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

Utah Supreme Court

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JAN 13 1958

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IN THE SUPREME COURT
of the
STATE OF UTAH

LEONARD M. OLSON,
Plaintiff and Appellant,

vs.

INDEPENDENT ORDER OF FOR-
ESTERS, a corporation, and THOMAS
McGAHAN,

Defendants and Respondents.

FILED

DEC 8 - 1957

Clerk, Supreme Court, Utah

Case No. 8668

UNIVERSITY UTAH

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BRIEF OF RESPONDENT LAW LIBRARY

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Plaintiff and Appellant,

vs.

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McGAHAN,
Defendants and Respondents.

Case No. 8668

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The relevant facts involved in this appeal are few. Briefly stated they are as follows: (We will refer to the parties as they appeared below.)

The plaintiff was charged with embezzlement upon a

complaint which was issued by the County Attorney of Salt Lake County and signed by Thomas McGahan, field auditor for the defendant. (Tr. 48-49) Upon this complaint the plaintiff was arrested and brought before the Honorable Leland G. Larsen, City Judge and Committing Magistrate for Salt Lake County, and released to the custody of his attorney. (Tr. 114) Sometime later a preliminary hearing on the criminal charge was held by Judge Larsen. At this hearing witnesses were called by the State and the plaintiff, and plaintiff also testified in his own defense. (Tr. 115) After the conclusion of the preliminary hearing, plaintiff was bound over for trial upon a certificate of probable cause. (Tr. 114-115, 129, 130) Plaintiff was later tried before the Honorable Ray Van Cott, Jr. At the conclusion of the State's evidence, plaintiff moved to dismiss. This motion was denied. (Tr. 189-190). The case was submitted to the jury which duly acquitted the plaintiff.

Following the acquittal this action was commenced against the defendant and Thomas McGahan. The latter was never served with Summons and the case proceeded to trial against the defendant, Independent Order of Foresters.

At the conclusion of the plaintiff's evidence, defendant moved for a directed verdict whereupon the court dismissed the jury and dismissed the complaint. (Tr. 189-191) The complaint was dismissed upon the ground that the binding over of the plaintiff was a finding of probable cause and, in the absence of evidence showing that the order binding the plaintiff over to answer the criminal charge was obtained by fraud, misrepresentation, perjured evidence or other undue or unfair means practiced or induced by defendant, constituted a complete defense to plaintiff's charge of malicious prosecution. No evidence of any kind was offered

by plaintiff to prove that the order binding the plaintiff over for trial was tainted in any way by any improper act of defendant which induced or caused the Committing Magistrate to order plaintiff held for trial before the District Court or that plaintiff would not have been bound over except for such improper acts of defendant. No evidence was offered by defendant in its own defense.

The foregoing facts are the only ones relevant or necessary to be considered in deciding the correctness of the trial court's ruling. Because we think a recital of any other facts would only burden the court and be of no value in clarifying the issue to be decided here, we will omit any further reference to them. However, defendant does not accept as accurate or correct many of the facts set out in plaintiff's brief which statement defendant believes is not supported by the record in many important and vital particulars.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CONCLUSION OF PLAINTIFF'S EVIDENCE BECAUSE THE RECORD SHOWS WITHOUT DISPUTE THAT PROBABLE CAUSE WAS ESTABLISHED AS A MATTER OF LAW WHEN PLAINTIFF WAS BOUND OVER FOR TRIAL AND THERE WAS NO EVIDENCE THAT THIS RESULTED FROM FRAUD, FALSE OR PERJURED TESTIMONY OR OTHER UNDUE MEANS PRACTICED BY DEFENDANT.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING DEFENDANT'S MOTION FOR A DIRECT VERDICT AT THE CONCLUSION OF PLAINTIFF'S EVIDENCE BECAUSE THE RECORD SHOWS WITHOUT DISPUTE THAT PROBABLE CAUSE WAS ESTABLISHED AS A MATTER OF LAW WHEN PLAINTIFF WAS BOUND OVER FOR TRIAL AND THERE WAS NO EVIDENCE THAT THIS RESULTED FROM FRAUD, FALSE OR PERJURED TESTIMONY OR OTHER UNDUE MEANS PRACTICED BY DEFENDANT.

