[HIGH COURT OF AUSTRALIA.]

CORBETT AND OTHERS . . . . . APPLICANTS;

AND

THE KING . . . . . RESPONDENT.

THE KING . . . . . APPLICANT;

AND

CORBETT AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES.

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SYDNEY, *May* 5; *Aug.* 15.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Landlord and Tenant—Ejectment—Warrant of possession—Conformity with requirements of Act—Warrant issued by a justice not party to the adjudication—Directed to particular police officers—Competency of all police officers to execute—Time for execution—"Not less than seven nor more than thirty clear days"—Withdrawal of warrant by landlord prior to execution—Landlord and Tenant Act 1899-1930 (*N.S.W.*) (*No.* 18 *of* 1899—*No.* 49 *of* 1930), *sec.* 23*—*Justices Act* 1902-1918 (*N.S.W.*) (*No.* 27 *of* 1902—*No.* 32 *of* 1918), *sec.* 98*—*Police Regulation Act* 1899 (*N.S.W.*) (*No.* 20 *of* 1899), *sec.* 13 (3).

Criminal Law—Empanelling jury—Panel exhausted—Tales de circumstantibus—Jurors appointed from another Court—Right of challenge—Jury Act 1912 (*N.S.W.*) (*No.* 31 *of* 1912), *secs.* 55, 57*.

Criminal Law—Statements from dock by several accused—"Comment" on failure to give evidence on oath—Each accused questioned by Judge—Crimes Act 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *secs.* 405*, 407*.

On 21st May 1931 the owner of certain property situate at Bankstown obtained an adjudication under sec. 23 of the *Landlord and Tenant Act* 1899-1930 (N.S.W.) from a stipendiary magistrate sitting at Campsie that she was

* The *Landlord and Tenant Act* 1899-1930 (N.S.W.) provided, by sec. 23:—"(1) When the term or interest of the tenant of any land . . . has been determined . . . and such tenant or any person claiming under him who is actually occupying such land or any part thereof neglects to quit and deliver up possession of such land . . . the landlord . . . or his agent may exhibit

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entitled to the possession of such property and that a warrant should issue for the purpose of putting her into possession within the period beginning on 11th and ending on 30th June 1931. Following upon the adjudication, a warrant, dated 11th June, was issued by another justice of the peace, a chamber magistrate, directed to "the senior officer of police at Campsie, in the Parramatta Police District in the State of New South Wales, and all other constables in the Police Force in the said State," authorizing and commanding him and them to enter upon the property within the period beginning 11th June and ending 30th June 1931, and to eject all persons therefrom and give possession to the owner. Entry was effected on 17th June, by police drawn from various parts of the metropolitan area, after a determined resistance by the tenant and numerous men, during the course of which the police and the men by whom they were attacked sustained injuries and the property was damaged. The tenant and the men associated with him were convicted of resisting and wilfully obstructing the police in the execution of their duty. The defendants appealed on the ground that the police were not in the execution of their duty inasmuch as the warrant did not comply with the requirements of sec. 23 of the *Landlord and Tenant Act* because (1) it was signed by a justice of the peace who took no part in the adjudication and therefore had no authority to sign it; (2) it was not directed to constables "of or acting in or for the district or place within which such land is situate"; and (3) the time fixed by the warrant for its execution was not a period "not less than seven nor more than thirty clear days from the date of such warrant."

Held, by the whole Court, as to (1) that the requisite authority was conferred by sec. 98 (2) of the *Justices Act* 1902-1918 (N.S.W.); as to (2) that although the warrant was directed in terms which did not coincide with the description provided by sec. 23 (2) (*c*) of the *Landlord and Tenant Act* 1899-1930 (N.S.W.) it was not thereby invalidated; and as to (3) that sec. 23 (2) (*c*) confers a discretion upon the justices to specify a particular number of days from the date of the warrant within the limits imposed by the sub-section, and the warrant

his information before any justice of the peace, who shall thereupon issue a summons . . . under his hand against the person so neglecting to quit and deliver up possession, requiring such person to appear before any two or more justices of the peace at the place where the Petty Sessions of the district in which such land is situated usually sit to show cause why such landlord should not be put into possession of such land. (2) If . . . such landlord or such agent gives due proof according to law to the satisfaction of the justices before whom the matter is heard, or the majority of them . . . that such landlord then has and had at the time of the service of the summons upon the tenant or occupier lawful right as against such tenant or occupier to the possession of such land, and that the tenant or occupier against whom such summons is issued was the tenant in possession or the actual occupier of such land at the time of the service of such summons, then . . . the said justices, or the majority of them, unless reasonable cause is shown or appears to them to the contrary, may (*a*) adjudge the landlord . . . entitled to possession of such land . . . and (*c*) issue a warrant under their hands directed to the constables and peace officers of or acting in or for the district or place within which such land is situate, or to any of them, or to any other person as a special bailiff in that behalf, requiring and authorizing them or him, within a period to be therein named, not less than seven nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into such land and to give possession of the same to such landlord or such

may be executed at any time within that number of days; and, therefore, as the warrant was valid, the constables, in executing it, acted in the execution of their duty.

Held, further, by *Gavan Duffy* C.J., *Rich*, *Dixon* and *McTiernan* JJ. (*Starke* and *Evatt* JJ. dissenting), that the warrant did not cease to operate as an authority to the police upon an instruction to them by the landlord not to execute it.

Barker v. *St. Quintin*, (1844) 12 M. & W. 441; 152 E.R. 1270, considered.

Held, also, that sec. 57 (2) of the *Jury Act* 1912 (N.S.W.) ought not to be construed as excluding in respect of jurors appointed thereunder by the sheriff the right of peremptory challenge conferred by sec. 55 of that Act.

Per Evatt J.: Observations on the conduct of a trial at which the presiding Judge interrogated each of a number of accused persons being tried together as to whether he did or did not propose to give evidence on oath, and on the effect of par. 2 of the proviso to sec. 407 of the *Crimes Act* 1900 (N.S.W.).

Special leave to appeal from the decision of the Court of Criminal Appeal of New South Wales: *R.* v. *Corbett*, (1932) 32 S.R. (N.S.W.) 93, refused.

APPLICATIONS for special leave to appeal from the Court of Criminal Appeal of New South Wales.

John Corbett, John Bowles and several other persons were, upon indictment, found guilty at the Court of Quarter Sessions held at Darlinghurst, Sydney, in November 1931, of (1) resisting certain constables in the execution of their duty, and (2) wilfully obstructing such constables in the execution of their duty, and were sentenced by the Chairman of Quarter Sessions, to various terms of imprisonment ranging from six months to eighteen months. Corbett and certain of the other prisoners appealed to the Court of Criminal

agent on his behalf, and such warrant shall be a sufficient authority to such constables, peace officers, or bailiff to enter upon such land with such assistants as they or he may deem necessary, and to give possession accordingly: Provided that the period referred to may be in excess of thirty days if the justices are satisfied that thirty days is not an adequate period in the circumstances."

The *Justices Act* 1902-1918 (N.S.W.) provides, by sec. 98:—"(1) One justice out of sessions may receive an information or complaint and grant a summons or warrant thereon . . . and do all . . . necessary acts and matters preliminary to the hearing, notwithstanding that by this Act or by the statute dealing with the matter, the information or complaint must be heard and determined by two or more justices. (2) One justice may after any such case has been heard and determined issue a warrant of commitment thereon or any process to enforce an adjudication. (3) The justice who so acts as in the two preceding subsections mentioned need not be one of the justices by and before whom the case is heard and determined."

The *Jury Act* 1912 (N.S.W.) provides:—By sec. 55:—"(1) The same right of challenge to jurors shall exist in cases of misdemeanour as in cases of felony. (2) No person shall, except for cause shown, be allowed in either case more than eight . . . challenges." By sec. 57:—"(1) Upon calling on for trial by a jury of

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Appeal of New South Wales. The following statement of the facts appears in the judgment of *Street* C.J., delivered on 18th December 1931 :—" The applicants were tried at the Court of Quarter Sessions at Darlinghurst last November, on charges of resisting and wilfully obstructing certain police officers in the execution of their duty. It appears that the owner of a house at Bankstown took proceedings in the Police Court at Campsie to evict her tenant who was wrongfully holding over after receiving notice to quit. On the 21st of last May she obtained an adjudication under sec. 23 of the *Landlord and Tenant Act* 1899 from a stipendiary magistrate that she was entitled to the possession of the premises and that a warrant should issue for the purpose of putting her into possession within the period beginning on the 11th and ending on the 30th June. Following upon this adjudication a warrant was issued dated the 11th June." The warrant was signed, not by the magistrate who had adjudicated, but by a chamber magistrate, and it was as follows :—" Warrant of Possession.—New South Wales, Parramatta Police District, to wit.—To the senior officer of police at Campsie in the Parramatta Police District, in the State of New South Wales, and all other constables in the Police Force in the said State, and all peace officers of or acting in or for the said District, and to each of them.—Whereas M. C. Nott, Esquire, one of His Majesty's stipendiary magistrates in and for the said District, in pursuance of Part IV. of the *Landlord and Tenant Act* of 1899 and of the *Fair Rents Act* 1915, on the twenty-first day of

twelve persons any criminal issue joined in . . . a Court of Quarter Sessions, the clerk of the Court shall, in open Court, put into a box . . . pieces of card furnished . . . by the sheriff, and shall draw out therefrom the said pieces of card, one after another, until twelve men appear without just cause of challenge, which said men, being duly sworn, shall be the jury to try such issue. (2) If the whole number of such pieces of card is exhausted, by challenge or otherwise, before twelve men are duly sworn either the Crown or the prisoner may pray a tales, whereupon the . . . chairman . . . may command the sheriff . . . forthwith to appoint as many good and lawful men of the bystanders (being qualified and liable to serve as jurors for the district) as may be sufficient to make up twelve men for the trial of the said issue."

