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Malicious Prosecution -- Probable Cause as Question for Judge or Jury -- Authority of Agent to Institute Prosecution Under Bad Check Law

A. T. Allen Jr.

seems desirable for the legislature to give to the probate court authority to expunge from a will any libellous matter which is not strictly dispositive. This solution, in accord with the time-proven English practice, tends to preserve common law principles and at the same time prevents injurious publication.

ROBERT A. HOVIS.

Malicious Prosecution—Probable Cause as Question for Judge or Jury—Authority of Agent to Institute Prosecution Under Bad Check Law.

In the recent case of *Dickerson v. Atlantic Refining Co.*,[1] the plaintiff gave an agent of the defendant company a check in payment for certain goods. Three hours later, and before presentation of the check to the drawee bank, the plaintiff was arrested on a warrant sworn out by said agent charging him with uttering a worthless check. Due to a subsequent deposit, the check was paid when presented by the general manager of the local branch of the defendant corporation. The case against the plaintiff was *"nol. pros'd.* with leave," and this action for malicious prosecution was then instituted against the defendant company and its agents. It was *held* that a prosecution for uttering a worthless check, instituted chiefly to collect a debt and before presentation, was *prima facie* evidence that the prosecution was without probable cause, and that the evidence was sufficient to take the case to the jury.

Although some of the earlier decisions are to the effect that probable cause is a question to be determined by the jury,[2] the more numerous and later cases establish the principle that it is a question of law to be determined by the court.[3] The jury are to find the facts

[1] 201 N. C. 90, 159 S. E. 446 (1931).

[2] Thurber v. Building and Loan Ass'n., 118 N. C. 129, 24 S. E. 730 (1896); R. R. v. Hardware Co., 143 N. C. 54, 55 S. E. 422 (1906).

[3] Overton v. Combs, 182 N. C. 4, 108 S. E. 357 (1921); Humphries v. Edwards, 164 N. C. 154, 80 S. E. 165 (1914) (when the facts are admitted or established, the question of probable cause is one of law); Bowen v. Pollard and Co., 173 N. C. 129, 91 S. E. 711 (1921) (is a question of law to be decided by the court upon the facts as they may be found by the jury); Tyler v. Mahoney, 166 N. C. 509, 82 S. E. 870 (1917) (a mixed question of law and fact); see Jones v. R. R., 125 N. C. 227, 229, 34 S. E. 398, 399 (1899).

Despite this fact many cases state that a criminal prosecution for the purpose of collecting a debt is prima facie evidence of lack of probable cause. McDonald v. Schroeder, 214 Pa. 411. 63 Atl. 1024, 6 L. R. A. (N. S.) 701, 6 ANN. CAS. 506 (1906); Wenger v. Philips, 195 Pa. 214, 45 Atl. 27, 78 Am. St. Rep. 810 (1900) (is not conclusive in establishing want of probable cause, but is prima facie evidence).

and the judge is to instruct them hypothetically as to the existence or non-existence of probable cause under the different views that might be taken of the evidence. A rule that certain facts establish a *prima facie* case of probable cause and a rule that the court determines the question cannot, in logic or practice, both exist at the same time. The former requires a permissive instruction;[4] the latter, a mandatory one. The instant holding reversing a nonsuit with instructions to submit the question of probable cause to the jury is therefore an effectual, though inarticulate, repudiation of the established rule.[5]

Under our "Bad Check Law"[6] was the defendant justified in having the plaintiff arrested without having presented the check to the bank for payment? No general rule can be laid down due to the diversity in form of the statutes in the different states;[7] but the majority holding under the more recent statutes seems to be that the giving of a check does not of itself represent that the drawer has with the drawee bank sufficient funds out of which it will be paid, but simply that the check will be paid in the ordinary course of business.[8] In construing the North Carolina statute, the Supreme Court seems

In Hotel Supply Co. v. Reid, 16 Ala. App. 563, 80 So. 137 (1918) it was held an abuse of criminal process.