The defendant rests its case for affirmance upon the proposition that when plaintiff was bound over by Judge Larsen for trial upon the complaint charging embezzlement that order constituted a finding of probable cause for the issuance of the complaint as a matter of law. Thereafter this finding of probable cause could only be overcome by competent evidence that the order was obtained by fraud, misrepresentation, perjured testimony or other undue means practiced or brought about or caused by defendant. (*Kennedy v. Burbidge*, 54 Utah 497, 183 P. 325.)

The plaintiff made no attempt to overcome this finding by any evidence whatsoever. It is asserted by plaintiff that the order of the Committing Magistrate was only prima facie evidence of probable cause which was overcome by plaintiff's evidence. We thus have the issue squarely presented as to what is the legal effect of an order binding a defendant over to answer criminal charges? Defendant does not con-

tend that an order binding a defendant over in a criminal proceeding is more than prima facie proof of probable cause. Even a judgment of conviction has no greater effect than to establish such prima facie defense. *Kennedy v. Burbidge, supra*; *Staton v. Mason*, N. Y., 104 N. Y. S. 157; *McElroy v. Catholic Press*, Ill., 98 N. E. 527; *Miller v. Runkle*, Iowa, 114 N. W. 611. What we do contend, however, is that it requires more than an acquittal by a jury to overthrow the presumption of probable cause and that no evidence of plaintiff's innocence, no matter how strong, will overthrow this presumption unless associated and connected with such evidence of innocence there is further competent evidence which shows that such order was obtained by fraud, perjury or other undue or unfair means. *Kennedy v. Burbidge, supra*; *McElroy v. Catholic Press, supra*.

The plaintiff seeks to establish a distinction between a case where a plaintiff has been convicted which conviction is later set aside or reversed and a case where a plaintiff has been held on the order of a Committing Magistrate for trial. We think the distinction sought to be made is tenuous and without substance and is contrary to the better authority.

Many cases support the defendant in the contention that an order of a Committing Magistrate binding a defendant over has the same effect as a conviction. In 14 ALR 2d, 312, Sec. 13, the author says:

"Although there is authority to the contrary, the numerical weight of authority, at least, is to the effect that where the complaint in an action for malicious prosecution shows on its face that a committing magistrate found probable cause to bind plaintiff over to a higher court, or that the grand jury indicted, the

plaintiff must, in his pleading, go further than a mere allegation of want of probable cause, and must plead facts showing fraud or other improper means to overcome the presumption of probable cause arising from the fact that he was bound over by the magistrate or indicted by the grand jury."

In the case of *Penton v. Canning*, *Wyo.*, 118 P. 2d 1005, the plaintiff sought to make the same distinction which the plaintiff here asserts must be made between a case where there is an order holding a plaintiff for trial and a case where a judgment of conviction has been obtained. That court reviewed the authorities and rejected the distinction and criticized the case of *Ross v. Hixon*, *Kan.*, 26 P. 955, upon which the plaintiff here relies. That court said:

"It is urged for the plaintiff and respondent, Penton, that there is a 'clear distinction which is made in the authorities between cases in which the committing magistrate has jurisdiction to and does finally, try, determine and convict the defendant and cases in which he merely sits as a committing magistrate', and the rule announced in *Ross v. Hixon*, *supra*, is insisted upon as the correct rule to govern the case at bar.

