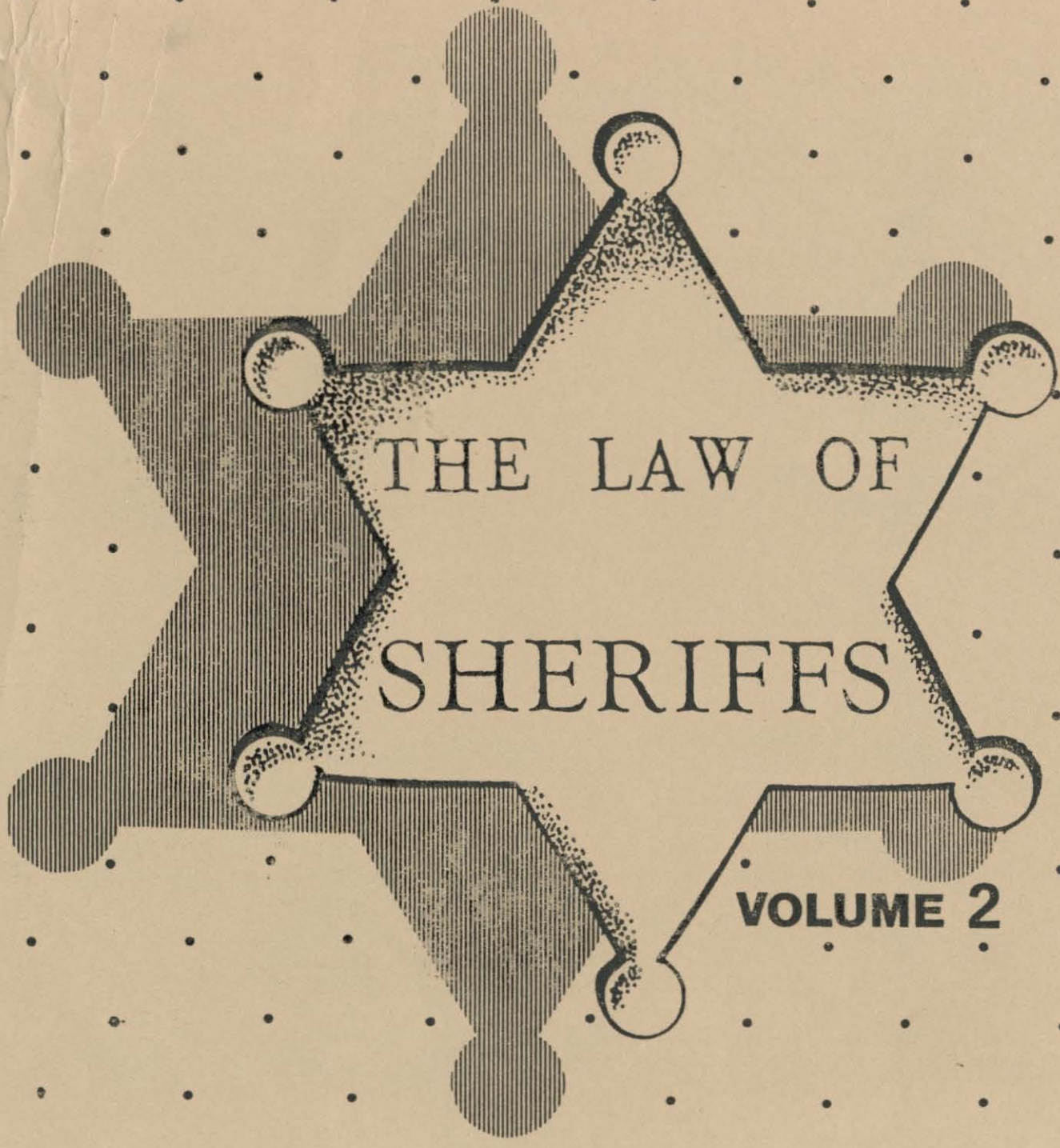
THE LAW OF
SHERIFFS
VOLUME 2

A TREATISE ON THE LAW OF

SHERIFFS

CORONERS AND CONSTABLES WITH FORMS

BY

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VOLUME TWO

SHERIFFS, CORONERS, AND CONSTABLES

CHAPTER XX

EXECUTION—LEVY UPON LANDS

SECS.

§ 538. At Ancient Common Law, No Levy upon Lands.—At common law there was no means by which lands could be taken in satisfaction of a judgment, or debt due a private citizen, but the King could take the land under an execution on a judgment in his favor.[1] This situation was remedied in England by some parliamentary enactments.[2] The reason that lands were not subject to seizure and sale under an execution at common law, except at the instance of the King, was because they were obliged to answer the duties of the feudal lord, and a new tenant could not be forced upon him without his consent in the alienation and the subject was not liable because he was obliged by tenure to serve the King in time of war, and at home the Lords, according to the distinct nature of the tenure.[3]

After the statutory changes were made, lands were subject there-

1. Morsell v. First Nat'l Bank, 91 US 357, 23 L ed 436; Due v. Bankhardt, 152 SW 786, 151 Ky 624; Murray v. Ridley, 3 Har & M (Md) 171; Hollingsworth v. Patten, 3 Har & M (Md) 125; State v. Rogers, 2 Har & M (Md) 198; Jones v. Jones, 1 Bland's Ch (Md) 443, 18 Am Dec 327; Riggs v. Sterling, 27 NW 705, 60 Mich 643, 1 Am St R 554; McMillan v. Davenport, 118 P 756, 44 Mont 23, AC 1912D 984; Hulbert v. Hulbert, 111 NE 70, 216 NY 430, LRA1916D 661, AC 1917D 180; Murfree on Sheriffs, Sec. 690; Coombs v. Jordan, 3 Bland's Ch (Md) 284, 22 Am Dec 236; Rorke v. Dayrell, 4 Times R 402, 100 Eng Rep 1086.

2. Murfree on Sheriffs, Sec. 690; Statutes 11 and 13, Edward 1st, 27 Edward 3rd, 23 Henry VIII.

3. Morsell v. First Nat'l Bank, supra.

under to be taken, after a fashion, in satisfaction of debts. They could be taken under a writ called "extents." With prescribed formalities, the lands of a debtor could be sequestered by the use of the "extents" through the instrumentality of the sheriff until such time as the rents and profits thereof would extinguish the debts for which they were seized. It seems that this procedure has been recognized as being in force in some of the states.[4] However, it may be asserted, at this time, all interests in lands may be reached in satisfaction of a judgment in all jurisdictions, differing only in the method of accomplishing the result. It is sometimes necessary to resort to proceedings in equity to subject equitable interests to the satisfaction of a judgment at law.[5]

§ 539. Writ of Execution as Applied to Land.—It may be generally stated that real property in the United States can be subjected to the satisfaction of judgments at law through a writ of execution. This writ is usually directed to the sheriff or constable and commands him that of the goods and chattels, lands and tenements, of the defendant he cause to be made the amount of the judgment, including interests and costs. In the absence of a controlling statutory provision to the contrary, the execution ought to be levied in the order directed; that is, first the goods and chattels of the defendant therein should be seized before resort is had to lands and tenements.[6]

The rule requiring the exhaustion of personalty found approval, if it did not originate, in the Magna Charta, where it was provided: "Neither we nor our bailiffs will seize any land or rent for any debt, so long as the chattels of the debtor are sufficient to pay the debt; nor shall the sureties of the debtor be distrained so long as the principal debtor has sufficient to pay the debt; and if the prin-

4. Murfree on Sheriffs, Secs. 690, 691.

5. In re McGraw, 254 F 442; Jackson v. Parkersburg & O. V. E. R. Co. 233 F 784; Smith v. McCann, 24 How (US) 398, 16 L ed 714; Fish v. Fowlie, 58 Cal 373; Ohio etc. Smelting etc. Co. v. Barr, 144 P 552, 58 Colo 116; Stock-Growers Bank v. Newton, 22 P 444, 13 Colo 245; Thalheimer v. Tischler, 46 So 514, 55 Fla 796, 17 LRANS 841, 15 AC 863; Rucker v. Tabor & Almand, 54 SE 959, 126 Ga 132; Phillips v. Rogers, 12 Metc (Mass) 405; Eneberg v. Carter, 12 SW 522, 98 Mo 647, 14 Am St R 664; Holmes v. Wolfard, 81 P 819, 47 Ore 93; Greene v. Mobley, 99 SE 814, 112 SC 275; Wieters v. Timmons, 1 SE 1, 25 SC 488; Hulbert v. Hulbert, supra.

6. U. S. v. Drennen, 25 F Cas No. 14,992, Hempst 320; Bartholomew v. Hook, 23 Cal 277; Eaves v. Garner, 36 SE 688, 111 Ga 273; Pitts v. Magie, 24 Ill 610; Sansberry v. Lord, 82 Ind 521; Nelson v. Bronnenburg, 81 Ind 103; Jakobsen v. Wigen, 53 NW 1016, 52 Minn 6; Wright v. Young, 6 Or 87; Hassell v. Kentucky Southern Bank, 2 Head (Tenn) 381; Stockard v. Pinkard, 6 Humph (Tenn) 119.

cipal debtor shall fail in the payment of the debt, not having wherewithal to pay it, then the sureties shall answer the debt; and if they will they shall have the lands and rent of the debtor, until they shall be satisfied for the debt which they paid for him, unless the principal debtor can show himself acquitted thereof against the said sureties."[6a]

If an execution directs the officer "to levy upon the real estate, goods, and chattels of" the debtor or defendant, it is an irregularity, but does not avoid the writ.[6b] In those jurisdictions where it is necessary to file a homestead declaration in order to make a claim of homestead exemption, and lands have been levied upon under process against the husband, the wife can file the homestead, and then by appropriate proceedings compel the officer to proceed against the personalty of the debtor before resorting to the realty thus attempted to be exempted.[6c]

The subject of the manner of levying executions is now generally regulated by statute, and the statutes of the particular jurisdictions involved ought to be consulted and followed. At common law, since, as we have seen in the next preceding section, that land was not subject to levy, the execution merely directed the officer to make the money of the "goods and chattels" of the defendant.[7] Under the modern legislative enactments, the general rule is that land is embraced along with goods and chattels, and where the word in the execution is directed of goods and chattels and lands of the defendant, that is sufficient to authorize the seizure of any interest in land of which the execution debtor is possessed.[8] Also, it seems the word "effects" is sufficiently comprehensive in its significance as to warrant the seizure of real estate, when such word is used in respect to levying an execution on property.[9]

However, under some statutory provisions, and perhaps independently thereof, the execution debtor has the right of election as to which of his property shall be seized first; whether realty or personalty.[10] It has been denied, however, that such right on the part

6a. 3 Id. ho Compiled Statutes 1919, p. 2006, Sec. 9.

6b. Wright v. Young, supra.

6c. Bartholomew v. Hook, supra.

7. 3 Blackstone's Comm. page 417.

8. Brown v. Duncan, 23 NE 1126, 132 Ill 413, 22 Am St R 545; Holmes v. Jordan, 39 NE 1005, 163 Mass 147; Lord v. Johnson, 15 SW 73, 102 Mo 680.

9. State v. Newell, 1 Mo 248; Horton v. Garrison, 20 SW 773, 1 Tex Civ A 31.

10. Smith v. Randall, 6 Cal 47, 65 Am D 475; Pitts v. Magie, supra; Nutter v. Fouch, 86 Ind 451; Stancill v. Branch, 61 NC 306, 93 Am D 592; Frink v. Roe, 11 P 820, 70 Cal 296, 7 P 481, 2 Cal Unrep Cas 491; Hollinshed v. Woodard, 52 SE 815, 124 Ga 721; Peo. v. Palmer, 46 Ill 398, 95 Am D 418.

of the judgment debtor existed at common law.[10a] But, since, at common law lands were not subject to seizure, it is difficult to see how the question could have arisen. It seems also, under some statutes, that the officer should first call upon the debtor for payment before making any levy whatever.[11] Statutory enactments are to be encountered directing that personal property be levied upon before proceeding to the taking of real estate.[12]

Where the right to have personalty taken before resorting to realty exists and is recognized, such right may be waived. This may result where the debtor is guilty of making a fraudulent conveyance, or where he refuses to point out personalty to be seized, and the officer is uninformed as to the debtor's ownership of such, or its location, if known to be owned by the debtor.[12a] If the execution runs against joint defendants, the fact one has personalty and realty and the other owns realty only, the latter's realty may be taken in the first instance.[12b] As to whether a return of an execution "nulla bona" ought to be made before levying on realty, showing by the return the absence of personal property, and as to the necessity of procuring the issuance of an alias writ to levy on realty or whether the levy may be made on real estate under original writ, are matters calling for a consultation of local statutes. While what we have said has been in regard to executions, yet these rules would have an equal controlling effect with regard to the levy of writs of attachment. The levy upon lands in the different jurisdictions is a matter subject to statutory regulation and the statutes of a particular jurisdiction where involved should be consulted.

