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ORIGINAL CIVIL.

Before Mr. Justice Scott.

AUGUSTUS FISHER (PLAINTIFF), *v.* JAMES PEARSE AND TWO OTHERS, DEFENDANTS.*

1884
August 14.

False imprisonment—Good faith—Wrongful arrest under decree already satisfied—Mistake of officers of the Court—Cause of action—Limitation Act XV of 1877, *Sec.* 22 *and Sched. II, Art.* 19.

On the 27th June, 1883, the plaintiff was arrested by a bailiff of the Small Cause Court at Bombay, under a writ of arrest for the amount of a decree obtained by the defendant on the 2nd May, 1883, against the plaintiff. On arrest the plaintiff informed the bailiff, that the money due under the decree had already been paid, as was the fact. Plaintiff could not produce the receipt of payment, and the bailiff refused to raise the arrest until payment was made. The plaintiff thereupon paid the money under protest, and was set at liberty. The mistake was subsequently discovered, and the money was refunded to the plaintiff. It appeared that, prior to plaintiff's arrest, defendant's clerk had inquired of the head cashier of the Small Cause Court if the amount of the decree had been paid, but was told it was not, and a certificate of non-payment was issued. In conformity with the usual practice of the Court the chief clerk of the Court on receipt of the certificate issued the writ of arrest under the seal of the Small Cause Court, and the plaintiff was arrested.

In March, 1884, the plaintiff presented a petition to the High Court for leave to sue as pauper, and claimed Rs. 25,000 from first defendant as damages for the wrongful arrest. When the petition came on for inquiry into the pauperism of the

* Suit No. 94 of 1884.

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plaintiff, the presiding Judge was of opinion that it disclosed no cause of action, and the plaint was returned to the plaintiff to be amended, but at the same time allowed to be filed. The plaintiff subsequently desired to add as party-defendants the cashier and the chief clerk of the Small Cause Court, and on 5th July, 1884, took out a summons calling upon the defendants to show cause why his amended plaint should not be received on the file of the Court in place of his first petition. It was contended for the cashier and the chief clerk of the Small Cause Court that the suit against them was barred by limitation.

Held, as regards the first defendant, that the plaint should be rejected. as there was no bad faith, fault or irregularity on the part of the first defendant so as to make him responsible for the wrongful arrest. The plaintiff's imprisonment having taken place under a warrant of the Court issued in regular manner, and such Court being of competent jurisdiction, the plaintiff had no cause of action as against the first defendant,—the error was wholly and entirely the error of the officers of the Small Cause Court.

Held, also, as regards the cashier and the chief clerk of the Small Cause Court that the plaintiff's suit was barred, as more than one year had elapsed from the date of the termination of the plaintiff's imprisonment.

SUMMONS adjourned into Court.

The suit was originally filed by the plaintiff as a pauper, and claimed Rs. 25,000 as damages for false imprisonment.

On the 27th June, 1883, the plaintiff was arrested by a bailiff of the Small Cause Court in execution of a decree for the sum of Rs. 133-12-0 which had been obtained against him by the defendant Pearse on the 2nd May, 1883. The plaintiff informed the bailiff that the decree had been already satisfied, which was the fact, but as the plaintiff could not then produce the receipt for the amount, the bailiff insisted that the money should be paid. The money was immediately paid under protest, and the plaintiff was then set at liberty. On the following day the mistake was discovered, and the money was refunded to the plaintiff.

It appeared that, prior to the plaintiff's arrest, the defendant's clerk had inquired of the head cashier of the Small Cause Court (Sadánand Esoba) if the amount of the decree had been paid. He was told it had not, and a certificate of non-payment was duly issued. On that certificate the chief clerk (J. F. Spencer) had issued the writ of arrest under the seal of the Court in accordance with the usual practice.

