

1960

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

Utah Supreme Court

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**IN THE SUPREME COURT OF THE
STATE OF UTAH**

LOWELL POTTER,

FILED
AUG 1 1960
Plaintiff, Supreme Court, Utah

vs.

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

Defendants

Case No.

~~120359~~

9228

PLAINTIFF AND RESPONDENT'S BRIEF

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Attorney for Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

LOWELL POTTER,

Plaintiff

vs.

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

Defendants

Case No.
120359

STATEMENT OF FACTS

Plaintiff Potter on February 2nd, 1959 rented from Defendants an automobile; Plaintiff testified he was a customer of Defendant and that he had rented automobiles from Defendant on a number of occasions over a period of five years (Trans. 29). Receipts were offered and received showing Plaintiff's rental of cars from Defendant on July 12, 1957 and September 12, 1957 (Exhs. 1 and 2). Among other things Plaintiff gave his address

as 256 Union Avenue in Midvale, an address where he had lived for many years, and now resides. Plaintiff still receives mail at that address and received mail from the State Tax Commission post marked December 28, 1959 See Exhibit 6 (Line 38), although Plaintiff testified that recently there had been a renumbering of the houses and his house number now is 297 7700 South, Midvale (Tr. 38).

When Plaintiff returned with the car 8 days later (Tr. 34) Defendant Anderson refused to take the money for the rental of the car and instead informed Plaintiff he was under arrest.

Plaintiff waited until an arresting officer arrived and took him into custody. He testified that he was held at the City Jail and later at the County Jail for a total of eight hours. Plaintiff was fingerprinted, photographed, booked and placed in jail (Tr. 35).

Later Plaintiff appeared at a preliminary hearing where after evidence was offered by the State, the complaint for embezzlement was dismissed.

Plaintiff thereafter commenced an action for malicious prosecution. At the trial Plaintiff testified he paid \$300.00 to his attorney to defend the criminal action and \$50.00 for a bond.

The jury returned a verdict of \$5,000.00 general damages; \$350.00 special damages, making a total of \$5,350.00. It is from the judgment on this verdict that Defendants appeal.

Plaintiff's wife, Marie Potter, testified that she had lived at 256 Union Avenue for twenty years; that she had

lived at that address before she married Mr. Potter. (Tr. 48) and that she and her husband and family are well known in the area; that she does church work. She testified that during most of the time the car Plaintiff had rented was parked at the mouth of the driveway; that it was never in the garage, but in the front part of he driveway (Tr. 49). She testified that except for trips to a doctor's office, the car remained at this point.

Mr. Miner, the deputy county attorney, who prosecuted the action in behalf of the State of Utah, testified as follows (Tr. 57):

Q. At the present time you hold public office?

A. I am the Deputy Criminal Attorney for Salt Lake County.

Q. And were you so engaged in February, 1959?

A. I was.

Q. Calling your attention to on or about the 9th of February, 1959 did you have occasion to have a Mr. V. H. Anderson in your office?

A. I did.

Q. And what did he come in for?

A. Mr. Anderson and one of the officers of the Salt Lake City Police Department who is head of the auto-theft- they came together into my office to request a complaint against a Mr. Lowell Potter for embezzling an automobile.

Q. Now did they see you more than once?

A. Oh, yes.

Q. How many times did they see you?

A. They came on the 6th of February, 1959. And again on the 9th.

Q. And again on the 9th?

A. Yes.

Q. Now what did you say to him on the 6th, Mr. Miner?

A. On the 6th they presented to me a contract signed by Mr. Lowell Potter, in which he agreed, rented a car, and agreed to return it on the 2nd and I told them that in my opinion sufficient time had not elapsed to warrant a criminal complaint at that time because I didn't think there was enough time to show criminal intent, unless the car had been found stripped same place or outside of the county or outside of the state.