[4] "Of course, a prima facie showing does not necessarily mean that the plaintiff is entitled to recover. It is sufficient to carry the case to the jury, and it is for the jurors to say whether or not the crucial and necessary facts have been established. We express no opinion as to the weight of the evidence, other than its prima facie character, which means only that it is legally sufficient to carry the case to the jury and to warrant a recovery, nothing else appearing. It neither insures nor compels a recovery, however." Dickerson v. Refining Co., 201 N. C. 90, 96, 159 S. E. 446, 450 (1931).

[5] Of course, the ruling of nonsuit might have been reversed on the ground that the plaintiff's evidence, taken as true under the motion for nonsuit, showed want of probable cause as a matter of law. That is, it might be established as a rule of substantive law that a prosecution under the "Bad Check Law" instituted either before presentation or for a collateral purpose, and not to vindicate public justice, is want of probable cause as a matter of law. But the theory of reversal here is solely that the case should have gone to the jury.

[6] N. C. ANN. CODE (Michie, 1927) §4283(a). It shall be unlawful for any person . . . to draw, make, utter or issue and deliver to another, any check or draft . . . knowing at the time of making, drawing, uttering, issuing, and delivering . . . that the maker or drawer thereof has not sufficient funds on deposit in or credit with the bank . . . with which to pay the same upon presentation.

[7] Note (1925) 35 A. L. R. 344, and Note (1925) 35 A. L. R. 380.

[8] Maxey v. State, 85 Ark. 499, 108 S. W. 1135 (1908); Arrington v. State, 296 S. W. 568, Tex. Cr. App. (1927), in which the defendant was held not guilty of uttering a worthless check, although he had given a check knowing that he did not have sufficient funds on deposit with which to pay the same. Before the check could have been presented he paid a part and promised payment of the balance. See (1927) 14 VA. L. REV. 134.

to indicate that presentation of the check to the drawee bank is necessary before the drawer can be convicted under the act.[9] The statute makes no reference to post-dated checks; but it has been held that a post-dated check is not a representation that the drawer has funds for payment upon presentation, and the maker is not guilty of uttering a worthless check.[10] Even though it were ascertained by the payee that the maker of the check did not have sufficient funds on deposit at the time of the drawing, there should be a presentation of the check to the drawee bank, before criminal proceedings are instituted by the payee, to avoid liability for malicious prosecution or false arrest.[11]

When an agent is acting within the scope of his employment, a prosecution undertaken for the purpose of furthering the master's business would, if unfounded, impose liability upon the master.[12] As a general rule it appears that general managers and agents employed for collection purposes are acting within their authority when instituting proceedings against anyone uttering a worthless check payable to the master.[13] If such prosecution is instituted without probable cause, for the purpose of collecting a debt due the employer, then the

[9] Stacy, C. J., in State v. Crawford, 198 N. C. 522, 152 S. E. 504 (1930), states that "our statute is specifically directed against the issuance of checks or drafts on any bank or depository when the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same *upon presentation.*"

In State v. Yarboro, 194 N. C. 498, 140 S. E. 216 (1927), our court passed on the constitutionality of and construed the statute. Note (1927) 6 N. C. L. REV. 300.

[10] State v. Crawford, *supra* note 5. *Contra:* State v. Avery, 111 Kan. 588, 207 Pac. 838 (1922); State v. Johnson, 116 Kan. 390, 226 Pac. 758 (1924); People v. Westerdahl, 316 Ill. 86, 146 N. E. 737 (1925).

Statutes against obtaining property by false pretenses do not include post-dated checks. State v. Ferris, 171 Ind. 562, 86 N. E. 993 (1909); (1928) 34 W. VA. L. Q. 207.

[11] If the prosecution is instituted before presentation of the check it should be lack of probable cause and evidence of malice, if the check is paid when presented. This was in effect held in Dickerson v. Atl. Ref. Co., *supra* note 1; *supra* note 5.

