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THE LAW OF ESCAPE IN CIVIL ACTIONS.

*(Continued from the June No., ante, p. 358.)*

III. WHO LIABLE FOR AN ESCAPE.

1. *In general.*—The liability rests primarily upon the superior. The action for an escape shall be brought against him who has the custody of the jail: 3 Com. Dig. 574. Though he has it *de facto* only and not *de jure*: 2 Inst. 331-2. And it shall be against the sheriff, not against his deputy; as the gaoler who takes care of the prison in the county: 2 Inst. 382; Rol. Abr. 94, l. 30; *semble*, Hard. 34. But an action for an escape shall not be against the superior, if the inferior be sufficient: 2 Inst. 382. But in all cases where the inferior is insufficient, debt lies against the superior for an escape: *semble*, Sir T. Jones 60; 1 Vent. 314; 2 Lev. 158; 9 Co. 98 *a*. If he be insufficient at the time of the action brought, though he was sufficient at the time of the commitment or escape, for that is the time most regarded: Sir T. Jones 61; 2 Lev. 160; Com. Dig. 575.

If a jailer, who is the sheriff's servant, suffers a prisoner to escape, the action must be brought against the sheriff, not against the jailer. See 5 Mod. 414, 416; Ld. Raym. 424; Salk. 272; where it is said in general that jailers are liable for escapes. But this must be understood of escapes in criminal cases for which whoever *de facto* occupies the office of jailer is liable to answer; nor is it material whether his title to the office be legal or not:

Hale P. C.; 2 Ro. Rep. 146; Hawk. P. C., c. 19, § 28; and see Hard. 29 to 35, that where actions are said to lie against jailers such absolute jailers are intended as writs are directed to. The sheriff is answerable *civiliter*, though not *criminaliter*, for the acts of his officers; *their* acts are by intendment of law *his* acts. But though not liable *criminaliter*, that is, not liable to be indicted for the acts of his officers, he is liable in a penal action for them: *Sturmy q. t. v. Smith*, 11 East 25; *Stanway q. t. v. Perry*, 2 B. & P. 157; 3 Bac. Abr. 408.

The United States marshal is not liable for the escape of a debtor committed to a state jail, under process from the United States courts: *Randolph v. Donaldson*, 9 Cranch 76. If by a state statute a fraudulent debtor is liable to imprisonment, and the sheriff suffer him to escape, the sheriff is liable and the action may be brought in the United States Circuit Court: *Mewster v. Spalding*; 6 McLean 24. The sheriff is liable for the escape of a party taken in execution, in a civil action, and legally in his custody, though there be no jail in the county: *Gwinn v. Hubbard*, 3 Blackf. (Ind.) 14.

2. *Preceding or succeeding sheriff*.—Where a new sheriff is appointed, his predecessor should deliver over by indenture (for which see form, Dalt. Sheriff 18) all the prisoners in his custody, charged with their respective executions; for the prisoners, until they are turned over to the new sheriff, remain in the custody of the old sheriff, and if he omit to deliver them over, every omission will be deemed an escape, wherewith he will be chargeable: Hob. 266; 2 Rol. Abr. 457; Cro. Eliz. 365; Bulst. 70; 4 Co. 72; Bac. Abr. 406. But if the sheriff dies during his shrievalty; the new sheriff, as soon as he is appointed, must take notice of all persons in custody, and of the several executions with which they are charged; and this he must do out of necessity, for there being nobody to inform him, he must himself take notice thereof at his peril: 3 Co. 72. In England, by statute (3 Geo. 1, c. 15, § 8), the duties of sheriff are, in such case, to be executed by the under-sheriff until a successor is appointed. If a new sheriff receive a prisoner from his predecessor, he is bound to detain him, although a voluntary escape may have taken place in the time of his predecessor: *Rawson v. Turner*, 4 Johns. 469, *g*. Even where in such case the prisoner voluntarily returned to jail, and being found there by a succeeding marshal, was detained by

him: *Held*, that had he not done so it would have been an escape: *Grant v. Southers*, Strange 423. In such case it must be presumed that the former sheriff consented to receive the prisoner: *Drake v. Chester*, 2 Conn. 473. The old sheriff will remain liable if he omits to deliver any prisoner by indenture to the new: Vide *County* (B. 3) Com. Dig. 575. But now a notice in writing, not by indenture, or by parol, is sufficient, if the new sheriff do not object: *Watson on Sheriff* 20; *Sewell on Sheriff* 29; and in New York, by 1 R. S. 416, § 62 (5th ed.), if the former sheriff refuses to deliver possession to the new sheriff, or to the person appointed to discharge the duties of the office, he will be guilty of a misdemeanor. If the old sheriff omits to assign his prisoners within ten days after notice, and a prisoner go at large, it is an escape: *Hinds v. Doubleday*, 21 Wend. 223. See also *Partridge v. Westervelt*, 13 Wend. 500; *French v. Willett*, 4 Bos. 649; 10 Abb. Pr. 99.

