

1960

## Lowell Potter v. Utah-Drive-Ur-Self System, Inc. and V. H. Anderson : Brief of Appellant

Utah Supreme Court

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Irving H. Biele; Attorney for Defendants and Appellants;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

JUN 27 1960

LOWELL POTTER,

*Plaintiff,*

vs.

UTAH-DRIVE-UR-SELF SYSTEM,  
INC., a corportion of Utah, and  
V. H. ANDERSON,

*Defendants.*

Chief, Supreme Court, Utah

Case No.

~~120359~~ 9 2 2 8

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BRIEF OF APPELLANT

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IRVING H. BIELE

*Attorney for Defendants  
and Appellants*

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of the  
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*Defendants.*

Case No.

120359

BRIEF OF APPELLANT

STATEMENT OF FACTS

On February 2, 1959, the Plaintiff attended the Defendant's place of business and rented an automobile. At the time of rental a contract covering the rental was executed by the Plaintiff and one copy retained by him. (Exhibit 3, Exhibit 8, R-5 line 21 and R-7 line 21)

Under the terms of the contract the Plaintiff agreed to return the vehicle rented the same day and a deposit commensurate with this period of use was received by the Defendant. (R-19, R-20, R-41)

In violation of the provisions of paragraph two (2) on the reverse side of the Rental Agreement (Exhibit 3, Exhibit 8) the Plaintiff did not return the vehicle on the agreed date but retained the same until February 10, 1959 (R-48, R-49). The Defendant commenced an investigation on February 4, 1959 (R-44), and checked with the Salt Lake City Police Department, the Salt Lake County Sheriff's office, telephone directory and city directory, and through each source was unable to locate the Plaintiff or the vehicle. (R-45 through 47, R-10, R-11)

The Defendant attended the County Attorney's office and made a complete disclosure of facts on February 6, 1959 (R-11, R 60, R-47). The County Attorney advised Defendant to wait a few days to see if the vehicle would be returned. (R-34, R-47). The police officer was directed to make a further search and return at a later date. (R-35) The Defendant and the police officer returned to the County Attorney's office on February 9, and the police officer represented that he had made a further search but he could find neither the house nor the automobile, (R-35, R-56) whereupon the County Attorney advised them of other facts within his knowledge and directed the Defendant to sign the Criminal Complaint. (R-36, R-37, R-63, R-64) There is no evidence that the Defendants had any knowledge relative to the Plaintiff that they did not communicate to the County Attorney. There is no evidence of any misrepresentation of fact

in relation to the disclosures to the County Attorney. The Defendant asked the County Attorney if a crime had been committed and the County Attorney advised him that a crime had been committed and recommended the issuance of the Complaint (R-12, R-35, R-66). The chronological sequence of events as shown by the testimonies, affidavits and records is as follows:

Max Miner, Agent for the Defendant. (R-40)

“Q. Did you deliver the Exhibit 3 to Mr. Potter at the time of execution?

A. Yes, I did.”

The Plaintiff, Mr. Potter testified as follows:

“Q. Did this conversation that you are talking about lead up to the execution of this rental agreement, this proposed Exhibit 3? (R 7)

A. Yes, sir.”

The Defendant V. A. Anderson testified as follows:

“Q. Did you make any investigation in relation to this rental? (R-44)

A. Yes, A lot of them

\* \* \*

Q. And then on the 4th what investigation did you make?

A. I called the police department to see if they had any record there. I called the driver's license division at the State Capitol. They had a license issue to Mr. Potter. I think it was 254 Union Avenue they showed. I went to the Sheriff's office to see if they had any information on this thing and one place would lead me to another and — (R-45)

Q. Did you try telephoning?

A. Yes.

Q. Were you successful?

A. Not in locating Mr. Potter.

Q. Did you find a listing?

A. No.

Q. Did you try the City Directory?

A. I tried the City Directory and telephone information.

Q. Were you able to locate the party in either of those?

A. The City Directory gave Mrs. Potter as an employee of Harmon's Cafe.

Q. At what address, do you recall?

A. At about 3900 South State.

\* \* \*

Q. What is your next source of inquiry after not being able to locate by the City Directory or Telephone Directory?

A. I asked the police department to put out an order to locate, just to locate the car, and find where it was so we could get in touch with them.

Q. Were you ever informed that that car was located?

A. No. They were unsuccessful.

Q. Did you make any inquiries through the Sheiff's office? (R-46)

A. Yes.

Q. And who did you direct your inquiries to at the Sheriff's office?

A. To Officer Mander. (Tohmander)

Q. And what date would that approximately have been?

A. Well I think that would have been approximately the 6th of February.

Q. And what did you ask the Sheriff's office to do?



MR. DUNCAN: Just a minute. I object to any hearsay testimony.

THE COURT: The objection will be overruled. I don't think that is hearsay. You may proceed.

A. I asked if they had a deputy in that area and if they would be kind enough to have him stop by this address and if they could locate either the car or Mr. Potter to ask him to come in; that he was late, and that we would like to know when he expected to bring the car back and pay the rental up.

Q. Did you receive a report from the Sheriff's office?

A. Yes. They were unable —

\* \* \*

Q. What was the report that you received from the Sheriff's office?

A. They said they were unable to locate the address or Mr. Potter or the car. (R-47)

Q. And who made that report to you?

A. Officer Tohmander.

Q. Did you contact anybody in the Salt Lake City police office, the police department?

A. Yes, I had done that a day or so before and I at that time contacted Officer Stroud and asked him if he got out that way to see if he could locate it.

