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## EFFECT OF SUBSEQUENT MISCONDUCT UPON A LAWFUL ARREST

### I

Assuming that the actor has made a proper and valid arrest, what effect has a subsequent dereliction of duty or misconduct on the part of the actor towards the prisoner?<sup>1</sup> The question may arise in several ways.<sup>2</sup>

1. If the arrest is made under process, the actor may fail to return the process, or may make a defective return.

2. Following an arrest either with or without process, the actor may fail to use reasonable diligence to bring his prisoner promptly before a proper court or magistrate.

3. Or the actor may release, or permit the release of, the prisoner without presentment before a proper court or magistrate.

4. Or the actor may misuse his official power over the prisoner in order to coerce him to comply with some demand which has no relation to the purpose of presentment before a proper court in the due course of administration of the criminal law, as for example, to compel the prisoner to restore property, or to pay money, or, perhaps, to disclose evidence against himself or others.

5. Or the actor may use unnecessary or unreasonable force against the prisoner in maintaining his custody, or he may take advantage of his power in order to inflict bodily harm on the prisoner or to commit some other independent and recognized tort.

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<sup>1</sup> Although this problem arises most frequently in cases of arrests in the administration of the criminal law, it is raised also in cases of arrests on civil or other process, and similar problems are raised in executions or attachments on real or personal property on either mesne or final process. Some of the cases cited in this paper are cases involving an officer's abuse of authority or dereliction of duty following an execution or attachment on a civil process.

<sup>2</sup> This article does not discuss the effect of the misconduct on the criminal prosecution of the prisoner for the crime for which he is arrested. See *McGuire v. United States*, 273 U. S. 95, 47 Sup. Ct. 259 (1927); *State v. Thavanot*, 225 Mo. 545, 125 S. W. 473 (1910). It is limited to the *civil* liability of the actor to the prisoner resulting from such misconduct, or *mutatis mutandis* to the owner of the property upon which levy is made.

It will be shown later that there is abundant authority for holding the actor liable civilly to the prisoner for any invasion of a legally protected interest of the prisoner, resulting from any of the above acts or omissions on the part of the actor. But a great number of cases go much further. There are many cases holding that the first, second and third types of misconduct dislodge the actor's privilege in making the arrest and make him liable for the entire imprisonment in the same manner as if the original arrest were unprivileged.<sup>3</sup> There are a few decisions which give a similar effect to misconduct of the fourth type.<sup>4</sup> But there is no direct decision as to the effect of misconduct of the fifth type, although there are a few dicta<sup>5</sup> which will be discussed later.

The grounds stated for such holdings are variously given as the trespass *ab initio* doctrine;<sup>6</sup> or, what may be only a variation in language, a principle that, to make good his justification, the actor must show that he has strictly complied with the authority given him by the law;<sup>7</sup> or a frank statement of public policy in the prevention of abuse of authority and in the proper administration of the law.<sup>8</sup>

<sup>3</sup> *Infra* notes 43, 57, 63 and 64.

<sup>4</sup> *Infra* note 75.

<sup>5</sup> *Infra* note 77.

<sup>6</sup> *Piedmont Hotel Co. v. Henderson*, 9 Ga. App. 672, 72 S. E. 51 (1911); *Brock v. Stimson*, 108 Mass. 520, 521 (1871)—the court here expressed itself thus: "... he may not perhaps in the strictest sense be said to become a trespasser *ab initio*; but he is often called such"; *Barrett v. White*, 3 N. H. 210 (1825).

<sup>7</sup> See *Phillips v. Fadden*, 125 Mass. 198, 202 (1878): "One who arrests the person of another by legal process, or other equivalent authority conferred upon him by law, can only justify himself by a strict compliance with the requirements of such process or authority." See also *Gibson v. Holmes*, 78 Vt. 110, 123, 62 Atl. 11, 14 (1905). In discussing the effect of an officer's failure to return the process under which he levied, the latter court said: "... instead of saying that the want of a return makes him a trespasser *ab initio*, it would be more accurate to say that the presence of a return is necessary to make the taking lawful *ab initio*." See also *Holroyd, J., in Shorland v. Govett*, 5 B. & C. 485, 489 (1826). In *Tubbs v. Tukey*, 3 Cush. 438, 440 (Mass. 1849), the court stated that when an officer justifies under process, he must "show that he has done all that it was his duty to do." The same idea is sometimes expressed by saying that the arrest is not in itself privileged, but is only a step in the process of bringing the prisoner before a court. Thus in *Brock v. Stimson*, *supra* note 6, at 522, the court said: "The statute authorizes the arrest without a warrant, only as a preliminary step toward taking the prisoner before a court." And in *Phillips v. Fadden*, *supra*, at 200, this statement was approved, as was also the holding that the officer is "liable to an action for assault and false imprisonment if he omitted to take the party arrested before the proper tribunal and to complain against him." See also the statement in *POLLOCK, TORTS* (12th ed. 1923) 401: "He [the person who uses an authority given by law] is never doing a fully lawful act: he is rather an excusable trespasser, and becomes a trespasser without excuse if he exceeds his authority."

<sup>8</sup> *Boston & Maine Ry. v. Small*, 85 Me. 462, 27 Atl. 349 (1893). See also *Phillips v. Fadden*, *supra* note 7, at 201; *Tubbs v. Tukey*, *supra* note 7, at 441 where the court said: "The principle is essential to the safety of the citizen, and to prevent the processes of the law and the action of its officers from being employed for purposes of oppression"; and *Esty v. Wilmont*, 15 Gray 168 (Mass. 1860).

## II

Some of the forms of misconduct have little or no relation to the individual interests of the prisoner which are given general legal recognition and protection. They are misconducts because they defeat the public interest to secure which the privilege is given. In this category falls the failure of an officer to make a full return of a warrant upon which the arrest is made. At the opposite extreme is the use of excessive force to maintain the prisoner's custody or the commission of any other tort which the officer's custody of the prisoner gives him the opportunity to commit upon the prisoner. Such misconducts do not defeat the public purpose for which the privilege was given and while it is the duty of the officer not to use excessive force in maintaining his custody of a prisoner,<sup>9</sup> this duty is imposed solely to protect the individual interest of the prisoners. The fact that a patrolman clubs his prisoner as he takes him to a station house, while a grievous wrong to the prisoner, does not prevent him from being brought before a court in due season, even though he comes with a bandaged head. There are, however, between these two extremes, certain misconducts which affect both the interests of the public and of the individual. Thus, an officer is required not only to bring his prisoner before a magistrate or court which is to determine whether the prisoner is to be released or held for trial, but also to do this without unreasonable delay.<sup>10</sup> This requirement is perhaps primarily for the protection of the prisoners from an undue prolonging of their confinement, though there is here some tincture of public interest since justice should be administered speedily as well as certainly. Where the officer releases the prisoner, the officer's dereliction save under very exceptional circumstances, injures only, or at least primarily, the interest of the state in having arrested persons brought before some tribunal competent to determine whether there is sufficient evidence to warrant the prisoner in being held for trial or further investigation. If, however, the prisoner is released against his will and over his objection, it is possible to regard the release as being analogous to defamation, since, while it does not itself impute criminality to the prisoner, it does prevent him from clearing his reputation from a defamatory charge made in the warrant or implied in the fact of arrest without a warrant.

