

1957

Leonard M. Olson v. Independent Order of Foresters and Thomas McGahan : Brief of Appellant

Utah Supreme Court

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Case No. 8668

JAN 13 1958

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IN THE SUPREME COURT

of the

STATE OF UTAH FILED

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Clerk, Supreme Court, Utah

LEONARD M. OLSON,
Plaintiff and Appellant,
vs.
INDEPENDENT ORDER OF FORESTERS,
a corporation, and THOMAS McGAHAN,
Defendants and Respondents.

UNIVERSITY UTAH

JAN 10 1958

BRIEF OF APPELLANT

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Defendants and Respondents.

} Case No.
8668

BRIEF OF APPELLANT

STATEMENT OF FACTS

A. PRELIMINARY STATEMENT

The parties will be referred to as in the Court below.
All italics are ours.

B. THE FACTS

The plaintiff was employed by the defendant insurance company (a Canadian Corporation) during the year 1947 (P. 31). That under his contract of employment, he became its manager of the State of Utah, with headquarters at Salt Lake City and Provo (P. 32). That under

his contract of employment, he was empowered to organize the business affairs of the defendant company for the purpose of selling memberships by way of insurance and to employ any and all agents for that purpose in the conduct of defendant's affairs (P. 32). That he continued such employment on, up, and until the 17th day of February, 1954, at which time his employment was terminated pursuant to verbal notice given to him over the telephone in December, 1953, and later confirmed by letter that his services would terminate as of Feb. 17, 1954 (PP. 33, 164). That by virtue of the telephone communication, plaintiff was instructed by the defendant company to turn over all the books and records in plaintiff's office to a new man that was coming in to take plaintiff's place and also he was ordered to turn all monies in his possession without an audit, to ascertain the exact amounts that might be due either party (PP. 33-35, 164). This the plaintiff refused to do stating definitely and emphatically that before turning over any monies, he insisted on an audit being made of the books by the company, which in turn they refused to do (PP. 34-35, 165). That on Feb. 18, 1954, plaintiff caused to be mailed to the defendant company a registered letter wherein he stated that he had the monies that he withheld in his possession and intended to keep the same until a complete audit was had between the parties. (See Exhibit 2, P. 42-43-44-45.) That at no time or at all did the defendant company furnish the plaintiff with an audit showing that what was owing from one party to the other for the purpose of striking a balance due and payable

to one party or the other (P. 45). That the bank records show that on Feb. 18, 1954, the plaintiff transferred the fund in question in the sum of approximately \$5400 from the account of the defendant company by him to his personal account in Utah Savings and Trust Company of Salt Lake City, Utah (P. 49). That thereafter and prior to plaintiff leaving the State of Utah for the State of California to secure other employment, he transferred said sum to his credit with the First Security Bank of Utah, at Salt Lake City, Utah (P. 50). And that thereafter, in the month of November, 1955, he left the State of Utah for the State of California and set up his home at Walnut Creek, California, and had said fund transferred to his credit at his new residence.

*This
had
for P*

From Feb. 17, 1954, up to and including Oct. 27, 1954, numerous conferences were had between the attorneys for the plaintiff and the attorneys for the defendant company, in an attempt to arrive at some reasonable basis to estimate a settlement between the parties (P. 46). When the plaintiff was unable to secure an audit from the defendant company, he instituted suit in the Third Judicial District Court of Salt Lake County, on the 27th day of October, 1955, in which he demanded an audit and an accounting between himself and the defendant company, for the purpose of determining who owned who, so that the differences between the parties could be settled by judicial determination (P. 46). The defendant company filed two counterclaims against the plaintiff in said suit, neither of which contained an accounting or an audit.

In the accounting suit now pending in the District Court, there was a pretrial had thereon on May 6, 1955, before Judge David T. Lewis and the order provided—

“In view of the offer, the Court adjudges that there is no issue in the case, other than to have an accounting between the parties — the parties desire time to make this accounting one to the other, and the matter is continued without date with the limitation placed upon any trial of issue limiting such issues to accounting issues referred to (P. 48).”

On January 20, 1956, the accounting case was set for trial, at which time the matter was continued and among other things, the Court made an order that the plaintiff pay into Court, pending the ultimate outcome of the case, the sum of \$5460.62, on or before March 1, 1956, at which time and place, the plaintiff agreed so to do and, subsequently, did deposit said amount with the Clerk of the District Court, where it still remains (P. 58). The Court also ordered that the plaintiff pay into Court, for the purpose of having an audit made, the sum of \$200.00, which plaintiff did (P. 58).

