DISTRICT JUDGE TRAVIS' DECISION

Journal Prints Opinion In Full For Public Benefit

On the motion for new trial the court finds where two separate and independent causes of action are joined to the same petition and each appears upon the trial of one of the causes of action that this is error and there is no error in the other, can a new trial be granted upon one of the causes of action and a judgment entered upon the verdict in the other?

Section 341 Code of Civil procedure of Nebraska provides: "A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury, report or referee, or a decision of a court"

We find this provision precisely in the codes of many other states, notably California and Montana. The California, Montana and Nevada courts construing these very words, have held that a new trial can be granted upon one of the causes of action and overruled as to the other. In the case of Ramsdell vs. Clark, 20 Montana 103, 49 Pac., 592, the court say:

"The appellant concedes that there was no errer in the order of the lower court granting a new trial so far as the second alleged breach of the lease is concerned, because the evidence was conflicting on that branch of the case. He objects, however to the alleged order in so far as it grants a new trial as to the first and third branches of the lease. Does the complaint contain more than one cause of action? We are of the opinion that three separate causes of action are set forth by plaintiff in his complaint. It is true each is connected with the same contract, but each differs essentially from the other two. Can a new trial to be granted as to one or more of several causes of action included and tried in the same suit? We are of the opinion that this can be done where, as in this case, the issues have not been blended, and each cause of action remains distinguishable and separate even after verdict. Section 295, div. 1, Comp. St. 1887, and section 1170, Code Civ. Proc. 1895, define a new trial to be "a re examination of an issue of fact in the same court after a trial and decision by a jury, court or referees." The case of Town Co. v. Neale (Cal.) 20 Pac. 372, lays down this rule under an identical statute. See also, Lake v. Bender, 18 Nev. 361 Pac. 711 and 7 Pac. 74. Where the issue or issues in one cause of action have been properly tried, it is the duty of the trial court, in passing upon a motion for a new trial, to grant it only as to those issues which have been improperly tried, where this can be done readily, and without confusion resulting upon the retrial."

See also 34 N. E,. 242; 7 Pac., 74.

In this case the jury found separately upon the first cause of action and separately upon the second cause of action. The mere fact that these findings are upon the same piece of paper does not mean that it is one compound verdict. It is essentially two verdicts. A verdict may be defined to be the answer of the jury to the questions of fact contained in the issue formed by the pleadings.

28 Conn., 140.

A verdict is a decision of an issue by jury.

Froman v. Patterson, 10 Mont., 107.

In effect, in this case, two separate causes of action were tried and the jury were instructed upon each cause of action, and the jury found the issues separately upon each cause of action and in effect rendered two verdicts. The first verdict for slander has been maintained; the second is set aside and a new trial granted.

In view of the fact that counsel of both sides have so carefully, diligently and ably argued the 14th instruction, it may be due to counsel to give the reasons of the court for the finding that the 14th instruction should not have been given.

I find our court, from the 5th Nebraska down to the present time, repeatedly declaring that want of probable cause and malice must be alleged and proven each as a fact. 26 Neb., page 76, Jones vs. Purin, the Court says: "Want of probable cause being shown, the question of malice is still a fact for the jury to find." And the court has no where said that malice is not a question of fact for the jury to weigh. Whatever inferences or presumptions arise would only be questions of fact to be weighed by the jury. As in a criminal case the presumption of innocence is a fact to be taken to the jury room to be weighed by the jury along with the other evidence. Our court does say that the jury may infer malice from want of probable cause, but as a fact only. It is not the province of the jury to find the law.

The instruction in question contained the finding of a fact, to-wit: the inference of malice and says to the jury you must find this inference to be true, depriving them of the right to weigh the same as evidence. The instruction gives them to understand that this inference is not to be rebutted, but is to be found as a fact, as in the same manner as when the court directs the jury upon an undisputed fact to find it. It tells the jury not to weigh the presumption at all, but to take it as true and that the presumption is conclusive.

