

1959

Stratford L. Wendelboe v. Richard B. Jacobson, Billy Joe Lang and John H. Douglas : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the

STATE OF UTAH

FILED

SEP 15 1959

STRATFORD L. WENDELBOE,

Plaintiff and Appellant,

Clerk, Supreme Court, Utah

—vs.—

RICHARD B. JACOBSON, BILLY
JOE LANG, and JOHN H.
DOUGLAS,

Defendants and Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

	<i>Page</i>
INTRODUCTION	1
STATEMENT OF FACTS.....	2
ARGUMENT	12
STATEMENT OF POINTS.....	11
POINT I: An analysis of the points set forth in appellant's brief discloses no merit thereto and a complete misconception of the facts and the law applicable to this case, and plaintiff was legally arrested by defendants after and only after he had committed not only one but several misdemeanors in the presence of the officers.....	12
POINT II: Plaintiff did not receive a severe beating or anything approaching it and was only superficially injured in the lawful efforts of the defendant officers to retain him in custody.	36
POINT III: As a matter of law the third cause of action for malicious prosecution should not lie against the defendants in this case, and in any event, the facts and evidence produced by defendants at the trial clearly established a defense to any such cause of action, and the Court's instructions were not erroneous.....	38
POINT IV: The award of attorney's fees to the defendants is not sufficient under the evidence presented and in view of the applicable law applied by the Court below...	41
POINT V: The Court should have granted defendants' motion to dismiss as to Reserve Officer Douglas.....	43
CONCLUSION	44

TABLE OF CASES CITED

State v. Anselmo, 148 Pac. 1071 (46, Utah 137).....	20, 28
State v. Grenz (Wash.) 175 Pac. (2d) 633.....	24
State v. Sandman, 4 Utah (2d) 69, 286 Pac. (2d) 1060.....	22, 29
White v. Towers, 37 California (2d) 727, 235 Pac. (2d) 209; 28 A.L.R. (2d) 636.....	39

TABLE OF CONTENTS—(Continued)

Page

STATUTES

10-6-66, U.C.A. 1953	21, 22
10-6-67, U.C.A. 1953	22
30-1-18, Revised Ordinances, Salt Lake City, 1955.....	21
32-1-31, Revised Ordinances, Salt Lake City, 1955.....	22
32-1-52 (5) (6), Revised Ordinances, Salt Lake City, 1955.....	15
41-1-40, U.C.A. 1953	15, 18
41-1-142, U.C.A.	15, 18
46 - Sec. 179, Revised Ordinances, Salt Lake City, 1955.....	18
76-28-54, U.C.A. 1953.....	15, 22, 26
78-11-10, U.C.A. 1953	41, 43
Rule 43 (b) Utah Rules of Civil Procedure.....	34

TEXTS

28 A.L.R. (2d) Page 646.....	39
48 A.L.R. Annotated, Page 746.....	28
53 American Jurisprudence, Sec. 74, Page 73.....	36
53 American Jurisprudence, Sec. 81, Page 79.....	36
53 American Jurisprudence, Sec. 602, Page 475.....	20
Corpus Juris Secundum, Vol. 91, Page 783.....	25
Restatement of Law of Torts, Sec. 504-756.....	40-1

IN THE SUPREME COURT

of the

STATE OF UTAH

STRATFORD L. WENDELBOE,
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—vs.—

RICHARD B. JACOBSON, BILLY
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DOUGLAS,
Defendants and Respondents.

Case No.
9025

BRIEF OF RESPONDENTS

INTRODUCTION

In his brief the plaintiff purports to give a statement of the case and a statement of the facts, but in so doing plaintiff completely overlooks one cardinal and fundamental principle that has been so firmly and repeatedly stated by this Court as to require no citation. That principle is that the jury by determining the issues in favor of defendants has found the facts of the incident to be as

the evidence of the defendants discloses them. The plaintiff repeatedly in his purported statement of the case and statement of the facts relies on statements of the plaintiff, statements of the defendants taken completely out of context, and in several instances, as we will point out later, on a misstatement of the record.

The fact versions of what occurred in the early morning hours of April 6 that gave rise to this lawsuit were bitterly contested by the parties, and the defendants' version as against the plaintiff's version of what really occurred conflicted at nearly every material point. The facts, of course, are vital in this case. It is impossible to apply any of the law of arrest or false imprisonment or malicious prosecution to this case without accurately ascertaining just what the facts of the incident were. It is because the facts are of such vital importance in this matter that defendants believe that this Court cannot possibly give just consideration to this appeal unless those facts are set out accurately and in detail and with genuine references to the record. Therefore, respondents shall set forth the facts as they actually occurred and as they were found to have occurred by the jury in this case.

STATEMENT OF THE FACTS

From approximately March 15 to and including April 6, 1958, Salt Lake City had been undergoing a crime wave (R. 402). Chief Skousen of the Salt Lake City police force testified that there was an area in downtown Salt Lake in which there was and had been a particularly

heavy concentration of crimes committed. The locality of Fifth East and Second South Streets in Salt Lake City was in the heart of this area (R. 401). On the night of April 5 and the early morning hours of April 6, 1958, there was a special police car assigned to this area. The defendant officer Richard B. Jacobson was the senior officer in charge of this car. Chief Skousen further testified that from 11 o'clock at night until around 4 or 5 o'clock in the morning is the time of night that the most serious types of crimes are committed and that he had given special instructions to be transmitted to the officers patrolling this area to very carefully check the area and ordered that every suspicious situation must be completely checked out (R. 403), and Officer Jacobson was informed of these instructions (R. 438).

This was the general situation that confronted the police officers as they commenced their patrol work and duties on the night of April 5 and during the early morning hours of April 6, 1958.

At approximately 3 o'clock A.M. on the morning of April 6, the three defendant officers in the performance of their duties were approaching in their police car the intersection of Second South and Fifth East. The police officers were driving from the south to the north (R. 251). As they approached Second South while driving north on Fifth East, the officers noticed an old automobile parked on the west side of Fifth East heading in a southerly direction approximately 70 feet south of the intersection (R. 251-253, 310). At that time, on the south-

west corner of the Second South and Fifth East intersection there was a service station under construction, and there was a construction shed full of tools, equipment, etc. near the place where the automobile was parked (R. 435). As the officers drove by, they noticed that the lights of the automobile were out and that the engine was running (R. 317, 419). After first observing the automobile, the officers continued on across Second South driving in a northerly direction and proceeded to check out a service station and other buildings in the area, and then they checked out the Grand Central Store located west of Fifth East on the south side of Second South. They then drove out the back and south end of the Grand Central Parking Lot on to Fifth East again and turned back to the north.

