directed the trial of the point raised as a preliminary issue.

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(2) Criminal proceedings have been defined in various statutes in pari materia as any proceeding instituted against any person to obtain punishment of such person for any offence against the law. The definition is declaratory of the Common Law, it has the same meaning as «criminal matter».

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(3) The object of the proceedings under the Mental Patients Law is an inquiry as to the state of mind of the suspected person, if such person is a mental patient and a proper subject of confinement.

(4) Proceedings under the Mental Patients Law lack the main characteristics of criminal proceedings, as herein above explained. They are not taken in respect of a criminal offence and their object is not the punishment of the suspected person.

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In view of the above, the statement of claim does not disclose a cause of action within the ambit of section 32 of the Civil Wrongs Law, Cap. 148.

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(5) However, under Common Law an action for malicious prosecution lies, if the other elements are present, for abuse of legal process and for proceedings analogous or akin to criminal proceedings. The action for malicious prosecution is not confined to criminal proceedings, bankruptcy and winding-up.

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The test of Holt, C.J. in *Savile v. Roberts* [1558-1774] All E.R. Rep. 456 about the three sorts of damage, which may support such an action (damage to a man's fame, danger to life, limb and liberty, and damage to property) is still valid.

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Proceedings instigated under the Mental Patients Law, Cap. 252 endanger the liberty of the suspected person named in the affidavit, cause damage to his fame, i.e. reputation, injury to his feelings for the indignity, humiliation and disgrace, caused to him by the fact of the holding of an inquiry under the Law as to his state of mind. It certainly causes damage to his property as he is forced to expend money to protect his rights (if he does so) before the Court.

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(6) The Common Law is now applicable in Cyprus in virtue of section 29(1)(c)* of the Courts of Justice Law, 1960 (Law No. 14/60).

The Common Law, not as modified by statute, is applicable in this country if the following are satisfied:-

5 No other provision has been made by any law saved under Article 188 of the Constitution, or enacted by the Legislative Authority of the Republic.

«Other provision» is made, if it is very clear from the enactment which is being relied on, that it is the intention of the Legislative Authority to exclude the Common Law.

The Common Law is not inconsistent with, or contrary to our Constitution.

15 And lastly it is suitable for Cyprus, as the Common Law must be planted here as a living growth which can be pruned by judicial decision to suit local conditions. The object and the intention of the country's legislator was the service of the people of this country.

(7) Does section 32 of Cap. 148 exclude the Common Law as far as malicious prosecution is concerned?

20 This Court does not share the view that the legislator by the wording of section 32 intended to exclude the Common Law. Section 32 is not such «other provision» as required by the Courts of Justice Law to exclude from the legal order of this Country the Common Law and the doctrines of Equity.

25 Our Constitution safeguards the right of liberty and the right of reputation. Therefore, as a cause of action, intending to protect these rights from being endangered by malicious prosecution not only is not repugnant or inconsistent, but, on the contrary, it accords to it constitutional provisions and enables the citizen to vindicate such rights.

30 *Appeal dismissed with costs.*

Cases referred to:

Michaelides v. Diakou (1968) 1 C.L.R. 392;

Papamichael v. Chaholiades (1970) 1 C.L.R. 305;

35 *Jupiter Electrical (Overseas) Ltd. and Another v. Christides* (1975) 1 C.L.R. 144;

* Quoted at p. 60 post.

- Malachtou v. Arnefti and Another* (1984) 1 C.L.R. 548;
- Everett v. Ribbands and Another* [1952] 1 All E.R. 823;
- Hasip v. The Police*, 1964 C.L.R. 48;
- In re Zamin* (1983) 2 C.L.R. 188;
- R. v. Loxdale* (1758) 1 Burr. 445; 5
- Clifford and O' Sullival* [1921] 2 A.C. 570;
- Amand v. Secretary of State for Home Affairs and Another* [1942] 2 All E.R. 381;
- R. v. Southampton Justices ex parte Green* [1975] 2 All E.R. 1073;
- R. v. Marlow Justices, ex parte O' Sullivan* [1983] 3 All E.R. 578; 10
- Smalley v. Crown Court at Warwick and Others* [1985] 1 All E.R. 769;
- Glinski v. McIver* [1962] 1 All E.R. 696;
- Savile v. Roberts* [1558-1774] All E.R. Rep. 456;
- The Quartz Hill Consolidated Gold Mining Company v. Eyre*, 15 [1882-83] 11 Q.B.D. 674;
- Berry v. British Transport Commission* [1961] 1 Q.B.D. 149;
- Wiffen v. Bailey & Romford U.D.C.* [1914-1915] All E.R. Rep. 967.
- Castrique v. Behrens*, 121 E.R. 608;
- Bynoe v. Bank of England* [1902] 1 K.B. 467; 20
- Steward v. Gromett*, 141 E.R. 788;
- Amin v. Bannerjee and Others* [1947] A.C. 322 (P.C.);
- Gifford v. Kelson* (1943) 3 D.L.R. 441;
- Vassilliou v. Vassiliou*, XVI C.L.R. 70;
- Schmuel v. The Officer in Command Illegal Jewish Immigrants' Camp Karaolos*, XVIII C.L.R. 158; 25
- Universal Advertising and Publishing Agency v. Vouros*, XIX C.L.R. 87;
- Anastassi & Another v. The Police*, XIX C.L.R. 131;
- Georghiades & Sons v. Kaminaras*, 23 C.L.R. 276; 30