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In March, 1884, the plaintiff presented a petition praying for leave to sue as a pauper, and claiming Rs. 25,000 from the defendant Pearse. On the petition coming before the Court for investigation of pauperism, the learned Judge (*Pinhey*, J.) considered that it showed no cause of action, and it was returned to the plaintiff to be amended, but in the meantime allowed to be filed. The plaintiff subsequently desired to add as party-defendants J. F. Spencer, chief clerk, and Sadánand Esoba, head cashier of the Court of Small Causes, and on the 5th July, 1884, took out a summons calling on the defendant Pearse, J. F. Spencer and Sadánand Esoba to show cause why his amended plaint making the said J. F. Spencer and Sadánand Esoba party-defendants to the suit should not be received by the Prothonotary on the file of the Court in the place and stead of the petition filed at the institution of the suit, &c.

The plaint proposed to be substituted for the original petition stated the facts above set forth, and named Pearse, Spencer and Sadánand Esoba as defendants in the suit. The summons now came on for argument.

Inverarity for the defendant Pearse showed cause.—Our first point is that the plaint, even as amended, shows no cause of action and ought not to be received. The defendant Pearse had made due inquiry and had been informed by the proper officer of the Small Cause Court that the decree was not satisfied. He was not responsible for the mistake, and an apology was made immediately to the plaintiff. It is clear, therefore, that on the part of the first defendant there was no malice. The plaint does not aver malice, but in actions of this kind express malice and want of reasonable and probable cause must be averred and proved—*Sexon* v. *Castle*[1].

[SCOTT, J.—Even supposing the proof of malice to be necessary, would it not be enough for our procedure to state facts from which malice might be inferred. Would it be necessary to aver malice. Here the plaintiff had paid the debt, and yet was arrested].

(1) 6 Ad. & El., 652.

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Malice could not necessarily be inferred from such facts. A mistake might have occurred, and, if so, there is no action. Malice need not be averred in words, but facts must be stated from which there can only be one inference. Otherwise malice must be expressly alleged. The Court will not infer it from the mere fact of arrest—*Tebbutt* v. *Holt*(1), *Moore* v. *Gardner*(2), *Medina* v. *Grove*(3), *Churchill* v. *Siggers*(4), *Phillips* v. *Naylor*(5), *Brasyer* v. *Maclean*(6), *Huffer* v. *Allen*(7). These cases show that the mere fact of arrest after payment is not enough. The payment was not made to the first defendant himself, and the plaint does not allege that he knew of the payment.

The defendant made all due inquiry in good faith, and is not responsible for the mistake of the Court.—*Jarlton* v. *Fisher*(8), *Nearslay* v. *Keen*(9), *Ewart* v. *Jones*(10). If the Court delegates the execution of a decree to its officers, the acts of such officers are the acts of the Court.

B. Tyabji for Spencer and Sadánand Esoba showed cause.—As regards my clients, whom the plaintiff for the first time by this summons seeks to make defendants, the suit is barred—Limitation Act XV of 1877, sec. 22, and Sched. II, arts. 19 and 22. The arrest took place on 27th June, 1883, and this summons is dated the 5th July, 1884. Next, I contend that the wrong complained of in this suit comes within the term "assault" in section 402 of the Civil Procedure Code (Act XIV of 1882), and that such a suit cannot be brought by a pauper. As to the meaning of "assault" see Addison on Torts (4th ed., 1873), p. 569, p. 596, and p. 606; *Chivers* v. *Savage*(11); *Brandt* v. *Craddock*(12); Penal Code, sections 349—351. 'Assault' in section 402 means all injuries affecting the person.

Apart from this objection the plaintiff has no cause of action against my clients. They took no part directly in his arrest.

(1) 1 Cr. & Kirw., 280.
(2) 16 M. & W., 595.
(3) 10 Q. B., 152.
(4) 3 Ell. & Bl., 937 and 939.
(5) 4 H. & N., 565.
(6) L. R. 6 P. C. at p. 405.
(7) L. R. 2 Ex., 15.
(8) 2 Douglas, 671.
(9) 14 M. & W., 322.
(10) 14 M. & W., 774.
(11) 5 Ell. & Bl., 697.
(12) 27 L. J. Ex., 314.