§ 540. Appraisal.—In some jurisdictions, after a levy of process upon real estate, the defendant has a right to have it appraised. The purpose of such is to prevent the sacrifice of property at public auction. The statutes in these jurisdictions usually provide that there shall not be a sale for less than the appraised value or a percentage thereof. The disobedience of the command of the statute renders the sale so made voidable.[13]

10a. Bodley v. Downing, 4 Litt (Ky) 28.

11. Pitts v. Magie, supra.

12. Garczynski v. Russell, 27 NYS 465, 75 Hun 497, 57 NY St 673; Guiterman v. Coutant, 111 NYS 1081, 59 Misc 23, 111 NYS 19, 59 Misc 447, aff. 112 NYS 900, 128 App Div 452; Stancill v. Branch, supra.

12a. Oliver v. Dougherty, 68 P 553, 8 Ariz 65; Landrum v. Broadwell, 35 SE 638, 110 Ga 538; Pitts v. Magie, 24 Ill 610.

12b. Drake v. Murphy, 42 Ind 82; Faris v. Banton, 6 JJ Marsh. (Ky) 235; Warren v. Edgerton, 22 Vt 199, 54 Am D 66.

13. Murfree on Sheriffs, Sec. 703.

§ 541. Subdivision of Lands Sold under Execution.—Statutes are to be found in many jurisdictions providing for the offer of lands sold under an execution in parcels first, and then as a whole, and adopt the method from which arises the greater amount. Sometimes statutes are found authorizing the debtor himself to subdivide his lands before a sale, and where this is the case, it is the duty of the sheriff to offer the land as subdivided by the execution debtor. A failure to comply with the statute is an irregularity subjecting the sale to be set aside.[14] However, where property is of such character that it cannot be subdivided, then it should be sold as a single parcel or piece.[15]

§ 542. Sufficient Description in Officer's Return.—It is not every imperfect description of a piece of land levied upon that will invalidate the levy, or affect the sale, and where a number of pieces of land are levied upon, and some imperfectly described, this will not vitiate the levy with respect to those perfectly described. It may be sufficient description to describe land levied upon as a certain number of feet off of a piece of land in a certain direction.[16]

§ 543. Presumption as to the Correctness of Return When Land Levied Upon.—The same presumption attaches in respect to a levy upon real estate as to other official acts, and the presumption of regularity, as in other cases, generally obtains.[17] Where an officer's return is silent as to whether certain acts were performed, a presumption will be indulged that the officer correctly and legally discharged his duty. So, if in the sale of land, the officer's return is silent as to whether or not it was appraised in pursuance to the mandates of a statutory enactment, a presumption will come into play, and it will be assumed that it was so appraised; that is, the officer performed his duty.

It may be stated as a general rule, in respect to recitals in an officer's return as to the performance of his official duties, it will be assumed that such recitals are true and the burden is on whoever disputes the same to offer proof thereof.[18]

14. Osgood v. Blackmore, 59 Ill 261; Rigney v. Small, 60 Ill 416; Nesbit v. Hanway, 87 Ind 400; Weaver v. Guyer, 59 Ind 195; Baker v. Chester Gas Co. 73 Pa St 116, 2 Del Co R 269.

15. Nesbit v. Hanway, supra; Weaver v. Guyer, supra.

16. Bond v. Heuser, 86 Ind 398. See also, Freeman on Exemptions, Sec. 281.

17. See Section 530, supra.

18. Tucker v. Bond, 23 Ark 268; Hammond v. Starr, 21 P 971, 70 Cal 556; Humphrey's Exr. v. Wade, 1 SW 648, 84 Ky 391, 8 Ky L 384; Baldwin v. Gordon, 12 Mart (OS La) 378; State ex rel. Hurst v. Bode, 219 SW (Mo App) 1001; Miller v. Powers, 23 SE 182, 117 NC 218; Jackson v. Jackson, 35 NC 159; Browning v. Flanagin, 22 NJL 567.

§ 544. Plaintiff May Be Purchaser.—There is nothing in the law to prevent an execution plaintiff or execution creditor from purchasing at an execution sale.[19] This is especially true where such execution creditor has transferred his claim to some one else.[20] It goes without saying that where the execution creditor may purchase, he may likewise make the purchase through an agent.[21] However, where such judgment creditor purchases at an execution sale and credits the bid on the judgment, it is held that he is not a purchaser for value.[22] Where the execution creditor is the purchaser, as such, he is not an innocent purchaser or a bona fide purchaser for value in whose favor an estoppel may arise.[23]

However, it has been held that where a judgment creditor purchases at the execution sale, he is protected as against unknown latent equities, and where there had been oral assignments of rents and a subsequent collection thereof by the assignee, it was held that such judgment creditor could recover such rents accruing after the execution sale from the tenants, notwithstanding the oral assignments prior to the judgment, there being no recorded instrument showing such assignment, and the judgment creditor had no notice of such assignment.[24] Where such execution creditor purchases at a sale under a void judgment on a replevy bond, he cannot assert any of the rights of an innocent purchaser.[25] For a sale to be good, at which the execution creditor is a purchaser, there must be a fair competition of bidders, or at least an opportunity for such bidding.[26] Where the execution creditor is the purchaser at a sale, it has been held that it takes less, or slighter irregularities to avoid the sale than in a case where the purchaser is a third party.[27]

§ 545. Inadequacy of Price—Plus Irregularities.—Mere inadequacy of price is, in itself, insufficient to set aside an execution sale,

19. Pacific Fruit Exchange v. Schropfer, 279 P 170, 99 Cal App 692; Patterson v. Drake, 55 SE 175, 126 Ga 478; Jones v. Webb, 59 SW 858, 22 Ky L 1100; Tonopah Banking Corp. v. McKane Mining Co. 103 P 230, 31 Nev 295; Corinth v. Locke, 20 Atl 809, 63 Vt 411, 11 LRA 207.

20. Hudson v. Morriss, 55 Tex 595.

21. Arnold v. Ness, 212 F 200; Foster v. Pugh, 12 Smedes & M (Miss) 416.

22. Carlisle v. Holland, 289 SW (Tex Civ App) 116.

23. Tallyn v. Cowden, 290 P 1005, 158 Wash 335; Vandin v. Henry McCleary Timber Co. 289 P 1016, 157 Wash 635; Waddell v. Roberts, 216 P 755, 139 Wash 273.

24. Pacific Fruit Exchange v. Schropfer, supra.

25. Linn Bros. Motor Co. v. Williams, 293 SW (Tex Civ App) 658.

26. Ricketts v. Unangst, 15 Pa 90, 53 Am Dec 572; McMichael v. McDermott, 17 Pa 353, 55 Am Dec 560.

27. Dickerman v. Burgess, 20 Ill 266; Cavender v. Smith's Heirs, 1 Iowa 306; Leisenring v. Black, 5 Watts (Pa) 303, 30 Am Dec 322.

unless so grossly inadequate as to shock the conscience.[28] However, inadequacy along with other elements may be sufficient to set aside such sale.[29] And it is not necessary that there should be any fraud in connection with the inadequacy of the price for the sale to be set aside.[30] It was held sufficient to set aside a sale where it was not attended by the party defendant through mistake or misapprehension, plus gross inadequacy of price, even though there was no fraud.[31] It has likewise been held that where the price received at the sale is so inadequate as to shock the conscience or understanding, such will in itself justify the court to void the sale.[32] The inadequacy of price, however, does not prevent the passing of title, and sale is not subject to collateral attack by reason thereof, but must be attacked in a direct action therefor.[33] In determining what is an adequate price, the courts will remember that such sale is a forced sale. After acknowledgment and delivery of sheriff's deed following an execution sale not mere defects and irregularities, however gross, but only fraud in the sale, or want of authority to sell, can defeat the title of sheriff's vendee.[34] A grossly inadequate price, coupled with very slight circumstances, is sufficient to move the court to set aside an execution sale, as where realty is sold without resort to personalty.[34a]

§ 546. Sheriff's Deed Prima Facie Evidence of Title.—A sheriff's deed on an execution sale is prima facie evidence of such sale.[35]

28. Graffam v. Burgess, 117 US 180, 29 L ed 839, 6 S Ct 686; Samuels v. Revier, 92 F 199, 34 CCA 294; Bock v. Losekamp, 179 P 516, 179 Cal 674; Olp v. Meyer, 115 NE 221, 277 Ill 202; Learned v. Geer, 29 NE 215, 139 Mass 31; Fox v. Curry, 29 P(2d) 663, 96 Mont 212; Bowker v. Semple, 152 Atl 604, 51 RI 142.

29. C & D Building Corp. v. Griffithes, 157 Atl 137, 109 NJE 319; Warren Pearl Works v. Rappaport, 154 Atl 587, 303 Pa 235; Selkirk v. Selkirk, 297 SW (Tex Civ App) 578.

30. Sapinsky v. Stout, 138 Atl 899, 101 NJE 813; Gillette v. Davis, 15 SW (2d) (Tex Civ App) 1085; C & D Building Corp. v. Griffithes, supra.

31. Raphael v. Zehner, 42 A 1015, 56 NJE 836; Sapinsky v. Stout, supra.

32. Graffam v. Burgess, 117 US 180, 29 L ed 839, 6 S Ct 686; Danforth v. Burchfield, 78 So 904, 201 Ala 550; McCoy v. Brooks, 80 P 365, 9 Ariz 157; Odell v. Cox, 90 P 194, 151 Cal 70; Suttles v. Sewell, 35 SE 224, 109 Ga 707; Glenn v. Miller, 173 NW 135, 186 Iowa 1187; Sheppard v. Enright, 188 SW(Mo) 186; Chapman v. Boetcher, 27 Hun (NY) 606; Nodine v. Richmond, 87 P 775, 48 Ore 527; Young v. Schroeder, 37 P 252, 10 Utah 155, affirmed 16 S Ct 512, 161 US 334, 40 L ed 721; Johnson v. Johnson, 119 P 22, 66 Wash 113.

33. Howard v. Corey, 28 So 682, 126 Ala 283.

34. Atcheson v. Hutchison, 51 Tex 223; Derr v. N. Y. Joint Stock Land Bank, 6 Atl (2d) 899, 335 Pa 309; Knox v. Noggle, 196 A 18, 328 Pa 302.

34a. Shepperd v. Holmes, 174 P 530, 89 Or 626. See also, Garcia v. Humacao, 25 Porto Rico 635.

35. McCullough v. East Arkansas Lumber Co. 20 SW(2d) 305, 180 Ark 57.

Where the sheriff's deed is regular on its face and conforms to the statutes relating thereto, it is prima facie evidence that the law has been complied with.[36] In other words, a valid sheriff's deed is an effective grant of the debtor's interest in the property as a deed would be from the debtor himself.[37] A presumption exists that a sheriff's deed is valid, and therefore may not be collaterally attacked.[38] And where a sheriff's deed issued on an execution sale, duly acknowledged, is introduced in evidence, such is prima facie evidence of the grantee's claim to property.[39] In collateral proceedings, acknowledgment of sheriff's deed is conclusive, except for fraud and want of power to sell.[40] However, the presumption indulged in voluntary sales in aid of description or identity of the property conveyed, based upon a supposition of the grantor's intention, finds no room for application in involuntary sales, where the owner intends nothing with respect to the matter.[41] However, where there is an imperfect description of land in the levy of an execution, such defect may be cured by a good description in the sheriff's deed.[42] Where the original record of a sheriff's sale was destroyed after the sale, but the deed which the sheriff gave to the purchaser recited all the necessary elements of a valid sale, such purchaser possessed valid title.[43]

§ 547. Sheriff's Deed—Its Recitals.—In the absence of statute, as in other deeds of conveyance, no particular words are required to pass the title. However, it should be gathered from the instrument that the intention of the sheriff was to pass the title and must contain such words as indicate such intention.[44] It is not necessary, unless required by statute, that the sheriff's deed state the judgment upon which it is based, or upon which the sale was had, it being sufficient to recite the sale was made on an execution issued out of a competent court.[45] On the other hand, however, in order

36. McCracken v. Citizens Nat'l Bank, 249 P 652, 80 Colo 164.

37. McCracken v. Citizens Nat'l Bank, supra.

38. Frum v. Kueny, 207 NW 372, 201 Iowa 327.

39. Zimmerman v. Boynton, 229 N W 3, 59 ND 112.

40. Colvin v. Crown Coal & Coke Co. 90 Pa Super 560.

41. Millsap v. Peoples, 288 SW 181, 116 Tex 180.

42. Downs v. Wagnon, 66 SW(2d) (Tex Civ App) 777. But see Sec. 547, note 58, infra.

43. Cooper v. Cooper, 124 SW(2d) 264, 22 Tenn App 473.

44. Howell v. Sherwood, 147 SW 810, 242 Mo 513; Jackson v. Jones, 9 Cow (NY) 182; Carolina Savings Bank v. McMahon, 16 SE 31, 37 SC 309.

