DURYEE v. WEBB.

Case No. 4,198.
{16 Conn. 558, note.}

Circuit Court, D. Connecticut. 1810.

SHERIFF—ACTION FOR ESCAPE UNDER MESNE PROCESS—COMPETENCY OF WITNESS—RESCUE—PLEADING CITIZENSHIP.

{1. In an action against a sheriff for an escape upon mesne process, the escaped prisoner is not a competent witness to prove his bankruptcy at the time of his escape.}

{2. The interest of the witness is not balanced so as to make him competent because, while liable for the debt to both parties, he is further liable to the sheriff for the cost and expense consequent upon the escape and defense of the action.}

{3. The sheriff cannot prove a rescue, as his return that the prisoner escaped is conclusive.}

{4. A person escaping from an arrest on mesne process is liable to the sheriff for all damage sustained by the latter by reason of the escape.}

{5. The sheriff is liable for the escape to the extent of the damage sustained by the party issuing the process.}

{6. A description of a defendant as "of the town and county of W., in the Connecticut district, a citizen of the United States, and sheriff of said W. county," is equivalent to describing him as a citizen of Connecticut.}

This was an action on the case, brought by John T. Duryee, described as "a citizen of the city, county and district of New York, merchant," against Henry Webb, described as "of the town and county of Windham, in the Connecticut district, esquire, a citizen of the United States, and sheriff of said Windham county," to recover damages for the default of Hubbard Dutton, a deputy of the defendant, in permitting the escape of Roswell Bailey, after he had been arrested on mesne process in favour of the plaintiff. The return of the deputy-sheriff on such process, was as follows: "I then, by virtue of this writ, attached the body of the within named Roswell Bailey, read the same in his hearing, and immediately thereafter, by reason of the darkness of the night and the connivance of sundry persons, there being many then present, and by their aid and secret assistance, the said Bailey escaped, so that I was unable to procure bail, or have the said Bailey in court." The defendant pleaded the general issue; on which the parties went to trial.

The plaintiff having made out his case prima facie, and rested, T. S. Williams, (with whom was J. Trumbull,) for the defendant, offered Roswell Bailey, as a witness, to prove, that at the time of the alleged escape, he was a bankrupt.

Daggett, for the plaintiff, objected to his competency; because if the plaintiff should recover, the defendant would have remedy against Bailey. He was, therefore, interested to defeat a recovery.

LIVINGSTON, Circuit Justice. Is not Bailey's interest balanced? He is now liable to Duryee; if the plaintiff recovers, he will then

be responsible to the sheriff. He cannot avoid responsibility one way or the other.

Daggett. The rule of damages in the two cases, will be different. Duryee can claim of Bailey no more than the debt; whereas the sheriff, if he is subjected in this suit, can come upon Bailey for all that he has had to pay on his account—debt, costs and expenses.

LIVINGSTON, Circuit Justice. Is that clear? Would the sheriff, in that case, recover accumulated damages?

Daggett referred to Sheriffs of Norwich v. Bradshaw, Cro. Eliz. 53, which was an action against the party arrested, for an escape. The debt for which defendant was arrested, was £9 10s.; and the plaintiff alleged, that they were bound, by reason of escape, to answer the debt, "necnon to expend money for the search of him, to their damage £20." After a verdict for the plaintiffs, the court held, that the action was sustainable, though they had not paid the money. This establishes the principle, that the party escaping must indemnify the sheriff. A judgment in favour of the sheriff against Bailey, would, of course, be greater than the amount of Duryee's present judgment against him.

Williams remarked, that it had been decided, that a person rescued may be a witness.

LIVINGSTON, Circuit Justice. In that case, the person rescued is supposed to be innocent. He would not be liable for accumulated damages. If Bailey was rescued, he might be a witness. But if he has run away himself, he must indemnify the sheriff, and is interested to diminish the damages against him. Here it appears from the return of the officer who made the arrest, that Bailey "escaped;" and this return is conclusive against the sheriff. I think Bailey ought to be excluded, though it struck me differently at first.

The counsel for the defendant then proposed to. call other witnesses to prove that Bailey was a bankrupt.

Daggett said he would not object to the admission of this evidence, though he should contend, that if admitted and the fact proved, it would make no difference in the damages to be recovered.