At this time, they noticed that the automobile was still parked in the position observed a few minutes before (R. 316-317). They then drove up to the parked car and parked the police car parallel to the automobile and a few feet east of it so that the police car was heading north and the plaintiff's automobile was heading south. Officer Jacobson thereupon got out of the police car and went over to the parked car and observed the plaintiff was sitting at the wheel and that the motor was indeed running and that there were no keys in the ignition lock (R. 317). Officer Jacobson then asked in a courteous manner the occupant, who was the plaintiff, for identification or a driver's license. Plaintiff said absolutely nothing. He produced a temporary driving permit and handed it to Officer Jacobson (R. 254-258). Officer Jacob-

son looked at the temporary permit and since he did not consider it reliable identification because there was nothing on it but a name and address and no physical description of the bearer (R. 412), he asked for additional identification and the registration certificate for the car. At this time Officer Jacobson noticed that there was no registration certificate on the steering column of the car or elsewhere (R. 436). Plaintiff thereupon pulled a large stack of cards and other papers from a wallet and began thumbing through them. As he did so Officer Jacobson noticed the corner of what he recognized as an army identification card because of its pinkish border. He stated to the plaintiff that the army identification card would be excellent identification. Thereupon the plaintiff, still without saying a word, deliberately flipped by the army identification card (R. 256, 311, 312). This rather unusual conduct began to alert the further suspicions of Officer Jacobson, and he thereupon asked the plaintiff to step outside the automobile because he thought perhaps it might be someone else's army identification card or that plaintiff had made an obvious attempt to cover it up, and Officer Jacobson did not know who he was (R. 312).

Officer Jacobson at this point then asked the Plaintiff Wendelboe what he was doing there at that time of morning and what his business was, and plaintiff thereupon replied, "That it was none of your damn business. That he was a citizen, and he had his rights," (R. 257, 329, 354). Officer Jacobson thereupon continued to ask plaintiff for his identification and stated that they

definitely wanted that identification and that they definitely wanted to know what plaintiff was doing (R. 258). Thereupon Officer Jacobson asked plaintiff to be seated in the rear seat of the police car. But first the officers directed the plaintiff to place his hands on top of the police car, and Officer Jacobson quickly patted plaintiff down as a preliminary precaution against weapons (R. 323). Plaintiff was not searched at this time, and the patting down was only for the purpose of determining whether the person had a weapon before placing him in the back seat of the police car (R. 378). Once in the police car, Officer Jacobson sat down in the front seat and told plaintiff he was either going to identify himself with the car and produce the registration certificate or he was going to jail (R. 267, 320). Plaintiff just sat in the seat of the car and said and did absolutely nothing. Thereupon Officer Jacobson informed plaintiff that he was under arrest for failing to produce that identification and that registration of that car and told him that if he didn't bring it out he was going to jail (R. 324). He also told plaintiff that he could be arrested for vagrancy (R. 313, 316, and 324).

When the plaintiff still refused to answer or to say a single word, Officer Jacobson put in a call to the dispatcher to impound the car (R. 269), and plaintiff still said nothing.

Officer Jacobson and Reserve Trainee Douglas then went over to the parked automobile and began to examine it. Officer Jacobson became aware of a commo-

tion behind him and turned around and saw that plaintiff was trying to get out of the police car, and Officer Lang was holding him in (R. 271). Officer Jacobson told Lang to let him out and that perhaps now he would tell them what he was doing there and who he was. At this time Officers Jacobson and Douglas were standing by the side of plaintiff's car. As Officer Lang released the door of the police car, plaintiff came directly out of the police car at a high rate of speed and knocked both officers aside (R. 318). He forcibly pushed Officer Jacobson aside with a movement of his arm across Officer Jacobson's chest (R. 273, 334, and 339). This conduct, of course, amounted to an obvious battery by the plaintiff on the person of Officer Jacobson. At this point Officer Lang caught one arm and Officer Jacobson the other arm of the plaintiff and started him back toward the police car (R. 274). The plaintiff then attempted to break away from the officers and a scuffle ensued. Plaintiff had one arm loose swinging it around and at that point Officer Jacobson struck the plaintiff on the chin in an effort to bring him under control. This blow had no effect whatever on the plaintiff and seemed to rile him more and resulted in increased efforts of the plaintiff to break from the custody of the officers (R. 276). Reserve Officer Douglas was not participating in the struggle at all (R. 277), and never took any affirmative action against plaintiff.

Officers Lang and Jacobson managed to get ahold of plaintiff again and Officer Jacobson was able to snap a handcuff on one wrist (R. 278). The plaintiff got the arm and wrist free and began wildly flailing his arm

about, and at that point Officer Jacobson was cut by the loose handcuff quite a little bit (R. 463). It was at this point and not before that Officer Lang hit plaintiff with his flashlight. The Officer hit the plaintiff a maximum of two or three times (R. 335, 364, 365). These blows with the flashlight were not hard or anywhere near as hard as Officer Lang could hit, and he had no intention to injure the plaintiff only get him under control (R. 380). It is perfectly obvious that these blows with the flashlight were of no severity at all, and the best possible proof of this fact is the photographs "Exhibits 2, 3, and '6" introduced by the plaintiff at the trial and which photographs clearly illustrate the minor, superficial nature of the contact from the flashlight. At this point in the scuffle, Officer Jacobson managed to get behind the plaintiff and apply a perfectly harmless and effective hold with his arm underneath the plaintiff's chin, which hold renders a person off balance and momentarily cuts off the blood supply to the head making him groggy. As Officer Jacobson applied the hold to the plaintiff, the officer was able to snap the other handcuff on to plaintiff's other hand, and at that point all physical activity of the officers toward plaintiff ceased (R. 381), and plaintiff was lowered to the ground, and except for a moment of dizziness, the plaintiff from this point on during the entire evening was completely conscious and observant of everything that was going on around him although from that time on during the evening the plaintiff faked unconsciousness and injury as it suited his convenience (R. 290, 387).

A police ambulance within a moment or two appeared on the scene. Plaintiff was examined and pronounced not injured, and because he refused to walk or talk because he didn't want to (R. 126), the officers picked him up and placed him on the rear seat of the police car. From this point on through the entire evening, plaintiff never would walk or stand up, requiring the officers to lift and carry him about from place to place as will be seen. Upon arriving at the jail, the officers decided to take plaintiff to the County Hospital for examination (R. 284-286). At the hospital Officer Jacobson requested a blood alcohol test in order to determine if plaintiff was drunk, since he was at a loss to account for plaintiff's actions (R. 288 et. seq.). Officer Jacobson then left the plaintiff at the County Hospital and went up to the Latter-day Saints Hospital to have his hand examined which had been injured in his scuffle with the plaintiff.

Other officers rehandcuffed the plaintiff at the County Hospital and returned him to the City Jail for booking. At the time of the booking, Officers Jacobson, Lang, and Douglas had returned from the Latter-day Saints Hospital and were present.

From the time that the handcuffs were placed on plaintiff at the scene until he was returned to the City Jail for booking, he intermittently faked unconsciousness and only aroused himself to swear at the officers (R. 290). Plaintiff again required the officers to carry him into the jail by the booking pen, and he refused to stand or talk, so he was laid down on the floor (R. 291, et.

seq.). At this point, the custody of the plaintiff was turned over from the arresting officers to the booking officers and jailer. The officer in charge was Harvey Roach assisted by Larry D. Lunnen, and these officers made the decision and determined what was to be done with plaintiff from that point on (R. 426).

Plaintiff refused to give the booking officers any information at all. He refused to state his name, and he refused to get up; he just stubbornly lay on the floor, although he was not really injured at all. The only thing he did at the jail was to call for newspapermen, lawyers, etc. (R. 291).