That immediately at the conclusion of this hearing before Judge Lewis, the plaintiff and his counsel, Mr. Beezley, (now deceased) walked out of Judge Lewis' chambers into the hall of the City and County Bldg., whereupon the plaintiff was immediately placed under arrest by virtue of a warrant based upon a criminal complaint charging him with embezzlement, signed and sworn to by Mr. McGahan, a field auditor for defendant com-

pany the day before. Thereupon the plaintiff was immediately taken before a Committing Magistrate and released without bond and allowed to leave the State of Utah (P. 58 and 59).

Pursuant to the order made in the hearing before Judge Lewis on May 20, 1955, the plaintiff employed the auditing firm of Lincoln G. Kelly & Co. of Salt Lake City to make an audit for which he paid the sum of \$200.00 and which audit has been introduced in evidence in this case, marked Exhibit 9, wherein the audit shows a total potential commission due the plaintiff from the defendant in the sum of \$9,573.62 (P. 58). And this is the only audit that was ever made between the parties and which the defendant now seeks to repudiate, although defendant to this day has not complied with the pre-trial order of the Court, in which each party was ordered to give to the other an accounting. The plaintiff has complied with the order, but the defendant has not and still refuses so to do. Therefore, the only factual proof before the Court as to who owes who in this accounting case is Exhibit 9 which shows the defendant company in debt to the plaintiff in excess of \$9,000.00.

At the trial of the criminal case, on which Mr. Olson was charged with embezzlement, he was acquitted by a jury in the District Court (P. 76).

Mrs. Elaine Olson, the wife of the plaintiff, was employed as the financial secretary of the Salt Lake office of the defendant herein, (P. 163), and she kept all books and records of the company from 1947 until the date of

Mr. Olson's termination of employment. She listened in on a telephone conversation with Mr. Carlisle, the Vice President of the defendant company in December of 1953, in which Mr. Carlisle told Mr. Olson that he would be replaced in January or February, as State Manager (P. 164), and the said Carlisle requested Olson to turn over all money to his successor a Mr. Mason, and Olson replied that he wouldn't turn the money over until he had an audit (P.164-165). Mr. Carlisle then wrote Olson about the 20th of January that they would not bring an auditor to Utah just to accommodate Olson, and that they would make an audit sometime after his termination, but they gave no specific date as to when they would actually make an audit (P. 165). She went down to the company office in Salt Lake City and made a check of Mr. Olson's business for the preceding seven years, and from her check of the records and books, she computed what she had figured the company books showed was owing Mr. Olson, and that was the sum of \$16,000.00 (P. 166-167). At that time, Mr. Olson had \$5,460.62 in the bank. The next day, the plaintiff and his wife went to see Mr. Romney, a Salt Lake attorney, and explained the financial question with him (P.167), and as a result of this conference, Attorney Romney wrote a letter to the defendant company (P. 168-Exhibit 2), advising the defendant that Mr. Olson was holding the \$5,460.62 until an audit could be made determining who was entitled to this money. To this letter no offer of settlement was made by the defendant between Feb. and Oct., 1954. So in order to bring the matter to a head, the plaintiff commenced a civil

action in the District Court for an accounting (P. 169). Plaintiff left Utah on November 4, 1955 and went to Walnut Creek, California, and before moving he left his forwarding address at the Post Office. In December of 1955, the plaintiff received a letter from Mr. J. C. Carlisle, addressed to his former address in Salt Lake, which letter was forwarded immediately to their present address in Walnut Creek, California by the postal authorities (P. 171). On or about the 7th of December, the plaintiff and his wife received a telegram from Mr. Carlisle at Walnut Creek, California asking the plaintiff and his wife to phone him (P. 172). And thereafter, the plaintiff and his wife went to San Francisco where they had dinner with Mr. and Mrs. Carlisle and Mr. and Mrs. Cohn, who was the State Manager of California for the Independent Order of the Foresters (P. 172).

The audit prepared by Lawrence Olson (no relation to the plaintiff, Leonard Olson) who is a partner in the firm of Lincoln G. Kelly & Co., certified public accountants in Salt Lake City, Utah, and marked Exhibit 9, was identified and offered in evidence (P. 174-175) and after considerable voir dire examination, by defendants counsel, the Court admitted Exhibit 9 into evidence (P. 179).

