

included within the purposes for which the injured man was employed, nor in connection with his employer's business, and that, when he was injured, he had taken himself away from his duties. That is only a paraphrase of the expression, that is used in one of the authorities, "abandon his job for the time being." That is a finding of fact of the Commission, and, if there is any evidence on which the Commission could arrive at that conclusion, we are not entitled to disturb it.

I confess I should not have felt the least surprised if the Commission, on the facts stated in its judgment, had arrived at the opposite conclusion, but that is not a matter that we can consider here. I think there was evidence to support the finding at which it arrived, and, therefore, I do not think that we can disturb it.

Appeal dismissed, with costs.

Solicitors: *C. Jollie Smith & Co.; Fred W. Bretnall*
(Solicitor for Transport).

1937.
WEBB
v.
COMMISSIONER
FOR
RAILWAYS.
Bavin J.

WARD v. MURPHY.

Trespass—Justification—Imprisonment under ca. sa.—Order of District Court—Quashing of order by Supreme Court—Delay in release—Sheriff's liability—Burden of proof—Pleading.

1937.
Nov. 1, 2, 3,
10, 11;
Dec. 9.
Davidson J.
Stephen J.
Bavin J.

W. was imprisoned under a writ of *ca. sa.* issued under an order of the District Court. That order was quashed by a judge of the Supreme Court, whose judgment was delivered at about 6.0 p.m. At 7.30 p.m. a letter, signed by the judgment creditor's attorney and addressed to the District Court Bailiff and to the person having W.'s custody, together with a covering letter from W.'s attorney, was delivered to the governor of the gaol. The former letter gave notice that a rule for *certiorari* to quash the order directing the issue of the writ of *ca. sa.* had

1937.

WARD
v.
MURPHY.

been made absolute, and stated that W. could be released. The governor refused to act on the letters but, at 8.30 p.m., the sheriff was informed of their contents by the prison authorities. The sheriff said that he knew nothing of the matter and would have to make inquiries. W. was not released until 11.25 a.m. on the following day. In an action, against the sheriff, claiming damages for trespass by imprisonment, W. was awarded £250. On appeal,

Held, that the sheriff was entitled to justify under the writ of *ca. sa.* until it was set aside; that he was entitled to a reasonable time in order to make inquiries before releasing the respondent; that, in the circumstances, it would be unreasonable for the jury to hold that he acted unreasonably in leaving his searches until the morning, but that the jury would be entitled to hold that there had been unreasonable delay in the morning; and that, as it appeared that the jury must have assessed damages on the footing of unreasonable delay during the night, a new trial should be ordered.

NEW TRIAL MOTION.

This was an appeal in an action in which the jury returned a verdict for the plaintiff, against the sheriff, for trespass by imprisonment.

The following statement of facts is taken from the judgment:—

The respondent in this appeal was imprisoned under a writ of *capias ad satisfaciendum* issued under an order of the District Court. After he had spent several days in prison the order was quashed, upon an application for the issue of a writ of *certiorari* heard by a judge of the Supreme Court, in Chambers. The judgment was delivered at about six o'clock in the evening. At half past seven the respondent's brother delivered to the governor of the gaol a letter signed by the attorney for the judgment creditor, together with a covering letter from the respondent's attorney, and a text book on the District Court practice. The former of these letters was addressed to the District Court Bailiff and to the person having custody of the respondent, and was in the following form: "I hereby give you notice that his Honour Mr. Justice Owen this day made absolute a rule for *certiorari* to quash the order directing the issue of the writ of *ca. sa.* under which you hold the above-named. (Sgd.) H. E. McIntosh, solicitor for the judgment creditor. You can now release him." The other letter was addressed to the governor of the gaol who said, in his evidence, that he did not remember seeing it.

The letter from the attorney of the judgment creditor was written on paper without any heading such as is usually employed by solicitors. The covering letter did set out the name and address of the respondent's attorneys, but it stated that the application for release was made in accordance with the notes appearing under rule 292 of the District Court Practice. Reference is made there to the Judgment Creditor's Remedies Act, but the procedure under the rule was not adopted. The governor of the gaol refused to act upon the instructions, and returned the letter which he says he saw, and the book, to the respondent's brother. The gaoler succeeded, however, in having a conversation on the telephone, at 8.30 o'clock on the same evening, with the Sheriff, who is the appellant, and who happened to be at his office at the Supreme Court at that time, working. After inquiring as to the terms of the letters, and receiving the particulars already mentioned, the Sheriff said he did not know anything about the matter and would have to make enquiries. Eventually, the respondent was not released until 25 minutes past 11 o'clock on the following morning. Subsequently he instituted proceedings, recovering a verdict with £250 damages.

The declaration in the action contains a single count for trespass by imprisonment. The appellant pleaded not guilty, and not guilty by statute, and also a plea in justification. The latter plea stated, in substance, that the respondent was arrested under a writ directed to the Superintendent of the said Penitentiary, amongst others, directing him to safely keep the respondent until a certain sum should be paid, or until he should be sooner discharged, and that, upon the said writ being discharged, the appellant, when notified of that fact, caused the respondent to be released, which was the alleged imprisonment. By amendment made during the hearing, at the suggestion of the learned trial judge, there were added, after reference to the writ being discharged and notification of that fact to the defendant, words which made the plea read that the defendant "after making inquiries and within a reasonable time thereafter" caused the respondent to be released. This amendment was objected to, but the replication was a joinder of issue on all the pleas. It was not stated in the plea that the writ was issued out of the District Court.

1937.

WARD
v.
MURPHY.

1937.**WARD
v.
MURPHY.**
—

At the conclusion of the plaintiff's case there was an application for a non-suit, which was refused.

In his evidence, the defendant said that the form of the letter of the judgment creditor's attorney, as described to him, caused him some doubt. He did not know if the letter was authentic, as there were two attorneys of the same name on the roll, and he was unaware at the time which one it was. He said, however, that he thought it possible that the second letter was mentioned to him by the gaoler. Also, he stated that it was necessary for him, before authorising the release of the respondent, to make enquiries at the District Court next morning to see if there were any other writs outstanding and also to examine the Supreme Court records, some of which were not available to him at the time, as they were locked up. His evidence was further to the effect that he had the necessary searches made on the following morning, but was unable for some time to find any record of the order having been made, as it had not been taken out, and the judge who made it was sitting in Chambers, at half past nine, and was using his note-book. The judgment creditor's attorney was also appearing in Court as an advocate at Darlington, and information could not be obtained from him without some delay. The sheriff admitted that he did not communicate with the present respondent's attorney. Before the summing up to the jury, the appellant's counsel also asked that a verdict should be directed for the defendant.

