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1916

### The Sheriff's Return

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#### Recommended Citation

Sunderland, Edson R. "The Sheriff's Return." *Colum. L. Rev.* 16 (1916): 281–98.

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## THE SHERIFF'S RETURN.

When William the Conqueror found himself military master of Britain, he was confronted by a governmental problem quite different from that which has usually accompanied foreign conquest. He did not subdue a nation already organized, substituting his power for that of its former ruler in the conventional way of conquerors. Britain was a geographical unit but politically and socially it was a congeries of loosely related communities. The natural law of survival of the fittest normally operates upon peoples as upon individuals, and develops centralized power as a means of self-preservation. But Britain had a substitute for this. The sheltering sea was a protector more effective than a king's army, and behind the bulwarks of its restless waves the primitive communities of the British Isles went their separate ways and lived their separate lives.

With the advent of the Normans all was changed. That hardy line of chieftains developed a most extraordinary genius for government. The task which they persistently held before themselves was the organization of England into a political unit, and their skill and capacity to govern is nowhere better shown than in the instrument chosen for the work of unification. Not the king's soldiers were to bring order out of chaos and power out of weakness. The means to that great end was the king's writ. Private rights in those turbulent times were none too safe, and what could appeal more strongly to the people of England than a king whose strong hand reached everywhere to protect life, liberty, and property! The king's own representative carried the royal summons, the king's court tried the issues and rendered judgment, and behind that judgment was the coercive power of a government which steadily increased in strength as it gained the good will of the people it served.

The functionary who carried the royal writ was the sheriff. Since the writ was an original executive writ rather than a judicial writ, the sheriff was the direct agent of the crown, rather than an officer of the court, in making service and entering his return. Service by the sheriff was essential to jurisdiction by the king's court, and no one was liable to suffer judgment unless after notice obtained by the service of the writ.

But human nature is never infallible, and the sheriff was no more than human. Suppose he mistook the party against whom the writ ran, and served another, but returned that he had served

him who was named in the writ. Or suppose, to satisfy a selfish purpose, he intentionally returned that he had made service of the writ when in fact he had not, so as to subject the innocent and helpless defendant to a judgment depriving him of his property. What remedy was offered the victim of the false return?

This question raises one of the most interesting problems in the history of procedure, and the manner in which it was solved throws into vivid relief the curious conservatism of the common law.

We read in Comyn's Digest that "the return of a sheriff is of such high regard, that generally no averment shall be admitted against it; as if A be returned to be outlawed, he cannot say that he was only *quarto* or *quinto exactus*."<sup>1</sup> Comyn cites Rolle's Abridgment as authority for this proposition, and Rolle in turn cites the Year Books of Edward III and Henry VI, which carries us back nearly five centuries. This doctrine continued in full force after Comyn's time. In the year 1728, in *Barr v. Satchwell*,<sup>2</sup> a motion was made, supported by affidavits, to set aside the sheriff's return as false. "*Sed per curiam*. If that be a false return, the defendant will have his action against the sheriff. But we will not try the truth of the return on a motion to set aside the proceedings." And a century later, in *Goubot v. De Crouy*,<sup>3</sup> it was sought by a motion based on very strong affidavits to set aside the return of facts falsely showing privilege from service, but the court refused to interfere. This was the invariable rule.<sup>4</sup> Even when it was sought to show that the supposed return was not in fact made by the sheriff but by another person, Hoyt, C. J., held that after the term was passed and the writ was filed and had become a record, it was then too late, and everyone was estopped to say the sheriff did not return it.<sup>5</sup>

None of the English cases discuss the reasons for the rule, but they apparently treat the doctrine of the conclusiveness of the sheriff's return as a matter so obvious and so essential as to be axiomatic.

This inflexible rule was a part of the common law heritage which we received from England when the United States asserted its independence.

<sup>1</sup>Comyn's Digest, Return.

<sup>2</sup>Strange, 813.

<sup>3</sup>(1833) 2 Dowl. P. C. 86.

<sup>4</sup>(1628) 2 Coke, Inst. 452; (1773) Lofft, 372.

<sup>5</sup>Andrews v. Lynton (1704) 1 Salk. 265.

It is not proposed in this discussion to enter into the field of collateral attack on judgments. Where rights of third parties have intervened the judgment may very well operate as an estoppel, but in such cases the inquiry is primarily directed to the effect of the judgment as an estoppel and not to the effect of the sheriff's return upon which the judgment rests. In the present paper it is proposed to consider the conclusive effect of the return itself, divorced from the secondary complications involved in collateral attacks on judgments, and the problem therefore assumes this form:—

*Should the sheriff's return be deemed conclusively true as against a direct attack before or after judgment, where no rights of third parties are involved?*

If A. resides in New York and B. wishes to sue him in Missouri for a personal judgment, it is requisite that A. be served with process in Missouri. But the sheriff in Missouri, through mistake or design, returns that he duly served him in that State when in fact he did not do so. If A. discover the fact of the suit before judgment it would seem logically reasonable for him to make a special appearance in the Missouri court, prove the want of service and have the return set aside. He would thus enjoy the right to be sued personally only after personal service, which in this case would save him the time, expense and hardship of defending himself in a foreign jurisdiction a thousand miles away from his home; and the plaintiff would at the same time lose nothing to which he is justly entitled, for his only right is to sue A. wherever he can be personally served, and if such service is impossible in Missouri he has no right to prosecute an action there. Nor would the sheriff who made the false return be injured by proof of the falsity upon such a special appearance, for if he is liable for all damages resulting from his misconduct, the sooner it is discovered and annulled the better, for the farther the case proceeds the greater will be the resulting damages. Accordingly everyone involved would be fully protected, costs and inconvenience would be kept down, and the parties would the sooner be placed in a position where the litigation could proceed in due course of law to a just and binding judgment.

