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Torts--Malicious Prosecution

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TORTS—MALICIOUS PROSECUTION

The Central Acceptance Corporation brought action to recover of Katherine Rachal moneys alleged to have been due as the unpaid balance of a series of notes executed by her and representing deferred payments of the purchase price of an automobile, and also to foreclose a mortgage on the automobile, also alleged to have been executed by Rachal to secure the payment of the notes.[1] Katherine Rachal, in her answer, admitted the purchase of the automobile, but denied having signed, executed or delivered the notes or mortgage mentioned in the petition, or that either the notes or the mortgage had been assigned to Central Acceptance Corporation by the original holder. Although she admitted paying two of the series of notes, defendant averred that such payments were made by her under duress and fraud. Defendant also filed a counterclaim, alleging that the suit brought by the plaintiff corporation was brought maliciously and without probable cause, and was brought for the purpose of harassing, embarrassing and humiliating defendant, and prayed damages for mental anguish, humiliation and mortification caused by the suit, and for costs and expenses incident to the suit. Plaintiff demurred to the counterclaim, which demurrer the lower court overruled. Judgment in the sum of $500.00 was awarded defendant, and plaintiff appealed.

The Court of Appeals of Kentucky held that the demurrer to the counterclaim should have been sustained. The only reason suggested by the defendant below why the demurrer should not have been sustained was that the plaintiff was a non-resident, and if defendant was not allowed to assert her purported cause of action for malicious prosecution as a counterclaim in the suit brought by plaintiff corporation, she might not later, after termination of that suit, be able to maintain her suit against such non-resident. While admitting the general rule to be that termination of the suit in defendant's favor must be alleged before an action of malicious prosecution can be maintained,[2] defendant sought to have an exception made to this rule in cases where the plaintiff in such a suit is a non-resident. Defendant here sought to establish a ground for the making of such an exception to the general rule by attempting to draw an analogy to the rule that an action for unliquidated damages may be maintained as a counterclaim where the defendant on the counterclaim is insolvent or a non-resident of the state.[3] As stated above, the Court of Appeals of Kentucky refused to recognize the suggested exception. Such ruling

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[1] Central Acceptance Corporation v. Rachal, 264 Ky. 849 (1936).

[2] Wood v. Laycock, 60 Ky. (3 Metc.) 192 (1860); Graziani v. Ernst, 169 Ky. 751, 185 S. W. 99 (1916); Davis v. Brady, 218 Ky. 384, 291 S. W. 412 (1927); Feterly v. Gibson, 210 Cal. 282, 291 Pac. 411 (1930); Shaeffer v. O. K. Tool Co., Inc., 110 Conn. 528, 148 Atl. 330 (1930); Harper on Torts, Sec. 269, page 584.

[3] Marks v. Grace, 205 Ky. 456, 266 S. W. 30 (1924); North Chicago Rolling Mill Co. v. St. Louis Ore, Etc., Co., 152 U. S. 596, 14 S. Ct. 710, 38 L. Ed. 565 (1893); Brown v. Pegram, et al., 149 Fed. 515 (1906).

of the court seems to be in accord with all previously decided cases on a similar point of law.

No case has been found which is directly in point with the instant case. As stated by the Court of Appeals in its opinion, this contention of the defendant is a novel one.[4]

Defendant attempted to discover an analogy between the rule that an action for unliquidated damages may be maintained as a counterclaim where the defendant on the counterclaim is insolvent or a non-resident. But such an analogy is imperfect. Defendant had no "unliquidated damages" until the suit brought by the plaintiff was terminated in defendant's favor, for until such termination it could not possibly be shown that there was not probable cause for the institution of such suit. Then again, defendant seeks to go one step further with the unliquidated damage rule than any case found applying that rule. She seeks to set up as a counterclaim a set of facts which might, upon the happening of a future event (termination of the present suit in her favor), ripen into a claim for unliquidated damages. She is in much the same position as a man about to be hit by a recklessly driven car. Such a man certainly has no cause of action until he *is* hit. Here, if the action in which malicious prosecution was alleged to have occurred had terminated, defendant in that suit would have a claim similar to cases where counterclaims for unliquidated damages have been allowed against non-residents, in order that such claims would not be lost because of inability to get the non-resident before the court in a later suit

The proposed exception to the general rule would be a greater departure from precedent and policy of the law than any court would probably allow. The action of malicious prosecution is a type of action *not* favored by the law, and suits of such nature have been to some degree actively discouraged.[5] Many courts refuse to allow an action for malicious prosecution in civil cases, unless the party sued suffers some interference, by reason of the suit, with his person or his property.[6] No court encourages such an action based upon a civil

[4] Central Acceptance Corporation v. Rachal, 264 Ky. 849 (1936).