Mitchell K.C. and Badham, for the appellant. On the uncontradicted evidence any finding that the sheriff acted otherwise than reasonably would be such as reasonable men could not find. The verdict should be set aside, therefore, as being against the weight of evidence. This may be done even though a non-suit might rightly have been refused: *Mechanised and General Inventions Co. v. Austin*.⁽¹⁾

Section 24 of the Judgment Creditors' Remedies Act, 1901, provides that a written order under the hand of the attorney in the cause by whom any writ of *capias ad satisfaciendum* has been issued shall justify the sheriff in discharging the detained person. But the sheriff must have reasonable time

(1) [1935] A.C. 346.

1937.

WARD
v.
MURPHY.

in which to satisfy himself as to the authenticity of the order. The onus is on the person who produces the order to satisfy the sheriff as to its genuineness; alternatively, the sheriff must have a reasonable time wherein to test its authenticity. If all the facts are found the question of what was reasonable in time was a matter of law: *Glassbrook Brothers Ltd. v. Leyson* (1); *Hirschfield v. Smith* (2); *Tindal v. Brown*. (3) The lastmentioned case was overruled in *Chapman v. Keane* (4), but on a different point. The sheriff is not a trespasser until he has notice of the order to release: *Belshaw v. Marshall* (5). He is not bound to look behind the process of the Court which ordered the imprisonment: *Simpson v. Water Conservation and Irrigation Commission*. (6) After notice of the order to release, he is entitled to detain for a reasonable time: *Samuel v. Buller* (7), unless the person detained is wrongfully in custody by a wrongful act of the sheriff, in order that he may ascertain whether there are other detainers in his hands: *Robinson v. Yewens* (8); *Hooper v. Lane* (9); *Taylor v. Brander* (10); *Ockford v. Freston*. (11) The sheriff is entitled to due notice of the order. Where the order is not taken out, and there is no service of the order or of a copy thereof, the sheriff has a legal right to insist upon some authentication of the order, and to detain and search until this is provided. On the question of the duties and authority of the sheriff they referred to the Judgment Creditors' Remedies Act, 1901; he Prisons Act, 1899; and Chitty's Arch. Pr., 12th ed. vol. 1, p. 703. Section 24 of the Judgment Creditors' Remedies Act, 1901, does not command the sheriff to release the prisoner but only operates as a protection to the sheriff if he elects to act under its authority. He is not obliged to act under that section except on a written order addressed to him. Upon the receipt of such an order he is entitled to a reasonable period for enquiring into its authenticity and that of its contents. Here, upon the undisputed facts, the sheriff did not take an unreasonable time to make inquiries. The

(1) [1933] 2 K.B. 91 at 108, 117, 121.

(2) L.R. 1 C.P. 340.

(3) 1 Term Rep. 167.

(4) 3 Ad. & El. 193.

(5) 4 B. & Ad. 336.

(6) 17 S.R. 493 at 499; 13 Austrn Dig. 1098.

(7) 1 Exch. 439.

(8) 5 M. & W. 149.

(9) 6 H.L. Cas. 443 at 553.

(10) 1 Esp. 44.

(11) 6 H. & N. 466 at 472.

1937.

WARD
v.
MURPHY.

jury's finding otherwise was against the evidence and the weight of evidence. Any wrongful detention could not exceed, at most, detention in the morning. For such detention the amount awarded was excessive.

During the course of argument reference was also made to *Canning v. Temby*(1); *Blee v. London & North-Eastern Railway Co.*(2); *Lavy v. London County Council* (3); *Hick v. Raymond & Reid*(4); *Carratt v. Morley*(5) and *Moravia v. Sloper*.(6)

Barwick and *Malor*, for the respondent. As the respondent was imprisoned on process of an inferior court which was subsequently quashed for want of jurisdiction, the whole was a nullity *ab initio*. The holding of the respondent at all was, therefore, unlawful. The sheriff acts at his peril in arresting on such process and, in the event of it being void, he is liable to an action at the suit of the prisoner, whether he knew of the defect or not, even if the writ is good on its face. The process being void he cannot justify under it: *Mayor of London v. Cox* (7); *Parsons v. Loyd* (8); *Hooper v. Lane*.(9) It was for the defendant to allege and prove that the Court had jurisdiction to issue the original process on which he took and held: *Mayor of London v. Cox* (7); *Bullen & Leake*, 3rd ed., p. 9. Even if the sheriff can justify, he can only do so up to the point of time when he knew, or ought to have known, that the process was invalid. It is not a question of notice in the strict sense. He need have no formal notice. If he acquired the knowledge, or ought to have acquired it, anywhere or anyhow, justification thence onwards ceased, and it was for the jury to say whether the sheriff knew or ought to have known, and whether he detained for an unreasonable time: *Ash v. Dawnay*.(10) The sheriff is bound to know whom he is holding and for what reason and to discharge the prisoner upon acquiring such knowledge and being directed so to do: *Withers v. Henley*.(11) The only time thereafter for which he can justify is such as is reasonable for the carrying out of the

(1) [1905] 3 C.L.R. 419 at 423, 426.

(2) [1936] 3 All E.R. 286.

(3) [1895] 2 Q.B. 577 at 585.

(4) [1893] A.C. 22 at 29.

(5) 1 Q.B. 18.

(6) Willes 30.

(7) L.R. 2 H.L. 239 at 263.

(8) 3 Wils. 341.

(9) 10 Q.B. 546.

(10) 8 Exch. 237.

(11) Cro. Jac. 379.

physical release of the prisoner—and this is a matter for the jury.

1937.

WARD
v.
MURPHY.

There was evidence on which the jury could find that, after he was informed that the order had been quashed, the sheriff did not discharge the prisoner within a reasonable time. The sheriff was not entitled to hold the prisoner while he searched for detainers. The plaintiff being wrongfully detained, he must be discharged, even if there were other detainers: *Ockford v. Freston* (1); *Bateman v. Freston* (2) *Ex parte Freston*. (3) It would be an abuse of the process of Court to detain on a good writ a person being held illegally: *Barlow v. Hall*. (4) A person held on an invalid writ must, therefore, be discharged before being arrested on a valid writ: *Harper v. Lane* (5). Consequently, the sheriff need not search for detainers and is not entitled to hold the prisoner while he does search. In any event, as he searched that night, he was not justified in holding after the completion thereof. The sheriff has no concern with writs of *ca. sa.* in the hands of bailiffs of District Courts as they are not directed to him. Obviously he would not be entitled to hold the prisoner while he searched in all the District Courts in the State for detainers. The real effect of the judgment Creditors Remedies Act was to give the plaintiff's attorney authority to direct the prisoner to be released. The sheriff was bound to act on that authority.