Q. Now did you have any conversation relative to the address and the location that he had given?

A. Yes. We discussed the facts of the matter, and, if I recall correctly, they told me, I think it was the officer that told me, that they could find no such house or no such address as 256 Union Avenue, and that they were of the opinion that this was a phoney address and a phoney street. So I instructed them to go out and make a diligent search in the area to see if they could find this house, or this address, or this car, and I told them if they could find the car or the address to come back at some later date and we would talk to them again concerning a criminal complaint.

Q. Now was that on the 6th?

A. That was on the 6th.

Q. Now did you see them again on the 9th?

A. Yes.

Q. And did they say they had made a search for 256 Union Avenue?

A. If I remember correctly I talked to the officer and he said he had made a very diligent search in the area of 256 Union Avenue in Midvale; that he could find no such house or no such address or no such automobile in that area.

Q. Now was Mr. Anderson present with him at the time?

A. Yes. Mr. Anderson was present at the time.

It is apparent from the testimony that the address of Potter and the location of the car could be accomplished with little or no effort on the part of Defendants, it is further apparent from the testimony that these facts were not disclosed to the County Attorney.

ARGUMENT

POINT I AND II

IN ANSWER TO POINT I AND II THE DEFENDANTS DID NOT MAKE A COMPLETE DISCLOSURE OF ALL THE FACTS KNOWN TO THEM; THAT THE ADDRESS OF PLAINTIFF AND THE LOCATION OF THE CAR COULD HAVE BEEN EASILY ASCERTAINED BY ANY REASONABLE DEGREE OF DILIGENCE:

In the deposition of Lowell Potter, taken on May 28, 1959, eight months before the trial, Potter testified that he lived at 256 Union Avenue, and that was his permanent address. Mrs. Potter, as hereinabove set forth, testi-

fied as to the address and her acquaintance in the neighborhood.

Based upon the testimony of Mr. Miner that he instructed Mr. Anderson to make a "diligent" search to locate 256 Union Avenue, together with the testimony of Mrs. Potter that she lived at this address for many years and prior to her marriage, that she and her husband were all known in the community and area, we submit that the question of whether Defendants had made a full, fair and complete disclosure to the prosecutor, becomes one of fact for the jury.

In *Uhr vs. Eaton*, 95 Utah, 309, relied on so much by Defendant's counsel, the Court said at page 316.

"Turning now to the question as to whether a sufficient showing of lack of probable cause was made so as to require the submission of this issue to a jury, we are confronted with a rule of law that it is the duty of a complainant to make a full, fair and complete disclosure of the facts within his knowledge to the public prosecutor, and also all the facts which he had reasonable ground to believe existed at the time of making the statement, or all facts which he could have ascertained by reasonable diligence, and that, having done so, he can successfully defend, by reason of such disclosure and the acting on the advice received thereon, any malicious prosecution action brought against him.

"Respondent maintains that because the record affirmatively shows, which it does, that she testified substantially to the same facts at the preliminary hearing as she had theretofore told the county attorney prior to the issuance of the criminal complaint, that she must be classified as having

made a full, fair and truthful disclosure in accordance with the rule, and therefore justly entitled to the directed verdict rendered. In the light of other facts in the record, however, taken in their most favorably light, which we are required to do in determining this question, we cannot say that respondent is entitled to the protective cloak of this rule.

Appellant contends that the respondent made up the story which she told the County Attorney and on which she relied for the conviction, and that such statements were false. Can it be said that one who concocts or "frames" another by going to the county attorney relating false statements, which appear plausible enough at the time, and thereby obtains the arrest of an innocent man, can thereafter successfully prevent a malicious prosecution action from being submitted to a Jury by merely showing that her testimony at the preliminary hearing before a magistrate was substantially the same as related by her originally to the public prosecutor in the face of facts which tend to show that the whole story was untrue? We think not. The very essence of the rule is that the disclosure to the prosecutor must be truthful, and when evidence is introduced in a damage action, as here, by the aggrieved party tending to show that the county attorney unbeknowningly acted on deliberate falsehoods, presented by the complainant, then this rule should not be used to prevent the triers of fact from passing on the ultimate issues.