Appellant instituted this action against respondent in the Third Judicial District Court, Salt Lake County, State of Utah, on May 24, 1956. That said action was and is based upon malicious prosecution wherein appellant sought damages, and that the defendant filed Answer to said complaint denying the allegations therein con-

tained. That said cause was tried before Judge Ray Van Cott, Jr. on the 17th day of March, 1957, and that after appellants evidence was adduced and appellant rested, respondent moved for dismissal which motion was granted by order of said court, from which appellant has appealed in this matter (P. 219-220).

STATEMENT OF POINTS

POINT I.

THE EVIDENCE IN THE RECORD WAS SUFFICIENT TO SHOW LACK OF PROBABLE CAUSE.

POINT II.

THE COURT COMMITTED ERROR IN SUSTAINING THE DEFENDANT'S MOTION FOR A NON SUIT AND IN DISMISSING PLAINTIFF'S ACTION, WITHOUT SUBMITTING THE CAUSE TO THE JURY.

ARGUMENT

POINT I.

THE EVIDENCE IN THE RECORD WAS SUFFICIENT TO SHOW LACK OF PROBABLE CAUSE.

In this jurisdiction, in order for the plaintiff to prove a prima facie case for malicious prosecution, he must establish three elements:

1. That the proceeding complained of as grounds for the action was without probable cause.
2. That the proceeding was malicious.
3. That the proceeding was finally terminated in favor of the plaintiff.

We submit that the evidence showing lack of probable cause on the part of the defendant for filing the complaint, was ample and sufficient as to a lack of probable cause as to have required the Court to submit the question to the jury. The fundamental basis of an action for malicious prosecution is that a defendant instituted a criminal prosecution without having such information as would create in the mind of a reasonable person in the defendant's position, an honest and sincere belief that the accused was guilty of the crime charged. Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is untrue. If the defendant himself did not reasonably believe in the guilt of the accused, the defense of probable cause may not be relied on.

Hardraker vs. Moore, 44 C 144;

Carpenter vs. Sibley, 15 CA 589;

Johnson vs. Southern Pacific, 157 C 333;

Center vs. Dollar Markets, 99 CA 2d 534;—222
Pac. 2nd 136.

Franzen v. Skink, 192 C. 572;

Smith v. Heusley, 109 P. 2d 909.

These cases are sound law and have been followed by this Court. In the case of *Straker vs. Voyles*, 252 Pac. 369, the Supreme Court of Utah said:

“The difficulty in this case, however, is that although the defendant produced evidence of his good motives and that he had probable cause, yet his own conduct was such that the jury were justified in believing that he did not, in good faith,

believe that he was not actuated by legal malice*** As before stated, while the question of probable cause is ordinarily one of law, or at least one of mixed law and fact, as it is sometimes said, yet when as in this case, a defendant's motives or belief are in issue, it is the exclusive province of the jury to determine whether or not he was actuated by proper motives and whether or not he had sufficient cause to believe and did believe the plaintiff insane."

In the case of *Sweaton vs. Linton*, 241 Pac. 309, Page 312, this Court said:

"The authorities generally hold that it is a defense to an action for malicious prosecution, for a defendant to show that he had fairly and fully stated all of the facts out of which the prosecution arose to a reputable attorney, and had been advised by such attorney that there was probable cause to initiate the criminal proceedings against the complaining party. It must appear, however, without contradiction, that a full and accurate statement of *all* of the facts was made to the attorney before the advice was given and that the party was advised that he had probable cause to initiate the prosecution and that he, *in good faith*, did believe that there was probable cause. There is some conflict in the authorities upon this particular question. Our Court, however, is committed to the rule that a full and fair statement to a reputable attorney, and acting upon the advice of such attorney, that there was probable cause is a complete and good defense unless there is some particular evidence or circumstances or facts which would tend to show that the defendant disbelieved the fact that he had probable cause—

“From all of the facts appearing in this record, we are of the opinion that the question as to whether Linton, in good faith, believed that there was probable cause for the prosecution of plaintiff, *was for the jury.*”

The court cited the case of *McKenzie vs. Canning*, 42 Utah 529; 131 Pac. 1172, in which this Court said, in the course of its opinion:

“It however in effect is urged that before advice of counsel may be a defense, it must appear not only that the defendant fairly stated all the facts to counsel, and upon them was advised, but also that the defendant, in good faith, believed the plaintiff guilty of the charge *and as to such fact, the plaintiff was entitled to the judgment of the jury.*”