The *Crimes Act* 1900 (N.S.W.) provides :—By sec. 405 : " Every accused person on his trial, whether defended by counsel or not, may make any statement at the close of the case for the prosecution, and before calling any witnesses in his defence, without being liable to examination thereupon by counsel for the Crown, or by the Court, and may thereafter, personally or by his counsel, address the jury." By sec. 407 (par. 2 of the proviso) : " It shall not be lawful to comment at the trial of any person upon the fact that he has refrained from giving evidence on oath on his own behalf."

May 1931, upon the hearing of an information exhibited by Isabella McDonald agent for Janet Webster Lewis (hereinafter called the landlord) against J. Parsons (a male) did adjudge that the said landlord is entitled to the possession of certain land known as 'Auld Reekie,' Brancourt Ave., Bankstown, in the Parramatta Petty Sessions District, and in the Parramatta Police District in the said State And the said magistrate also ordered that a warrant should issue, according to the provisions of the said Acts, for putting the said landlord into possession of the said land within the period beginning on the eleventh day of June 1931, and ending on the thirtieth day of June 1931 And whereas such conditions have not been complied with . . . Now, therefore, I, the undersigned, one of His Majesty's justices of the peace in and for the said State, do authorize and command you the said senior officer and other constables and peace officers as aforesaid, within the period beginning on the eleventh day of June 1931, and ending on the thirtieth day of June 1931, on any day except Sunday . . . between the hours of nine o'clock in the forenoon and four o'clock in the afternoon (with or without the aid of the said landlord or his said agent or any other person or persons whom you may think requisite to call to your assistance) to enter (by force if needful) into and upon the said land, and to eject all persons thereout and therefrom, and to give possession of the same to the said landlord or to such agent as aforesaid, on behalf of the said landlord. Given under my hand and seal this eleventh day of June 1931 at the Campsie Police Office in the District aforesaid.—(Sgd.) R. M. Stewart, Justice of the Peace." His Honor continued :— "The tenant, a man named Parsons, made up his mind to resist the eviction, and for that purpose he gathered together a number of men who barricaded the place with barbed wire entanglements to prevent entrance, and laid in a supply of stones—and, I think, other things—as weapons of offence. The result was that when a body of police officers went to the house on 17th June to enforce the warrant they were attacked both before and after entering the premises, and only succeeded in ousting the intruders after considerable injury had been inflicted upon them and their attackers,

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in addition to considerable damage to the property." The indorsement on the warrant was as follows :—" Executed this seventeenth day of June, in the year . . . one thousand nine hundred and thirty-one, at fifteen minutes past nine of the clock in the forenoon, premises vacant handed over to the owner.—(Sgd.) A. D. McMaster, Inspector, 2nd Class, Burwood, 17/6/1931."

Before the execution of the warrant the owner of the property saw Sergeant Wiblin, who was stationed at Bankstown, with a view to having the warrant withdrawn. No steps were taken by her, however, to obtain a magistrate's order withdrawing it.

At the trial of the tenant and persons associated with him on the charges above mentioned, evidence was given by Angus Donald McMaster, an inspector of police, that he was in charge of a district known as No. 9 Division, which comprised Bankstown and Campsie, and which formed part of the Metropolitan Police District, but did not include Parramatta which was in the Eastern Police District.

A further statement of the facts appearing in the judgment of *Street* C.J. shows that for the purposes of the trial " a panel of ninety-six jurors was summoned and, of these, seventy-three were peremptorily challenged by the accused and two were ordered to stand by by the Crown. In the result, after allowing for absentees, the whole panel was exhausted before the whole of the accused had exercised their right of peremptory challenge, and only six jurors were in the jury-box. The Crown prayed a tales and the sheriff went into an adjoining Court-room and appointed six qualified jurors who had been empanelled in another Court. These six men were put in the jury-box without any right of challenge being given to those of the accused who had not exercised their full right of peremptory challenge, and the trial proceeded before a jury constituted in this way . . . None of the accused gave evidence, but the learned Chairman of Quarter Sessions asked each whether he was going to make a statement or to give evidence. Mr. *Evatt* protested, and, after two or three had been questioned in that way, he informed the learned Chairman that they were all making statements. The learned Chairman, however, continued to interrogate each one in turn as to his intention, the form of his inquiry varying slightly in different cases. For instance, in the case of

Makaroff this took place :—His Honor : 'Are you making a statement from there ?' Accused : 'Yes.' His Honor : 'You are not giving evidence ?' Accused : 'No.' In the case of Sammon what was said was this :—His Honor : 'Do you wish to make a statement from there ?' Accused : 'Yes.' His Honor : 'And not give evidence ?' Accused : 'No.'"

The appeals were allowed by the Court of Criminal Appeal to the extent that the convictions were quashed, but a new trial was ordered on the grounds (1) that as some of the accused had been deprived of their right of peremptory challenge the jury was not properly empanelled, and (2) that in the circumstances the remarks of the Chairman of Quarter Sessions amounted to comment within the meaning of sec. 407 (2) of the *Crimes Act* 1900 (N.S.W.). Apart from one question which was answered against the accused, the Court of Criminal Appeal found it unnecessary to answer certain questions raised as regards the warrant : *R.* v. *Corbett* (1).

From this decision the appellants therein and also the Crown now applied for special leave to appeal to the High Court—the former on the ground that owing to certain alleged irregularities in the warrant the constables when executing it were not in the execution of their duty ; and the latter on the grounds (*a*) that the right of peremptory challenge did not extend to a case where a tales had been granted in accordance with sec. 57 (2) of the *Jury Act* 1912 (N.S.W.), (*b*) that the Court of Criminal Appeal was in error in holding that the accused who had fully exercised their rights of peremptory challenge were prejudiced by being tried with the other accused, and (*c*) that the remarks of the trial Judge did not contravene sec. 407 (2) of the *Crimes Act* 1900.

Evatt, for the applicants. The warrant of possession issued in this matter was, on the face of it, bad on three grounds, and, therefore, void. The first ground is that it should have been issued by the adjudicating magistrate and not by a single justice, acting as a chamber magistrate, who took no part in the adjudication (*In re Smith* ; *Ex parte Hunter* (2) ; see also *Landlord and Tenant Act* 1899-1930 (N.S.W.), secs. 23, 33 and Schedule E ; *Hammond and Davidson's*

(1) (1932) 32 S.R. (N.S.W.) 93.

(2) (1867) 4 W. W. & à B. (L.) 276.

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Landlord and Tenant, 3rd ed., pp. 336, 350, 383, 384). The position is not met by sec. 98 of the *Justices Act* 1902-1918 (N.S.W.). Sub-sec. 2 of that section refers to the issuing of warrants rendered necessary to enforce the payment of fines, and not, as here, to the issuing of a warrant which forms a material part of the adjudication, and the time for enforcement of which is a matter of discretion. The second ground on which the warrant is bad is that it is directed to the wrong persons, that is, to the senior officer of police at Campsie in the Parramatta Police District. The district referred to in sec. 23 (2) of the *Landlord and Tenant Act* is the Petty Sessions District in which the land in question is situate. The land here in question is situate at Bankstown, four miles distant from Campsie; neither of these places is within the Parramatta Police District, but both are within the Parramatta Petty Sessions District. In the circumstances the warrant should have been directed to the senior officer of police at Bankstown or to the senior officer of police in the Parramatta Petty Sessions District. Unless the warrant is directed to the police in the district as required by the Act, it is bad (*Jones* v. *Chapman* (1)). The third ground on which the warrant is bad is that the time shown therein for its execution is not in accordance with the provisions of sec. 23 (2) (*c*) of the *Landlord and Tenant Act*, which authorizes and requires the person to whom the warrant is directed to enter into the land and give possession to the landlord "within a period to be . . . named" in the warrant "not less than seven nor more than thirty clear days from the date of such warrant." Here the warrant was issued on 11th June and purports to authorize entry "within the period beginning on 11th June 1931 and ending on 30th June 1931." Under the warrant entry could have been effected at any time on or after 11th June, and was actually effected on 17th June, so that seven clear days after the issue of the warrant were not allowed to elapse as required by the section (*Ex parte Cahill* (2); *Ex parte Mobbs* (3)). The operation of a warrant issued under sec. 23 is suspended for the period of seven clear days following its issue (*Jones* v. *Foley* (4); *R.* v. *Hopkins* (5)). The date upon which the warrant was to be executed should

(1) (1845) 14 M. & W. 124; 153 E.R. 416.
(2) (1891) 7 N.S.W.W.N. 138.
(3) (1900) 17 N.S.W.W.N. 156.
(4) (1891) 1 Q.B. 730.
(5) (1900) 64 J.P. 454.

have been definitely stated therein. The warrant is granted at the time of the adjudication (*Todd* v. *Enticott* (1)). Police constables are not protected from liability for their acts if the warrant, as here, is invalid on the face of it (*Halsbury's Laws of England*, vol. XXIII., par. 663 ; see also *Chaster's Public Officers*, p. 624).

[STARKE J. referred to *Moravia* v. *Sloper* (2).]

No protection at common law is afforded to constables who execute a warrant not properly issued (*Feather* v. *Rogers* (3)), or which was not directed to them (*Sly* v. *Stevenson* (4)). As to whether the constables acted bona fide is beside the point. The police were the agents of the owner of the land, and after the receipt of her instructions withdrawing the warrant no further action thereon should have been taken by the police (*Barker* v. *St. Quintin* (5)).