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 dis-

closure of the facts to a prosecutor constitutes a complete defense to an action of this kind.

We feel that there was a sufficient showing of malice to require submission to a jury. In certain cases the facts from which lack of probable cause may be inferred may also give rise to the inference of malice. *Ward v. United Groc. Co.* 84 Utah 437, 36 P. 2d 99. But there appears affirmatively here independent acts and words on the part of respondent, which, if given credence, tend to substantiate appellant's theory. The statement of one witness that respondent told him before any arresting officer arrived that appellant would never work for the company again, and also, that Mrs. Eaton had made statements about the plaintiff indicating ill will toward him; respondent's statement that if the witness would say that he saw appellant throw a package in her yard, he would make a good witness for her, and finally, the statement of respondent in reply to a suggestion that she tell Uhr that she saw him throw the bacon in the yard, "no, no, I would be afraid to. He is a dangerous snooping character," would appear to be sufficient, under all the facts and circumstances to justify the submission of the question of malice to the Jury.

In *Sweatman vs. Linton*, 66 Utah 208, 241 P. 309, The Plaintiff had been charged with issuing a check against insufficient funds. After the complaint had been dismissed he brought his action for malicious prosecution, Page 217, the Court:

"Under that state of facts, it was a question for the Jury to determine whether Linton in good faith believed that there was cause for the prosecution of Plaintiff for a violation of the statute quoted.***

“It must appear, however, without contradiction, that a full and accurate statement of all the facts was made to the attorney before the advice was given, and that the party causing the prosecution was advised that he had probable cause to initiate the prosecution and that in good faith did believe there was probable cause.*** From all the facts appearing in this record, we are of the opinion that the question as to whether Linton in good faith believed that there was probable cause for the prosecution of Plaintiff, or whether he acted maliciously in causing the prosecution of Plaintiff, was for the jury.”

Again in *Thomas vs. Frost* 83 Utah, 207, 27 P 2d 459, the Court held at p. 215:

“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, 4 ALR 1682 *Singh vs. MacDonald*, 55 Utah 541, 188 P. 631.

“It is the further contention of counsel that the appellant made a full and complete statement of the facts to the county attorney, and that thereon the county attorney made an independent investigation and as a result of such investigation reached the conclusion that the respondent had committed perjury and that this under the law absolves the appellant from any liability to respondent, even though it appears that the committing magistrate found that there was no probable cause for the institution of the proceeding. But the weakness of these contentions, as applied to this cause, is in ignoring the facts that the principal issue at the

trial was whether appellant made a full and truthful disclosure to the county attorney of all the facts known to him. 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, mislead the county attorney. We refer to the testimony of the witness Paskett, who testified that Thomas did not sign the affidavit, but that Frost had brought the affidavit to him and asked him to sign Thomas' name to it. The jury had a right to believe the testimony of Paskett and the verdict shows it believed him. The testimony of Paskett was sharply contradicted by the appellant and his son, and there was opinion evidence given by handwriting experts that the hand that signed Thomas' name to the affidavit was Thomas' own, and other evidence which would have justified the jury in entirely ignoring the testimony of Paskett. Where the truth lay was a question the jury was obliged to decide, and it found that the truth was with Paskett and not with the appellant."

The rule is well established that it is the duty of complainant to make a full, fair and complete disclosure of the facts within his knowledge, and also all facts which he had reasonable ground to believe existed at the time of making the statement, or *all facts* which he *could have ascertained* by reasonable diligence.

