

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Jeremiah Brasyer v. Harold Maclean, from
the Supreme Court of New South Wales ;
delivered June 10th, 1875.*

Present :

SIR J. W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR R. P. COLLIER.

SIR HENRY S. KEATING.

THIS was an action brought by Jeremiah Brasyer against Harold Maclean, who was the sheriff of the colony of New South Wales, for a false return of rescue made by him upon a writ of *capias ad respondendum*, which was a mesne process. It appears that the *capias ad respondendum* was issued against Alexander Coghill Wylie, at the suit of George Face, on the 3d March 1873, and that that writ was delivered to the Sheriff to be executed. The Sheriff made a return stating that he had "made
" his warrant in writing, under his seal of
" office, to William Thomas and Joseph William
" Delany, his bailiffs, jointly and severally, to
" take and arrest the said Alexander Coghill
" Wylie, by virtue of which warrant the said
" William Thomas and Joseph William Delany
" afterwards, to wit, on the third day of March
" in the year of our Lord 1873, at Sydney in
" the colony of New South Wales, in his baili-
" wick, took and arrested the said Alexander
" Coghill Wylie according to the exigency of
" the said writ, and forthwith delivered to him
" a copy of the said writ, and safely kept him in

" their custody until the Plaintiff and divers
 " other persons to the said bailiffs unknown, on
 " the said third day of March, at Sydney afore-
 " said, with force and arms assaulted and
 " illtreated his said bailiffs, and the said Alex-
 " ander Coghili Wylie out of the custody of his
 " said bailiffs then and there rescued, and the
 " said Alexander Coghill Wylie then and there
 " with force of arms violently resisted and
 " assaulted his said bailiffs and rescued himself
 " and escaped out of the custody of his said
 " bailiffs against the peace of our Lady the
 " Queen, and afterwards, to wit, on the third day
 " of March aforesaid, at Sydney aforesaid, within
 " his bailiwick, by his said bailiffs took and
 " re-arrested the said Alexander Coghill Wylie,
 " and whose body then remained in the prison
 " of our Lady the Queen under his custody."

It was contended in the course of the argument
 that this was a return of *cepi corpus*, and that
 the sheriff had got the body ready, and that the
 allegation that it was rescued out of the custody
 of the bailiffs by the Plaintiff was immaterial and
 unnecessary. But it appears to their Lordships
 that it was a material allegation in the return,
 that although the sheriff afterwards retook the
 Defendant in the suit, still that the Plaintiff had
 rescued him out of his custody after he had been
 once arrested.

On the 4th March an order for attachment
 for contempt was issued by a Judge in conse-
 quence, as it is stated, of the "matter being a
 " matter of exigency and emergency requiring
 " a Judge in vacation to exercise the powers of
 " the full Court, under and in pursuance of the
 " powers conferred upon a single Judge in
 " vacation in cases of emergency," and he ordered
 upon that return, and upon the application of
 the sheriff, that a writ of attachment should issue
 against the said Alexander Coghill Wylie and

Jeremiah Brasycr, to be returnable before the full Court on Thursday the 6th day of March. That order having been made by a single Judge, it was afterwards adopted by the Court on the 6th March 1873. It is there stated that upon hearing counsel for the above-named applicant, Harold Maclean, and upon hearing the affidavit of David Lawrence Levy, the Court ordered "that the said order be confirmed and allowed and made absolute, and be and the same is hereby made a rule of this honourable Court." It therefore appears that without any cause shown by the Plaintiff, the Court by reason of the false return which the sheriff had made to the writ, ordered an attachment to be issued against the Plaintiff. That attachment having been issued, the Plaintiff was arrested on the 6th March, and was detained in custody until the 7th March. On that day he was admitted to bail, and on the 11th March a final order was made, by which he was ordered to be discharged and released from bail.

Now it is impossible to say that no damage was sustained by the Plaintiff in consequence of that arrest. He was apprehended and detained in custody from the 6th to the 7th of March, and he was subject to all the indignity of an arrest, and to the injury to his reputation from having it recorded against him that he had assisted or rescued the prisoner out of the custody of the sheriff, and that he had been attached for contempt of a Court of Justice.

But it is said that the Sheriff is not liable for that act, inasmuch as it is not found or proved that the sheriff acted maliciously. Their Lordships have been satisfied by the cases which have been cited to them that this return of the sheriff was conclusive in that proceeding that the Plaintiff had rescued Wylie out of the custody of the Sheriff. It is laid down in

Williams's Saunders, vol. 2, page 345, in addition to the cases which have already been cited, "It seems that anciently, when the sheriff returned a rescue, the party charged therewith was admitted to plead to it as an indictment"—at that time it was not conclusive evidence of the fact,—Bacon's Abridgement, title Rescue. "But it is now held that the return is not traversable." That does not mean perhaps traversable in the form of traversing a return made to a writ of mandamus, but when it is said that the return is not traversable it is probably intended that the party is not allowed to show that the fact returned is not true, "and the party is driven to his action against the sheriff in case the return is false. So that the return itself is considered a conviction,"—not an actual conviction, but in the nature of a conviction as conclusive in that particular proceeding of the facts returned by the sheriff,—"and the Courts will grant an attachment upon it in the first instance."

Now, their Lordships are clearly of opinion that the Court was not acting contrary to any principle of law, or contrary to an established practice, but that they were acting entirely in conformity with an established practice in issuing an attachment against the Plaintiff upon that conviction without allowing him to show cause against the truth of the return. This is not a case which falls within the general rule which has been laid down, that no action lies for damage or inconvenience sustained in consequence of process of law, unless it be alleged and proved that the party who occasioned it was actuated by malice. This is a case of a misfeasance by a public ministerial officer in the discharge of his duties. The sheriff was intrusted with the power of making a return to the Court which would be considered conclusive by the

Court as to the truth of the facts stated in the return. He was enabled, therefore, by virtue of his office, to make a return to the Court in this particular instance, which was conclusive in that stage of the proceedings, that the Plaintiff did rescue Wylie from his custody, and he therefore had the power and he exercised the power of doing that which rendered the Plaintiff liable to an attachment for a contempt of Court without being allowed to show that the facts returned were untrue.

It appears, therefore, to their Lordships that the sheriff in this case was guilty of a misfeasance in the exercise of the powers which were intrusted to him by law and in the discharge of his duty as a public ministerial officer, and that in respect of that misfeasance he is liable to an action for the damage which resulted from that act, notwithstanding it was not proved against him that he was actuated by malicious motives. The mere fact of the misfeasance and the damage resulting from it by reason of the attachment issuing upon the return as conclusive evidence against the Plaintiff was sufficient damage to enable the Plaintiff to maintain an action against the sheriff for that misfeasance, and to recover the damage which he has sustained in consequence of it.

Their Lordships, therefore, think that the majority of the Court were wrong in the conclusion at which they arrived, that the action could not be maintained without proof of malice or want of probable cause, and under those circumstances their Lordships will humbly recommend Her Majesty that the decision of the High Court be reversed, and that the rule for a nonsuit should be discharged with costs, and that the Defendant should pay the costs of this Appeal.