But the Missouri court would not tolerate such practice, for the sheriff's return cannot be questioned. Accordingly, the defendant must either defend the action in Missouri, at great expense and without the aid of compulsory process for the personal

attendance of the witnesses who reside in his own State of New York, or he must suffer a judgment by default on a claim which is perhaps without any merit whatever, and recompense himself by going to Missouri to sue the sheriff for damages resulting from the false return. The plaintiff thus gets a judgment which he does not deserve, the defendant is mulcted in damages which very likely he ought not to pay, and the sheriff or his sureties, for perhaps a wholly innocent mistake, are required to reimburse the defendant for all that he has lost. As to every one of the three parties involved there is a miscarriage of justice.

If A. does not discover the existence of the action in Missouri until after judgment, it would seem equally reasonable that he be permitted, where no subsequently accruing rights of third persons are involved, to go into the court in Missouri where the judgment was rendered, and upon satisfactory proof of the want of service, have the judgment vacated. The plaintiff would then be unable to keep the judgment which he did not deserve, the defendant would be relieved from a liability never lawfully found against him, and the minimum of loss would fall upon the sheriff as a result of his false return. But under the common law rule, as held by the Missouri court, the judgment would stand. The plaintiff would enjoy an unjust gain, the defendant would suffer an unjust loss, and the sheriff would be the scapegoat,—a three-sided failure on the part of the law to perform its obvious duty.

In the face of so easy a demonstration of the illogical and grotesque results produced by the operation of the common law rule, it would seem difficult to account for its existence. And a glance at the reasons adduced in its favor does little to strengthen one's confidence in its validity. Indeed there is nothing more remarkable in the judicial literature relating to this subject than the few and feeble efforts made by the courts to justify the rule they so confidently follow.

An interesting case is *Tillman v. Davis*,<sup>6</sup> decided in Georgia in 1859. The versatile and usually liberal Judge Lumpkin held that "upon examination, it will be found that the conclusiveness of the sheriff's return, both upon mesne and final process, is assumed as one of the axiomatic truths of the law, and the principle is found scattered broadcast throughout the whole of the text books and reports, both in England and in this country, except in the state of Connecticut, where a contrary doctrine has

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<sup>6</sup>(1859) 28 Ga. 494.

obtained. . . . I find it well settled that by the common law no averment will lie against the sheriff's return, and *one reason assigned amongst others is, that he is a sworn officer, to whom the law gives credit.*" This rule is "necessary to secure the rights of the parties, and to give validity and effect to the acts of ministerial officers, leaving the persons injured to their redress by an action for a false return."

It may be supposed that the learned Judge Lumpkin, who was put on the defensive in this case by a most vigorous dissenting opinion, would have presented the best of the reasons which he was able to offer in support of his position, and if the only one he mentions is the credibility of the sheriff as a sworn officer, he probably was able to find no better one.

But what of the sheriff's credit and standing? Did the people of England during the formative years of the common law, find him so reliable that no question was tolerated as to the truth of his official returns?

Evidently the people were not at all convinced of the efficiency or honesty of their sheriffs, for the Statute of Westminster Second, enacted in 1285, declared: "Many times also sheriffs make false returns as touching these articles, *quod de exitibus*, etc., returning sometime, and lying, that there be no issues, sometime that there are small issues, when they may return great, and sometime do make mention of no issues; wherefore it is ordained and agreed, That if the plaintiff demand hearing of the sheriff's return, it shall be granted him. . . . And the King hath commanded that sheriffs shall be punished by the justices once or twice (if need be) for such false returns; and if they offend the third time, none shall have to do therewith but the King. They make also many times false answers, returning that they could not execute the King's precept for the resistance of some great man; wherefore let the sheriffs beware from henceforth, for such manner of answers redound much to the dishonor of the King."<sup>7</sup>

And furthermore, when the sheriff was sued by the injured party for damages resulting from his false return, his official character was no protection. The law gave no superior credit to his sworn statement. His oath was pitted against the plaintiff's oath and the oaths of the plaintiff's witnesses, and the jury found the truth. His official return was just as much an official act when questioned subsequently in an action on the case as when

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<sup>7</sup>Chapter XXXIX.

questioned in the original action by a motion or a plea in abatement. So that Judge Lumpkin's argument, which he really took from Comyn, is entirely inadequate to sustain the rule of conclusiveness.

In Indiana a long line of decisions has held rigidly to the common law rule of conclusiveness, but the only reason that could be suggested by that court was the same one, taken from the old English digests, *viz.*, that the sheriff is a sworn officer to whom the law gives credit.<sup>8</sup>

So in Missouri. No State has more consistently maintained the unimpeachable verity of the sheriff's return, but the court is only able to say: "The ground upon which this important rule rests is, that the officer declares in his return that he has done the things required of him to be done."<sup>9</sup>

Another reason not fully acknowledged but vaguely hinted in a number of cases, is that the return is a "record", and hence imports absolute verity. But this can hardly be taken as a serious effort to base the rule on a solid foundation, for records may be changed by direct proceedings for that purpose, as all courts admit. Mr. Bigelow, in his work on Estoppel, well states this doctrine as follows: "Using the term now in the modern sense, it remains to say that the record, though to be received between the parties and their privies as conclusive evidence, in proceedings not begun on the one side or the other to impeach it, may always be corrected, as has been intimated, by a direct proceeding instituted for the purpose. Thus, if facts are erroneously inserted, the court may order an erasing of them or such a change as will make them conform to the truth; and if material facts have been omitted, the court may order that they be inserted. . . . But the evidence in support of the desired change in the record should be very strong."<sup>10</sup>

And not only this, but in regard to the specific question of changing the sheriff's return, it is universally held that the court has full power to authorize the sheriff to amend his return so as to show the true facts. In *Main v. Lynch*,<sup>11</sup> the Supreme Court of Maryland said: "He [the sheriff] is answerable for neglect of duty as well as for a false return, and if he has neglected to make

<sup>8</sup>*Splahn v. Gillespie* (1874) 48 Ind. 397. (This opinion contains a full review of the authorities).