38 C.J. 434.

This rule of law was given to the jury by the Court in this action by the 7th instructions (Trs. 117) as follows:

INSTRUCTION NO. 7

"You are further instructed that the De-

fendants are required to make and to prove to your satisfaction by a preponderance of testimony that they did make, to the County Attorney of Salt Lake County, a full fair and true statement of the material facts known to him of which he had and knew the means of ascertaining and if the Defendants before instituting criminal proceedings, obtained advice of the County Attorney and at the time of obtaining such advice communicated to the counsel or County Attorney all the facts bearing on the case of which they had knowledge or could have ascertained by reasonable diligence and inquiry, and that they acted upon the advice given them honestly and in good faith, the absence of malice is established, the want of probable cause is negatived, and the action for malicious prosecution will not lie.”

In *Schnathorst vs. Williams*, Iowa (1949) 36 NW 2nd 739- 10 ALR 2nd 1199 at page 1211, the Court:

“Defendant testified that he honestly believed, when he signed and swore to the information, that Plaintiff had stolen the car. Such testimony was proper and competent, but it is not conclusive. The important question was not his belief, but whether all of the facts, as he knew them or should have known them, were such as to justify the ordinary, reasonably prudent, careful and conscientious person in reaching such a conclusion. A like contention was made in *Shaul v. Brown*, 28 Iowa 37, 46, 4 Am. Rep. 151, and this Court said: ‘This cannot be the law. No man’s liberties or rights can thus be measured by even the honest belief of another. The honest belief of a person commencing a criminal prosecution against another, in the guilt of the accused is an essential element of fact for him in showing probable cause or in disproving the want of it; but he must also show due reasonable

ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in that belief, before his belief can become his vindication or shield. If he should show such circumstances, and yet it was apparent that he did not himself believe in the guilt of the accused, they would not protect him."

Defendant leans heavily on the defense that he stated his case fully and fairly to the county attorney and relied upon the latter's advice in starting and pursuing the criminal prosecution. The fact that defendant took such counsel before acting is not an absolute or conclusive defense. It may or may not rebut malice and want of good cause. To be a good defense the advice of counsel must have been sought in good faith, from honest motives, and for good purposes, after a full and fair disclosure of all matters having a bearing on the case, and the advice must have been followed in good faith with honest belief in the probable guilt of the one suspected. As said in *Johnson vs. Miller*, 82 Iowa 693, 47 NW 903, 904, 48 NW 1081, 31 Am. St. Rep. 514, "it is good faith that excuses from wrongfully commencing or continuing the criminal prosecution". Advice of counsel does not necessarily shield a person against a charge of malicious prosecution.

Mesher v. Iddings, 72 Iowa 553, 554, 34 NW 328.

"If, however, the defendant misrepresents the facts to counsel; if he does not act in good faith under the advice received; if he does not himself believe that there is cause for the prosecution of action . . . and acts in bad faith in originating and urging the prosecution; he will not be protected, and in such cases the integrity or bona fides of his conduct is a question of fact for the jury."

Center v. Spring, 2 Iowa

In *Bair v. Schultz*, supra, 227 Iowa 193, 201, 288 NW 119, 123, we quoted from *Wilson v. Thurlow*, 156 Iowa 656, 658, 137 NW 956, as follows:

“Whether defendant in good faith acted on the advice of the County Attorney is generally a question for the jury. *White v. International Text-Book Co.* 144 Iowa 92, 121 NW 1104. Advice of an attorney to constitute a good defense must be based on a full and fair statement of the facts within defendant’s knowledge, and the advice must have been acted on in good faith and with the belief that there was good cause for the prosecution, and whether or not these were done is a jury question. (Citing decisions.) “In *Dickson v. Young*, supra, 208 Iowa 1, 6, 221 NW 820, 822, the court said: “Ordinarily, the question as to whether such disclosures were made in good faith, and the advice of an attorney obtained, are questions of fact to be submitted to the Jury”.

On this question in *Wilson v. Lapham*, supra, 196 Iowa 745, 750, 195 NW 235, 237, we said: “Obviously, this is ordinarily a question of fact for the jury.”