The abuse of the privilege of arrest by using the custody obtained therein as a means of coercing the prisoner into complying with a demand, which has no relation to securing his appearance before a competent court, is more difficult to classify. While the wrong is primarily against the prisoner, there is a very strong public interest

<sup>9</sup> TORTS RESTATEMENT No. 3 (Am. L. Inst. 1927) § 157 and Comment.

<sup>10</sup> See *infra* note 52.

in preventing such a misuse of the privilege of arrest. The successful use of the privilege as a means of extortion or of compelling restitution is extremely likely to be followed by the release of the prisoner and a compounding of the crime.

Insofar as the conduct of the officer who has made a lawful arrest not only violates the duty which, as officer, he owes to the state which he serves, but also invades any legally protected interests, whether material or sentimental, of his prisoner, it is obvious that the officer should incur liability, not only to the state but also to the individual whose interests are invaded by his conduct. On the other hand, where the officer has failed to comply with some requirement, the sole purpose of which is to secure the state's interest in the proper functioning of its judicial machinery, a different problem is presented. Many of the early tort actions can be explained only on the ground that the interest of the state, or to put it somewhat differently, of the community *en masse*, could be effectually preserved only by giving a private right of action to those individuals most directly affected by acts which are primarily, if not exclusively, injurious to the state or community. Such a use of the private right of action was perhaps necessary while the power of the Crown was not sufficiently established, or the machinery of public justice sufficiently organized, to make criminal liability a sufficient deterrent to or punishment of official misconduct. It can be justified today only if the sovereign is still so impotent as to be incapable of enforcing proper respect for its interest by proceedings instituted by itself and if, in addition, there is reason to believe that the fear of a liability to pay money damages in a civil action may be a real deterrent to official misconduct.<sup>11</sup>

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<sup>11</sup> Apart from the theoretical objections to the use of civil actions for distinctly punitive and deterrent purposes, it is submitted that there is no reason to believe that this abnormal variant of the doctrine of trespass *ab initio* has had or will have any substantially deterrent effect. Now that persons who fail to pay a judgment can no longer be imprisoned for debt, a fear of incurring a liability enforceable by a civil action can act as a deterrent only upon those who have assets out of which the judgment can be collected. The class of persons who serve warrants rarely if ever possess such assets. It is significant that there are exceedingly few cases in which peace officers or private individuals, serving criminal warrants or arresting for a crime, have been made defendants in a civil action for damages except where they are joined as defendants with the persons making the complaint or the court or magistrate issuing the warrant, themselves likely to be solvent persons. On the other hand, actions are constantly brought against officers serving civil process, generally process directing them to seize chattels in execution or on mesne process. The reason for this is obvious. In the majority of jurisdictions such persons may and do require bonds to insure them against liability. The action against such an officer, though in form against him, is then actually against the bondsman. The judgment against the bondsman is no punishment for the officer and the fear of such a judgment has little or no deterrent effect upon him. Therefore, while a right of action for punitive damages may in theory appear to be an effective method of punishing official misconduct and deter officers therefrom, it supposes a financial position which those who serve warrants and make arrests rarely, if ever, possess.

It may be said with some confidence that the whole tendency of modern law is against the use of tort actions to bolster up a supposedly inefficient administration. The courts are reluctant to recognize new sentimental interests and to impose liability for their violation, no matter how malevolent and inexcusable may be the conduct which invades them.<sup>12</sup> There is no tendency to increase the so called "absolute rights" whose violation carries with it a right to damages which, no matter how named, are substantially imposed as a punishment upon the violator. In not a few jurisdictions the right to punitive damages is denied by common law or by statute.<sup>13</sup> The tide of modern law has set towards the policy of recognizing the existence of some materially valuable interest of the plaintiff as the only proper basis for recovery in a tort action. In the minority of jurisdictions, which reject the "trespass *ab initio*" idea as applied to the privilege of arrest, the courts refuse to create a new right, or perhaps better, give legal protection to a new interest of the prisoner to have the officer deal with him in such a manner as best tends to secure the administration of justice, by attaching liability to misconduct which does not invade some personal interest of the prisoner, universally recognized as legally protected.<sup>14</sup> If our society and the criminal law have developed sufficiently to be willing and able to punish official misconduct, then there is no room in our tort law for anomalous civil liability to a plaintiff who has suffered no harm from the misconduct. There is then no reason for making an arbitrary and meaningless distinction<sup>15</sup> between misconduct following the exercise of an authority granted by law and mis-

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<sup>12</sup> *Pyle v. Waechter*, 202 Iowa 695, 210 N. W. 926 (1926), noted in (1927) 40 HARV. L. REV. 771.

<sup>13</sup> See cases collected in (1915) 8 R. C. L. 583, n. 18; (1919) 17 C. J. 969, n. 73; (1922) 16 A. L. R. 771.

<sup>14</sup> To recognize such a right is merely a roundabout way of saying that the private individual is given a right to damages for the purpose of better securing the proper administration of justice. Such a method is necessary only to those who think of a right to damages as implying the pre-existence of some right found in the nature of things, the violation of which entails liability upon the violator and therefore gives the right of damages to him whose supposed right is violated. It is impossible in this brief compass to adequately discuss the psychology of this point of view. The history of Anglo-American law shows a constant recognition of new interests as worthy of legal protection. These interests, by being protected by a liability, whether criminal or civil, imposed upon those who invade them, become, to the extent to which they are protected, capable of description as legal rights; but it is the liability which creates the right and not the right which creates the liability.

<sup>15</sup> See *Savage, C. J.*, in *Allen v. Crofoot*, 5 Wend. 506, 509 (N. Y. 1830): "Whether this is not a distinction without a difference of principle, it is not necessary to inquire."

conduct following the exercise of an authority granted by a party,<sup>16</sup> if, in both cases, the original exercise of the privilege was not wrongful.<sup>17</sup>

### III

Legal fictions play an important role in the slow development of a system of law from infancy to maturity. They are almost inevitable in a period of transition from a mechanical, strict law to a more enlightened and functional law. Fictions frequently are the means of progress from one stage to the other.<sup>18</sup> But in a system of law characterized by a reasoning from judicial precedent and the doctrine of *stare decisis*, legal fictions have the feline attribute of clinging to life.<sup>19</sup> They outgrow their usefulness and live long after they should have died. They become strange anomalies in a new environment. Yet, such is the force of inertia and conservatism that, once having been born into the world and reared to maturity, many legal fictions not only refuse to pass away or at least show signs of senility, but, becoming tenants at sufferance, they grow bigger and stronger after their lease on life had long expired. Worse still, like recusant children, they disappoint their parents, forget the purpose for which they were given life and fall into vocations never desired, and even despised, by their creators.