We submit that the facts, as heretofore set forth in the Statement of Facts, all of which are in this record and undisputed, clearly brings this case within the rule established that before the defendant can take advantage of the defense of probable cause, he must himself actually believe that there was probable cause and that whether he did in fact actually believe that there was probable cause, was a question of fact for the jury. The affidavit of Jay Banks, Chief Criminal Deputy County Attorney, on file in this case (P. 10, 11, 12, 13 and 14) recites that at the time Mr. Bowen, attorney for the defendant company and Mr. McGahan, the company's auditor, appeared before him and requested a criminal complaint against Olson, that they represented to Banks that Olson withdrew the funds which were in dispute, and that he moved from Utah without notice or knowledge of the defendant

corporation or its agents, and Banks specifically recites that Bowen and McGahan represented to him, "That efforts had been made to locate Olson without success, that he could not be located in the State of Utah, and that the Independent Order of Foresters *first learned of the withdrawal of said funds from the Utah Savings and Trust Company and of Olson's removal to California about January 6, 1956.*" Whereas, in truth and in fact, the Vice President of the defendant company and the company's resident agent in San Francisco, in December of 1955 had both wired and telephoned Olson at his address in Walnut Creek, California, inviting the Olson's to have a social evening with them, and the Olson's did meet with the Vice President of the company in San Francisco and the company's resident agent there, and spent the evening with them. The statement of the defendant company's agents to the County Attorney were in bad faith because they knew all the time where Olson was, because they had located him without any trouble in Walnut Creek, California in December of 1955.

We particularly call attention of the Court to the affidavit of Wm. L. Beezley (P. 15, 16 and 17) in which Mr. Beezley, on oath, stated that during the hearing of the criminal case, Mr. Banks said to him that if Olson would agree not to sue the defendant company for malicious prosecution, he Banks would dismiss the criminal action, which offer Olson declined. To this affidavit, Mr. Banks has never replied, by counter-affidavit or in any other manner. Banks further stated in his affidavit (P. 13) that McGahan and Bowen also advised him that Olson

had returned to Salt Lake City for said trial and would be in town on that date. Bowen and McGahan requested the criminal complaint on the 19th day of January, 1956 and the civil suit for an accounting between the parties was to be heard the next day, January 20, 1956. So that McGahan, who signed the complaint and Mr. Bowen, his attorney could not have honestly believed, at the time the criminal complaint was filed, that there was probable cause for the issuance of the complaint. And that the only reason that they could have had for filing the criminal complaint, the day before the trial, was to use the County Attorney's office as a collection agency.

Mr. Banks also stated in his affidavit, that McGahan and Bowen had advised him that approximately two years had elapsed between the time of Olson's termination of employment by the defendant corporation and the date on which they appeared before him requesting a criminal complaint, and that during this entire two years, negotiations were had between Mr. Bowen, who represented the defendant and Romney and Boyer and William L. Beezley, who had represented the plaintiff, trying to work out a compromise settlement of the financial difficulties between them. And Bowen had also advised him that Olson had filed a civil suit in the District Court demanding an accounting, which was to be heard the next day. Banks further stated in his affidavit (P. 11) that Olson's attorneys wrote the Foresters on Feb. 18, 1954, informing said Order of these withdrawals of premiums by Olson, and further advising that said funds would be held by Olson in his name in Utah Savings

and Trust Company until there was a satisfactory adjustment of the amount claimed by Olson to be owing, as a result of termination of his employment with said Order. In other words, when McGahan, an auditor for the company, who had been subpoenaed by his company to appear in court the next day and testify against Olson, as one of the company's auditors and Mr. Bowen, as attorney for the defendant company, both knew that the financial matters in dispute were in civil litigation in the District Court, that the company had received a letter from Olson's attorney stating that he was holding the money until a compromise settlement could be effected, or a decision by the District Court, and that the civil trial was going to take place the next day, and that Olson would be present in court the next day; they could not have honestly believed that there was probable cause for issuance of a criminal complaint.

The trial court did not follow these well established principles of law heretofore settled by this Court, but granted a motion for non suit, against the plaintiff, in the following words: "Mrs. Gold and gentlemen of the jury, the motion made by the defendant, based on the *Kennedy Case*, 154 Utah, will be granted" (P. 214). 183 Pac. 325, 5 A.L.R. 1682.

The trial court, in granting defendant's motion for a non suit, deprived the plaintiff of his right to have the jury determine the question of fact as to whether the defendant actually did in fact honestly believe that there was probable cause for the issuance of the complaint at the time he had the criminal complaint issued.

