A TREATISE

UPON SOME OF THE

GENERAL PRINCIPLES OF THE LAW,

WHETHER OF A

LEGAL, OR OF AN EQUITABLE NATURE,

INCLUDING THEIR

RELATIONS AND APPLICATION

TO

ACTIONS AND DEFENSES

IN GENERAL,

WHETHER IN

COURTS OF COMMON LAW, OR COURTS OF EQUITY;

AND EQUALLY ADAPTED TO

COURTS GOVERNED BY CODES.

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§ 6. **Negligent escape.** It is a negligent escape when the prisoner escapes without his keeper's knowledge or consent, and in such case upon fresh pursuit he may be retaken and the sheriff shall be excused, if he has him again before action brought against himself for escape, 3 Bl. Com. 415; *Butler* v. *Washburn*, 25 N. H. 251; *Ballou* v. *Kip*, 7 Johns. 175. As the two classes, negligent and voluntary, include all escapes for which the sheriff is liable, all not above defined as voluntary are negligent. The only excuse by which the sheriff can justify himself for not retaining his prisoner, is the act of God or the public enemy. *Fairfield* v. *Case*, 24 Wend. (N. Y.) 381; *Green* v. *Hern*, 2 Pen. & W. 167; *Wheeler* v. *Hambright*, 6 Serg. & R. (Penn.) 390; *Slemaker* v. *Marriott*, 5 Gill. & J. (Md.) 410; *Riley* v. *Whittiker*, 49 N. H. 145; 6 Am. Rep. 474; *Patten* v. *Halstead*, 1 N. J. Law, 277; *Rainey* v. *Dunning*, 2 Murph. (N. C.) 386; *State* v. *Halford*, 6 Rich. (S. C.)58; *Toll* v. *Alvord*, 64 Barb. (N. Y.) 568. A rescue of a prisoner in execution, either on the way to jail, or in the jail, or a breach of the prison, will be a negligent escape. Cro. Jac. 419. It is said that if the prison takes fire, by means whereof the prisoners escape, or if the prison is broken by the king's enemies, this shall excuse the sheriff; but if the prison is broken by rebels and traitors, the king's subjects, this shall not excuse him. 4 Co. 84. Therefore, if a mob riotously and by force demolish a jail or rescue the prisoners, it is an escape for which the sheriff is answerable. *Elliott* v. *Norfolk*, 4 T. R. 789; *Abbott* v. *Holland*, 20 Ga. 598; *Cargill* v. *Taylor*, 10 Mass. 206. Though the escape was without the knowledge of, and without any fault on the part of, the jailer, it is still a negligent escape (*Alsept* v. *Eyles*, 2 H. Bl. 108); and care is no defense for him. *State* v. *Cullen*, 50 Ind. 598. Where the prisoner gave bond and was allowed the rules of the prison whence he escaped without the jailer's knowledge, it was a negligent escape. *Bonafous* v. *Walker*, 2 T. R. 226. *Contra: Yates* v. *Yeaden*, 4 McCord (S. C.), 18; *Kepler* v. *Barker*, 13 Ohio St. 177. Where the sheriff in good faith released the prisoner on his giving a bond, which was in an amount less than twice the debt, it was held not a voluntary, but a negligent escape. *Holley* v. *Morgan*, 5 Ga. 178. The sheriff is liable for an escape on execution, though there be no jail in the county (*Gwinn* v. *Hubbard*, 3 Blackf. [Ind.] 14); or it be insufficient. *Trask* v. *Bartlett*, 3 Dane's Abr. 75; *Kepler* v. *Barker*, 13 Ohio St. 177.