Because of several attempts at suicide in the City Jail, Chief Skousen had given express instructions (R. 405) to the jailers, which instructions were in effect April 6, 1958, that any individual who was behaving in an abnormal manner or appeared to be mentally depressed must be stripped of his clothing and placed in an isolation cell so that he would not injure himself. The determination to follow this procedure with plaintiff was decided upon by Officers Roach and Lunnen and no one else (R. 426), although the defendants helped to carry plaintiff downstairs to the cell when he still refused to walk (R. 295), and Officer Jacobson assisted Officer Roach somewhat in removing clothes although Officer Roach removed most the clothing, and Officer Roach also filled out the booking sheet listing the plaintiff as John Doe (R. 427). By this time it was approximately 6 o'clock A.M. (R. 217). Approximately 2½ hours later, Officer

Merrill, after having previously offered breakfast to the plaintiff, returned to his cell to obtain information for the booking sheet, and he at that time asked plaintiff if he wanted an attorney and was given telephone numbers by the plaintiff which he called (R. 421, 422).

STATEMENT OF POINTS

POINT I

AN ANALYSIS OF THE POINTS SET FORTH IN APPELLANT'S BRIEF DISCLOSES NO MERIT THERETO AND A COMPLETE MISCONCEPTION OF THE FACTS AND THE LAW APPLICABLE TO THIS CASE, AND PLAINTIFF WAS LEGALLY ARRESTED BY DEFENDANTS AFTER AND ONLY AFTER HE HAD COMMITTED NOT ONLY ONE BUT SEVERAL MISDEMEANORS IN THE PRESENCE OF THE OFFICERS.

POINT II

PLAINTIFF DID NOT RECEIVE A SEVERE BEATING OR ANYTHING APPROACHING IT AND WAS ONLY SUPERFICIALLY INJURED IN THE LAWFUL EFFORTS OF THE DEFENDANT OFFICERS TO RETAIN HIM IN CUSTODY.

POINT III

AS A MATTER OF LAW THE THIRD CAUSE OF ACTION FOR MALICIOUS PROSECUTION SHOULD NOT LIE AGAINST THE DEFENDANTS IN THIS CASE, AND IN ANY EVENT, THE FACTS AND EVIDENCE PRODUCED BY DEFENDANTS AT THE TRIAL CLEARLY ESTABLISHED A DEFENSE TO ANY SUCH CAUSE OF ACTION, AND THE COURT'S INSTRUCTIONS WERE NOT ERRONEOUS.

POINT IV

THE AWARD OF ATTORNEY'S FEES TO THE DEFENDANTS IS NOT SUFFICIENT UNDER THE EVIDENCE PRESENTED AND IN VIEW OF THE APPLICABLE LAW APPLIED BY THE COURT BELOW.

POINT V

THE COURT SHOULD HAVE GRANTED DEFENDANTS' MOTION TO DISMISS AS TO RESERVE OFFICER DOUGLAS.

ARGUMENT

POINT I

AN ANALYSIS OF THE POINTS SET FORTH IN APPELLANT'S BRIEF DISCLOSES NO MERIT THERETO AND A COMPLETE MISCONCEPTION OF THE FACTS AND THE LAW APPLICABLE TO THIS CASE, AND PLAINTIFF WAS LEGALLY ARRESTED BY DEFENDANTS AFTER AND ONLY AFTER HE HAD COMMITTED NOT ONLY ONE BUT SEVERAL MISDEMEANORS IN THE PRESENCE OF THE OFFICERS.

Plaintiff's brief sets forth nine points which we will now briefly discuss in the order in which those points are presented in the plaintiff's and appellant's brief.

Plaintiff's Point I

Plaintiff claims in this point that there is little dispute as to the actual facts concerning the false arrest and imprisonment count. An examination of the facts set forth above show that this is not so.

At the trial, plaintiff insistently attempted to put over the false notion that for some reason the Defendant Reserve Trainee Douglas was being instructed in how to perform arrests and that plaintiff was badly treated for the special benefit of Defendant Douglas. Nothing could be further from the truth. The Defendant Douglas was not an inexperienced recruit or anything like it. He had

completely finished his schooling as a reserve officer and had been graduated from his class March 25, 1958 (R. 325), although he was not actually sworn in as a reserve officer until April 16, 1958. Defendant Officer Lang expressly testified that they were not trying to give Douglas any lessons (R. 362) and that he was just along on a routine evening of police work. Officer Jacobson testified that Defendant Douglas had been along with him on many occasions (R. 410), and the attempt by plaintiff both at trial and in his brief to imply that there was any improper conduct for the benefit of Douglas is totally unwarranted.

Plaintiff states at Page 34 of his brief that he was not resentful and was willing to comply. As a matter of truth, from the very first time that the officers approached plaintiff in the lawful exercise of their duties, plaintiff was belligerent, surly, and interfered with their lawful inquiries as to what he was doing there and everything he did delayed and obstructed them (R. 379).

Plaintiff in his brief repeatedly states that he was forced to put his hands on top of the police car and was searched when such is not the fact. The truth of the matter is that before plaintiff was requested to sit in the back seat of the police car, he was briefly and quickly patted down for the purpose of seeing whether or not he was carrying any weapons (R. 323). Certainly there is nothing illegal about this procedure, and in view of the fact that a police officer in circumstances such as existed here can expect almost anything, common sense would dictate

that police officers exercise this elementary caution. There is absolutely no truth to the claim on Page 36 of plaintiff's brief that when plaintiff left the police car all he wanted to do was talk to the officers and try to convince them not to impound his car. The jury has found, as set forth in the statement of facts above, that the truth of the matter is that the plaintiff burst out of the police car at a high rate of speed and knocked against both Officers Jacobson and Lang in an apparent attempt to get in his car or to leave the area (R. 318).

Defendants do not dispute that an arrest for a misdemeanor can only be made upon a warrant or for an offense committed in the presence of the arresting officer. Certainly this is a correct statement of the law, and these defendant officers were fully aware of that fact. By attempting to insist over and over again that he was falsely arrested, plaintiff merely begs the question. The facts are that he committed several offenses directly in the presence of the officers and when he was placed under arrest in the rear seat of the police car he was specifically informed by Officer Jacobson that he was being placed under arrest and what for (R. 417).

The two primary offenses, besides the assault and battery upon the officers, and the attempted escape, were plaintiff's wilfull failure and refusal to display a registration card and resisting and obstructing the officers.

Plaintiff repeatedly failed and refused to produce the registration certificate to the defendant officers after the same had been requested from him and demanded

from him. Section 41-1-40 of the Utah Code Annotated, 1953, provides that the registration card shall at all times be carried either in the vehicle or upon the person driving or in control of such vehicle, "*Who shall display the same upon demand of a police officer or any officer or employee of the department.*" Section 41-1-142(K), Utah Code Annotated, 1953, makes it a misdemeanor for any person to violate the provisions of the aforementioned section. The city ordinances follow the statute identically. The record shows without question that Officer Jacobson repeatedly requested and demanded this registration certificate in connection with his overall attempt to ascertain plaintiff's connection with the automobile, and plaintiff persistently refused and failed to produce the same. In fact when he was finally arrested in the back seat of the police car, he still said absolutely nothing when Officer Jacobson told him that he was being placed under arrest for refusing to display the registration certificate, to identify himself, and refusing to give a legitimate business for being there at that time of night (R. 320, 417).

At every point in the proceedings, the plaintiff obviously wilfully resisted, delayed, and obstructed Officer Jacobson in violation of Section 76-28-54 Utah Code Annotated, 1953. This point will be discussed later in connection with plaintiff's Point II.