Malice in a malicious prosecution action may be inferred from a malicious motive. *Naylor v. Peters*, 139 CA 244. The motive of the defendant in making the criminal charge is a matter to be considered by the jury in determining the existence of malice in a malicious prosecution suit. *Runo v. Williams*, 162 C. 444.

Many courts have held that the use of the criminal process to collect a private debt is evidence of malice. The case of *Schnathorst v. Williams* (Iowa) 36 NW 2d 739, 10 ALR 2d 1199 at 1213, cites many cases supporting this proposition and states:

“The use of criminal process to effect a personal and private purpose is in itself evidence of defendant’s lack of good faith in the prosecution.”

And in *White v. International Text Book Co.* (Iowa) 136 NW 121, the court said:

“It is a universal rule that, if one makes use of the criminal law for some collateral or private purpose rather than to vindicate the law as to compel . . . the payment of a debt, such proceeding will be deemed malicious.”

We respectfully urge that the rule expressed in these cases just quoted be specifically adopted as the rule in this state.

In addition to the evidence of malice from the use of the criminal process to collect a private debt, *the jury had the right to infer malice from the want of probable cause.* *Singleton v. Singleton*, 68 CA 2d 681.

The evidence in this record clearly shows that the defendant did not actually believe that he had probable cause for filing of the criminal complaint against the plaintiff at the time he had the complaint issued, and the Court completely ignored the well established rule of law concurred in by this Court, that the defense of probable cause is not available to the defendant, if he does not actually himself believe that there was probable cause; and whether the defendant actually himself believed that there was probable cause is a question to be submitted to the jury under proper instructions.

POINT II.

THE COURT COMMITTED ERROR IN SUSTAINING THE DEFENDANT'S MOTION FOR A NON SUIT AND IN DISMISSING PLAINTIFF'S ACTION, WITHOUT SUBMITTING THE CAUSE TO THE JURY.

The trial court, in sustaining the defendant's motion for dismissal, and basing it entirely on the Kennedy case, took the position that since the plaintiff had been bound over to the District Court by a magistrate, and that such a binding over by the Committing Magistrate constituted prima facie evidence of probable cause and could only be rebutted by evidence showing fraud, perjury, or other undue or unfair means employed by the defendant. This we submit was a misapplication of the law by the Court to the facts as they appeared in the record in this case.

In the case at bar, the Committing Magistrate bound the plaintiff over to the District Court to stand trial for embezzlement, and on trial of the case before the District Court, was found "not guilty". Does this constitute prima

facie evidence of probable cause that can be rebutted only by evidence of fraud, perjury or other undue or unfair means? We think not.

We think that this Court has long been committed to the doctrine that the binding over of the plaintiff to the District Court for trial, constitutes *only prima facie evidence* of probable cause and can be rebutted by any competent evidence, which must be submitted to the jury, and that the plaintiff does not have to impeach the judgment of the Committing Magistrate by evidence of perjury or false testimony. In the case of *Johnson vs. Meager*, 47 Pac. 861, (Utah) Pg. 865, Column 1, this Court said:

“It is true that the Justice decided in favor of the prosecution and held the plaintiff, Annie, to give a bond to keep the peace, but when the case was brought before the District Court, the prosecution dismissed the action and said that no probable cause existed. The judgment of magistrates against defendants in prosecution to bind persons to keep the peace and in preliminary examinations are not conclusive. They simply furnish a prima facie presumption of probable cause. *Denier vs. Huber* (75 Cal. 287; 17 Pac. 205). *Newell on Malicious Prosecution*, Page 290; *Brown vs. Toure*, 4 Cushing 217. The order holding the plaintiff for bail should have been submitted with all the other competent relevant and material evidence to the jury, upon the issue of probable cause under proper instructions.”

In this early case, this Court recognized the fundamental difference and distinction between the probative

value to be given a case where the defendant has merely been bound over by a Committing Magistrate to stand trial in the District Court, and a case like the Kennedy case in which there had been an actual trial by a jury and Court vested with power to make final disposition of the case, enter judgment and sentence. The two classes of cases are entirely separate and distinct, and the rule of law, as enunciated by this Court in the Kennedy case, certainly does not apply to the facts of the case at bar, where the defendant had merely been bound over by a Committing Magistrate vested with no power to render a final judgment or impose sentence. Much confusion has arisen in these cases, because many of the trial courts, including the case at bar, have failed to recognize the distinction between that class of cases where there has been a final judgment in a trial of the case, either by the Court or a jury, as in the Kennedy case, and that class of cases where there has simply been a binding over by a Committing Magistrate, not vested with any power to decide the issues or impose punishment, but can only decide that there is some cause to hold the plaintiff for trial in the District Court. The distinction between these two classes of cases is very ably set forth in the case of *Ross vs. Hixon*, 12 L.R.A. 760, wherein the Court said:

“The sole question discussed in the oral argument of counsel for defendant in error, and the briefs on both sides is as to the weight to be given the finding of the examining magistrate as to whether it is *prima facie* or conclusive on the question of probable cause and whether or not, in

either case, the finding must be attacked for fraud or undue means by proper allegations in the petition—

“We have been unable to find a reported case in which the rule has been held as reported by counsel for defendant in error. There are cases that so hold where the magistrate has power to render a judgment of conviction. How much weight, as proof of probable cause, shall be attributed to the judgment of a Court in an original action, when subsequently reversed for error, is elaborately discussed in the Supreme Court of the United States in the case of *Crescent City L.S.L. and S. H. Co. vs. Butchers Union*, 120 US 141, 308 Law Edition, 614, a case much relied on by counsel for defendant in error. To our mind, however, the distinction between that case and the one at bar is plain and distinct. If the magistrate in *Bourbon City* had possessed the statutory power to hear the evidence and determine the guilt or innocence of the defendant and to punish by fine or imprisonment, if guilt was found, then his finding and judgment would come within the rules established by that case to be the law of the land. The question in this case is how much weight, as proof of probable cause, shall be attributed to the finding of an examining magistrate that an offense had been committed and that there is probable cause to believe the defendant guilty thereof. When the defendant is subsequently discharged, the prosecution against him confessedly ended, and he has instituted an action for malicious prosecution against the complaining witness. In the one case, there is a solemn judgment rendered by a court having full and complete jurisdiction, both of the parties and the subject matter, binding on all until reversed upon appeal or error. In the other case, there is a finding in effect, that

sufficient facts have been developed that justify a magistrate in sending the parties before a Court competent to ultimately deal with the question of guilt or innocence. Again, while a conviction is generally conclusive of probable cause, yet it may be overcome by showing that it was procured by fraud, undue means, or the false testimony of the prosecution.

“In such a case, the petition in the action for malicious prosecution must directly attack the judgment of conviction or it will be suicidal. It is, therefore, unimportant whether the words used by the Court in the *Bower vs. Clay* or dicta or authoritative in that case, as they express the law as universally held by all courts of last resort that have spoken on the subject. It follows that the other suggestions of counsel, that the finding of the magistrate must be directly attacked in the Petition for fraud or undue means is without force, because that finding is only *prima facie*, because all that is necessary for plaintiff to do, to win, is to overthrow it by a preponderance of the evidence.”

Wolton Trust Co. vs. Taylor, 2 Fed. 2nd, 342, the Court said:

“We think these instructions clearly state the law on the matter of the binding over of plaintiff by the Justice of the Peace and the acquittal of the plaintiff in the Circuit Court, and the following was said:

“Inasmuch as the hearing before the Magistrate—that is to say the Justice of the Peace—was for the express purpose of inquiring into the existence of probable cause, and in as much as in this case, such inquiry was made which resulted after hearing on the merits in the conclu-

sion and judgment of the magistrate that the plaintiff should be held for trial in the Circuit Court, this judgment of the magistrate constitutes in law, prima facie evidence of such fact, namely probable cause, to believe that the defendant was guilty. By prima facie evidence is not that degree of proof which in the absence of satisfactory rebutting proof will justify a jury in concluding that the defendant had probable cause to believe the plaintiff guilty.

“Now then, speaking again of the evidence and of — the finding of the magistrate upon the preliminary hearing, such evidence gentlemen, is not conclusive, but is to be taken and considered by you in connection with all the evidence in the case—

“Counsel for defendants contend that the action of the justice of the peace was conclusive on the question of probable cause, unless the plaintiff showed such action of the justice was procured by fraud or perjured testimony, citing *Hansen vs. Huber* 271 Missouri, 326. 197 South-western 68. We do not think the case supports counsel’s contention. The question there involved was not as to the evidentiary value of a commitment on the question of probable cause, but the question involved was as to the evidentiary value of the judgment of conviction which had been reversed.

“The charge of the trial court in the instant case, as to the effect of the commitment by the justice of the peace, is amply sustained by the authorities.”