45. Johnson v. McKinnon, 45 So 23, 54 Fla 221, 127 Am St R 135, 13 LRA NS 874, 14 AC 180; People's Nat'l Bank of Waterville v. Nickerson, 80 Atl 849, 108 Me 341; McGlothlin v. Scott, 6 SW(2d) (Tex Civ App) 129.

to show proper authority in the officer for the execution of the sheriff's deed, it has been held that such deed should show the judgment, execution, levy and sale.[46] In general, however, it would be well for the officer, in order to avoid any question in regard to the validity of the deed, to set out both the judgment and execution which gave him authority for the execution of the deed.[47]

At the present time it is required in most jurisdictions that the deed contain a recital of certain facts, such as the judgment, and the court which rendered it, and the subsequent procedure leading up to the sale, and, of course, the deed should comply therewith.[48] There should also be included, as required by most of the statutes, the correct name of the purchaser and other parties in the proceedings, but slight variations will not vitiate the deed.[49] In order for an omission of a recital required by statute to invalidate the deed, such omission must be one that shows the authority of the officer to make the sale. Where the recitals fail to comply with requirements, which do not go to show the officer's authority to make the sale, such requirements of such statutes are held to be directory and the omission of such matter will not invalidate the deed.[50] Where the recitation in the sheriff's deed gives the dates of the order for sale, and the deed antedating the judgment upon which the sale was made, such defect was held not to render the deed void.[51]

In view of the foregoing, it should be kept in mind that the only necessary facts which are mandatory under the statutes are those showing the sheriff's authority to execute the deed, and other defects are not fatal.[52] Where the purchaser receives a deed and is in possession for a number of years, it has been held that if it appears from the deed that the sheriff did what the statute required, the deed will be upheld.[53] In regard to a sheriff's deed, in order for the property to pass to the purchaser, it must be properly described.[54] Where the description is sufficient to identify the land,

46. Sipes v. Sanders, 39 SW(2d) 739, 162 Tenn 593.

47. Johnson v. McKinnon, supra.

48. Hihn v. Peck, 30 Cal 280; Glover v. Cox, 73 SE 1068, 137 Ga 684; Woodward v. Sartwell, 129 Mass 210; Tanner v. Stine, 18 Mo 530, 59 Am Dec 320; Hall v. Klepzig, 12 SW 372, 99 Mo 83.

49. Alexander v. Bourdier, 8 So 876, 43 La Ann 321; Davis v. Kline, 76 Mo 310.

50. Davidson v. Kahn, 24 So 583, 119 Ala 364; Clark v. Sawyer, 48 Cal 133; Armstead v. Jones, 80 P 56, 71 Kan 142; Hall v. Klepzig, 12 SW 372, 99 Mo 83; Perkins' Lessee v. Dibble, 10 Ohio 433, 36 Am Dec 97.

51. McGlothlin v. Scott, 6 SW(2d) (Tex Civ App) 129. See also 30 SW (2d) 511, 48 SW(2d) 610.

52. People's Nat'l Bank of Waterville v. Nickerson, 80 Atl 849, 108 Me 341; Groner v. Smith, 49 Mo 318; Perkins v. Quigley, 62 Mo 498; Ammerman v. Linton, 214 SW 170.

53. Bush v. White, 85 Mo 339.

54. Goss v. Meadors, 78 Ind 528;

although imperfect, a sheriff's deed will not be held void on account thereof.[55] Where the sheriff's deed makes reference to some other document which describes the land, the description by reference is sufficient.[56] Where the description of the property intended cannot be gathered from the deed itself, or by reference to another document, such deed is void.[57]

Where the description contained in the deed is accurate, but it is inaccurate in the proceedings prior to the deed, the deed will not cure such defects.[58] And it goes without saying that where the sheriff sells property other than that which he is authorized to sell, such deed is void.[59] However, where the deed conveys more than the sheriff has authority to convey, the deed is good as to the amount for which the officer had authority to convey.[60] It should be noted that punctuation, or the want of it, is not decisive in construing a sheriff's deed, where the meaning is clear.[60a] It hardly need be noted that the recitals in a sheriff's deed are prima facie evidence of the facts recited, but they are not conclusive, and may be disproved. However, this cannot be done collaterally.[60b] If a sheriff's deed is void on its face, it may be challenged in a collateral proceeding.[60c] The recitals, in order to be clothed with the prima facie presumption of verity, must be of the character that the officer is required, or at least authorized to make and the presumption under consideration does not extend to those that the

Citizens Bank of Louisiana v. Jeansonne, 45 So 367, 120 La 393; Veatch v. Gray, 91 SW 324, 41 Tex Civ App 145.

55. Dodge v. Walley, 22 Cal 224, 83 Am Dec 61; Floyd v. Braswell, 166 SE 65, 45 Ga App 726; Frazee v. Nelson, 61 NE 40, 179 Mass 456, 88 Am St R 391; Ocean Causeway v. Gilbert, 66 NYS 401, 54 App Div 118; Downs v. Wagnon, 66 SW(2d) (Tex Civ App) 777; Bass v. Albright, 59 SW(2d) (Tex Civ App) 891; Konnerup v. Milspaugh, 126 P 939, 70 Wash 415.

56. De Sepulveda v. Baugh, 16 P 223, 74 Cal 468, 5 Am St R 455; Parler v. Johnson, 7 SE 317, 81 Ga 254; Watson v. McClane, 45 SW 176, 18 Tex Civ App 212.

57. Marshall v. Carter, 85 SE 691, 143 Ga 526; Spence v. Spence, 141 SW 898, 238 Mo 71; Chambers v. Brown,

2 SW (Tex) 518.

58. Pfeiffer v. Lindsay, 1 SW 264, 66 Tex 123. But see Sec. 546, note 42, supra.

59. Blue v. Blue, 38 Ill 9, 87 Am Dec 267; Pfeiffer v. Lindsay, supra.

60. Finch v. Turner, 40 P 565, 21 Colo 287.

60a. People's National Bank v. Nickerson, 80 A 849, 108 Me 341.

60b. McKee v. Lineberger, 87 NC 181; Hardin v. Cheek (3 Jones) 48 NC 135, 64 Am D 600; Wilson v. Taylor, 3 SE 492, 98 NC 275; Miller v. Miller, 89 NC 402; Blake v. Rogers, 97 NE 68, 210 Mass 588; Person v. Roberts, 74 SE 322, 159 NC 168; Plant v. Anderson, 16 F 914; Smith v. Commonwealth Land etc. Co. 189 SW 912, 172 Ky 607.

60c. Smith v. Commonwealth L. etc. Co. supra.

officer has no authority to make, or to a recitation of matters of a foreign character.[60d]

§ 548. Sheriff's Deed Must Be Taken Out in Due Season.—Generally stated, where no time is fixed by statute, a sheriff's deed may issue any time after the sale, but it cannot be made before the return day of the writ of execution. But reasonable diligence is demanded of a purchaser at an execution sale in perfecting his title, and it ought to be placed of record when perfected.[61] Where there is such delay in the issuance of the sheriff's deed that it would warrant one in assuming as a matter of law that such purchaser had abandoned his title and that he did not intend to take a deed from the sheriff, and a subsequent purchaser from the execution defendant, without notice, who recorded his deed, had superior title to the property, although the purchaser at the sheriff's sale finally took the sheriff's deed, it was held that the sheriff's deed did not relate back to the time of the levy.[62]

However, it has been held that a purchaser of land at a sheriff's sale acquires an inchoate title by virtue of his bid and the acceptance thereof by the sheriff. Then the executing, acknowledging, and delivering of the deed provides the purchaser with evidence of his title, which relates back to and takes effect as of the date of the sale.[62a] It has further been held that the right of a purchaser to a sheriff's deed is not lost by the expiration of the time within which a second execution could issue on a judgment.[63] The sheriff may under statutory authority issue such deed after his term of office has expired.[64]

Although the purchaser may not immediately take a deed from the officer making an execution sale, still he does not lose his rights even though the same property is again levied upon at the instance of another judgment creditor, and sold a second time, and the second purchaser takes a deed and records it before the first purchaser receives his deed. The reason is that on taking the deed the purchaser's rights relate back to the time of the sale, unless the delay is so great as to work an abandonment, as for example, eight

60d. Engle v. Bond-Foley Lumber Co. 189 SW 1146, 173 Ky 35; Summerlin v. Heaterly, 20 Ga 689, 65 Am D 639.

61. Webster v. Rogers, 171 P 197, 87 Ore 547; Glancey v. Jones, 4 Yeates (Pa) 212; Hammock v. Qualls, 201 SW 517, 139 Tenn 388.

62. Hammock v. Qualls, 201 SW 517, 139 Tenn 388.

62a. Penn. S. V. R. Co. v. Cleary, 17 A 468, 125 Pa St 442, 11 Am St R 913. See Sec. 549, note 67, infra.

63. Webster v. Rogers, 171 P 197, 87 Ore 547.

64. Woods v. Lane, 2 Serg & R (Pa) 53.

years.[65] A sheriff's deed is competent evidence in an ejectment or other action involving the title to the land, although not acknowledged until after action is brought, where the sale was held prior to commencement of the ejectment suit.[66]

§ 549. Sheriff's Deed—Effect of.—A purchaser of land at a sheriff's sale is clothed with legal title from the day of sale. His deed, whenever he subsequently obtains it, relates back to that and gives him all of the legal advantages that can be given by the transfer of title. It defeats any intermediate conveyance or encumbrance that may have taken place between the day of sale and the making, executing, and delivering of the deed by the officer.[67] The fact that the deed is not made until after the expiration of the redemption period or that a considerable lapse of time intervenes between the expiration of the redemption period and the making of the deed does not change this situation.[68] But if the delay in taking a deed is so great as to amount to an abandonment, then the purchaser will lose his rights.[68a] An amended deed is given the same force and effect as the original deed where it is made to remedy a defect in the former one.[69]

It is also true that while the purchaser has the advantage of having his deed relate back to the day of sale, he is also subject to the disadvantage of holding the legal title from the day of sale, and one in possession thereof becomes adverse to the purchaser from that date, and the statute of limitations is initiated as of that day also.[70] It is readily apparent that the execution of a deed in these

65. Hoyt v. Koons, 19 Pa 277; Penn. S. V. R. Co. v. Cleary, supra; Hammock v. Qualls, supra.

66. Smith v. Grim, 26 Pa State 95, 67 Am Dec 400.

67. Frink v. Roe, 11 P 820, 70 Cal 296, 7 Pac 491, 2 Cal Unrep Cas 491.

See Sec. 548, supra; Ryhiner v. Frank, 105 Ill 326; Wilhelm v. Humphries, 97 Ind 520; Greer v. Wintersmith, 4 SW 232, 85 Ky 516, 9 Ky L 96, 7 Am St R 613; Benson v. Smith, 42 Me 414, 66 Am Dec 285; Howard v. Brown, 95 SW 191, 197 Mo 36; Ozark Land etc. Co. v. Franks, 57 SW 540, 156 Mo 673; Cowles v. Coffey, 88 NC 340; Woodley v. Gilliam, 67 NC 237; Testerman v. Poe, 19 NC 103; Richardson v. Thornton, 52 NC 458; Hackensack Savings Bank v. Morse, 18 Atl 367, 46 NJE 161. But see: 20 Atl 961, 47 NJE 279, 12 LRA 62; Cook v. Travis, 20 NY 400, 22 Barb 338; Oviatt v. Brown, 14 Ohio 285, 45 Am Dec 539; Pennsylvania S. V. R. Co. v. Cleary, 17 Atl 468, 125 Pa 442, 11 Am St R 913; Willis v. Pounds, 25 SW 715, 6 Tex Civ App 512; Gibson v. Stowell, 108 Atl 201, 93 Vt 375.

68. Holman v. Holman, 66 Barb (NY) 215; Dumond v. Church, 38 NYS 557, 4 App Div 194, 74 NY St 176; Wilson v. Spear, 34 Atl 429, 68 Vt 145.

68a. Hammock v. Qualls, 201 SW 517, 139 Tenn 388. See sec. 548, supra.

69. Bush v. White, 85 Mo 339; Carolina Savings Bank v. McMahon, 16 SE 31, 37 SC 309; Ozark Land etc. Co. v. Franks, supra.

