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FLORA *v.* RUSSELL.[1] SUPREME COURT OF INDIANA.

The mere fact that a party acts on the advice of an attorney in suing out a search warrant, does not absolutely show absence of malice, and probable cause, especially where, in communicating the facts to the attorney, he so enlarges a mere suspicion as to make it appear that he has some positive information. In such a case the advice of the attorney is no defence.

ADVICE OF COUNSEL AS A DEFENCE TO A SUIT FOR MALICIOUS PROSECUTION.

I. The action for malicious prosecution depends upon the two conditions, usually interdependent, of malice and want of probable cause; in other words, the defendant must have instituted the proceeding out of which the suit grew from a bad motive, and have had no reason to believe the plaintiff guilty of the offence charged. These two conditions must, as a general rule, co-exist. If there was really good ground to believe the plaintiff guilty, the motive of the defendant in prosecuting is immaterial; and, on the other hand, if he had no valid reason to believe in his guilt, the very purest motive ought not to relieve him from liability for negligence, if for nothing else. As a matter of fact, malice is much more frequently inferred from the want of probable cause than proven by direct evidence. It follows, then, that anything which tends to disprove malice or to show probable cause is, or ought to be, admissible in evidence, in the one instance to mitigate damages, in the other to exonerate from all liability.

[1] Reported in 37 N. E. Rep. 593.

II. In all matters involving legal questions, the opinion of an attorney is necessarily of great and controlling weight; and, therefore, when he pronounces it as his opinion on a given state of facts that they warrant a criminal prosecution, and that is set on foot, it is only fair to infer that the prosecution would not have been begun without that opinion. The opinion, then, is really the efficient cause of the suit; and the prosecutor, who has acted according to his best lights, ought not justly to be held liable. The general rule, therefore, is, that the advice of an attorney is admissible in evidence to disprove malice and establish probable cause; and, if connected with perfect good faith on the part of the prosecutor, will exonerate him from all liability: Miller *v.* Chic., M. & St. P. Ry. Co., 41 Fed. Rep. 898; Wicker *v.* Hotchkiss, 62 Ill. 107; Walker *v.* Camp, 69 Iowa, 741; Acton *v.* Coffman, 74 Iowa, 17; Soule *v.* Winslow, 66 Me. 447; Perry *v.* Sulier, 92 Mich. 72; S. C., 52 N. W. Rep. 801; Cole *v.* Curtis, 16 Minn. 182; Jonasen *v.* Kennedy (Neb.), 58 N. W. Rep. 122; Bartlett *v.* Brown, 6 R. I. 37; Newton *v.* Weaver, 13 R. I. 616. The attorney should be competent to give the advice sought; or at least the defendant should have no reason to suspect him of incompetency: Schippel *v.* Norton, 38 Kans. 567; and should be a man of integrity: Walter *v.* Sample, 25 Pa. 275. It would be monstrous to hold that anyone, by applying to a weak man, or an ignorant one, might shelter his malice in bringing an unfounded prosecution: Hewlett *v.* Cruchley, 5 Taunt. 277. But it is sufficient that he be reputed competent in the community in which he lives: Murphy *v.* Larson, 77 Ill. 172. If he is a regularly licensed attorney, his competency will be presumed, and the defendant need not adduce proof thereof: Horne *v.* Sullivan, 83 Ill. 30. He must also be one whom defendant had no reason to suspect of prejudice or bias: Smith *v.* King, 62 Conn. 515; S. C., 26 Atl. Rep. 1059. If he is interested in the subject matter of the prosecution, and defendant have knowledge of it, his advice will be no defence, though it be given honestly, for the defendant in such a case has no right to expect an unbiased opinion: White *v.* Carr, 71 Me. 555.

