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Anderson's Trustee *vs.* Cairncross.

Maasdorp, for the applicant, applied in terms of the notice, and *Cole*, for the respondent, read affidavits in support of the objections.

DE VILLIERS, C.J.: Under the 111th section of the Insolvent Ordinance any person objecting to the Liquidation and Distribution Account is bound to come to the Court and substantiate his objection. In the present case the respondent has lodged objections, but has not yet come forward, and the applicant has called upon him to shew cause why his objections should not be expunged and the account confirmed. Now under such circumstances the trustee ought clearly to convince the Court that the objections are wholly invalid. In the present case the trustee has failed in showing that these objections are not good. True, that one of them has been withdrawn, but I do not think that therefore the Court must necessarily grant this application. The affidavits do not give a sufficiently clear explanation to enable us now to expunge the other objections; and the best course will be to refuse this application, leaving it to the creditor hereafter to move the Court to substantiate his objections. He must, of course, proceed without undue delay.

DENYSSEN, J., & FITZPATRICK, J., concurred.

Application refused accordingly, with costs.

[Applicant's Attorney, VAN ZYL.
Respondent's Attorneys, FAIRBRIDGE, ARDERNE & SCANLEN.]

QUEEN *vs.* JACKSON.

Assault.—False Imprisonment.—Criminal Action.

Appellants arrested and tied the hands of complainant, suspecting him of having stolen their property. Complainant was innocent, and the evidence did not disclose that appellants had reasonable grounds for acting on their suspicion. A criminal conviction of appellants before the Magistrate for assault, sustained.

The appellants, Jackson & Cloete, had been charged before

the Magistrate of Malmesbury with assaulting one Nicodemus and two other lads, and were found guilty and sentenced to pay a fine of £2, or in default fourteen days' imprisonment. Against this conviction they now appealed.

It appeared that the appellants were coming to town from Malmesbury, when they lost a bag. Returning along the road to the spot where the bag had been dropped, they saw two boys whom they questioned about the bag. They said they could point out the boys by whom the bag was taken, and thereupon pointed out two other boys, one of whom ran away. Appellants arrested the three boys, and tied their hands and took them to a house in the neighbourhood. The bag was afterwards recovered, when it was found that it had been cut open and some of its contents abstracted. There was nothing to connect the three boys with the theft, and they denied all participation in it. The appellants had their dogs with them, and one of the party fired a gun when the other boy ran away.

Upington, for the appellants, contended that as they had acted *bonâ fide* in arresting the boys, and upon reasonable grounds of suspicion, any such assault as was committed in making the arrest did not justify a criminal prosecution. In England it had been laid down in *Coward* vs. *Baddeley* (28 L.J., Exchr., 260), that in order to constitute an assault and battery punishable by the criminal law, the act complained of must be done with a hostile intention. Counsel cited this case to shew that a distinction existed, depending on the hostile intent, between an assault punishable criminally, and one which gave rise only to a civil action for damages. In this case there was no police to whom an appeal could be made, the property was lost, and the acts and conduct of the boys were highly suspicious. Ordinance No. 73, section 15, authorized an arrest by a private person upon reasonable suspicion, though at the peril of such private person if the accused be innocent. That peril was a civil and not a criminal liability.

[De Villiers, C.J.: But what necessity was there for tying the boys' hands? Is a person not liable who uses more violence than is necessary?]

If he acted *bonâ fide* and without hostile intent, that would only affect the question of damages in a civil suit.

Stockenström, A.G., for the Crown, supported the conviction.

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He would not pretend to deny the right of a private person to arrest on suspicion, but it was necessary for such person to have reasonable grounds for acting, and also he must not be guilty of unnecessary violence. If he was, he was liable criminally as well as civilly. Here there was both an absence of reasonable grounds of suspicion and also unnecessary violence used.

DE VILLIERS, C.J.: The sole question we have to consider is, whether the appellants had reasonable grounds for believing that the three boys had committed this theft, and we are of opinion they had not. The evidence shews that the boys were frightened by the appellants' dogs, and by the shot fired by Cloete, and under such circumstances they might be frightened into saying anything. But as a fact these boys were guilty of nothing to justify their arrest. There were no reasonable grounds for the arrest, the appellants acted in a very high-handed manner, and the Magistrate was justified in convicting them of assault.

FITZPATRICK, J., concurred.

Appeal dismissed accordingly.

[Appellants' Attorneys, FAIRBRIDGE, ARDERNE & SCANLEN.]

DURHAM *vs.* PEISER & CO.

Ejectment.—Inconsistent Pleas.

To a claim for ejectment and for damages, pleas setting up lawful possession, and in case that should be insufficient, a tender,—Held,—*inconsistent pleas.*

1878. Feb. 4. — Durham *vs.* Peiser & Co.

Plaintiff claimed the right of possession of certain property leased from the Government by one Barry, under cession to him by Barry of his rights, and prayed for ejectment against defendants, whom he alleged were in unlawful possession, and also for damages.

Defendants first pleaded, save as excepted, the general