70. Pickett v. Pickett, 14 NC 6; Cowles v. Coffey, supra.

circumstances is by the exercise of a bare power, disconnected from any interest in the land itself, whether the officer is acting under an execution, or other process, or under power conferred upon him as a commissioner by special statutory enactment, and by virtue thereof acting under the directions of the court, the rule is the same, and the conveyance relates back to the creation of the power and is affected by the same incidents as if the execution of the deed and the creation of the power had been simultaneous.[71] It is wholly immaterial, so far as the operation of the rule is concerned with respect to the relation back of the deed to the day of sale or to the time the land is impressed with the lien, that the conveyance merely indicates that the title is transferred as of a specified date. The law controls, rather than the face of the deed.[72]

71. Cranford Merc. Co. v. Anderton, 60 So 874, 179 Ala 573; Webber v. Kastner, 53 P 207, 5 Ariz 324; Bagley v. Ward, 37 Cal 121, 99 Am Dec 256; Hawley v. Simons, 14 NE (Ill) 7; Gorham v. Farson, 10 NE 1, 119 Ill 425; Merritt v. Richey, 27 NE 131, 127 Ind 400; Bonnell v. Allerton, 49 NW 857, 51 Iowa 166; Farlin v. Sook, 1 P 123, 30 Kan 401, 46 Am R 100; Mason v. Perkins, 79 SW 683, 180 Mo 702, 103 Am St R 591; Mansfield v. Gregory, 1 NW 382, 8 Neb 432; Maroney v. Boyle, 36 NE 511, 141 NY 462, 38 Am St R 821, 63 Hun 625, 17 NYS 275, 43 NY St 902; Potter v. Cromwell, 40 NY 287, 100 Am Dec 485; McArtan v. McLaughlin, 88 NC 391; Rodgers v. Wallace, 50 NC 181; Greer v. Wintersmith, supra; Cowles v. Coffey, supra.

72. Owen v. Baker, 14 SW 175, 101 Mo 407, 20 Am St R 618.

CHAPTER XXI

EXECUTION ON FIXTURES

§ 550. **Levy upon Fixtures.**—As to whether or not a fixture or something located upon land is annexed thereto in such fashion as to make it a part of the realty determines whether or not it may be levied upon, or seized under an attachment or execution as personalty or realty. We have heretofore had occasion to examine this question to some extent.[1] The English and American courts, as to what amounts to a fixture, have not always been in accord. At an early day in New York, it was held that a statue and a sun dial and their respective pedestals placed upon the ground formed a portion of the freehold, and were a part of the land, and that such other objects as loose rails, or rail fences, or piles of rails, that had been used in a fence, doors, gates, blinds, padlocks, etc., which were attached, or unattached but resting on the land by their weight, constituted fixtures, and therefore were a part of the realty.[2] The English cases, however, formerly did not go so far, and it was held that a barn which rested upon blocks or staddles, if it were not otherwise attached to the freehold, was not a part of it.[3]

However, the drift of the adjudications in our day is away from the common law doctrine to the effect that the determining characteristic was the manner of annexation.[4] It is submitted that it may be safely asserted that there is a manifest growing tendency in the decisions to modify the common law test of affixation of the chat-

1. Sec. 377, supra.

2. Goodrich v. Jones, 2 Hill(NY) 142; Walker v. Sherman, 20 Wend (NY) 636; Snedeker v. Warring, 12 NY 170. See also Emrich v. Ireland, 56 Miss 390. See also Westgate v. Wixon, 128 Mass 304.

3. Wilshear v. Cotrell, 1 El & B 674; Wansborough v. Maton, 4 Ad & El 884, 31 ECL 386; Davis v. Jones, 3 Barn & Ald 165; Howard v. Baker, 9 East 215; Elwes v. Mawe, 3 East 55.

4. First Nat'l Bank v. Clifton Armory Co. 128 P 810, 14 Ariz 360, AC 1915A 1061; Dawson v. Scruggs-Vandervoort-Barney Realty Co. 208 P 534, 84 Colo 152; Greenwald v. Graham, 130 So 608, 100 Fla 818; Doll v. Guthrie, 24 SW(2d) 947, 233 Ky 77; Frost v. Schinkel, 238 NW 659, 121 Neb 784, 77 ALR 1381; Kay County Gas Co. v. Bryant, 276 P 218, 135 Okl 135; First State & Savings Bank v. Oliver, 198 P 920, 101 Ore 42.

tel. One tendency of this doctrine is to include articles such as machinery whose permanent annexation is not manifested by the use of bolts, screws, and the like, but they are of such weight and nature that the manner of their retention impressed by gravity is sufficient to give them the character of permanency and therefore affixation to the realty. Likewise, even where things would technically become fixed, within the former common law rules, they are not such where their nature and the use for which they are intended do not indicate a permanent connection with the realty, and they can be removed. However, this divergence of views is apparent merely, and is the result of the application of what has come to be recognized as the test of whether an article becomes a fixture when physical annexation fails as a sufficient and adequate test. Also, under the modern drift of decisions, the intent of the parties plays an important role in the solution of the question we have under consideration. So, now it may be said that annexation by weight and gravity in some cases may be sufficient to make the article a part of the realty, but is not always alone sufficient, when the intent of the parties is taken into consideration. If it should appear from the nature of the chattel that if used for the purpose for which it was designed, it would naturally and necessarily be annexed to and become an integral part of the realty, then it becomes realty.[5]

§ 551. Custom and Usage as Determining What Is a Fixture.—It may be stated generally that custom and usage may be looked to in determining whether an article affixed to realty may be regarded as realty or personalty.[6]

§ 552. Rulings Generally with Respect to Fixtures.—Articles, almost too numerous to mention, have, at different times, been treated as fixtures, but in view of the modern developed rule, as we have seen in the first section of this chapter, it is doubtful if an ex-

5. Chicago Pneumatic Tool Co. v. Arnold, 282 F 43; Catlin v. C. E. Rosenbaum Machinery Co. 22 SW(2d) 906, 180 Ark 739; City of Los Angeles v. Klinker, 25 P(2d) 826, 219 Cal 198, 90 ALR 148; Breyfogle v. Tighe, 208 P 1008, 58 Cal App 301; Gosliner v. Briones, 204 P 19, 187 Cal 557; Oakland Bank of Savings v. Cal. Pressed Brick Co. 191 P 524, 183 Cal 295; Lavenson v. Standard Soap Co. 22 P 184, 80 Cal 245, 13 Am St R 147; Fratt v. Whittier, 58 Cal 126, 41 Am Rep 251; Dauch v. Ginsburg, 6 P(2d) 952, 214 Cal 540; M. P. Moller Inc. v. Wilson, 63 P(2d) 818, 8 Cal(2d) 31; Peninsula Burner & Oil Co. v. McCaw, 3 P(2d) 40, 116 Cal App 569; Mangino v. Bonslett, 292 P 1006, 109 Cal App 295; Anglo-American Mill Co. v. Community Mill Co. 240 P 446, 41 Idaho 561; Abramson v. W. W. Penn & Co. 143 Atl 795, 156 Md 186, 73 ALR 742.

6. Teaff v. Hewitt, 1 Ohio State 511, 59 Am Dec 634.

tended treatment with respect thereto would be helpful, and it is suggested that the officer or his counsel rather apply the general rule laid down herein to the particular situation and determine therefrom whether or not an article in question is to be treated as realty or personalty. It seems, however, that an agreement between the parties, even though verbal, that an article placed upon or attached to realty shall remain personalty, such an agreement will be given force and that status retained by the article.[7] The agreement may be either express or implied.[8]

§ 553. Trade Fixtures.—The courts have been most liberal in treating articles annexed to realty as trade fixtures where they were designed for carrying on a trade and, no doubt, could be levied upon as personalty and sold as such.[9] It seems that whatever is annexed to realty for the purpose of prosecuting a business or trade will be regarded as personalty.[10] It sufficiently illustrates the length to which the comparatively modern decisions have gone in this regard with respect to the liberality in holding what is a trade fixture to say that buildings have been generally held to be such.[11] That

7. E. A. Kinsey Co. v. Heckermann, 224 F 308, 139 CCA 544. See Sec. 550, supra. Detroit Steel Cooperage Co. v. Sistersville Brewing Co. 34 S Ct 753, 233 US 712, 58 L ed 1166; Oakland Bank of Savings v. Cal. Pressed Brick Co. 191 P 524, 183 Cal 295; Gracy v. Gracy, 76 So 530, 74 Fla 63, LRA 1918B 82; Binkley v. Forkner, 19 NE 753, 117 Ind 176, 3 LRA 33; Harris v. Scovel, 48 NW 173, 85 Mich 32; De Bevoise v. Maple Avenue Const. Co. 127 NE 487, 228 NY 496; Melton v. Fullerton-Weaver Realty Co. 108 NE 849, 214 NY 571; Heckscher Building Corp. v. Melton, 184 NYS 624, 113 Misc 184, 185 NYS 932, 194 App Div 957; Dippold v. Cathlamet Timber Co. 193 P 909, 98 Ore 183; State v. Buck, 51 Atl 1087, 74 Vt 29; German Savings & Loan Soc. v. Weber, 47 P 224, 16 Wash 95, 38 LRA 267.

8. March v. McKoy, 56 Cal 85; Young v. Chandler, 66 Atl 539, 102 Me 251; Jennings v. Vahey, 66 NE 598, 183 Mass 47, 97 Am St R 409.

9. Hayes v. N. Y. Gold Min. Co. 2 Colo 273; In re Delaware Candy Co. 85 Atl 1069, 10 Del Ch 142; Waverly Park Amusement Co. v. Michigan United Traction Co. 163 NW 917, 197 Mich 92. See also 163 NW 919, 197 Mich 101; Andrews v. Day Button Co. 30 NE 831, 132 NY 348, aff. in 55 Hun 494, 9 NYS 916, 29 NY St 548.

10. In re Montello Brick Works, 163 F 624, aff. 167 F 482, 93 CCA 118; Ray v. Young, 142 NW 393, 160 Iowa 613, 46 LRANS 947, AC 1915D 258; Waverly Park Amusement Co. v. Michigan United Traction Co. supra.

11. Brown v. Reno Electric Light etc. Co. 55 F 229; Van Ness v. Pacard, 2 Pet (US) 137, 7 L ed 374; Security L. & T. Co. v. Willamette Steam Mills etc. Co. 34 P 321, 99 Cal 636; Royce v. Latshaw, 62 P 627, 15 Colo App 420; Galena Iron Works Co. v. McDonald, 160 Ill App 211; Free v. Stuart, 57 NW 991, 39 Neb 220; Waverly Park Amusement Co. v. Michigan United Traction Co. supra; In re Montello Brick Works, supra.

a part of the building is occupied as a dwelling does not seem to change the rule in any respect.[12]

12. Conrad v. Saginaw Min. Co. 20 NW 39, 54 Mich 249, 52 Am Rep 817; Idalia Realty etc. Co. v. Norman, 183 SW (Mo App) 348; Couch v. Welsh, 66 P 600, 24 Utah 36; Welsh v. McDonald, 116 P 589, 64 Wash 108; Security L. & T. Co. v. Willamette Steam Mills etc. Co. supra.

CHAPTER XXII

EXECUTION SALES

SECS.

§ 554. Execution Sales in General.—It is the duty of the sheriff, constable, or other officer, having authority so to do, who has levied upon property, real or personal, in obedience to an execution, to give the prescribed notice of sale at an appointed time and place. The purpose of this notice is to give publicity to the proposed sale to the end that bidders and others interested therein may purchase the same, and to prevent a sacrifice of the property. This notice is required in many jurisdictions by positive statutory enactments but

it is dictated, in any event, by the policy of the law.[1] If the process is regular upon its face, it is sufficient authority for the sheriff or constable to hold the sale, and it is wholly immaterial that it may afterwards be set aside. The reason for this is that an erroneous judgment is the act of the court.[2] If an execution is, upon its face, irregular or illegal, it affords no protection to the officer.[3] Where, however, the levy is abandoned as to a part of the property levied upon, notice thereof need not be given.[3a]

§ 555. Sale under Satisfied Judgment.—It is readily apparent that an execution cannot lawfully be issued upon a judgment that has theretofore been paid and satisfied.[4] It does not seem to be material how the judgment is satisfied, whether it is payment of money or otherwise, in so far as it being illegal to execute thereon.[5] Even after an execution has gone into the hands of an officer, if the judgment is then satisfied, the power to make a sale thereunder ceases.[6] If, however, the satisfaction of the judgment is improperly made and is thereafter set aside, the right to issue an execution thereon and enforce the same by levy and sale is thereby revived.[7]

Passing to the consideration of the effect of a sale held under a judgment that had been satisfied upon the purchaser thereat, it seems, by the weight of authority, that a satisfied or void judgment cannot be made the basis for valid transfer of title by an execution sale to an innocent purchaser, and it is not material whether the property that is the subject matter of such sale is real or

1. Frazee v. Nelson, 61 NE 40, 179 Mass 450, 88 Am St R 301; Farmers Security Bank v. Wood, 271 NW 349, 132 Neb 175; McMichael v. McDermott, 17 Pa 353, 55 Am Dec 560, wherein it is said:

"Not only the positive enactment, but the policy of the law, requires that a sheriff's sale of personalty as well as real estate shall be published, by which I mean a sale upon due notice as required by statute."