<sup>9</sup>*Heath v. Missouri, K. & T. Ry.* (1884) 83 Mo. 617, 624.

<sup>10</sup>Bigelow, *Estoppel* (6th ed.) p. 38.

<sup>11</sup>(1880) 54 Md. 658.

a proper return, or has, by inadvertence, made a return which is untruthful, justice to him has always allowed the error to be corrected within a reasonable time, by amending his return." In *Webster v. Blount*<sup>12</sup> the Supreme Court of Missouri declared that "Courts have always exercised the power of permitting amendments to be made to promote the ends of justice and make the return conform to the truth," though the rule was held to be limited to cases where the rights of third parties had not been innocently acquired on the faith of a return regular on its face. The force of the reference now being made to the power of courts to authorize alterations in the return is not impaired by the corollary that the officer cannot be forced to amend. In *Vastine v. Fury*,<sup>13</sup> the Supreme Court of Pennsylvania, speaking through Chief Justice Tilghman, said: "The plaintiff in error contends, that the first return made by the sheriff was unalterable and conclusive. To this I cannot agree. . . . Judgments are every day opened, more than one Term after their entry: and records are amended even after writs of error brought." Yet in a previous portion of the same opinion the court has said, "I agree with the counsel for the plaintiff in error, that the sheriff cannot be *compelled* to alter his return, as to *matter of fact*. I consider it rather as *leave* to the sheriff to amend his return; and this leave might be important to the sheriff, as he was liable to an action by Jackson, in case he had made a false return."

It thus appears that neither the orthodox and historical reason,—that the sheriff is an officer entitled to credit, nor the vague and almost furtive excuse,—that the return is a "record", are sufficient to justify or even explain the rule that the sheriff's return cannot be contradicted by a direct attack in the action in which it is filed.

The real reason for this rule seems to be a wholly different one, and illustrates a very characteristic feature of the common law. It is simply this: One remedy was available for a false return, namely, an action against the sheriff. One remedy was enough. Hence no attack on the truth of the return was permitted.

The common law was always conservative and parsimonious in the matter of remedies. The existence of one was considered a sufficient reason for refusing another. It was no answer to this argument to show that the existing remedy was inferior and inade-

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<sup>12</sup>(1867) 39 Mo. 500.

<sup>13</sup>(Pa. 1816) 2 S. & R. 426.

quate. To the common law there was democracy among remedies which obliterated qualitative distinctions. The rise of the court of chancery demonstrates in the most remarkable way the perverseness of the common law in obstinately refusing to admit that new remedies which offer practical advantages should be allowed to compete with old remedies which were theoretically sufficient. An almost equally striking illustration of the same tendency on the part of the common law is found in the long and tangled history of the forms of action. The maxim, where there is a right, there is a remedy, was in practice almost reversed, and the old register of writs was stoutly defended as a catalogue of rights. Many writers have discussed the details of the struggle for the development and election of actions. Ames, in his *History of Assumpsit*, shows with his accustomed wealth of learning, how the action of Debt with its wager of law and its technical averments fought the new action of Assumpsit as a low-born interloper;<sup>14</sup> and Pollock and Maitland, in explaining the curious limitation in the action of covenant that it would not lie to recover a debt founded upon a sealed instrument, observe that "the law is economical; the fact that a man has one action is a reason for not giving him another."<sup>15</sup> Even a right of election between trespass and case was only reluctantly granted as an indulgence due to the impossibility of a clear judicial determination of the precise scope of these two actions.

The history of the common law is full of illustrations of this conservatism in remedies. A further instance which comes to hand may be added. The statute of Elizabeth relating to fraudulent conveyances has always been construed as inapplicable to preferential conveyances to creditors in fraud of other creditors, although there was nothing in either the letter or the spirit of the statute to require such an interpretation. The explanation is that there was already a remedy for fraudulent conveyances of this kind through the medium of a Bankruptcy Act, and the existence of one remedy was enough to condemn the allowance of another.<sup>16</sup>

That this is the true explanation of the rule appears to receive additional countenance from the early doctrine relative to unauthorized appearances entered by attorneys. Here again we have a case of an officer, the attorney, making an official declaration in the line of his official duties. Suppose he falsely states that the

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<sup>14</sup>2 *Harvard Law Rev.* 53.

<sup>15</sup>2 *History of English Law*, p. 219.

<sup>16</sup>*Bigelow, Fraudulent Conveyances (Knowlton's Edition)*, pp. 73, 74.

defendant appears through him. Can the statement be denied in that action and the proceedings dismissed?