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<sup>16</sup> Although the doctrine of trespass *ab initio* dates much earlier than the Six Carpenters' Case, 8 Coke 146a (1610), it is always recalled and associated with that case. Coke reports that "first, it was resolved when an entry, authority or licence, is given, to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*: but where an entry, authority, or licence, is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*." *Ibid.* 146a, 146b. As a second proposition, "It was resolved *per totam curiam*, that not doing, cannot make the party who has authority or licence by law a trespasser *ab initio*, because not doing is no trespass . . ."

<sup>17</sup> Both the facts and the opinion in *Boston & Maine Ry. v. Small*, *supra* note 8, show clearly that the liability is imposed upon the officer as a punishment for his official misconduct and without regard for any harm which it may do to the private interests of the prisoner or the person whose goods were seized. The defendant officer entered upon the plaintiff's premises to execute a search warrant and seize any liquor he might find there. He found liquor but did not seize it because of an erroneous belief that it was not subject to seizure. The officer was held liable for the trespass committed in making the search. The court's opinion embraced the doctrine of trespass *ab initio*, placed it squarely on the ground of public policy and discarded the orthodox distinction between subsequent misfeasance and nonfeasance. For a significant contrast in the English attitude, compare *Canadian Pacific Wine Co. v. Tuley*, 2 A. C. 417 (1921) where the Privy Council held that a sheriff who seized more goods than his warrant authorized was liable only for the excess and not for the part that was subject to seizure.

<sup>18</sup> Compare the part played by fiction in the problems raised by the inclusion of corporations within the diversity of citizenship jurisdiction of the Federal courts. See HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* (1918) 50-100. Also see (1927) 40 HARV. L. REV. 772, n. 4.

<sup>19</sup> See Smith, *Surviving Fictions* (1917-18) 27 YALE L. J. 147, 317.

The fiction of trespass *ab initio* had its origin in the ancient law of distress.<sup>20</sup> It looks like one of the many restrictions on the privileges of self-help, which were the bane of primitive law. The early development of the fiction seems to have been confined almost wholly to the abuse of such privilege.<sup>21</sup> Thus, the doctrine of trespass *ab initio* was invoked where cattle were seized damage feasant, where a reversioner entered to see if the tenant in possession was committing waste, where a commoner entered to see his cattle,<sup>22</sup> or where one entered on another's land to hunt ravenous beasts of prey.<sup>23</sup> Furthermore, as long as procedure was the life-blood of law, this fiction served to overcome certain procedural difficulties which tended to obstruct the administration of justice in particular cases.<sup>24</sup> And finally, in the absence of a law of evidence, this doctrine provided a crude rule of thumb by which to determine a man's intention<sup>25</sup> at a time when it was believed that "the thought of man is not triable."<sup>26</sup>

Always jealous of the growth of the executive power and careful to provide remedies for abuses of authority,<sup>27</sup> the common law was able to provide a full breast for the nurture of this suckling. It grew into, or was "ossified"<sup>28</sup> into, a universal principle that the subsequent abuse of an authority granted by law—as distinguished from an authority

<sup>20</sup> See 7 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1925) 499. It is a significant reflection on the doctrine of trespass *ab initio* that it was early abolished by statute both in England and in some of the United States in cases of distress—the very cases in which the doctrine was first developed. See 11 GEO. II, c. 19, § 19; *Sackrider v. McDonald*, 10 Johns. 253, 257 (N. Y. 1813).

<sup>21</sup> See 2 BLACKSTONE, COMMENTARIES (Cooley's 3rd ed. 1834) 14, where the learned editor appends the following generalization to Blackstone's discussion of trespass *ab initio* in the law of distress: "Generally a party pursuing a remedy *ex parte* which may result in depriving another of his property, must pursue strictly the authority the law gives him. . . ."

<sup>22</sup> See *Six Carpenters' Case*, *supra* note 16.

<sup>23</sup> See 3 BLACKSTONE, COMMENTARIES (1770) 213.

<sup>24</sup> See Ames, *History of Trover* (1897) 11 HARV. L. REV. 277, 287-88; LECTURES ON LEGAL HISTORY (1913) 61-63.

<sup>25</sup> See the opinion of Mr. Justice Holmes, then Justice of the Supreme Judicial Court of Massachusetts, in *Commonwealth v. Rubin*, 165 Mass. 453, 455, 43 N. E. 200 (1896). "The rule that, if a man abuse an authority given him by the law, he becomes a trespasser *ab initio*, although now it looks like a rule of substantive law and is limited to a certain class of cases, in its origin was only a rule of evidence by which, when such rules were few and rude, the original intent was presumed conclusively from the subsequent conduct." This theory finds support in Coke's statement in the *Six Carpenters' Case*, *supra* note 16, that "the law adjudges by the subsequent act, *quo animo*, or to what intent, he entered; for *acta exteriora indicant interiora secreta*." See also *infra* note 29. But note the language of the Maine court in *Boston and Maine Ry. v. Small*, *supra* note 8, at 446, 27 Atl. at 351: "This dictum [just quoted from Coke] has been often repeated in various forms. It seems, however, to be artificial and even fictitious. An officer may often, in fact, begin with the best and most lawful intent and yet forfeit his protection by subsequent misconduct."

<sup>26</sup> 7 HOLDSWORTH, *op. cit. supra* note 20, at 500.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Commonwealth v. Rubin*, *supra* note 25, at 456.

granted by a party—annulled the authority and made the abuser a trespasser *ab initio*.<sup>29</sup> But while this fictitious creature was thus developing in parts, decay was eating away other parts. By the time of the *Six Carpenters' Case*,<sup>30</sup> it was well established that it could not be applied in cases where the subsequent misconduct consisted of non-feasance<sup>31</sup>—exactly the type of cases in which the fiction was first invoked.<sup>32</sup> Such was its peculiar growth!

In England, the fiction continued to decay—or, at least, it grew

<sup>29</sup> The courts seem to have been strongly influenced by the reason for the doctrine, as it was stated by Lord Coke and later by Mr. Justice Holmes. See *supra* note 25. Thus in some jurisdictions, in addition to the rule that non-feasance is not sufficient to render a lawful exercise of a privilege wrongful *ab initio*, certain restrictions are put upon the doctrine of trespass *ab initio* which come close to reducing the doctrine solely to a rule of evidence. The Vermont court has stated that, to render lawful conduct illegal *ab initio*, the subsequent conduct "must be a positive and active wrong, and of such a character as to fairly justify the implication that the original entry was for the purpose of committing the wrong, and not *bona fide* made under the authority which the law gave, and for the purpose for which the law gave it. . . ." *Stone v. Knapp*, 29 Vt. 501, 503 (1857). See also *Stoughton v. Mott*, 25 Vt. 668, 673 (1853).