They also referred to:—*Hart v. MacDonald* (6); *Morrell v. Martin* (7); *Brown v. Compton* (8); *Luttin v. Benin* (9); *Commissioner for Railways (N.S.W.) v. Cavanough* (10); *Dr. Drury's Case* (11); *Moravia v. Sloper* (12); *Futcher v. Hinder* (13); *The Case of The Marshalsea* (14); *Prince v. Allington* (15); *Savory v. Chapman*. (16)

Mitchell K.C., in reply.

Cur. adv. vul.

- (1) 6 H. & N. 466.
- (2) 3 E. & E. 578.
- (3) 3 De G. F. & J. 612, 619.
- (4) 2 Anst. 461.
- (5) 6 H.L. Cas. 443 at 550, 551.
- (6) 10 C.L.R. 417.
- (7) 3 Man. & G. 581.
- (8) 8 Term. Rep. 424.

- (9) 11 Mod. 50.
- (10) 53 C.L.R. 220.
- (11) 8 Co. Rep. 141 b.
- (12) Willes 30.
- (13) 3 H. & N. 757.
- (14) 10 Co. Rep. 68 b.
- (15) Coke Eliz. 918.
- (16) 11 A. & E. 829

1937.

Dec. 9.

WARD
v.
MURPHY.

DAVIDSON J. [after stating the facts, as set out above, continued :] The law relating to the liability of the sheriff for an arrest or detainer under a writ or order of a Court of inferior jurisdiction which proves to be defective is confusing, and the difficulties are accentuated, in the present case, owing to the form of the pleadings and the course of the trial. But the respondent claims, and I think rightly, that, having recovered a verdict, he is entitled to support it, not only by reason of the effect of s. 24 of the Judgment Creditor Remedies Act, but also, if he can, by establishing that the sheriff, upon the facts in evidence, was a trespasser throughout, and incapable of showing any legal justification. As the respondent admitted, during the hearing, that he could not recover damages for detention for the period before the writ was set aside, he cannot claim to do so now, but his contention as to the existence of an unjustifiable trespass during the whole period of detention renders it necessary to consider fully the law on the subject.

At common law the sheriff could only justify holding a person in custody under a writ or order of a competent Court directed to him or his officers: *Watkins v. West*.⁽¹⁾ The effect of the Prisons Act, No. 27 of 1899, s. 6, is, however, that the custody of all persons committed to any prison before or after the passing of the Act, not being prisoners under sentence for an indictable offence, or adjudication for some offence, punishable on summary conviction, shall, together with all powers, rights, obligations, and liabilities in respect of such persons, whether under the provisions of any Act or at common law, continue to be vested in, and incident to, the sheriff. Sub-section (3) also provides that the Comptroller-General and all gaolers and other officers shall hold prisoners who have not been convicted and sentenced as aforesaid for and on behalf of the sheriff, who shall have such access to, and communication with, and all other powers and authorities over, or in reference to, such prisoners, as he would have had if the Act had not been passed.

This statute, accordingly, vests in the sheriff the custody of persons imprisoned under mesne process although a writ

(1) 2 Ld. Raym. 1530.

is not directed to him. Notwithstanding this fact, s. 24 of the Judgment Creditors Remedies Act, No. 8 of 1901, and r. 292 made under the provisions of the District Courts Act, No. 23 of 1912, purport to confer certain powers of releasing prisoners held under writs of *capias* upon the gaoler. It is provided, by the former of these Acts, that a written order under the hand of the attorney in the cause by whom any writ of *capias ad satisfaciendum* has been issued shall justify the sheriff, gaoler, or other person in whose custody the party may be, in discharging such party, unless the party for whom such attorney professes to act has given notice to the contrary to such sheriff, gaoler, or person. The following sub-section. sub-s. (3), further provides that nothing in the section shall justify any attorney in giving such an order for discharge without the consent of his client.

1937.
WARD
v.
MURPHY.
Davidson J.

There may be some doubt as to whether the gaoler himself is authorised to act under the terms of this section once he has lodged the prisoner in gaol so that he holds him in custody under the Prisons Act on behalf of the sheriff. It may be that the power only extends to the length of enabling the gaoler to discharge the prisoner before the custody actually vests in the sheriff.

Under the District Court rule No. 292, when the judgment creditor lodges with the registrar a request in writing in accordance with the form provided, requesting that the judgment debtor, if imprisoned, be discharged, the registrar is required to issue a notice to the gaoler who, upon receiving it, must discharge the prisoner forthwith. Under this procedure, which was not employed, it may be that no reference to the sheriff is necessary, notwithstanding the provisions of the Prisons Act.

As I construe the terms of the Prisons Act, I do not think that the gaol officials, amongst whom are included the Comptroller-General, are thereby made servants of the sheriff. They are not in that position, but are servants of the Crown, and merely hold prisoners given into their charge for the sheriff to enable him to carry out his duties under the statute. No doubt such officials are his agents to some extent, so that it would be his duty to give them necessary instructions to prevent undue delay in releasing prisoners beyond the time

1937.

WARD
v.
MURPHY.

Davidson J.

when he himself could lawfully retain their custody : *Mee v. Cruickshank*.(1) But so far as the sheriff is concerned, whilst the statute gives him the same powers as regards the prisoner as he had at common law if such statute had not been passed, it does not appear to me that the effect would be to make delivery of an order, under the Judgment Creditors Remedies Act, to the gaoler equivalent to delivery of it to the sheriff, as may have been the case at common law if a servant of the sheriff had received such an order : *Futcher v. Hinder*.(2)

None of the provisions of the statutes which have been referred to and relied upon under the plea of not guilty by statute, such as No. 27 of 1899, s. 6 ; No. 8 of 1901, ss. 24 and 25 ; or the District Courts Act, No. 23 of 1912, appear to afford any specific defence to the sheriff beyond what is covered by his defence of justification. Possibly, however, he could have relied solely upon the plea of not guilty by statute, had he so desired, but this makes no difference as to the legal position : *Eagleton v. Gutteridge* (3) ; District Courts Act, No. 23 of 1912 ; General Legal Procedure Act, No. 34 of 1902.