Q. Do you know whether or not Officer Stroud made an investigation?

A. Yes, he did.

Q. Did you contact the office of the County Attorney?

A. Yes. When Officer Stroud came back and said he couldn't find the address or the car or Mr.

Potter, I asked if he would mind going over to the County Attorney's office with me and see if they thought a complaint should be signed.

Q. And who did you see in the County Attorney's office?

A. Mr. Mark Miner.

Q. And what did you tell Mr. Miner?

A. We told him just about exactly as I have told the court here now.

Q. Is there anything that you have told the court at this point that you did not tell Mr. Miner?

A. No. No, I told Mr. Miner everything I knew.

Q. Was a complaint issued at that time?

A. No. He said he thought we had better wait a few days and see if the car didn't show up.

Q. All right. When did you next attend the County Attorney's office? (R-48)

A. About three or four days after that.

Q. And who was with you at that time, was anyone?

A. Officer Stroud.

Q. Officer Stroud was with you?

A. Yes. . . .

\* \* \*

Q. And who did you see in the County Attorney's office?

A. Mr. Miner.

Q. And did you make any further report to Mr. Miner?

A. Just to the effect that the car had not been located nor had Mr. Potter been located, nor had we been able to locate the address and we hadn't been able to locate neither Mr. Potter or the car or the address and would he advise issuing the complaint?

Q. And did he so advise?

A. Yes. He said he thought it should be done.

Q. Did you thereupon sign a complaint?

A. Yes.

Q. Did you make any other telephone calls trying to locate this party?

A. Yes. I didn't stop attempting by phone and one leading to another I finally located Mrs. Potter's mother.

Q. And about what day would that be?

A. Well that was late the night before Mr. Potter brought the car in.

THE COURT: And after the complaint was issued?

A. Yes."

\* \* \*

"Q. Now you mentioned you noted in the City Directory that Mr. Potter's wife was employed by Harmons? (R-49)

A. Yes.

Q. Did you check with Harmons Cafe?

A. I did by phone.

Q. And did you receive a report from them?

A. Just to this effect that they didn't have any idea where she was at or where either she or he could be located.

Q. Did they say whether he or she was employed by them?

A. She was not employed by them.

\* \* \*

Q. Now did you go to 256 Union Avenue?  
(R-50)

A. No, I didn't.

Q. Did you at any rate find 256 Union Avenue?

A. No.

Q. You didn't ever go down there?

A. No.

Q. You didn't ever go down to Midvale, did you?

A. No, I didn't.

Q. Well isn't it a fact that you went down there and tried to locate that car and tried to locate that 254 Union Avenue?

A. No.

Q. You didn't do that? (R-51)

A. No.

Q. And your testimony now is if Mr. Miner said that that is not true, isn't that right?

A. No. I asked Mr. Miner about 256.

Q. You didn't say anything about that?

A. I got the report from the police and the Sheriff.

Q. But you didn't do anything yourself about that address, is that right?

A. Nothing except what was given to me by them.

Q. You didn't go out to Midvale at any time to try to locate that address yourself?

A. No."

Salt Lake Sheriff Superintendent Deputy Weston Tohmander testified as follows:

"Q. And what is your position in the Salt Lake County Sheriff's office? (R-51)

A. Superintendent Deputy. I have charge of the record of cars and accidents and traffic. . . .

Q. During that period did you receive any inquiry from a Mr. Vern Anderson who you have

just seen testify? (R-52)

A. I did.

Q. Would you have any note or memoranda in your possession that would indicate that?

A. Yes, I have.

Q. Would you please refer to it?

A. This is a report of a car, a '59 Chev, four door sedan, hard top, license number EH 5904.

Q. Now can you, by referring to that form, tell me when you first had contact with Mr. Anderson?

A. On the 9th is the report from the Salt Lake City Police Department. My contact here, a note on the back I have here that first contact with Vernon Anderson.

Q. All right, will you please tell me what your note states?

A. This is the car which we attempted to locate for Vern Anderson, Hertz Driv-Ur-Self or advise the driver, Lowell Potter, 256 Union Avenue. This was February 5, 1959.

Q. That was on February 5th that you had the inquiry apparently made at your office, is that right?

A. Yes, that's right. (R-53)

Q. Now is this your handwriting on the back, sir?

A. Yes, sir.

Q. That is made about the time you got the report or the form, is that true?

A. Yes, sir.

Q. And did you make a report to Mr. Anderson?

A. Yes.

Q. And when was that report made?

A. On the 6th, this notation here, the 6th of February, 1959 Car 12 is the car in the Midvale area, reports no such address nor any of the neighbors have every heard of such a person. Mr. Anderson was advised.

Q. You had advised Mr. Anderson of it?

A. I signed it, yes, sir.

Q. And that would be on about the 6th?

A. Yes, sir, February 6th.

Q. I have no further questions."

Salt Lake City Police Officer Alva C. Stroud testified as follows:

"Q. And what were your duties in that department on and between those dates? (R-54)