In *Page v. De Puy*, 40 Ill. 506, 513 (1866) the Illinois court stated that: "To render the officer a trespasser *ab initio*, there must be some positive, wrongful act, as an abuse of the authority which seems to give character to the original lawful act, and which inclines to the belief that the legal authority was only employed for the purpose of enabling the officer to obtain the means of committing the wrong—this seems to be the rule." See also Green, J., dissenting in *Barrett v. White*, 3 N. H. 210, 217 (1825): ". . . when the officer wholly departs from the course pointed out for him by the law, he may be considered as intending to do so from the beginning, and as making use of the process of law for a mere pretense and cover. . . . Where, however, the officer evidently means to do his duty, faithfully and properly, in pursuance of the authority given him by law, but commits some errors and mistakes . . . the officer is not liable as a trespasser, though he may be liable in case, for the damage done by his errors and mistakes to the person, who sustains it." But the court held otherwise, saying, ". . . an attentive examination of all the authorities will clearly shew, that a man may become a trespasser *ab initio* not only by using an authority, which the law gives him, for improper purposes, or by pushing the exercise of it beyond its due limits, but by exercising it in an improper and illegal manner to the prejudice of another." *Ibid.* 230. See, however, the statement of Fowler, J., speaking for the whole court in *Taylor v. Jones*, 42 N. H. 25, 35 (1860): "Such an error or mistake as a person of ordinary care and common intelligence might commit, will not amount to an abuse; but there must be such a complete departure from the line of duty . . . such an active and wilful wrong perpetrated—as will warrant the conclusion that its perpetrator intended from the first to do wrong, and to use his legal authority as a cover for his illegal conduct." (Citing the dissenting opinion of Green, J., in *Barrett v. White*, *supra*.)

<sup>30</sup> 8 Coke 146a (1610).

<sup>31</sup> This distinction has led to the usual confusion as to what conduct constitutes misfeasance and what, nonfeasance. The distinction is, at best, a difficult one. In connection with our problem, it has not been strictly observed. See note to *Barrett v. White* in 14 Am. Dec. 352, 367-369 (1880). The Maine court, adopting the doctrine of trespass *ab initio*, discarded the distinction between misfeasance and nonfeasance as being "a bit of sterile, verbal syllogization. It has borne no good fruit." *Boston & Maine R. v. Small*, *supra* note 8, at 467, 27 Atl. at 357.

<sup>32</sup> See Ames, *History of Trover* (1897) 11 HARV. L. REV. 277, 288; LECTURES ON LEGAL HISTORY (1913) 62-63.



no more.<sup>33</sup> Many American courts on the contrary not only adopted the creature but attempted to nurse it back to health.<sup>34</sup> Although no cases have been found invoking the fiction, except in the field of arrest, where interests of personality have been invaded, the fiction was applied in its full rigor in the field of arrest and in cases of levies on civil process.<sup>35</sup> In recent times, however, there have been several judicial expressions of disfavor.<sup>36</sup> Within the last year the United States Supreme Court has taken the opportunity to frown upon the doctrine.<sup>37</sup> Law writers have long counseled its death.<sup>38</sup>

Certainly the fiction of trespass *ab initio* ought to be banished, at least from the law of arrest. The argument against its retention as a deterrent to official misconduct has already been set forth above. We are no longer encircled by a maze of procedure from which we need seek this avenue of escape. Nor are we much troubled by the difficulty of trying the "thought of man." Intention is ascertained daily in our courts. In criminal law, in cases of fraud, deceit, assault, indeed in the great bulk of our law, intention is important and triable. The maxim, *acta exteriora indicant interiora secreta*, may well be preserved—and it is of great service. Subsequent acts may well serve as evidence of prior intent.<sup>39</sup> But it is not conclusive and should not be given the artificial quality of conclusive proof.

It is necessary to distinguish sharply between the effect of misconduct subsequent to an arrest as evidence to prove that the purpose of the arrest was not to secure the proper administration of justice but to

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<sup>33</sup> No late English case has been found in which the doctrine of trespass *ab initio* was successfully invoked, in any case involving either arrest with or without a warrant or the seizure of goods under civil process. Where it was relied upon by counsel, the courts have managed to avoid it. For example, in *Smith v. Egginton*, 7 A. & E. 167 (K. B. 1837), the court almost confined the doctrine to a rule of evidence. Littledale, J., said at p. 176: "The rule is said to rest upon this;—that the subsequent illegality shews the party to have contemplated an illegality all along, so that the whole becomes a trespass. But here the sheriff could not, from the first, have had in view the detention of the plaintiff after the time should have expired." Other English cases will be discussed presently in the text. See also *Stoughton v. Mott*, *supra* note 29, at 674: "It is obvious from the slightest examination of the English books, that this doctrine of making public officers trespassers *ab initio*, is very much discountenanced of late. . . ." See also *supra* note 17.

<sup>34</sup> See cases collected in 14 Am. Dec. 352 (1880), and see the extensions of the doctrine in *Boston & Maine Ry. v. Small*, *supra* note 8; *Blanchard v. Dow*, 32 Me. 557 (1851); *Carter v. Allen*, 59 Me. 296 (1871).

<sup>35</sup> See *Carrier v. Esbaugh*, 70 Pa. 239 (1871); *Hall v. Ray*, 40 Vt. 576 (1868).

<sup>36</sup> See *Stoughton v. Mott*, *supra* note 29, at 674; *A. T. & S. F. R. R. v. Hinsdell*, 76 Kan. 74, 90 Pac. 800, 12 L. R. A. (N.S.) 94 (1907); *Oxford v. Berry*, 204 Mich. 197, 170 N. W. 83 (1918).

<sup>37</sup> *McGuire v. United States*, *supra* note 2.

<sup>38</sup> Holmes, *The Path of the Law* (1896) 10 HARV. L. REV. 457, 469; Smith, *op. cit. supra* note 19, at 164; CLERK & LINDSELL, TORTS (7 ed. 1921) 202; POLLOCK, TORTS (12 ed. 1923) 402; SALMOND, TORTS (6 ed. 1924) 232.