Malice is not and never can be implied simply from an unfounded prosecution, but may be inferred from want of probable cause to institute the prosecution. But this needs explanation. The books are misleading in this, that they take the phrase "want of probable cause" anr say that malice may be inferred from want of probable cause. This is not what the court means. What is meant is that malice may be inferred from the facts which show want of probable cause, and these facts may or may not show both want of probable cause and malice. If the facts which show want of probable cause show malice, then malice may be inferred by the jury, but if the facts which show want of probable cause do not show malice, then malice may not be inferred and these facts are to be considered and weighed by the jury.

Carson v. Edgworth 43 Mich., 241,

The Missouri court has explained this. Few other courts have taken the trouble to do so.

If the defendant had probable cause to institute this prosecution, it does not matter how malicious he was or what was his motive. In this cause it is a question for the jury to determine from the facts which constitute want of probable cause or probable cause; whether he had probable cause, and the court cannot assume upon a state of facts in dispute that want of probable cause was proven in the case and then say upon a disputed state of facts that they must find malice. It would be right to say in the instruction, if they found want of probable cause that you may infer malice but it would not be right to tell them that if they found want of probable cause they must find malice. The jury must consider the facts which constitute want of probable cause and from these facts determine whether or not they can reasonably infer malice. See Shapp vs. John, 76 Mo., 660. If in this case the evidence indisputably showed want of probable cause and the facts which constituted want of probable cause showed malice and the evidence was indisputed on the other issues to be proved by plaintiff, then the court could direct a verdict, or if the evidence was indisputed that there was want of probable cause and the same facts showed malice or facts showing malice were absolutely proven and indisputed, then the court could tell the jury that they must infer malice and that is all the case in the 13th Nebraska and the case in the 95th Northwestern at page 686 determine. They seem to be an apparent exception to the general rule, but in fact are not. In these cases want of probable cause was indisputably shown and the same facts which constituted want of probable cause showed malice.

See 26 Cyc., 110; also Bartlett vs. Hawley, 37 N. W., 581; see also 2nd Kansas, the case of Malone vs. Murphy, pages 254-258.

In the case of Bartlett vs. Hawley the court says:

1 Malicious Prosecution — Probable Cause—Malice.

In an action for malicious prosecution the question of probable cause, upon a given state of facts, is for the court; but whether the prosecution originated in malice is for the jury.

2. It may be inferred by the jury from the want of probable cause, and also from conduct showing vindictiveness and ill will, or an attempt to use criminal process to compel the settlement of a disputed claim.

3. But undisputed evidence clearly showing that the defendant has knowingly and wrongfully instituted a groundless prosecution in wilful violation of duty and disregard of the rights of the plaintiff, may establish a prima facie case of malice as matter of law such as (if rebutted) to justify the court in setting aside an adverse verdict.

But the general rule is that the question of malice is for the jury, though it may be true that in some cases the evidence of want of probable cause and of intentional wrong may be so clear as to authorize the court to hold that certain undisputed facts establish a prima facie case, warranting a verdict unless rebutted. Briggs vs. Richmond, 10 Pick. 395. And see Kavanagh vs., Beckwith, 44 Barb. 195; Robinson vs. Stewart, 10 N. Y., 194; Cunningham vs. Freeborn, 11 Wend. 241; Webb vs. Dagget, 2 Barb. 12.

In 2nd Ks. 248 the court says:

On trial of the case in the court below, after the introduction of the evidence of both parties the court among other things, charged the jury as follows: "The rule of law is, that if there was an absence of probable cause, the prosecution wac malicious, the law implying malice from want of probable cause," and also: "If, then, if you should find there was a want of probable cause, you must find for the plaintiff, for the law presumes malice from want of probable cause, and no other proof of malice is required."