A. I worked out of the auto theft bureau.

Q. Now have you met Mr. Anderson before?

A. Yes, sir.

Q. And you are acquainted with him, are you?

A. Yes, sir.

Q. Did he make inquiry of you in relation to a Mr. Lowell Potter on or about those dates?

A. Yes, sir, he did.

Q. And what did he ask you?

A. He stated that a car had been rented and Lowell Potter had rented the car and wanted it to be check out. (R-55)

Q. Did you make any checks in relation to that?

A. Yes, sir, I did.

Q. What checking did you do?

A. I checked the address at 256 Union Avenue and couldn't find any place with an address of that number.

Q. On which side of the street would 256 be?

A. Are you familiar with this area, first?

Q. Yes, sir. On which side of the street would 256 be?

A. It would be on the south side of the street.

Q. And are odd numbers on the other side?

A. Yes, sir.

Q. Were you able to locate the address?

A. No, sir, I wasn't.

Q. Were you looking for the car at the same time?

A. Yes, sir, I was.

Q. And were you able to locate the car in the area?

A. No sir, I couldn't.

Q. Did you and Mr. Anderson attend the County Attorney's office?

A. Yes, sir, I did.

Q. And who did you speak to in the County Attorney's office?

A. Mr. Miner.

Q. And what did you advise Mr. Miner?

A. I advised him I was unable to locate this address out on Union Avenue, this 256.

Q. Did you advise him that you were unable to locate the car, also?

A. Yes, sir. (R-56)

Q. And I believe, sir, you had two visits, so let's limit ourselves to the first one. Did you ask him whether or not he thought it advisable to issue a criminal complaint on this matter?

A. At this time he said we should wait a few more days before issuing a complaint.

Q. Did he ask you to do any further investigation?

A. Yes, sir, he did.

Q. And what further investigation did he request?

A. I checked the driver's license bureau at the State Capitol to see if they had a license under a Lowell Potter at 256 Union Avenue. I also checked the State Tax Commission and found a car had been registered under Mr. Potter's name and he listed the address at 254 Union Avenue.

Q. Did you make another tour out there?

A. Yes, sir.

Q. And were you able to locate the address again?

A. No, sir.

Q. Were you looking for the car?

A. Yes, sir.

Q. Were you able to locate the car?

A. No, sir.

Q. And do you know whether or not there has been — what do you call it — a general locate out on this car?

A. There had been, yes, sir.

Q. And had any of your police cars reported on the general locate?

A. No, sir.

Q. Did you again visit Mr. Miner and did you advise him of these matters that you just testified to? (R-57)

A. Yes, sir.

Q. Were there any other matters that may have come to your knowledge or information that you hold him?

A. Oh, just what we have stated here.

Q. Now did you make notes or a report in relation to this matter?

A. Yes, sir, I did.



Q. And do you have that with you?

A. Yes, sir.

Q. And did you check that before the trial?

A. Yes, sir, I did.

Q. And so you had the written memoranda that has refreshed your recollection of these facts, is that correct?

A. Yes, sir.

Q. On the last interview with Mr. Miner, did he recommend that a complaint issue?

A. Yes, sir, he did.

\* \* \*

Q. Now you didn't stop and talk to anybody on Union Avenue? (R-59)

A. No, sir, I did not.

Q. Did you have the description of the car?

A. Yes, sir.

Q. And the license number?

A. Yes.

Q. What time did you go out there? (R-60)

A. The first time was before noon. In fact both days it was before noon.

Q. Do you remember what day it was?

A. The first day it was the 6th. The second time it was on the 9th. That was February."

Deputy County Attorney Mark S. Miner testified as follows: (R-61 through 66)

"Q. Did Officer Stroud and Mr. Anderson attend your office for the purpose of consulting you in relation to having a complaint issued in this matter? (R-61)

A. Yes.

Q. And as I recall your prior testimony, they attended your office on two occasions, is

that true?

A. That's correct.

Q. All right. Did you have any occasion to consult with any other members of the County Attorney's staff in relation to this matter?

A. Yes.

Q. And when would that discussion have taken place?

A. The complete facts of this transaction was laid before the County Attorney and the complete staff and it was their recommendation that a complaint be issued in this case.

Q. And it was after that meeting that you told Mr. Anderson that you would recommend the issuance of a complaint?

A. There was certain events took place during a staff meeting which brought this case under discussion.

\* \* \*

Q. Did you have other facts at your disposal in relation to this case that weren't furnished to you by Officer Stroud and Mr. Anderson? (R-62)

A. I did.

Q. And did those facts affect your decision in this matter?

A. They did.

Q. Were they facts that would have normally come to the knowledge of Officer Stroud or first Mr. Anderson?

A. No. They would have no knowledge of these facts.

\* \* \*

Q. Did those facts pertain to any of the events related to the transaction with the Utah Driv-Ur-Self?

A. I would say no, they only related to the whereabouts of Mr. Potter.

Q. Did they relate to any events that had taken place or transpired within the State of Utah?

A. No.

Q. Did they relate to anything that had to do with the disappearance of the automobile of the Utah Driv-Ur-Self?

A. I thought so.

Q. Did they have anything to do with the location of the automobile?

A. Well, I thought so.

Q. But they had nothing to do with any facts pertaining to this particular transaction? (R-63)

A. Well, in my opinion, they did.

\* \* \*

Q. Did you have any indication that the car might not be used locally?

A. Yes, I did.

Q. And did you tell Mr. Anderson about this probability at the time that he signed the complaint?

A. If I recollect I told Mr. Anderson and Mr. Stroud when they came into the office what I had learned at the staff meeting.

Q. And did you have any reason to learn that the car might not be in the State of Utah? (R-64)

A. I did.

\* \* \*

Q. I will withdraw the question. What did you advise Mr. Anderson and Mr. Stroud as to probable location?

A. I advised them that in my opinion Mr. Potter had the car in Montana because we had an inquiry from there from the District Attorney in Butte, Montana, concerning Mr. Potter on some bad checks.