<sup>39</sup> *Commonwealth v. Rubin*, *supra* note 25.

commit the misconduct, and the effect of a misconduct, subsequent to an arrest for a proper purpose, as in itself depriving the officer of the immunity otherwise normally created by the privileged character of the arrest. The privilege of arrest is given to secure the administration of justice, generally by bringing an actual or supposed criminal before a magistrate who can decide whether or not he should be held for trial. Even though the circumstances are such as to justify an arrest which is made for such a purpose, the arrest is not privileged if made for any other purpose.<sup>40</sup> And this is so irrespective of whether such other purpose is otherwise wrongful.<sup>41</sup> Where the officer's misconduct is an abuse of his custody to force his prisoner to pay him or a third person a sum of money which may or may not be justly payable by the prisoner, even an unsuccessful effort to compel such a payment tends to prove that the arrest was made for that purpose and not to secure the ends of justice.<sup>42</sup> In fact, it is evidence, the probative force of which is often so great that it would not only permit but require the jury to find that such was the purpose. Except in the exceedingly unusual situations where the circumstances show that the purpose to misuse the custody was an afterthought, it is therefore of little practical moment whether such a misconduct is treated as proving that no privilege ever arose or as destroying a previously existing privilege. On the other hand, a misconduct such as unreasonable delay in bringing the prisoner promptly before a magistrate or the release of a prisoner soon after his arrest has, normally, no such probative force. It is unfortunately true that the police do occasionally arrest a man whose conduct has made him amenable to lawful arrest, not for the purpose of bringing him to trial for such conduct, but for the purpose of examining him as to his own or some third party's connection with some other and more serious offense. If such is the case, the officer is making the arrest for the purpose of

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<sup>40</sup> TORTS RESTATEMENT No. 3, (Am. L. Inst. 1927) § 152. As regards arrest on civil process, see note in (1926) 26 COLUMBIA LAW REV. 1007. For arrest on a "bench warrant," see *Oxford v. Berry*, *supra* note 36.

<sup>41</sup> It is necessary to distinguish between the purpose for which the arrest is made and the motive which actuates the person to act for that purpose. Thus, it is stated in COMMENTARIES ON TORTS RESTATEMENT No. 3 (Am. L. Inst. 1927) § 152: "If however, the actor makes the arrest for the purposes stated in this Section, the fact that he has an ulterior motive in making it does not make the arrest unprivileged."

<sup>42</sup> In *Mullen v. Brown*, 138 Mass. 114 (1884) the plaintiff, who had been arrested on a valid warrant and brought before a proper court in due season, brought an action for false arrest against the officer who arrested him and against the complainant alleging that the latter had sworn out the warrant in order to extort money from him. There was no evidence that either of the defendants made any attempt to extort money or compel the plaintiff to pay any debt. The court affirmed the judgment entered upon a verdict for the defendants in the court below, holding that the defendants' motive was immaterial, if their object was to bring the plaintiff before a court and this was done in a regular manner; his remedy, if any, being an action for malicious prosecution.

obtaining the power to extort information from his prisoner, and the situation is substantially identical with that in which an officer makes an arrest in order to gain power to extort money or force the restitution of a chattel. But in the great majority of cases the delay is obviously due to some carelessness or oversight on the part of the officer or to some other cause occurring after the arrest. So too, a prisoner's release is usually due to causes subsequent to the arrest. It requires a vivid imagination to conceive of an officer making an arrest for the purpose of releasing his prisoner. In these situations, therefore, it is of great practical moment to discriminate between misconduct as evidence that the original arrest was unprivileged and misconduct as destroying an existing privilege.

#### IV

Now let us consider in detail the specific forms of misconduct following a privileged arrest.

1. There are a number of cases stating that an officer's failure to return the process under which he makes an arrest or levy renders him liable for the entire arrest and imprisonment as a trespasser *ab initio*.<sup>43</sup> It is to be noted, first, that this principle is out of line with the settled doctrine of trespass *ab initio*. The *Six Carpenters' Case*<sup>44</sup> resolved it as settled law that mere nonfeasance is not enough to turn a privileged act into a trespass. Failure to return the process can be nothing if not nonfeasance. Some courts, indeed, have admitted this rule to be an exception to the second half of the trespass *ab initio* doctrine.<sup>45</sup> Secondly, it is to be noted that in none of the cases on this point is there anything to show that the prisoner was brought before a magistrate for a hearing. Indeed, the implication seems to be the other way. In none of these cases, then, is there anything to discredit the statement of Bingham, J., in *Clark v. Tilton*,<sup>46</sup> that "an officer could not avail himself of civil or criminal process to justify an arrest, unless he returned the writ or *produced the prisoner*<sup>47</sup> with the warrant before the court to which the process was returnable. . . ." If the prisoner is brought before a magistrate, it would indeed be outrageous to make the officer liable to the prisoner for the arrest simply because the officer failed to comply with what then is a matter of office detail. It is believed that such is not the law.

<sup>43</sup> *Tubbs v. Tukey*, *supra* note 7; *Gibson v. Holmes*, 78 Vt. 110, 62 Atl. 11, 4 L. R. A. (N.S.) 451 (1905); *Anderson v. Cowles*, 72 Conn. 335, 44 Atl. 477 (1899); See *Boston & Maine Ry. v. Small*, *supra* note 8; *Shorland v. Govett*, *supra* note 7; *Rowland v. Veale*, 1 Cowp. 18 (1774). In *Tubbs v. Tukey*, *supra*, the warrant did not command its return, but the court held that a return was necessary and the officer was liable as a trespasser *ab initio* if he failed to return.

<sup>44</sup> *Supra* note 30.

<sup>45</sup> *E.g.*, *Ferrin v. Symonds*, 11 N.H. 363 (1840).

<sup>46</sup> 74 N.H. 330, 332, 68 Atl. 335, 336 (1907). <sup>47</sup> Italics ours.

The rule that a failure to return the process under which an arrest is made renders the actor liable for the arrest *ab initio* applies only to those persons charged with the duty of making the return.<sup>48</sup> Subordinate officers who are under no such duty,<sup>49</sup> or persons who aid officers in making an arrest,<sup>50</sup> are entitled to the protection of the process even though the process is not returned—unless, possibly they had sponsored or encouraged the omission.<sup>51</sup>

2. The cases are unanimous in holding that one who has made a privileged arrest must use due diligence to present his prisoner promptly before a proper tribunal.<sup>52</sup> Unreasonable delay is not justifiable, even though the delay was for the purpose of investigating the charges,<sup>53</sup> or of collecting witnesses,<sup>54</sup> or of confronting the prisoner with the complainant or prosecuting attorney.<sup>55</sup> In such cases, there is a strong probability that by reason of this lack of diligence, the prisoner's confinement is unduly prolonged.<sup>56</sup> For the undue part of the imprisonment, the actor should, of course, be liable. But should he be liable for more—even for the lawful part of the imprisonment?<sup>57</sup> Here there is no reason

<sup>48</sup> Freeman v. Blewitt, 1 Salk. 409 (1701).

<sup>49</sup> Ellis v. Cleveland, 54 Vt. 437 (1882); Rowland v. Veale, *supra* note 43; Freeman v. Blewitt, *supra* note 48.

<sup>50</sup> Dehm v. Hinman, 56 Conn. 320, 15 Atl. 741 (1887).

<sup>51</sup> Anderson v. Cowles, *supra* note 43. See also Sands & Co. v. Norvell, 126 Va. 384, 101 S. E. 569 (1919). In Clark v. Tilton, *supra* note 46, it was held that, where the prisoner himself requested that the warrant be not returned, the non-return of the warrant did not render the officer a trespasser *ab initio*. See comment, *infra* note 63.

