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## NOTES.

ARREST—LIABILITY FOR ARREST IN ACTIONS FOR NEGLIGENCE—In a *per curiam* opinion on a rule to show cause of action and discharge on common bail the Court of Common Pleas No. 2, of Philadelphia County, recently decided that bail was demandable in an action for negligence.[1] The case illustrates the difficulty in getting a court to do something different from what has been done before in a question of practice. An auto when the brakes were suddenly applied, skidded on a street slippery from a slight snow and struck another. There was no doubt that the accident happened purely

[1] Adams v. Rogasner, December Term, 1916, Philadelphia, C. P. No. 2, No. 4250.

from negligence, though it was debatable which party was really to blame.

The ancient writ of *capias ad respondendum* was not an original writ, but issued only to arrest a defendant, after a summons had been issued and returned *nihil* or served and the defendant had defaulted in appearance. This writ was at first issuable only in actions for injuries accompanied by force, but was extended by statute to actions of account,[2] actions of debt and detinue,[3] and all actions on the case,[4] though no breach of the peace had occurred. Prior to the last-named statute it was customary in all tort cases to take out a writ of trespass *quare clausum fregit, vi et armis,* in order to get the *capias,* and then to proceed for any other less forcible injury with the consent of the court.

Then gradually it became the custom to take out the *capias* in the first instance, and if objection was made to draw up a fictitious original writ and return.

As the *capias* was not the original writ, but only issued after the prior writ had been disobeyed or returned *nihil,* the defendant was arrested in all cases, no matter how trivial the offence. As the original writ became fictitious this seemed a harsh rule, so by various statutes it was provided that unless the plaintiff made oath that his damages were a certain amount, at first 10*l.* or more, and included a statement of the cause of action in the writ, the *capias* could only be served as a summons and the defendant would only have to give common bail. But it was only possible in actions of debt, or trover, or case for money due, to swear to a certain amount of damage. Hence in actions of trespass, bail could not be had of course, but would be allowed by the judges in cases of special and violent injuries, as mayhem or atrocious battery, or where the defendant for some reason had to be kept within the jurisdiction of the court.[5]

In Pennsylvania the practice was to arrest on a *capias* for almost everything. In 1725 the assembly passed an act exempting any freeholder with a certain amount or value of land from arrest on a *capias.*[6]

An affidavit of cause of action was not required as a prerequisite to obtaining the writ. But contrary to the practice in England where no writ could issue marked for bail without a previous order of the court, it was customary to mark the writ for bail in a certain sum in all cases in which it might fairly be presumed that the court would require bail. Then the defendant might rule the plaintiff to show cause of action. At the hearing on this rule the court would

[2] Statute of Malberge, 52 Hen. III, c. 23; Statute of Westm. 2, 13 Ed. I, c. 11.

[3] 25 Ed. III, c. 17.

[4] 19 Hen. VII, c. 9.

[5] III Blk. 281, 287, 292.

[6] Act March 20, 1725, 1 Sm. 164.

determine whether bail should have been allowed and how much. In actions for uncertain damages as trespass, slander, *etc.*, there was common bail only, except by special order of the court. The writ would then be marked "no bail required," and served as a summons. The defendant would in such cases endorse the writ with authority to the prothonotary to enter an appearance for him.[7]

It is significant that Roberts in his Digest makes no mention of actions on the case, *i. e.*, those based on negligence or on the actions of the defendant's servant. It is also significant that the judges of the Supreme Court of Pennsylvania, in 1808, in reporting what English statutes were in force in the state did not mention that one which extended *capias* to actions on the case.[8]

In 1836 the assembly passed a comprehensive statute covering the commencement of actions by summons and *capias ad respondendum*.[9] Section 3 of this act provided that it should be the duty of the prothonotary of any court having jurisdiction on the application of the plaintiff in *any* personal action, instead of a writ of summons, to issue a writ of *capias ad respondendum* in a certain form. This apparently broad power to issue a *capias* was limited to a large extent by the two subsequent sections of the act.

Section 4 provides, "That no writ of *capias ad respondendum* shall issue in any case, unless the plaintiff, his agent or attorney, shall previously thereto make affidavit, setting forth:

"First: The cause of action, and the amount in which the defendant is indebted to the plaintiff, or the value of the property taken or detained, or the damages sustained, as the case may be, to the best of the deponent's knowledge or belief; and,

"Second: That to the best of the deponent's knowledge or belief, the defendant is not an inhabitant of this commonwealth, or if such inhabitant that he has no known residence therein to the knowledge of the deponent, or that he is about to quit the commonwealth, without leaving sufficient real or personal estate therein to satisfy the demand; which affidavit shall be filed of record in the suit."

Section 5 provides, "That it shall be lawful for a plaintiff in any action founded upon actual force, or which shall be brought by reason of actual fraud or deceit, upon affidavit of the facts, to have a *capias* as aforesaid, against any person not otherwise liable to arrest."

All statutes inconsistent with this act or "supplied" by it were thereby repealed. Within this category fell the Act of 1725, exempting freeholders.[10]

After this statute no one could be arrested on a *capias*, unless

[7] Roberts' Digest, 88, 89; Carroll v. Simmons, 27 C. C. 29 (Pa. 1902).

[8] See note 4, *supra*.

[9] Act June 13, 1836, P. L. 572.

[10] See note 6, *supra*.

he was not an inhabitant of the state, or had no known residence herein, or was about to leave without leaving sufficient property to satisfy the demand, or unless action was founded on actual force or actual fraud or deceit. In either case the plaintiff must file an affidavit of the facts necessary to give the right to the *capias,* and in case the defendant was a non-resident or about to quit the jurisdiction, must state the amount of damages sustained to the best of his knowledge and belief.