\* \* \*

THE COURT: Did you tell Mr. Stroud and Mr. Anderson that?

A. I told them both that.

THE COURT: And before the complaint was signed?

A. I told them before the complaint was signed.

THE COURT: It may stand.

Q. I'm not sure I covered this, but I think I did. This whole matter was discussed in full council in the County Attorney's office, is that true?

A. That's correct.

Q. And were some of these inquires or these notes received during that conference?

A. Well they were received at my conference with Mr. Stroud and Mr. Anderson, the second conference was the following Monday.

Q. No, I mean the conference with the County Attorney in the County Attorney's office, the conference with the County Attorney and the other deputies. Did you have this conversation at that time? (R-65)

A. Yes, it came in during the staff meeting and that is why that was discussed.

Q. Now I have no further questions.

\* \* \*

Q. Regardless of the fact that you represented him you recommended — you represented him, I believe, this is in the past, was it not?

A. Yes.

Q. In spite of that fact you did recommend that the complaint be issued?

A. Yes. I certainly recommended that it be issued.

Q. Why did you advise Mr. Anderson?

THE COURT: Did you advise Mr. Anderson about that?

A. That I had represented him?

THE COURT: That you recommended the complaint be issued.

A. Yes, I advised it. It was on my recommendation the complaint was issued.

Q. I have no further questions.”

There is on the record no indication of any facts that were known to the Defendants and not disclosed to the County Attorney.

(For emphasis, the Appellant has italicized portions of documents and authorities quoted in this brief.)

## STATEMENT OF POINTS

### POINT I

The Court erred in denying Defendant’s Motion for Summary Judgment of Dismissal, in that:

THE AFFIDAVITS AND DEPOSITIONS BEFORE THE COURT, NONE OF WHICH WERE CONTROVERTED, INDICATED THAT THE DEFENDANTS HAD MADE A COMPLETE DISCLOSURE OF ALL PERTINENT FACTS TO THE COUNTY ATTORNEY WHO THEREUPON OF HIS OWN INITIATIVE ADVISED THE ISSUANCE OF THE CRIMINAL COMPLAINT.

### POINT II

The Court erred in denying the defendant’s motion for a directed verdict, in that:



AT THE CONCLUSION OF THE PLAINTIFF'S CASE IT WAS APPARENT THAT ALL FACTS KNOWN TO THE DEFENDANT HAD BEEN DISCLOSED WITHOUT RESERVATION TO THE COUNTY ATTORNEY AND THAT THE COUNTY ATTORNEY ON HIS OWN INITIATIVE HAD ADVISED THE ISSUANCE OF THE CRIMINAL COMPLAINT.

### POINT III

The Court erred in denying defendant's motion for a directed verdict and defendant's motion for Judgment Notwithstanding the Verdict, in that:

AT THE CONCLUSION OF THE CASE IT WAS APPARENT THAT THE UNCONTROVERTED EVIDENCE INDICATED FULL AND COMPLETE DISCLOSURE OF ALL MATERIAL FACTS BY THE DEFENDANT TO THE COUNTY ATTORNEY WHO OF HIS OWN VOLITION ADVISED THE ISSUANCE OF A CRIMINAL COMPLAINT.

### POINT IV

The Court erred in denying the Defendant's Motion for Directed Verdict and Judgment Not Withstanding the Verdict, in that:

PLAINTIFF FAILED TO ADDUCE ANY EVIDENCE OF MALICE.

### ARGUMENT

#### POINT I and POINT II

The Court erred in denying defendant's motion for summary Judgment of dismissal, in that:

THE AFFIDAVITS AND DEPOSITIONS BEFORE THE COURT, NONE OF WHICH WERE CONTROVERTED, INDICATED THAT THE DEFENDANTS HAD MADE A COMPLETE DISCLOSURE OF ALL PERTINENT FACTS TO THE COUNTY ATTORNEY WHO THEREUPON OF HIS OWN INITIATIVE ADVISED THE ISSUANCE OF THE CRIMINAL COMPLAINT.

The Court erred in denying the defendant's motion for a directed verdict, in that:

AT THE CONCLUSION OF THE PLAINTIFF'S CASE IT WAS APPARENT THAT ALL FACTS KNOWN TO THE DEFENDANT HAD BEEN DISCLOSED WITHOUT RESERVATION TO THE COUNTY ATTORNEY AND THAT THE COUNTY ATTORNEY ON HIS OWN INITIATIVE HAD ADVISED THE ISSUANCE OF THE CRIMINAL COMPLAINT.

The argument in relation to both Point I and Point II will be presented under this heading in that the principal facts are practically identical. At the time of the Motion for Summary Judgment, the defendant's position was established by Affidavits and Depositions and opposing Affidavits were not presented. At the time of the Motion for Directed Verdict at the conclusion of the plaintiff's case, the facts had been adduced by the plaintiff in his case and such facts are almost identical with the facts shown by Affidavit, etc.

In relation to the Summary Judgment if primary issues or contested facts are not made apparent by opposing Affidavits, the Court should enter a Summary Judgment.

41, *American Jurisprudence*, Pleading Sec. 340.  
Page 523.

#### "D. MOTION FOR SUMMARY JUDGMENT.

"340. Generally \*\*\* the courts have in general upheld, as constitutional and valid, statutes or rules of Court requiring the defendant, in specified cases, to file an affidavit of defense, \*\*\* answers filed in certain classes of cases may be stricken out and summary judgment rendered on motion of the plaintiff supported by affidavit unless the defendant supports his answer by af-

fidavit showing such facts as may be deemed by the court hearing the motion sufficient to entitle him to defend.”