<sup>52</sup> Von Arx v. Shafer, 241 Fed. 649 (C. C. A. 9th, 1927); Gomez v. Scanlon, 155 Calif. 528, 102 Pac. 12 (1909); Piedmont Hotel Co. v. Henderson, *supra* note 6; Harness v. Steele, 159 Ind. 286, 64 N. E. 875 (1902); Linnen v. Banfield, 114 Mich. 93, 72 N. W. 1 (1897); Anderson v. Beck, 64 Miss. 113, 8 So. 167 (1886); Cochran v. Toher, 14 Minn. 385 (1869); Davis v. Carroll, 172 App. Div. 729, 159 N. Y. Supp. 568 (4th Dept. 1916); Jackson v. Miller, 84 N. J. L. 189, 86 Atl. 50 (1913); Leger v. Warren, 62 Oh. St. 500, 57 N. E. 506 (1900); Newhall v. Egan, 28 R. I. 584, 68 Atl. 471 (1908); Wright v. Court, 4 B. & C. 596 (1825). See Note (1909) 13 Ann. Cas. 984; and Note (1914 A) Ann. Cas. 717.

<sup>53</sup> Keefe v. Hart, 213 Mass. 476, 100 N.E. 558 (1913).

<sup>54</sup> Von Arx v. Shafer, *supra* note 52; Wright v. Court, *supra* note 52. But *cf.* Therriault v. Breton, 114 Me. 137, 95 Atl. 699 (1915).

<sup>55</sup> Harness v. Steele, *supra* note 52; Wright v. Templeton, 80 Vt. 358, 67 Atl. 817 (1907).

<sup>56</sup> So too, prolongation of the imprisonment probably results when the officer takes his prisoner to a magistrate in the wrong county having no jurisdiction of the case. Francisco v. State, 24 N. J. L. 30 (1853); Gibson v. Holmes, *supra* note 7.

<sup>57</sup> There are few cases in which this problem is treated as a separate matter. In most of the cases where the question was raised, the unreasonable delay was followed by a release of the prisoner—the third type of misconduct next to be discussed. In some of the cases the courts do not deal with the question specifically; they simply hold the defendant liable in an action of false imprisonment, leaving the implication that damages are to be recovered for the entire imprisonment. But there are specific holdings and expressions to this effect. Piedmont Hotel Co. v. Henderson, *supra* note 6; Snead v. Bonnoil, 49 App. Div. 330, 63 N. Y. Supp. 553 (1st Dept. 1900); Leger v. Warren, *supra* note 52; Gibson v. Holmes, *supra* note 7; and see Clark v. Tilton, *supra* note 46, and cases collected therein.

in the policy of guarding against official misconduct which would justify the imposition of liability for the arrest *ab initio*. The actor has here violated the prisoner's interest in freedom of locomotion. He has committed a recognized tort for which an action is universally given. There is here a peg on which to hang punitive damages. There is no need of a fictitious relation back to punish the officer for his misconduct. Reason would seem to be against the numerical weight of authority on this point. And a minority of courts have held that liability should be limited to the unwarranted part of the imprisonment.<sup>58</sup> These decisions exhibit the correct treatment of the misconduct, namely, as some evidence of an original unlawful purpose in making the arrest.<sup>59</sup>

A very similar problem is raised where an officer levies on real or personal property and subsequently remains on the premises for too long a time, or refuses to restore the property at the proper time. It has been held that a refusal to restore property so taken, being a non-feasance, does not render the actor a trespasser *ab initio*.<sup>60</sup> This is in accord with the second resolve in the *Six Carpenters' Case*. But English courts have consistently held that an officer who remains too long on the premises after a levy is not a trespasser *ab initio*,<sup>61</sup> although each day's presence is a new trespass.<sup>62</sup> This holding can not be explained by the second resolve in the *Six Carpenters' Case*. If the defendant's presence on the premises is a new trespass, then it is a misfeasance and within the terms of the first resolve in that case. These decisions, therefore, show a clear desire to restrict the scope of the trespass *ab initio* doctrine.

3. There is considerable conflict in the decisions in regard to the effect of an actor's release of a prisoner, whom he had lawfully arrested, without presentment before a proper judicial tribunal. Some courts hold the actor liable for the arrest and the entire imprisonment, unless the prisoner as a condition of his release voluntarily agrees to waive his right to damages, which the release, without such an agreement, would give him.<sup>63</sup> Other courts intimate that even a definite waiver

<sup>58</sup> *A. T. & S. F. R. R. v. Hinsdell*, *supra* note 36; *Friesenhan v. Maines*, 137 Mich. 10, 100 N. W. 172 (1904); *Oxford v. Berry*, *supra* note 36; *semble*, *Mulberry v. Fuelhart*, 203 Pa. 573, 53 Atl. 504 (1902).

<sup>59</sup> See *Oxford v. Berry*, *supra* note 36, at 215, 170 N. W. at 89: ". . . an unlawful detention, following a lawful arrest by a sheriff, does not make him a trespasser *ab initio*, unless the original arrest was made with the intent of being used for a subsequent wrong."

<sup>60</sup> *Taylor v. Jones*, 42 N. H. 25 (1860) and cases cited therein at page 34.

<sup>61</sup> *Lee v. Dangai, Grant & Co.*, 1 Q.B. 231, 242 (1892).

<sup>62</sup> *Ash v. Dawnay*, 8 Ex. 237 (1852); *Playfair v. Musgrove*, 14 M. & W. 239 (1845).

<sup>63</sup> *Stewart v. Feeley*, 118 Iowa 524, 92 N. W. 670 (1902); *Caffrey v. Drugan*, 144 Mass. 294, 11 N. E. 96 (1887); *Joyce v. Parkhurst*, 150 Mass. 243, 22 N. E. 899 (1889); *Bates v. Reynolds*, 195 Mass. 549, 81 N. E. 260 (1907); *Clark v. Tilton*, *supra* note 46; *Venable v. Huddy*, 77 N. J. L. 351, 72 Atl. 10 (1909). These cases would seem to indicate that civil liability is imposed upon the officer only

of this sort by the prisoner will not prevent a premature release from having the effect of making the officer liable for the originally privileged imprisonment.<sup>64</sup> While still other courts hold the actor to no liability under such circumstances.<sup>65</sup> Moreover, some cases indicate a distinction between an arrest for a misdemeanor and an arrest on suspicion of felony, imposing liability for the entire imprisonment in the event of a release in the former case, but not in the latter.<sup>66</sup>

If the prisoner is guilty of the crime charged against him, it is clear that he is probably benefited by his release rather than injured. But if innocent, the prisoner may be aggrieved, as indicated above, by the loss of his opportunity to obtain of an official refutation of the charges laid against him. If the prisoner's personality or reputation is thus injured, he should have compensation. And, if no other remedy is available, a remedy by way of trespass *ab initio* is probably justifiable. But it is doubtful, in the first place, whether the prisoner really is injured in the manner above indicated,<sup>67</sup> and it is highly doubtful, in the second place, whether the release does deprive the prisoner of all opportunity to obtain an official refutation of the charges against him.<sup>68</sup> Finally, no case has been found which draws any distinction between an innocent and a guilty prisoner in this connection.