The Electricity Authority of Cyprus v. Kipparis, 24 C.L.R. 121;

Constantinou v. Panayides (1984) 1 C.L.R. 466;

Zivlas v. Municipality of Limassol and Another (1975) J.S.C. 989;

Markou v. Michael, XIX C.L.R. 282;

5 *Myrianthousis v. Petrou*, XXI C.L.R. 32;

Bibee v. Ghose, 19 Times Law Reports 295;

Papadopoulou v. Polycarpou, (1968) 1 C.L.R. 352;

Tseriotis v. Christodoulou and Another, XIX C.L.R. 216;

Iordanou v. Anyftos, 24 C.L.R. 97;

10 *Protopapas v. Gunther & Another* (1974) J.S.C. 981;

Bain v. Fothergill (1874) L.R. 8 (H.L.) 158;

Pissourios v. Dervish (Limassol Action No.916/71 the Full District Court of Limassol).

Appeal.

15 Appeal by defendant against the interim decision of the District Court of Nicosia (Nikitas, P.D.C.) dated the 19th June, 1984 (Action No. 4546/82) whereby it was decided that laying information on oath before a Judge under section 3 of the Mental Patients Law, Cap. 252 whereby an inquiry starts as to the state of mind of a suspected person, being akin to criminal proceedings, creates a cause of action for damages for malicious prosecution.

20 *G. Cacoyannis*, for the appellant.

H. Stavrakis, for the respondent.

Cur. adv. vult.

25 MALACHTOS J.: The Judgment of the Court will be delivered by Mr. Justice Stylianides.

30 STYLIANIDES, J.: This appeal is directed against an Interim Decision, whereby it was held that section 32 of the Civil Wrongs Law, Cap. 148, is not exhaustive; that the Common Law is applicable; and laying information on oath before a Judge of the District Court, under section 3 of the Mental Patients Law, Cap. 252, whereby an inquiry starts as to the state of mind of a suspected person, being akin to criminal proceedings, creates a cause of action for damages for malicious prosecution.

The defendant, a practicing advocate, on 4th June, 1982, laid information on oath before a Judge of the District Court of Nicosia, that he had good cause to suspect and believe and did suspect and believe the plaintiff to be mentally afflicted and proper subject of confinement, under section 3 of the Mental Patients Law, Cap 252. 5

In consequence, thereof, the Judge directed the issue of a summons calling on the plaintiff - the suspected person - to appear before the Court on the 25th June, 1982, for the purpose of an inquiry as to the state of his mind and directed the plaintiff to submit to an examination by government psychiatrist. 10

On 2nd August, 1982, the District Judge, after holding the inquiry envisaged by the Law, found that the plaintiff was not a mentally afflicted person; the plaintiff was not adjudged a mental patient and a proper subject of confinement. 15

The plaintiff thereafter instituted this action, whereby he claims against the defendant special and general damages for malicious prosecution.

The defendant resisted and denied the claim. In his defence he contended that the statement of claim discloses no cause of action, in that the civil wrong of malicious prosecution does not lie in respect of proceedings under the Mental Patients Law, Cap. 252. 20

Counsel for the defendant followed the orthodox procedure directed by this Court in *The Heirs of the Late Theodora Panayi v. The Administrators of the Estate of the Late Stylianos Mandriotis* (1963) 2 C.L.R. 167, at p. 170, that where an objection is taken in the defence, the interested party must apply to the Court to have a particular point of law under Order 27 formulated and set down for hearing before the date of trial. An application under Order 27 should normally be made on the summons for directions. 30

The function of the Court is not to decide abstract questions of law, but to decide questions of law when arising between the parties as a result of a certain state of facts. Only points of law should be dealt with under the provisions of Order 27, rule 1.

Whilst cases of mixed law and fact or fact alone should follow the procedure laid down in Order 33, regarding the hearing of an action. 35

The true test whether the trial of a preliminary issue on a point of law should be ordered is where the point of law, if decided in one

way, should be decisive on the litigation - (*Maroulla Athanassi Michaelides (Wife of Aristotelis Gregoriades) v. Pinelopi Hji Michael Diakou* (1968) 1 C.L.R. 392; *Michael Papamichael v. Klitos Chaholiades* (1970) 1 C.L.R. 305; *Jupiter Electrical (Overseas) Ltd. and Another v. Savvas Costa Christides* (1975) 1 C.L.R. 144; *Malachtou v. Arnefti and Another* (1984) 1 C.L.R. 548 and *Everett v. Ribbands and Another* [1952] 1 All E.R. 823 at p. 827 per Romer, L.J.).

The trial Court rightly directed the trial of the point raised as a preliminary issue.

The Civil Wrongs Law, Cap. 148, which came into operation on 1st January, 1933, provides in section 32 as follows:-

«32. Malicious prosecution consists of actually, maliciously and without reasonable and probable cause instituting or carrying on against any person unsuccessful criminal, bankruptcy or winding-up proceedings, where such proceedings -

(a) caused scandal to the credit or reputation of, or possible loss of liberty by, such person, and

(b) terminated, if in fact they were capable of so terminating, in favour of such person:

Provided that no action for malicious prosecution shall be brought against any person by reason only that he furnished information to some competent authority by whom any proceedings were instituted.»