If there is an agreement to hold a check and then a criminal prosecution is instituted, it is evidence of malice, and also of lack of probable cause. Aldana v. Tarazon, 15 S. W. (2d) 678, (Tex. Civ. App. 1929); Turner v. Brenner, 138 Va. 232, 121 S. E. 510 (1924).

[12] Jackson v. Amer. Tel. and Telegraph Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738 (1905); Kelly v. Shoe Co., 190 N. C. 406, 130 S. E. 32 (1925); (but if the agent exceeds his authority the master is not liable) Buttery v. Wilhite, 208 Ala. 573, 94 So. 585 (1922).

[13] Sweatman v. Linton, 66 Utah 208, 241 Pac. 309 (1925); Hostettler v. Carter, 73 Okla. 125, 175 Pac. 244 (1918); Gorman-Gammill Seed and Dairy Co. v. Morton, 203 Ala. 530, 84 So. 766 (1919).

principal may be liable for malicious prosecution or false arrest.[14] It was recently held that if an agent is expressly forbidden to accept checks except at his own risk, and he then procures the arrest of a person for cashing a worthless check, the employer is not responsible, unless there is a subsequent ratification of the act of the agent.[15]

To avoid liability for a malicious prosecution the owner of a business enterprise should forbid its agents to institute proceedings under the Worthless Check Act, until the check has been presented and returned from the bank;[16] or else, to vindicate public justice and not merely to collect a debt, make a full and fair disclosure of the facts to a reliable attorney before commencing the prosecution;[17] or so limit the authority of the agent that he will be acting outside the scope of his employment if he institutes criminal proceedings to enforce payment of a check.[18]

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[14] Hotel Supply Co. v. Reid, *supra* note 3; Hostettler v. Carter; Sweatman v. Linton, both *supra* note 13.

If there is probable cause for the arrest, and no evidence of malice on the part of the agent, the master is not liable. Genovesse v. Piggly Wiggly, 32 S. W. (2d) 379, Tex. Civ. App. (1930).

[15] Lamm v. Charles Stores Co., 201 N. C. 134, 159 S. E. 444 (1931), in which the store manager's arrest of the plaintiff on a charge of cashing a worthless check was held to be an unauthorized act. There were written instructions to the store manager in the following words: "If a manager cashes a personal check, it is his own responsibility and he will positively be held responsible." There was no evidence of ratification of the act of the agent and the master was not held liable for the false imprisonment.

Counsel in this case seems to have overlooked the rule of *Price v. Neal,* that the loss on the forged check should have been borne by the drawee bank. Bank v. Trust Co., 168 N. C. 605, 85 S. E. 5, L. R. A. 1915 D 1138 (1915).

Whether the agent had authority to take checks was not decided, but the fact that the store manager did take checks and that this was known by the employer, would seem to imply such authority. Even though the manager was acting within the scope of his employment in accepting checks in payment would not necessarily imply that he had the further authority to prosecute, since he accepted the checks at his own risk, and there could be no benefit to the principal. Whereas, in Dickerson v. Refining Co., *supra* note 1, the agents instituted the proceedings to collect a debt due the principal, and whether they were within the scope of their authority, or whether there was a ratification of their act, was held for the jury to determine. You must look to the facts in each particular case. There was such a difference in the facts to the two cases as to justify the different conclusions reached.

[16] Dickerson v. Atl. Refining Co., *supra* note 1.

[17] The advice of counsel, given in good faith on a full and fair statement of all the facts, is a defense in an action for malicious prosecution. Moser v. Fable, 164 Ky. 517, 175 S. W. 997 (1915); J. B. Colt Co. v. Grubbs, 206 Ky. 809, 268 S. W. 817 (1925); Downing v. Stone, 152 N. C. 525, 68 S. E. 9, 136 Am. St. Rep. 841, 21 ANN. CAS. 753 (1910) (not a complete defense, but evidence to be submitted to the jury on the issue of probable cause as well as the issue of malice).

[18] Lamm v. Charles Stores Co., *supra* note 15.