In those jurisdictions which hold that a release of a prisoner without presentment before a proper court entails liability on the part of the actor for the entire arrest and imprisonment, unless the prisoner agrees to waive his right to damages, no express agreement is required. It is there generally held that it is for the jury to say whether or not such an agreement is to be "implied" in or "inferred" from a request for a release, or a "free and intelligent acceptance thereof."<sup>69</sup> The New Hamp-

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for the purpose of protecting the interest of the prisoner. For, if the liability were imposed for the protection of the state's interest in having arrested persons brought to trial, the prisoner could not waive it. It would therefore follow that liability should be imposed only if the prisoner suffered damage by his release. But these courts stop short of the logical step and impose liability for the arrest and entire imprisonment regardless of whether or not the prisoner was injured by the release, by the restoration of his freedom of locomotion. See also *supra* note 51.

<sup>64</sup> *Newhall v. Egan*, *supra* note 52; and see *Tobin v. Bell*, 73 App. Div. 41, 46, 76 N. Y. Supp. 425, 529 (4th Dept. 1902), where the court said: "If the rule [that, by the release, the officer becomes liable for the arrest and imprisonment] were otherwise it might result in compounding offenses of this kind . . ."

<sup>65</sup> See *A. T. & S. F. R. R. v. Hinsdell*, *supra* note 36; *Harness v. Steele*, *supra* note 52; *Mulberry v. Fuelhart*, *supra* note 58; *Mayer v. Vaughan*, 11 K. B. 340 (Que. 1902).

<sup>66</sup> See *Therriault v. Breton*, *supra* note 54; *Burke v. Bell*, 36 Me. 317 (1853).

<sup>67</sup> The release itself would seem to be a sufficient refutation of the charge of criminality implied in the arrest.

<sup>68</sup> In the first place, the prisoner could insist on not being released without a hearing. But even if he is forcibly released, he could probably still get either a hearing or an official refutation of the charge against him.

<sup>69</sup> See the cases cited *supra* note 63.

shire court has stated that, to relieve the officer from liability, it must appear that "the prisoner had so conducted [himself] with reference to the officer's omission [to bring the prisoner before a court] that he had estopped himself from interposing the omission to the officer's use of the process"<sup>70</sup> as a justification of the arrest. In almost all the cases, there was nothing from which to infer a waiver of damages or to raise such an estoppel save the fact that the prisoner had accepted his release proffered by an officer, who had exerted no pressure upon him to force his acceptance thereof. In none of the cases, in which a free and uncoerced acceptance of a release has been held sufficient to warrant the jury in inferring the waiver of damages, was there any evidence to so much as suggest that the prisoner had any idea that, but for such a waiver, the officer would be under any liability to him. No case has been discovered where the jury failed to find a waiver of damages from a request for, or an uncoerced acceptance of, a release. While these jurisdictions seem to require an agreement to waive the right to damages, or to release the officer from liability, it may fairly be concluded that all that is required is a willingness on the part of the prisoner to be released from custody.<sup>71</sup> Such a willingness may appear either from the prisoner's request to be released or from his free acceptance of his release where he is given an option to stay. But a mere compliance with an order to leave, when his wishes are not consulted and he is not given an option to stay, will not warrant the jury in finding that the prisoner is willing to accept his liberty.<sup>72</sup>

Before leaving the subject of release without presentment before a proper tribunal, it is to be noted that it has been held that the actor's duty to present the prisoner before a proper tribunal is not delegable, even to a superior officer in accordance with the regular practice. If the second officer release the prisoner without presentment, the officer making the arrest is under the same liability as if he had himself released the prisoner.<sup>73</sup>

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<sup>70</sup> Clark v. Tilton, *supra* note 46.

<sup>71</sup> See TORTS RESTATEMENT No. 3 (Am. L. Inst. 1927) § 161 (d) and Comment.

<sup>72</sup> Stewart v. Feeley, *supra* note 63.

<sup>73</sup> Davis v. Carroll, *supra* note 52; Leger v. Warren, *supra* note 52. In both of these cases, the defendants trusted to the officer to whom they turned over the custody of the prisoner and did nothing more with regard to the prisoners. No case appears to have dealt with a situation in which, an arrest being made at night, the officer making the arrest must take his prisoner to a station house for safekeeping, and during the night the prisoner is released under such circumstances as to make his release improper. In such a case it seems too much to require that the officer should so far distrust the fidelity of those in charge of the police station that he should forego his rest or suspend his other duties to maintain a constant supervision over their conduct. It is, therefore, possible that a distinction might be drawn between the two situations and that it might be held that the officer placing his prisoner overnight in a police station for safekeeping is not liable for his prisoner's improper release before he himself has an oppor-

4. There are very few cases involving the effect of misconducts of the fourth class mentioned at the outset of this paper. This type of subsequent misconduct is very strong evidence of an improper purpose in the original arrest—a purpose which would render the arrest unprivileged.<sup>74</sup> But, assuming a proper purpose for the original arrest, the cases on this point that have been found are quite unsatisfactory and establish no rule. It may be said, however, that the American cases seem to indicate that the effect of misconduct of this type would be the same as that of misconduct of the types already discussed.<sup>75</sup> The English cases, however, indicate that misconduct of this type would not render the actor liable as a trespasser *ab initio*.<sup>76</sup> This is in line with the general tendency of the English law not to give misconduct a retroactive effect so as to make an originally privileged arrest wrongful.

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tunity to return to the station to see to the bringing of the prisoner before a magistrate for hearing. See, however, *Keefe v. Hart*, *supra* note 53, in which the action was brought against two defendants, one of whom was the officer who had arrested the plaintiff and the other was the officer to whom the plaintiff had been entrusted for safekeeping. The latter released the plaintiff in the absence of his co-defendant. A judgment in favor of both defendants was set aside. The court held that the circumstances precluded an implication of an agreement by the plaintiff to waive his right to be taken before a magistrate and therefore set aside a verdict which the jury had found in favor of both. The court, in its opinion, makes no allusion to the fact that the plaintiff was released by only one of the defendants and the other was not present and did not know of, much less consent to, the release.

<sup>74</sup> See *supra* notes 41 and 42 relative to the distinction between the purpose of an arrest and the motive of the actor in arresting for such purpose.