Crawford, for the respondent. The warrant was issued from the Petty Sessions of the district in which the land in question is situate. It is a warrant of the adjudicating magistrate, signed by the chamber magistrate in a ministerial capacity, the effective part of the whole proceedings being the adjudication. The warrant was properly issued by the chamber magistrate under the powers conferred by sec. 98 of the *Justices Act* 1902-1918 (N.S.W.). The warrant was valid, the effect of it relating back to the date of the adjudication ; therefore the police acted in the execution of their duty. So long as the form and terms of the warrant and the procedure followed as regards its execution are substantially correct, the verdict should not be disturbed (*R.* v. *Shannon* (6)). A constable is bound to execute a warrant which contains the direct order of a magistrate who has jurisdiction over the subject matter, and the constable is protected if he bona fide believes he is acting in the execution of his duty. (See also *Archbold's Criminal Pleading, Evidence and Practice*, 25th ed., p. 862.) The right of challenge by the accused on the empanelling of the jury did not extend to the talesmen appointed thereto. The history of the legislation on this matter, commencing with the Act 37 Geo. II. c. 24, shows that the New South Wales

(1) (1887) 13 V.L.R. 475 ; 9 A.L.T. 42.
(2) (1737) Willes 30 ; 125 E.R. 1039.
(3) (1909) 9 S.R. (N.S.W.) 192.
(4) (1826) 2 C. & P. 464 ; 172 E.R. 209.
(5) (1844) 12 M. & W. 441 ; 152 E.R. 1270.
(6) (1883) 23 N.B.R. 1.

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Legislature intentionally omitted the right to challenge talesmen from the relevant statutes (*R.* v. *Valentine* (1)).

[DIXON J. referred to *Vicars* v. *Langham* (2).]

That case refers to challenges to the array, on circuit.

[MCTIERNAN J. referred to *Archbold's Criminal Pleading, Evidence and Practice*, 26th ed., p. 192, as to challenge to the array.]

The right to challenge talesmen was intentionally omitted by the Legislature from the relevant statutes because of the decision in *Levinger* v. *The Queen* (3)). The remarks of the trial Judge did not amount to comment within the meaning of sec. 407 of the *Crimes Act* 1900 (N.S.W.) : such remarks were intended to, and did in fact, inform the accused as to their rights (*R.* v. *Villars* (4)).

Evatt, in reply. As the trial Judge had previously been informed that each of the accused intended to make a statement his remarks amounted, in the circumstances, to comment within the meaning of sec. 407 of the *Crimes Act*.

Cur. adv. vult.

Aug. 15. The following written judgments were delivered :—

GAVAN DUFFY C.J., RICH AND DIXON JJ. These are applications by the defendants and by the Crown for special leave to appeal from a decision of the Supreme Court of New South Wales (sitting as a Court of Criminal Appeal) by which a new trial was ordered upon an indictment charging the defendants under sec. 58 of the *Crimes Act* 1900 with resisting constables in the execution of their duty.

The defendants, who were convicted before a Court of Quarter Sessions, appealed to the Supreme Court upon grounds which included the contention that on the occasion when resistance was offered to the constables they were not acting in the execution of their duty and that, therefore, the defendants were entitled to a verdict of acquittal. The Supreme Court decided against this contention, but upheld two further grounds taken in support of the

(1) (1871) 10 S.C.R. (N.S.W.) 113.
(2) (1618) Hob. 235 ; 80 E.R. 381.
(3) (1870) L.R. 3 P.C. 282.
(4) (1927) 20 Cr. App. R. 150.

appeal and quashed the conviction and ordered a new trial. The grounds upheld were (1) that the jury had not been chosen according to law, because, the panel having been exhausted and a tales awarded, the Chairman ruled that the prisoners were not entitled to challenge the talesmen peremptorily, a ruling which the Supreme Court considered erroneous; (2) that the failure of the prisoners to give evidence on oath had been made the subject of comment by the Chairman of Quarter Sessions.

The defendants seek to appeal from the new trial order upon the ground that the constables were not acting in the execution of their duty, and the Crown upon the ground that no peremptory challenge to the polls is given by law when a tales is awarded, and that, so far as any comment was made, it was not contrary to law.

The constables whom the defendants resisted were attempting in the execution of a warrant of possession to evict a tenant from a dwelling. There could be no doubt that the constables were acting according to the exigency of the warrant, but the contention is made that the warrant conferred no authority upon them because it was not issued or granted in accordance with the provisions of the *Landlord and Tenant Act* 1899 and was a nullity. The Supreme Court did not decide whether any of the objections made to the warrant were well founded. The Court assumed that the warrant did not comply with the requirements of the statute, but held that the warrant did not appear upon its face to be invalid, and that a constable, who, in good faith, executed such a warrant, acted in the execution of his duty. This proposition is somewhat too widely stated. The cases decided upon enactments making penal the obstruction or resistance to an officer in the course of the execution of his duty show that, when the alleged duty arises from a warrant, the charge cannot be sustained unless the warrant did operate in law as an authority to the officer, and, unless when he was resisted, he was in the course of executing that authority according to law (*R.* v. *Sanders* (1); *Codd* v. *Cabe* (2); *R.* v. *Cumpton* (3); *R.* v. *Levesque* (4)). It is not enough that the officer was acting bona fide in obedience to a warrant, which, although bad, appeared to be good. It is true

(1) (1867) L.R. 1 C.C.R. 75.
(2) (1876) 1 Ex. D. 352.
(3) (1880) 5 Q.B.D. 341.
(4) (1918) 42 Dom.L.R. 120; 45 N.B.R. 522.

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that generally, in such a case, he would not be liable as for an actionable wrong. But he is not protected from liability because it is his duty to execute a bad warrant. The protection is conferred upon him because "the public interest requires that officers who really act in obedience to the warrant of a magistrate should be protected" (*Price* v. *Messenger* (1), 24 Geo. II. c. 44; cf. *Landlord and Tenant Act* 1899, sec. 28, and *Jones* v. *Chapman* (2)).

In considering, however, whether an officer acting under a warrant is in the course of the execution of his duty, it must be remembered that it is not every defect or irregularity in the warrant and not every non-compliance with statutory provisions that destroys the efficacy of the process. Unless the warrant is a nullity, it will operate to confer upon the officer an authority resistance to which would constitute the offence.

The grounds upon which the warrant in the present case is said always to have been a nullity are three in number.

The first ground is that the warrant was not directed to the proper officers. Sec. 23 (2) (*c*) of the *Landlord and Tenant Act* 1899 empowers the magistrates to issue a warrant of possession directed to the constables and peace officers of, or acting in or for, the district or place within which the land is situate, or to any of them, or to any other person as bailiff in that behalf. In *Jones* v. *Chapman* (3) it was held that a warrant of possession would not confer authority upon any person outside this description. The warrant now in question was directed to constables and peace officers under a description which did not coincide with the description provided by the statute. Constables, however, might answer both the descriptions contained in the warrant and that required by the enactment, and the constables who acted in execution of the warrant appear at least to have included officers who answered the statutory description. (See too *Police Regulation Act* 1899 (N.S.W.), sec. 13 (3).) The first objection to the warrant, therefore, fails.

The second objection is that neither the warrant nor the adjudication, which it recites, complies with the requirement contained in sec. 23 (2) (*c*) with respect to the time or period to be stated in the

(1) (1800) 2 Bos. & P. 158, at p. 161; 126 E.R. 1213, at p. 1215.

(2) (1845) 14 M. & W., at p. 130; 153 E.R., at p. 419.

(3) (1845) 14 M. & W. 124; 153 E.R. 416.

warrant for its execution. The provision enables magistrates to issue a warrant, directed to the officers described, "requiring and authorizing them or him, within a period to be therein named, not less than seven nor more than thirty clear days from the date of such warrant, to enter" and give possession of the land. The adjudication ordered that a warrant should issue for putting the landlord in possession within the period beginning on 11th June 1931 and ending on 30th June 1931. The warrant was issued on 11th June 1931 and named a period beginning on that day and ending on 30th June 1931. The interpretation of the statute adopted in naming such a time requires that the warrant shall give a period during which the officers must execute it and the period shall begin with the date of the warrant and extend to a time not less than seven days nor more than thirty clear days from that date. It is objected that this construction is incorrect and that the provision means that a period must be given by the warrant commencing not less than seven clear days from the date of the warrant and ending not more than thirty clear days from that date. The grammatical meaning of the language in which the provision is expressed is opposed to this interpretation, but it is adopted by the form of adjudication given in Schedule E of the Act. On the other hand, the form of warrant given in the same Schedule adopts the first interpretation, that upon which the warrant was based in the present case. The language upon which the question arises is taken from 1 & 2 Vict. c. 74, sec. 1, and it seems everywhere to have occasioned much confusion and uncertainty as to its meaning. In New South Wales the first construction was accepted in *Ex parte Cahill* (1) and the second in *Ex parte Mobbs* (2). The question is examined in his work on *Landlord and Tenant*, 6th ed., at p. 900, by Mr. *Foa*, who, after referring to what English authority there is, submits that the true meaning is that upon which the warrant in this case proceeds. This view is in accordance with the ordinary meaning of the words of the enactment and should be adopted. The proviso which was added to sec. 23 (2) (*c*) by sec. 3 (*a*) (i.) of Act No. 49 of 1930 is consistent with this interpretation. (See too, per *Cussen* A.C.J. in

(1) (1891) 7 N.S.W.W.N. 138. (2) (1900) 17 N.S.W.W.N. 156.

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McLaren v. *Gannaway* (1).) The second objection to the validity of the warrant, therefore, fails.