3. *Sheriff's liability for deputy.*—If the jailer, who is the sheriff's deputy, suffers a prisoner to escape, the action must be brought against the sheriff. Vide 5 Mod. 414–416; *Ld. Raym.* 424. An escape from the custody of a deputy sheriff may be declared on as an escape from the sheriff: *Skinner v. White*, 9 N. H. 204. Where a sheriff has returned *non est* to a *capias ad satisfaciendum*, and his deputy had the prisoner in custody before the return day on another *capias ad satisfaciendum*, and allowed him to escape, though neither knew of the writ in the hands of the other (*Wheeler v. Hambright*, 9 S. & R. (Pa.) 390), the sheriff has been held liable. But in what cases at common law and upon the statute of West. 2, c. 11, the rule of *respondeat superior* will hold, vide 2 Inst. 382, 466; 9 Co. 98; *T. Jon.* 60; 2 Lev. 158; *Vent.* 314; 2 Mod. 119; 3 Keb. 591, 656, 701, 754, 758, 773; *Noy* 69; *Comb.* 95. By the 8 & 9 W. 3, c. 27, s. 11, it was enacted that the marshal of the King's Bench prison and the warden of the Fleet “shall be answerable, and the profits and aforesaid inheritances of the said several offices shall be sequestered, seized or extended to make satisfaction for such forfeitures, escapes or misdemeanors respectively, as if permitted, suffered or committed by the person or persons themselves, or either of them,” &c. To render the sheriff liable for the acts of his deputy, irrespective of statute, such acts must have been done in the regular course of his official business: *Perkins v. Pitman*, 34 N. H. 261; *Stevens*

v. *Colby*, 46 Id. 163. With that proviso, the sheriff is civilly liable for any act or acts of his deputy: *Clute v. Goodell*, 2 McLean 193; *Lawrence v. Sherman*, Id. 488; *Harrington v. Fuller*, 18 Me. 277; *Mason v. Ide*, 20 Vt. 697; *Buck v. Ashley*, 37 Id. 475. Also, *Knowlton v. Bartlett*, 1 Pick. 270; and the English case of *Cook et al. v. Palmer*, 6 B. & C. 739. A sheriff is liable in trespass for the acts of his deputy, and they may be sued jointly: *King v. Orser*, 4 Duer 431.

4. *Liability of deputy*.—If the sheriff directs his warrant to his bailiff, and afterwards J. S. puts in his own name as special bailiff, and thereupon arrests the defendant, who escapes, here J. S. shall only be chargeable, and not the sheriff, because the defendant was never in the sheriff's custody, but only in the custody of J. S.: Cro. Eliz. 745; Dalt. Sheriff 560. It has been repeatedly holden that where a special bailiff is appointed on the nomination of the plaintiff in the action, the sheriff is not answerable for the acts of such bailiff: *De Moranda v. Dunkin*, 4 Term Rep. 120; 3 Bac. Abr. 408. So if a writ comes to the sheriff and he makes out his mandate to the bailiff of a liberty, who takes the party and afterward suffers him to escape, an action lies against the bailiff of the franchise, and not against the sheriff. Vide Rol. Abr. 98, 99; Bro. *Escape* 40; Noy 27. And if the bailiff in such case remove the party to the county jail, situate out of the liberty, and there deliver him into the custody of the sheriff, he will subject himself to an action for an escape: *Boothman v. Earl of Surrey*, 2 Term Rep. 5.

So where a *capias ad satisfaciendum* was awarded to the sheriff of Berks to arrest J. S., who then was in custody of the mayor and burgesses of W., and thereupon the sheriff made a warrant to the mayor; &c., to take him, and afterwards they let him escape, it was clearly held, that the mayor, &c., and not the sheriff, were chargeable with the escape: Cro. Eliz. 26. The modern cases do not appear to be numerous where the sheriff is wholly exonerated from liability. Primarily he would, in most cases, be liable, though even where the sufficiency of the inferior is pleaded, in an action against the superior, the verdict in order to bind the superior must find the insufficiency of the inferior when the action was brought, and not merely his insufficiency when he was keeper, or at the time of the commitment or escape: Sir T. Jones 61; 1 Vent. 314; 2 Lev. 160; 3 Com. Dig. 575. In Salk. 18, Lord HALE is reported to