The rule applies to advice given by a district, county, or prosecuting attorney, equally with private counsel: Jessup *v.* Whitehead (Colo.), 29 Pac. Rep. 916; Wright *v.* Hanna, 98 Ind. 217; Thurston *v.* Wright, 77 Mich. 96; Huntingdon *v.* Gault, 81 Mich. 144; S. C., 45 N. W. Rep. 970; Webster *v.* Fowler, 89 Mich. 303; S. C., 50 N. W. Rep. 1074; Norrell *v.* Vogel, 39 Minn. 107; S. C., 38 N. W. Rep. 705; Baldwin *v.* Weed, 17 Wend. 224; Laughlin *v.* Clauson, 27 Pa. 328. It has been claimed that the rule should apply more strongly to these than to private counsel, on account of their official character, and that their advice should be a complete defence; but this was rejected by the court on unassailable grounds. "Prosecuting officers in this county do not stand on a higher plane of learning or ability than their brethren of the profession who do not hold office; nor are they held in higher esteem for honor or integrity of purpose. If this be true (and it certainly cannot be doubted), there is no good reason why the advice of a county or distinct attorney should be treated as a more effective shield than that of the private lawyer, who is also an officer of court, and entitled to its confidence and respect:" Sebastian *v.* Cheney (Tex.), 24 S. W. Rep. 970. It might also have been added that there were powerful reasons why it should have even less effect: that the ablest members of the Bar would not accept the office of district attorney except in the large cities; that even there, as in all other places, the office was liable to become the prey of professional politicians; and that in many places it is given to men of youth and inexperience, as a means to help them rise in their profession.

The person whose advice is sought must be an attorney; and if he is not, his advice will be of no avail. The fact that he held himself out as an attorney, and that the defendant believed him to be such, does not alter the case: Murphy *v.* Larson, 77 Ill. 172. No person unlearned in the law is competent to give such advice; and consequently the advice of a pettifogger, who has been for years engaged in suits before justices, is no defence, as there is no presumption that he knows more than other laymen: Stanton *v.* Hart, 27 Mich. 539.

The same is true of the advice of a police officer: Coleman *v.* Heurich, 2 Mackey (D. C.), 189; and of a detective: Breitmesser *v.* Stier, 13 Phila. 80.

There is, however, some little difference of opinion on the question of the effect in this regard of advice given by a justice of the peace or magistrate. The vast preponderance of authority gives it the same status as any other lay advice, and declares it to be no defence: Rigden *v.* Jordan, 81 Ga. 668; Finn *v.* Frink, 84 Me. 261; S. C., 24 Atl. Rep. 851; Straus *v.* Young, 36 Md. 246; Olmstead *v.* Partridge, 82 Mass. 381; Cooney *v.* Chase, 81 Mich. 203; S. C., 45 N. W. Rep. 833; Brobst *v.* Ruff, 100 Pa. 91; Beihofer *v.* Loeffert (Pa.), 28 Atl. Rep. 217; Sutton *v.* McConnell, 46 Wis. 269; S. C., 50 N. W. Rep. 414; Burgett *v.* Burgett, 43 Ind. 78; Williams *v.* Van Meter, 8 Mo. 339; Gee *v.* Culver, 12 Ore. 228. "Justices of the peace are not required to be learned in the law. In fact, generally throughout the State they are not. They are not qualified by a course of study to give advice on questions of law. They do not pursue it as a profession. They are not charged with the duty of advising any person to commence a prosecution. They ought not to act as attorney or agent for one in regard to a prosecution he is about to institute before them. . . . An educated business man may be much better qualified than many inexperienced justices of the peace to advise as to the law; yet I am not aware that the advice of such a person has ever been held to protect against damages for a malicious prosecution:" Brobst *v.* Ruff, *supra.*

On the other side are Holmes *v.* Horger (Mich.), 56 N. W. Rep. 3, which does not mention Cooney *v.* Chase, 81 Mich. 203, which it seems to overrule; Thomas *v.* Painter, 10 Phila. 409, practically overruled by Brobst *v.* Ruff, *supra;* Sisk *v.* Hurst, 1 W. Va. 53; and Ball *v.* Rawles, 93 Cal. 222; S. C., 28 Pac. Rep. 937, which rests upon a mistaken view of Hahn *v.* Schmidt, 64 Cal. 284; S. C., 30 Pac. Rep. 818. All that was decided in the latter case was, that when a complaint is made before a justice, and he issues a warrant thereon under a mistaken conception of the law, the person who made the complaint is not liable, as the justice issued the warrant on his

own responsibility. This is a correct view of the law: Leigh *v.* Webb, 3 Esp. 165; Cohen *v.* Morgan, 6 D. & R. 8; Carratt *v.* Morley, 1 Gale & D. 275; Teal *v.* Fissel, 28 Fed. Rep. 351; Newman *v.* Davis, 58 Iowa, 447; S. C., 10 N.W. Rep. 852; Smith *v.* Austin, 49 Mich. 286; but is a wholly different case from the issuance of a warrant by a justice on request of the complainant, after obtaining his advice. In the latter case the complainant is active, in the former passive. Ball *v.* Rawles, therefore, is of no authority.