[5] Ball v. Rawles, 93 Cal. 222, 28 Pac. 937 (1892); Davis v. Brady, 218 Ky. 384, 291 S. W. 412 (1927); Bazzell v. Ill. Central Ry. Co., 203 Ky. 626, 262 S. W. 966 (1924). In 18 R. C. L., page 11, paragraph 2, it is said:

> "The action for malicious prosecution is not favored in law, and hence has been hedged about by limitations more stringent than those in the case of almost any other act causing damage to another, and the courts have allowed recovery only when the requirements limiting it have been fully complied with. The disfavor with which the action is looked upon is especially marked in cases where the suit is being brought for the institution of criminal proceedings against the plaintiff, as public policy favors the exposure of crime, which a recovery against a prosecutor obviously tends to discourage."

[6] Pye v. Cardwell, 110 Tex. 572, 222 S. W. 153 (1920); National Stock Yards Nat. Bk. v. Valentine (Texas Civil App.), 39 S. W. (2d) 907 (1931); Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N. E. 569 (1898); Peckham v. Union Finance Co., 48 Fed. (2d) 1016 (1931).

suit, although some courts, including Kentucky, do allow them if reputation is involved, or if the sole purpose of the suit is to annoy. But in most cases where recoveries were allowed for malicious prosecution in civil suits, the offending party had brought successive suits upon the same cause of action.[7] Therefore, it is doubtful if defendant's claim for damages for malicious prosecution would have been allowed even if the termination of the suit could have been alleged and proved, because of the hesitancy upon the part of all courts to allow the maintenance of this type of action. In view of this oft expressed disfavor to this type of action, a court would hardly be justified in making an exception to the rule regarding termination of suits simply because of the non-residency of a party and the consequent hardship upon the party sued to later maintain his possible action for malicious prosecution.

Defendant would have had no cause of action if she had attempted to bring an independent suit, rather than asserting her purported claim as a counterclaim, before termination of the present suit. For this reason the demurrer to the counterclaim should have been sustained. It is well settled that a counterclaim *must be a cause of action*, and state all the necessary allegations of such cause of action,[8] and here defendant had no cause of action for malicious prosecution until the final termination of the present suit. For this reason, if for no other, plaintiff's demurrer to defendant's counterclaim should have been sustained by the court.

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VIOLATION OF A STATUTE IN DETERMINING NEGLIGENCE

In the recent case of *Southern Mining Company* v. *Saylor*,[1] the plaintiff sued for damages for injuries sustained by him when the improperly supported ceiling of the mine room in which he was working fell on him. The plaintiff based his right to recover on the failure of the defendant mine owners and mine foreman to comply with Kentucky Statutes 2726-4, which imperatively imposed upon the mine foreman and the assistant mine foreman the duty of examining the plaintiff's working place not less than two times a week while he was working, and to see that his working place was properly secured by props and timbers, and not to direct him to work in an unsafe place except for the purpose of making it safe; and Kentucky Statutes 2726-7, which states that it shall be the duty of the mine foreman or the assistant mine foreman of every coal mine in this state to see that every person employed to work in such mine shall, before beginning

[7] Pierce v. Thompson, 6 Pick. (Mass.) 192 (1828); Kolka v. Jones, 6 N. D. 461, 71 N. W. 558 (1897); Payne v. Donegan, 9 Ill. App. 566 (1881); Shedd v. Patterson, 302 Ill. 355, 134 N. E. 705 (1922).

[8] Kelly v. Kelly, 1 Ky. Opin. 328 (1866); Rice v. Pulliam, 141 Ky. 10, 131 S. W. 1053 (1910); Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420 (1916); Albrecht v. Dillon, 224 Ill. App. 421 (1922); Braden v. Gulf Coast Lumber Co., 89 Okla. 215, 215 Pac. 202 (1923); J. M. Broat Lumber Co. v. Van Houten, 66 Mont. 478, 213 Pac. 1116 (1923).