The third objection is that the justice, who issued the warrant, had no authority to do so. Sec. 23 of the *Landlord and Tenant Act* 1899 provides that the justices before whom the matter is heard, or a majority of them, unless reasonable cause is shown may (*a*) adjudge the landlord entitled to possession of the land, and (*b*) award costs to him, and (*c*) issue a warrant of possession. Sec. 24 enables the justices by whom such adjudication is made to postpone the issuing of such warrant or to suspend its execution for a limited time. Stipendiary magistrates may do alone any act, and exercise alone any jurisdiction which might be done or exercised by two justices (sec. 10 of the *Justices Act* 1902 (N.S.W.)). The adjudication in the matter in question was made by a stipendiary magistrate. But although he ordered that a warrant should issue, he did not himself issue it under his hand. The warrant was issued under the hand of a single justice. If the provisions of sec. 23 (2) (*c*) of the *Landlord and Tenant Act* 1899 as affected by sec. 10 of the *Justices Act* 1902 alone governed the matter, there could be no doubt that a warrant of possession must be issued by the magistrate who made the adjudication. But sec. 98 of the *Justices Act* 1902-1918 makes the following provision :—" (1) One justice out of sessions may receive an information or complaint and grant a summons or warrant thereon, and may issue his summons or warrant to compel the attendance of any witness, and do all other necessary acts and matters preliminary to the hearing, notwithstanding that by this Act or by the statute dealing with the matter, the information or complaint must be heard and determined by two or more justices. (2) One justice may after any such case has been heard and determined issue a warrant of commitment thereon or any other process to enforce an adjudication. (3) The justice who so acts as in the two preceding sub-sections mentioned need not be one of the justices by and before whom the case is heard and determined." Since the words " or any other process to enforce an adjudication " were introduced into sub-sec. 2 by Act No. 24 of 1909, it appears to have been the practice in New South Wales for one justice to issue warrants

(1) (1932) V.L.R. 166, at p. 170.

of possession. The question is whether that practice is justified. So far as the law respecting summary proceedings before justices out of sessions is applicable, it governs proceedings for recovery of possession (sec. 31 of the *Landlord and Tenant Act* 1899). But sec. 98 cannot be incorporated by this provision. If it applies, it must do so of its own force as a later inconsistent enactment intending to include in its operation proceedings for the recovery of possession. The operation of sub-sec. 1 is clearly wide enough to include such proceedings. The words " notwithstanding that by this Act or by the statute dealing with the matter the information or complaint must be heard and determined by two or more justices " and the provision contained in sub-sec. 3 point unmistakably to such enactments as sec. 23 (2). In sub-sec. 2 the words " any such case " require an antecedent in sub-sec. 1, and a scrutiny of sub-sec. 1 shows that the antecedent is contained in the expression " notwithstanding that by this Act or by the statute dealing with the matter " &c. This reference together with sub-sec. 3 makes it clear that sub-sec. 2 applies to proceedings after adjudication taken under statutes which in terms require that two justices shall adjudicate and that the same justices shall act in the subsequent proceedings. A warrant for possession answers the description " process to enforce an adjudication." It is said, however, that by sec. 23 (2) of the *Landlord and Tenant Act* 1899 the power to issue a warrant, as well as the power to adjudicate the landlord entitled to possession, is made conditional upon proof of the creation and determination of the tenancy and of the facts mentioned therein, and that a discretion is confided to the justices by the sub-section to withhold the warrant even after adjudication if reasonable cause is shown or appears. These considerations found a suggestion that sec. 98 (2) of the *Justices Act* 1902-1918 does not contain enough to transfer to a single justice, who by sec. 13 may not adjudicate in respect of any matter or make any order, the function of considering the preliminary proofs and of exercising such a discretion. But the form in which sec. 23 is expressed arises not from an intention that proof of the facts which it mentions should be given after an adjudication of possession, nor that a separate discretion should be exercised in respect of the warrant, but from the fact that the complete function

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of adjudicating upon the information and of granting a warrant in pursuance of the adjudication was confided to the same magistrates. If those magistrates had, under sec. 24, postponed the issue of a warrant, they could not, if afterwards the landlord applied for a warrant, have gone behind their adjudication, and required proof once again of the facts upon which the adjudication had been founded. It seems doubtful, too, whether at that stage they could have refused or deferred the grant of a warrant, except pursuant to secs. 24 and 26. But even if, after adjudication of possession, a warrant may be withheld upon discretionary grounds under the heading of "reasonable cause," the function of issuing a warrant would not involve adjudication and the warrant would none the less be a process to enforce an adjudication. For these reasons sec. 98 (2) of the *Justices Act* applies to warrants of possession, and, accordingly, the third objection to the warrant fails.

But although the warrant was good when granted by the magistrate and the constables to whom it was given were bound to execute it, the defendants assert that it was afterwards countermanded by the landlord and that thereupon it ceased to operate as an authority to the officers. At common law a sheriff to whom a writ of execution is directed is bound to desist from executing it if the judgment creditor expressly forbids him from executing it, and he becomes a trespasser if he proceeds (*Barker* v. *St. Quintin* (1)). A reason is given in an observation of *Parke* B. (2) :—"The sheriff is not bound to execute a writ which is not delivered to him to be executed in due form at law. And after a countermand by the plaintiff before the execution of the writ, it is no longer in the hands of the sheriff to be executed in due form of law." See *Hunt* v. *Hooper* (3). In the course of his opinion in *Hooper* v. *Lane* (4) *Erle* J. said :—"A party leaving a writ with the sheriff is, strictly, a principal dealing with an agent. The sheriff must execute according to his instructions, and in this, as in all cases, his duty is placed between opposite perils." Lord *Cranworth* modified the generality of this proposition saying (5) :—"The sheriff, though for some purposes an agent of the party

(1) (1844) 12 M. & W. 441 ; 152 E.R. 1270.
(2) (1844) 12 M. & W., at p. 448 ; 152 E.R., at p. 1273.
(3) (1844) 12 M. & W. 664, at p. 672 ; 152 E.R. 1365, at p. 1369.
(4) (1857) 6 H.L.C. 443, at p. 522 ; 10 E.R. 1368, at p. 1399.
(5) (1857) 6 H.L.C., at pp. 549, 550 ; 10 E.R., at p. 1410.

who puts the writ into his hands, is not a mere agent. He is a public functionary, having indeed duties to perform towards those who set him in motion analogous, in many respects, to those of an agent towards his principal; but he has also duties towards others, and particularly towards those against whom the writs in his hands are directed."

How far do these doctrines apply to constables and others to whom is directed a magistrate's warrant granted in aid of a civil right? Between a warrant and a writ there is little resemblance either in origin or in nature. A warrant is a precept under the hand and seal or hand of a person vested with authority empowering another or others to do an act or perform a function. The warrant of a magistrate was considered so much a delegation of his authority that, before the rule was abrogated by statute, the warrant lapsed if he died or ceased to be a justice before it was executed (*Normand* v. *Mills* (1)). Thus, in *Dickenson* v. *Brown* (2), Lord *Kenyon* said that a warrant of a magistrate not made returnable at a particular time continued in force until it was fully executed provided the magistrate so long lived. A sheriff may, and usually does, by his warrant empower a bailiff to issue a writ of execution directed to the sheriff. But a constable to whom a warrant is directed may not employ a deputy or agent who is not himself within the direction of the warrant (*Symonds* v. *Kurtz* (3)). *Field* J. applied the maxim *delegatus non potest delegare* treating the constable as the magistrate's delegate (4). According to a well known text-book, "a justice may . . . at any time withdraw his own warrant, which is a mere command to a constable obtained upon *ex parte* application, and may be countermanded at any time," a matter, however, upon which there seems to be little or no authority (see *Stone's Justices' Manual* (1932), 64th ed., p. 168; *R.* v. *Crossman and Leyland*; *Ex parte Chetwynd* (5), and *Barons* v. *Luscombe* (6)). At common law a constable who refused to obey a valid warrant properly directed to him committed a misdemeanour. (Compare *Police Regulation Act*

(1) (1700) 12 Mod. 347; 88 E.R. 370.
(2) (1794) Peake 307; 1 Esp. 218; 170 E.R. 166.
(3) (1889) 61 L.T. 559; 5 T.L.R. 511.
(4) (1889) 61 L.T., at p. 560; 5 T.L.R., at p. 512.
(5) (1908) 24 T.L.R. 517.
(6) (1835) 3 A. & E. 589; 111 E.R. 537.

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1899 (N.S.W.), sec. 14.) The powers and authority of magistrates formerly related to matters which were of a criminal or at least of a public nature, and it is only by modern statutes that jurisdiction has been bestowed upon them over civil remedies for the enforcement of private rights. The very purpose for which warrants were granted would make it unreasonable to allow the person obtaining one to nullify it by his instructions. In a criminal matter, and in most other matters of a public nature, he really had done no more than put the magistrate in motion to enforce the law. But when warrants are diverted to a purpose analogous to writs of execution for the enforcement of civil judgments, the question arises how far the warrant should be considered to require the officer to whom it is directed to act as the agent of the party obtaining it. Can he countermand the warrant or withdraw it, so that the officer's authority ceases ? Many grounds of convenience may be urged in favour of the view that execution of a warrant of possession should be as much subject to the control of the complainant as the execution of a writ of *habere facias possessionem* is under the direction of a plaintiff. But in considering them, it must be remembered that the question is not whether a constable lawfully may comply with the request of the complainant to return the warrant, or to refrain from executing it, but whether upon such a request the warrant ceases to operate as an authority from the justice so that the constable becomes a trespasser if he acts under it. No doubt the constable charged with the execution of a warrant of possession would act with propriety if at the landlord's instance he allowed the warrant to remain unexecuted ; for the landlord is the only person who could complain that the exigency of the warrant was not complied with. But it does not follow that the constable is bound at his peril to disobey the warrant and to obey the landlord, a person whom he may not be able to identify and whose verbal instructions he may feel unable to verify or rely upon. Questions of convenience, however, cannot have much weight in determining whether the constable in relation to the commands of the complainant occupies the same situation as the sheriff with respect to those of a plaintiff who has sued out a writ of possession. The question is rather one of analogy, and on the whole we think the analogy fails at the point upon which the rule depends, that the plaintiff's

countermand operates to withdraw the writ. We do not think a constable to whom a justice directs his warrant should be considered as receiving delivery of the process of the complainant. Every warrant of a justice, whatever its purpose, is an authority from the justice to an officer. The relation between the magistracy and the office of constable is such, both traditionally and in present practice, that the justice should be conceived as himself communicating his commands, or causing them to be communicated, to the constable. His warrant ought not to be considered as a process issued like a writ of execution depending for its operation upon its subsequent delivery by the party obtaining it, a delivery which he may make or withhold or countermand at his pleasure. It does not empower the party to use the constable as his agent. The constable is the delegate of the justice and the warrant is the instrument of delegation. But the very reason given for the rule that the authority of the sheriff ceases when a writ of execution is countermanded by the party is that the writ is thus withdrawn and is as if it were never delivered. For these reasons, in spite of the alleged attempt of the landlord to countermand it, the warrant continued in force and remained an authority to the constables. Accordingly they were acting in the execution of their duty and the defendants were not entitled to a verdict of acquittal. It therefore becomes necessary to consider the Crown's application for special leave to appeal from the order setting aside the convictions and ordering a new trial.

