

HOOPER vs. LEE.

In case for malicious prosecution, the affidavit and warrant under which plaintiff was arrested, must be introduced as evidence, unless a showing is made for the introduction of secondary evidence—in this case the court below erroneously excluded them as evidence when offered by the plaintiff.

Appeal from Scott Circuit Court.

This was an action on the case for malicious prosecution, brought by Obadiah C. Hooper against James F. Lee, in the Scott circuit court.

The gravamen of the charge in the declaration is, that on the 24th April, 1849, defendant falsely and maliciously made an affidavit before Seth Spangler, a justice of the peace of said county, that plaintiff was guilty of perjury in posting a certain cow, &c., whereupon the justice issued a warrant for the apprehension of the plaintiff, under which he was arrested, imprisoned, and afterwards tried and acquitted.

Defendant pleaded not guilty, upon which plea the parties went to trial. The plaintiff offered in evidence, the affidavit, warrant and return thereon, under which he was arrested, &c., after having proven by the justice Spangler, (whose official character was admitted) that said warrant was sworn to and subscribed by the defendant, before him, and that he issued said warrant, as such justice, and that said plaintiff was arrested thereunder, tried and acquitted before him, &c., to the introduction of which, as evidence, defendant objected, and the court sustained the objection. Verdict for defendant, bill of exceptions, and appeal by plaintiff.

F. W. & P. TRAPNALL, for the appellant. The apprehension and imprisonment of the plaintiff, the affidavit, writ and return

thereon, afforded the highest evidence, and were therefore competent. 4 *Met.* 421. 7 *Watts* 189. 7 *Porter* 437. 1 *Brevard* 173. 5 *Watts & Serg.* 438. The plaintiff was bound to prove the affidavit made by the defendant, either by the affidavit itself or an examined copy. 4 *Stark. Ev.* 919. *Peake's Ev.* 330. 1 *B. & P.* 281; also the writ and return—the return of the sheriff is evidence for either party. 4 *Starkie* 919. 11 *East.* 297. 1 *Starkie* 284.

Mr. Justice SCOTT delivered the opinion of the Court.

The testimony rejected was clearly competent: indeed no other evidence was competent, unless a foundation had been laid for secondary evidence by proof of the loss of this that the court rejected. Those proceedings before the justice were the very foundation of the complaint, and by these the plaintiff proposed to make out the first point in his case, to wit: his prosecution and acquittal. (2 *Greenl. Ev.*, p. 427, § 449. 4 *Phil. Ev.*, p. 253. *Beebe v. De Baun*, 3 *Eng.*, p. 570.)

Let the judgment be reversed, and the cause remanded.