§ 7. **Escape on mesne process.** The importance of the distinction which we have been considering between a voluntary and a negligent escape is found in the different results following from an escape where the prisoner is in custody on mesne process, and where he is in custody

on final process. If the sheriff arrest a debtor on mesne process and the prisoner is rescued before he is committed to jail, the sheriff may return the rescue and such return is good, and no action for the escape lies against him after such return, but the court will issue process against such rescuer or fine him; for in this case though the sheriff may, yet he is not obliged to raise the *posse comitatus*. 3 Bac. Abr. 403. On mesne process after an arrest the sheriff is obliged to admit the prisoner to bail and discharge him, and if he does not appear the sheriff is liable for an escape and must look to the bail for indemnity. 3 Bac. Abr. 404. If the officer arrests the defendant on mesne process and voluntarily lets him escape, he may arrest him again before the writ is returned, and is not guilty of false imprisonment. *Atkinson* v. *Matteson*, 2 T. R. 172. In *Riley* v. *Whittiker*, 49 N. H. 147; 6 Am. Rep. 474, it is said "there is a broad distinction between an arrest on final and one on mesne process. This difference arises from the different nature of the object to be attained and of the duty to be performed in the two cases. On mesne process the officer is to arrest the body of the defendant and have him before the court at the return day of the writ, and if he do this it is sufficient, no matter if there be an escape of the prisoner, and it is held to be immaterial whether the escape be voluntary or negligent on the part of the officer, in either case the right of reception still exists, and the officer obeys the mandate of his writ if he has the defendant in court on the return day." *Pariente* v. *Plumbtree*, 2 B. & P. 35; *Alingham* v. *Flower*, id. 246; *Whithead* v. *Keyes*, 1 Allen (Mass.), 350; *Commonwealth* v. *Sheriff*, 1 Grant's (Penn.) Cas. 187.

§ 8. **Escape on final process.** But on final process the object is to deprive the defendant of his liberty in order that he may be induced to pay the judgment against him, and the object of the process is delayed if not defeated by an escape of any kind. *Riley* v. *Whittiker*, 49 N. H. 147; 6 Am. Rep. 474. And on final process there is held to be a distinction between a voluntary and a negligent escape. The officer who is guilty of an escape on final process, has no right to recapture the prisoner, while he may retake him in case of a negligent escape. *Butler* v. *Washburn*, 25 N. H. 258; *Clark* v. *Cleveland*, 6 Hill (N. Y.), 344; *Jackson* v. *Hampton*, 6 Ired. (N. C.) L. 34; *Commonwealth* v. *Sheriff*, 1 Grant's (Penn.) Cas. 187; *Parsons* v. *Lee*, Jeff. (Va.) 50; *Brown* v. *Getchell*, 11 Mass. 11. That the prisoner voluntarily returns after a voluntary escape is no excuse for the officer, and does not, in any manner, affect or lessen his liability. *Riley* v. *Whittiker*, 149 N. H. 49; 6 Am. Rep. 474. But if one in execution escapes and the escape is negligent, not voluntary, and the officer makes fresh

stances into view. 2 Dane's Abr. 648; *Chase* v. *Keyes*, 2 Gray (Mass.), 214. The plaintiff can charge the officer with the debt and leave him to prove that less should be recovered. *Moore* v. *Moore*, 25 Beav. 8. Thus, although the debtor was worthless, the jury were allowed to consider that his father was over 100 and rich. The measure of damages is the value of the custody of the debtor to the creditor at the time of the escape, and the jury are not limited to the consideration of the actual available means of the debtor, but may consider the value of the chances of the creditors obtaining payment by continuing such imprisonment. *Macrae* v. *Clarke*, L. R., 1 C. P. 403; *Griffin* v. *Brown*, 2 Pick. (Mass.) 304. On mesne process the creditor ought to have a sum equal to the amount his remedy is affected by the delay. *Scott* v. *Henley*, 1 Mood. & R. 227. The sheriff stands in the defendant's place and may reduce the damages by any equities which the defendant could have set up. *Evans* v. *Manero*, 9 Dow. P. C. 256. On mesne process special damages must be proved. *Planck* v. *Anderson*, 5 Term R. 37. If he can still recover his debt, the damages may be diminished accordingly. *Scott* v. *Henley*, 1 Mood. & R. 227; *Morris* v. *Robinson*, 3 Barn. & C. 206. Only actual damages can be recovered. *Russell* v. *Turner*, 7 Johns. (N. Y.) 189; *Colby* v. *Sampson*, 5 Mass. 310; *State* v. *Baden*, 11 Md. 317; *Spafford* v. *Goodell*, 3 McLean, 97; *Lovell* v. *Bellows*, 7 N. H. 375. The defendant may prove in mitigation that the debtor was unable to pay the debt (*Brooks* v. *Hoyt*, 6 Pick. [Mass.] 468; *State* v. *Lawson*, 2 Gill. [Md.] 62; *Faulkner* v. *State*, 6 Ark. 150; *State* v. *Mullin*, 50 Ind. 598); or that the plaintiff could not have recovered in the original action. *Riggs* v. *Thatcher*, 1 Me. 68. Damages may be recovered though the action was never entered (*Whithead* v. *Keyes*, 1 Allen [Mass.], 350), or never prosecuted to judgment. *Crane* v. *Stone*, 15 Kan. 94.