The Supreme Court held that the jury had not been lawfully chosen because certain of the prisoners were not permitted to challenge the talesmen. Sec. 57 (2) of the *Jury Act* 1912 (N.S.W.) provides that if the whole number of the pieces of card placed in the box " is exhausted, by challenge or otherwise, before twelve men are duly sworn, either the Crown or the prisoner may pray a tales, whereupon the Court or Judge or Chairman, as the case may be, may command the sheriff or his deputy forthwith to appoint as many good and lawful men of the bystanders (being qualified and liable to serve as jurors for the district) as may be sufficient to make up twelve men for the trial of the said issue." The question is whether persons appointed as talesmen under this provision are liable to peremptory challenge.

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At common law, if the number of jurors proved insufficient for the purposes of a trial before the Court itself, writs of *decem tales*, *octo tales*, &c., might be awarded until sufficient jurors were obtained; but the practice of awarding a *tales de circumstantibus* had a statutory origin. By 35 Hen. VIII. c. 6, secs. 6, 7 and 8, it was provided that where a full jury shall not appear before the justices of assize or *nisi prius* or else after appearance of a full jury by challenge of any of the parties the jury is likely to remain untaken for default of jurors, then the same justices upon request made by the plaintiff or defendant shall have authority to command the sheriff or other minister to whom the making of the return shall appertain to name and appoint, as often as need shall require, so many of such other able persons of the County then present at the said assizes or *nisi prius* as shall make up a full jury, which persons shall be added to the former panel and their names annexed to the same, and that the parties shall have their challenges to the juries so named and annexed to the former panel, as if they had been empanelled upon the *venire facias*. The operation of this provision was extended by 4 & 5 Phil. & Mar. c. 7, to proceedings to which the Crown was a party including criminal inquests (see *Hawkins' Pleas of the Crown*, book 2, ch. 41, sec. 18, and cf. *Sir John Sabin's Case* (1)). Thus under statute there was the same challenge as in the case of the original panel as well to the polls as to the array of talesmen (see *Bacon's Abridgment Juries* (c), pp. 546-548; *Blackstone's Commentaries*, book III., p. 364) as also was the case with talesmen at common law (see per *Parke* B. in *Gray* v. *The Queen* (2)).

The manner in which the law relating to juries was introduced into New South Wales is explained in *R.* v. *Valentine* (3). An express provision giving challenges to talesmen was included in sec. 37 of 6 Geo. IV. c. 50, which regulated the procedure in relation to juries. The Crown contends that the omission of such a provision from the New South Wales statute when considered with the form of the expression in sub-sec. 2 of sec. 57 of the *Jury Act* 1912 (N.S.W.) " sufficient to make up twelve men for the trial of the said issue," should lead to the conclusion that it was not

(1) (1674) 3 Keb. 490; 84 E.R. 838.
(2) (1844) 11 Cl. & Fin. 427, at p. 474; 8 E.R. 1164, at p. 1181.
(3) (1871) 10 S.C.R. (N.S.W.), at pp. 122-124, 133-136.

intended that the talesmen should be liable to challenge, or at any rate to peremptory challenge. These considerations appear quite inadequate to support the inference. Although, strictly speaking, the right to challenge talesmen in the case of a *tales de circumstantibus* is not a common law right, yet the observations of *Tindal* C.J. in *Gray* v. *The Queen* (1) quoted with approval by the Privy Council in *Levinger* v. *The Queen* (2) are applicable: "If the question, whether his right to peremptory challenge has or has not been taken away, remains open to any doubt, it appears to me, that in accordance with the general principle of decision applied to criminal cases, *tutius erratur in mitiori sensu*, the decision of such question is to be given in favour of the prisoner, who is not to be deprived, by implication, of a right of so much importance to him, given by the common law, and enjoyed for many centuries, unless such implication is absolutely necessary for the interpretation of the statute."

For these reasons sec. 57 (2) ought not to be construed as excluding a right of challenge to the polls in the case of talesmen. Accordingly a new trial was rightly ordered.

Both applications for special leave to appeal from the order of the Supreme Court should be refused.

STARKE J. Corbett and others were jointly charged on indictment with resisting police officers in the execution of their duty and with wilfully obstructing police officers in the execution of their duty (*Crimes Act* 1900 (N.S.W.), sec. 58). Proceedings had been taken by a landlord, through her agent, against a tenant to recover possession of certain land under the *Landlord and Tenant Act* 1899, and, after adjudication on 21st May 1931 that the landlord was entitled to possession, a warrant of possession was issued, directed to the senior officer of police at Campsie, and to all other constables in the Police Force of New South Wales, commanding them, within the period beginning on 11th and ending on 30th June, to enter upon the land and to eject all persons on it and to give possession of the same to the landlord. It appeared that the police officers

(1) (1844) 11 Cl. & Fin., at p. 480; 8 E.R., at p. 1183.
(2) (1870) L.R. 3 P.C., at p. 289.

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proceeded to execute this warrant, but "the tenant . . . made up his mind to resist the eviction, and . . . gathered together a number of men who barricaded the place with barbed wire entanglements to prevent entrance, and laid in a supply of stones," &c., "as weapons of offence" (1), and it was only after a severe struggle and various casualties that the police succeeded in executing the warrant. Corbett and others jointly indicted with him were convicted for thus resisting and wilfully obstructing the police officers in the execution of their duty. The Court of Criminal Appeal set aside this conviction, and ordered a new trial, mainly on the ground that the persons charged were not allowed to exercise their right of peremptory challenge in respect of certain talesmen appointed pursuant to the provisions of the *Jury Act* 1912 (N.S.W.), sec. 57.

The Attorney-General for New South Wales desires special leave to appeal against the decision setting aside the conviction. But the decision was right, and for the reasons given by the Court of Criminal Appeal.

The accused persons desired special leave to appeal against the order for a new trial, and contended that a judgment and verdict of acquittal should be entered (*Criminal Appeal Act* 1912 (N.S.W.), sec. 6 (2)). This application might well be refused, as a matter of discretion, in the circumstances of this case. But we have heard a learned argument attacking the validity of the warrant of possession, and perhaps our reasons for rejecting this attack may be of assistance in the administration of justice. The grounds of attack were (1) that the warrant was issued by the wrong person; (2) that the warrant was directed to the wrong people; (3) that the warrant was not executed within the time thereby prescribed, or in accordance with the provisions of the *Landlord and Tenant Act*, sec. 23; (4) that the warrant was withdrawn by the landlord, or her agent, before execution.

The object of this attack upon the warrant is to establish that the police officers were not acting in the execution or performance of any duty imposed upon them by law. No duty was imposed by law upon the police officers to execute this warrant, other than that arising from the authority and command contained in the warrant

(1) (1932) S.R. (N.S.W.), at p. 95.

itself, which, it should be observed, is not that of a superior Court of common law. A suitor is liable for the execution of process of an inferior Court in a matter beyond its jurisdiction, but, like the sheriff of a superior Court, a police officer is called upon to show his warrant only. But he cannot justify under his warrant if on its face it is such as no law authorizes, and is therefore a nullity and of no more effect than a piece of waste paper (*Moravia* v. *Sloper* (1); *Andrews* v. *Marris* (2); *Carratt* v. *Morley* (3); *Mayor &c. of London* v. *Cox* (4)). Nor could he justify if he acted in excess of the authority of the warrant (*Ash* v. *Dawnay* (5)). Mere irregularities in procedure would not affect the justification, for it is no part of the duty of an officer to examine into the regularity of the proceedings upon which the warrant issues. It is his duty to execute the warrant according to its exigency (cf. *Countess of Rutland's Case* (6)). The act of an officer under a warrant unauthorized by law or an act in excess of the authority conferred by a warrant so authorized is illegal. Such acts are not in the execution or performance of the officer's duty, but in contravention of the law, and even actionable unless some statutory provision protects him for acts committed under the bona fide belief that he was acting in the execution of his authority (*Chaster* on *Public Officers*, p. 627). But the allegation that must be established on the present indictment is that the police officers were acting in the execution of some duty imposed by law; and proof that they bona fide believed that they were so acting, whilst possibly protecting them against civil action for a wrongful act, is irrelevant to the charge laid and would not establish it. On this basis, the specific objections to the warrant can now be considered.

