Nov. 12, 1909. *Present:* Mr. Justice Middleton and Mr. Justice Wood Renton.

MOHAMADO ABDULLA *v.* LUSHINGTON.*

D. C., Galle, 8,908

Wrongful arrest under civil warrant—Liability of Fiscal—"Gross negligence"—Mistake—Malice—Civil Procedure Code, s. 362—English Law—Roman-Dutch Law.

Held, that in an action against the Fiscal for wrongful arrest, malice need not be proved, where such arrest has been effected without lawful authority. But where the arrest has been properly made (i.e., according to the forms enjoined by law) no action lies, unless the arrest was malicious and without reasonable and probable cause.

Held, also, that section 362 of the Civil Procedure Code does not make proof of special damage a necessary element in the constitution of an action for unlawful arrest.

THE plaintiff sued the defendant, the Fiscal of the Southern Province, for damages for wrongful arrest. The plaintiff alleged that in C. R., Galle, 4,417, writ against person was issued against the judgment-debtor in the said case, and that the Fiscal's officer unlawfully arrested the plaintiff under the said writ and took him into custody and detained him from 4.30 to 7 P.M.

* Reported by Mr. H. A. Jayewardene, during his editorship.

The defendant alleged that the Fiscal's officer who arrested the plaintiff did so by mistake under the *bona fide* and reasonable belief that he was the judgment-debtor in C. R., 4,417.

The District Judge (W. E. Thorpe, Esq.) gave judgment for the plaintiff for Rs. 250, holding that the Fiscal's officer in arresting the plaintiff acted maliciously.

The defendant appealed.

A. St. V. Jayewardene, for the defendant, appellant.

H. A. Jayewardene, for the plaintiff, respondent.

Cur. adv. vult.

November 12, 1909. WOOD RENTON J.—

I think that the judgment of the District Judge should be affirmed. The respondent clearly established the arrest, the unlawfulness of the arrest, and, as required by section 362 of the Civil Procedure Code, the "gross negligence" of the Fiscal's officer by whom the arrest was effected. If the case were governed by English Law, there would be no other *facta probanda*. Proof of malice is not necessary in an action based on trespass to the person (*Tralton v. Fisher*[1]). Proof of special damage is relevant only as establishing a circumstance of aggravation. Section 362 of the Code does not, in my opinion, make such proof a necessary element in the constitution of an action for unlawful arrest. It recognizes an existing civil liability for unlawful arrest, and merely adds a statutory element, viz., "fraud, gross negligence, or gross irregularity of proceeding, or gross want of ordinary diligence, or abuse of authority, on the part of the person executing the process," to the *facta probanda* in actions against the class of public officers for whose protection it was enacted. Moreover, "gross negligence," or, where that is present, malice on the part of an inferior officer is in law imputable to his superior, if the class of act done by the former falls within the ordinary scope of his express or implied authority from the latter. This is clearly English Law (*Abraham v. Deakin*,[2] and *cf. Citizens' Life Insurance Co. v. Brown*[3]), and section 362 appears to me to contemplate its application in Ceylon, for it makes, in effect, the Fiscal liable for the act of his officer in the execution of process, if "fraud, gross negligence," or one of the other forms of wrongful conduct above mentioned is brought home to "the person executing such process." If, on the other hand, the case is governed—as I think we must hold it to be—by Roman-Dutch Law, it is equally unnecessary that, in the circumstances before us, the

[1] *(1881) 2 Dong, per Lord Mansfield, at page 673.*

[2] *(1891) 1 Q. B. 516.*

[3] *(1904) A. C. 423.*

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additional element of malice should be established. "It is an actionable wrong," says Nathan,[1] "to deprive another person of his liberty without lawful authority, or in an unlawful manner, on the ground that he owes a debt. That is to say, the informal or illegal arrest of a person for civil debt constitutes a trespass to the person, and amounts in law to a false imprisonment, for which damages may be recovered. If, on the other hand, the arrest had been properly made (*i.e.*, according to the forms enjoined by law), a plaintiff who seeks to recover damages on account of such arrest must show that it was malicious and without reasonable and probable cause. In the one case the arrest is informal or illegal, and the consequent deprivation of the plaintiff's liberty is effected without colour of right, and is, therefore, actionable as a false imprisonment or trespass to the person; while, in the other, the arrest is executed with due formalities, but is actionable as a malicious civil arrest, because it was executed maliciously and without reasonable and probable cause."

In the case of false imprisonment, proof of special damage seems to be unnecessary.[2] The present case is one of false imprisonment. The arrest itself was illegal, and it was not incumbent on the respondent to prove malice.[3] Even if that burden had rested on him, I should not be prepared to differ from the finding of the District Judge that malice had been proved. I think that that finding is justified (1) as an inference from the utter recklessness of the arrest;[4] (2) by appreciable, though slight, evidence of actual malice, such as the pulling of the respondent about after his arrest; (3) by the facts that the respondent had been a trader in Galle Bazaar for twenty years, that the Fiscal's officer had executed process for him, and that, in spite of his denial of the suggestion, he could hardly have been ignorant of the respondent's name. The evidence of malice, although not a *factum probandum* in the case, is an element to be considered in the computation of damages. Moreover, in the Roman-Dutch, as in English Law, a servant or agent who effects an illegal arrest in the course, and within the scope, of his ordinary duties may render his principal liable for his wrongful act.[5]

The damages (Rs. 250) are heavy. But no plea for their reduction was embodied in the petition of appeal, and I think that we ought to treat them as if they had been assessed by a jury.

I would dismiss the appeal with costs.

MIDDLETON J.—I agree.

Appeal dismissed.

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[1] *II, s. 1654.*
[2] *Nathan, II, s. 1657.*
[3] *See Hart and Cohen, 16 S. C. at page 368.*
[4] *See Nathan II, ss. 1653, 1657.*
[5] *Davidson v. Johannesburg Turf Club (1904) Trans. H. C. per Solomon J., p. 268.*