The Revised Ordinances, 1955, Salt Lake City, Utah, Section 32-1-52 define vagrancy. Sub-section 5 thereof states that every idle person is a vagrant and Section 6

thereunder provides that every person who wanders about the streets at late or unusual hours of the night without any visible or lawful business is a vagrant. It seems perfectly apparent that the officers had every right and duty to determine whether or not plaintiff was indeed idle upon the streets of Salt Lake City without any visible or lawful business, for he certainly appeared to be. Whether or not he actually was a vagrant is a little beside the point because the only way a police officer could tell whether or not a person had a lawful business or was idle would be to ask him and without becoming involved in the question of whether or not the plaintiff was under a duty to answer such a question, it certainly seems apparent that he had no right to reply that it was "None of the officers damn business." Perhaps the plaintiff might have said, "I stand on Constitutional grounds and refuse to answer," but he did not, and as we shall point out later, by his action and in his statements he obstructed and delayed Officer Jacobson in the exercise of what certainly was the officer's legitimate duty, namely to ascertain what business the plaintiff was up to at that late hour of the night in the extremely unusual and suspicious circumstances of sitting in a parked automobile with the lights out, the motor running, no keys in the ignition, and right next to a construction shed at the scene (R. 317, 435). If the plaintiff had made even the slightest effort to produce the registration to the automobile as he was under a duty to do, quite probably the entire incident would have ended here, and the plaintiff could have gone on his way. But the

plaintiff admitted himself (R. 197, 198) that he never even told the officer that he had a registration, that he never even told him his name, that he never even said I'm an army officer or a cab driver, and certainly by his own admissions alone and by the positive statements of defendant officers, he clearly committed an offense and misdemeanor in the presence of the officers by failing to produce the registration certificate, and this was not a minor or technical point. The way the situation was developing, Officer Jacobson had every reasonable right to begin to form the belief that perhaps this was a stolen car, and he certainly would have been derelict in his duty if he had not continued to investigate the situation.

The striking thing about this entire case and incident is the way the whole matter developed point by point solely and completely as a result of the defiant and belligerent attitude of the plaintiff and in his total refusal to produce his registration or say anything about it or state what he was doing in the area under those highly unusual circumstances. Therefore, it seems clear beyond any shadow of a doubt that before any struggle or scuffle whatever ensued, the Plaintiff Wendelboe was under lawful arrest in the back seat of that police car. Indeed, he himself stated that he submitted to being put in the car (R. 195) and was confined therein (R. 196), although he denied the final chance that Officer Jacobson gave him to produce his registration (R. 417). Certainly in view of these facts, there was no error in the Court's failure to grant plaintiff's requested Instruction No. 6 to instruct

the jury that in this connection plaintiff was falsely arrested.

Plaintiff's Point II

Plaintiff maintains that Instruction No. 7 is contrary to law. It is difficult to understand plaintiff's position on this Instruction. The Instruction follows the language identically of Section 41-1-40, Utah Code Annotated, 1953, which Section clearly requires that a person display and show the registration certificate to a police officer upon demand. Whether or not the registration is attached inside the vehicle or upon the person is not of particular importance. The vital point is that a police officer in the performance of his duty quite often must determine the connection a person in a vehicle has with the ownership of such vehicle. There is no need in this case to be concerned with any supposed inconsistency between Section 41-1-40 and Section 41-1-142 in connection with the point as to whether or not the registration must be attached inside the automobile or may be carried on the person, because the Salt Lake City Ordinance is clear and mandatory. The Revised Ordinances of Salt Lake City, Utah, 1955, in Title 46, designated the "Traffic Code," at Section 179 thereof provide that the registration certificate "*shall* at all times be carried in the vehicle to which it refers or shall be carried by the person driving or in control of such vehicle who shall display the same upon demand of a police officer."

Plaintiff then further makes the complete misstatement in Page 42 of his brief that the evidence is uncontra-

dicted that Mr. Wendelboe did not either fail or refuse to display his registration certificate. Nothing could be further from the truth; as we have already seen by appropriate citations to the record, Officer Jacobson repeatedly requested and demanded that plaintiff display the registration certificate; first when he was still in his automobile (and even the plaintiff doesn't deny this) (R. 195, 196), next outside the plaintiff's automobile, and finally in the back seat of the police car before Officer Jacobson stated to the plaintiff that he was under arrest (R. 320, 417), and in this connection note that when Officer Jacobson talked to Mr. Melvin Morris, the City Prosecutor, soon after the incident, Mr. Morris testified that at that time Officer Jacobson told him that plaintiff had failed to produce the registration (R. 449).

There can be no question at all in this case that the plaintiff absolutely failed and refused to display his registration certificate, and from his belligerent and defiant attitude and his refusal to say one word, particularly in the back seat of the police car, it is quite obvious that, either he had no intention of displaying the same, or what is more probably the truth, that in fact he had no registration certificate either on his person or in the vehicle, because Officer Jacobson never did see the registration certificate at any time (R. 256), and Officer Larry D. Lunnen who looked through plaintiff's wallet at the jail did not see or find plaintiff's registration certificate (R. 427). The omnibus penalty provision, Section 41-1-142, (K) thereof clearly makes it a misdemeanor for any person to violate any of the provisions of this Act, and

Section 41-1-40 is a provision of the Act referred to.

Plaintiff claims that the Instruction is contrary to law, argumentative, confusing and tends to comment on the evidence. 53 American Jurisprudence at Page 475, Section 602 states as follows :

“* * * it is generally not deemed to be an invasion of the province of the jury for the trial judge, in his discretion, in charging the jury to sum up the facts in the case or state the evidence. Instructions which are in the nature of a resume of the evidence and argument do not constitute reversible error unless so unfair to the appellant as to have prejudiced him in the eyes of the jury.”

In this case it was vital because of the nature of the law of arrest that the jury be able to determine at what time plaintiff was subject to lawful arrest or in other words at what point his conduct amounted to an offense or misdemeanor committed in the presence of the arresting officer because there is no dispute whatever that an officer, or any other person for that matter, arresting without a warrant for a misdemeanor must have the offense committed in his presence.

State v. Anselmo, 148 Pac. 1071 (46, Utah 137) decided by this Court in 1915 clearly states the law and the Court's duties on instructions when the law of arrest is involved. Under headnotes 5 and 6 at Page 1075 in the Pacific Reporter this Court states :

“The decisions of the Courts are practically unanimous that whether an officer was authorized to make an arrest, or whether the arrest was law-

ful or unlawful, when the facts are not in dispute, is a question of law for the Court. Where, however, the facts are in dispute and while the question on a given set of facts is still one of law, yet the jury must find the facts, and the Court charge them in specific terms under what state of particular facts, when found, an arrest is lawful or otherwise."

This is exactly what the Court did in Instruction No. 7 and also Instruction No. 17 to be discussed later, and it is submitted that unless instructions are framed this way, the jury could not possibly determine under contraverted facts whether or not the arrest was lawful.

Entirely apart from the fact that the plaintiff had been resisting and obstructing the officers in their lawful duty to investigate the unusual and suspicious circumstances of the plaintiff's presence at that time of night in his automobile parked with the lights off, motor running, and no keys in the ignition — there can be no dispute under the facts in this case that the plaintiff clearly failed and refused to display the registration certificate according to the mandate of the statute.