(1) The warrant was issued by the wrong person.—This ground of objection means that under the *Landlord and Tenant Act* the adjudicating magistrates should have issued the warrant under their hands, and that the issue by another magistrate pursuant to the adjudication was without jurisdiction. I understand that the warrant was issued in accordance with the usual practice in New South Wales, and it is justified by the *Justices Act* 1902-1909, sec.98 (2).

(1) (1737) Willes 30; 125 E.R. 1039.
(2) (1841) 1 Q.B. 3; 113 E.R. 1030.
(3) (1841) 1 Q.B. 18; 113 E.R. 1036.
(4) (1867) L.R. 2 H.L. 239, at p. 263.
(5) (1852) 8 Ex. 237; 155 E.R. 1334.
(6) (1605) 6 Rep. 52b, at p. 54a.

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(2) The warrant was directed to the wrong people: it was not directed to the constables and peace officers of or acting in or for the district or place within which the land in question is situate or to any of them.—In my opinion this objection is untenable. The jurisdiction of the police officers of the State of New South Wales is not confined to any district or place (as is the case in England and elsewhere) but covers the whole territory of New South Wales, and they act in aid and assistance of each other. The administrative grouping of the police in New South Wales has nothing to do with their jurisdiction or authority: it extends, as I have said, over the whole area of the State. A police force so organized acts in and for the whole of the State, and a warrant addressed to the senior officer of police at Campsie, and to all other constables in the Police Force of New South Wales, or any of them, is a warrant addressed to constables and peace officers of or acting in or for the district or place within which the land is situate or some of them. Such a description would not, in any case, avoid the warrant even if it were irregular in form.

(3) The warrant was not executed within the time thereby prescribed or in accordance with the provisions of the *Landlord and Tenant Act*, sec. 23.—The warrant is dated the 11th June, and was executed on the 17th June. The statute prescribes that the justices may issue a warrant to police officers authorizing them within a period to be therein named, not less than seven nor more than thirty clear days from the date of the warrant, to enter on to such land and give possession to the landlord. According to the argument, the warrant could not have been executed lawfully until seven clear days had elapsed from the date of the warrant, because the statute and the warrant so direct. *Redman* (*Landlord and Tenant*, 7th ed., p. 806) says of the corresponding English provision that "the words have given rise to a difference of view of serious practical importance . . . as to the time at which the warrant may be legally executed" (see *Ex parte Cahill* (1); *Ex parte Mobbs* (2); *Jones* v. *Foley* (3); *R.* v. *Hopkins* (4)). *Redman* (*Landlord and Tenant*, 7th ed., proceeds at pp. 806 *et seq.*):—"According to one

(1) (1891) 7 N.S.W.W.N. 138.
(2) (1900) 17 N.S.W.W.N. 156.
(3) (1891) 1 Q.B. 730.
(4) (1900) 64 J.P. 454.

view it cannot be executed until after the expiration of the twenty-first day" (seventh in New South Wales), "and must be executed on some day named in the warrant between the twenty-first" (seventh) "and thirty-first days. According to the other view, while the section obliges the magistrate to name a period which must not fall short of twenty-one" (seven) "days and *may* extend to thirty days, it authorizes the officer charged with the warrant to execute it on any day falling within that period which may appear reasonable and just under varying circumstances. The section so construed places the actual date of execution in the discretion of the warrant officer. . . . Apart from authorities . . . the second is the more correct view. The first reads the statute as if it said 'on the expiration of twenty-one [seven] days' denoting a space of time on the lapse of which, or rather a named day after such lapse on which, the execution is to take place. The second view follows the actual words of the statute, 'within a period of . . . twenty-one [seven] days' which in their ordinary signification, denote a continuous space of time, and leave any point between the termini of that time to be selected for execution as circumstances may render just and convenient." *Foa, Landlord and Tenant*, 5th ed. p. 789, 6th ed. p. 900, is to the same effect. The directions in the form of adjudication in Schedule E to the Act are not in accordance with this view, but the form of adjudication and the warrant itself, omitting the erroneous direction, follow the words of the statute. To me the reasoning above set forth is convincing, and I cannot do better than adopt it.

(4) The warrant was withdrawn by the landlord or her agent before execution. It is well settled that a party may withdraw or countermand a process issued to enforce a judgment made in a civil action or proceeding against one of the parties. Thus a writ of *ca. sa.* or *fi. fa.* may be countermanded and the officer to whom it is addressed will not be justified in executing it after such countermand (*Barker* v. *St. Quintin* (1); *Hunt* v. *Hooper* (2); and cf. *Crozer* v. *Pilling* (3)). The object of such writs is to satisfy a debt due to the party suing out the same. A distinction must, however,

(1) (1844) 12 M. & W. 441; 152 E.R. 1270.
(2) (1844) 12 M. & W. 664; 152 E.R. 1365.
(3) (1825) 4 B. & C. 26, per *Holroyd* J., at p. 32; 107 E.R. 969, at p. 971.

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be observed between judgments or orders made in civil actions or proceedings for the enforcement of civil rights, and judgments and orders made for the purpose of securing the course of justice (*O'Shea* v. *O'Shea and Parnell* (1); *Attorney-General* v. *Kissane* (2)). But the warrant of possession clearly belongs to the former class of judgment or order. Its object is to enforce a civil right, the right to possession of land. A party has as much control over its issue and execution as he has in the case of writs of *ca. sa.* and *fi. fa.* (cf. *Cole* on *Ejectment*, pp. 342 *et seqq.*). If a party does not desire possession there is no reason of a public or overriding nature that demands that he should have it. Clearly, I should suppose, that would be so in the case of a writ of possession directed to a sheriff and issued out of the Supreme Court of a State in a civil action for the recovery of land. And I can see no distinction in principle between these cases and the case of a warrant issued under the provisions of the *Landlord and Tenant Act*. In my opinion, therefore, the authority of the police officers to execute the warrant had ceased if it had been in fact countermanded or withdrawn. There was some evidence fit to be submitted to a jury, of the withdrawal of the warrant. But another view was also open on the evidence, namely, that the agent, being afraid of injury to the property, suggested to a senior police officer the advisability of procuring a withdrawal of the warrant from the justices; but this course was not followed and the warrant remained effective.

The result is that the order for a new trial was right, and the applications for special leave should be refused.

EVATT J. These are two applications for special leave to appeal from the judgment of the Supreme Court of New South Wales which, sitting as the Court of Criminal Appeal, set aside the convictions of the applicants on charges of resisting and wilfully obstructing certain officers of police "then being constables in the execution of their duty," and ordered a new trial. The Crown asks for the restoration of the convictions of the accused, and the accused, that judgment of acquittal should be entered.

The Supreme Court did not determine the question of the validity of the warrant dated June 11, 1931, in executing which it is said

(1) (1890) 15 P.D. 59. (2) (1893) 32 L.R. Ir. 220.

that the officers of police were resisted and wilfully obstructed by the accused.

> "Assuming," said *Street* C.J., "that the warrant as issued did not comply with the requirements of sec. 23 of the Act, it does not follow that the police were not acting in the execution of their duty in taking steps to enforce it. A police officer receiving a warrant signed by a magistrate is not required to scrutinize it critically and to search the statute book to see that there is no irregularity. If there is nothing upon its face to suggest any invalidity, and if it comes to him in the course of his duty, apparently properly issued, he is acting in the execution of his duty in enforcing it, if he does so in good faith, even though his action may be invalidated by reason of some defect in the authority under which he acts. If it were otherwise, if a police officer every time he received a warrant of possession from a magistrate had to satisfy himself before acting upon it that the magistrate had issued it regularly, an extraordinary state of affairs might be brought about. If he acts illegally he may expose himself to penalties or to an action for trespass or some other form of tort, but as long as he acts in good faith, though illegally, in enforcing a warrant, the validity of which he has no reason to doubt, he is acting in the execution of his duty" (1).

All the cases relied upon for the adoption of this principle by the Supreme Court were concerned with the question of defences to civil actions. And the Supreme Court said that the position of an officer of police was "analogous to that of a magistrate entitled by statute to notice of an action intended to be brought against him for something done by him in the execution of his office. The authorities show that in such cases the magistrate purporting to act in the execution of his office, though illegally, is entitled to notice of any action intended to be brought against him" (2).

Now statutes which afford a special privilege to a magistrate or officer of police by way of grant of a defensive right, usually seek to protect the officer in respect of acts done "in the execution of his duty." And it has frequently been pointed out that, if the officers are acting lawfully in carrying out the relevant duty, no civil action against them could possibly succeed; and that, therefore, such statutes must intend to do more than protect the lawful acts of the officers. Hence there was forced upon the Courts a construction of the statutes giving officers some additional protection, i.e., a protection covering acts which were not lawful. So it has been repeatedly held that officers, acting bona fide and intending to execute their duty, may obtain the benefit of this class of enactment, although their actions are contrary to law.

(1) (1932) 32 S.R. (N.S.W.), at pp. 95, 96. (2) (1932) 32 S.R. (N.S.W.), at p. 96.

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But when the domain of criminal jurisprudence is reached, and when, as in sec. 58 of the New South Wales *Crimes Act*, special penalties are imposed upon persons guilty of resisting, obstructing, or assaulting a peace officer acting "in the execution of his duty," very different considerations arise. There is, in such case, no reason whatever for adopting the interpretation forced upon the Courts owing to the express terms of other Acts, granting police officers protection against civil liability although they have acted unlawfully. The obvious purpose of sec. 58 of the *Crimes Act* is that of inflicting a special punishment upon persons guilty of acts which are therein described. There is every reason for insisting upon strict proof that the acts answer to the statutory description. In the present case it lay upon the prosecution to prove that the officers of police were acting in the execution of their duty. It is no part of the duty of a constable to perform unlawful acts, even though some other statute shields him from the ordinary civil liability which would thereby attach to him.