*Capias* in an action based on negligence could under this statute be issued only if the defendant was a non-resident or about to leave the state without leaving property. But in such cases *capias* could always be issued.[11] So by this act no added right was given to issue *capias* in actions for negligence.

Sections 4 and 5 of the Act of 1836 were repealed two years later by an act,[12] whose eleven different sections deal with eight different subjects, ranging from the inspection of butter and lard to the boundaries of the borough of Allegheny, and all previous laws repealed or supplied by them were revived. This act revived the Act of 1725,[13] exempting freeholders, and abolished the necessity of an affidavit of cause of action as a prerequisite for obtaining the writ of *capias,* though the latter is now required by rule of court in many counties.

This left in force that section of the Act of 1836, which provided for the issuance of *capias* in *any* personal action. It is by force of it that *capias* has been issued and bail allowed in actions for negligence. But it hardly seems possible that the legislature intended to create this entirely new liability. The legislature of 1836 clearly did not intend to pass the third section without the qualifications of the fourth and fifth. It does not seem reasonable that the legislature in 1838 so intended, if it can be supposed that they had any idea what they were doing considering the heterogeneous character of the act. It is much more probable that they only intended to get rid of the liability of a freeholder for arrest in actions based on force or fraud, and the requirement of filing an affidavit before obtaining a writ. These were the only new features of the Act of 1836. Aside from them it was merely a statement of the common law.

There is no case reported of an arrest in an action for negligence before the act. Judge Tilghman stated in *Duffield* v. *Smith,*[14] that bail was not demandable in trespass because there was no measure of damages, except when the defendant was about to leave the state, or in cases of violent battery, or where large damages had already been given in another action arising from similar circumstances. If then we are to regard the statute as expressing the

[11] Duffield v. Smith, 6 Binney 302 (Pa. 1814).
[12] Act April 14, 1838, P. L. 457.
[13] See note 6, *supra.*
[14] See note 11, *supra.*

common law, unless the contrary is clearly shown, we must come to the conclusion that the right to arrest on a *capias* in an action for negligence was not given by the Acts of 1836 and 1838.

If an action for negligence is included within the "any personal action" of the Act of 1836, it would seem that an action for an injury done by one's partner, or servant, or wife, would be also included. But the courts have uniformly held that such was not the case.[15]

This view is also supported by *dicta* in several Pennsylvania cases. Judge Tilghman's *dictum* in *Duffield* v. *Smith*[16] has been mentioned above. This is cited with approval by Judge Arnold in *Carroll* v. *Simmons*,[17] who after a review of the history of *capias* in Pennsylvania adds, "Imprisonment for debt on contract being now abolished, except in actions on promises to marry, and females being exempted altogether from arrest in civil cases, it would be well if the *capias ad respondendum* were abolished in all cases."

In *Gelsavage* v. *Mardos*,[18] an action for assault and battery, Judge Newcomb said, in discussing a motion to discharge on common bail, "The test of such a motion is not whether enough appears to warrant substantial damages, but whether they are so specific in character as to be capable of an estimate at the present stage and on the face of the complaint."

In *Orzel* v. *Cominsky*,[19] Judge Broomall said, "It is true that there is a general rule that in actions of trespass bail is not demandable, because there is no standard by which the damages can be measured. . . . In matters of mere tort, bail is not of course, but may be directed by the special order of the court." The same judge on the same day refused to allow bail in a suit for injuries "caused by the negligence of the defendant in not guarding a cellar way in a sidewalk."[20]

But in spite of these considerations the courts of Pennsylvania generally hold that the defendant may be arrested on a *capias* in an action for negligence.[21]

In New Jersey the rule is that in no tort action for unliquiated damages may the defendant be arrested, unless some special ground is shown therefor.[22] Cases in some states seem to say that

[15] (Partner) Bassett v. Davis, 1 Clarke P. L. J. 310 (Pa. 1842); (servant) Carroll v. Simmons, 11 D. R. 47, 27 C. C. 29 (Pa. 1902); (wife) Reader v. Rosendale, 21 W. N. C. 153 (Pa. 1887); O'Connor v. Walsh, 29 W. N. C. 92 (Pa. 1891).

[16] See note 11, *supra*.

[17] See note 15, *supra*.

[18] 22 D. R. 844 (Pa. 1913).

[19] 30 York 104, 14 Del. Co. 173 (Pa. 1916).

[20] Turner v. Sugarman, 14 Del. Co. 175 (Pa. 1916).

[21] Dungan v. Read, 167 Pa. 393 (1895); Adams v. Rogasner, see note 1, *supra; contra*, Turner v. Sugarman, see note 20, *supra*.

[22] Bennett v. Benson, 25 N. J. L. 166 (1855).

arrest is permissible in any tort action. But none of these cases are actions for negligence.[23]

In New York arrest is allowed in an action for the negligence of the defendant himself,[24] but not for that of his servant.[25]

A Quebec case expressly decides that there may be no arrest in an action based on negligence.[26]

In practically every jurisdiction this question is regulated by statute.

*E. N. V.*

[23] Jones v. Kelley, 17 Mass. 116 (1821); Barnes v. Tenney, 52 Vt. 557 (1880); *In re* Kindling, 39 Wis. 35 (1875); Mullin v. Frost, 18 N. B. 463 (1879).

[24] Ritterman v. Ropes, 52 N. Y. Super. (1885); People *ex rel.* Harris v. Gill, 85 App. Div. 192 (N. Y. 1903).

[25] Lasche v. Dearing, 23 N. Y. Misc. 722. (1898); Davids v. R. R., 45 N. Y. Misc. 208 (1904).

[26] Chartrand v. Smart, 23 Quebec Super. 304 (1902).