So far as the *Ross v. Hixon* case is concerned, it is, we think, sufficient to say that in *Giusti v. Del Papa*, *supra*, the Supreme Court of Rhode Island pointedly criticises the position taken in the *Hixon* case, saying: 'With all due deference, we feel constrained, for the reasons that we have given, to dissent from this conclusion. We do not think it follows that, because the binding over is only *prima facie* evidence of probable cause, it is not necessary to attack it in the petition for fraud or undue means; or, in other words, to aver such fraud or undue means

to negative its effect. The pleader must state a cause of action, and he fails to do so unless he overthrows the prima facie effect of probable cause arising from the binding over." * * *

Relative to there being any 'clear distinction' so far as it affects the matter of properly alleging the element of probable cause in a malicious prosecution action, as plaintiff urges and above recited, we are unable to see that that is so."

See also *Graham v. Buffalo General Laundries Corporation*, N. Y., 184 N. E. 746; *Dunn v. E. E. Gray Co.*, Mass., 150 N. E. 166; *Giusti v. Del Papa*, R. I., 33 A. 525; *White v. Pacific Telephone & Telegraph Co.*, Ore., 90 P. 2d 193. See also the dissenting opinion of Phillips in *Stainer v. San Louis Valley Land & Mining Co.*, 8th C. C. A., 166 F. 220. There are many other cases cited in 14 A. L. R. 2d, *supra*.

Plaintiff relies upon *Johnston v. Meaghr*, 14 Utah 426, 47 P. 861. This case goes no further than to say that the orders of magistrates binding defendants over on preliminary examinations are not conclusive but only furnish a prima facie presumption of probable cause. To this extent the case is in harmony with the *Kennedy case*. To the extent that it holds that evidence should be submitted to the jury that there was or was not probable cause without a showing of fraud, false testimony, etc. it is overruled by the *Kennedy case* and is not authority in this jurisdiction.

The other cases on this point relied upon by plaintiff, notably, *Ross v. Hixon*, *supra*, are either not in point or represent a minority view.

There is no reason in logic why the finding of probable

cause by a committing magistrate should not have the same effect as a conviction after a trial. The authorities relied upon by defendant so hold. *Penton v. Canning*, *supra*, and *Giusti v. Del Papa*, *supra*. The very purpose of a preliminary hearing is to determine if there is cause to prosecute the party charged with a criminal offense. If the committing magistrate so finds then it should require as much evidence to overcome the *prima facie* effect of the order binding the defendant over as in the case of a conviction. It is no answer for plaintiff to assert, with no evidence or foundation in the record to support the claim, that preliminary hearings before justices are informal and lacking in judicial climate. The record in the case shows that the plaintiff was accorded a hearing, that he called witnesses and testified himself. Furthermore, it is a fact well known to this Court that Judge Larsen, by whom plaintiff was committed, was a judge learned in the law and with many years of experience in presiding at trials of both civil and criminal cases. The argument of plaintiff is an attack upon the integrity of the approved judicial processes of this State.

There is an additional reason why the proposition contended for by plaintiff should not receive judicial sanction in this State. Actions for malicious prosecution are not favored in the law and are to be managed with great caution. See *Penton v. Canning*, *supra*; *Van Sant v. Am. Express Co.*, 158 Fed. 2d 924, 3rd C. C. A.; and *Cloon v. Gerry*, 13 Gray, Mass., 201.

It would constitute a serious threat to the administration of justice to open the door to such actions if, every time a jury in a criminal case turns a defendant loose, no matter what the reason, including sympathy, he might with im-

punity turn around and sue the one who had courage enough to sign the complaint, for malicious prosecution without being also required to show in addition to acquittal, that his being held for trial was the result of improper acts committed by the defendant in securing such binding over.

CONCLUSION

Inasmuch as the plaintiff was bound over for trial on the charge of embezzlement, which constituted a finding of probable cause, and there is no evidence to rebut the prima facie defense of probable cause thereby established by a showing that the order binding plaintiff over was obtained by fraud, perjured testimony or other unfair or undue means, the judgment of the trial court dismissing plaintiff's complaint was proper and must be affirmed.

Respectfully submitted,

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