In an anonymous case reported by Salkeld,<sup>17</sup> an attorney appeared, and judgment was rendered against his client and he had no warrant of attorney; and the question was whether the court could set aside the judgment. The court said: "If the attorney be able and responsible we will not set aside the judgment. The reason is, because the judgment is regular, and the plaintiff ought not to suffer, for there is no fault in him; but if the attorney be not responsible or suspicious, we will set aside the judgment; otherwise the defendant has no remedy, and any one may be undone by that means." In *Schirling v. Scites*<sup>18</sup> the Supreme Court of Mississippi said that "if the attorneys have acted without authority, the defendant, Wren, has his remedy against them; . . . . In such cases the usual course has been to turn the injured party over to his remedy at law against the attorney. But in case he is not able to respond in damages . . . . the Court of Chancery . . . . would grant relief;" but the objection could not be taken in the same case in which the wrongful appearance was made. In *Smith v. Bowditch*<sup>19</sup> the Massachusetts court declared the rule to be general that "if the person whose name is there as attorney acted without authority, and the plaintiff is thereby injured, the remedy is by an action for damages." In none of these cases were the rights of third parties involved, and the attack on the appearance was direct. The only distinction for our present purpose between these cases and those where the fault lies in the sheriff's return, consists in the practical availability of the remedy against the officer. Sheriffs were not originally under bond for the benefit of litigants,<sup>20</sup> yet it was declared by statute that "none shall be sheriff, except he have sufficient land within the same shire where he shall be sheriff to answer the King and his people."<sup>21</sup> But attorneys were not necessarily so well fortified with property, so that the remedy against them might or might not be available. If the direct remedy against the judgment was to be denied because another already existed, solvency of the attorney was a very proper matter for consideration.

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<sup>17</sup>(1703) 1 Salk. 88.

<sup>18</sup>(1868) 41 Miss. 644.

<sup>19</sup>(1828) 7 Pick. 137.

<sup>20</sup>Impey on the Office of Sheriff, p. 41.

<sup>21</sup>Statute of Sheriffs, 9 Edw. II.

The conclusive nature of a return to the alternative writ in mandamus may be suggested as another instance of the same principle. "A return to the mandamus is not traversable. The prosecutor is estopped by the return. The only remedy left open is an action for a false return."<sup>22</sup> The existence of one remedy precluded resort to another. But in this case the rule was so clearly an obstacle to justice that parliament intervened and authorized the traverse of returns made by certain classes of officers.<sup>23</sup>

A rule carrying in its wake the obvious hardships disclosed by that under discussion, and supported by nothing more meritorious than judicial conservatism, could not be expected to maintain itself in undiminished vigor in the face of modern radical and iconoclastic tendencies. The sheriff's return is no longer protected from the profane hands of the defendant in most of our American jurisdictions, although it still enjoys an asylum in a few States.

The present status of the doctrine appears to be about as follows:

1. In by far the largest number of States the courts have simply abandoned the rule, as out of harmony with modern notions of the function of rules of procedure, and it is permissible to attack the truth of the sheriff's return by motion or plea before judgment or by motion to vacate after judgment, in the same action and in the same court where the return is made.<sup>24</sup>

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<sup>22</sup>Dane v. Derby (1866) 54 Me. 95.

<sup>23</sup>9 Ann, Ch. 20.

<sup>24</sup>Alabama: Paul v. Malone (1889) 87 Ala. 544, 6 So. 351.

Colorado: Kavanagh v. Hamilton (1912) 53 Colo. 157, 125 Pac. 512: "In direct attack on a judgment upon the ground that there was no service, if third parties have not acquired rights upon the faith of the return, and no one is affected except the parties in the case in which the return is made, oral evidence is admissible for the purpose of impeaching the record."

Connecticut: Buckingham v. Osborne (1876) 44 Conn. 133.

Illinois: Hilt v. Heimberger (1908) 235 Ill. 235, 85 N. E. 304:—"The sheriff's return of service does not import absolute verity, but is only *prima facie* evidence of the truth of the matters therein stated. (Sibert v. Thorp, 77 Ill. 43; Hickey v. Stone, 60 *id.* 458). Where the rights of third persons have been acquired in good faith, the return of an officer showing the service of summons cannot be contradicted, but as against parties acquiring rights with notice of the facts the return is not conclusive."

Iowa: Bowden v. Hadley (1908) 138 Iowa, 711, 116 N. W. 689.

Louisiana: Sloan v. Menard (1850) 5 La. Ann. 218.

Maryland: Abell v. Simon (1878) 49 Md. 318; Taylor v. Welstlager (1900) 90 Md. 409, 45 Atl. 476; Tiernan v. Hammond (1874) 41 Md. 548:—"Upon a motion to strike out a judgment after the term is passed, the Courts in this State exercise a general equitable jurisdiction."

Michigan: Lane v. Jones (1893) 94 Mich. 540, 54 N. W. 283.

Minnesota: Knutson v. Davies (1892) 51 Minn. 363, 53 N. W. 646:—"It was held in Crosby v. Farmer (1888) 39 Minn. 305, 40 N. W. 71, that in direct proceedings to vacate (and this action is such a proceeding) and

2. In a few States the courts have held that the return is conclusive as to all facts stated therein which are presumptively within the personal knowledge of the officer, but that it is *prima facie* evidence only as to facts which he would presumably have to learn through inquiry from others. This curious doctrine seems to have been first definitely announced in Kansas, and is now the settled rule in that State,<sup>25</sup> though in an early decision, Judge Brewer, speaking for the Supreme Court of Kansas, with his clear grasp of fundamental principles, had laid down the true rule,

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where no rights of third persons have intervened, an officer's return of service may be impeached."

Montana: *Burke v. Inter-State Savings Ass'n.* (1901) 25 Mont. 315, 64 Pac. 879.

Nebraska: *Bankers' Life Ins. Co. v. Hobbins* (1897) 53 Neb. 44, 73 N. W. 269.