Plaintiff's Point III

Instruction No. 17 to which plaintiff objects is based upon the following statutes:

10-6-66 Utah Code Annotated, 1953, concerning powers and duties of police officers, and the Salt Lake City Ordinance which is identical, to wit: Revised Ordinances, 1955, Salt Lake City, 30-1-18.

Section 76-28-54 Utah Code Annotated, 1953, which is the state statute on resisting or obstructing officers.

Section 32-1-31 Revised Ordinances, 1955, Salt Lake City, Utah, which is the City Ordinance on interfering with an officer.

State v. Sandman, 4 Utah (2d) 69, 286 Pac. (2d), 1060.

Section 10-6-66, Utah Code Annotated, 1953, and the identical Salt Lake City Ordinance provide that it “*shall* be the duty of the police force in any city at *all* times to preserve the common peace, *prevent* crime, *detect* and arrest offenders, *** enforce every law relating to the oppression of offenses, and perform all duties enjoined upon them by ordinance.”

Section 10-6-67 Utah Code Annotated, 1953, says that police officers “*shall* have power and authority without process to arrest and take into custody any person who shall commit or threaten or attempt to commit in the presence of such officer, or within his vision, any breach of the peace or any offense directly prohibited by the laws of this state or by any ordinance.

It will be observed that both these statutes use the mandatory word “*shall*” have certain duties, etc., in connection with their description of the duties of police officers to prevent and detect crime; and the mandatory “*shall*” further states that police officers shall perform these duties at *all times*. Therefore, Instruction No. 17 wherein it states that police officers and the defendants

in this case had the positive and absolute duty to investigate any circumstances or situations, etc. does nothing more than set forth the mandatory direction of the statutes because the duty *is* positive and absolute and such duty must be performed at all times.

On the night in question, these police officers were engaged in performing that part of police work which occupies most of the working hours of any police officer. The solving of committed crimes and the arresting of persons who are actually committing a crime is but a small part of the police officer's duties when compared with the amount of time that he spends patrolling, investigating, detecting, and endeavoring to prevent crime. That is exactly what these police officers were doing in the early morning hours of April 6, 1958. They were patrolling a very bad area in Salt Lake, an area in which there had been recent outbreaks of serious crimes. To say that the automobile of the plaintiff parked at 3 A.M. in the morning near a construction tool shed on property under construction, with the lights out, the motor running, and no keys in the ignition, did not present a situation that these officers were under an absolute duty to investigate seems absurd. This automobile was parked in that fashion in a very bad area crimewise, but suppose the automobile had been parked anywhere else in Salt Lake City at that time of night under those circumstances—a residential area for example—certainly even then it would have been the absolute duty of these police officers to stop and investigate those circumstances in connection with their mandatory

duty to prevent and detect crime and at all times preserve the public peace. So when the Instruction sets forth that if the defendants had a *reasonable* suspicion upon *reasonable* grounds whatever that plaintiff sitting in the parked automobile in question as appears from the evidence (and this part of the evidence is not in dispute or denied even by plaintiff) might be committing any offense or might be about to commit any offense, and states that the defendants had the power and the authority and the absolute duty to approach the plaintiff and ask him what he was doing at that time and place, said Instruction correctly states the law. That is the only possible way that the officers could determine whether or not the plaintiff was or was not idle upon the streets of Salt Lake City at late and unusual hours of the night without any apparent or lawful business. To argue whether the plaintiff was or was not a vagrant at that time, more or less begs the question. A very interesting and pertinent case on this point is one by the Supreme Court of Washington under a vagrancy statute identical with the vagrancy statute of the state of Utah and Salt Lake City, Utah. That decision is:

State v. Grenz, 175 Pac. (2d) 633. The Court states on Page 637 of the Pacific Reporter the following:

“A continuous or habitual wandering about the streets at late or unusual hours of the night is not required to constitute vagrancy as here charged. The obvious intent of the legislature in enacting subdivision 8 of the vagrancy statute was to enable law enforcement officers to keep the streets clear, at late and unusual hours of the night, of those persons who, by reason of being

bent upon serious mischief, theft, or burglary, have no visible or lawful business or mission in the locality.”

Corpus Juris Secundum Volume 91 at Page 783 states the following:

“On the other hand, when one’s wandering and conduct on the streets at a late or unusual hour is such as to give reasonable grounds for the belief that his purpose in being on the street is not a legitimate one, the law may validly require that he be called on to account for his actions and may deem his failure to give a good account as proof that his purpose on the street is not a legitimate one.”

The only possible way a police officer could ever determine whether a person apparently idle upon the streets at late and unusual hours has lawful business is to ask him, and it seems to us that it is no burden whatsoever and violates and infringes on no Constitutional right whatever to require a citizen who might find himself in such circumstances to decently inform the police officer just what his business was there at that time and place. It would be a fine state of affairs if every potential burglar or other person observed upon the streets of Salt Lake City at late and unusual hours of the night under highly suspicious circumstances could tell the police officer that it was “None of their damn business what they were doing there.” This plaintiff was determined to resist and obstruct and delay these officers in the exercise of their lawful duties from the very first time that he was approached by Officer Jacobson. In the first place he didn’t even answer the request of Officer Jacobson for his

driver's license, merely handed him the temporary permit (R. 254). In the second place, he deliberately flipped past the army identification card that Officer Jacobson had noticed and asked to see (R. 311) without saying a word. In the third place, he did not produce his registration card, and in the fourth place after Officer Jacobson directed him to step out of his automobile and asked him what he was doing there at that time and place, the plaintiff defiantly answered, "It is none of your damn business," (R. 257, 329, and 354). This conduct it is obvious was wilful. The provisions of 76-28-54 provide as follows:

"Every person who wilfully resists, delays, or obstructs any public officer in discharging or attempting to discharge any duty of his office shall be punished by a fine of \$1,000.00 or by an imprisonment in the County Jail not exceeding one year or by both."

The plaintiff in those circumstances certainly could have been a vagrant. Any reasonable person might have expected him of that, let alone a police officer. He might have been a lookout assisting some other person bent on mischief at the service station under construction or the Grand Central Store next door, and an officer who is under a positive and mandatory duty to prevent crime and detect crime who failed to investigate such a situation would certainly be derelict in his duties in the extreme. The 1949 edition of Webster's New Collegiate Dictionary based on Webster's New International Dictionary Second Edition says that "detect" means to uncover or reveal or to discover the existence or presence

or fact of something hidden or obscure, and if police officers have a duty to detect crime they certainly have a right and a positive duty to uncover, reveal, or discover the existence or presence of any fact which might show that a public offense of any kind was being committed or was about to be committed, and that is exactly what Instruction No. 17 told the jury. The Instruction does not give the officers any blank check or "Gestapo" techniques. It very expressly says that ⁵the circumstances *must* be *reasonably* suspicious or unusual or the circumstances *must* suggest to them a *reasonable* possibility that a public offense was being committed before they can investigate. The claim that this Instruction is contrary to the Bill of Rights and could conceivably be the orders to a "Gestapo" unit in a police state is completely ridiculous. In the first place, this jury under the Instruction decided whether or not the officers' investigation was reasonable under the circumstances of the case. What greater safeguard could any person anywhere have against "Gestapo" police than a requirement that a jury of his peers minutely examine every action of the officers through four full days of trial and then determine whether the initial investigation itself was reasonable under the circumstances. Instruction No. 17 does no more than this. The Instruction further states that no person has any right whatsoever to resist, interfere with, obstruct or delay a police officer, and this language is taken identically from the statute. The Instruction then states that if such a person *wilfully* does or says anything which resists, interferes with, delays

or obstructs a police officer in the legal exercise of his duties then such person is guilty of a crime and a public offense. We have already seen from the citation to *State vs. Anselmo supra* at 148 Pac. 1075, that this type of an Instruction which sets forth the facts which constitute an offense is proper.

