JOHNSON v. DAWS.

Case No. 7,382.
[5 Cranch, C. C. 283.][1]

District Court, Districts Columbia. March Term, 1837.

MALICIOUS PROSECUTION—DEFENCE TO.

In an action for maliciously causing the plaintiff to be arrested, it is no defence that the defendant's oath did not, in law, authorize the magistrate to grant the warrant, if the defendant availed himself of it, and delivered it to the constable to be executed, unless the oath and arrest were made ignorantly, and without malice.

Action upon the case, for maliciously causing the plaintiff [William Johnson] to be arrested and imprisoned for ten days, without probable cause, upon a charge of felony. It appeared in evidence, that Mr. Coote, a justice of the peace, issued his warrant, reciting that it appeared to him by the information and oath of Frederick Daws, the defendant, that his property, namely, three mares, had, within two days last past, strayed from the commons of the city of Washington, or been feloniously stolen, taken, and carried away out of the city of Washington; and that the said Frederick Daws had probable cause to suspect, and did suspect, that the said mares were confined in the premises of a certain William Johnson, (the plaintiff,) in the said county; therefore, the constable, Madison Jeffers, was thereby required, with proper assistance, to enter, in the daytime, into the said premises of the said William Johnson, and there diligently search for the said mares; and if the same or any part thereof should be found, upon such search, to bring the said mares so found, and also the body of the said William Johnson, before the said justice or some other justice of the peace of the said county, to be disposed of and dealt with according to law. The warrant was executed, and the plaintiff arrested on the 3d of October, 1835. It appeared, also, that the case was dismissed by the justice, with the consent of the complainant, (the present defendant,) on the 13th of October, 1835. This suit was commenced on the 17th of the same month. The warrant, when issued, was delivered to the constable, and the defendant went with him to show and identify the mares.

Mr. Bradley, for defendant, prayed the court to instruct the jury, that the oath, as stated in the warrant, did not authorize the justice to issue it; and therefore the defendant is not liable, which instruction THE COURT (THRUSTON, Circuit Judge, doubting) refused to give; but, upon the prayer of Mr. Bradley, (the defendant's counsel,) THE COURT (nem. con.) instructed the jury, that if, from the evidence, they should be of opinion that the defendant's horses strayed, or were stolen, from the commons of the city of Washington; that they were found by him on the premises of the plaintiff, and by him there confined; that the defendant demanded them, and the plaintiff refused to deliver them; that thereupon the defendant applied to the justice of the peace for advice and direction to regain his said property, by a civil remedy; that the justice advised him to make the affi-

davit; and that, thereupon, he did make the affidavit upon which the warrant was issued, under which the horses were retaken and delivered to the defendant; and the defendant, upon being called upon, said he did not mean, and never

did mean, to prosecute the plaintiff criminally, then the plaintiff is not entitled to recover in this action. See Cohen v. Morgan, 6 Dowl. & R. 8; 1 Har. S. C. Dig. 295.

Verdict for plaintiff, $25. Motion in arrest of judgment, and for a new trial, refused.

[1] {Reported by Hon. William Cranch, Chief Judge.}