They merely signed certain documents, and he does not allege express malice against them. The damage suffered by the plaintiff must be either to his estate or to his person. He has become insolvent since his arrest, and his cause of action, if any, arising out of damage to his estate has passed to the official assignee—Indian Insolvent Act 11 and 12 Vic., c. 21, sec. 7 ; Griffiths on Bankruptcy, Vol. I, p. 302. As to damage to the person, it must be very small, as he was only under arrest for a short time. Unless the Court thinks he can recover over Rs. 2,000 for this, the High Court has no jurisdiction. The Court must see that there is a fair *primâ facie* case—*Sterling* v. *Cochrane*[1].

Russell for the plaintiff in support of the summons.—This is not a suit for malicious arrest, but for trespass to the person. The first defendant set the Court in motion, and is liable—Addison on Torts (5th ed., 1879), p. 653. The proceedings were illegal from the beginning, and the first defendant is responsible—*Parsons* v. *Lloyd*[2], *Barker* v. *Braham*[3], *Wilson* v. *Conyn*[4], *Jarmain* v. *Hooper*[5], *Bates* v. *Pilling*[5], *Green* v. *Elgee*[7], *Codrington* v. *Lloyd*.[8]

As to the point of limitation raised on behalf of Spencer and Sadánand Esoba, I submit the case comes within article 36, Schedule II of Limitation Act XV of 1877. The plaintiff has suffered in his reputation, and section 24 of the Act applies.

SCOTT, J.—In this suit the plaintiff claims Rs. 25,000 damages for his false imprisonment. I am now asked as Chamber Judge to reject the amended plaint on the ground that it does not disclose a sufficient cause of action. And further as regards the second and third defendants, I am asked to reject the suit as barred by limitation. As Chamber Judge I adjourned the case into Court for argument.

The facts set forth in the plaint are as follows:—On the 27th June, 1883, the plaintiff, Fisher, was arrested by a bailiff of

(1) 1 Beng. L. R., 114.
(2) 3 Wils., 345.
(3) 3 Wils., 368.
(4) 6 M. & G., 236, 243.
(5) 6 M. & Gr., 827.
(6) 6 B. & Cr., 38.
(7) 5 Q. B., 99.
(8) 8 Ad. & E., 449.

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the Small Causes Court by virtue of a writ for the sum of Rs. 133-12-0, the amount of a decree obtained by Pearse against Fisher on the 2nd May, 1883. The present plaintiff, Fisher, at the time of his arrest informed the bailiff that the money had been already paid; and, as a matter of fact, it had been paid. In spite of this statement, the bailiff, on Fisher saying he had not the receipt of the payment, refused to raise the arrest until the money was paid under protest, which was done immediately. Thus the imprisonment lasted only a few minutes, as appears from the correspondence. The mistake was discovered, and the money repaid the following day.

The amended plaint further states that the third defendant, as cashier of the Court, had certified to the defendant Pearse's agent the non-payment of the decree; and that the second defendant, as chief clerk of the Court, had upon that certificate issued the said writ of arrest under his hand and under the seal of the Court.

The original judgment and warrant were produced before me. The judgment runs as follows: "In the Court of Small Causes.—Judgment for the plaintiff. Debt and costs Rs. 133-12-0, ordered by the said Court to be paid to the clerk at his office by the said A. Fisher on or before 10th May, 1883. Term of imprisonment ninety days. Given under my hand this 2nd day of May, 1883. —N. Spencer, Judge." Thus eight days were given for payment, and imprisonment sanctioned on default of payment after that date. The warrant is entitled in "the Court of Small Causes," and it is given under the seal of the Court. It is a judicial order issuing from the Court. After receiving the judgment and non-payment, the Court "commands the bailiff or bailiffs" to arrest the defendant in default of payment. I have already stated that it was issued by the chief clerk on the certificate of the cashier that the debt had not been paid. Pearse's action in the matter only amounted to a request that warrant should issue if payment had not been made.