At common law, if a writ is issued out of a superior Court, or by an inferior Court within its jurisdiction, the sheriff will be protected if he acts strictly within the authority of the writ, even if it be set aside, subsequently, for irregularity : *Simpson v. Water Conservation and Irrigation Commission* (4) ; *Andrews v. Marriis* (5) ; *Ockford v. Freston* (6) ; *Carratt v. Morley* (7) ; Halsbury's Laws of England, vol. 23, par. 663.

Many pitfalls, however, lie in the way of reliance upon the writ or order of an inferior Court. For instance, its mere existence does not give rise to the presumption that it was made or issued with jurisdiction : *Mayor of London v. Cox* (8) ; also, even the judge who makes the order, or an officer who executes it, cannot justify under it if it was made without jurisdiction, and such judge or officer knew of the defect : *Mayor of London v. Cox*.(8) In the case of the judge, ignorance of the law is no excuse, if he was not misled and knew the facts which, in law, would show that there was no jurisdiction : *Houlden v. Smith* (9) ; *Mayor of London v. Cox*.(8)

(1) 86 L.T. 708.

(2) 3 H. & N. 757.

(3) 11 M. & W. 465.

(4) 17 S.R. 493 ; 13 Austn
Dig. 1098.

(5) 1 Q.B. 3.

(6) 6 H. & N. 466, at 472.

(7) 1 Q.B. 18.

(8) L.R. 2 H.L. 239 at 263.

(9) 14 Q.B. 841.

And he would be bound to justify, if he could, by pleading and proving what jurisdiction the Court had and, if there was no jurisdiction in the Court, that he did not know it : *Moravia v. Sloper*.(1)

1937.

WARD
v.
MURPHY.

Davidson J.

The statement of the law in *Mayor of London v. Cox* (2) is of the highest authority as it was made by the judges in the course of answering certain questions submitted to them by the House of Lords, and the latter said that it accepted the opinions which were given, and the reasoning on which they were based. The difficulty in applying the law arises in connection with the reference to knowledge in the case of officers executing writs. The cases cited by the judges in support of the statement already mentioned in *Mayor of London v. Cox* (2), as well as other authorities, support the proposition that, as an inferior officer of the Court is punishable as a Minister of the Court if he does not obey its commands, he is not bound to justify by showing that he did not know of a defect of jurisdiction, but may merely rely on the writ : *Moravia v. Sloper* (3) ; *Andrews v. Marris* (4) ; *Carratt v. Morley* (5) ; *Rowland v. Veale* (6) ; *Horsefield v. Brown*.(7) But all the authorities appear to agree that an inferior or any other officer can rely upon no justification, and will have no defence, if the writ is bad on the face of it : *Carratt v. Morley* (5) ; *Hooper v. Lane* (8). Presumably, he would then be taken to have knowledge, and the same position is said, in the old cases, to exist when absence of jurisdiction appears to some extent in the proceedings. This proposition is expressed in various ways ; for instance, if the writ is " without pretence of jurisdiction " : *Shergold v. Holloway* (9) ; if there is " no semblance of jurisdiction " : *Houlden v. Smith* (10) ; if there was no " general jurisdiction " to deal with the matter : *Andrews v. Marris* (11) ; if the matter is " *coram non judice* " : *Lutlin v. Benin* (12) ; *Morrell v. Martin* (13) ; if the matter is not " plainly within the jurisdiction " : *Hill v. Bateman* (14) ; if there is " no jurisdiction whatever " : *Morrell v. Martin* (15) ;

(1) Willes 30, at 37.

(2) L.R. 2 H.L. 239 at 263.

(3) Willes 30 at 34.

(4) 1 Q.B. 3 at 16.

(5) 1 Q.B. 18.

(6) Cowp. 18 at 20.

(7) [1932] 1 K.B. 355 at 369.

(8) 10 Q.B. 546 at 560, 561 ; 6 H.L. Cas. 443.

(9) 2 Stra. 1002.

(10) 14 Q.B. 841 at 852.

(11) 1 Q.B. 3 at 17.

(12) 11 Mod. 50.

(13) 3 Man. & G. 581, 595.

(14) 2 Stra. 710.

(15) 3 Man. & G. 581.

1937.

WARD

v.

MURPHY.

Davidson J.

or if the matter is "beyond jurisdiction": *Mayor of London v. Cox*.(1)

In *Morrell v. Martin* (2), which adopted the second rule in *The Case of The Marshalsea* (3), the distinction is drawn between the effect of process issued merely in error, and issued with absence of jurisdiction, and it is said that, in the former case, a ministerial officer is protected if he acts upon it, whereas in the latter he is not; so that, in pleading justification, he must aver that the Court had jurisdiction over the subject matter upon which this warrant is granted. Disagreement was expressed with decisions such as *Hill v. Bateman* (4), where an inferior Court had power to issue a warrant, provided there had first been an attempt to levy distress, and in the absence of any evidence of that preliminary step having been taken the Court issued a warrant. The constable who executed it was held to be protected because the matter was within the jurisdiction of the Court, but it was said that it would have been otherwise if the matter were plainly not within the jurisdiction of the magistrate.

Counsel for the respondent also relies upon the expression of opinion appearing in *Hooper v. Lane* (5), that, if a writ be void for want of jurisdiction, it would be no defence to the sheriff, in an action of trespass by the person arrested, whether the sheriff knew it to be void or not, or could not discover its defect with ordinary care, because the sheriff, in depriving a man of his liberty, acts at his peril, and, if the authority on which he assumes to act is invalid, he is responsible to the party injured. This case was affirmed in the House of Lords(6), but not with any express approval of the above statement, which was only *obiter*, and it appears from the evidence that the writ was invalid on the face of it. Although, however, these decisions were not cited in the case of *Mayor of London v. Cox* (7), it appears to me that, so far as they state that where there is absence of jurisdiction the sheriff has no defence whatever, whether he knew of the defect or not they must yield to the expression of opinion in that case, and in the others which were cited with approval, which say

(1) L.R. 2 H.L. 239 at 263.

(4) 2 Stra. 710.

(2) 3 Man. & G. 581.

(5) 10 Q.B. 546 at 560, 561.

(3) 10 Co. Rep. 68 b. at 76.

(6) 6 H.L. Cas. 443.