To sustain the action for malicious prosecution, two things are essential—malice and want of probable cause. Malice is not of itself sufficient; neither is want of probable cause. Both must occur. Affirmative proof of malice is as necessary as affirmative proof of the absence of probable cause. Both are issues to be submitted to the jury, and both must be found from the testimony as facts, by the jury, to sustain a verdict for the plaintiff.

How, then, can they be said to find from the testimony that there was malice if the court should say to them that the evidence which shall convince them of the existence of malice. The evidence might clearly show that the defendant acted in the best of faith, but upon an entirely innocent mistake of fact. The jury might be fully satisfied of the entire absence of probable cause in such a case; yet the rule as given the jury by the court below would compel them to find that the prosecution was malicious. The real effect of the rule would be that the jury would find one of the essential facts, and the court would find the other, and compel the jury to adopt its finding.

Such we do not believe the law to be. The jury may consider the absence of probable cause as a circumstance tending to show malice. It may be in individual cases a circumstance sufficient to satisfy them of malice. They are to be the sole judges of that. They are not bound by the law to be so satisfied. They may infer malice from want of probable cause, but they are not bound to so infer it.

Therefore we think the court erred in charging the jury that malice was implied from want of probable cause, and the judgment will be reversed.

The court is clearly of the opinion that in this instruction in the case at bar the jury were directed to find malice as a fact. This was clearly error and for that the defendant is entitled to a new trial on the second cause of action. There are other errors in the record, but it is not necessary to go any further. Upon the second cause of action the verdict for $7,500 is set aside and a new trial granted.

Auto Turned Over.

Wednesday a party of five were here from Rockport, Mo., being a physician, a county official and three friends. They came over in an auto and spent the afternoon here having a good time with some of their friends and started home about 5:30 o'clock and when they reached the Burlington bridge they were going at the rate of about 25 miles per hour. The man in charge of the machine seemed to be under the influence of trust made goods and in trying to turn off the bridge the machine struck one of the posts and was overturned, throwing all the party out and seriously injuring one man and bruising the others up considerably. The physician looked after the injured and after the bridge men assisted them in righting the machine all of the men were placed back in it and after making the bridge men promise not to say anything they started for home. It was in this way the matter was kept quiet until this time.—Nebraska City News.

New Restaurant.

We, the undersigned, have purchased the restaurant formerly known as the "Adair Cafe" situated upon Fourth street in the Gund building, and will continue to run the same as a first-class, upto-date restaurant. A share of the patronage is solicited.

G. L. Mullis and J. C. Brady.

COLONEL MAKES HIT

Representative Bates Gives Good Impression at Lincoln

The democratic representative from this county Col. M. A. Bates seems to be making good right on the start in his new duties as a legislator. That the Colonel is in evidence and that the people of Cass and Otoe counties who elected him will have a representative who will be no figurehead but a live member, is vouchsafed by the attention given him by the papers. Both the State Journal and the Bee pay him some handsome compliments. The State Journal referring to the democratic caucus says "A call for a caucus was circulated during the afternoon, the time for meeting being set for 7:30 in the evening. It was generally agreed that M. A. Bates, the democratic editor with the silk tile, should call the meeting to order." Col Bates, however, declined the position.

The Bee gave an even more extended comment, heading its reference "Bates is Modest." It says: "Colnel Bates of the Plattsmouth Journal is one of the distinguished members of the house. The Colonel stands about six feet high and is broad in proportion. He carries a gold headed cane and wears a high silk hat and in appearance is in keeping with the profession to which he has the honor to belong. He is a candidate for the chairmanship of the committee on printing and that is all he wants at the hands of the organization."

This is not bad as a starter for our representative and the local democrats are justly proud of their proxy in the lower house.

Rank Foolishness.

"When attacked by a cough or cold, or when your throat is sore, it is rank foolishness to take any other medicine than Dr. ing's New Discovery," says C. O. Eldridge of Empire, Ga. "I have used New Discovery for seven years and I know it is the best remedy on earth for caughs and colds, croup, and all throat and lung troubles. My children are subject to croup, but New Discovery quickly cures every attack." Known the world over as the kind of throat and lung remedies. Sold under guarantee at F. G. Fricke & Co.'s drug store at 50c and $1.00. Trial bottle free.