ARTICLE V.

DEFENSES.

Section 1. In general. In defense of the action for an escape, the sheriff may prove that the prisoner was never in his custody, because the process was void; or, he never legally arrested him; that there was no escape; that if the prisoner is out of his custody, it is by virtue of a legal authority, because he has been discharged in bankruptcy, or taken the poor debtor's oath, or because he has been discharged by the plaintiff's orders; that if he has escaped, it was under circumstances which excuse him, because he was privileged from arrest,

or because he was rescued, while under arrest on mesne process, by a mob, or on final process, by the act of God or the public enemy, or that the plaintiff has suffered no injury from the escape, because the prisoner was recaptured on fresh pursuit and is produced at the return day, or because the custody of the prisoner was of no value to the plaintiff, or that since the escape the plaintiff has barred himself of an action against the sheriff by electing a remedy against some other person, because he has sued the persons who rescued the prisoner, or because he has sued the preceding sheriff, or because he has satisfied the execution from some other source, as by a levy on real or personal property, or has discharged a joint defendant. A sheriff who releases a convict under a valid act of the legislature is not liable for an escape. *Rankin* v. *Beaird*, Breese, 163.

§ 2. **Recapture.** Whenever the jailer suffers a voluntary escape, from that moment he is a wrong-doer, and though the prisoner returns and the plaintiff proceeds to judgment against him, the jailer is still liable. *Ravenscroft* v. *Eyles*, 2 Wils. 294. In case of a voluntary escape, the jailer cannot retake the prisoner (*Seymour* v. *Harvey*, 8 Conn. 70), but the plaintiff may. *Atkinson* v. *Jameson*, 5 Term R. 25; *Butler* v. *Washburn*, 25 N. H. 251; *Jackson* v. *Hampton*, 6 Ired. (N. C.) L. 34. In case of negligent escapes, the jailer may, at any time, retake the prisoner. *Whithead* v. *Keyes*, 1 Allen (Mass.), 350; *Colley* v. *Morgan*, 5 Ga. 178. Unless, of course, he has in the meantime been discharged by the plaintiff. *Willing* v. *Goad*, Str. 909. If the prisoner has escaped on mesne process he may be retaken at any time before the return day. *Commonwealth* v. *Sheriff*, 1 Grant's (Penn.) Cas. 187. The prisoner in execution must be taken on a fresh suit to justify or to excuse the sheriff, and though he may have been out of sight even for a day and a night, yet may the capture be deemed fresh suit and the sheriff be excused, and though the prisoner may have fled into another country, yet may the sheriff there retake him on a fresh suit. *Rigeway's case*, 3 Co. 52. And where the prisoner was recaptured by a sheriff of New York in another State, the court refused to discharge him. *Lockwood* v. *Mercereau*, 6 Abb. Pr. (N. Y.) 206. So bail may retake him in another State. *Nichols* v. *Ingersoll*, 7 Johns. 145; *State* v. *Mahon*, 3 Harr. (Del.) 568. But, in Vermont, a prisoner who has escaped from custody or civil process in another State, cannot be arrested by the pursuing sheriff. *Bromley* v. *Hutchins*, 8 Vt. 194. See *Pearl* v. *Rawdin*, 5 Day, 249; *Howard* v. *Lyon*, 1 Root, 107. If a prisoner escapes, and several days after, but as soon as the sheriff has notice of it, he makes fresh suit and retakes him before any action brought, this shall excuse him. Rolle's Abr. 809; *Drake* v. *Chester*, 2