Proceedings under Cap. 252 are definitely neither bankruptcy nor winding-up proceedings.

The term «criminal proceedings» is a well known expression to our statutory legislation.

In the Cyprus Courts of Justice Order, 1927, a comprehensive statutory enactment, dealing with the Constitution of the Courts, Jurisdiction, Law, etc., «criminal proceedings» is defined:-

«... any proceeding instituted against any person to obtain punishment of such person for any offence against the law.»

Almost identical is the definition of «criminal proceedings» in the Evidence Law, passed in 1946, (Cap. 9), the Criminal Procedure Law, enacted in 1948 (Cap. 155), the Courts of Justice Law, 1953

(No. 40/53), (Cap. 8) and the Courts of Justice Law, 1960 (Law No. 14/60).

In a number of cases the Supreme Court has considered this definition - (see, inter alia, *Vedat Ahmet Hasip v. The Police*, 1964 C.L.R. 48; *In re Zamin* (1983) 2 C.L.R. 188).

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The aforesaid are statutes in pari materia.

It is well settled that in statutes in pari materia similar language is similarly interpreted and retains the same meaning unless the same term is otherwise defined in the statute which the Court seeks to interpret.

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Lord Mansfield in *R. v. Loxdale* (1758) 1 Burr 445 at p. 447 said:-

«Where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other».

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The term «criminal proceedings», as used and defined in our statutory legislation, is declaratory of the Common Law on the subject and has the same meaning as the expression «criminal cause or matter» in England.

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In *Clifford and O'Sullivan* [1921] 2 A.C. 570, Viscount Cave said at p. 580:-

«... but in order that a matter may be a criminal cause or matter it must, I think, fulfil two conditions which are connoted by and implied in the word 'criminal'. It must involve the consideration of some charge of crime, that is to say, of an offence against the public law (Imperial Dictionary, tit. 'Crime' and 'Criminal'); and that charge must have been preferred or be about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed; or that the tribunal has no jurisdiction to deal with it ...»

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In *Amand v. Secretary of State for Home Affairs and Another* [1942] 2 All E.R. 381, at 385 Viscount Simon, L.C., said:-

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'If the matter is one the direct outcome of which may be trial

of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.»

This passage was adopted in *R. v. Southampton Justices, ex parte Green* [1975] 2 All E.R. 1073, where Lord Denning M.R. said at p. 1076:-

«The words 'criminal cause or matter' were considered by the House of Lords in *Amand v. Secretary of State for Home Affairs* [1942] 2 All E.R. 381 at 385. Viscount Simon LC said:

10 'If the matter is one the direct outcome of which may be trial of applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.'

15 Apply that test to an application to estreat a recognisance. The outcome is not a 'trial' of the surety. There is no 'possible punishment' of the surety for an 'offence'. A recognisance is in the nature of a bond. A failure to fulfil it gives rise to a civil debt. It is different from the ordinary kind of civil debt, because the enforcement is different. It is enforceable like a fine. ...But
20 that method of enforcement does not alter the nature of the debt. It is simply a civil debt on a bond and as such it is not a criminal cause or matter».

With that Judgment Browne LJ. and Brightman J. agreed. (See, also, *R. v. Marlow Justices, ex parte O'Sullivan* [1983] 3 All E.R. 578, and *Smalley v. Crown Court at Warwick and others* [1985] 1
25 All E.R. 769.)

Criminal proceedings have two characteristics:-

- (a) Prosecution for an offence under the law, and
- (b) Possible punishment.

30 The object of the proceedings under the Mental Patients Law is an inquiry as to the state of mind of the suspected person, if such person is a mental patient and a proper subject of confinement. If it appears to the Court that any person is a mental patient and a proper subject of confinement, the Court, after adjudication, shall
35 proceed to order such patient to be confined in a mental hospital.

The procedure which regulates the conduct of such inquiry is

governed by the Mental Patients Rules - Subsidiary Legislation of Cyprus, Volume II, p. 430. Rule 7. - (1) reads:-

«7. - (1) The procedure to be followed at the inquiry shall, as nearly as possible, be the same as the procedure followed in criminal proceedings upon summary trial.»

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Rule 20 provides:-

«The law and rules governing criminal proceedings upon summary trial and on appeal shall apply to any matter arising out of proceedings before the Court or on appeal for which provision is not herein made.»

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Proceedings under the Mental Patients Law lack the main characteristics of criminal proceedings, as herein above explained. They are not taken in respect of a criminal offence and their object is not the punishment of the suspected person.

In view of the above, the statement of claim does not disclose a cause of action within the ambit of section 32 of the Civil Wrongs Law, Cap. 148.

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The trial Court proceeded further and decided that there is a Common Law right of action for malicious prosecution in respect of proceedings akin to criminal proceedings, which is available in this country under section 29(1)(c) of the Courts of Justice Law, 1960 (Law No. 14/60), as there is no provision in the Civil Wrongs Law which expressly excludes or is repugnant to this cause of action. It concluded that the statement of claim does, therefore, disclose a cause of action.