The further facts necessary for my decision are as follows: In March, 1884, the plaintiff presented a petition for leave to sue in *formâ pauperis*, in which Pearse was made sole defendant. On

the 21st April, 1884, he gave the requisite statutory notice to the cashier and chief clerk that he intended to add them as parties. On the 5th July, 1884, he obtained a Judge's summons calling upon them to show cause why the amended plaint making them party-defendants should not be placed on the file of the Court instead of the original petition.

These are the facts. I will now deal with the law. First as regards Pearse. Mr. Inverarity argued that no cause of action was shown, as there was no allegation of (1) malice, and (2) of the absence of reasonable cause for the arrest. I think confusion was here made between actions of malicious arrest and malicious prosecution, and an action for false imprisonment. The latter action is founded on the common law right of every man to the liberty of his person, and every illegal detention affords grounds for such an action (Blackstone's Commentaries by Stephen Volume III, page 393.) Malice and want of probable cause need not be alleged in the plaint, although the absence of malice and existence of probable cause are fair grounds of defence. In *Bird* v. *Jones*[1] the principle is thus stated: "When a total restraint for some period, however short, is put upon the liberty of another without sufficient reason, an action lies for the infringement of the right." As to what constitutes an imprisonment, *Grainge* v. *Hill*[2] says, "where a bailiff tells a person that he has a writ against him and thereupon such person peaceably accompanies him, that constitutes an imprisonment."

In the present case the facts clearly show an imprisonment. The question, no doubt, is whether they do not also show the defendant, Pearse, to have been justified in what he did under the circumstances of the case. Great distinction is made by the authorities between the case of a warrant of a Court with jurisdiction and a warrant of a Court without jurisdiction. The first case on the point is the *Marshalsea case*[3], and it has since been invariably followed: see *Morrell* v. *Martin*[4]. The principle there laid down is that when a Court of competent authority has disposed of the matter erroneously, then the party who takes out the

(1) 7 Q. B., 743.
(2) 4 Bing. N. S., 212.
(3) 10 Rep., 76 (*a*).
(4) 3 M. & G. 595. *Per* Tindal, C. J.

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warrant is not liable; but when the Court has no jurisdiction to issue the warrant, then the whole proceeding is *coram non judice* and the parties are liable. Now, in this case the Court of Small Causes had clearly jurisdiction of the matter, which was an ordinary money claim of Rs. 131, but it acted erroneously in issuing the warrant. Mr. Russell for Fisher, however, urged the principle to be found in another set of cases of which *Barker* v. *Braham*[1] is the earliest. It is laid down in that case: "the mere circumstance of the writ issuing by the authority of the Court will not protect either the plaintiff or his attorney for answering in damages as wrong-doers, if it be issued illegally." (See also *Carrot* v. *Small*[2], *King* v. *Harrison*[3], *Bates* v. *Pilling*,[4] *Codrington* v. *Lloyd*[5], *Prentice* v. *Harrison*[6], *Collett* v. *Forest*[7], *Brooks* v. *Hodgkinson*[8]. *Bates* v. *Pilling* was especially urged as being on all fours with the present case. But there Pilling had not only taken out execution, but he had also signed judgment for a debt which had been paid. In all the cases cited, and others I have consulted, the party, not the Court, appears to have taken the initiative and assumed the responsibility. There is no case which says that where the officers of the Court and not the party have caused the error, the latter shall still be held liable. In fact, the consensus of authority is the other way. The latest case on the point is *Smith* v. *Sydney*[9]. There the defendant had arrested the plaintiff on a debt of £34, for which he had signed judgment in default of appearance. The judgment was subsequently set aside on the ground that £16 was only due. As arrest was not legal for sums below £20, an action for false imprisonment was instituted. But it was held not to lie, because, as Mellor, J., puts it, "there was nothing to show that the defendants were legally blameable for what they did." Lush, J., says: "The authorities distinguish between an act of Court and act of parties, and it is only when proceedings are set aside on the latter ground that the party is made a wrong-doer." In *Williams* v. *Smith*[10] the same principle is

(1) 3 Wils. 368.
(2) 9 East., 330.
(3) 15 East., 612.
(4) 6 B. & C., 38.
(5) 8 Ad. & Ell., 449.
(6) 4 Q. B., 852.
(7) 2 H. & N., 361.
(8) 4 H. & N., 712.
(9) L. R. 5 Q. B., 203.
(10) 14 C. B. N. S., 596.