Two cases dealing with this important part of the appeal may be referred to. In 1867, the Court for Crown Cases Reserved determined *R.* v. *Sanders* (1). Sanders was convicted of wounding a police constable "in the execution of his duty," and with intent to resist his lawful apprehension. It was objected that, as the warrant was directed to the "constable of Gainsborough," it could not be lawfully executed by any other person. The Court sustained the point, and quashed the conviction upon the ground that the arresting constable (though acting, no doubt, in perfect good faith) had no lawful authority to execute the warrant.

In *R.* v. *Cumpton* (2) the Court for Crown Cases Reserved quashed a conviction of the appellant for assaulting two constables in the execution of their duty. The Court examined the warrant of apprehension which the police officers were executing at the time of the assault, and determined that it did not confer legal authority for the arrest of the prisoner, as it had not been properly backed. Again, no question was raised as to the bona fides of the arresting officers, and *Field* J. said (3): "In this case it lies on the prosecution

(1) (1867) L.R. 1 C.C.R. 75.
(2) (1880) 5 Q.B.D. 341.
(3) (1880) 5 Q.B.D., at p. 345.

to make out that the constable has the power contended for, and in this I think they have failed."

The Supreme Court, therefore, acted erroneously in supposing that the offences charged did not require proof that the policemen were lawfully executing their duty when resisted or obstructed; the real question is whether it has been shown that the police officers were acting in the lawful discharge of duty, when on June 17th, 1931, they forcibly entered a house at Bankstown near Sydney in order to execute the warrant. That warrant is in evidence, and was issued under the terms of the *Landlord and Tenant Act* 1899.

It is said for the accused that the warrant is bad upon three separate grounds: (1) That it was signed by a chamber magistrate who had no authority to sign such a document; (2) that it was not addressed to the persons to whom alone it could lawfully be addressed under sec. 23 (2) (*c*) of the *Landlord and Tenant Act*; and (3) that the time which was fixed by the warrant for its execution was not that allowed and contemplated by sec. 23 (2) (*c*) of the Act.

(1) The first point is this. The warrant of possession in relation to tenements recovery in Courts of Petty Sessions is dealt with by sec. 23 (2) (*c*). The provision empowers the adjudicating justices, "unless reasonable cause is shown or appears to them to the contrary," to "issue a warrant *under their hands*." But the warrant which was executed by the officers was signed, not by the magistrate who on May 21st, 1931, adjudged that the landlord was entitled to possession of the land, but on June 11th, 1931, by a chamber magistrate.

The only authority which can justify the issuing of the warrant by the chamber magistrate is sec. 98 (2) of the *Justices Act* 1902, as amended in 1909. It provides that "one justice may after any such case has been heard and determined issue a warrant of commitment thereon or *any other process to enforce an adjudication*." The words italicized were added in the Act of 1909, and I am of opinion that the warrant of possession may fairly be described as the process which enforces the adjudication under sec. 23 (2) (*a*) that the landlord is "entitled to possession of such land."

(2) The second objection to the warrant cannot be sustained. The warrant is not framed with much care, but it should be taken

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as addressed to all constables ordinarily acting in the district or place of Bankstown, as well as to all other police officers in the State of New South Wales.

(3) Sec. 23 (2) (c) of the *Landlord and Tenant Act* provides that the warrant shall name a period "not less than seven nor more than thirty clear days from the date of such warrant," within which possession shall be given to the landlord. Two meanings have been assigned to this provision. In *Ex parte Mobbs* (1) Mr. *D. G. Ferguson* (later Mr. Justice *Ferguson*) successfully argued that the Act intended that the tenant could not be turned out of possession until the expiration of seven days from the date of the issue of the warrant. "There should," he contends, "be two dates mentioned within which possession should not be given; the first date must not be less than seven days and the last date not more than thirty days." In acceding to this argument *G. B. Simpson* J. (2) (with whom *Cohen* J. concurred) said:—

> "It is perfectly clear that the law has not been complied with. The adjudication states 'that a warrant shall issue for putting the said estate into possession of the said land within ten clear days from the date thereof.' Under that order, if the warrant issued (for instance) on the 1st September, possession could be taken on the very next day, whereas the Act says that possession cannot be taken except after expiration of seven days, and within thirty days after the date of the warrant."

The opposing view is that the warrant must name not two dates but one number, being a number not less than seven and not more than thirty, so that the selection of such number also fixes a period. This period commences from the date of the warrant and ends at the expiry of the number of days mentioned in the warrant. If the first interpretation is right, the warrant is clearly bad because the date of its issue was June 11th, and it authorized possession to be given "within the period beginning on June 11th, 1931, and ending on June 30th, 1931." Under its terms, it could have been acted upon immediately, and no provision was made in it for the expiration of seven days before its execution.

The interpretation in *Ex parte Mobbs* (1) accords with that given to a similar phrase in the English *Small Tenements Recovery Act* 1838, by *R.* v. *Hopkins* (3) and *Jones* v. *Foley* (4); and also with the

(1) (1900) 17 N.S.W.W.N. 156.
(2) (1900) 17 N.S.W.W.N., at pp. 156, 157.
(3) (1900) 64 J.P. 454.
(4) (1891) 1 Q.B. 730.

forms set out in the Schedules to the *Landlord and Tenant Act* itself.

On the other hand, *Foa*, in a powerful criticism of *R.* v. *Hopkins* (1), says :—

> "The opinion has been expressed by the King's Bench Division—perhaps owing to the somewhat peculiar circumstances of the case the judgment hardly amounts to a binding decision—to the effect that justices cannot order the warrant to be executed earlier than twenty-one days from its date. It is, however, submitted that this is not the correct construction of the statute. The words, it will be noticed, are 'within a period'; and, according to the ordinary meaning of the English language, they are by no means equivalent to the words 'at a date.' It is submitted that the true meaning of the enactment is that the warrant is, at the discretion of the justices, to specify a particular number of days (from twenty-one to thirty inclusive) from its date,—for instance, twenty-five: and that in such case it may be executed 'within' —i.e., *at any time within*—that number of days" (5th ed., p. 789; 6th ed., p. 900).

The Legislature of New South Wales by Act No. 49 of 1930, sec. 3 (*a*) (i.), has given its approval to the second interpretation, by adding to sec. 23 (2) (*c*) the words "Provided that the period referred to may be in excess of thirty days if the justices are satisfied that thirty days is not an adequate period in the circumstances." This enactment assumes that the earlier form of the sub-section gave a period of thirty days for the execution of the warrant, whereas the judgment in *Ex parte Mobbs* (2) regarded the period as being limited to 23 at the most, that is, 30 minus 7.

In the circumstances I think that the opinion expressed by *Foa* should be adopted.

I am of opinion that in this respect the warrant was good. Although it did not directly express a number of days not less than seven, it did so indirectly by fixing a point of time (June 30th, 1931), which gave "at least seven clear days" in which execution might take place.

But it is also contended for the accused that although the warrant authorized the constables to "enter (by force if needful) into such land and to give possession of the same to such landlord or such agent on his behalf," the facts show that, before June 17th, the landlord instructed the constables not to proceed with its execution. It was on that date that the officers executed the warrant, and the alleged resistance and obstruction to them took place: and the question is whether, such a direction or instruction to the police

(1) (1900) 64 J.P. 454.

(2) (1900) 17 N.S.W.W.N. 156.

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having been given by or on behalf of the landlord, the constables were acting " in the execution of their duty " in ignoring the direction and forcibly entering into possession.

In the leading case of *Barker* v. *St. Quintin* (1) it was held that if the sheriff insist upon executing a writ, e.g., *ca. sa.*, after a direction from the plaintiff not to do so, he becomes a trespasser. Lord *Abinger* C.B. said (2) :—

> " It is true the sheriff is the officer of the Court, but appointed by the Court to do the plaintiff's service, and they will not put him in motion except at the instance of the plaintiff, who is the party from whom the sheriff is to receive directions to proceed on the writ, or not. If it were not so, the sheriff would be bound to proceed upon every writ delivered to him, *in extremis*, until the party was brought into Court. It is the constant practice to treat the sheriff as the mere agent of the plaintiff, and the case in *Bulstrode*, where the replication was held bad, is a decided authority on the point, and is an answer to the theory that the sheriff is bound without reference to the plaintiff's directions to obey the exigency of the writ."

In *Barker* v. *St. Quintin* (3) the argument advanced by Mr. *Martin* for the defendant was much the same as that now urged by the Crown. He said :—

> " Even such an express direction is not sufficient to make the sheriff liable in trespass for afterwards executing the writ. He might be excused thereby for not executing it, but he is not a trespasser if he does. The sheriff does not derive his authority from the party ; he is the officer of the law, acting under the direction of the Court, and is in no way the agent of the plaintiff in the action, nor bound to take notice of his directions in contradiction to those of the Court. The plaintiff may issue a *supersedeas*, but the sheriff cannot be a trespasser for going on to do that which the writ expressly commands him to do " (3).