(7) L.R. 2 H.L. 239.

that the sheriff is not liable for executing a writ not bad on the face of it although issued without jurisdiction unless he did know of the defect, and that it does not lie on him, when acting as an inferior ministerial officer, to do more than plead the writ itself, with the addition that it was issued out of an inferior Court and was not bad on the face of it. The knowledge of the absence of jurisdiction on the part of the sheriff, which it would be necessary to prove, could not be more than knowledge of the facts from which it must appear that the Court had no jurisdiction, cf., *Houlden v. Smith*.⁽¹⁾ Consequently, it appears to me that what the cases which have been referred to must mean is that, as the sheriff could not know more than appeared on the face of the record, the absence of jurisdiction would have to appear on the face of such record if it were inspected: *R. v. Nat Bell Liquors Ltd.*⁽²⁾, and it would have to be shown that the sheriff knew it. There is a material and recognised distinction between what is beyond jurisdiction on the face of the record, and want of jurisdiction occasioned by collateral matters, which may be established by extraneous evidence: *Ex parte Mullen*; *Re Hood*⁽³⁾; *R. v. Nat Bell Liquors Ltd.*⁽⁴⁾

The order for the issue of the writ of *capias*, in the present case, must have been made under the provisions of s. 144 of the District Courts Act, No. 23 of 1912, wherein it is provided that, whenever a judgment has been recovered in any District Court, and the judgment creditor shows, to the satisfaction of a judge of the Supreme Court or of any District Court, that such judgment has been recovered and is unsatisfied, and to what amount, and that certain other specified circumstances exist, such judge may authorise the registrar to issue a writ *capias ad satisfaciendum* in such form as is fixed by the rules of Court. Having regard to the terms of that section, it is clear that the judge had jurisdiction, if a summons was issued and evidence adduced, to consider the matter in order to determine whether or not he was satisfied, and, consequently, it could not be said that at any stage he was without jurisdiction on the face of the record: *R. v. Nat Bell Liquors*

1937.

WARD

v.

MURPHY.

Davidson J.

(1) 14 Q.B. 841.

(2) [1922] 2 A.C. 128 at 160.

(3) 35 S.R. 289.

(4) [1922] 2 A.C. 128 at 152, 153, 158, 160.

1937. *Ltd.*(1); *Ex parte Mullen*; *Re Hood*.(2) The summons
 WARD
 v.
 MURPHY.
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 Davidson J.

itself is an exhibit in the present action, and the order granting a writ of *certiorari* to quash the order of the District Court judge refers to the judgment in the action, so that some evidence must have been before the judge. There is nothing to indicate, moreover, upon what grounds the order was made for the issue of a writ of *certiorari*. The rule *nisi* is in evidence, and sets out four grounds, three of which relate to defects in regard to the evidence. This fact, in itself, also shows that there was evidence before the judge who ordered that the writ should issue out of the District Court. A writ of *certiorari* can only be granted, it is true, upon the ground of want of jurisdiction or the absence of natural justice : *Ex parte Mullen* ; *Re Hood* (2) ; but as there was jurisdiction on the face of the matter, the order must have been made upon some other ground. At all events, so far as the sheriff is concerned, it cannot be said that there was absence of jurisdiction on the face of the record.

It is contended, however, that the sheriff does not fall within the category of such inferior officers as have been mentioned. The writ was not directed to him but to the superintendent of the gaol, amongst others. In form the writ itself is framed in accordance with the provisions of the District Courts Act, s. 114, and the rules made thereunder, so that it was good on the face of it. The sheriff, however, is not included amongst the persons mentioned in that section of the District Courts Act as one of the officers who has to obey the order and writs of the Court. Consequently, he does not specifically come within the class of persons described as inferior officers who have to obey the writ and who can claim the benefit of the rule of law laid down by the authorities for their protection. For instance, as already mentioned, it has been said that no one else other than those to whom the writ is directed has the protective benefit of that rule : *Watkins v. West*.(3) The sheriff merely has custody of the prisoners vested in him by the Prisons Act, but subject to all the liabilities he might incur at common law. His position then is a difficult one. Whilst the sheriff did not, in fact, arrest or have

(1) [1922] 2 A.C. 128 at 153.

(2) 35 S.R. 289, 515.

(3) 2 Ld. Raym. 1530.

the duty of arresting the respondent, and may not even have had exhibited to him the writ under which the respondent was arrested, so that he might see if it were in proper form, the mere fact of the prisoner being given in charge to the gaoler would vest custody in him as sheriff without any further protection than that which the common law provides. If, in such circumstances, he should allow the prisoner to escape, he would be liable in an action for damages under s. 23 of the Judgment Creditors' Remedies Act, and, if he should wrongly permit a prisoner in custody by authority of a Court which had jurisdiction in the matter to go at large, it would amount to an escape for, as it has been said, the sheriff cannot judge of the validity of the process or other proceedings of the Court, and cannot take advantage of errors in them not appearing upon their face: *Boynton's Case* (1); Mather, Sheriff and Execution, 3rd ed., p. 269. Consequently, unless he should make proper inquiries in order to be certain that the writ was discharged for want of jurisdiction, or that there was a valid order from the attorney of the judgment creditor, he might render himself liable in an action for escape, while, if he did not let the prisoner at large at once, if the writ should turn out to have been made without jurisdiction he might, according to the plaintiff's argument, render himself liable to another action, as in the present case. Whilst not expressly directed by the writ to execute it, however, this duty is cast upon him by the Prisons Act. His duties are ministerial, and neglect of them would render him liable to an action for damages, and no doubt to other proceedings at the instance of the Court itself. It is difficult, therefore, to see how he can be differentiated from other ministerial officers who are named in the writ, and, as so called inferior officers, are permitted to justify under it.

Since it appears to me, therefore, that the appellant was entitled to justify under the writ until it was set aside, the further question then arises as to whether he was entitled to a reasonable time, in addition, in order to make inquiries before releasing the respondent. It is necessary, in the first instance, to consider the position in relation to the order from the

1937.

WARD

v.

MURPHY.

Davidson J.

(1) 3 Co. Rep. 43a.

1937. respondent's attorney under the Judgment Creditors' Remedies Act.

WARD

v.

MURPHY.

Davidson J.

Section 24 of the Judgment Creditors' Remedies Act is couched in permissive terms, and seems to be directed more towards the protection of the judgment creditor and of the sheriff and gaoler than of the prisoner. Previously it was only the judgment creditor himself who could issue the order, and the section, no doubt, was really directed towards enabling his attorney to act on his behalf: *Savory v. Chapman*.⁽¹⁾ *Prima facie*, permissive powers must be read as such, and not as being obligatory: *Metropolitan Coal Company of Sydney Ltd. v. Australian Coal and Shale Employees' Federation*.⁽²⁾ There are authorities, however, to the effect that, as soon as the person who is within the statute is entrusted thereby with a power, it becomes his duty to exercise it; for instance, where he is applied to for an order to enforce the legal right of the applicant: *Sheffield Corporation v. Luxford*.⁽³⁾ The prisoner is not given any specific right to be such an applicant, but, whether or not the construction of s. 24 of the Judgment Creditor's Remedies Act is governed by the abovementioned rule, it has been held, from the earliest times, that, as an order for release revokes the sheriff's authority to detain a prisoner held under a writ of *capias*, the sheriff is bound to discharge him: *Withers v. Henley* ⁽⁴⁾; *Barker v. St. Quintin*.⁽⁵⁾ In those cases it was stated that, as an order for release of the judgment creditor determines the authority of the sheriff to hold a prisoner, it is an unjustifiable trespass on the sheriff's part to hold him thereafter even for an hour.