Nevada: *Higley v. Pollock* (1891) 21 Nev. 198, 27 Pac. 895.

New Jersey: *Chapman v. Cumming* (1839) 17 N. J. L. 11, holding the return not conclusive as to place of service, as distinguished from the fact of service; *Hotovitsky v. Little Russian Church* (1911) 78 N. J. Eq. 576, 79 Atl. 340:—"The sheriff's return is presumptive proof of the facts recited in it." This was a case of chancery process.

New York: *Wheeler v. N. Y. & Harlem R. R.* (1857) 24 Barb. 414; *Wheeler & Wilson Mfg. Co. v. McLaughlin* (1889) 8 N. Y. Supp. 95; *Ferguson v. Crawford* (1877) 70 N. Y. 253, holding the return not conclusive even on collateral attack.

North Carolina: *Burlingham v. Canady* (1911) 156 N. C. 177, 72 S. E. 324.

Ohio: *Kingsborough v. Tousley* (1897) 56 Ohio St. 450, 47 N. E. 541.

Oklahoma: *Ray v. Harrison* (1912) 32 Okla. 17, 121 Pac. 633:—"It is fundamental that a judgment rendered without notice is void, and to make an officer's return, which is false, conclusive evidence against the truth, is not in harmony with reason or justice, and we think the better rule is, that while it required clear and convincing proof to set it aside, it is the duty of the court, when evidence meets this test, to act upon it and not permit an established falsehood to stand as true."

South Carolina: *Genobles v. West* (1884) 23 S. C. 154.

South Dakota: *Matchett v. Liebig* (1905) 20 S. Dak. 169, 105 N. W. 170.

Texas: *Randall v. Collina* (1881) 58 Tex. 231.

Wisconsin: *Ill. Steel Co. v. Dettlaff* (1903) 116 Wis. 319, 93 N. W. 14; *Carr v. Commercial Bank* (1862) 16 Wis. 52:—"If it appears from the return that process has been regularly served, and nothing appears to the contrary, the court is authorized to proceed with the action. If the defendant appears in season, he can avail himself of the objection that service has not been had so as to confer jurisdiction. *Wheeler v. N. Y. & Harlem R. R.* (1857) 24 Barb. 414. And so obvious a principle would not seem to require any authority to support it. We can see no substantial reason why he cannot take the same objection on a motion to set aside the judgment."

United States: *Mechanical Appliance Co. v. Castleman* (1909) 215 U. S. 437, 30 Sup. Ct. 410, holding that the State rule, that the sheriff's return was conclusive, was not one which should be followed by the federal court sitting in that State.

<sup>25</sup>*Schott v. Linscott* (1909) 80 Kan. 536, 103 Pac. 997; *Goddard v. Harbour* (1896) 56 Kan. 744, 44 Pac. 1055; *Orchard v. Peake* (1904) 69 Kan. 510, 77 Pac. 281.

namely, that the whole matter was one of evidence.<sup>26</sup> But when Judge Brewer wrote, the doctrine had already been announced in accordance with the rule now followed,<sup>27</sup> and his views, while interesting, had no influence upon the subsequent course of the Supreme Court of that State.

That this Kansas rule has no support in the common law is very clear. In *Von Roy v. Blackman*<sup>28</sup> it was sought to induce the court to make this distinction, but Judge Woods, in the United States Circuit Court, disposed of the matter very conclusively, quoting *Goubot v. DeCrouy*<sup>29</sup> and *Lawrence v. Pond*,<sup>30</sup> where the English and Massachusetts courts had held returns to be conclusive even where they were made up largely of matters of opinion. In a recent federal decision<sup>31</sup> the same distinction was more kindly treated, as offering a means of escape in the case at bar from the rule of conclusiveness in force in Missouri, the district where the court was sitting, but in view of the decision of the United States Supreme Court in *Mechanical Appliance Company v. Castleman*,<sup>32</sup> this decision cannot be accorded any weight. Only

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<sup>26</sup>*Starkweather v. Morgan* (1875) 15 Kan. 274:—"The question, in whatever cases it may arise, is one of evidence. . . . Looking at it in the light of the evidence, and the ruling of the court cannot be disturbed. On the one hand, it is the return of the sheriff, a disinterested party, and a sworn officer, which, if not conclusive, is the strongest kind of evidence. On the other, the denial of the witness, Mrs. Starkweather, corroborated to some extent by the testimony of her husband, both interested witnesses. . . . At any rate, there is not enough testimony adverse to the return of the officer to warrant us in reversing the ruling of the district court."

<sup>27</sup>This was in *Bond v. Wilson* (1871) 8 Kan. 228, where the question arose on a motion to set aside the return as false in fact. The court said:—"The sheriff not only executes original process by service upon the defendant personally, but by leaving a copy at his usual place of residence. The sheriff also determines whether a minor is over fourteen years of age, and serves accordingly. He also determines who is president, mayor, chairman, or chief officer of a board of directors; and also what is the usual place of business of a corporation, and who has charge thereof, and serves his process accordingly. Is his determination of such question final? Must the defendant suffer the judgment to stand in such cases, and resort to his remedy against the officer? It must be borne in mind that no rights of third parties have intervened, and the only parties interested are before the court. . . . Of his own acts his knowledge ought to be absolute, and himself officially responsible. Of such facts as are not in his special knowledge he must act from information, which will often come from interested parties, and his return thereof ought not to be held conclusive."

<sup>28</sup>(C. C., D. La. 1877) 3 Woods, 98.

<sup>29</sup>(1833) 1 Crompt. & M. 772.