DO MUCH BUSINESS

Commissioners' Session a Busy One Bids Asked For

From Tuesday's Daily.

The county commissioners were in session today and besides allowing an unusual grist of bills against the county, transacted a great deal of other business. Among other things they approved the official bonds of Geo. A. B. Hicks, M. Sulser, and Frank Rouse as road overseers, C. E. Hulbert as justice of the peace, and W. S. Kitsell as constable.

County Judge Beeson filed his report for the fourth quarter of 1908 showing his office had collected $596.50. County Clerk Rosencrans filed his report for the fourth quarter showing his office had taken in $240.90 and County Recorder Schneider's report for the last quarter of the year showed his collections as $363.25. Sheriff Quinton filed his report for the second and third quarters of 1908 showing collection by his office of $103.95. All the reports were approved by the board.

The county clerk was instructed to advertise for bids for the county printing for the year commencing February 22, 1909 and ending February 22, 1910. He was also instructed to advertise for bids for county physician for districts 1, 2, 3, 4, 5, 6 for a like period and for burying paupers during the same space of time.

J. H. Tams was once more elected superintendent of the poor farm for the year 1909, his work in that capacity proving excellent and satisfying the commissioners.

Fever Sores.

Fever sores and old chronic sores should not be healed entirely, but should be kept in healthy condition. This can be done by applying Chamberlain's Salve. This salve has no superior for this purpose. It is also most excellent for chapped hands, sore nipples, burns and diseases of the skin. For sale by F. G. Fricke & Co.

TO THE POLICY HOLDERS OF THE PLATTE MUTUAL INSURANCE CO:

The annual meeting of the Platte Mutual Insurance Company will be held at the office of Judge M. Archer at ten o'clock a. m., Saturday, January 9th, for the purpose of renewing the annual statement and of the annual election of directors for the ensuing term.

Henry R. Gering, Sec.

W. J. White, Pres.

The News Plant Sold.

From Tuesday's Daily.

According to advertisement the plant of the Evening News and the Semi-Weekly News-Herald was sold this afternoon at trustees sale, the sale taking place at the office at three o'clock. There was no great rush of bidders for the plant only two parties entering the lists. C. A. Rawls started the bidding at $500 and Commissioner Freidrich raising it $100 after which Rawls bid $700 and the bidding ceased. Mr. Rawls ths became the owner of the plant for $700. The low price which the plant brought seems to preclude the general creditors realizing anything at all on their claims. By the time the expenses for the past month have been paid and the labor claims paid off there will be nothing left for the other creditors. It is not known yet what the policy of the new proprietor will be nor what process he will adopt to realize his investment from the plant. There are various rumors as to the plan of reorganization which will be put into effect but nothing reliable. In view of the liabilities which the firm had, something over eight thousand four hundred dollars, the small price the assets realized causes unbounded astonishment..

Stomach Trouble Cured.

If you have any trouble with your stomach you should take Chamberlain's Stomach and Liver Tablets. Mr. J. P. Clote of Edina, Mo., says: "I have used a great many different medicines for stomach trouble, but find Chamberlain's Stomach and Liver Tablets more beneficial than any other remedy I ever used." For sale by F. G. Fricke & Co.

Fine Walnut Timber.

From Tuesday's Daily.

Charles Miller and Wm. Sales today brought into the city and shipped to Brady Neb., in care of C. B. Schleicher for the Brady lodge of Woodmen, a fine walnut log. The log is ten feet in length and measures fifteen inches in diameter. The Brady lodge will have the log cut up and dressed into tables for their lodge room. The wood is a very fine speciman of walnut and will make a very handsome and artistic decoration for the rooms.

For Rent.

A six room house in good repair to rent. Inquire of J. H. Becker.