In other cases of a later date, however, it has been held that the sheriff is entitled to a reasonable time within which to search the office in order to see if there are other writs or detainers against the prisoner, and that, in addition, he is not called upon so to act until the written discharge comes to him from the judgment creditor: *Samuel v. Buller* ⁽⁶⁾; *Taylor v. Brander*.⁽⁷⁾ But it is sufficient if it is served on the sheriff's servant or officer: *Futcher v. Hinder*.⁽⁸⁾ Some later authorities deal with the same subject, but unfortunately they only

(1) 11 A. & E. 829.

(2) [1917] 24 C.L.R. 85 at 97;

(3) [1929] 2 K.B. 180 at 183.

(4) 3 Bulst. 96.

(5) 1 Dow. & L. 542.

(6) 1 Exch. 439.

(7) 1 Esp. 44.

(8) 3 H. & N. 757.

add to the doubt as to what is the law relating to it. In *Robinson v. Yewens* (1), which has been followed in *In re Sellar* (2), it was held that the sheriff could not act under another detainer if he, by himself or his officers, has taken a person unlawfully into custody so that such custody amounts to false imprisonment, or if he is guilty of collusion. The House of Lords, in *Hooper v. Lane* (3), said that it was manifestly inexpedient to interfere with that statement of the law, which had been acted on for twenty years and upwards, and accepted it as being correct. Disapproval of it was expressed, however, by the majority of the Court of Exchequer, *Martin B.* dissenting, in *Ockford v. Freston* (4), where it was decided that a detainer could not be enforced against a person already in custody of the sheriff. At a later date, the Court of Queen's Bench approved of the opinion of *Martin B.* : *Bateman v. Freston* (5); but, later still, the Court of Appeal in Chancery, without expressly deciding the point, disapproved of the reasoning in the decision in the Court of Queen's Bench : *Ex parte Freston*. (6) It is obvious that if detainers cannot be put in force by the sheriff it would be futile to search for them, but, in view of the abovementioned decisions, it appears to me that the statement of the law as accepted by the House of Lords must still be treated as being in force.

Then it is contended that any writs or detainers in the District Court cannot be taken into consideration, as they cannot be enforced by the sheriff, who has to await their effect until the person to whom such writs may be directed lodges the prisoner in gaol. This contention, I think, must be correct, so far as it extends to writs issued under the order of a judge of the District Court. Section 114 of the District Courts Act, however, provides that a writ of *capias ad satisfaciendum* may be issued upon the order of a judge of the Supreme Court, although it would be based upon a judgment of the District Court. But such an order would require to be made under the powers conferred by the District Courts Act, and, consequently, the writ would have to be directed to the bailiff and gaoler. The sheriff is appointed under the Charter

1937.

WARD
v.
MURPHY.
—
Davidson J.

(1) 5 M. & W. 149.

(2) 1 S.A.L.R. 32.

(3) 6 H.L. Cas. 443 at p. 554.

(4) 6 H. & N. 446.

(5) 3 E. & E. 578.

(6) 3 De G. F. & J. 612 at 619.

1937.

WARD
v.
MURPHY.

Davidson J.

of Justice, where it is stated that he is to be responsible for his deputies appointed by him, and that his duties are to execute writs and processes of the Supreme Court and to receive and detain in prison such persons as are committed to his custody by the Supreme Court, or by the Chief Justice thereof. Consequently, he would have no concern with writs of *capias ad satisfaciendum* coming from the District Court, by whomsoever they might be issued, until the prisoner is placed in his custody under the Prisons Act. Nevertheless, as there can be no question, in this case, of the respondent having been held owing to an improper arrest by the sheriff, or through collusion, the sheriff would have the right to a reasonable time to see if there were any other writs or warrants of estreat justifying him in detaining his prisoner. He said, in his evidence, that the estreat book was locked up and that he could not see it until the morning, when the office was opened at 9 o'clock. Whether or not the jury chose to believe him in this respect, in my opinion, it could not be reasonably charged against him that, from the mere fact that he happened to be in his office at night time without his usual staff, he would be unreasonable in leaving his searches until the morning: *Samuel v. Buller*.⁽¹⁾ He would be entitled, for instance, to investigate the authenticity of the order for release, which had not been brought to him, or to make a proper inquiry as to whether the District Court order had, in fact, been quashed. Indeed, one would think that it would be negligent on his part if he failed to make inquiries on those subjects when he was merely told by the gaoler about the letter and that someone else had said that the order had been quashed. The Sheriff's evidence is also to the effect that his instructions from the former Chief Justice and another Justice of the Supreme Court were to issue instructions for release only through the Comptroller-General. This procedure is obviously necessary, as the Comptroller-General might also be holding the prisoner under his own powers conferred by the Prisons Act. At least some reasonable time would be required to enable the sheriff to issue formal directions and to have them carried into effect.

(1) 1 Exch. 439.

As the sheriff, accordingly, had the protection of the writ until it was discharged and for a reasonable time thereafter, he could only be liable for damages in respect of a trespass which occurred or continued beyond, or which was in excess of, a reasonable time. It has been contended in this connection that what amounts to a reasonable time is a question of law. When there is an issue as to whether a person had reasonable cause, or whether his conduct was reasonable, the matter does become a question of law, once the relevant facts have been found: *Glassbrook Brothers, Ltd. v. Leyson*.⁽¹⁾ Also, in the case of many other issues, for instance, where some descriptive term is used with reference to rights created by statute, a similar rule applies: *Knowles v. Southern Railway Co.* ⁽²⁾; *McPhee v. S. Bennett Ltd.* ⁽³⁾; and the same principle is applicable where the facts are admitted, or are not in dispute: *Heilbut, Symons & Co. v. Buckleton*.⁽⁴⁾ Similarly, in some instances in connection with the law relating to bills of exchange, where the question of what is a reasonable time is in issue, it may be a matter of law when the facts have been decided: *Hirschfield v. Smith*.⁽⁵⁾ But where the issue is whether a time is reasonable as a matter of degree, the question is one of fact: *Hart v. MacDonald* ⁽⁶⁾; *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee*.⁽⁷⁾ In the present case, the question of what is a reasonable time would, in my opinion, be one of degree, and fall within the lastly mentioned authority.