<sup>30</sup>(1821) 17 Mass. 433.

<sup>31</sup>*Higham v. Iowa State Travelers' Ass'n.* (C. C., W. D. Mo., W. D. 1911) 183 Fed. 845.

<sup>32</sup>(1909) 215 U. S. 437, 30 Sup. Ct. 410 (see note 24 *supra*).

in Washington has the Kansas rule found any real and authoritative welcome.<sup>83</sup>

That it is unsound in principle has been demonstrated by the Court of Appeals of Colorado in a vigorous and convincing opinion,<sup>84</sup> in the course of which the court says: "The effect of a false return upon the proceeding, and upon the parties to it, is precisely the same in one case as in the other. The officer certifies that he made personal service of the writ upon the defendant, or he certifies that he left a copy of the summons at the usual place of abode of the defendant, with a member of his family over a specified age. Whether he made personal service or not is said to be within his own knowledge; but whether the place where the writ was left was in fact the usual place of abode of the party, or whether the person with whom it was left, was a member of the defendant's family, was something to be ascertained by inquiry, and, therefore, is said not to be necessarily within his knowledge. But either mode of service is good, and, if the defendant fails to appear, authorizes default and judgment against him. Why a defendant who is ignorant of the proceedings of the sheriff, should be compelled to submit to the hardship of being concluded by the judgment in one case, and not in the other, or why a plaintiff, who is equally ignorant of the proceedings of the sheriff, should be compelled to submit to the hardship of losing the benefit of his judgment in one case, and not in the other, is, we confess, not obvious to us. Neither are we quite able to see why there should be a conclusive presumption in one case, and not in the other. It is true that if the officer does not personally know the place of abode of the defendant, he must inquire, and must rely upon the information received. . . . But on the other hand, he may not be personally acquainted with the defendant. The latter may be a man whom he has never seen, and of whom he has never heard, and in such case he must make inquiry, and must depend upon the result of the inquiry. . . . In finding the man, he is acting upon information derived from others. As it is entirely possible that the identity of the party may not be within the officer's knowledge, why should it be conclusively presumed that it is? As it is entirely possible that he may by misdirection or mistake serve the

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<sup>83</sup>Wilbert *v.* Day (1915) 83 Wash. 390, 145 Pac. 750.

<sup>84</sup>Du Bois *v.* Clark (1898) 12 Colo. App. 220, 55 Pac. 750.

process on the wrong man, why should it be conclusively presumed that he served it on the right one?"<sup>35</sup>

3. In a number of States the legislature has by statute expressly abolished the common law rule by declaring the sheriff's return to be *prima facie* evidence of facts therein stated,<sup>36</sup> and in others by authorizing it to be traversed.<sup>37</sup>

4. In another group of States the common law rule has not been directly affected by statute, and is deemed to be in force, but remedial statutes, construed to authorize the courts to give relief in cases of false returns, have very greatly reduced the amount of harm which the old rule is able to do.

In Indiana, the statute empowered the court at any time within two years to relieve a party from a judgment against him by reason of mistake, inadvertence, surprise or excusable neglect. The court held<sup>38</sup> that to have recourse to the statute the party must show some excuse for his default, and that want of service of process was a good excuse and might be shown, not for the purpose of assailing the jurisdiction of the court, for the sheriff's return was conclusive on that matter, but merely to excuse the party's failure to appear and submit to a jurisdiction which the return showed had been properly obtained over him.

So in Kentucky, the statute declares that the sheriff's return can be contradicted only in case of fraud by the party benefitted, or mistake on the part of the officer, and under this statute it was held in *Bramlett v. McVey*<sup>39</sup> that a petition alleging the taking of

<sup>35</sup>See *Great West Min. Co. v. Min. Co.* (1888) 12 Colo. 46, 20 Pac. 771, holding that the return is not conclusive on matters not within the sheriff's personal knowledge, and quoting the Kansas cases approvingly. But the court does not hold that the return is conclusive as to matters within the sheriff's personal knowledge.

<sup>36</sup>Arizona: R. S. 1901, § 1088. Construed in *National Metal Co. v. Greene Copper Co.* (1907) 1901 Ariz. 109, 89 Pac. 535.

California: Pol. Code 1909 § 4159; *Horton v. Atchison T. & S. F. R. R.* (1893) 97 Cal. 388, 32 Pac. 452.

Idaho: Pol. Code, § 2026.

Utah: C. L. 1907, § 584.

<sup>37</sup>Georgia: Code 1895, § 4988 (Code 1911 § 5566). *Lamb v. Dozier* (1876) 55 Ga. 677, holding that the sheriff must be made a party to the traverse.

Mississippi: Code 1906, § 3945. *Mayfield v. Barnard* (1870) 43 Miss. 270, holding that a plea in abatement and not a motion is contemplated by the statute; *Meyer v. Whitehead* (1884) 62 Miss. 387, holding that a judgment taken on a false return may be vacated at a subsequent term under the statute.

<sup>38</sup>*Nietert v. Trentman* (1886) 104 Ind. 390, 4 N. E. 306.

<sup>39</sup>(1891) 91 Ky. 151, 15 S. W. 49.

a judgment against petitioner on a false return which was made by the mistake of the sheriff in supposing he had served the defendant when in fact he had not done so, stated a good cause for relief. Since false returns are almost invariably due to mistake rather than design, this construction of the statute makes relief possible in most cases.