In *Foster vs. Evans*, 297, Pac. 106, the California Court said:

"The fact alone that reasonable men divided on the question of guilt or innocence, would of itself seem to be slight, if any evidence of probable cause, but there is no question that the fact that respondent was held to answer is *prima facie* evidence of the existence of probable cause, *but it is not conclusive*. *Diemer vs. Herber*, 75 California 287; 17 Pac. 205, and while the burden of proof is on the plaintiff in an action for malicious prosecution, to show want of probable cause, there is ample evidence in the record here."

Steidham vs. Diamond, State Brewery, 21 Atlantic 2nd 283 — "The almost uniform current of the law is to the effect that the action of a committing magistrate or of a municipal court in holding a defendant in bail on a criminal charge to await the action of a grand jury, is a prima facie showing of probable cause for the institution of the charge. So too, is the action of the grand jury in presenting a true bill, such indictment constitutes *prima facie* showing of probable cause. In neither case does the action show conclusive evidence of probable cause, but merely prima facie evidence which might be rebutted by other testimony."

It is perfectly clear that the trial court, in following the Kennedy case and applying the ruling of the Kennedy case to the facts of the case at bar, clearly failed to make a distinction between that class of cases where there has been a judgment by the Court on the merits, as in the Kennedy case, and where there had simply been a binding over by a Committing Magistrate, as in the case at bar.

In the Kennedy case, this Court explicitly limited its ruling to the facts of that case wherein there had been a final judgment of conviction in the City Court and an appeal from the conviction, and the decision of the City Court reversed upon appeal.

In the Kennedy case, this Court said:

“Neither is it contended that the Complaint fails to show that the proceeding finally terminated in favor of the plaintiff. The question is narrowed down to the proposition as to whether or not the complaint, on its face discloses a want of probable cause for the proceeding complained of. The complaint alleges the fact that the plaintiff, in the City Court, was *convicted* of the offense instituted against him by the defendant. And under authorities hereinafter cited, such a *conviction* is at least prima facie evidence of probable cause for the prosecution, notwithstanding the conviction is afterwards reversed. Some of the authorities go so far as to hold that such evidence is absolutely conclusive, but in our opinion, the weight of judicial opinion, as well as that of jurists and text writers, is to the effect that *evidence of a conviction* is only prima facie and may be rebutted by competent evidence, which impeaches the validity of the judgment. As will be seen from the decisions to which we shall refer, the most common expression is that a *judgment of conviction* against the plaintiff, in a case of this kind, can be impeached and overthrown only by showing that the judgment was procured by perjury, fraud, or other undue means.”

It is perfectly apparent that this Court, by its expressed language, intended to confine its ruling, requiring

that the judgment could be over-turned only by evidence of fraud and perjury, was limited to those cases where there had been a conviction and that as far as this Court would go.

“ Conceding this to be true, there is no escape from the conclusion that a judgment of conviction followed by a reversal, when offered as evidence in a case for malicious prosecution, is at least *prima facie* evidence of probable cause for the prosecution. It follows therefore, that where the complaint itself, in an action for malicious prosecution, shows that plaintiff was *convicted* in the proceeding complained of, notwithstanding a *reversal* afterwards on appeal, the complaint fails to state a cause of action, unless it goes farther and alleges some fact or facts, the legal effect of which is to impeach the validity of the judgment and render it worthless as evidence of probable cause. The fact or facts so alleged should be to the effect that the judgment of conviction relied on as proof of probable cause procured by fraud, perjury or other undue or unfair means.”

The expressed language of this court limits its ruling to those cases in which there had been a judgment of conviction. And only in such cases would it require evidence of fraud or perjury in order to attack the judgment.

Clearly, this court in the Kennedy case confined its decision to the particular facts of that case, namely, where there had been a conviction and a judgment in the City Court, by a court and jury vested by law with authority to try the facts and make a final judgment

and inflict punishment. And it did not, by its language, extend the ruling to include cases such as the case at bar where there had simply been a binding over by the Committing Magistrate to stand trial in the Third Judicial District Court. We believe that the distinction between these two classes of cases is sound and that the ruling in the Kennedy case should never be extended by this court so as to include cases similar to the case at bar and give the same probative value to the decision of a committing magistrate as it does to the judgment of a Court and jury vested with authority to hear the facts and make a final decision and render a judgment, and requiring the plaintiff, in order to recover in a judgment for malicious prosecution, to prove that the judgment of the committing magistrate was induced by fraud or perjury.