It is useful, then, to consider how the pleadings should have been framed in the action so as to have the issues properly presented to the jury. The defendant, in my opinion, should have averred that the writ issued out of the District Court and was not bad on the face of it. But, as there was no demurrer to the plea, and the necessary facts appeared in the evidence, any defect in that respect is cured. Then the plaintiff should have new assigned. Such a plea of new assignment might have taken the form of either charging another trespass than that pleaded, for instance, by alleging detention beyond a reasonable time, or of new assigning, and replying at the same time

1937.

WARD
v.
MURPHY.

Davidson J.

(1) [1933] 2 K.B. 91, at 108.

(2) [1937] A.C. 463, at 467.

(3) 52 W.N. 8.

(4) [1913] A.C. 30 at 36.

(5) L.R. 1 C.P. 340.

(6) [1910] 10 C.L.R. 417; 8 Austn Dig. 485.

(7) 1937 W.N. Eng. 158.

1937. in the form that the plaintiff sued not only for the trespasses
 WARD in the plea admitted but also for trespass or detention in excess
 v. of a reasonable time: Bullen & Leake, 457. As the re-
 MURPHY. spondent did not propose to claim damages for the period
 Davidson J. of detention before the writ was quashed, the former of those
 pleas by way of new assignment is the one which should have
 been adopted. The excess beyond a reasonable time after
 the discharge of the writ would be a new trespass: *Davis v.*
Capper (1); whilst the cause of action as alleged in the declar-
 ation only amounts to a charge of one continuing trespass
 throughout: Bullen & Leake, 755; *Lambert v. Hodgson*. (2)
 The addition of the claim to justify for a reasonable time after
 the discharge of the writ by way of amendment would make
 no difference, as there should still have been a new assignment:
Worth v. Terrington. (3) The effect of the plea of justification
 was merely to narrow the limits of the generality of the charge
 in the declaration. The plaintiff could not then join issue,
 for by so doing he would adopt the particular or restricted
 cause of action which the plea specified: Bullen & Leake,
 p. 653. Also, the plaintiff could not, by replication, merely
 deny that the cause of action specified in the plea was the cause
 of action in the declaration, as the only issue left would then
 be one of identity, and thereby the defendant would be pre-
 cluded from answering the cause of action on which the plain-
 tiff really relied: Bullen & Leake, p. 654; *Aldred v. Con-*
stable. (4) If the new assignment alleged a cause of action
 not only for trespasses admitted and purported to be justified
 by the plea, but also for excess, then the existence of the
 writ would be put at issue, and the defendant would have to
 reply further to the charge as to the excess. Section 93 of
 the Common Law Procedure Act provides on this subject
 that, by new assignment, the plaintiff proceeds for causes of
 action different from those which the plea professes to justify
 or for an excess over and above what the defences set out in
 the defendant's plea purport to justify, or both. If the new
 assignment alleges not only the trespass purported to be jus-
 tified, but also the excess, then, as already mentioned, it would
 be a reply as to the first part, and a new assignment as to the

(1) 10 B. & C. 28.

(3) 13 M. & W. 781.

(2) 1 Bing. 317.

(4) 6 Q.B. 370 at 380.

excess. A plea of joinder of issue by the plaintiff would only put in issue those facts which, before the general form of pleading, were allowed to have been traversed, and matters which had to be pleaded by new assignment must still be so pleaded, otherwise the only issues, in any event, would be the existence of the writ and the identity of the cause of action : *Glover v. Dixon* (1) ; *Magnay v. Burt* (2) ; Chitty's Pleadings, vol. III., p. 504. A new assignment makes no admission of the truth of the matter stated in the plea. It merely says that the matter in the plea is irrelevant to the true cause of action. It only amounts to an assertion, by the plaintiff, that he did not choose, and never intended, to sue for that trespass, or only that trespass, which the defendant attempted to justify : *Norman v. Wescombe*.(3) The whole object of new assigning is to compel the plaintiff to particularise his charge in the declaration, so that the defendant may plead not guilty or pay money into Court : Stephen, Pleading, 6th ed., 406 ; Bullen & Leake, 654. Accordingly, as the present respondent should have been placed in the position that he was bound to assert, as his cause of action, that he was claiming damages for trespass in respect of the detention in excess of a reasonable time after the discharge of the writ, the burden of proving such an excess should have rested on him, and the defendant should not have been called upon to bear the burden of proving that he only detained for a reasonable time : *Penn v. Ward*.(4) As the case stood on the pleadings, if the point had been properly taken at the hearing, there should have been a verdict directed for the defendant, unless the plaintiff amended his pleadings so as to produce the result which has been mentioned.

The defects in the pleadings were not insisted upon by either party, and the issues were left to the jury in the following form : " The case is one in which the burden of proof is on the plaintiff to prove that he was imprisoned by someone acting on behalf of the sheriff, and the burden of proof is on the sheriff to prove that the imprisonment was not unlawful. There is no dispute that the sheriff acted in a perfectly lawful way in keeping the plaintiff imprisoned in the first instance. The question for your determination is, whether he acted un-

1937.

WARD

v.

MURPHY.

Davidson J.

(1) 9 Exch. 159.

(2) 5 Q.B. 381.

(3) 2 M. & W. 349 at 360.

(4) 2 Cr. M. & R. 338.

1937. lawfully in keeping him imprisoned during the night of Monday, 22nd June of last year. If he did, the plaintiff is entitled to such reasonable compensation as you think he deserves for having spent another night in the debtors' prison."

WARD

v.

MURPHY.

Davidson J.

Left in this form, the issue places an undue burden upon the sheriff, as undoubtedly he was entitled to some reasonable time after the writ was set aside, and could only be made liable in damages for any imprisonment in excess of that time. The direction as to the onus of proof was not questioned.

The learned trial judge, however, also told the jury that "If the sheriff receives a paper which purports to be an order from a solicitor, he is not bound to act on it immediately and without inquiry. Indeed, he cannot lawfully act on such a document at all unless it is in fact authentic and unless no other reason exists for the prisoner's imprisonment than the particular debt in respect of which the solicitor has signed the order. The sheriff is, therefore, always entitled to continue to detain the prisoner for a reasonable time whilst he makes inquiries to see whether he can lawfully act on such an order. Indeed, it is his duty to do so. The question for you then, is, does it appear that the sheriff detained the plaintiff for an unreasonable time after the solicitor's order was brought to his notice."