2. U. S. Bank v. Bank of Washington, 6 Pet (31 US) 8, 8 L ed 299; Williams v. Cummins, 4 JJ Marsh. (Ky) 637; Stinson v. Ross, 51 Me 556, 81 Am Dec 591; Barney v. Patterson, 6 Har & J (Md) 182; Wilkinson's Appeal, 65 Pa State 189; Spade v. Bruner, 72 Pa State 57; Duff v. Wynkoop, 74 Pa 300; Jermon v. Lyon, 81 Pa 107; Herrick v. Graves, 16 Wis 157.

3. Section 88, supra.

3a. Frazee v. Nelson, supra.

4. Redmond v. Packenham, 66 Ill 434; Laval v. Rowley, 17 Ind 36; State v. Salyers, 19 Ind 432; Soukup v. Union Inv. Co. 51 NW 167, 84 Iowa 448, 35 Am St R 317; Wood v. Colvin, 2 Hill (NY) 566, 38 Am Dec 598; Caldwell v. Walters, 18 Pa 79, 55 Am Dec 592.

5. Bullard v. McCardle, 33 P 193, 98 Cal 355, 35 Am St R 176.

6. Bullard v. McCardle, supra.

7. Mitchell v. Hockett, 25 Cal 538, 85 Am Dec 151; Cross v. Zane, 47 Cal 602; Cowles v. Bacon, 21 Conn 451, 56 Am Dec 371; Hughes v. Streeter, 24 Ill 647, 76 Am Dec 777; Magwire v. Marks, 28 Mo 193, 75 Am Dec 121; Townsend v. Smith, 20 Tex 465, 70 Am Dec 400; Freeman on Judgments, Secs. 478, 478a.

personal. There is no warranty express or implied of quality of title. The rule of caveat emptor, it ought to be noted, applies only to execution sales made under a valid subsisting judgment.[8] However, there are some authorities, particularly some early Pennsylvania cases, holding that a purchaser at an execution sale was not affected by the fact the judgment under which the sale was made theretofore had been satisfied unless he had notice of such satisfaction.[9] It seems, however, that where a judgment has been satisfied, although not of record, a sale thereunder conveys no title.[10] It has been held, however, that where the satisfaction is not of record in the action wherein the execution issued, a purchaser at such sale acquires whatever title the judgment debtor had in and to the property provided the purchaser had no notice of the satisfaction.[11] It seems also that the rule is different where executions are issued to different counties and that when one of such executions is satisfied a purchaser in a different county may acquire a good title at a sale under an execution in such county. If the judgment debtor would avoid this effect it is necessary that he pay the costs in each county whereto an execution has been issued after having satisfied the judgment.[12]

§ 556. The Rule of Caveat Emptor as Applicable to Execution Sales.—A sheriff or constable in making a sale is a ministerial officer and he is without power to make any terms except those authorized and prescribed by law. He only sells the judgment debtor's title and a purchaser at such sale buys the judgment debtor's title. If there is no title, he acquires none. The rule of caveat emptor is fully applicable to sales made under execution.[13] Differently phrased, it may be stated as a general rule, that a sheriff or consta-

8. Boggs v. Fowler, 16 Cal 559, 76 Am Dec 561; Knight v. Morrison, 3 SE 689, 79 Ga 55, 11 Am St R 405; Bassett v. Lockard, 60 Ill 164; Boos v. Morgan, 30 NE 141, 130 Ind 305, 30 Am St R 237; McGhee v. Ellis, 4 Litt (Ky) 244, 14 Am Dec 124; Champney v. Smith, 15 Gray (Mass) 512; Walton v. Reager, 20 Tex 103; Griffith v. Fowler, 18 Vt 390.

9. Hoffman v. Strohecker, 7 Watts (Pa) 86, 32 Am Dec 740; Gibbs v. Neely, 7 Watts (Pa) 305; Samms' Lessee v. Alexander, 3 Yeates (Pa) 268.

10. Pope v. Benster, 60 NW 561, 42 Neb 304, 47 Am St R 703.

11. Hoffman v. Strohecker, supra. See also Nichols v. Dissler (2 Vroom) 31 NJL 461, 86 Am Dec 219.

12. Slater v. Alston, 15 So 944, 103 Ala 605, 49 Am St R 55.

13. Buxton v. Pennsylvania Lumber Co. 221 F 718; Figh v. Taber, 82 So 495, 203 Ala 253; McGuigan v. Rix, 215 SW 611, 140 Ark 418; Widenmann v. Weniger, 130 P 421, 164 Cal 667; Bassett v. Lockard, 60 Ill 164; Frost v. Yonkers Savings Bank, 8 Hun 26, rev 70 NY 553, 26 Am Rep 627; Coyne v. Souther, 61 Pa 455; Griffith v. Fowler, 18 Vt 390.

ble making a sale under an execution sells only the title of the execution defendant and such sale does not in any way operate to cut off the rights of the true owner or the holder of a lien upon the property.[14] However, the rule is different where there is an express warranty made, but in the absence thereof, no warranty is raised by implication of law.[15]

It ought not to be overlooked that in the event the property is not subject to sale, then no title passes. This is the case where the defendant in the execution held only an interest in the property not subject to seizure and sale, as a contingent remainder, or a possibility of reverter, or a breach of a condition subsequent.[16] It may be stated as a general rule that neither the plaintiff nor defendant in the execution can be held to have impliedly made a warranty of title to the property sold under an execution.[17]

The execution defendant owes no duty to even disclose defects in the title of the property sold under an execution, and when he is present at such sale and merely remains silent as to defects of title of the property, an action of deceit will not lie against him.[17a] Indeed, it has been held that a bidder at an execution sale cannot be relieved of his bid on the ground that the execution defendant had no title to the property bid on. The reason underlying this pronouncement is that the bid, when the property was knocked off to the bidder, became an irrevocable satisfaction of the judgment.[17b] The rule that caveat emptor applies to sales of property under execution is not ecumenical in its operation to all situations; for example, it does not apply unless the sale is held upon execution issued upon a valid judgment.[17c]

14. Milner & Kettig Co. v. Deloach Mill Mfg. Co. 36 So 765, 139 Ala 645, 101 Am St R 63; Hendrix v. Southern R. Co. 30 So 596, 130 Ala 205, 89 Am St R 27; Tallman v. Huff, 173 P 869, 65 Colo 128, LRA1918F 399; Ohio Etc. Smelting & Refining Co. v. Barr, 144 P 552, 58 Colo 116; Schroeder v. Tomlinson, 39 Atl 484, 70 Conn 348; Walters v. Taylor, 92 SE 352, 19 Ga App 822; Maghee v. Robinson, 98 Ill 458; Witmer v. Shreves, 120 NW 86, 141 Iowa 496; Jewell v. De Blanc, 34 So 787, 110 La 810; Reichenbach v. McKean, 95 Pa 432.

15. Works v. Byrom, 128 P 551, 22 Idaho 794; Pritchard v. People's Bank of Holcomb, 200 SW 665, 198 Mo App 597; Toledo Scale Co. v. Bailey, 90 SE 345, 78 W Va 797; Ohio Etc. Smelting & Refining Co. v. Barr, supra.

16. Aetna Life Ins. Co. v. Hoppin, 94 NE 669, 249 Ill 406; Brown v. Tilley, 57 Atl 380, 25 RI 579.

17. Copper Belle Min. Co. v. Gleeson, 134 P 285, 14 Ariz 548, 48 LRA (NS) 481; Jones v. Burr, 36 SCL (5 Strobh) 147, 53 Am D 699.

17a. Hart v. Hampton, 7 T B Mon (Ky) 381, 18 Am D 186.

17b. Goodbar v. Daniel, 7 So 254, 88 Ala 583, 16 Am St R 76.

17c. Smith v. Painter, 5 Serg & R (Pa) 223, 9 Am D 344; Boggs v. Fowler, 16 Cal 559, 76 Am D 561. See also sec. 555 note 8.

§ 557. **Essentials of an Execution Sale in General.**—Usually, a sale under an execution in the absence of a statute to the contrary, is not required to be confirmed by an order of the court out of which the process issued.[18] This is one of the distinguishing features between an execution sale and a strictly judicial one. In a judicial sale usually it is required to be confirmed by the court ordering it.[19] In some jurisdictions, in obedience to statutory requirements, a sale made on execution is required to be reported for confirmation to the court out of which the process issued.[20] It seems, however, that the failure to return an execution, and obtain confirmation by the court issuing the same is regarded as a mere irregularity, if the proceedings are otherwise regular, and that this failure will not vitiate the sale.[21] It hardly need be noted that before an execution sale can be had, such process must have been issued and levied, and that the sale should correspond with the advertisement or notice thereof given in pursuance to statutory provisions.[22]

An execution sale, in order to be clothed with validity, must be made in pursuance of a writ of execution, valid on its face, directed to the officer making the sale.[23] However, it is unobjectionable that a portion of the sale is made by the sheriff while another portion is made by his deputy.[24] Generally speaking, the officer who makes the levy and causes the advertisement of the sale to be given should make the sale and this is true notwithstanding the fact that his term of office has expired before the sale date. The fact that the levying

18. In re Haywood Wagon Co. 219 F 655, 135 CCA 391; McGaugh v. Franklin Deposit Bank, 38 So 181, 141 Ala 434; Webster v. Daniel, 14 SW 550, 47 Ark 131; Forman v. Hunt, 3 Dana(Ky) 614; Noland v. Barrett, 26 SW 692, 122 Mo 181, 43 Am St R 572.

19. In re Haywood Wagon Co. supra.

20. Deputron v. Young, 10 S Ct 539, 134 US 241, 33 L ed 923, 37 F 46; Palmour v. Roper, 45 SE 790, 119 Ga 10; Hendryx v. Evans, 94 NW 853, 120 Iowa 310; Westerfield v. South Omaha L. & B. Ass'n 105 NW 1087, 75 Neb 53, 107 NW 1010; Schultz v. Selberg, 157 P 1114, 80 Ore 668; Baxter v. O'Leary, 72 NW 91, 10 SD 150, 66 Am St R 702; Knowles v. Rogers, 67 P 572, 27 Wash 211; Morrow v. Moran, 32 P 770, 5 Wash 692.

21. Baxter v. O'Leary, supra; Morrow v. Moran, supra.

22. Kellogg v. Buckler, 17 Ga 187; State v. Byrd, 42 Ga 629; A. G. Rhodes & Son Furniture Co. v. Jenkins, 58 SE 897, 2 Ga App 475; Pickett v. Pickett, 3 P 549, 31 Kan 727; Jarboe v. Colvin, 4 Bush(Ky) 70; Berry v. Griffith, 2 Har & G (Md) 337, 18 Am Dec 309; Hamblen v. Hamblen, 33 Miss 455, 69 Am Dec 358; Bond v. Willett, 31 NY 102, 40 NY (1 Keyes) 377, 1 Abb Dec 165, 29 How Pr 47; McLaughlin v. Houston-Hudson Lumber Co. 120 P 659, 31 Okl 182, 38 LRA(NS) 248.

23. Doyle v. African Methodist Church, 43 Ga 400; Tompkins v. American Land Co. 103 SE 190, 25 Ga App 326.

24. Scottish-American Mortgage Co. v. Nye, 79 NW 553, 58 Neb 661; U.

officer's successor has been inducted into office does not change the rule.[25] The reason for the rule that the officer making the levy may conduct the sale after the expiration of his term of office is by making such levy he acquires an interest in the property.[26] This rule is carried so far that even in the case of the death of the levying officer that his personal representative may thereafter carry out the sale.[27] It seems that in many jurisdictions either the officer making the levy or his successor may conduct the sale where the subject matter of the levy is real estate,[28] but not so where personalty is levied upon; in that case only the levying officer may hold the sale.[29] The rule would seem to be the same where personalty was held under an attachment at the time the officer's term expired.[29a]

§ 558. Sales Should Be Made to Highest Bidder and for Cash.—Generally speaking, a sheriff's sale must be for cash.[30] However, statutes are to be found authorizing the officer to sell on a credit under certain conditions which, of course, would have to be complied with. Likewise, where the parties consent or the execution creditor directs, the officer may extend credit to the purchaser.[31] It has even been held that where an officer under an execution against some administrators of an estate, sold some property of the

S. Nat'l Bank v. Hanson, 95 NW 364, 1 Neb (Unof) 87.

25. Kent v. Roberts, 14 F Cas 7715, 2 Story 591; Bondurant v. Buford, 1 Ala 359, 35 Am Dec 33; Vroman v. Thompson, 16 NW 808, 51 Mich 452; Holmes v. Crooks, 76 NW 1073, 56 Neb 466; Nat'l Black River Bank v. Wall, 91 NW 525, 3 Neb (Unof) 316; Ayers v. Casey, 61 Atl 452, 72 NJL 223; Union Dime Sav. Inst. v. Anderson, 83 NY 174, 19 Hun 310; State v. Parchmen, 3 Head.(Tenn) 609; Ballard v. Whitlock, 18 Grat(Va) 235; Cord v. Hirsch, 17 Wis 403.