After the evidence in the cause was before the jury, Daggett contended, that the rule of damages must be the amount of the judgment against Bailey and interest. It is a prominent feature of our law, that it takes the most effective means to secure the payment of honest debts. It first protects the debtor, by furnishing him security against an unfounded claim. It then gives the creditor power to proceed, first against the debtor's property, and then, for want thereof, to take his body. In the latter alternative, the officer must commit the prisoner, if he does not procure bail. If he does, he must still find special bail, before he can plead. If judgment goes against him, and he avoids, so that the execution is returned non est, the whole debt is recoverable of the bail. If he is committed, and escapes through the insufficiency of the gaol, the county is liable for the whole debt If he escapes through the negligence of the sheriff, he is liable for the whole debt. And there is practically no difference, (if any in theory,) between an escape on mesne and one on final

process. In every case that has occurred, the rule of damages has in fact been the whole debt. Hubbard v. Shaler, 2 Day, 195. In Gleason v. Chester, 1 Day, 152, the verdict was for the whole debt No other rule can be adopted consistently with the principle which pervades our laws on this subject. The creditor has an absolute right to have the body. The sheriff has no discretion in the matter. He is not authorized to inquire whether his prisoner is rich or poor, young or old, strong or weak. The law prescribes to him a certain line of duty, and requires strict performance. Nor is the law unreasonable in this. The debtor may have no Visible property; but he may have secret resources, which imprisonment will call forth. A young and active man, like the debtor in this case, may have friends who will pay the debt and trust to his future efforts for reimbursement. If the debtor is destitute of resources and friends, and is committed on the execution, he may obtain relief by the poor debtor's oath, or the insolvent law.[1] In England, if the debtor, through the negligence of the attorney, is not charged in the execution, such attorney is liable for the whole debt Russel v. Palmer, 2 Wils. 325.

LIVINGSTON, Circuit Justice. That case has always been relied on, to show, that the attorney was not of course liable for the whole debt; for although a verdict was, in the first instance, given for the plaintiff for the whole debt, yet a new trial was afterwards granted, the court, including Lord Camden, before whom the cause had been tried, being of opinion, that he had misdirected the jury in telling them they ought to find a verdict for the whole debt; and upon the second trial, the jury were told they might find what damages they thought fit, and they accordingly found only one-sixth part of the debt 2 Wils. 328.

Trumbull, contra, insisted, that if the plaintiff was entitled to recover at all, in this case, the rule of damages was the injury actually sustained, by the negligence of the officer; and on the amount of that they (the counsel for the defendant) were at liberty to go to the jury. In the first place, here was a rescous. To constitute a rescous, it is not necessary that the prisoner should be taken out of the hands of the officer,

wholly by extraneous force. It may be done by aid of others. Nay, the prisoner may rescue himself.

LIVINGSTON, Circuit Justice. Rescous is a technical term, and must be shown distinctly. The return does not state in terms a rescous. Its construction must be made most strongly against the officer. Do the circumstances detailed in it amount to a rescous? Must not a rescous be effected by force?

Trumbull. It is not necessary that there should be physical force. He referred to Waldo v. Lambert, Cro. Eliz. 868, and Mounson v. Cleyton, Cro. Car. 255.

LIVINGSTON, Circuit Justice. Have you any authority to show, that the sheriff, in a case like this, is liable only for the injury actually sustained?

Trumbull. I was coming to that point. The opinion of Grose, J., in Bonafous v. Walker, 2 Term R. 132, establishes the proposition, that in an action on the case for an escape, the jury are at liberty to give such damages as they shall think right, under all the circumstances of the case; and he adds, that a shilling is frequently sufficient.

LIVINGSTON, Circuit Justice. Read the facts in that case. What a judge says, is to go for nothing, except as it applies to the facts. If the point is settled, as you claim it, by decisions, the court will be governed by them; but in the absence of such decisions, the court is inclined the other way. The evils would be great, if it were understood, that an officer may let a prisoner go, whenever he thinks that nothing can be got from him. It would open a wide door to collusion.[2]

Trumbull then cited Planck v. Anderson, 5 Term R. 37, 40, as a decision in point Buller, J., says, where the prisoner escapes out of custody on mesne process, the creditor cannot bring an action of debt but is driven to his action on the case, which is founded on the damage sustained; and if no damage be sustained, the creditor has no cause of action.

LIVINGSTON, Circuit Justice. There is a great difference between the liability of a private agent or attorney, and that of a public officer, to whom the party must of necessity resort. The sheriff ought not to be allowed to say, that this action is vindictive. If he is not liable, it is in his power not to execute mesne process at all; and we should be placed in an ocean of uncertainty.