After reviewing the evidence which had been given, his Honour gave the further following direction: "That, gentlemen, is the evidence that has been given on both sides, and obviously, if you accept the evidence of Colonel Murphy there would appear to be no reason whatever why there should not be a verdict for the defendant. As I have pointed out to you, it was the sheriff's legal duty to make proper inquiries before releasing the prisoner, and he was legally entitled to a reasonable time within which to make inquiries. He had no inkling of the matter until late at night after all his officers had gone and the District Court offices were closed, and, according to his evidence, if you accept it, he made his inquiries with the utmost diligence, and gave instructions for the plaintiff's release as soon as he safely could. The matter is for you, gentlemen, but unless you can see any reason to doubt the evidence of Colonel Murphy that he made every reasonable effort to ascertain whether circumstances existed justifying

the plaintiff's release, and acted on them as soon as he found he could safely do so, then it cannot be said that he acted unreasonably, and, in that case, your verdict will be for the defendant."

1937.

 WARD
v.
MURPHY.

 Davidson J.

It is true that it was open to the jury to disbelieve the sheriff, and also, if their minds had been directed to the point, to find that, after the offices opened in the morning at nine o'clock, he had occupied a time beyond what was reasonable for making inquiries, although it might be difficult to see how a reasonable decision to that effect could be given. But, having regard to the direction as to damages being on the basis of the respondent spending an extra night in prison, and to the further directions, firstly, that the question was whether the respondent was unlawfully imprisoned during the night of the 22nd June, and secondly, that the question was whether it appeared that the sheriff detained the plaintiff for an unreasonable period after the solicitor's order was brought to the sheriff's notice, it seems to be obvious that the jury was only asked to direct its attention to the consideration of the question of reasonableness as from the actual time when the gaoler told the sheriff of the contents of the letter and to the matter of imprisonment of the respondent overnight. In my opinion, upon such an issue, it was not open to the jury to find that there was unreasonableness on the part of the sheriff during that night and prior to the office opening in the morning. And if they did so find, as undoubtedly they appear to have done, it was such a verdict as reasonable men might not come to, and was against the weight of evidence within the rule as stated in *Mechanised and General Inventions Co. v. Austin*.(1)

The jury might, no doubt, have restricted themselves to assessing damages only in respect of a trespass committed by the sheriff in taking more than a reasonable time for inquiries, from about nine o'clock in the morning until he gave his directions to the Comptroller-General about eleven o'clock. But the sum awarded is so excessive that this assumption should be excluded. There are no circumstances of aggravation. It is not comparable with the case of a person who is arrested wrongfully and imprisoned even for a few minutes,

 (1) [1935] A.C. 346 at 375.

1937. in which case a jury might award a large sum as damages.
WARD The respondent had already been in prison for several days,
v. and to award £250 for the extra imprisonment of approxi-
MURPHY. mately two hours, in my opinion, would indicate that the
Davidson J. jury did not assess the damage on that basis, as there is no
reasonable proportion whatever between that amount and
the circumstances of the case: *Mechanised and General In-*
ventions Co. v. Austin.(1)

When parties take their chance of what a jury will do, they are not permitted to raise new questions when the decision has gone against them: *Macdougall v. Knight* (2); but the objection that a verdict is against the weight of evidence cannot be taken except upon appeal: *Banbury v. Bank of Montreal.*(3)

Counsel for the defendant, however, did not assent to the manner in which the issues were submitted to the jury. On the contrary, in applying for a nonsuit, he took certain objections which, before the summing up, he said he repeated. These objections were firstly, that there was no evidence to go to the jury that there was any wrongful imprisonment of the plaintiff by the sheriff; secondly, that it was for the plaintiff to show, in accordance with the decision in *Samuel v. Buller*(4), that the order for release had been brought to the sheriff; and thirdly, that the onus did not rest on the sheriff to establish that, when he was merely told of the order by the gaoler (who was not his officer), he proceeded to institute inquiries then and there.

Counsel for the plaintiff has contended that, as no tenable objection was taken, after the summing up, to the form in which the issues were presented to the jury, it must be taken to have been assented to, and that, in the circumstances, the damages are not excessive. No ground of appeal has been taken that there was a misdirection notwithstanding the objections which were taken during the course of the trial and, if damages could have been properly assessed on the basis of there having been a wrongful imprisonment overnight, the amount possibly could not be called in question. But if the finding upon the issue as to wrongful imprisonment was

(1) [1935] A.C. 346 at 373.

(2) 14 A.C. 194 at 199.

(3) [1918] A.C. 626 at 706.

(4) 1 Exch. 439.

against the weight of evidence, as in my opinion was the case, no such objection could be taken except upon appeal, and, in fact, there was no assent to the form of the issues. For these reasons, the verdict should be set aside and a new trial be granted, when the real issue may then be submitted to the jury, as to whether there was a wrongful imprisonment after a reasonable time for the making of inquiries by the sheriff had elapsed. Both parties should have liberty to amend their pleadings. The costs of this appeal must be paid by the respondent. Costs of the new trial to abide the verdict.

1937.

WARD
v.
MURPHY.

Davidson J.

STEPHEN J. I have had the opportunity of conferring with Mr. Justice *Davidson*, and I agree with his conclusions and with his reasons.

In arriving at the conclusion that the onus is here on the plaintiff to prove excess, I was caused some difficulty by the dicta in *Reece v. Taylor*(1), partly disapproved in *Penn v. Ward*.(2) The solution, I think, is that, if a plaintiff chose sufficiently to particularise his claim in trespass, he may be able to throw an onus of proof on to a defendant, who is seeking to justify, which the defendant would not otherwise have to bear.

BAVIN J. I agree with the order proposed by my brother *Davidson*, and with the reasons given by him. I only wish to add that the examination of the principles and authorities relating to the obligations and liabilities of the sheriff, which has been necessary in this case, discloses ambiguities and uncertainties which might well receive the early attention of the Legislature.

*Verdict set aside. New trial granted.
Liberty to amend pleadings. Appellant
to have costs of appeal.*

Solicitors: *J. E. Clark* (Crown Solicitor); *S. G. Sommers & Stewart*.

(1) 1 Har. & W. 15; 4 Nev. & M. (K.B.) 469; 3 Nev. & M. (M.C.).
35; 5 L.J.K.B. 74.

(2) 2 Cr. M. & R. 338.