There is, however, no good reason why the advice of a justice or magistrate, who is also an attorney, should not be a defence; and this has been held to be the law: Turner *v.* Dinnegar, 20 Hun (N. Y.), 465. This doctrine was denied in Mark *v.* Hastings (Ala.), 13 So. Rep. 297, on the ground that in such a case the advice was asked and given, not as an attorney, but as a magistrate, and that "however learned in the law, it would be an impolitic and unwarrantable extension of the rule to allow the advice or opinion of a justice of the peace in regard to the sufficiency of the grounds for the institution of a prosecution before him." While this may be true, it does not touch the point. The only question is whether the person who advises is competent and disinterested; and if so, it makes no difference whether he is attorney, magistrate, or judge.

This question was very fully discussed in Monaghan *v.* Cox, 155 Mass. 487; S. C., 30 N. E. Rep. 467, where the magistrate was also an attorney. "Olmstead *v.* Partridge was decided in 1860. Since that time the authority to issue warrants for criminal offences has been taken from the ordinary justices of the peace and is lodged on officers specially designated for the purpose, and in trial justices, and the justices of police, district and municipal courts. A very large majority of the gentlemen now having this authority are members of the Bar, and all have been selected with care, and are known to the community as wise and discreet men. Besides this, they are disinterested and independent and not, as was sometimes felt to be the case with justices of the peace under the old system, under the control or influence of particular persons. No one expects that the old order of things

will be reinstated, or that less care will in the future be exercised in the selection of the magistrates, to whom, under the present system, the duty of receiving complaints is intrusted. If then it is clear, that our magistrates of this class possess the qualifications and are free from the disqualifications mentioned in the opinion of the court in Olmstead *v.* Partridge, the same principles which led the court to its decision in that case now require us to decide differently. . . . Upon the question whether, under certain circumstances stated, a formal complaint ought to be made, and a warrant issued, we cannot say that it is improper for such magistrates to give advice, and it follows that no good reason now exists why in this Commonwealth evidence that a complaint was made upon the advice of such a magistrate should be inadmissible upon the question of probable cause."

This is true, so far as concerns the case in hand, and the case of any magistrate or justice who is also an attorney; but it cannot be held to apply to magistrates or justices who are not learned in the law. As to them the old rule still applies. And in any case the advice of a justice, who is not responsible to any one for his action, ought not to be given the same effect as that of a regular attorney. This is acknowledged by the court in Monaghan *v.* Cox, *supra.*

In any case, the advice of a layman, if honestly sought, will go in mitigation of damages: Murphy *v.* Larson, 77 Ill. 172.

III. The advice of an attorney is by no means an absolute justification; but merely evidence to go to the jury of the absence of malice and the existence of probable cause. "It is not the advice that rebuts the presumption of malice, but the innocence of defendant's conduct, of which his seeking advice is merely evidence. Whether the advice makes out a good defence or not, depends on the good faith with which it is sought and followed. Such good faith is shown by the candor, fullness and fairness of the clients' statement, upon which the advice was based, and its adequacy in those respects, whenever it is disputed, is for the jury to determine upon all the evidence:" Smith *v.* Walter, 125 Pa. 453; S. C., 23 W. N. C. 538; 17 Atl. Rep. 466; Lemay *v.* Williams, 32 Ark. 166;