At the conclusion of the Plaintiff's case all major facts were of record. The Plaintiff had determined that Mark Miner was the Deputy Criminal Attorney for Salt Lake County (R-57) and that Mr. Miner issued the Complaint himself. (R-35)

“A. I issued this complaint myself. I charged Mr. Potter with embezzling a car,”  
and that the complaint was issued by reason of additional facts within the knowledge of the County Attorney. (R-36 and R-37)

“Q. Mr. Miner, were there other facts in your possession that caused you to issue this complaint?”

A. Yes.

\* \* \*

A. Yes, in my opinion a complaint should have been issued from the facts presented to me, from the information made available.

Q. Was the information made available only the information furnished by Mr. Anderson and Officer Stroud?

A. No. I had other —”

Mr. Potter by his own testimony indicated that his house number did not conform to the number placed on the car rental agreement. (R-21 and R-22)

“Q. Mr. Potter, where is your home?”

A. 256 Union Avenue, Midvale.

Q. Is there a house in Midvale on Union Avenue Number 256?



A. I don't know.

Q. Is your house number 256?

A. It is number 297 right now.

\* \* \*

Q. Do you have any relations or any in-laws that live at 297 East 9700 South?

A. That is my mother-in-law that lives there.

Q. That isn't Union Avenue?

A. That is Union Avenue."

All of the general authorities hold that a complete disclosure to the County Attorney relieves the person signing the Complaint from any liability in a malicious prosecution action. The Rule of Law is well stated in *Corpus Juris Secundum*, Volume 54, Malicious prosecution, Chapter V as follows:

#### "SECTION 46—AS A FULL OR PARTIAL DEFENSE

"As a general rule the defendant makes out a complete defense by showing that he submitted to the proper counsel a statement conforming to legal requirements concerning the guilt of the accused, that in good faith he received advice justifying the prosecutor, and that he acted on the advice in instituting the proceedings of which the plaintiff complains.

As a general rule, since advice of counsel goes to the question of probable cause and must be considered in determining the matter, defendant makes out a complete defense by showing that he submitted to proper counsel a statement conforming to legal requirements concerning the guilt of the accused, and in good faith he received advice justifying the prosecution, and that he acted on that advice in instituting the proceed-

ings of which plaintiff complains. If he shows these things he is entitled to immunity from damages, although it may appear that the facts did not warrant the advice or the prosecution or that the accused was innocent \*\*\*”

“SECTION 48—BY WHOM ADVICE GIVEN

“Paragraph B—BY PUBLIC COUNSEL as follows :

“As a general rule, the fact that the defendant acted on the advice of competent and qualified public counsel is a defense to a suit for malacious prosecution \*\*\*”

and a similar reporting of the general rule is contained in 34 *American Jurisprudence*, Section 72, page 748.

“Sec. 72 Prosecuting Attorney—It is established that if, in addition to his own belief, a defendant proves that before commencing the prosecution of the criminal proceeding complained of he sought the legal advice of an officer selected by the people to prosecute offenders against laws, and in good faith fully and fairly disclosed to that officer all the information he possessed, and he was advised that a crime had been committed, the defendant has made out a complete defense to the action. This is true even though the advice may have been erroneous . . . So, also there is authority to the effect that the individual would be protected by the advice even though he may not have stated facts which he could have ascertained by reasonable diligence, the reason being that it is the duty of the public prosecutor to investigate charges of the commission of crime.”

The law in the State of Utah is in conformity with the general rule. The earliest Utah case is the case *McKenzie vs. Canning*, 131 Pacific 1172, 42-Utah-529, 1913 wherein the court stated as follows:

“\*\*\*What divides the parties is this: The defendant contends that the evidence with respect to such facts is without conflict, and hence the court, on his request ought to have directed a verdict in his favor on that ground; the plaintiff, that there is some conflict as to whether the defendant stated to counsel all the material facts known to him, and as to his belief of the plaintiff’s guilt of the charge. \*\*\* We think the evidence, without conflict, shows that the defendant substantially stated to counsel all the material facts known to him; that upon them they advised him; that he, on such advice, instituted the criminal prosecution; and that in doing so he acted in good faith and upon a well-grounded belief of the plaintiff’s guilt. \*\*\* *“In other words, the jury may not arbitrarily reject the defendant’s evidence showing a well-grounded belief by him of the plaintiff’s guilt. \*\*\* If the defendant \*\*\* had knowledge of other facts which would tend to explain or modify them or tending directly to show want of probable cause . . . this would be a question for the jury. \*\*\* but this does not apply to a case where all the undisputed facts known to the defendant, taken together, would justify in a reasonable person the honest belief that the fact charged was probably true. In such case the defense would be absolute as matter of law, and the jury would have no right under the pretense of saying the defendant did not believe, to find against him. \*\*\* Upon the evidence we think the defendant was entitled to a directed verdict in his favor; for the assumed facts as to the question of probable cause, and upon which the court directed the jury to return a verdict for the defendant, were without any substantial conflict.”*

The McKenzie case was followed by Kennedy vs. Burbidge, 183 Pacific, 325 54 Utah-497, 1919 wherein

the court in a Malicious prosecution action stated as follows:

(Page 326) "In an action for malicious prosecution at least three distinct matters are necessary to be alleged and proved: (1) That the proceeding complained of as ground for the action was without probable cause; (2) that the proceeding was malicious; and (3) that the proceeding was finally terminated in favor of the plaintiff."