This is not a case where officers took a person into custody to investigate him. This is not a case where a person was searched or arrested before any offense was committed. This is a case wherein the plaintiff placed himself in highly suspicious and unusual circumstances late at night and then wilfully obstructed, resisted, and delayed police officers performing their duty, violated the registration law, swore at the officers, assaulted them, and finally ended up in jail where he belonged.

The claim that he stopped to buy a paper seems completely ridiculous since the evidence is clear that he was parked some 70 feet south from the place where the newspaper stand was (R. 253, 310), and also in view of the fact that he had already bought himself one paper earlier in the evening (R. 167), and also in view of the fact that there was a paper stand right outside the door of the place where he worked (R. 166 et. seq., 169, 221.), and particularly in view of the fact that he never mentioned the newspaper story according to Officer Jacobson or anyone else until he was down at the hospital. (R. 434).

At 48 American Law Reports Annotated, Page 746, there is a very interesting annotation on what constitutes the offense of obstructing or resisting an officer. The

American Law Reports Blue Book of supplemental decisions discloses that no less than 70 cases have been decided since the original annotation. Among those cases cited is the Utah case of *State vs. Sandman*, 4 Utah (2d) 69, 286 Pac. 1060. Respondents have read every one of those cases therein cited, and none of those cases is as pertinent or as clearly reasoned in connection with the problem here under consideration as the case of *State vs. Sandman* decided by this Court in 1955. The Court says that the elements of resisting and obstructing are as follows:

A. *A duly constituted public officer.* Of this element there can be no question in this case.

B. *Engaged in the performance of an official duty.* It should certainly be clear beyond doubt that the defendants were engaged in the performance and official duties in stopping and investigating and looking into the circumstances presented by the plaintiff in his automobile on Fifth East near Second South on the night in question.

C. *Was obstructed or resisted by the person in question.* Decisions dealing directly with the law applying to an officer when he is investigating and performing his duty before any crime may have actually been committed are rare, and this is a surprising thing because as we have seen, most police work, in the point of time spent at least, involves this very process. This Court in a clear and far reaching statement of the law cuts through

much confusion and obscurity on this point and states simply and clearly as follows :

“Such interference or resistance need not be in the form of physical force or violence, but it is sufficient that there be some direct action amounting to affirmative interference,” and this is exactly what Instruction No. 17 informed the jury that they must find against the plaintiff before they could find that he committed an offense when the Instruction says that if he *wilfully* resists, interferes with, delays or obstructs a police officer in the legal exercise of his duties, then such person at that moment by such statement or conduct itself is guilty of a crime and public offense. On the facts of this case, it seems clear beyond dispute that the plaintiff was surly, belligerent, defiant, and obstructed, delayed, and resisted these officers at every point in the entire incident from the time they first made the lawful request and inquiry with respect to his registration and his business there until the time that he attempted to break from lawful custody and committed an assault and battery on the officers and continuously through the entire evening right up through the booking process at the jail. There was no excuse or rhyme or reason for the plaintiff’s conduct and affirmative actions and statements in this case unless he was in fact trying to actually cover up some illegal activity that he was engaged in.

Plaintiff’s Point IV

Plaintiff states on Page 51 of his brief that it appears from the evidence that he was unmercifully beaten. This

statement is so completely untrue that respondents will discuss the matter under their own Point II at Page 36 in this brief.

Plaintiff further complains of Instruction No. 8 and insists that the Court should have directed a verdict on the cause of action for assault and battery for the plaintiff. The entire basis for this argument seems to be the assumption by plaintiff that he was not lawfully arrested. Respondents' position on this matter has already been stated in this brief. If we assume that the plaintiff was lawfully under arrest in the back seat of the police car before the altercation ever started, then certainly the only question left to consider is whether or not plaintiff attempted to remove himself from this custody and forcibly enter the automobile and leave the area, and if he did make such an attempt, whether reasonable force under the circumstances was used by the respondent officers to prevent him from so doing.

There certainly can be no question from the evidence in this case that plaintiff came out of the police car at a high rate of speed and knocked or pushed both officers aside in an apparent attempt to enter his automobile and leave the area (R. 273, 334, 339, and 318). There was nothing the officers could do under the circumstances except to stop him, and Instruction No. 8 fairly and adequately informed the jury that the amount of force and restraint used must be only the degree of force that the officers believe they had reasonable grounds for using and that amount of force that appeared necessary

to these defendants. The first blow struck by Officer Jacobson was not struck until after both he and Officer Lang had a hold of each arm of the plaintiff and were leading him back to the car and the plaintiff broke loose (R. 275), and this blow was certainly not very severe because it had no apparent effect on the plaintiff whatsoever and only seemed to rile him more (R. 276). Then Officer Jacobson managed to get a handcuff on one arm (R. 278), and plaintiff broke that arm free and in swinging and flailing it about cut Officer Jacobson quite a little bit (R. 463), and then and only then did Officer Lang hit him with the flashlight (R. 279). These blows were not severe or brutal and were not intended to injure plaintiff (R. 380). The minute both handcuffs were secured to the plaintiff's arms, all physical activity against him ceased (R. 381). As we will demonstrate under our own Point II, the plaintiff was not severely injured at all, and the truth of the matter is that these officers had no intention or design to injure the plaintiff and actually did a very good job of placing an extremely violent and powerful man under control without hurting him.

Plaintiff's Point V

This point in regard to the malicious prosecution cause of action will be discussed under respondents' Point III at Page 38 of this brief.

Plaintiff's Point VI

All the defendant officers were expressly charged with malice and punitive damages were sought. There-

fore, it certainly was permissible to show what was actually in their minds and what their frame of mind was on the night in question. The fact that they were patrolling an extremely dangerous area and were under specific instructions to completely check every suspicious situation (R. 403) certainly would be highly material and relevant on the question of malice, and, therefore, the evidence of Chief Skousen in this respect was permissible and proper in every sense. See also the comments of the Court below on this point at R. 401.

Plaintiff's Point VII

Throughout the trial plaintiff's attorney persistently and flagrantly in express violation of repeated rulings by the trial Court attempted to read from certain records and reports made by the police officers in connection with their departmental reports about the incident. The proper use of these documents as a basis of cross-examination and impeachment is not doubted, but they were not used for that purpose by plaintiff. Plaintiff's counsel persisted in an attempt to capitalize on certain grammatical errors or stilted language used in the reports by the defendants and to ridicule their ability to write. The conduct of plaintiff's counsel in persisting in these tactics throughout the trial was clearly improper, and he was able, in the judgment of attorney for respondents, to successfully convey to the jury the notion that perhaps there was something in those reports that defendants were trying to hide. Therefore, Officer Jacobson's primary report "Exhibit 20" and Officer Lang's

report "Exhibit 22" were admitted by respondents withdrawing their objections to the previous offerings. (R. 305, R. 376). It is submitted and perfectly apparent from all the reports that there is no material variance whatever in the information given in the officers' reports from their evidence at the trial.