Trumbull. Peake, in treating of the evidence in actions against sheriffs, says, that in an action for false return of mesne process, the plaintiff, in order to show the amount of damages he has sustained, should prove the circumstances of the party arrested, at the time of the arrest, and that he has since absconded or become insolvent; for if he were originally in bad circumstances, or he may be met with every day, and the plaintiff has not in fact been injured, by the negligence of the defendant, the damages will be nominal. In an action for an escape on mesne process, the plaintiff, he says, must prove, that the party was at large, or in improper custody, after the return of the writ; that no bail above was

put in; and that by these circumstances, he has been injured; for where a sheriff's officer kept a party in his custody some time after the return of the writ, and then took him to prison, yet as the plaintiff was not in fact delayed or injured, the action was holden not to be maintainable. Peake, Ev. [390] 420.

LIVINGSTON, Circuit Justice. Since I have been sitting here, my mind has undergone a great change. I doubt now, whether it has ever been decided in England, that the sheriff is liable for the whole debt, in an action for an escape on mesne process. The, cases which have been read, seem to go on the ground, that where no damage has been sustained, no liability at all has been incurred. It appears, however, to have been understood, in the case read from 2 Day, that for an escape for the insufficiency of the gaol, the county is liable for the whole debt; though perhaps a distinction may be taken between that case and this.

Williams. The cases in which the county has been subjected for the whole debt, are where the escape was on execution, and turned on the construction of our statute. In Massachusetts, where the statute on this subject is different, the supreme court has decided differently. Burrell v. Lithgow, 2 Mass. 526. In the same case, the court say, that if a debtor in prison on mesne process escapes, the sheriff is answerable to the creditor, in an action on the case, who shall recover according to the damages he has sustained. This is the common law remedy.

LIVINGSTON, Circuit Justice. This is in point, and as respectable as any English decision. It is so respectable that I feel unwilling to depart from it; though it appears to me that the policy is the other way. The "common law" is spoken of in the case referred to. If this is the doctrine of the common law, I have no doubt it has grown up from consideration of hardship in particular cases, which do infinite mischief to public justice—the worst consideration in the world to influence a court of law.

Daggett commented upon the case of Burrell v. Lithgow, remarking, that the court cite no authority for their dictum about the common law. The case of Brown v. Lord, Kirby, 209, in this state, was an action against the sheriff, for the default of his deputy, in suffering a person arrested on mesne process to escape; and the defendant was subjected to

the whole debt. In Gleason v. Chester [supra], in this county, the record shows, that the verdict was for the whole debt. In Crompton v. Ward, 1 Strange, 429, 436, which was an action for an escape from custody on a writ of habeas corpus, the plaintiff had judgment; and as there is nothing said about the damages, it must be understod to be for the whole debt. Powell v. Hord, 1 Strange, 650, before Raymond, Ch. J., was an action for a false return on mesne process; the jury found the whole debt in damages, with the approbation of the chief justice; and afterwards, on a motion for a new trial, the whole court were of opinion that the verdict was right.

Williams. It is clear beyond a doubt, that in an action for an escape on mesne process, the damages recoverable, are, by the common law, uncertain. All the cases, even those in which the whole debt was recovered, show this. In the case of Powell v. Hord, just cited, Lord Raymond said, the damages would depend on circumstances. If the defendant in the original action had been a man of estate, and in no danger, he would think the debt would be too much to give. In Crompton v. Ward, the court say, that the sheriff had not taken proper caution, whereby the plaintiff, who had an interest—a sort of property—in the body of the prisoner, had sustained a damage. This damage happened by the neglect, of the sheriff, and therefore, he must answer it to the plaintiff in this action. 1 Strange, 436. No other rule of damages is here given, than the damage sustained. From a note of the case of Lenthal v. Gardiner, Bull. N. P. 69, it appears, that the sum recovered against the sheriff was less than the debt; the judgment being for £2000, and the damages recovered, only £1000. The giving of a less sum than the whole debt, is here spoken of as a thing that happens in the course of practice. Peake fully confirms the position, that in an action against the sheriff, either for a false return or an escape, on mesne process, the measure of damages is the injury, which the plaintiff has in fact sustained, by the negligence of the defendant Peake, Ev. (3d Lond. Ed.) 390. The case of Burrell v. Lithgow, 2 Mass. 526, already cited, establishes the same position. To the same effect is Potter v. Lansing, 1 Johns. 215, in the state of New York. And in Rawson v. Dole, 2 Johns. 454, which was an action of debt for an escape, the court say, that if an action on the case had been brought, it might have been inquired what was lost by the escape, and the jury might have given such damages as they supposed the party had sustained. If the party bring case, even when he might have had debt, he thereby leaves the question of damages open. There is a plain distinction not only between escapes on mesne and final process, but also between escapes on mesne process before and after commitment. For an escape from a mere arrest, before commitment, the officer has never been held liable beyond the damage actually sustained. (The counsel then addressed the jury on the circumstances attending the escape in question, claiming, that the damages, if any, should be merely nominal.)

