St. John's Law Review

Volume 2, December 1927, Number 1 Article 21

Torts--Malicious Prosecution--Abuse of Process--Extradition--Original Criminal Proceeding Undetermined (Keller v. Butler, 246 N.Y. 249 (1927))

St. John's Law Review

principal case, based its holding on its prior decisions[7] indicating that such prior decisions permitted the action. Examination of these decisions fails to disclose that any of the cases have been decided on such a theory. In one case the action was for negligence of a physician in the performance of his services.[8] In others, the Court spelled out an express contract and held the defendant liable for a breach of that contract.[9] The decision in the principal case was, at most, based on dicta in the prior decisions. However, it would appear that where there is a fiduciary or contractual relationship, in all justice, a cause of action should be maintainable.[10] The principal case presents possibilities for opening up an entire new field of litigation, especially in New York where the complexities of modern business are at their height. This, however, should not deter a Court from handing down a decision that is sound in principle and does substantial justice.

TORTS—MALICIOUS PROSECUTION—ABUSE OF PROCESS—EXTRADITION—ORIGINAL CRIMINAL PROCEEDING UNDETERMINED.—The defendant charged the plaintiff in the State of Florida with having committed larceny. Through the action of the defendant the governor of the State of Florida made requisition upon the governor of the State of New York for extradition of the plaintiff, who was in New York. The plaintiff was arrested upon the process of a magistrate issued in New York State, under its procedure and brought before the governor who determined that the prisoner was not a fugitive and should not be surrendered. The plaintiff was thereupon discharged, and instituted this action for malicious prosecution alleging that defendant falsely and maliciously and without probable cause accused him of being a fugitive from justice, as a result of which he was arrested in New York as a fugitive and imprisoned. *Held,* when extradition proceedings are set in motion by one maliciously and without probable cause to believe that the subject of the proceeding is a fugitive from justice, and such proceeding terminates upon the ground that the subject was not a fugitive from justice, an action for malicious prosecution will lie, though brought prior to the termination of the original criminal prosecution. Keller *v.* Butler, 246 N. Y. 249, 158 N. E. 510 (1927).

The Court reached its decision on the theory that extradition proceedings could not be instituted unless the subject was in Florida actually, and not constructively, at the time of the larceny so as to make him a fugitive.[1] Extradition can lie only where the subject

---

[7] Carpenter *v.* Blake, 75 N. Y. 12 (1878); Bush Terminal Co. *v.* Insurance Co., 182 App. Div., aff'd 228 N. Y. 575 (1920); Glanzer *v.* Shepard, 233 N. Y. 236 (1922); Jaillet *v.* Cashman, 235 N. Y. 511 (1923).

[8] Carpenter *v.* Blake, *supra,* note 7.

[9] Bush Terminal Co. *v.* Insurance Co., and Glanzer *v.* Shepard, *supra,* note 7.

[10] See (1900) 14 Harv. L. Rev. 184, for full discussion of advisability of permitting such an action to lie.

[1] Hyatt *v.* Corkran, 188 U. S. 691 (1903); McNichols *v.* Pease, 207 U. S. 100 (1907).

is a fugitive.[2] The mode in which fugitives are to be arrested, brought before the governor and surrendered pursuant to requisition is prescribed by statute.[3] Before surrendering a person, it is the duty of the governor to determine whether or not he is a fugitive from the demanding state.[4] For the wrongful institution of such proceedings, the authorities hold that an action for malicious prosecution will lie.[5] Similarly, actions in the nature of malicious prosecution have been maintained for the abuse of a search warrant,[6] of an injunction order,[7] of a warrant of attachment.[8] It has also been held in other jurisdictions that the termination of the original criminal prosecution is not a condition precedent to the maintenance of the action for the malicious abuse of the process.[9] These holdings, as the Court well demonstrated, are sound in principle, and the holdings were based more upon a desire to do substantial justice than upon fine distinctions between actions for malicious prosecution and actions for the malicious abuse of process.

PARTNERSHIP—FIRM PROPERTY—STOCK EXCHANGE SEAT.—Father and son, as partners, conducted a banking and brokerage business from 1899 to 1901. With money given him by his father, the son had purchased a seat on the New York Stock Exchange. Upon the father's death in 1901, the son formed a new partnership with a younger brother. The firm name was continued and the same set of books was used. Under the new articles, the firm agreed to pay $3600 per annum "as compensation for and in consideration of the contribution to the firm of the entire and exclusive benefit of the membership in the New York Stock Exchange." Through this membership the firm was enabled to execute orders upon the Exchange. After a number of years of trading, the firm encountered difficulties in the post-war period and finally made an assignment for the benefit of creditors. A petition in bankruptcy shortly followed and, in due course, both the partnership and the individual members were adjudicated bankrupts. The individual in whose name the Exchange membership stood, had, prior to the failure, misappropriated substantial sums in securities entrusted to him by a testamentary trustee and a charitable corporation. It developed that the Stock Exchange seat constituted the greater part of the assets. The seat

---

[2] U. S. Const. Art. IV, § 2, cl. 2, as supplemented by the Act of 1793, 1 Stat. L., 302, now embodied in U. S. Rev. Stat. §§ 5278, 5279.

[3] N. Y. Code Crim. Proc. §§ 827, 828.

[4] Hogan *v.* O'Neill, 255 U. S. 52, 56 (1921); McNichols *v.* Pease, *supra*, note 1,108; N. Y. Code Crim. Proc. § 827.

[5] Johnson *v.* Corrington, 7 Ohio Dec. 572 (1878); Malone *v.* Belcher, 216 Mass. 209, 103 N. E. 637 (1913); Cardival *v.* Smith, 109 Mass. 158 (1872).

[6] Boeger *v.* Langenberg, 97 Mo. 390, 11 S. W. 223 (1889).

[7] Powell *v.* Woodbury, 85 Vt. 504, 83 Atl. 541 (1912); Mark *v.* Hyatt, 135 N. Y. 306, 31 N. E. 1099 (1892); Rieger & Co. *v.* Knight, 128 Md. 189, 97 Atl. 358 (1916).

[8] Lawrence *v.* Hagerman, 56 Ill. 68 (1870); Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. 664 (1888).

[9] Spangler *v.* Booze, 103 Va. 276, 49 S. E. 42 (1904); Zinn *v.* Rice, 154 Mass. 1, 27 N. E. 772 (1891).