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The law applicable in this country according to section 29 of the Courts of Justice Law, 1960 (Law No. 14/60) is:-

«(a)

(b) The Laws saved under Article 188 of the Constitution subject to the conditions provided therein save in so far as other provision has been or shall be made by a law made or becoming applicable under the Constitution.

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(c) The Common Law and the doctrines of equity save in so far as other provision has been or shall be made by any law, made or becoming applicable under the Constitution or any law saved under paragraph (b) of this section in so far as they are not inconsistent with or contrary to the Constitution».

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The Civil Wrongs Law is applicable under paragraph (b).

We have to consider whether the factual situation alleged in the statement of claim founds a cause of action under the Common Law.

- 5 The history of malicious prosecution in England goes back to the old writ of conspiracy, which was in existence as early as Edward I's reign and was probably of statutory origin.

10 The Judges at Westminster were making use of an action upon the case in the nature of conspiracy. It lay against a single person, as well as against those who acted in combination. This gradually became known as the action for malicious prosecution.

As it is written in Winfield and Jolowicz on Tort, 9th Edition at p. 488:-

15 «Its progress was gradual, for it had to make its way between two competing principles - the freedom of action that every man should have in bringing criminals to justice and the necessity for checking lying accusations of innocent people.»

(See *Glinski v. McIver* [1962] 1 All E.R., 696).

20 In *Savile v. Roberts* [1558-1774] All E.R. Rep., 456, Sir John Holt, C.J., put the action on a firm basis. He said at p. 457:-

25 «There are three sorts of damage, any of which would be sufficient ground to support this action. (i) The damage to a man's fame, as if the matter whereof he is accused be scandalous. This was the ground of *Henley v. Burstal* (76 E.R. 899) ... (ii) The second sort of damage which would support such an action is such as is done to the person, as where a man is put in danger to lose his life, or limb, or liberty, which has been always allowed a good foundation of such an action, ... (iii) The third sort of damage which will support such an action is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. ...; and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself. Although this doctrine has been questioned lately, it was always received in ancient times: ...»

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He clarified that no action for malicious prosecution lies where a civil action was sued without cause (p. 458):-

«To that it was answered that there is a great difference between the suing of an action maliciously, and the indicting of a man maliciously. When a man sues an action, he claims a right to himself, or complains of an injury done to himself; and if a man fancies he has a right, he may sue an action.»

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In *The Quartz Hill Consolidated Gold Mining Company v. Eyre*, Q.B.D. 11 [1882-83] p. 674, Bowen, L.J., at p. 688 said that:-

«... the bringing of an action under our present rules of procedure, and with the consequences attaching under our present law, although the action is brought falsely and maliciously and without reasonable or probable cause, and whatever may be the allegations contained in the pleadings, will not furnish a ground for a subsequent complaint by the person who has been sued nor support an action on his part for maliciously bringing the first action.»

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He repeated with approval and appreciation the three categories of damage for the purpose of the tort of malicious prosecution, and referred to the doctrine laid down by Holt, C.J. in *Savile v. Roberts* (supra), and at p. 691 he said:-

«But although an action does not give rise to an action for malicious prosecution, inasmuch as it does not necessarily or naturally involve damage, there are legal proceedings which do necessarily and naturally involve that damage; and when proceedings of that kind have been taken falsely and maliciously, and without reasonable or probable cause, then, inasmuch as an injury has been done, the law gives a remedy.»

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The word «scandalous» in the doctrine of Holt, C.J., was considered later to mean defamatory and damage to the fair fame of a person - (*Berry v. British Transport Commission* [1961] 1 Q.B.D. 149, 166 (Diplock, J. in the first instance); *Wiffen v. Bailey & Romford U.D.C.* [1914-1915] *All E.R. Rep.* 967).

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In *Castrique v. Behrens*, 121 E.R. 608, Crompton, J., in delivering the Judgment of the Court, said at p. 613:-

«There is no doubt, on principle and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage; *Cotterell v. Jones* (11 C.B. 713), *Barber v. Lesiter* (7 C.B.N.S. 175). But in such an action

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it is essential to shew 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 a 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».

10 (See, also, *Bynoe v. Bank of England* [1902] 1 K.B. p. 467, 470).

In *Steward v. Gromett*, 141 E.R. 788, it was held that an ex parte proceeding in the nature of a writ of process maliciously and without reasonable or probable cause sufficiently founds an action for malicious prosecution. This was an action for maliciously and without reasonable or probable cause procuring certain magistrates to commit the plaintiff to gaol until he found sureties of the peace.