Advice of counsel cannot be used as a subterfuge. As said by the eminent Chief Justice Shaw in, *Wills v. Noyes*, 12 Pick, Mass. 324, 327, 328; “But even legal advice, if used only as a cover, and not acted upon in good faith — if it does not induce an honest belief that the party has probable cause, will not screen him from the consequences of prosecuting an entirely groundless suit.” The Maryland Court in *Turner v. Walker*, 3 Gil & J 377, 22 Am. Dec. 329, 334, said “But in an action for a malicious prosecution, . . . it is not enough,

as has been supposed, for the defendant merely to show that he acted under professional advice, the want of probable cause having first been established. He may have done that, and believed that he acted legally, and yet have acted maliciously and for the purpose of oppression. And having acted maliciously and oppressively and without reasonable or probable cause, his belief alone, that he acted legally will not support him in his malicious and oppressive violation of the law. However far his taking professional advice should go, if standing alone, to show his absence of malice, and a desire to act legally and correctly; yet it is evidence only to go to the jury for that purpose, and may be rebutted by other surrounding circumstances the whole of which should go to the jury."

POINT III

IN ANSWER TO POINT III OF APPELLANTS' BRIEF, DEFENDANT HAD THE BURDEN OF PROOF THAT HE HAD MADE A FULL, AND COMPLETE DISCLOSURE OF ALL THE MATERIAL FACTS TO THE COUNTY ATTORNEY, WHO ON HIS OWN VOLITION ADVISED THE ISSUANCE OF A CRIMINAL COMPLAINT, AND DEFENDANT FAILED TO SUSTAIN THAT BURDEN.

10 ALR 2nd 1272, #20 BURDEN OF PROOF.

"The defense of advice of counsel is an affirmative one, the burden of establishing which rests upon the defendant in a malicious prosecution action. See *Diggs v. Arnold Bros.* (1033) 132 Cal. App. 518, 23 P. 2d 71, wherein apparently the district attorney, as well as private attorneys, was consulted.

The defendant in a malicious prosecution action has the burden of proving that the advice of private counsel and commonwealth's attorney was sought and obtained with the honest purpose of being informed as to the law and upon a full, correct and honest disclosure of all the material facts within his knowledge, or which should have been within his knowledge if he had made a reasonably careful investigation. *Commander v. Provident Relief Asso.* (1920) 126 Va. 455, 102 SE 89.

In *Albrecht v. Ward* (1900) 91 Ill. App. 38, it was held that the defense of advice of the state's attorney given after a full and fair disclosure of material facts, and acted upon in good faith was an affirmative one required to be sustained by a preponderance of the evidence.

In *Shaffer vs. Arnaelsteen* (1921 54 Cal. App. 719, 202 P 946, considered further, *supra* 4, it was held that to support the affirmative defense of advice of counsel the defendant in a malicious prosecution action must show by a preponderance of the evidence that he made to the deputy prosecuting attorney, a full, fair and true statement of all the material facts, "known to him, of which he had and knew the means of ascertaining."

And in *Beadle v. Harrison* (1920), 58 Mont. 606, 194 P. 134, the Court pointed out that where a prima facie case was made out by the plaintiff in a malicious prosecution action, the defendant must rebut it by showing the existence of probable cause, which he could do by the affirmative defense that he fully and fairly and in good faith disclosed all of the facts to the county attorney."

That a defendant in a malicious prosecution action made a full and complete disclosure of all the facts to an attorney who advised a prosecution

is in the nature of an affirmative defense, the burden of proving which is on the defendant, see *Lowther vs. Metzker* (1949) — Idaho — 203 P 2d 604.

Again, in *Scsnathorst v. Williams* (1949) Iowa — 36 NW 2d 739, 10 ALR 2d 1199 (Supra) where defendant in a malicious prosecution action pleaded specially and affirmatively the defense of advice of the county attorney, it was held that the burden was on the defendant to establish good faith in seeking and acting upon the advice of the county attorney.