To extend the rule of the Kennedy case to cases such as the case at bar, relieves the defendant from all the consequences of his malicious acts in using the criminal courts as a collection agency, and maliciously and intentionally injuring the plaintiff simply because the committing magistrate felt there was some evidence that should be submitted to a jury.

All members of the Utah Bar and the members of this Court know that our committing magistrates as a practical matter, bind the defendant over to the District Court, if there is the slightest evidence of his guilt and leaves the question of his ultimate guilt to the jury in the District Court and for this court to give to such a judgment of a committing magistrate the same probative

value on the question of probable cause, as it does a final judgment by a court and jury vested with authority to hear the facts and render a final judgment, as were the facts in the Kennedy case, would not be sound law or justifiable by this Court.

We believe that all the defendant was entitled to in this case was to have the judgment of the committing magistrate holding that there was probable cause submitted to the jury, along with the other evidence, as this court indicated in the case of *Johnson vs. Meager*, 47 Pac. P. 61.

SUMMARY

The plaintiff was employed from 1947 to 1954 by the defendant corporation as its manager for its insurance business for the State of Utah, at which time the plaintiff's employment was terminated by the defendant. That at the time of the termination of employment, the defendant was holding certain monies, which the plaintiff claimed was owing him by the defendant company for commissions and renewals earned by him during his employment. Prior to his termination, the plaintiff requested an audit by the company (P. 34-35) and advised the defendant company that he would not turn the money over until he was furnished an audit (P. 35). That at no time did the company furnish the plaintiff with an audit, striking a balance between the plaintiff and defendant. That many conferences were had between the plaintiff and defendant and their respective attorneys for the purpose of trying to determine whether or not there was any

money due the company. That on the 27th day of October, 1955, the plaintiff filed an action in the Third Judicial District Court to compel the defendant to make an accounting and to determine the question as to which one was indebted to the other. In the pre-trial held before Judge Lewis on May 6, 1955, the Court stated that the only issue in the case was an accounting between the parties as to the amount of renewals and commissions earned, and the amount of monies retained by the plaintiff. He also granted time for the respective parties hereto to make an accounting one to the other.

The accounting suit filed by Olson was set for trial on January 20, 1956. The day before the day the case was to be tried, the defendant's auditor, Mr. McGahan, and its attorney, Mr. Bowen, secured a criminal complaint against Olson for embezzlement, well knowing that the issues as to who owed who the money was to be settled the following day in a civil action. On the next day, January 20, 1956, a continuance of the trial of this case was granted by Judge Lewis, who made an order that plaintiff pay into the Clerk of the Court, the sum of \$5,460.62, and also deposit \$200.00 to have an audit made on the company's books. Mr. Olson complied in full with the Court order, and eventually an audit was made of the company books by Lincoln G. Kelly and Co., certified public accountants, of Salt Lake City, Utah (Exhibit 9), which showed that there was due and owing to Olson approximately the sum of \$9,000.00. That immediately upon leaving Judge Lewis's Courtroom, after the order above described was entered, the defendant was arrested

outside of Judge Lewis's Courtroom and taken before a Committing Magistrate, who released him without bond. Thereafter, the criminal case was tried in the District Court before a jury, who found the plaintiff "not guilty" of the charges preferred against him.

The facts in this record conclusively show that the defendant, at the time he had the criminal complaint issued, did not honestly believe that there was probable cause to file the criminal complaint, and that the question of whether the defendant honestly believed that there was probable cause was a matter that the Court should have submitted to the jury.

The evidence conclusively shows that the acts of the defendant corporation's auditor and attorney, in securing a criminal complaint for embezzlement against the plaintiff, the day before the trial of the issues, was an overt act of using the County Attorney's office as a collection agency to compel the payment of the claimed indebtedness.

CONCLUSION

That the Court erred in not submitting to the jury the question as to whether or not the defendant actually believed, at the time the criminal action was instituted, that there was probable cause for the issuance of said criminal complaint; and, that the trial court, in granting the defendant's motion for a non suit, following the Kennedy case, failed to recognize the well established rules of law *as heretofore enunciated by this Court and*

having never been reversed by this Court, that there is a vital distinction between that class of cases of which the Kennedy case is typical, where there has been an actual trial by a court vested by law with authority to try the facts, enter a judgment, and pass sentence, and that class of cases like the case at bar, where the plaintiff was only bound over to the District Court by a Committing Magistrate not vested by law with any power or authority to render a final judgment and impose sentence.

Respectfully submitted,

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