<sup>75</sup> *Holley v. Mix*, 3 Wend. 350 (N. Y. 1829); *Robbins v. Swift*, 86 Me. 197, 29 Atl. 981 (1894); see *Clark v. Tilton*, *supra* note 46, at 333, 68 Atl. at 337.

In *Bergeron v. Payton*, 106 Wis. 377, 82 N. W. 291 (1900), the defendant, a peace officer, had unsuccessfully attempted to force the plaintiff to restore to a bank money which it had overpaid him. The unsuccessful attempt did not prevent the officer from bringing the prisoner promptly before a magistrate. The court made no reference to the fact that the officer had abused his custody of the prisoner by attempting to force him to make restitution. A verdict for the plaintiff was sustained on the ground that the jury was justified in holding, from the defendant's conduct, that the purpose of the arrest was to force restitution and not to secure the prisoner's punishment for his statutory misdemeanor in knowingly receiving the over-payment. See *Carter v. Allen*, 59 Me. 296 (1871). Cf. *Richardson v. Duncan*, 3 N. H. 508 (1826); *Severance v. Kimball*, 8 N. H. 386 (1836)—in both these cases it was held that the plaintiff could maintain an action for the recovery of money which was received from him in consideration of release from an arrest which the court found was made for the purpose of extorting the money. See also *Shaw v. Spooner*, 9 N. H. 197 (1838). In *Clark v. Tilton*, *supra* note 46, it was held that if the plaintiff voluntarily gave his mortgage and was not coerced by the officer, the latter was not liable.

<sup>76</sup> In *Shorland v. Govett*, *supra* note 7, the Court of Kings Bench had before it an action for trespass for breaking and entering plaintiff's dwelling-place. The defendant justified his entry under a *fi fa*. The plaintiff's replication was to the effect that defendant extortionately demanded and exacted a sum greater than that for which the writ was issued. The court sustained a demurrer to the replication on the ground that the defendant's subsequent extortionate demand did not amount to a new trespass and that it could not be reasonable to suppose that the original entry was for the purpose of extortion and held that the defendant was liable only for the excessive amount which he had extorted and did not become a trespasser *ab initio*, and so, liable for the entire amount which he had received, or for damages for his entry.



5. It is extremely curious that in the one situation in which the misconduct of officers most frequently occurs and most vitally concerns the individual interests of the prisoner, namely, the use of excessive force to maintain a custody which the officer has taken under the privileged arrest, there is no case which expressly holds that such misconduct makes the officer liable for the originally privileged arrest. In a *nisi prius* case in Delaware<sup>77</sup> a justice of the Supreme Court, sitting as trial judge, used language which might possibly be construed as favorable to the view that the defendant officer became a trespasser *ab initio* by depriving the plaintiff of suitable clothing while in custody. On the other hand, the Supreme Court of Kentucky,<sup>78</sup> in an opinion intended for the guidance of the trial court upon a new trial ordered by it, expressly stated that the court should "submit to the jury only the amount of damages which the plaintiff sustained by reason of any assault and battery committed by the defendant"<sup>79</sup> officer upon the plaintiff while in his lawful custody. It held that the trial court should have instructed the jury that the arrest was privileged and that plaintiff could recover nothing for the arrest.

Even in those jurisdictions which hold that the misconduct of an officer after an otherwise privileged arrest makes him liable for the original arrest, as well as for such injury as is done to his prisoner by his misconduct, the officer's misconduct merely entails a penalty of liability for the original arrest. It does not affect the immunity given to one who assists an officer in making the arrest, unless he is a party to the officer's subsequent misconduct.<sup>80</sup> Nor does the officer's misconduct destroy all the legal effects of his original privilege in so far as they concern his own part in the arrest. One who uses force in resisting a privileged arrest is criminally punishable, no matter how grossly the officer who makes it may subsequently misconduct himself.<sup>81</sup>

While the numerical weight of authority is still to the effect that one who has made a privileged arrest forfeits, by his subsequent mis-

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<sup>77</sup> *Petit v. Colmery*, 20 Del. 266, 55 Atl. 344 (1903).

<sup>78</sup> *Grau v. Forge*, 183 Ky. 521, 209 S.W. 369 (1919).

<sup>79</sup> *Ibid.* 529, 209 S.W. at 372. The defendant, a peace officer, having arrested the plaintiff, committed a serious battery upon him while taking him to the station-house. A verdict was rendered for the plaintiff upon instructions which permitted the jury to find that the original arrest was unprivileged. The Supreme Court reversed the judgment on the ground that there was no evidence upon which the jury could have found that the arrest was unlawful. There is nothing in the report to show that any argument was addressed to the court upon the question as to whether the officer's subsequent misconduct destroyed the immunity which the privileged character of the arrest would otherwise have conferred upon him. None the less, the above quoted language of the court was not mere dictum since it was intended for the guidance of the trial court upon the new trial ordered by the Supreme Court.

<sup>80</sup> *Dehm v. Hinman*, *supra* note 50; *Van Brunt v. Schenck*, 11 Johns. 377 (N. Y. 1814). *Cf.* also *supra* note 49.

<sup>81</sup> *Commonwealth v. Tobin*, 108 Mass. 426 (1871).

conduct, the immunity conferred by his privilege, the cases are confined to a comparatively small number of the many American jurisdictions. In those jurisdictions in which the question is not concluded by early authority, there is a pronounced tendency to the contrary. This tendency is sound and should be followed. The whole doctrine of trespass *ab initio* is discredited even in the field in which it had its origin. Its application to misconduct after a privileged arrest is anomalous, and its most usual application directly contradictory to one of its fundamental principles. The whole tendency of modern tort law is to recognize liability only where the defendant has inflicted some harm upon the plaintiff. Whatever may have been the case when the doctrine of trespass *ab initio* was first imported into the American decisions in regard to privileged arrest, there is no longer any tendency to bolster up an inefficient criminal administration by creating tort actions for the purpose of punishing official misconduct by punitive damages. If the misconduct of an officer subsequent to a privileged arrest causes actual harm to his prisoner, the latter does not need the aid of the *ab initio* doctrine to obtain redress. It is sufficient to hold, as intimated by the Kansas Supreme Court,<sup>82</sup> that the misconduct makes the officer's custody of his prisoner unlawful from the time of its occurrence. Indeed, it may be questioned whether the Kansas court has not gone too far in its dictum to this effect.<sup>83</sup> It may be doubted whether a prisoner, whose detention has been prolonged by an unnecessary delay in bringing him before a court for hearing, is not sufficiently compensated by permitting him to recover for so much of his subsequent detention as is unnecessarily caused by the officer's delay.

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<sup>82</sup> *A. T. & S. F. R. R. v. Hinsdell*, *supra* note 36.

<sup>83</sup> In the *Hinsdell* case, the defendant's misconduct consisted in releasing his prisoner without bringing him before a proper court. There was, therefore, no retention of custody after the misconduct and the court's statement as to the effect of the misconduct in making any subsequent detention illegal is, therefore, dictum.