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Article 22

Liability of Sheriff for Wrongfully Discharging Prisoner Committed for Contempt--Measure of Damages (Bijou et al. v. Jacoby et al., 260 N. Y. 289 (1932))

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purposes of this case, the fundamental point is that the proceeding was not a criminal one. The state was not seeking to punish a malefactor, it was seeking to salvage a boy who was in danger of becoming one. In other words, the problem for determination by the judge is not—"Has this boy committed a specific wrong?" but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career?" [6] As Statute [7] declares the act committed by the boy was not a crime, there was no need to warn him of self-incrimination at the time he made his confession and the confession is binding evidence.

J. J. L.

LIABILITY OF SHERIFF FOR WRONGFULLY DISCHARGING PRISONER COMMITTED FOR CONTEMPT—MEASURE OF DAMAGES.—One Joseph S. Alberti, an executor, was adjudged in contempt of court for wrongfully neglecting to make certain payments under his mother's will as directed by the surrogate. These payments exceeded $16,000, some $6,000 of which were due plaintiffs. Pursuant to the contempt order, a warrant was issued in the usual form, relating the sums due, the persons to whom owed, and that commitment was to last until payments were made. Six months after Alberti's arrest, the sheriff, defendant in this action, released him without getting the required money. *Held,* sheriff liable to plaintiffs to the extent of their damage, namely the $6,000 with interest. *Bijou et al.* v. *Jacoby et al.,* 260 N. Y. 289, 183 N. E. 428 (1932).

The Judiciary Law [1] provides that if actual loss is produced by reason of misconduct of a person adjudged guilty of contempt of court, "a fine sufficient to indemnify the aggrieved party must be imposed upon the offender, collected, and paid over to the aggrieved party under direction of the court." Thus, once misconduct has been established (as in the instant case by the surrogate), the only question remaining is the determination of the amount due in terms of the fine.[2] This must be the actual damage suffered,[3] as shown from the extent of the impairment or prejudice caused,[4]

[6] Mack, *The Juvenile Court* (1909) 23 HARV. L. REV. 104.

[7] *Supra* note 1.

[1] N. Y. JUDICIARY LAW (1909) §773.

[2] Brill v. Brill, 148 App. Div. 63, 131 N. Y. Supp. 1030 (1st Dept. 1911).

[3] *Supra* note 1; Bernstein v. McCahill, 56 Misc. 460, 107 N. Y. Supp. 161 (1907).

[4] People v. Reid, 139 App. Div. 551, 124 N. Y. Supp. 205 (1st Dept. 1910).

providing that the latter are the proximate cause of the injury.[5] If there is no measurable loss, only $250 may be collected.[6] If on the other hand, the amount is a definite and provable sum, it is immediately translated into the fine.[7]

The court may confine the punishment of the offender to simply this fine,[8] or it may go one step further and order an arrest, as in the instant case. If the court decides upon arrest and the misconduct consisted of an omission to perform an act or duty "which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it and paid the fine imposed." [9] In such a case the warrant of commitment must state the act or duty to be performed, and the sum to be paid, or else the prisoner may be released after a reasonable time, not exceeding six months.[10] Therefore, it becomes very important that the warrant be patently explicit, if there is to be an extended jail term. The mere reference in the warrant to the prior contempt judgment would be insufficient to hold the offender indefinitely,[11] however, any information clear enough to enable the committing officer to know, upon a reading of the warrant, the reason for the arrest and the penalty imposed will be deemed sufficient.[12]

The committing officer in such a case would be, of course, the sheriff, and it is he who must determine the length of time to keep the offender. Should his determination be erroneous, he will have to answer under the Correction Law,[13] which provides that, "a sheriff or keeper of a jail, who suffers such a prisoner to go or be at large out of his jail, * * *, is liable to the party aggrieved for his damages sustained therefor, and is guilty of a misdemeanor." And further, "if the commitment was for the non-payment of a sum of money, the amount thereof with interest is the measure of damages." The party aggrieved in such an instance would be the complainant who had secured the contempt order originally,[14] and the amount of damage the same as the fine imposed by the contempt order. Neither insolvency,[15] nor inability to pay due to prior mis-

[5] Clark v. Bininger, 75 N. Y .344 (1878); Moffat v. Herman, 116 N. Y. 131, 22 N. E. 287 (1889); Socialistic Co-op. Pub. Assn. v. Kuhn, 164 N. Y. 473, 58 N. E. 649 (1900).