26. Leavitt v. Smith, 7 Ala 175; Clark v. Sawyer, 48 Cal 133; Clark v. Pratt, 55 Me 546; Bilby v. Hartman, 29 Mo App 125; Sanderson v. Rogers, 14 NC 38; Bank of Tennessee v. Beatty, 3 Sneed(Tenn) 305, 65 Am Dec 58.

27. Read v. Stevens, 1 NJL 264; Sanderson v. Rogers, supra.

28. Henderson v. Trimmier, 11 SE 540, 32 SC 269; Lewis v. Bartlett, 40 P 934, 12 Wash 212, 50 Am St Rep 885; Clark v. Pratt, supra; Clark v. Sawyer, supra.

29. Holmes v. McIndoe, 20 Wis 657; Purl's Lessee v. Duvall, 5 Har & J (Md) 69, 9 Am D 490; Bank of Tenn. v. Beatty, 3 Sneed(Tenn) 305, 65 Am D 58; Clark v. Sawyer, 48 Cal 133.

But see, Tarkinton v. Alexander, 19 NC 87, where there had been a levy upon both lands and goods the successor made the sale.

29a. Pecotte v. Oliver, 10 P 302, 2 Ida 251.

30. Hall v. Doyle, 35 Ark 445; Meherin v. Saunders, 63 P 1084, 131 Cal 681, 54 LRA 272; Fuller v. Exchange Bank, 78 NE 206, 38 Ind App 570; Carlson v. Headline, 111 NW 259, 100 Minn 327.

31. Coker v. McConnell, 31 SE 411, 104 Ga 482; Sutton v. Baldwin, 45 NE 518, 146 Ind 361; Marx v. Sanders, 32 So 331, 108 La 140; Doe v. Natchez Ins. Co. 16 Miss (8 Smedes & M) 197.

estate, at a price in excess of the amount due on the execution and with the consent and acquiescence of one of the administrators, the purchaser was permitted to credit the excess on indebtedness due from the last mentioned administrator individually to the purchaser, such an arrangement was sufficiently binding that the officer could not thereafter recover the excess from the purchaser.[31a]

It would seem that the consent of the execution debtor is not required in order that the sheriff or constable may sell on a credit at the direction of the execution creditor. When a sale is made on a credit by virtue of an agreement between the parties, it does not in any way impair the execution character of the sale nor does it abrogate the rule of caveat emptor.[32] The reason we conclude that the consent of the debtor is not required is because a credit sale would probably realize a greater sum. But if a surplus above the amount necessary to satisfy the execution would be raised when the sale price was paid, then it would seem the execution debtor could demand it immediately from the execution creditor. Where the sale is made for cash, the sheriff or constable has no power or authority to issue a receipt until the money or its equivalent is received by him.[33]

In the absence of an agreement of the parties to the contrary, that is, the execution plaintiff and possibly the officer, the sheriff or constable making the sale is not authorized to even take a draft or other negotiable instrument, but this may be done by consent of the execution plaintiff.[34] Where a custom had obtained to allow purchasers at an execution sale occurring on Saturday until Monday to make payment, it does not change the law, nor the duty of the officer to collect at the time of sale.[34a] An execution creditor, where he bids in the property, may have the purchase price credited upon the judgment, but he cannot credit upon judgment the costs of the sale. That is the execution plaintiff's obligation primarily, notwithstanding the fact that he may ultimately charge it up to the execution debtor.[35]

31a. Coker v. McConnell, supra.

32. Kilgore v. Peden & Johnson, 1 Strob (32 SCL) 18. In this case, however, the sale was with the consent of the execution plaintiff and defendant. Sauer v. Steinbauer, 14 Wis 70.

33. McCormick v. Walter A. Wood Mowing & Reaping Machine Co. 72 Ind. 518.

34. Cramer v. Oppenstein, 27 P 716, 16 Colo 504; Dunlap v. Whitmer, 62 So 938, 133 La 317, AC 1915C 990; Tiffany v. Johnson, 27 Miss 227; Sutton v. Baldwin, supra.

34a. Sauer v. Steinbauer, supra.

35. Fowler v. Pearce, 7 Ark 28, 44 Am Dec 526; Pinkston v. Harrell, 31 SE 808, 106 Ga 102, 71 Am St Rep 242; Boots v. Ristine, 44 NE 15, 146 Ind 75; Tyler v. Budd, 64 NW 679, 96 Iowa 29; Munger v. Sanford, 107 N

§ 559. Time of Holding Sale, and Advertisement Thereof.—Ordinarily, a sale may not be conducted on Sunday, but in the absence of a statute to the contrary, it may be held on a nonjudicial day, as an election day, labor day, etc., because execution sales are not regarded as judicial business.[36] Where a statute prescribes the hour of the sale, then a sale made at any other time is void, unless it is by the consent of the parties, which would seem to require the consent of the judgment debtor.[37] However, at common law, it seems that the matter of the time of holding the sale was left largely to the discretion of the sheriff or constable and his judgment would not be disturbed so long as he acted in good faith.[38] In the absence of a showing to the contrary, it will be presumed that the officer carried out the sale, in all respects, in accordance with the law.[39] However, in New York it seems that a sale must be made before sunset in any event.[40] It is the duty of an officer to advertise an execution sale. This is demanded by the policy of the law as well as by statutes.[40a] Publicity of an execution sale is indispensable, but failure to advertise is generally held not to avoid the sale.[40b] Slight inaccuracies, and immaterial errors in the notice of sale will not vitiate the sale.[40c] It is no ground of complaint on the purchaser's part that sale was advertised before levy was made upon the property.[40d] The controlling statute should be followed with respect to notice of time, place, terms and conditions of an execution sale.

W 914, 144 Mich 323; Sweeney v. Hawthorne, 6 Nev 129; Nichols v. Ketcham, 19 Johns.(NY) 84; Needham v. Cooney, 173 SW(Tex Civ App) 979.

36. Shaw v. Williams, 87 Ind 158, 44 Am Rep 756; King v. Platt, 37 NY 155, 3 Abb Pr NS 434, 35 How Pr 23; McLaughlin v. Houston-Hudson Lumber Co. 120 P 659, 31 Okl 182, 38 LRANS 248; Rogers v. Cawood, 1 Swan(Tenn) 142, 55 Am Dec 729; Crabtree v. Whiteselle, 65 Tex 111; McKennon v. McGown, 11 SW(Tex) 532.

37. Cawthorn v. McCraw, 9 Ala 519; Pettit v. Johnson, 15 Ark 55; Morey v. Hoyt, 33 Atl 406, 65 Conn 516; Howe v. Starkweather, 17 Mass 240; Loudermilk v. Corpening, 8 SE 117, 101 NC 649.

38. Caldwell v. Eaton, 5 Mass 399.

39. Childs v. McChesney, 20 Iowa 431, 89 Am Dec 545; Bradley v. Sandilands, 68 NW 321, 66 Minn 40, 61 Am St Rep 386; Fuller v. East Texas Land & Implement Co. 23 SW (Tex Civ App) 571.

40. Cornick v. Myers, 14 Barb(NY) 9; Farmers Security Bank v. Wood, 271 NW 349, 132 Neb 175.

40a. McMichael v. McDermott, 17 Pa 353, 55 Am D 560.

40b. McMichael v. McDermott, supra; Brown v. Bose, 75 NW 536, 65 Neb 200, 70 Am St Rep 379; Hazelwood v. Suiter, 205 P 1038, 111 Kan 10; Morris v. Hastings, 7 SW 649, 70 Tex 26, 8 Am St Rep 570; Conley v. Redwine, 35 SE 92, 109 Ga 640, 77 Am St Rep 398.

40c. Frazee v. Nelson, 61 NE 40, 179 Mass 456, 88 Am St Rep 391; Hamilton v. Lubukee, 51 Ill 415, 99 Am D 562; Model Lodging House Ass'n v. City of Boston, 114 Mass 133.

40d. Sherlock v. Vinson, 1 P 2d 71,

§ 560. Necessity for Delivery and Change of Possession.—The rule that there must in sales transactions be an immediate delivery and thereafter a continuous change of possession is inapplicable to execution sales. The rule mentioned hereinabove is applicable to transactions between private individuals and gives rise to a presumption of fraud.[41] The rule above announced is, in many states, a subject of statutory enactment, and it is immaterial whether the above mentioned rule obtains in a particular jurisdiction by adoption of the common law or by virtue of legislative enactment, in so far as its inapplicability to an execution sale is concerned, according to the great weight of authority.[42] This is true notwithstanding the aphoristic declaration made by the English court at an early day that a sheriff's sale was required to be "ready money and immediate delivery."[43]

§ 561. Liability of Sheriff for Failing to Collect Sale Price.—The sheriff's duty is clear that upon making the sale, in the absence of a statute or agreement to the contrary, that he must collect the sale price, and if he fails in this respect he is liable.[44] A custom in the vicinity where the sale is held to allow a bidder at a sale on Saturday until Monday following to pay does not change the rule or affect the officer's responsibility.[44a] If the sheriff accepts in payment anything other than money, or gives credit, and unconditionally delivers the property to the purchaser, he is liable therefor, as if he had collected the money.[45] It would seem that the English court laid down a safe rule when it declared that a sheriff's sale should be only made for "ready money and immediate delivery."[46] If the purchaser does not pay for the property bid in, the officer's duty is clear; he must immediately offer it for resale, or re-advertise it for sale at another time. It seems he may pursue either course.[46a]

90 Mont 235. See also Blood v. Light, 38 Cal 649, 99 Am D 441; Hibberd v. Smith, 4 P 473-484, 8 P 46, 67 Cal 547, 56 Am Rep 726.

41. Twyne's Case, 3 Coke 80b, 76 Eng Rep 809, 5 ERC 2.

42. Wyatt v. Stewart, 34 Ala 716; Matteucci v. Whelan, 55 P 990, 123 Cal 312, 69 Am St Rep 60; Huebler v. Smith, 25 Atl 658, 62 Conn 186, 36 Am St Rep 337; Sweeten v. Ezell, 163 P 612, 30 Idaho 154; Lowe v. Kean, 29 NE 1036, 140 Ill 108; Carlock v. Atlee, 53 SW(Tenn Ch App) 186.

43. Aldred v. Constable, 8 Jurist (OS) 956.

44. Disston v. Strauck, 42 NJL 546, aff 44 NJL 662.

44a. Sauer v. Steinbauer, 14 Wis 76.

45. Robinson v. Brennan, 90 NY 208.

46. Aldred v. Constable, 8 Jurist(O S) 956.

46a. Robinson v. Brennan, 90 NY 208; May v. Sturdivant, 39 NW 221, 75 Ia 116, 9 Am St Rep 463, and note; Dunlap v. Whitmer, 62 So 938, 133 La 317, Ann Cas 1915C 990; Wortman v. Conyngham, 30 Fed Cas 18,056, Pet. CC 241; Weatherby v. Slape, 43 Atl 898, 58 NJE 550, 72 Am St Rep 627.

But if the officer elects to resell on the same day, he should do so within the hours fixed by law for holding an execution sale; or, at most, the resale ought not be delayed until the bidders have dispersed.[46b]

§ 562. Personal Property Should Be Sold in Parcels.—It may be stated as a general rule that it is irregular and improper and, in many jurisdictions, illegal for a sheriff or constable to sell property en masse and in the absence of special circumstances a sale en masse cannot be justified.[47] However, the sale of personal property by a sheriff or constable in a single lot is ordinarily not regarded as sufficient to void the sale.[48] In any event, the prime consideration that addresses itself to the officer in the method of sale, whether en masse or in lots or parcels, is which will raise the most money, and this is, in general, committed to the sound discretion of the officer.[49] It seems also that the parties may agree as to the manner of sale, whether in parcels or en masse, and that the officer will be justified in complying with such an agreement.[49a]

§ 563. Real Estate Should Be Sold in Parcels.—It is irregular and improper, at least, for a sheriff or constable to sell together separate parcels of real estate.[50] The general rule is that where it is possible to do so, real estate should be sold in parcels.[51] Where a statute directs that real estate shall be sold at an execution sale in parcels, it is regarded generally as mandatory.[52] However, there are holdings to the contrary, that such statutory enactments are merely directory in character, and that a sale made in disregard of the directions thereof with respect to the selling of parcels is not void.[53] There may be some exceptions to the exaction of the rule

46b. Humphrey v. McGill, 59 Ga 649; Givan v. Crawford. 5 Blackf (Ind) 260; Saunders v. Bell, 56 Ga 442; Roberts v. Smith, 72 SE 410, 137 Ga 30; Jones v. Null, 2 NW 350, 9 Neb 254.