Byles, J., said at p. 795:-

20 «The only objection which has been urged against the maintenance of this action is, that the inquiry before the magistrates appears to have terminated unfavourably for the plaintiff. Whether the proceeding was of a judicial nature or not depends upon whether or not the plaintiff had an opportunity of being heard before the magistrates in answer to the charge. No direct authority has been cited to shew that he had; but two faint traces of authority in support of the affirmative have been shewn, - one, the assertion made by Mr. Marryatt in *The King v. Doherty*, 13 East, 171, which does not seem to be warranted by the authorities cited, and the passage in Dalton's Justice, c. 116, to the effect that the magistrate has a discretion in the matter. There certainly seems to be no good reason why the magistrate should not receive information from the defendant as well as from the plaintiff. But the question is whether the plaintiff had a right to be heard to controvert the statement made against him upon oath. Upon the authorities, it seems clear that he had not. It was an ex parte proceeding: but I am not disposed to admit that the action would not have been maintainable even if the plaintiff had an opportunity of defending himself, and of controverting

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that which was alleged against him. Under the statute 1 & 2 Vict. c.110, the judge does not allow a *capias* as a matter of course; and yet it has been held that an action lies against a party for maliciously and without reasonable and probable cause procuring a *capias* to be issued against the plaintiff, although he has a right to come before the judge to shew cause why the writ should not issue» 5

In the Indian case *Mohamed Amin v. Jogendra Kumar Bannerjee and Others* [1947] A.C. (P.C.) 322, Sir John Beaumont, delivering the advice of the Board, said at pp. 330-331, after referring to *Savile v. Roberts*:- 10

«That the word 'prosecution' in the title of the action is not used in the technical sense which it bears in criminal law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings, ...» 15

In *Everett v. Ribbands* (supra) Somervell, L.J., after quoting the passage from *Castrique v. Behrens* above, said at p. 825:-

«The principle is there stated as covering a wider field than prosecutions. Where an action of this kind is brought in respect of civil process the plaintiff has, I think, to show special damage» 20

Lord Denning said at p. 827:-

«It is this conduct which is the subject of the complaint and which must be proved before an order for sureties can be made. In these circumstances it seems to me that the proceedings are analogous to a criminal proceeding and that no action lies for maliciously instituting them unless they have ended favourably for the plaintiff. In the present case they ended unfavourably for the plaintiff. An order was made against him. This action, therefore, does not lie.» 30

We underline the words «are analogous to a criminal proceeding». They were not criminal proceedings, but analogous.

The Canadian case *Gifford v. Kelson* (1943) 3 D.L.R. 441, was an action for malicious prosecution for damages. The plaintiff established that the defendant, with malice and without reasonable and/or probable cause, laid an information, under the Mental Diseases Act, whereunder the plaintiff was arrested and confined in the psychopathic ward of a certain hospital. The plaintiff succeeded and damages were awarded to her. 35

We have made a review of the Common Law on the subject of malicious prosecution.

5 From the Judgments quoted above, we arrive at the safe conclusion that an action for malicious prosecution lies, if the other elements are present, for abuse of legal process and for proceedings analogous or akin to criminal proceedings. The action for malicious prosecution is not confined to criminal proceedings, bankruptcy and winding-up. The doctrine laid down by Holt, C.J., three centuries ago, continues to be valid. In 10 proceedings under the Mental Patients Law, Cap. 252, in this country the Court acts on the instigation of the person laying the information on oath before it. The proceedings instigated thereby endanger the liberty of the suspected person named in the affidavit, cause damage to his fame, i.e. reputation, injury to his 15 feelings for the indignity, humiliation and disgrace, caused to him by the fact of the holding of an inquiry under the Law as to his state of mind. It certainly causes damage to his property, as he is forced to expend money to protect his rights (if he does so) before the Court.

20 In conclusion, we are of the opinion that the factual situation alleged in the statement of claim founds an action for malicious prosecution under the Common Law.

It was, however strongly argued by counsel for the appellant that section 32 is exhaustive, thereby other provision was made by 25 statute and, therefore, the Common Law is not applicable in this country.

Rival arguments were placed before the Court by counsel of the parties.

30 The Island of Cyprus became by conquest part of the Ottoman Empire in the late part of the 17th century. The Ottoman Laws applied.

On 4th June, 1878, by Convention, Great Britain took over the administration of the Island.

35 The Cyprus (Annexation) Order in Council, 1914, dated the Fifth day of November, 1914, provided that from and after that day the Island of Cyprus should be annexed to and form part of the British Dominions and our Island was annexed accordingly.

This Annexation Order was amended by The Cyprus (Annexation) Amendment Order in Council, 1917.

By Article 20 of the Treaty of Peace with Turkey, signed at Lausanne on the twenty-fourth day of July, 1923, Turkey recognised the annexation of Cyprus proclaimed by the British Government on the Fifth November, 1914. 5

The said Treaty of Peace was duly deposited and came into force as between the British Empire and Turkey on the sixth day of August, 1924.

As from 1928, gradually the English Common Law was being introduced in this country by statute. 10

In 1928, with effect from 1st January, 1929, the Criminal Code, that is a codification of the English Criminal Law, was introduced by the Cyprus Criminal Code Order in Council, 1928.

In 1930, with effect 1st January, 1931, a Code of Contract Law, modelled on the Indian Contract Act, came into operation. 15

Two years later the Civil Wrongs Law, 1932, (Law 35/32), another Code, which was in operation in Palestine, introduced the Common Law on Tort in this country.

All these Codes had an almost identical provision, that:- 20

«This Law shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English law and shall be construed in accordance therewith». 25

Ultimately, by section 49(c) of the Courts of Justice Law, 1935 (No. 38/35): «the common law and the rules of equity as in force in England on the 5th day of November, 1914, save in so far as other provision has been or shall be made by any Law of the Colony» was made applicable by every Court in the exercise of its civil or criminal jurisdiction. 30

Section 49 was repealed and substituted by section 4 of Law 19/1940.