The booking sheet "Exhibit 23" was simply the booking officers's version of what had been said to him by defendant officers and in no sense constituted any statement by them which was admissible for any purpose in this lawsuit and was properly excluded by the Court. Exhibits 19 and 21 which were not admitted by the Court, are merely written reports originally submitted by the officers as departmental record and do not purport to set forth the full and complete details of what occurred — they are secondary evidence and were not admissible under any theory propounded by plaintiff.

A reading of Rule 43(b) shows that there was no irregularity in defendants cross-examination by their own counsel after they had been called by plaintiff. The rule expressly authorizes such cross-examination — and in any event no unfair advantage was taken of plaintiff.

Plaintiff's Point VIII

Plaintiff complains that the Court's conduct was prejudicial to him. Nothing could more clearly illustrate the belligerent disposition of the plaintiff than his conduct at his own trial. The truth of the matter is that the trial judge exhibited patience almost beyond belief before

he finally was forced to reprimand the plaintiff. The plaintiff was determined in this case to sound off and volunteer his own statements regardless of what questions were asked him and regardless of admonitions from the Court. No less than seventeen times during the course of the trial it was necessary for the Court to instruct the plaintiff to stop volunteering answers and to confine himself to the questions asked (R. 112, 114, 119, 123, 128, 129, 134, 135, 138, 139, 141, 143, 169, 170, 202, 210, 211). At R. 143, the plaintiff in a very insolent tone argued with the Court and told the Court that he was trying to be helpful. At R. 211 the Court finally administered the reprimand to the plaintiff that is complained of in plaintiff's brief. It is impossible to tell from the printed record exactly what the tone of voice was that was being used, but the Court's reporter from the top of R. 211 to the bottom of R. 211 did a remarkable job of reporting because what really happened was that the Court began to reprimand and instruct the plaintiff, and all the answers as shown at R. 211 by plaintiff were out and out interruptions of the Court's statements. The Court was attempting to make a statement and an instruction and a reprimand to plaintiff, and plaintiff in a rude and belligerent fashion kept butting in to the remarks that the Court was making. Plaintiff was lucky that he didn't get punished for contempt as a result of this incident.

There is little need to cite extensive authority for the proposition that the trial Court is certainly entitled, indeed has a duty, to keep the proceedings in his Court

orderly and to keep witnesses within proper bounds. The trial Court was well within his bounds of discretion in this incident, and the attempt on the part of plaintiff to now capitalize on his own misbehavior is typical of his conduct in the entire lawsuit. At 53 American Jurisprudence under the heading TRIAL at Section 74 found at Page 73 of said volume there is an excellent discussion relating to the conduct of the judge at trial. Section 81 at Page 79 of said volume deals with the conduct of the Court toward witnesses. The authorities there discussed show that without question the Court was entirely justified in his reprimand to the plaintiff. It was not even necessary for the Court to make the comments to the jury with respect to the incident that he did at R. 298, 299, but the trial Court wanted to be completely fair to the plaintiff, and, therefore, made these remarks.

Plaintiff's Point IX

The matter of the defendants' judgment for attorney's fees against the plaintiff will be discussed in respondents' Point IV at Page 41 of this brief.

POINT II

PLAINTIFF DID NOT RECEIVE A SEVERE BEATING OR ANYTHING APPROACHING IT AND WAS ONLY SUPERFICIALLY INJURED IN THE LAWFUL EFFORTS OF THE DEFENDANT OFFICERS TO RETAIN HIM IN CUSTODY.

Dr. Marshall S. Decker, the obstetrician who examined and treated the plaintiff, testified (R. 183) that he examined and treated the plaintiff on the 6th day of April, 1958. He testified that the plaintiff had bruises on the

shoulders, under the left armpit, over the right loin, and over the sacroiliac region (R. 184). Plaintiff within a day or two after the incident had large photographs taken of himself purporting to illustrate his tremendous injury, and these photographs were introduced as "Exhibits 2, 3, 4, 5, 6, and 7." The bruises mentioned by the doctor do not appear in these photographs. Since the plaintiff had large photographs taken of apparently every scratch he could find on him, it seems fair to assume that if these bruises had amounted to anything, he would have had pictures taken of them. However, be that as it may, the bruises are not shown in the photographs. The doctor further testified that there were abrasions and lacerations around the ankles and on both knees and kneecaps. The "wound" on the left ankle is shown on "Exhibit 5," and "Exhibits 4 and 7" show the ankle wounds on the right ankle. The damage to the knees and the kneecaps is not shown. The doctor testified that he found only two incisive wounds as opposed to abrasive wounds on the head of plaintiff (R. 185), and at R. 187 he said that those wounds appeared to be the same wounds as shown on plaintiff's "Exhibit 2" and also testified that the plaintiff had a bruise on the upper lid of his eye. This is shown on plaintiff's "Exhibit 3." Plaintiff's "Exhibit 6" presumably shows the rest of the head wounds that he received from what has been characterized in his brief from an unmerciful and brutal beating. We submit these photographs to the Court for examination without further comment on the severity of these wounds.

The doctor also testified that he thought the plaintiff's nose was broken and that it should be x-rayed to determine that, (R. 185). Plaintiff's "Exhibits 3 and 6" taken a day or two after the incident illustrate his nose. The appearance of the plaintiff's nose at the trial did not appear one bit different than it does in these photographs, and the jury must certainly have observed that fact. The plaintiff testified that his nose was indeed broken and that it was set at the Veterans Hospital, but he produced no x-rays and no witnesses whatsoever to testify to or verify this treatment. It would seem that if his nose had indeed been broken or (deviated) that this was his most serious physical damage, and if the proof was available it should have been presented. However, there was no evidence at all introduced by the plaintiff other than the observations of Dr. Decker without benefit of x-rays. Plaintiff did not submit any evidence of medical expenses and claimed no item of special damages in this connection.

POINT III

AS A MATTER OF LAW THE THIRD CAUSE OF ACTION FOR MALICIOUS PROSECUTION SHOULD NOT LIE AGAINST THE DEFENDANTS IN THIS CASE, AND IN ANY EVENT, THE FACTS AND EVIDENCE PRODUCED BY DEFENDANTS AT THE TRIAL CLEARLY ESTABLISHED A DEFENSE TO ANY SUCH CAUSE OF ACTION, AND THE COURT'S INSTRUCTIONS WERE NOT ERRONEOUS.