47. Brock v. Berry, 31 So 517, 132 Ala 95, 90 Am St Rep 896; McLeod v. Pearce, 9 NC(2 Hawks) 110, 11 Am Dec 742; Klopp v. Witmoyer, 43 Pa 219, 82 Am Dec 561; Yost v. Smith, 105 Pa 628, 51 Am Rep 219.

48. Furbush v. Greene, 108 P 503; Klopp v. Witmoyer, supra.

49. State v. Morgan, 29 NC(7 Ired L) 387, 47 Am Dec 329; Yost v. Smith, supra.

49a. Yost v. Smith, supra.

50. Anniston Pipe-Works v. Williams, 18 So 111, 106 Ala 324, 54 Am St Rep 51.

51. In re Roach, 130 Atl 676, 33 Del (3 Harr) 89; Butler v. Roys, 25 Mich 53, 12 Am Rep 218.

52. Piel v. Brayer, 30 Ind 332, 95 Am Dec 699.

53. Shelton v. Franklin, 123 SW 1084, 224 Mo 342, 135 Am St Rep 537, and note; Rector v. Hartt, 8 Mo 448, 41 Am Dec 650, see also 13 Mo 497, 53 Am D 157; Power v. Larabee, 57 NW 789, 3 ND 502, 44 Am St Rep 577.

that real estate be sold in several parcels. This is true where the description has been furnished by the debtor and the entire property in tracts is described as a single one.[54] So too, where the tract of land is composed of fractional parts of lots or subdivisions and has been treated by the debtor as a single tract or lot of land, a sale thereof en masse is not unjustified.[55]

The execution debtor may waive his right to have his property sold in parcels.[56] He has the right to direct how his property shall be sold in the absence of fraud or collusion.[56a] Occasionally circumstances may so formulate themselves into a situation that would seem to demand that real estate be sold as a single tract as, for instance, where the nature of the property is such that it is not divisible into parcels or parts without material injury to the debtor.[57] It has even been held that under some circumstances a sale en masse will not be overturned even though resulting in great sacrifice. The principle which seemed to have been given operation in such circumstances was that mere inadequacy of price was not sufficient to set aside a sale so long as it was conducted fairly and judiciously. So, where a quarter section of wild land was sold as a single piece or parcel, the sale would not be disturbed.[58] The general rule seems to be that it is necessary to show prejudice in order to successfully assail an en masse sale of realty.[58a] A sound principle underlying those adjudications holding that property should be sold in parcels is that no more of the debtor's land will be taken than is necessary.[59] So, it has been held that a sale of the execution debtor's land en masse is invalid if a less amount thereof would have been sufficient.[59a]

In those jurisdictions, even where statutory enactments are found, the courts construe or hold that such statutes are merely directory; it is held that the manner of sale, whether as a single piece of real

54. Smith v. Randall, 6 Cal 47, 65 Am Dec 475.

55. Conley v. Redwine, 35 SE 92, 109 Ga 640, 77 Am St Rep 398.

56. Reynolds v. Tenant, 9 SW 857, 51 Ark 84. This case holds being present at the sale and making no objection constitutes a waiver. Taylor v. Graham, 18 La Ann 656, 89 Am Dec 699; Hudepohl v. Liberty Hill Con. etc. Co. 29 P 1025, 94 Cal 588, 28 Am St Rep 149.

56a. Gregg v. First Natl. Bank, 26 SW(2d) 179, rev 18 SW(2d) 772.

57. McLean County Bank v. Flagg, 31 Ill 290, 83 Am Dec 224, see also Swift v. Dean, 11 Vt 323, 34 Am Dec 693.

58. Greenup v. Stoker, 12 Ill 24, 52 Am Dec 474.

58a. Batini v. Ivancich, 287 P 523, 105 Cal A 391; Weir v. Weir, 145 SE 281, 196 NC 268.

59. Jones v. Davis, 2 Ala 730; Lynch v. Reese, 97 Ind 360; Cunningham v Cassidy, 17 NY 276. 7 Abb Pr 183; Smith v. Meldren, 107 Pa 348.

59a. Coulters v. Meiggs, 191 Atl (RI) 115; Delaware Co. Natl. Bank v. Miller, 154 Atl 19, 303 Pa 1.

estate or in parcels, is committed to the sound discretion of the officer.[60] Consideration may also be given to the fact whether or not the property is encumbered, as having an important effect upon a sale of the property en masse.[61] In those jurisdictions where the matter is committed to the discretion of the officer, his decision is final in the absence of fraud.[62] Where, however, the land is sold in parcels, it should be offered in the smallest parcels possible, consistent with the proper divisions thereof.[63] The title papers of the judgment debtor may be looked to to determine whether or not the property is a single piece or parcel.[64] However, this is not necessarily controlling.[65]

Where a sale of six tracts realized a sum exceeding that required to satisfy the execution, it was the duty of the officer to sell only the necessary part of the sixth tract to raise the money to satisfy the execution, if the tract could have been divided.[66] According to the weight of authority, if there are no bids for separate parcels, then the entire body of real estate may be sold as a single tract. However, no subterfuge can be resorted to by the officer to effect a sale in this method but it is only where separate parcels have been offered in good faith that they may be sold en masse.[67] The safest course for an officer to pursue is to offer the property by both methods of sale, but reserving the right, when it is first offered, to reoffer it, and the method raising the largest amount should be adopted. The general rule is that where the real estate to be sold is an undivided interest, statutes requiring sales in parcels are inapplicable.[68]

§ 564. Necessity of Having Property within View.—It is necessary that personal property to be sold under an execution shall be within the view of the officer and bidders at the time of the sale to the end that it may be subject to examination by all persons who desire to become bidders, and also that it may be within the power of the officer, upon completion of the sale, to make delivery.[69] The execution debtor may waive the requirement of having personal property to be sold under an execution present thereat. This waiver may be implied as well as express.[69a] This rule is inapplicable to real estate in the absence of a controlling statutory enactment, and a sale of real estate ordinarily need not be made thereon.[70] Of course, if the place of selling real estate is fixed by statute, then the statute must be complied with as a rule. The weight of authority sustains the view that a sale of personalty under an execution when the property is not present is voidable and not void.[70a] As to whether or not personal property is present at a sale under given state of facts is generally determinable as a question of law by the court.[70b] The defect is not cured by taking an adjournment of the sale to go to and view the property.[70c] Where the property is a short distance from the place of sale, the sale will be upheld.[70d] But where the sale is held some two hundred yards from the property, the sale is vulnerable to assailment.[70e] However, the law is

60. Feild v. Dortch, 34 Ark 399; Palmour v. Roper, 45 SE 790, 119 Ga 10; Mullaney v. Cutting, 154 NW 893, 175 Iowa 547; Balfour v. Burnett, 41 P 1, 28 Ore 72.

61. Mullaney v. Cutting, supra.

62. Nelson v. Bronnenburg, 81 Ind 193.

63. Van Gundy v. Hill, 104 NE 147, 262 Ill 162.

64. Ament v. Brennan, 1 Tenn Ch 431.

65. Palmour v. Roper, supra; Conley v. Redwine, supra.

66. Marcum v. Thompson, 2 SW (2d) 392, 222 Ky 702.

67. White v. Crow, 4 S Ct 71, 110 US 183, 28 L ed 113; Marston v. White, 27 P 588, 91 Cal 37; Ollis v. Kirkpatrick, 28 P 435, 3 Idaho 247; Henderson v. Harness, 56 NE 786, 184 Ill 520; Ballance v. Loomiss, 22 Ill 82; Nix v Williams, 11 NE 36, 110 Ind 234; Drake v. Brickner, 163 NW 597, 180 Iowa 1166; Siler v. Lawson, 173 S W 158, 163 Ky 6; Burton v. Kipp, 76 P 563, 30 Mont 275; Deadwood First Natl. Bank v. Black Hills Fire Ass'n, 48 NW 852, 2 SD 145; Marcum v. Thompson, supra.

68. Bressler v. Martin, 42 Ill App 356; Barnes v. Zoercher, 26 NE 769, 127 Ind 105; Borron v. Sollibellos, 28 La Ann 355, however see Miller v. McAlister, 64 NE 254, 197 Ill 72; Lockhart v Ruden, 250 NW 349, 62 SD 1.

69. Coulson v. Panhandle Nat'l Bank 54 F 855, 4 CCA 616, 13 US App 39; Brock v. Berry, 31 So 517, 132 Ala 95, 90 Am St Rep 896; Chenault v. Milan, 87 So 537, 205 Ala 310; Rowan v. Refeld, 31 Ark 648; Smith v. Morse, 2 Cal 524; Tibbetts v. Jageman, 58 Ill 43; Lawry v. Ellis, 27 Atl 518, 85 Me 500; Penney v. Earle, 32 Atl 879, 87 Me 167; Haggerty v. Wilber, 16 Johns.(NY) 286, 8 Am Dec 321; Linnendoll v. Doe, 14 Johns.(NY) 222; Sheldon v. Soper, 14 Johns.(NY) 352; Cresson v. Stout, 17 Johns.(NY) 116, 8 Am Dec 373; Manhattan Taxi Service Corp. v. Checker Cab Mfg. Co. 171 NE 705, 253 NY 455, 236 NYS 559, 226 App Div 624, 237 NYS 832, 227 App Div 798, 228 App Div 628, 69 ALR 1190 and note; Commercial Inv. Trust v. Browning, 152 SE 10, 108 W Va 585.

69a. Gift v. Anderson, 5 Humph (Tenn) 577; Lexington Bank v. Wirges, 72 NW 1049, 52 Neb 649; Marsh v. Lapp, 180 P 533, 180 Cal 231; Bowdoin v. Bedsole, 75 So 167, 199 Ala 648.

70. Nesbitt v. Dallam, 7 Gill & J (Md) 494, 28 Am Dec 236; Woodward v. Sartwell, 129 Mass 210; Grandy v. Morris, 28 NC 433; Howland v. Pettey, 10 Atl 650, 15 RI 603.

70a. Foster v. Mabe, 4 Ala 402, 37 Am D 749; Eads v. Stephens, 63 Mo 90; Hamilton v. Shrewsbury, 4 Rand (Va) 427, 15 Am D 779; Coulson v. Panhandle Nat'l Bank, supra. Cases holding such sale void, are: Cresson v. Stout, supra. McNeeley v. Hart, 30 NC 492, 49 Am D 404; Smith v. Tritt, 18 NC 241, 28 Am D 565; Ainsworth v. Greenlee, 7 NC 470, 9 Am D 615.

70b. McNeeley v. Hart, supra.

70c. Alston v. Morphew, 18 SE 335, 113 NC 460. But see: Mundy v. Phillips, 102 So 519, 157 La 445, wherein a sale was sustained, the property being first inspected by the bidders and then the sale held away from it.

70d. Wormell v. Nason, 83 NC 32.

70e. Barbee v. Scoggins, 28 SE 259,

satisfied and a valid sale made if the property is sufficiently near at the place of sale that it can be seen and examined by the prospective buyers.[70f]

§ 565. **Property of One Class Cannot Be Sold as That of Another.**—Property must be sold as of the class to which it belongs as realty or personalty, as the case may be, and a sale of one class of property as that of another renders the sale void. So, where rails and ties, etc., of a tramway or railroad, and installed hoisting machinery of a mining company are sold as personalty, the sale may be avoided.[71] If any of the property is sold as personalty when it is not such, then the sale is subject to attack as to all property sold.[71a] It seems, however, that chattels real are sold as personalty and this is the rule in the absence of a controlling statute to the contrary.[72]

§ 566. **Combination Sale of Realty and Personalty.**—It must be apparent from what has already been said in the immediate preceding sections that a combination sale of realty and personalty, together and indiscriminately, cannot be made, and any attempt so to do would result in making an invalid sale. So too, if any of the property is realty and all is sold as personal property, then the sale is assailable as to all.[73]

§ 567. **Discretion of Officer in Making Sales.**—Considerable latitude of discretion is committed to the sheriff or constable in making an execution sale. If it is apparent that a sacrifice may be prevented by some delay, it is his duty to do so and to this end he is authorized to refuse to accept a bid, and he may safely make a return that the property was not sold for want of bidders, and if a purchaser fails to comply with his bid it is the duty of the officer in

121 NC 135; Alston v. Morphew, supra.

70f. Bank of Almyra v. Laur, 184 SW 30, 122 Ark 486.