Daggett, in reply, commented on the cases cited by the counsel for the defendant. In Rawson v. Dole, the sole question was, whether interest on the original debt, could be recovered. In Potter v. Lansing, no point was decided, by a majority of the court, but that the damages recoverable for the escape, might be enhanced, by the false return. There is no distinction between an escape on mesne process before and after commitment, as to the liability of the sheriff, though there may be, as to his returning rescous, or as to the effect of it See 1 Strange, 435, 436.

LIVINGSTON, Circuit Justice (charging jury). The first question is, whether there was a rescous, such as would justify the sheriff. This depends upon the construction to be given to the return, and is a mere question of law. I have no difficulty in saying, that the return shews no rescous. It only confesses that the officer was guilty of a negligent escape. I am therefore of opinion, that the plaintiff is entitled to recover.

The next question relates to the amount of damages to be recovered. Great inconvenience would result to the public from holding that a sheriff, in a case like this, is not liable for the whole debt: its tendency would be to make officers lax in the performance of their duty. Still I am fully satisfied, that in point of law, the jury are not bound to give the whole debt. You may give the whole debt; or you may give less; it is a matter wholly within your province; the court will not interfere.

His honor remarked, that the case from Massachusetts was entitled to great consideration. He was fully satisfied, that the practice in England and in this country, had been according to this direction.

The jury returned a verdict for the plaintiff to recover damages equal to the whole debt.

Williams moved to erase the cause from the docket, on, the ground that the court had not jurisdiction of it. He read the description of the parties in the writ and cited Bingham v. Cabot, 3 Dall. [3 U. S.] 382; Abercombie v. Dupuis, 1 Cranch [5 U. S.] 343; Wood v. Wagnon, 2 Cranch [6 U. S.] 1.

Daggett, contra. It may well be presumed, that there is no disposition in this country to apply the doctrine of these cases to others not strictly analogous. The plaintiff is described as a citizen of the district of New York. He is, of course, a citizen of the state of New York. The court will judicially take notice of the act of congress making the district and state co-extensive. Then as to the defendant; he is described as an inhabitant of Windham in Windham county, sheriff of said county, and a citizen of the United

States. Every person who is an inhabitant of any state, and a citizen of the United States, is a citizen of that state. The description of the defendant is tantamount to saying, that he is a citizen of the state of Connecticut. Thus it appears, that the parties are citizens of different states.

Williams, in reply. The court will not hold jurisdiction by intendment. It must be expressly averred, that one party is a citizen of one state, and that the other party is a citizen of a different state. Now, to say nothing of the plaintiff, is it here averred that defendant is a citizen of Connecticut? It certainly is not, in terms. Nor does this fact appear by necessary inference. A man may be "of Windham"—i. e. a resident or inhabitant of that town—and sheriff of the county of Windham, without being a citizen of this state. Citizenship is not co-extensive with inhabitancy. But if otherwise, we claim the intendment is not sufficient.

LIVINGSTON, Circuit Justice. I do not question the correctness of the decisions referred to. If I understand them they amount to this, that if the court cannot see from the record, that the parties are citizens of different states, it will dismiss the cause. After a cause has proceeded as far as this has, it is the duty of the court to make every reasonable intendment in favour of the jurisdiction. Can such intendment be made here? There is a decision which removes all objections to the plaintiff. Then is the defendant so described, that the court can see, that he is a citizen of Connecticut? The description of him as a citizen of the United States and an inhabitant of Connecticut, is equivalent to describing him as a citizen of Connecticut. He is, moreover, described as exercising an office, which none but a citizen of the state can be presumed to be capable of exercising. The motion must be denied.

{In the original report in 16 Conn. 558. this case is published as a note to Palmer v. Gallup.}

[1] The act of May, 1809 {Rev. St. 1821}, authorizing the superior court to grant relief in certain cases of insolvency was then in force.

[2] It was in this connexion, I believe that the remark quoted in the text was made. I do not insert it in this report, simply because I do not find it in any minutes; and at this distant period, I may he mistaken as to its true locality.