In Massachusetts a statute<sup>40</sup> providing that if a judgment is rendered in the absence of the defendant and without his knowledge, a petition for review may be filed in the Supreme Court within one year after notice of the judgment, was held to apply to a case where the judgment was rendered on a false return.<sup>41</sup> Chief Justice Shaw, who wrote the opinion in this case, gave one of the best arguments against following the common law rule which is to be found in the books, but the court was apparently either unable to see that it logically called for the complete abandonment of that rule or was too timid to take the logical step.<sup>42</sup>

In Rhode Island, under a statute authorizing the court, for a period of six months after the entry of the decree, and for cause shown, to set aside the same on proper notice, it was held to be competent for the court to vacate a decree made on a false return by the sheriff.<sup>43</sup>

The weakness in all these statutory cases is that the power of the court to grant relief does not attach until after judgment. Nothing could be more absurd than a rule which prohibits relief when applied for early, but allows it when applied for late. Such a rule reverses the whole doctrine of diligence as the *sine qua non* of procedural rights.

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<sup>40</sup>Rev. St. 1836, Ch. 99.

<sup>41</sup>*Brewer v. Holmes* (Mass. 1840) 1 Metc. 288.

<sup>42</sup>"Shaw, C. J. . . . It is said that the petitioner would have a remedy upon the officer for a false return, and, on showing his defense to the first action, recover back from him the amount he had been compelled to pay. Supposing he could, which may be doubted, the result would be that the present respondent, the original plaintiff, would have a sum of money, which, in the case supposed, he had no just claim to recover, and the officer would be compelled to pay a like sum for a slight and perfectly innocent mistake. An officer goes to a house to leave a summons with John Smith; not knowing the person, he is led to believe, without fault of anybody, that his brother James Smith is the man he is looking for, and he leaves the summons with him and makes his return accordingly. This is a false return. If somebody must necessarily suffer loss, in consequence of this mistake, it is no doubt right that it should fall on him who made it. But if it is seasonably discovered, in time to prevent loss to anybody, why should not the remedy be applied, and the rights of all parties be saved? The effect of a review will be simply to give the petitioner opportunity to make a defence."

<sup>43</sup>*Locke v. Locke* (1894) 18 R. I. 716, 30 Atl. 422.

5. In one State, Arkansas, the court has, by a very clever line of reasoning, reached the same position without the aid of a statute that the Indiana court reached by means of the statute above mentioned. In *Wells, Fargo & Company v. Baker Lumber Company*<sup>44</sup> a judgment by default was taken on a false return, and a few days later, at the same term, defendant filed a motion to set it aside on the ground that it had had no notice whatever of the pending action until after judgment. The court started with the well settled premise that "during the whole of the term, at which a judgment or order is rendered, it remains subject to the plenary control of the court, and may be vacated, set aside, modified or annulled. . . . This is a power inherent in all courts of general jurisdiction and is not dependent upon nor derived from the statutes." It then proceeded:—"It is also true, this court held, in *St. Louis Ry., Ex parte*, 40 Ark. 141, in a case of a default judgment, that the truth of the sheriff's return upon a copy of the writ could not be controverted either in the action or in a review upon certiorari. But it has further held, however, that an officer's false return of service of process shall not preclude the defendant from showing the truth in a proper proceeding to be relieved from the burden of a judgment based thereon. 'Evidence tending to contradict the record is heard in such cases, not for the purpose of nullifying the officer's return, but to show that by the judgment the defendant has been deprived of the opportunity to assert his legal rights without fault of his, and that it would be unfair to allow the judgment to stand without affording him the chance to do so. The principle that affords relief to one that has been summoned, but has been prevented through unavoidable casualty from attending the trial governs.' *State v. Hill*, 50 Ark. 461, 8 S. W. 401. Appellant was not entitled to show the falsity of the officer's return to defeat the jurisdiction of the court rendering the judgment under the doctrine of the cases above cited, but only to excuse its failure to make its defense at the time of the trial and prevent its being compelled to submit to a judgment and have its rights unjustly concluded without an opportunity to be heard."

This argument is of general application, and illustrates how any court, having too tender a regard for the authority of the common law, can violate its spirit and evade its most serious consequences, while conforming to its letter with the utmost punctiliousness. Its practical weakness is the same as that pointed out in regard to the statutes mentioned in 4, above, namely, it grants a remedy at a late stage while it refuses relief at an early stage.

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<sup>44</sup>(1913) 107 Ark. 415, 155 S. W. 122.

6. The last group of States consists of those which have sought to be faithful to the ancient dogma of an inviolate return, a small group standing like a forlorn hope against a world in arms.<sup>45</sup>

But even where the common law rule obtains, there may still be a chance for relief through a resort to equity, unfair as it may seem to throw the burden of warding off a miscarriage of justice at law upon that long-suffering court of conscience. Many courts which permit a direct attack on the return also hold open the remedy in equity; some hold the remedy in equity exclusive; while some of the recalcitrant ones stand by the inviolability of the return both at law and in equity. Since it is not the purpose of this article to go into the question of indirect attack, no close analysis of these cases will be offered, but a list of cases will be found in the note bearing upon the availability of a remedy in equity.<sup>46</sup>

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<sup>45</sup>Maine: *Remick v. Wentworth* (1896) 89 Me. 392, 36 Atl. 622.

Missouri: *Smoot v. Judd* (1904) 184 Mo. 508, 33 S. W. 431.

New Hampshire: *Brown v. Davis* (1837) 9 N. H. 76.

Pennsylvania: *Park Bros. & Co. v. Oil City Boiler Works* (1903) 204 Pa. 453, 54 Atl. 334. But see *Flaccus Leather Co. v. Heasley* (1912) 50 Pa. Super. Ct. 127, where signs of distress are apparent, the court saying that the return is conclusive *but* "it is not now decided that a denial of service might not have weight along with a meritorious defense and motion to open a judgment and let a defendant into a defense."