Skidmore *v.* Bricker, 77 Ill. 164; Fadner *v.* Filer, 27 Ill. App. 506; Smith *v.* Zent, 59 Ind. 362; McCarthy *v.* Kitchen, 59 Ind. 500; Lytton *v.* Baird, 95 Ind. 349; Flora *v.* Russell (Ind.), the principal case, 37 N. E. Rep. 593; Mesher *v.* Iddings, 72 Iowa, 553; Hall *v.* Kehoe, 8 N. Y. Suppl. 176; Ramsey *v.* Arrott, 64 Tex. 320; Glasgow *v.* Owen, 69 Tex. 167; S. C., 6 S. W. Rep. 527; Shannon *v.* Jones, 76 Tex. 141; S. C., 13 S. W. Rep. 477. Accordingly, the conduct of the plaintiff must be free from any bad faith. In the first place, he must have given to the attorney, as the basis for his advice, a full and fair statement of the facts of the case, or he will still be liable: Guthbert *v.* Galloway, 35 Fed. Rep. 466; Blunt *v.* Little, 3 Mason, 102; Bliss *v.* Wyman, 7 Cal. 257; Potter *v.* Seale, 8 Cal. 217; Aldridge *v.* Churchill, 28 Ind. 62; Scotten *v.* Longfellow, 40 Ind. 23; Paddock *v.* Watts, 116 Ind. 146; S. C., 18 N. E. Rep. 518; Logan *v.* Maytag, 57 Iowa, 107; Mesher *v.* Iddings, 72 Iowa, 553; Schippel *v.* Norton, 38 Kans. 567; Cointement *v.* Cropper, 41 La. An. 303; S. C., 6 So. Rep. 127; Weil *v.* Israel, 42 La. An. 955; S. C., 8 So. Rep. 826; Wells *v.* Noyes, 12 Pick. 324; Donnelly *v.* Daggett, 145 Mass. 314; Stevens *v.* Fassett, 27 Me. 266; Huntington *v.* Gault, 81 Mich. 144; S. C., 45 N. W. Rep. 970; Baldwin *v.* Weed, 17 Wend. 224; Davenport *v.* Lynch, 6 Jones N. C. L. 545; Ash *v.* Marlow, 20 Ohio, 119; Walter *v.* Sample, 25 Pa. 275; Fisher *v.* Forrester, 33 Pa. 501; Emerson *v.* Cochran, 111 Pa. 619; Leahey *v.* March, 155 Pa. 458; S. C., 32 W. N. C. 292; 26 Atl. Rep. 701; Hall *v.* Hawkins, 5 Humph. (Tenn.) 357; Kendrick *v.* Cypert, 10 Humph. (Tenn.) 291; Forbes *v.* Hagman, 75 Va. 168; Sherburn *v.* Rodman, 51 Wis. 474; Palmer *v.* Broder, 78 Wis. 483; S. C., 47 N. W. Rep. 744. It is therefore not enough to merely prove the consultation with the attorney; the facts laid before him must also be proved: Aldridge *v.* Churchill, 28 Ind. 62; Porter *v.* Knight, 63 Iowa, 365; Blunt *v.* Little, 3 Mason, 102.

A suppression of material facts will render the defendant liable. "Any evasion or concealment by a prosecutor in his statement of case to his counsel, or any failure on his part to

make a full disclosure of all the facts within his knowledge concerning it, will deprive him of the protection which advice founded upon an honest, fair and full presentation of the case affords. An incomplete and unfair statement warrants an inference that the advice was sought as "a mere cover for the prosecution, and an opinion based on such statement is an unsatisfactory reply to evidence of malice and want of probable cause:" Barhight *v.* Tammany (Pa.), 28 Atl. Rep. 135; Galloway *v.* Stewart, 49 Ind. 156; Stevens *v.* Fassett, 27 Me. 266; Willard *v.* Holmes, 21 N. Y. Suppl. 998; S. C., 2 Misc. Rep. 303. Thus, defendant is liable if he fail to state that property taken by plaintiff was taken openly and under a claim of right: Roy *v.* Goings, 112 Ill. 656; that the plaintiff requested him to examine the property alleged to have been stolen, and that he refused: Norrell *v.* Vogel, 39 Minn. 107; S. C., 38 N. W. Rep. 705; or that there are facts tending to exculpate the plaintiff: Jessup *v.* Whitehead (Colo.), 29 Pac. Rep. 916. The defendant will not be exonerated if he so exaggerate the facts as to mislead the attorney: Flora *v.* Russell (Ind.), the principal case, 37 N. E. Rep. 593. It is competent to ask the attorney, as an expert, whether or not, if the facts stated had been different in a specified particular from those stated by defendant, he would have given the advice he did: Paddock *v.* Watts, 116 Ind. 136; S. C., 18 N. E. Rep. 518.