(Page 328) "We are not disposed to hold that a prosecutor acts without probable cause merely because it turns out that the information upon which he acts was false."

The case of *Thomas vs. Frost*, 27 Pacific 2nd, 459, 83-Utah-207, again contains discussion of the law in relation to the defense of disclosure and the court stated as follows on page 463:

"(3) The important question the court and jury had to consider was whether or not the defendant, in causing a complaint to be issued charging plaintiff with perjury, acted maliciously and without probable cause. Both must concur in order that the defendant be held liable. *Kennedy v. Burbidge*, 54 Utah, 497, 183 P. 325, 5 A.L.R. 1682; *Singh v. MacDonald*, 55 Utah, 541 188 P. 631.

In the *Frost* case there was competent testimony indicating that the appellant did not make truthful statements and the court after reviewing such evidence stated as follows on page 463:

"There was competent testimony offered by the respondent which, if believed by the jury, conclusively proved that the appellant did not make a truthful statement of the facts to the

county attorney, but, on the contrary, misled the county attorney."

In the case at point there is no evidence that the appellant did not make a truthful statement of the facts to the county attorney or that he misled the county attorney. To the contrary, the facts indicated that in addition to the disclosures of the appellant, the county attorney on his own initiative obtained other information which persuaded him to issue the Complaint. (R-36 and R-37)

In the fairly recent case of *Uhr vs. Eaton*, 80 Pacific 2nd, 925, 95 Utah, 309 the court reaffirmed the fundamental law in case and stated as follows on page 929:

"We accordingly hold, on the record before us, that there appears such a substantial conflict of evidence regarding the necessary elements of probable cause as to require the submission of this issue to a jury. *In doing so, however, we do not relax the time-honored rule that a truthful and full disclosure of the facts to a prosecutor constitutes a complete defense to an action of this kind.*"

In the case at hand there is no conflict of evidence requiring the submission of the cause to the jury. In the recent case of *J. Hensley Cottrell vs. Grand Union Tea Company*, 299 Pacific 2nd, 622, 5 Utah 2nd, 187, Justice Crockett, in considering another case involving a malicious prosecution action resulting from an embezzlement complaint stated as follows (Page 623):

"The critical point of inquiry is this: Considering all of the evidence, could reasonable minds fairly say that they were not convinced by a



preponderance of the evidence that the defendants made a full and truthful disclosure of the material facts to the country attorney?"

In that case, the Court found that there was considerable discrepancy in the testimony and some testimony indicating that a full and faithful disclosure was not furnished. In that case, the judge notes in reference to evaluation of the testimony of the parties as follows: (Page 624)

"Self-interest is uniformly recognized as a factor which may be considered in evaluating or in discounting testimony. . . Each of the witnesses relied upon by the defendants have such motivation. . .

"The only one of plaintiff's witnesses for whom they can claim any degree of detachment is Mr. Taylor, the Deputy County Attorney."

It should be noted at this point that in this case Mr. Miner, the Deputy County Attorney, was an independent witness, Mr. Stroud, the City Police Officer was an independent witness, and Mr. Tohmander of the County Sheriff's Office, was an independent witness and none of these witnesses were motivated by any pecuniary interest. Justice Henroid, in his dissent to the Cottrell case, (Page 627) stated as follows:

"The only pertinent question here is whether, before signing a complaint against the plaintiff for embezzlement, respondents made a full disclosure of the material facts in their possession, to a Deputy County Attorney, who, after filing the complaint, moved its dismissal which was granted."

Mr. Taylor, Deputy County Attorney in the Cottrell

case, stated that his opinion might have been changed if additional facts propounded by the Plaintiff had been disclosed. In the instant case the Deputy County Attorney, Mr. Minor, made no such qualifications nor were any additional facts propounded by the Plaintiff.

Our sister states have had two rather recent cases involving a similar issue. In the case of *Montgomery Ward & Company vs. Pherson*, 272 Pacific 2nd, 643, Colorado 1954; another case involving malicious prosecution as a result of a complaint in embezzlement, the Court stated as follows (Page 646):

(Page 646) “(5) It is for the best interests of society that those who offend against the laws of the state shall be promptly punished, and that any citizen who has reasonable grounds to believe that the law has been violated shall have the right to cause the arrest of the person whom he honestly and in good faith believes to be the offender. *For the purpose of protecting him in so doing, it is the generally established rule that if he has reasonable grounds for his belief, and acts thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. The rule is founded on the grounds of public policy in order to encourage the exposure of crime.*

(Page 647) “The rule that advice of counsel, properly taken and relied upon in good faith, is a defense to a suit for malicious prosecution applies with greater reason when the proceeding complained of was instituted by and with the approval of the prosecuting officer, in this instance the district attorney.”

“... ‘Acting in good faith upon the mistaken opinion of counsel will not subject the prosecutor

to liability to the person prosecuted.' ” (Page 648)

“ . . . The evidence, it seems to us, clearly established the defendants instituted the prosecution in good faith and on advice of counsel, and that under the evidence presented defendant's motion for a directed verdict in their favor should have been granted.

“These conclusions make it unnecessary for us to consider the other points urged for reversal of the Judgment.

(Page 648) “The Judgment is reversed and the cause is remanded with direction to enter judgment in favor of the defendants.”

