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EXECUTION - MISDIRECTION OF PROCESS - VALIDITY OF AMENDMENT

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EXECUTION — MISDIRECTION OF PROCESS — VALIDITY OF AMENDMENT — A statute [1] provided that where the writ of execution requires the delivery of real or personal property, it "must" be issued to the sheriff of the county where the property is situated. The judgment debtor had some money deposited with the defendant bank in *Y* county on which plaintiff sought execution. The writ was directed to the sheriff of *X* county but was delivered to the sheriff of *Y* county. The writ was served on the defendant bank and the vice president of the bank made a return stating that the bank had no property in its possession, nor under its control, belonging to the judgment debtor. Two years after that service was made, plaintiff had the court amend the writ so that it was directed to the sheriff of *Y* county. *Held,* the original writ did not create a lien upon deposits belonging to the judgment debtor because, the statute being mandatory,

[1] Mont. Rev. Codes (1935), § 9423.

the service of the writ was void because misdirected, and the defect was cured neither by the defendant bank's return nor by the subsequent amendment. *Merchants Credit Service v. Chouteau County Bank*, (Mont. 1941) 114 P. (2d) 1074.

All courts agree that void process cannot be amended,[2] and that a garnishee [3] cannot waive a jurisdictional defect in the service, thereby favoring the creditor to the injury of the debtor.[4] However, the authorities are divided on the effect of misdirection of process. Some courts hold that the defect is one of substance and therefore the process, or any levy made under the process, is void,[5] but the weight of authority is that the misdirection is merely a formal defect rendering the process voidable.[6] In the principal case the court interpreted the statutory provision as to the issuance of the writ to be mandatory because the word "must" appeared in the statute.[7] But statutory language is not always given its literal connotation, especially if the general meaning and object of the statute is found to be inconsistent with the literal import of any particular clause or section.[8] In such a case the particular clause or section should be construed according to the purpose of the entire statute.[9] Since both the capias and imprisonment for debt have been abolished,[10] thus limiting the means by which a judgment creditor can enforce a judgment, it seems that a liberal construction

[2] 50 C. J. 600-601, § 343 (1930); Texas Title Guaranty Co. v. Mardis, 186 Okla. 433, 98 P. (2d) 593 (1940); Land v. Christenson, 109 Neb. 101, 189 N. W. 838 (1922). The court in the principal case did not deny amendment on the ground that the writ was void but on the ground that an amendment could be made only during the life of a writ, which in this case was six months. However, since amendments must be seasonably made, the principle of the court's rule as to the amendment is well supported. 23 C. J. 422, § 200 (1921).

[3] Where the judgment creditor attempts to reach assets of the judgment debtor which are in the hands of a third person, the execution remedy is similar to a garnishment after judgment. In this respect the defendant in the principal case stands in the position of the ordinary garnishee. 10 ENCYC. STANDARD PROC. 373, § 1 (1914).

[4] 2 SHINN, ATTACHMENT AND GARNISHMENT, § 610 (1896); DRAKE, ATTACHMENT, 7th ed., § 451b (1891); 2 WADE, ATTACHMENT, § 336 (1886); 5 AM. JUR. 51 (1936); 64 A. L. R. 430 (1929).

[5] 50 C. J. 601, § 344 (1930); Sidwell v. Schumacher, 99 Ill. 426 (1881); Gordon v. Camp, 3 Pa. St. 349 (1846).

[6] 50 C. J. 601, §§ 343, 348 (1930), and cases there cited; Chicago Mill & Lumber Co. v. Lamb, 174 Ark. 258, 295 S. W. 27 (1927); Cristy v. Springs, 11 Okla. 710, 69 P. 864 (1902); Rollins v. Rich, 27 Me. 557 (1847). The court in the principal case argued that this was the rule only when the misdirection was to another officer of the same county, e.g., where the writ is directed to a constable instead of to the sheriff, and not where the writ is directed to the sheriff of another county, but the cases do not restrict the rule to such narrow limits.

[7] In reaching this conclusion, the Montana court relied on cases involving: (1) a criminal code, People v. Thomas, 32 Misc. 170, 66 N. Y. S. 191 (1900); (2) a statute prescribing how jurors were to be paid, In re Farrell, 36 Mont. 254, 92 P. 785 (1907); (3) a statute providing that no court be open on certain legal holidays, Ex parte Smith, 152 Cal. 566, 93 P. 191 (1907).

[8] 27 WORDS AND PHRASES, perm. ed., 884 (1940), and cases there cited.

[9] 2 SUTHERLAND, STATUTORY CONSTRUCTION, 2d ed., § 370 (1904).

[10] 4 AM. JUR., 36-37, §§ 566-567 (1936); WALSH, EQUITY 62 (1930).

of the execution remedy is warranted. If resort must be had to the cases to determine what meaning should be imputed to words in the statute, the court should choose those cases which interpret statutes calling for a liberal construction rather than cases which interpret criminal codes or other types of statutes calling for strict construction. In view of the fact that the court which issued the defective writ had authority to issue a writ directed to the sheriff of any county in the state,[11] the court could have prevented technicality from overriding justice by ruling that the writ was merely formally defective and therefore voidable rather than void, and no difficulties would have been presented in reaching a judgment in favor of the plaintiff.

[11] Mont. Rev. Codes (1935), § 9423.