The defendant, however, is not bound to disclose all the facts in the case, but only those which he knows, or might have ascertained by reasonable diligence: Motes *v.* Bates, 80 Ala. 382; Wicker *v.* Hotchkiss, 62 Ill. 107; Manning *v.* Finn, 23 Neb. 511; R. R. *v.* Hunt, 59 Vt. 294. But a failure to state facts exculpatory of plaintiff, which the defendant might have known by the slightest inquiry of persons associated with himself in the transaction complained of, he being in possession of information which would have put a prudent man on inquiry respecting those facts, will make him liable: Jessup *v.* Whitehead (Colo.), 29 Pac. Rep. 916. If, however, the reputation of his informants for veracity is bad, a failure to make inquiry about the latter will not remove the

defendant from the protection of the rule, when there were no known facts to arouse suspicion as to the truth of their statements: Jordan *v.* R. R., 81 Ala. 220; S. C., 8 So. Rep. 191. The facts which the defendant is obliged to disclose are only those which a man of ordinary intelligence is bound to know are material: Peterson *v.* Toner, 80 Mich. 350; S. C., 45 N. W. Rep. 346.

IV. The prosecution must also be carried on in good faith, after the advice has been given: Wells *v.* Noyes, 12 Pick. 324; Cole *v.* Curtis, 16 Minn. 182; Ravenga *v.* Mackintosh, 2 B. & C. 693. A prosecution to force collection of a debt is not in good faith: Neufeld *v.* Rodeminiski (Ill.), 32 N. E. Rep. 913; nor if caused by passion and a desire to injure the plaintiff: Fugate *v.* Miller, 109 Mo. 281; S. C., 19 S. W. Rep. 71; Sharpe *v.* Johnston, 76 Mo. 660; nor if the defendant did not in fact believe the plaintiff guilty: Center *v.* Spring, 2 Iowa, 393; Johnson *v.* Miller, 82 Iowa, 693; nor had reason to believe him so: Brewer *v.* Jacobs, 22 Fed. Rep. 217.

V. The defendant, if he acts in good faith, is not liable for the error of the attorney in advising the prosecution: Stone *v.* Swift, 4 Pick. 389; Wells *v.* Noyes, 12 Pick. 324; Hall *v.* Suydam, 6 Barb. (N. Y.) 83; Walter *v.* Sample, 25 Pa. 275; Richardson *v.* Virtue, 72 Hun (N. Y.) 208. But see Hewlett *v.* Cruchley, 5 Taunt. 277; and Hall *v.* Hawkins, 5 Humph. 357.

VI. There has been much dispute as to the proper application of the evidence of advice. Some authorities hold that it goes to the question of malice only: Brewer *v.* Jacobs, 22 Fed. Rep. 217; Wright *v.* Hanna, 98 Ind. 217; Ramsey *v.* Arrott, 64 Tex. 320. Others claim that it relates only to probable cause: Genevey *v.* Edwards (Minn.), 56 N. W. Rep. 578; Sharpe *v.* Johnson, 59 Mo. 557; Hall *v.* Kehoe, 8 N. Y. Suppl. 176. The better opinion, however, is that which makes advice evidence of both want of malice and the existence of probable cause: Wilkinson *v.* Arnold, 11 Ind. 45; Smith *v.* Zent, 59 Ind. 362; McCarthy *v.* Kitchen, 59 Ind. 500; Gould *v.* Gardner, 8 La. An. 11; Phillips *v.* Bonham, 16 La. An. 387; Monaghan *v.* Cox, 155 Mass. 487; S. C., 30 N. E.

Rep. 467; Thurston *v.* Wright, 77 Mich. 96; Shannon *v.* Jones, 76 Tex. 141; S. C., 13 S. W. Rep. 477; Hurlbut *v.* Boaz (Tex.), 23 S. W. Rep. 446. The question of the effect of this evidence is solely for the jury: Smith *v.* Walter, 125 Pa. 453; S. C., 23 W. N. C., 538; 17 Atl. Rep. 466.

VII. The whole subject is very well summed in the following extract from the opinion of the court in Stevens *v.* Fassett, 27 Me. 266, 283: "If a person with an honest wish to ascertain whether certain facts will authorize a suit or a criminal prosecution, lays all such facts before one learned in the law, and solicits his deliberate opinion thereon, and the advice obtained is favorable to the suit or prosecution, which is thereupon commenced, it will certainly go far, in the absence of other facts, to show probable cause, and to negative malice. But if it appears that he withheld material facts, within his knowledge, or which, in the exercise of common prudence, he might have known; or if it appears that he was influenced by passion or a desire to injure the other party, and especially if he received from another, learned in the law, whose counsel he sought, advice of a contrary character upon the same question, the opinion which he invokes in defence, ought not to avail him, and it is well understood that it cannot be a protection."

[For a collection of cases on this subject, see 14 Am. & Eng. Enc. of Law, 52, etc.]

R. D. S.