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laid down. In that case an attachment was obtained by Smith which was afterwards set aside on appeal. But false imprisonment was held not to lie. Williams, J., said: "If the attachment in this case had been set aside on the ground of irregularity, or that it was issued in bad faith, or in any other way equivalent to irregularity, I should have thought that both attorney and client would be liable for any imprisonment which took place under it."

In the present case there was no bad faith, no fault, no irregularity of the party. He made the non-payment of the judgment, of which he had the best possible evidence, in the certificate of the proper officer, the foundation and condition of his request for a warrant. Indeed, I fail to see how he could have acted more regularly. The error was wholly and entirely the error of the officers of the Court. But the imprisonment took place under a warrant of the Court issued in the regular manner. That being so, and the Court being one of competent jurisdiction, I am of opinion that the amended plaint, taken as a whole, must be rejected. The imprisonment set forth is justified by the other facts it discloses. As regards Pearse, therefore, no sufficient ground of action is shown.

As regard the second and third defendants, the liability is of a different character. The error, which gave rise to these proceedings, did, no doubt, arise from some fault on the part of some official of the Small Causes Court. But I am met on the threshold by an objection I am bound to consider. It was argued that this suit against them is barred by limitation, under article 19 of the second schedule read with section 22 of the Act. Article 19 says that a suit for compensation for false imprisonment is barred after the lapse of one year from the time the imprisonment ended. The imprisonment in this case ended on the 27th June, 1883. Section 22 of the Act says that when parties are added after the institution of the suit, the suit shall as regards them be deemed to have been instituted when they were made a party. Now the Judge's order calling upon them to show cause why they should not be made parties is dated the 5th July, 1884. Up to that date, therefore, they were not made parties. As that date is more than a year from the date of the false imprisonment,

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article 19 of the second schedule applies, and the plaint must be as against these two defendants on the ground that the suit is barred by lapse of time.

Summons discharged.

Attorney for the plaintiff.—Mr. *E. Wilkin.*

Attorneys for the first defendant.—Messrs. *Craigie, Lynch and Owen.*

Attorneys for the second and third defendants.—Messrs. *Chalk and Walker.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

August 23. NANJUNDEPA AND GURULINGAPA (ORIGINAL DEFENDANTS NOS. 1 AND 5), APPELLANTS, *v.* HEMAPA BIN IRAPA AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Decree—Execution—Sale of equity of redemption—Purchaser at execution sale—Sale in execution of decree on mortgage prior in date—Priority—Possession—Notice—Certificate of sale.

On the 18th January, 1877, the father of the plaintiffs purchased the interest of M. in two houses at a sale in execution of a money decree against M. The purchaser, however, never obtained possession and he did not obtain the certificate of sale until the 31st July, 1878.

Subsequently to the sale of the 18th January, 1877, two suits were filed against M. on mortgages executed prior to that date and decrees in both were obtained against M. In execution of these decrees both the houses were sold and the respective purchasers were represented by two of the defendants. The purchasers got possession and both obtained sale-certificates, one prior to the sale to the father of the plaintiffs, *viz*, on 5th February, 1878, and the other subsequently, *viz.*, 1st November, 1878. The plaintiffs now sued to recover the houses.

Held that the plaintiffs were not entitled to recover as against the defendants. The plaintiffs not having either got possession or obtained a certificate of sale at the date of the sale in execution of the decrees on the mortgages, had only an inchoate title. The purchasers in execution had no notice of the plaintiffs' incipient right and having been left to buy what, so far as they knew, was a complete title they ought not to be disturbed at the instance of the plaintiffs who failed to assert their dormant right. Had the plaintiffs got into possession or obtained a certificate and registered, there would have been notice sufficient to put all persons interested in inquiry as to their rights; but while they chose to keep their

*Second Appeal, No. 469 of 1883.