The said paragraph (c) was amended by the Courts of Justice (Amendment No. 2) Law, 1952 (Law No. 29/52), so as to read as follows:- 35

«(c) The common law and the doctrines of equity save in so far as other provision has been or shall be made any Law of the Colony».

5 Law 38/35 was repealed and substituted by the Courts of Justice Law, 1953 (Law No. 40/53). Section 33(1)(c) is identical with 49(c) of Law 38/35 as amended by Law 29/52.

Law 40/53, Cap. 8 of the 1959 edition, remained in force until after the establishment of the Republic, when Law 14/60 was enacted.

10 The same provision with some modification is found in section 29 of Law 14/60, which reads as follows:-

«29. - (1) Έκαστον δικαστήριο εν τη ασκήσει της πολιτικής ή ποινικής αυτού δικαιοδοσίας θα εφαρμόζη -

(α)

15 (β)

(γ) το κοινόν δίκαιον (common law) και τας αρχάς της επεικίας (equity) εκτός εάν άλλη πρόβλεψις εγένετο ή θα γίνη υπό οιουδήποτε νόμου εφαρμοστέου ή γενομένου δυνάμει του Συντάγματος ή οιουδηποτε νόμου διατηρηθέντος εν ισχύϊ δυνάμει της παραγράφου (β) του παρόντος εδαφίου, εφόσον δεν αντιβαίνουν ή δεν είναι ασυμβίβαστοι προς το Σύνταγμα. »

20

(«29. - (1) Every Court in the exercise of its civil or criminal jurisdiction shall apply -

25 (a)

(b)

(c) the common law and the doctrines of equity save in so far as other provision has been or shall be made by any law made or becoming applicable under the Constitution or any law saved under paragraph (b) of this section in so far as they are not inconsistent with or contrary to the Constitution;»)

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Section 49(c) of the Courts of Justice Law, 1935, was judicially considered in *Themistocles Vassiliou v. Christos Vassiliou*, XVI C.L.R. 70, in which it was held that power was given thereby to the
35 Courts of the Colony to apply the English Common Law and the Rules of Equity in the absence of any provision in the existing

Laws. Because an action lay for damages for assault under the English Common Law and because there was no provision for it in the Civil Wrongs Law, actions for damages for assault could therefore be brought by virtue of section 49(c) of the Courts of Justice Law, 1935. 5

Crean, C.J., said at pp. 72-73:-

«He also argued that as there was a codified Civil Wrongs Law the English Law of Torts could not apply: torts generally being provided for by the Civil Wrongs Law.

This case raises a matter of great importance to the administration of justice in the Colony, since it seems to be the first time that section 49(c) of the Courts of Justice Law, 1935, and its bearing on the existing Law of Civil Wrongs has come before the Court for consideration. 10

Whatever civil wrongs were recognized by Ottoman Law, and defined in the Mejele, prior to 1932, the Civil Wrongs Law of that year repealed, and enacted that certain acts or omissions set out therein were to be civil wrongs for which action could be brought. After the passing of this law the only part of the Mejele dealing with civil wrongs that had not been totally repealed was the first, namely: Articles 1 to 100 containing legal maxims. These, however, were only operative in so far as they did not conflict with the Civil Wrongs Law, 1932. So it can be stated that the only tortious acts for which actions could be brought after the 1932 Law were those civil wrongs included in the Civil Wrongs Law. At the time it was passed, that act was exhaustive. 15 20 25

.....

Now the section already set out states definitely that the English Common Law and Rules of Equity are only to apply in the absence of any provision in the existing law. It does not exclude expressly or impliedly the whole existing law relating to tortious acts, and so following the above principle can only be held to exclude such tortious acts as are already provided for by the Civil Wrongs Law, 1932. That law nowhere states expressly that it is exhaustive of the civil wrongs in the Colony, as supplying remedies for all injuries caused by tortious acts; it merely codifies the civil wrongs for which action, could, under that law, be brought. 30 35

And at p. 74 he said:-

5 «The effect then of introducing the English common Law and Rules of Equity into the Colony is that civil actions since 1935 can be brought for any torts known to English Law on 5th November, 1914, though not included in the Civil Wrongs Law, 1932, provided no other provision is made in respect of it.»

10 In the case of *Rudolf Schmuel v. The Officer in Command Illegal Jewish Immigrants' Camp, Karaolos*, XVIII C.L.R. 158, sections 49 and 51 were considered in an application for a writ of habeas corpus. The Supreme Court held that, though sections 12 and 13 of Law 38/35 gave no authority for the issue of such a writ, the joint effect of sections 49 and 51 made the writ (admittedly a part of the Common Law of England) issuable in Cyprus.

15 The learned Chief Justice said at p. 161:-

20 «Now, by virtue of sections 49 and 51 of the Law of 1935 we have in operation in Cyprus both the substantive Law from which the writ derives and the procedural Law governing its issue. And there can be no doubt of the existence of the legal right which it is the function of the writ to enforce, for that is the right to personal liberty.»