[6] *Supra* note 1; Matter of Becker, 72 Misc. 157, 129 N. Y. Supp. 614 (1911); Matter of Schwartz, 85 Misc. 55, 146 N. Y. Supp. 1068 (1914); Amendola v. Zema, 93 Misc. 525, 157 N. Y. Supp. 273 (1916).

[7] *Supra* note 5.

[8] Hommel v. Buttling, 46 App. Div. 206, 61 N. Y. Supp. 811 (2d Dept. 1899).

[9] *Supra* note 1, §774, amended by Laws of 1919, c. 184.

[10] *Ibid.*

[11] People v. Grant, 50 Hun 243, 3 N. Y. Supp. 142 (1888).

[12] Instant case.

[13] N. Y. CORRECTION LAW (1909) §514.

[14] Matter of Ball, 94 Misc. 112, 158 N. Y. Supp. 1095 (1916).

[15] Dunford v. Weaver, 84 N. Y. 445 (1881).

conduct[16] would excuse the sheriff for a wrongful release. Only the court has the right to change or modify the terms of the order.[17]

In the case at hand, inasmuch as the warrant indicated the reason for the arrest, the sheriff was duty bound to keep Alberti within his custody until the fine imposed was paid. Since he did not so do, he rendered himself liable to the plaintiffs. The wisdom of strict compliance with the law in this case cannot be doubted. Any divergence from such a policy would promote laxity among public officers and tend to make the mandates of the court a nullity.

F. S. H.

NEGLIGENCE—ATTRACTIVE NUISANCES—LIABILITY TO MINOR.—The Holland Furnace Co. and its servant were sued by the plaintiff, a minor of tender years, for personal injuries sustained by him due to the alleged negligence of defendant in permitting its servant to abandon an old automobile, previously used *by him,* to remain on property used jointly by defendant and other tenants of the same landlord. Plaintiff was invited to play by the son of a tenant. One of the children had taken the cap off the tank, which contained some gasoline. While playing near the automobile, plaintiff picked up two stones and struck them together. A spark entered the tank; an explosion occurred and plaintiff was severely burned. A judgment in favor of the plaintiff was appealed to the Court of Appeals, *held,* that the plaintiff was entitled to recover. *Parnell* v. *Holland Furnace Co.,* 260 N. Y. 604, 184 N. E. 112 (1932), *aff'g* 234 App. Div. 567, 256 N. Y. Supp. 199 (4th Dept. 1932).

The theory of attractive nuisances has not been favored by courts in New York.[1] It is settled that where the defendant is the owner of the land he will not be held liable.[2] However, where

[16] People v. Antony, 7 App. Div. 132, 40 N. Y. Supp. 279 (1st Dept. 1896), *aff'd,* 151 N. Y. 620, 45 N. E. 1133 (1896).

[17] *Supra* note 1, §775.

[1] Walsh v. Fitchburgh Ry. Co., 145 N. Y. 301, 39 N. E. 1068 (1895); Mendelowitz v. Neisner, 258 N. Y. 181, 179 N. E. 378 (1932); Flaherty v. Metro Stations, Inc., 202 App. Div. 583, 196 N. Y. Supp. 2 (4th Dept. 1922), *aff'd,* 235 N. Y. 605, 139 N. E. 753 (1923); Jaffy v. N. Y. C. & H. R. R. Co., 118 Misc. 147, 192 N. Y. Supp. 852 (1922); Smith, *Liability of Landowner to Children Entering Without Permission* (1898) 11 HARV. L. REV. 349, 434.

[2] Murphy v. City of Brooklyn, 98 N. Y. 642 (1885); Lamore v. Crown Point Iron Co., 101 N. Y. 391, 4 N. E. 195 (1886); Walsh v. Fitchburgh Ry. Co., *supra* note 1; Johnson v. City of N. Y., 208 N. Y. 77, 101 N. E. 691 (1913); Flaherty v. Metro Stations, Inc., *supra* note 1; Beickert v. G. M. Laboratories, 242 N. Y. 168, 151 N. E. 195 (1926); Mendelowitz v. Neisner, *supra* note 1; De Biase v. Ewart & Lake, Inc., 228 App. Div. 407, 240 N. Y. Supp. 132 (4th Dept. 1930).