Tennessee: *Leftwick v. Hamilton* (1872) 56 Tenn. 310, in which the court regretfully confesses that the rule has been adhered to "in obedience to precedent, and not from a conviction of its original correctness."

Vermont: *Columbian Granite Co. v. Townsend* (1902) 74 Vt. 183, 52 Atl. 432.

Virginia: *Sutherland v. People's Bank* (1910) 111 Va. 515, 69 S. E. 341; *Preston v. Kindrick* (1897) 94 Va. 760, 27 S. E. 588.

West Virginia: *Talbott v. Southern Oil Co.* (1906) 60 W. Va. 423, 55 S. E. 1009:—"Our decisions hold that the return of the sheriff cannot be contradicted under any circumstances, nor overthrown by any kind of proceedings."

<sup>46</sup>Cases holding that equity will relieve a defendant from a judgment obtained at law on a false return, merely on satisfactory proof that there was in fact no proper service, without proof of fraud on the part of the plaintiff:

Alabama: *Robinson v. Reid's Ex'r* (1873) 50 Ala. 69.

Arkansas: *State v. Hill* (1887) 50 Ark. 458, 8 S. W. 401.

Colorado: *Wilson v. Hawthorne* (1890) 14 Colo. 530.

Connecticut: *Jeffery v. Fitch* (1879) 46 Conn. 601.

Illinois: *Waterbury Nat. Bank v. Reed* (1907) 231 Ill. 246, 83 N. E. 188.

Iowa: *Blain v. Dean* (1913) 160 Iowa 708, 142 N. W. 418.

Maryland: *Gardner v. Jenkins* (1859) 14 Md. 55 (Not directly covering the point).

Mississippi: *Duncan v. Gardine* (1882) 59 Miss. 550.

Nebraska: *Westman v. Garlson* (1910) 86 Neb. 647, 126 N. W. 515.

Oregon: *Abraham v. Miller* (1908) 52 Ore. 8, 95 Pac. 814.

Rhode Island: *Dowell v. Goodwin* (1900) 22 R. I. 287, 47 Atl. 693.

Tennessee: *Insurance Co. v. Webb* (1900) 106 Tenn. 191, 61 S. W. 79.

Cases holding that equity will not grant relief where the return merely makes a false showing of service, but that there must be fraudulent collusion between the sheriff and the plaintiff at law or the judgment must have been obtained with knowledge of the falsity of the return:

It thus appears that the common law rule is fast disappearing from our jurisprudence, and that the courts have been much more effective reformers than the legislatures. In view of the reasons underlying the common law rule, there should have been no difficulty or reluctance on the part of modern courts in authorizing attacks on the return before judgment, and in view of the admitted powers exercised by courts over their own judgments, the same privilege should have been everywhere granted after judgment during the period covered by that control. Before third parties have acquired rights based upon the judgment there is absolutely no valid reason why any court should deny a defendant the right to assert the truth in a direct proceeding for that purpose.

As to the amount of proof which should be requisite to overthrow the officer's return, the courts have groped about without being able to fix upon any rule.<sup>47</sup> Probably a rule of quantity would be of little value. Most cases require the evidence to be clear, satisfactory, and convincing.<sup>48</sup> A mere preponderance will not suffice.<sup>49</sup> It has been held that the falsity should be shown beyond a reasonable doubt.<sup>50</sup> Something more than the testimony of the defendant alone is necessary,<sup>51</sup> and no single affidavit should be sufficient to impeach the official return.<sup>52</sup> These universally recognized requirements of proof are an entirely adequate protection against any abuse of the privilege of challenging the truth of the sheriff's recital of the facts of service.

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District of Columbia: *Brown v. Wygant* (1888) 6 Mackey (20 D. C.) 447.

Florida: *Lewter v. Hadley* (1914) 68 Fla. 131, 66 So. 567.

Missouri: *Smoot v. Judd* (1904) 184 Mo. 508, 83 S. W. 481.

South Carolina: *Crocker v. Allan* (1891) 34 S. C. 452, 13 S. E. 650, (on the ground that there is an adequate remedy by a direct attack at law).

Virginia: *Preston v. Kindrick* (1897) 94 Va. 760, 27 S. E. 588.

United States: *Walker v. Hobbins* (1852) 14 How. 584, (on the ground that there is an adequate remedy by a direct attack at law).

<sup>47</sup>*Knutson v. Davies* (1892) 51 Minn. 365, 53 N. W. 646.

<sup>48</sup>*Westman v. Carlson* (1910) 86 Neb. 847, 126 N. W. 515; *Randall v. Collins* (1881) 58 Tex. 231; *Kochman v. O'Neill* (1903) 202 Ill. 110, 66 N. E. 1047; *Raulf v. Chicago Brick Co.* (1909) 138 Wis. 126, 119 N. W. 646; *Ferguson v. Crawford* (1881) 86 N. Y. 609; *Kavanagh v. Hamilton* (1912) 53 Colo. 157, 125 Pac. 512.

<sup>49</sup>*Lunschen v. Peterson* (1913) 120 Minn. 288, 139 N. W. 506.

<sup>50</sup>*Pinnacle Co. v. Popst* (1913) 54 Colo. 451, 131 Pac. 413.

<sup>51</sup>*Davis v. Dresback* (1876) 81 Ill. 393.

<sup>52</sup>*Burlingham v. Canady* (1911) 156 N. C. 177, 72 S. E. 324; *Driver v. Cobb* (1873) 1 Tenn. Ch. 490.