Thomas vs. Hinton, 281 Pacific 2nd, 1050, 78 Idaho 337, April 1955:

(Page 1055) “\*\*\* “In this class of cases the liability of juries to lose sight of the real issues, and to be influenced by sentiment, rather than the pertinent facts, is noted by careful observers. In the language of Mr. Newell: “*Our experience teaches us there are few questions of law more difficult of apprehension by a jury than those which govern trials for malicious prosecution.* It seems difficult for them to appreciate, if the plaintiff was really innocent of the charge for which he was prosecuted, that he still ought not to recover. They do not readily comprehend why an innocent man may be prosecuted for a supposed crime or offense, and yet have no recourse against the prosecutor who caused his arrest and imprisonment.’ Newell on Mal. Pros. 279.” ” Montgomery Ward & Co. vs. Pherson, Colo., 272 Pacific 2nd 643 at pages 646, 648.”

(Page 1056) “Where the evidence clearly establishes that the defendant instituted the prosecution in good faith and on the advice of counsel,



a motion for directed verdict in defendant's favor should be granted. *Montgomery Ward & Co. vs. Pherson, Colo.*, 272 Pacific 2nd, 643.

*"It is our opinion that appellant complied with the advice of counsel rule. It, therefore, became a question of law for the court to decide and not a question of fact to be submitted to the jury and the motion for a directed verdict should have been granted."*

The above cases contain profound statements relating to the public policy involved in malicious prosecution cases and when such policy is applied to the instant case there should be no question but that the defendants should be immune from damages.

### POINT III

The Court erred in denying defendant's motion for a directed verdict and defendant's motion for Judgment Not Withstanding the Verdict, in that:

AT THE CONCLUSION OF THE CASE IT WAS APPARENT THAT THE UNCONTROVERTED EVIDENCE INDICATED FULL AND COMPLETE DISCLOSURE OF ALL MATERIAL FACTS BY THE DEFENDANT TO THE COUNTY ATTORNEY WHO OF HIS OWN VOLITION ADVISED THE ISSUANCE OF A CRIMINAL COMPLAINT.

The authorities cited in support of points I and II are equally applicable in support of this point.

The factual situation differs in the consideration of this point for the reason that the defendants had presented their case and there is affirmative evidence in the record as to the disclosures and the basis for the disclosures to the County Attorney. The defendants established affirmatively that copy of the written con-

tract of rental was delivered to the plaintiff (R-40) and that the cash deposit taken under the rental agreement was in accordance with the general policy of the defendant corporation for a one-day rental and that if the car was to have been detained for a longer period, a larger deposit would have been required (R-41). The investigation by Mr. Anderson, rental manager for the defendant, was reviewed in detail and it was shown that the defendant checked the telephone directory, telephone information service, city directory and driver's license division personally (R-44, 45.) It is further shown that the defendant solicited the aid of the Police Department and the Sheriff's Office and asked that they attempt to locate either the residence or the car. (R-45-49)

It was indicated that there might be a possibility of a relationship between Mr. Anderson and the plaintiff's wife, but that if there was such a relationship, it was unknown to Mr. Anderson and there is no indication that there was any ill will between the parties. (R-50 and R-71) The County Sheriff testified as to his search and his report to Mr. Anderson. (R-51, R-54) The Police Officer testified as to his search and report to Mr. Anderson and the fact that he alone represented to the County Attorney that a diligent search had been made to determine the residence of the plaintiff (R-54 through R-66) specifically as follows:

Q. "Did you make another tour out there?"  
(R-56)

A. Yes, sir.

Q. And were you able to locate the address again?

A. No, sir.

Q. Were you looking for the car?

A. Yes, sir.

Q. Were you able to locate the car?

A. No, sir.

Q. And do you know whether or not there has been — what do you call it — a general locate out on this car?

A. There had been, yes, sir.

Q. And had any of your police cars reported on the general locate?

A. No, sir.

Q. Did you again visit Mr. Miner and did you advise him of these matters that you just testified to? (R-57)

A. Yes, sir."

The Deputy County Attorney was recalled as a witness and testified that the entire matter had been placed before the County Attorney's Staff and that it was their recommendation that a Complaint be issued (R-61). Further, the Deputy County Attorney indicated that he had obtained additional facts or information from independent sources and such facts influenced his decision.

"Q. And it was after that meeting that you told Mr. Anderson that you would recommend the issuance of a Complaint? (R-61)

A. There was certain events took place during a staff meeting which brought this case under discussion.

Q. Well were there other facts besides those?

A. Yes. Other facts that were brought into this case and that, coupled with —

THE COURT: Mr. Miner, I believe you had better proceed by question and answer so that we know what is coming and what to expect. (R-62)

MR. BIELE: Yes, sir.

Q. Did you have other facts at your disposal in relation to this case that weren't furnished to you by Officer Stroud and Mr. Anderson?

A. I did.

Q. And did those facts affect your decision in this matter?

A. They did.

Q. Did you have any indication that the car might not be used locally? (R-63)

A. Yes, I did."

The case now differs from the case at the close of the plaintiff's testimony in that it now appears that the County Attorney directed the issuance of the Complaint based on information obtained by him through his office and, therefore, a different rule of law applies. This rule is succulently stated in the annotation at 10 A.L.R. 2d, 1215:

(Page 1217) . . . "The question is, What had the defendant the right to assume at the time he called upon the prosecutor the second time and was directed by him to make oath to this complaint? . . . It must be assumed that defendant, in swearing to the affidavit, if he himself believed the truth of the statements, was acting under the direction of the prosecutor, and had the right to assume that the prosecutor was instituting the suit on behalf of the public. . ."