At the close of the plaintiff's evidence in the trial (R. 394) defendants made a motion to the Court to dismiss the plaintiff's third cause of action for malicious

prosecution on the ground that the action was not maintainable against the defendant police officers as a matter of law. At 28 A.L.R. (2d) Page 646 there appears the recent and latest annotation on the question of the civil liability of law enforcement officers for malicious prosecution. This is an excellent annotation, and it shows without question that the doctrine of immunity from suit is being extended to law enforcement officers in the various states whenever the question directly arises. The annotation discusses at length the pros and cons on the proposition of immunity. The prime case which heads the annotation is *White v. Towers*, 37 California (2d) 727, 235 Pac. (2d) 209; 28 A.L.R. (2d) 636. This is an excellent case, and we submit that this is a matter of first impression in this Court, and the Court should follow the California view in accordance with the majority view as set forth in the annotation. See in particular Sub-paragraph 2 of the annotation at Page 649. The California Court says, at Page 640 under headnote 3 in the A.L.R. citation, the following:

“We are aware of the fact that in thus surrounding peace officers with immunity in cases of this sort, hardship may result to some individuals. However, experience has shown that the common good is best served by permitting law enforcement officers to perform their assigned tasks without fear of being called to account in a civil action for alleged malicious prosecution. The doctrine of immunity from liability for allegedly malicious acts has long been established with respect to numerous public officers. In the early case of *Bradley v. Fisher*, 13 Wall 335, 20 L. Ed. 646, the

doctrine was applied to judges of courts of record. "The rule finds its genesis in the necessary protection of courts in the impartial, uninfluenced discharge of judicial duties.' Phelps v. Dawson, supra, 8 Cir., 97 F2d 339, 340, 116 ALR 1343. Since that time it has been recognized that the orderly administration of the affairs of government necessitates the inclusion of many officials within the cloak of immunity." (Cites cases)

Respondents submit that this Court should determine in this case that malicious prosecution suits do not and should not lie against law enforcement officers. Even in the event that this Court does not see fit to adopt the California and the majority rule, the facts and evidence produced by defendants at the trial clearly established a defense to any such cause of action, and the court's instructions to the jury on this cause were not in error.

Plaintiff complains of Instruction Nos. 18, 19, and 21. These Instructions are all based on the restatement on the Law of Torts in the volume containing Sections 504-756 and entitled "Torts Absolute Liability, Deceit, Defamation, Disparagement, Unjustifiable Litigation, etc." Instruction No. 18 is supported by the restatement discussion under Section 657, comment (a) and (b) at Page 393 of said restatement volume. Instruction No. 19 is based on Sections 662 and 665 of the said restatement volume, and Instruction No. 21 is based on Section 653. These restatement principles are not in conflict with any of the Utah cases cited, and the evidence is clear that none of the defendants except Jacobson ever instituted any proceedings before anyone, either by way of signing a

complaint or procuring a complaint or even discussing the matter with any prosecuting authority. Officer Jacobson took the responsibility for signing complaints. Officer Jacobson did sign a complaint charging plaintiff with assault, a complaint charging him with battery (R. 238) and with the offense of resisting and obstructing (R. 445). Officer Jacobson did not have anything to do with the filing of any drunk or vagrancy charges.

The testimony of Mr. Melvin H. Morris, the City Prosecutor, clearly establishes that Officer Jacobson made a full and fair disclosure of all the facts of the incident, and Prosecutor Morris felt that the complaints were justified and recommended them (R. 444, 446, 448, et. seq.). In all events there could have been no possible prejudice to plaintiff on the malicious prosecution act because as the Court told the jury in Instruction No. 18 that if the plaintiff actually did commit the offenses charged against him by the defendants then such a finding would be a complete defense and this, of course, is the law everywhere and is followed by the Restatement of Torts, Section 657.

POINT IV

THE AWARD OF ATTORNEY'S FEES TO THE DEFENDANTS IS NOT SUFFICIENT UNDER THE EVIDENCE PRESENTED AND IN VIEW OF THE APPLICABLE LAW APPLIED BY THE COURT BELOW.

78-11-10 Utah Code Annotated, 1953, provides as follows:

* * * "In the event judgment in the said cause shall be against the plaintiff for the pay-

ment to the defendant of all costs and expenses that may be awarded against such plaintiff including a reasonable attorney's fee to be fixed by the Court."

In the Court's judgment for attorney's fees found at R. 98, the Court said that in view of the apparent financial circumstances on both sides in the action, the Court was of the opinion that it should hold the awarding of attorney's fees to a minimum and that the judgment should be based upon such consideration rather than on what attorney's fees should be if the Court considered the actual, reasonable value of attorney's services rendered in the case. It is submitted that the statute does not lend itself to this interpretation. It should be construed to the effect that attorney's fees shall be reasonable and just according to what such services were worth.

The evidence on attorney's fees (R. 94-98) shows that a minimum time of 26 hours were spent by attorney for defendants in interviewing witnesses in preparation for trial and that 45 hours were devoted to researching the law on the case as it applied to the 3 causes of action and their intertwining nature. The evidence was that \$25.00 an hour was the usual charge of said attorney for this work, but in this case \$20.00 an hour was all that was being requested. The evidence further showed that pre-trial hearing was held and in the opinion of the attorney \$75.00 was a reasonable amount for that hearing. The evidence further showed that the trial of the case consumed four actual days in trial and one full day on Sunday in the middle of the trial reviewing transcripts

with the court reporter and finishing work on instructions. The recommended average fee schedule of the County Bar Association states that a reasonable fee for trial is \$200.00 per day. Defendants' attorney requested only \$150.00 a day from the Court. Finally the evidence of defendants was that in view of the total time spent, length of the trial, and result achieved, \$2700.00 was a reasonable attorney's fee.

It is submitted that plaintiff's entire lawsuit was completely unjustified, that he was clearly in the wrong, that he forced the officers into a position where they were required to defend an expensive and lengthy trial, and there is no basis for giving any special consideration to the plaintiff in view of the provisions of 78-11-10. It is further submitted that this Court should increase the award of attorney's fees to \$2700.00 and make an additional award for a reasonable fee to the defendants in connection with this appeal.

POINT V

THE COURT SHOULD HAVE GRANTED DEFENDANTS' MOTION TO DISMISS AS TO RESERVE OFFICER DOUGLAS.

At the close of the plaintiff's case, Defendant Douglas (R. 394) moved the Court to grant a judgment of dismissal upon the grounds that said defendant took no part and engaged in no assault or battery upon the plaintiff, made no arrest or imprisonment of the plaintiff and participated in no manner which would result in any liability against him and upon the further ground that it appeared

that he at all times was acting pursuant to the instructions and directions of a duly authorized police officer of Salt Lake City who was his superior officer at all times pertinent.

It is submitted to the Court that this position is well taken. Defendant Douglas was a reserve officer in training. He was under the direct supervision and control of Officer Jacobson who was his superior officer in charge (R. 402, 410).

Plaintiff maintains that because Douglas was present and would have been willing to assist the officers that he was, therefore, aiding and abetting. It is submitted that in view of the relationship between Douglas and his superior officer and his duties in connection therewith, that such a doctrine should not be applicable to defendant Douglas, and the Court below should have granted the Motion to Dismiss with respect to him.

CONCLUSION

Plaintiff in this case had a full, fair trial. The trial itself lasted four days. Plaintiff had every opportunity and indeed took every opportunity to give his side of the story. The jury chose to accept the officers' version of the story. The jury had the best opportunity to listen to and observe the parties and decide where the truth and the justice of the case lay. They emphatically decided against the plaintiff, and plaintiff has not suggested any valid reasons why these defendant police officers should be forced to go back into Court and submit to additional

lengthy and expensive litigation. The defendants in this case were excellent police officers. Under the facts and circumstances of this case, it is hard to see what other course of action they could have pursued other than the one they did. The plaintiff was determined to make trouble and give them a bad time. Because of his actions and conduct, one thing led to another until the entire situation became quite serious. The offenses committed by the plaintiff on that night were serious and unjustified. There was no excuse for the way he acted and for the the things he did, and he in no way conducted himself as a decent and responsible citizen on that evening. It would be a tremendous injustice if this Court were to disturb the judgment of the Court and jury below and permit plaintiff to continue this unjustifiable litigation.

Respectfully submitted,

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