25 *Universal Advertising and Publishing Agency v. Panayiotis A. Vouros*, XIX C.L.R. 87, is a landmark on the interpretation and application of the provision introducing the Common Law and Equity in this country.

Section 31 of the Civil Wrongs Law was interpreted that it provided only for passing-off of goods and not for passing-off of business.

30 It was argued that other provision already existed in the Law so as to exclude the Common Law right of action for the passing-off of business. First by section 31 of the Civil Wrongs Law which provided a right of action for passing-off of goods, and secondly by sections 14 and 20 of the Courts of Justice Law which provided for the payment of compensation in criminal cases.

35 It was said at p. 92:-

«The argument under section 31 of the Civil Wrongs Law contains two propositions - First, that having dealt with the tort of 'passing-off' in section 31 the legislative authority has made

provision for all species of that tort so as to exclude the Common Law; secondly, that by providing a right of action for the passing-off of goods only, the legislative authority has by necessary implication intimated its intention not to give a right of action for the passing-off of business.»

5

Halliman, C.J., at pp. 94-95 said:-

«For the reasons which I have discussed, I consider that the intention of the legislative authority when introducing the Common Law in 1935, can best be implemented by refusing to allow the saving clause in section 28(1)(c) to exclude a common law right unless the 'other provision' is clear and imperative: a cause of action at Common Law should after 1935 be available, unless this remedy is either expressly taken away by any Law of the Colony or is clearly repugnant to any such Law. Now, if the word 'goods' in section 31 of the Law of 1932 does not (as counsel for the appellants submitted) include 'business' then no cause of action lay up to 1935 for the passing-off of business. On the other hand there is no provision in the law of the Colony which expressly excludes or is repugnant to this cause of action which consequently became justiciable in this Colony under section 28 (1) (c) of the Law of 1935.»

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Before reaching this conclusion he said at p. 94:-

«It is reasonable to suppose that the legislative authority in applying the Common Law to this Colony in 1935 had in mind these considerations which indeed are part of the ideals and beliefs that underlie all British administration. For this reason a Court, called on to interpret a provision such as that contained in section 28(1)(c), should not regard the Civil Wrongs Law as a stockade around the Common Law lest it break out and damage the citizens of Cyprus; in my view the Civil Wrongs Law is nothing more than transitory legislation intended to prepare the soil of Cyprus for the planting of the Common Law. I am not suggesting for a moment that all the provisions of the English Common Law are suitable for Cyprus; what I affirm is that it must be planted here as a living growth which can be pruned by legislation and judicial decision to suit local conditions; but it cannot flourish if it is chopped up into statutory definitions.»

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In *Antonis Anastassi & Another v. The Police*, XIX C.L.R. 131, at p. 132 it was said:-

5 «It has been held recently in this Court that this Court will only hold that other provision has been made if it is very clear from the enactment which is being relied on that it is the intention of the legislative authority to exclude the Common Law.»

In *Loizos D. Georghiades & Son v. Renos Kaminaras*, 23 C.L.R. 276; Zekia, J., said at p. 283:-

10 «*Vassiliou v. Vassiliou*, 16 C.L.R. 69, *The Universal Advertising and Publishing Agency and others v. Panayiotis Vouros*, 19 C.L.R. 87, had enlarged the scope of this section and as a result not only the torts specified in the Civil Wrongs Law but those left out and recognised by Common Law
15 unless clearly excluded by some legislation were actionable in the Courts of the Colony as well.»

(*The Electricity Authority of Cyprus v. Antonis Kipparis*, 24 C.L.R. 121; *Jupiter case* (supra)).

20 In *Creon Constantinou v. Pavlos Panayides* (1984) 1 C.L.R. 466, it was held that section 29(1)(c) of the Courts of Justice Law, 1960 (Law No. 14/60) makes the Common Law applicable in Cyprus; that since enticement is a cause of action recognised by the Common Law, in fact it is a cause that was recognised as
25 actionable many centuries ago, it is part of our law and as such applicable in Cyprus. Though it can be argued that the action of enticement is in some respects outdated, it has not ceased to be part of our Law.

30 In *Zivlas v. Municipality of Limassol and Another* (1975) J.S.C. 989, it was held that section 51(2), which provides that: «A duty not to be negligent shall exist in the following cases, that is to say:-» and then five sub-paragraphs follow, it was not exhaustive.

35 It is well established by the jurisprudence of the Supreme Court of the Country for the last half century that the Civil Wrongs Law is not exhaustive, it does not provide for all actionable tortious acts, it does not supply remedies for all injuries caused thereby, it merely codifies the civil wrongs for which action could, under that Law, be brought.

This principle was extended and applied to the Contract Law, which is again a codification of the English Common Law on the subject. (See *Christos Markou v. Gregoria Michael*, XIX C.L.R. 282).