have drawn a clear distinction between the liability of the sheriff and his deputy; thus he says, "the deputy is not chargeable as an officer, but as a wrongdoer, that for a voluntary escape an action lies against the deputy, for it is in the nature of a rescue; but for a negligent escape the action lies only against the sheriff." And with this agrees SKINNER, C. J., in the case of *Hutchinson v. Parkhurst*, 1 Aik. 258, who says: "In England no action for neglect of duty will lie against a deputy sheriff, though such officer is liable for a tort committed by him. The distinction is that for *misfeasance* the deputy is liable as well as the sheriff, but for *non-feasance* the action must be against the sheriff." In Massachusetts the sheriff and deputy cannot be sued jointly for a tort done by the deputy alone: *Campbell v. Philips*, 1 Pick. 62. And in *Buck v. Ashley*, 37 Vt. 477, POLAND, C. J., in referring to *Hutchinson v. Parkhurst*, and Lord HALE's dictum, says, "that case goes on to decide that under our statute the respective liabilities of the sheriff and his deputies are the same as held in the English law." See also *Clute v. Goodell*, 2 McLean 193; *State v. Moore*, 19 Mo. 369; *Murrell v. Smith*, 2 Dana (Ky.) 462; *Owen v. Gatewood*, 4 Bibb (Ky.) 494; *Watson v. Todd*, 5 Mass. 271; *Perley v. Foster*, 9 Id. 112; *Newton v. Bradford*, 13 Id. 114; *Congdon v. Cooper*, 15 Id. 10; *Jentry v. Hunt*, 2 McCord (S. C.) 410; *Hazard v. Israel*, 1 Binn. (Pa.) 240.

5. *Remedy against party escaping.*—It was formerly held that where the sheriff suffered a prisoner in execution to make a voluntary escape, the prisoner was in such case absolutely discharged from the creditor, and that the right of action was entirely transferred against the sheriff, who by means of such escape became *debitor ex delicto*: *Arundell v. Wytham*, Leon. 73; s. p. per HOBART, in the *Sheriff of Essex's Case*, Hob. 202. But later decisions have been contrary, and it has since been adjudged that where a sheriff suffered a voluntary escape, the plaintiff might have a new action of debt or *scire facias quare executionem non* against the prisoner: *Allanson v. Butler*, Sid. 330; *Buxton v. Home*, Show. 174; *Basset v. Salter*, 2 Mod. 136; *James v. Peirce*, Vent. 269, and numerous other cases: 3 Bac. Abr. 403.

But statute 8 & 9 W. 3, c. 26, sect. 7, placed the matter beyond a doubt in enacting, after abolishing all distinctions between voluntary and permissive escapes with regard to the plaintiff's remedy, "that if any prisoner, who is or shall be committed in execu-

tion to either of the said respective prisons, shall escape from thence by any ways or means howsoever, the creditor or creditors, at whose suit such prisoner was charged in execution at the time of his escape, shall or may retake such prisoner by any new *capias* or *capias ad satisfaciendum*, or sue forth any other kind of execution on the judgment, as if the body of such prisoner had never been taken in execution." Therefore where to a *scire facias quare executionem non* upon a judgment the defendant pleaded, that he was formerly taken in execution upon a *capias ad satisfaciendum* upon the same judgment and the sheriff suffered him to escape, to which escape the plaintiff then and there consented, this was held a bad plea, for the assent will not make it an escape with the consent of the plaintiff, and therefore he has either his remedy against the sheriff or may retake the party: *Scott v. Pecoek*, Salk. 271; Show. 174; adjudged on the like plea, 3 Bac. Abr. 409-10. But if such prisoner be delivered out of execution by the sheriff or jailer with the assent of him at whose suit he is in execution, he shall not by color of this judgment take him again and put him in prison. So if the execution creditor consent that one of the bail shall be delivered out of execution, he shall not take the other: 2 Leon. 260. Or that one defendant only shall be delivered out of execution on a joint *capias ad satisfaciendum*: Style 387; *Clarke v. Clement*, 6 T. R. 525. So where the prisoner has been discharged upon terms which are not afterwards complied with: *Vigers v. Aldrich*, 4 Burr. 2482; or to render himself on a given day, if he did not in the meantime pay the debt, *Clarke v. Clement, supra*; or to pay the debt at a future time, *Tanner v. Hague*, 7 T. R. 420; and on failure, that he should be taken in execution again: *Blackburn v. Stupart*, 2 East 243. Or where the consent was that prisoner should come to a tavern out of the rule: Style 117. In these and such like cases the prisoner, it was held, could not be again taken in execution for the same matter. Although a sheriff is excused for not arresting a person exempted by law from arrest on civil process, he is not bound to take notice of this privilege: *People v. Campbell*, 40 N. Y. 133. But when once in custody such privilege cannot be pleaded in bar to an action for escape: *Gill v. Miner*, 13 Ohio St. 182.

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(To be continued.)