Lord *Abinger* C.B. interjected :—

> " Can you make out the sheriff to be other than a trespasser for making an arrest against the will of the person who alone can complain of his not doing it ? "

Is the principle of *Barker* v. *St. Quintin* (1) applicable to warrants of possession under sec. 23 (2) (*c*) of the New South Wales *Landlord and Tenant Act* ? That Act in Part II. deals with " *Tenements recovery by ejectment in the Supreme Court*," in Part III. with " *Tenements recovery in the District Courts*," and in Part IV. with " *Tenements recovery before justices of the peace*." It is clear that

(1) (1844) 12 M. & W. 441 ; 152 E.R. 1270 ; 13 L.J. Ex. 144.
(2) (1844) 13 L.J. Ex., at p. 149 ; 12 M. & W., at pp. 450, 451 ; 152 E.R., at p. 1274.
(3) (1844) 12 M. & W., at p. 448 ; 152 E.R., at p. 1273.

the principle of *Barker* v. *St. Quintin* (1) applies to the enforcement of adjudications in the superior Courts of the State of New South Wales, including, e.g., the warrant requiring the bailiff of a District Court to give possession to a plaintiff. Why does it not apply to warrants of possession authorized by a Court of Petty Sessions? In my opinion a perusal of Part IV. of the *Landlord and Tenant Act* makes it reasonably clear that those executing a warrant of possession are doing so on behalf of the landlord, and that he may terminate their authority to act in the execution of the warrant.

In the first place the functions performed by constables to whom a warrant under sec. 23 (2) is issued, are merely those of a bailiff. The warrant may go not only to peace officers but also to "any other person as a special bailiff in that behalf." The form of the sheriff's warrant on *habere facias* commands his bailiff to deliver to the claimant possession and to certify forthwith (*Cole* on *Ejectment*, p. 791). And further, the *Landlord and Tenant Act* repeatedly states the relation deemed to exist between the landlord and the warrant of possession. Sec. 23 (2) (*c*) describes the contents of the warrant, but sec. 28 refers to "the landlord, by or for or on whose behalf" the warrant is obtained. So too, sec. 29 refers to the "landlord by whom or for or on whose behalf such warrant has been obtained." Sec. 30 provides that the warrant shall not protect the landlord "on whose behalf" the warrant has been obtained, from any action by the person in possession in respect of any entry under the warrant, where the landlord "at the time of executing the same has not, as against such person in possession, lawful right to the possession thereof." In such case (1) the landlord is as liable as though possession had been taken without the authority of the warrant (sec. 30 (2)), and (2) the constables or bailiffs executing the warrant are not liable (sec. 28).

In my opinion these provisions provide conclusive evidence that the constables or bailiffs are executing a warrant that is obtained for the sole benefit of the landlord, and that the warrant is executed at the peril, not of the constables or bailiffs, but of the landlord. They are treated for the occasion as the mere innocent instruments of the landlord, and it is upon him alone that liability is visited in

(1) (1844) 12 M. & W. 441; 152 E.R. 1270; 13 L.J. Ex. 144.

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case he has no lawful right of possession. It would be very difficult to find stronger evidence of the absolute necessity for continuous control of the whole process by the landlord.

The same thing is shown by the form of the warrant. The sole purpose of the forcible entry and ejection which are authorized, is to give possession to the landlord. An arrangement may be come to between landlord and occupier after the warrant has been issued. The landlord in such case should have authority to inform the constables or bailiff that he does not wish to be put into possession under the warrant, and that he directs it should not be executed. The idea that a constable or bailiff is entitled to ignore such direction, and claim that he is still acting "in the execution of his duty," seems to be not warranted by the statute. It rather suggests that there is some element of punishment involved in the issue of the warrant. But the warrant is mere process for the enforcement of a civil adjudication. The fact that those who act as bailiffs are police constables suggests criminal or penal process, but that is an accident, due to the association of the Police Force with the "Police Courts."

As there is ample evidence to show that the landlord, in the present case, did direct that the warrant should not be executed, the accused would be entitled to be acquitted upon the present charges, if such direction to the constables is proved.

With regard to the application for leave to appeal by the Crown, I agree with the judgment of *Street* C.J. that the right of peremptory challenge of talesmen was available to the accused. It is a matter for regret that the learned Chairman of Quarter Sessions, who presided at the trial, should have found it necessary to condemn the exercise of the right of challenge by the accused as "meaningless, idle and senseless." Under ordinary circumstances delay and difficulty can seldom arise because, at the most, only a few persons are jointly tried for misdemeanour. In the present case no less than seventeen accused were jointly indicted, and the total number of challenges was greatly increased. If accused persons are given a legal right, the exercise of it is a matter entirely for them, and is no fit matter for prejudicial and disparaging comment by the presiding Judge. This comment, coupled with the interrogation of

the accused by the presiding Judge in reference to their making a statement from the dock, instead of giving evidence on oath, would amply justify the granting of a new trial. I am not satisfied that sec. 407 of the *Crimes Act* was disobeyed by the presiding Judge, because what he did was not so much to *comment* upon the fact that the accused had refrained from giving evidence on oath, as to state and restate *the mere fact* that all of them were so refraining. But the repetition of the fact as each accused was interrogated, was calculated, I assume it was not intended, to leave in the jury's mind the impression that it was a matter of great moment for their consideration that the statements of the accused were unsworn. The learned Judge kept up the interrogation, notwithstanding that he had already been informed by counsel that all the accused would make statements from the dock. One can readily imagine how this demonstration by the presiding Judge might have prejudicially affected the fair trial of the indictments, especially in view of the strong feeling with which such a case was probably imbued.

I am of opinion that the order of the Supreme Court for a new trial was right, but that the accused will be entitled to an acquittal if the jury are satisfied that, prior to the execution of the warrant, there was a countermand of its execution by or on behalf of the landlord.

McTIERNAN J. Both applications should, in my opinion, be dismissed. Assuming that the evidence established that the agent instructed the sergeant, to whom the warrant was handed, not to proceed under it, I do not think that the accused should have been acquitted on that ground. The effect of such an instruction, if given, would not have been to countermand the order which the magistrate by his warrant addressed to the police, directing them to enter the premises and give possession thereof to the agent. Assuming the instruction to have been given, it would not follow that the police were not acting in the execution of their duty while carrying out the command which the warrant expressed. It is not material to inquire whether it would be mere officiousness on the part of the police to proceed to execute a warrant under the *Landlord and*

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Tenant Act in face of a certain and well authenticated instruction from the agent or owner of the premises not to do so. The evidence in this case does not clearly show that a definite instruction was given by the agent to the police not to act under the warrant or that they persisted in executing the warrant in defiance of the agent's instructions. The state of the evidence, upon which the submission that the warrant was countermanded, is founded, may be gathered from the following passage from the summing-up of the learned Chairman of Quarter Sessions :—

"It is also suggested that the old lady, Mrs. McDonald, had withdrawn the warrant. On that the evidence before you goes to this extent, and it was elicited in cross-examination that she intended to withdraw it. There is no statement by her and no evidence before you that she had in fact withdrawn it. There is the statement by her in cross-examination that she had intended to withdraw it." [Mr. *Evatt* (who was counsel for the accused): "I am sorry to interrupt your Honor, but there is definite evidence of the withdrawal on page 7 of the notes."] *His Honor*: "She was asked about it in cross-examination. 'Q. Somebody came to you and said Don't execute the warrant and we will have all the paraphernalia removed? A. Yes.' Apparently that was said by somebody from amongst those in occupation of the premises. 'Q. I put it to you that after the issue of the warrant you went and saw Sergeant Wiblin to have the warrant withdrawn? A. Yes. Q. You instructed him so before the 17th? A. Yes.' That is not evidence that the warrant was ever withdrawn. There is not evidence before you that the warrant was ever in fact withdrawn. No such evidence is before you. I will read the evidence of Sergeant Wiblin as to what he says took place:—There was a conversation between Wiblin and the accused Woolfe, Terry, Corbett, and others. They said 'We want to see you, sergeant. I walked to the front gate and opened it. Corbett said Stop outside the fence, we will send a deputation to you. I opened the gate and walked close to the verandah. He said We want to see you about the promise we have made to the landlord that we are going to get out of these premises, and we want a written undertaking from you that if our men start to pull down our barricades the police will not rush in and baton them. I said I cannot give you any written undertaking of any kind. I said The landlord has requested that the warrant be held up until 1 p.m. on Tuesday and that will be done. A man named McGee was standing alongside of me and he said We cannot expect anything better than that. He was on the premises at the time and the others could hear what he said. One of the men on the verandah, it was either Terry or Stevens—one of them was close to me and the other one was on the verandah—one of them said It is nothing to do with us, it is a matter for the committee.' That is what Wiblin says, and it forms the basis of one of the suggestions that the warrant was withdrawn. There is no case before, that the warrant had in fact been withdrawn."

In addition, it may be observed that while there was evidence that Sergeant Wiblin was in immediate charge of Bankstown district and that he was the sergeant to whom the warrant was given, it was addressed to the principal police officer at Campsie. Inspector McMaster, who was called as a witness, said that the description " principal officer at Campsie " applied to him. There is no evidence that the owner or her agent communicated with that officer on the question of refraining from executing the warrant. Inspector McMaster also said that it was approximately about three-quarters of an hour after the police came to the cottage to execute the warrant that he " formally handed over to Mrs. McDonald " and that " the warrant was then executed." It appears that the agent, Mrs. McDonald, who is alleged to have countermanded the warrant which required and authorized the police to enter the premises and to give her possession of them, was present on the scene when the warrant was executed and thereupon accepted the possession of the premises from the police. Inspector McMaster said that when he formally handed over the premises to her, the warrant was executed.

Thus it is doubtful whether the point, upon which special leave is asked, does arise on the evidence. But as the order of the Supreme Court directing a new trial will stand, I have expressed my concurrence in the view that, even if the agent had asked the police not to execute the warrant, the result would not have been to take the conduct of the accused out of sec. 58 of the *Crimes Act* 1900 of New South Wales.

I agree with the conclusions of my learned brothers on the questions involving sec. 98 (2) of the *Justices Act* 1902-1918 and sec. 23 (2) (*c*) of the *Landlord and Tenant Act* 1899-1930; and I have nothing to add on these questions.

Both applications for special leave to appeal refused.

Solicitors for the applicants, *C. Jollie Smith & Co.*

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.