"The rule in connection with cases in which the defendant leaves the matter entirely to the judgment and responsibility of the prosecuting

officer, after a full, fair, and honest disclosure of the facts, was aptly stated in *Hopkinson vs. Lehigh Valley R. Co.* (1928) 249 N.Y. 296, 164 NE 104, as follows: *'If a person disclosed fairly and truthfully to an officer whose duty it is to prosecute crime, all matters within his knowledge, which as a man of ordinary intelligence he is bound to suppose would have a material bearing upon the question of the innocence or guilt of the persons suspected, and leaves it to the prosecutor to act entirely upon his own judgment and responsibility as a public officer, and does no more, he cannot be held answerable in an action for malicious prosecution, even if the officer comes to a wrong conclusion and prosecutes when he ought not to do so.'*"

It is difficult to conceive how a private citizen could conduct a more detailed investigation than was developed by the defendant in this case. If the Court sustains the verdict, it in effect tells the private citizens of this state that they may not rely upon the representations of the Police Officers or Deputy County Sheriffs or the County Attorney, but must, in each and every case, personally investigate the facts and further must hire private counsel rather than rely upon public prosecutor to advise them as to their potential liabilities when they are attempting to do their civic duty in reporting the commission of a suspected crime.

#### POINT IV

The Court erred in denying the Defendant's Motion For Directed Verdict and Judgment Not Withstanding the Verdict, in that:

**PLAINTIFF FAILED TO ADDUCE ANY EVIDENCE OF MALICE.**



In order for the Plaintiff to recover, he must prove malice or at the minimum, show facts or fact situations from which the jury may infer malice. This rule is set forth in 34 American Jurisprudence, Malicious Prosecution, section 44 as follows:

### "C. MALICE

Page 727 "44 Generally" It is an elementary rule, supported by numerous authorities, *that it is essential to a recovery in the action of malicious prosecution that the action or prosecution complained of must have been maliciously instituted.* This is true whether the action is for the prosecution of the criminal proceeding or civil action \*\*\* *If there was no malice, no verdict at all should be given.* Malice is essential to the maintenance of any such action, and not merely to the recovery of exemplary damages, it, as well as the want of probable cause, is of the essence of the action \*\*\*

Page 729 "Sec. 45 \*\*\* "It is also distinguishable from mere negligence, in that it arises from some purpose while negligence arises from absence of purpose, the characteristic of negligence is inadvertence or an absence of intent to injure, *but to constitute malice there must be a motive or purpose, and it must be an improper one.*"

In this case there is not a scintilla of evidence indicating malice. In fact the record is completely devoid of any evidence indicating that the Defendants or either of them knew the Plaintiff or had any reason or desire to do him harm.

Malice is the very essence of an action of malicious prosecution and when, as in this case, the Defendant

shows that it had no knowledge or intimate connection whatsoever with the Plaintiff and that it relied on the advice of the prosecuting attorney then any presumption of malice that might arise by reason of the execution of the criminal complaint is completely rebutted.

The matter of malice is reported in 10 A.L.R. 2nd 1215 at page 1268 et seq. and one of the best statements therein contained is on page 1269 as follows:

“It is a well-settled rule in cases of this character, when malice or its equivalent may be involved, that, if the defendant acted solely upon the advice of a reputable attorney, after fairly submitting to him all of the facts, this will make out a complete case against malice or bad faith.”

“\*\*\*The case appears to be wholly without merit. From the beginning to the end of the proceeding appellant acted with the utmost good faith, and under the advice of those in authority to whom he applied, and the evidence shows satisfactorily that there was an entire absence of any malice on his part toward appellee. Want of probable cause and malice must concur to sustain the action for malicious prosecution. Malice having been disproved, the action must fail.”

## CONCLUSION

The Plaintiff must show malice as an essential part of his cause of action. A slight presumption of malice arises by reason of the execution by the defendant of the criminal complaint. The defendants have clearly shown that all material facts known to them were disclosed to the county attorney who added thereto facts or circumstances within his own knowledge and advised the issuance of the criminal complaint. The presumption

is clearly rebutted by the disclosures and therefore the court must look to the record of the trial in order to determine the existance of actual malice. No malice is disclosed by any part or portion of the record nor is there any indication of concealment or failure to disclose material facts.

Since the record reveals that there is complete disclosure of all material facts to the County Attorney the court should set aside the judgment and grant plaintiff's Motion for Judgment Non Abstante Veredicto.

Even if the court should determine that some additional facts could have been disclosed by the exercise of extraordinary diligence, nevertheless since the county attorney advised the execution of the complaint, not only by reason of the facts disclosed by the defendants but by reason of additional facts known only to him, it becomes apparent that the county attorney as an officer of the state is the moving party in the execution of the criminal complaint and the judgment should be set aside and the defendants Motion for Judgment Non Abstante Veredicto should be granted.

Further, since the defendants have made full disclosures of all material facts known to them and on the advice of the county attorney executed the criminal complaint, any presumption of malice is overcome and the court must look to the record in order to determine actual malice. No actual malice or ill motive is indicated by the record or may be presumed by facts shown in the record, and therefore, the Plaintiff's cause fails for lack of a material element of this cause of action and



the Judgment should be set aside and Plaintiff's Motion  
for Judgment Non Abstante Veredicto granted.

Respectfully submitted,

IRVING H. BIELE  
*Attorney for Defendants  
and Appellants*

Receipt of copies of the above and foregoing Brief  
of the Defendants and Appellants acknowledged this  
..... day of June, 1960.

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LaMAR DUNCAN  
*Attorneys for Plaintiff  
and Respondent*