In *Panayiotis S. Myrianthousis v. Despina Petrou*, XXI C.L.R. 32, it was held that a person who does not come within section 11 (as it was then before its amendment by Law No. 7/1956) is by inference not competent to contract under section 10(1) and therefore such agreement is void. The Common Law of England was not applicable, because of the expressed provision made by section 11 and the interpretation given to similar provision in India in *Mohori Bibee v. Dhurmodas Ghose* (19, Times Law Reports 295). (See in this respect *Anthoulla Papadopoulou v. Xenophon Polykarpou* (1968) 1 C.L.R. 352). 5 10

In *Christodoulos Nicola Tseriotis v. Chryssi Christodoulou and Another*, XIX C.L.R. 216, it was held that under the Contract Law, section 74, a specific amount is to be paid in case of breach, no question arises whether compensation is liquidated damages or penalty. It was said:- 15

«... we have come to the conclusion that before the amendment it was clearly the intention of the legislature to do away with the distinction between penalty and liquidated damages, so that whenever a sum is named in a contract as the amount to be paid in case of a breach, the Court in every such case must award such sum as it considers reasonable compensation not exceeding the amount so named.» 20 25

(See *Eleni Panayiotou Iordanou v. Polycarpus Neophytou Anyftos*, 24 C.L.R. 97).

The Common Law, not as modified by statute, is applicable in this country if the following are satisfied:- 30

No other provision has been made by any law saved under Article 188 of the Constitution, or enacted by the Legislative Authority of the Republic.

«Other provision» is made, if it is very clear from the enactment which is being relied on, that it is the intention of the Legislative Authority to exclude the Common Law. 35

The Common Law is not inconsistent with, or contrary to our Constitution.

And lastly it is suitable for Cyprus, as the Common Law must be planted here as a living growth which can be pruned by judicial decision to suit local conditions. The object and the intention of the country's legislator was the service of the people of this
5 country.

The Full District Court of Kyrenia in *Protopapas v. Gunther & Another* (1974) J.S.C. 981, having regard to the wording of section 29(1)(c) and the judicial pronouncements aforesaid quoted, decided that the rule in *Bain v. Fothergill* (1874) L.R. 7
10 (H.L.) 158, is not applicable. It was said at p. 1006:-

«We have to view this rule of the English Law in the light of the local conditions, and we see no reason why an anomalous situation the existence of which has some justification in another jurisdiction must be introduced in the law of this
15 country.

.....
We consider this rule as bad law for our country where the land tenure and land registration law was modernised and for many years the Department of Lands & Surveys functions satisfactorily and no uncertainties can be entertained by a
20 careful vendor.»

In *Panayiotis Pissourios and Regina Dervish of Limassol* Action No. 916/71, the Full District Court of Limassol, in view of the nature of contractual leases in Cyprus ruled as inapplicable the
25 English principle of the Common Law that forfeiture of the lease for non-payment of rent should be preceded by demand of the exact sum due being made upon the demised premises; it did not apply, also, the doctrine that tenancy automatically comes to an end on the ground that the sub-tenant disclaimed, even in the
30 pleadings, the title of his immediate landlord.

At p. 26 of the Judgment we read:-

«What we have said about the necessity for the demand of rent before the exercise of the right to forfeit the lease applies *per force* for the forfeiture due to disclaimer. This rule is not
35 part of our law. We reject it.

The Common Law is evolutionary. This is one of its merits and main characteristics. This feudal relic is not only unnecessary today but offends commonsense and justice.

Even if we had to apply the English Common Law, we would not apply this rule in our country having regard to the conditions prevailing in our society.»

It was argued by counsel for the appellant that in case of malicious prosecution, the legislator intended to confine malicious prosecution within the four walls of the definition of section 32 of our Civil Wrongs Law; that section 32 is an exhaustive and all inclusive definition of what malicious proceedings are and that proceedings that could give rise to malicious prosecution must be criminal proceedings *stricto sensu*. He based his such submission on the wording of the section «malicious prosecution *consists*» and he endeavoured to make a differentiation between this section and the section which came under judicial consideration in the *Vouros* case (*supra*).

The Civil Wrongs Law is a Code. It is not exhaustive.

We do not share the view that the legislator by the wording of section 32 intended to exclude the Common Law. Section 32 is not such «other provision» as required by the Courts of Justice Law to exclude from the legal order of this country the Common Law and the doctrines of Equity.

The legislator did not intend to modify the English Law, as in the case of the Contract Law, sections 10 and 11, or section 249(3) of the Criminal Code, as decided in *Myrianthousis* and *Anastassi* cases respectively.

Whatever the rights of a person under the Civil Wrongs Law before 1935, they have been extended to all causes of malicious prosecution under the Common Law, provided that they are not contrary to our Constitution and are suitable for Cyprus.

Our Constitution safeguards the right of liberty and the right of reputation. Therefore, a cause of action, intending to protect these rights from being endangered by malicious prosecution, not only is not repugnant or inconsistent, but, on the contrary, it accords to the constitutional provisions and enables the citizen to vindicate such rights.

In view of the foregoing, we are of the opinion that an action for malicious prosecution lies for proceedings analogous to or akin to criminal proceedings, subject to proof of the other elements of the tort, that is «maliciously and without reasonable and probable cause» and ensuing damages; the burden of proof lies squarely on the shoulders of the plaintiff.

The laying, therefore, of information on oath, under section 3 of the Mental Patients Law, and the facts averred in the statement of claim, sufficiently disclose an actionable tort in this country.

In the result, this appeal fails and is hereby dismissed.

- 5 With regard to costs, appellant to pay the costs of the respondent in the appeal, but we leave undisturbed the order of the District Court.

*Appeal dismissed. Order
for costs as above.*