This principle was reaffirmed in the recent (1956) case of *Cottrell vs. Grand Union Tea Company*, 5 Utah 2nd, 187, 299 P. 2nd 622; Our Court held

“That defendants made full disclosure of facts to prosecuting attorney who advised filing of complaint is defense to action for malicious prosecution but it is an affirmative defense, the burden resting upon defendants to establish it by preponderance of evidence.”

Mr. Justice Crockett:

“From the foregoing facts, one does not wonder that the jury was not convinced that Mr. Taylor was given to understand the method of operation between parties. This should have been made clear to him by Mr. Fives and Mr. Pope who were seeking the prosecution. They were businessmen who either were, or should have been, entirely familiar with the facts and circumstances, and should have been acting with caution and circumspection in regard to a matter so serious as charging the plaintiff with a felony. From the dealings of these parties as disclosed by the evidence the conclusion is not at all unreasonable that the company was simply using the pressure of potential criminal prosecu-

tion to enforce its demands against Mr. Cottrell, which is expressly denounced by our statute. *Stickle v. Union Pacific R. R. Co.*, Utah, 251 P. 2d, 867, 871 *Newton vs. Oregon Short Line R. R.* 43 Utah, 219, 134 P. 567.

This case having been tried to a jury, they were the exclusive judges of the evidence and of the inferences to be drawn therefrom. It was not the privilege of the court to disagree with and overrule their action unless the evidence so unerringly pointed to a contrary conclusion that there existed no reasonable basis for the jury's finding. This court has many times affirmed commitment to a policy of reluctance to interfere with findings of fact and verdicts rendered by juries and has declared that it should be done only when the matter is so clear as to be free from doubt.

In *Butz v. Union Pacific R. R.* 120 Utah, 85, 232 P. 332, we quoted with approval the language of Justice Murphy, speaking for the United States Supreme Court with respect to trial by jury: “***A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.” Again in *Sticle v. Union Pac. R. R.* we stated “*** we remain cognizant of the vital importance of the privilege of trial by jury in our system of justice and deem it our duty to zealously protect and preserve it. *** Upon the basis of the self-interest of the defendant's witnesses and the uncertainties and other unsatisfactory aspects of their evidence, hereinabove discussed, there is ample basis upon which the jury, acting fairly and reasonably, could refuse to believe and find that there had been a full, fair and truthful disclosure of all the material facts to Mr. Taylor. Therefore, the trial court should not have in effect over-

ruled their determination and substituted his own conclusion that such disclosure had been established as a matter of law.

The case is remanded with instructions to reinstate verdict of the jury in favor of the plaintiff and to enter judgment thereon.”

POINT IV

DEFENDANTS ANSWER PLAINTIFF’S POINT IV THAT THERE WAS SUFFICIENT EVIDENCE OF MALICE AND WANT OF PROBABLE CAUSE, TO GO TO THE JURY.

THE COURT INSTRUCTED THE JURY AS FOLLOWS: (Tr. 115)

INSTRUCTION NO. 5

“You may infer malice from the absence of any reasonable or probable cause justifying Defendants’ acts. In other words if you find from the evidence that Defendants acted without any reasonable, justifiable or probable cause in charging Plaintiff with the felony resulting in his arrest, publicity and embarrassment, you may infer malice from such conduct.”

5 ALR 1688” The failure of a person who has received information tending to show the commission of a crime to make further inquiry or investigation as an ordinarily prudent man would have made under the circumstances before instituting a prosecution renders him liable for want of probable cause. (cases therein cited) *** (p. 1691). A failure to make an investigation before instituting proceedings constitutes a want of probable cause when the information received is such as to put an ordinarily prudent and caution person on inquiry. *Dun-*

lay v. New Zealand F. & M. Ins. Co. (1895, 109 Cal. 365, 42 Pac. 29; *Coyle vs. Scnellenberg* (1906) 30 Pa. Supra Ct. 246.

***When the facts are easily obtainable, a failure to make an inquiry before instituting a prosecution constitutes a want of probable cause. *Lacy v. Mitchell* (1864) 23 Ind. 67; *Lawrence vs. Leathers* (1903) 31 Ind. App. 414, 68 N.E. 179; *Boyd v. Mendenhall* (1893 53 Minn. 274, 55 N. W. 45; *Sweet v. Smith* (1899) 42 App. Div. 502, 59 N. T. Supp. 404. And see the cases cited supra in II. a.

In *Lacy v. Mitchell* (Ind.) supra, it appeared that the daughter of a landlord saw the tenant feed his chickens with some shelled corn. Both the tenant and the landlord kept shelled corn in the same barn.

The daughter also thought that her father's pile of corn looked as if a bushel had been taken therefrom. The landlord thereupon prosecuted the tenant. The court held that; as the landlord could easily have learned the truth by speaking with the tenant, there was a want of probable cause. The Court said: "Probable cause may be defined to be that apparent state of facts found to exist under reasonable inquiry; that is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged; and in a civil case, that a cause of action existed . . . We do not think probable cause for the prosecution was shown, considering all the circumstances. *Lacy* could have easily learned the facts of the case by speaking with *Mitchell* who was near him.

He should have made more inquiry, under the

circumstances of this case. If he really believed that Mitchell had stolen his corn, the belief arose from his own negligence.

Again in *Kennedy vs. Burbidge*, 54 Utah 497, 183 P. 325 at p. 506 this Court stated this rule as follows: Thurman J.

“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. But where, in addition to this fact, it is shown that the prosecutor either knew that the information upon which he acted was false, or had no personal knowledge of its truth, and made no investigation to determine its accuracy before instituting the prosecution a different question is presented. A judgment obtained under either of said conditions should have no standing in a court of justice as evidence of probable cause, much less be treated as conclusive. While every reasonable allowance should be made for possible errors and mistakes, we know of no reason why in a case of this kind a judgment wrongfully or recklessly procured should be used as evidence by the wrongdoer to defeat the person injured in his efforts to obtain redress.”

Again in the case of *Schnathorst v. Williams*, Ia. — 10 ALR 2d 1199 from which we have heretofore quoted above, the Court held that the “malice which is an ingredient of a cause of action for malicious prosecution is not ill will, hatred or express malice, but a want of probable cause.

The Court at p. 1210 “There was no burden on plaintiff to show “ill will,” “hatred,” or “express malice” on the part of the defendant. Malice

may be shown from want of probable cause, or from a prima facie showing thereof. As said, by quotation in *Connelly v. White*, 122 Iowa 391, 393, 98 NW 144, 145: "Malice in law is where malice is established by legal presumption from proof of certain facts . . . Malice in fact is to be found by the jury from the evidence in the case. They may infer it from want of probable cause. But it is well established that the plaintiff is not required to prove express malice, in the popular signification of the term, as that defendant was prompted by malevolence, or acted from motives of ill will, resentment, or hatred toward the plaintiff. It is insufficient if he prove it in its enlarged legal sense. *** "The fact that the action was commenced and prosecuted without probable cause may be considered by the jury on the question of malice . . . The malice required to support the action may be inferred by the jury from want of probable cause."

CONCLUSION

We submit that Plaintiff is entitled to have the judgment of the District Court affirmed. Had Defendants made any reasonable search for the car at the address or in the general neighborhood of Midvale, undoubtedly, the car would have been located, there would have been no arrest, and this lawsuit would not have been filed. It was the lack of any diligence on the part of Defendants which caused the issuance of the complaint, although Defendants would like to shift the blame to the County Attorney.

Potter was known to Defendant and as we have pointed out had done business with them on a number of previous occasions.

It would have been a comparatively simple matter for Defendants to locate the Plaintiff and the car had they exercised any degree of diligence.

We therefore feel that the verdict and judgment were fair and equitable and should be affirmed.

Respectfully Submitted

LaMAR DUNCAN,
Attorney for Respondent