71. Hart v. Benton-Bellefontaine R. Co. 7 Mo App 446. See also, Ritchie v. McAllister, 14 Pa Co 267; Arnold v. Goldfield Third Chance Min. Co. 109 P 718, 32 Nev 447.

71a. Arnold v. Goldfield Third Chance Min. Co. supra.

72. Chapman v. Gray, 15 Mass 439; U. S. Oxygen Co. v. Bernard A. Buge, Inc., 136 NYS 297, 138 NYS 1146, 153 App Div 900; Grover v. Fox, 36 Mich 453. This case holds certain interest in a contract respecting real estate was a chattel interest and not subject to an execution sale as realty. Buhl v. Kenyon, 11 Mich 249, 83 Am Dec 738. But see, Steers v. Daniel, 2 Flip 210, 4 S Ct 94, 110 US 204, 28 L ed 141; Hyatt v. Vincinnes Nat'l Bank, 5 S Ct 593, 113 US 408, 28 L ed 1009.

73. Lee v. Fellowes & Co. 10 B Mon (Ky) 117; Arnold v. Goldfield Third Chance Min. Co. 109 P 718, 32 Nev 447; Cresson v. Stout, 17 Johns.(NY) 116, 8 Am Dec 373; Roseburg Nat'l Bank v. Camp, 173 P 313, 89 Ore 67.

these circumstances, in making a resale, to exercise a reasonable discretion.[74] Where a resale is necessary, it is his duty to track the law in so doing. So, where property is struck off to a bidder who refuses to comply therewith, then it is clear that no sale is made, and the officer may make a return accordingly.[75]

§ 568. **What Amounts to a Refusal to Comply by a Bidder.**—What is a refusal on the part of the bidder when property has been knocked off is more than simple neglect to pay. It takes an absolute, unqualified refusal on the part of the bidder to pay the amount of his bid or purchase price, or some other unequivocal conduct of equal significance, and in the absence of such absolute refusal or unmistakable, or unequivocal acts or conduct tantamount thereto, it becomes the officer's duty to tender a deed or bill of sale and demand the amount of the bid before making a resale. In order to justify a sheriff or constable in making a resale, it is essential that the purchaser shall have refused to pay the amount of his bid.[76] In Pennsylvania, however, it seems that the officer is under no duty to make tender of deed, or other evidence of title as in case of a sale of personalty.[77]

§ 569. **Duty of Sheriff with Respect to Amount of Property Sold.**—It is the positive duty on the part of the sheriff or constable to sell no more property than is absolutely necessary to raise sufficient funds to satisfy the process in his hands, and in the absence of consent of the parties that more property may be sold than is necessary to satisfy the process, the officer selling the same is liable to the injured party therefor.[78] It is the duty of the officer in making the sale to clearly and distinctly announce the character and quantity of the property he offers for sale, particularly where it is real estate, as, for example, a fee simple interest, a life estate, a term for years, and the like.[79] And if he fails in this regard, resulting in injury to another, he will be liable there-

74. Swortzell v. Martin, 16 Iowa 519; Conway v. Nolte, 11 Mo 74.

75. State v. Borden, 15 Ark 611.

76. Hunt v. Gregg, 8 Blackf(Ind) 105; Williams v. Lines, 7 Blackf(Ind) 46; Shaw v. Potter, 50 Mo 281; Conway v. Nolte, 11 Mo 74; Phillips v. Goldman, 75 Mo 686.

77. Dickson v. McCartney, 75 Atl 735, 226 Pa 552, 134 Am St Rep 1078, 29 LRANS 792, 18 Ann Cas 500.

78. State v. Morgan, 3 Ired L (25 NC) 186, 38 Am Dec 714; Jones v. Lewis, 8 Ired L(NC) 70; In re Mevey's Appeal, 4 Pa 80; Cook v. Palmer, 6 Barn. & C 739; Stead v. Gascoigne, 8 Taunt 527; Woods v. Monell, 1 Johns. Ch 502; Coulters v. Meiggs, 191 A 115, — RI —; Hewson v. Deygert, 8 Johns. (NY) 333; Aldrich v. Wilcox, 10 RI 405.

79. Com. v. Dickinson, 5 B Mon (Ky) 506, 43 Am Dec 139; Wickliffe v. Bascom, 7 B Mon(Ky) 681.

for.[79a] It seems within the legal authority of a sheriff or constable in making a sale to employ an auctioneer as an agent to conduct the same, and collect the proceeds arising therefrom.[80] The holdings supporting the above and foregoing statement have met with opposition.[81]

§ 570. Sales by Sheriff after Expiration of Term of Office or after Return Day of Execution.—By the common law an execution is an entire thing, and where a sheriff or constable has levied upon goods it is not only his duty, but he is bound to complete the transaction by selling them. He may not avoid the consequences of his failure to discharge this obligation by delivering the goods and the execution to his successor in office. It does not seem to be material how the tenure of the levying officer is terminated; by expiration, resignation, or removal.[82] Especially with respect to personal property, it is a general rule that it should be sold by the officer making the levy.[83] The rule seems to be different with respect to real estate and there it appears that the successor in office may sell the same.[84]

It should be observed there are cases making no distinction between real estate and personal property, and as to both classes only the levying officer can make the sale, and if attempted by his successor, the sale will be void.[84a] There are cases, however, holding

79a. Bartholomew v. Warner, 32 Conn 98, 85 Am D 251.

80. Giles v. Bank of Southwestern Georgia, 29 SE 600, 102 Ga 702; Galbraith v. Drought, 24 Kan 590; Thurley v. O'Connell, 48 Mo 27; Lord v. Richmond, 38 How Pr(NY) 173.

81. Wallis v. Shelly, 30 F 747; McKeon v. Horsfall, 88 NY 429.

82. Kent v. Roberts, 14 F Cas No. 7715, 2 Story 591; Wickliffe v. Bascom, 7 B Mon(Ky) 681; Com. v. Dickinson, 5 B Mon(Ky) 506, 43 Am Dec 139; Lawrence v. Rice, 12 Metc(Mass) 527; Vroman v. Thompson, 16 NW 808, 51 Mich 452; Merchants' Bank v. Harrison, 39 Mo 443, 93 Am Dec 285; Holmes v. Crooks, 70 NW 1073, 56 Neb 466; Nat'l Black River Bank v. Wall, 91 NW 525, 3 Neb (Unof) 316; Hunt v. Swayze, 25 Atl 850, 55 NJL 33; Ayers v. Casey, 61 Atl 452, 72 NJL 223; Union Dime Sav. Inst. v. Anderson, 83 NY 174, 19 Hun 310; Note 36 Am D 705.

83. Leavitt v. Smith, 7 Ala 175; Clark v. Sawyer, 48 Cal 133; Rogers v. Darnaby, 4 B Mon(Ky) 238; Clark v. Pratt, 55 Me 546; Bilby v. Hartman, 29 Mo App 125; Doliver v. Collingwood, 8 Atl 711, 15 RI 510; Holmes v. McIndoe, 20 Wis 657; Lawrence v. Rice, supra.

84. Sumner v. Moore, 23 F Cas No. 13610, 2 McLean 59, Doolittle v. Bryan, 14 How.(US) 563, 14 L ed 543; Kane v. McCown, 55 Mo 181; Tuttle v. Jackson, 6 Wend(NY) 213, 21 Am Dec 306; Henderson v. Trimmier, 11 SE 540, 32 SC 269; Lewis v. Bartlett, 40 P 934, 12 Wash 212, 50 Am St Rep 885; Holmes v. McIndoe, supra; Merchants' Bank v. Harrison, supra; Clark v. Pratt, supra; Clark v. Sawyer, supra; Lemon v. Craddock, Litt. Sel. Cas. (Ky) 251, 12 Am D 301; Note 36 Am D 705.

84a. Lafland v. Ewing, 5 Litt(Ky) 43, 15 Am D 41; Allen v. Trimble, 4 Bibb(Ky) 21, 7 Am D 726; Purl v.

that in case of real estate, it is the duty of the succeeding officer to sell the same.[85] Even the personal representatives of a deceased officer who has made a levy may make the sale.[86] An officer may, after he has made a levy, sell property after the return day of the execution.[87]

§ 570a. Discretion of Officer in Making Sale on Execution.—It is the duty of the sheriff or constable to make the money called for in an execution in his hands if this can be done by the reasonable exercise of judgment and skill within the law. To this end considerable discretion is reposed in the officer, but notwithstanding this fact, he is responsible for a neglect of duty where it appears that such was the case even though the exercise of discretion is involved.[88] A bid may be made by letter to the sheriff, or through the instrumentality of an agency but, in any case, it is the duty of the officer to announce such bid and, of course, if there are no other bids, the property may be knocked off to such bidder. There is no law requiring the bid to be made in person or at the time and place of sale.[89]

Where a statute provides that "no officer shall directly or indirectly bid for or buy any property which may be sold under an execution by his deputy or principal, or by his co-deputy," that does not prohibit an officer holding a sale from offering a specified amount in behalf of an absent bidder.[89a] But if the officer is au-

Duvall, 5 Harr & J (Md) 69, 9 Am D 490.

85. Tarkinton v. Alexander, 19 NC 87; Leshey v. Gardner, 3 Watts & S (Pa) 314, 38 Am Dec 764; Bank of Tennessee v. Beatty, 3 Sneed(Tenn) 305, 65 Am Dec 58.

86. Read v. Stevens, 1 NJL 306.

87. Overton v. Perkins, 10 Yerg (Tenn) 328; Hogshead v. Carruth, 5 Yerg(Tenn) 227; See secs. 460, 466, supra.

88. Wright v. Child, LR 1 Exch 354; Crocker on Sheriffs, 488; Addison on Torts, 626; Todd v. Hoagland, 36 NJL 352, aff 37 NJL 544, wherein it is said: "If there is a failure of bidders, or the circumstances of the sale are such as to show that the property will be sold for a price unreasonably inadequate to what it ought to bring at a sheriff's sale, it is the duty of the sheriff, unless otherwise ordered, and where the creditor is likely to be benefited by it, to adjourn the sale for another opportunity. His duty is to make the money on the execution, if by fair judgment and skill it can be done according to the modes provided by law. His discretion should be liberally considered in the absence of bad faith, yet the sheriff is responsible for a clear neglect of its proper exercise, according to the measure stated."

89. Dickerman v. Burgess, 20 Ill 266; Wenner v. Thornton, 98 Ill 156; Mullins v. Buskirk, 5 Ky L 606; Merwin v. Smith, 2 NJE 182; Sparling v. Todd, 27 Ohio St 521; Victor Inv. Co. v. Roerig, 124 P 349, 22 Colo App 257. In this case the bid was made by telephone.

89a. Harrison v. McHenry, 9 Ga 164, 52 Am D 435; Moore v. Pye, 10 Kan 246; Brannin v. Broadus, 21 SW 244, 94 Ky 33, 14 Ky L 726; Victor v. Roerig, supra.

thorized to use his discretion in bidding, and is not confined to a single fixed amount as a bid, then the sale is invalid.[89b] Considerable discretion is committed to the officer in receiving bids. He is not required to receive the bid of a wholly irresponsible person whom he knows to be such, or, the rule is the same with respect to a bid by a person unknown to the sheriff, and he is not required to receive such bid unless the bidder, when called upon, proves his responsibility.[90]

It is, of course, the officer's duty to sell to the highest bidder, but this means the highest bidder who will comply with his bid, and, if one at a sheriff's or constable's sale bids for property, and fails to pay his bid, the officer may expose the property again to public sale, or confirm the next highest bid by receiving the money and making the title to such bidder.[91] But such resale must be immediate unless the sale is readvertised, and the property cannot be sold to the next highest bidder unless this is done without delay. A delay of one day to sell to the next highest bidder invalidates the sale to him, and passes no title to the property.[91a] If a bid is wrongfully rejected by an officer at an execution sale, the bidder, it seems, has one of three courses open to him, and they are: To sue the officer for damages, to bring an action for the property itself against the purchaser thereof to whom the officer wrongfully sold it; or the bidder may go into equity to have the sale set aside and the property again exposed for sale at his bid, and if no higher bid is offered, he is entitled to the property.[91b]

§ 571. Sheriff Cannot Purchase at His Own Sale.—It is the general rule that the officer conducting the sale by virtue of a writ of execution cannot purchase at such sale, and if he does so, such act on his part is void.[92] And the same rule would apply where

89b. Caswell v. Jones, 26 A 529, 65 Vt 457, 36 Am St Rep 879, 20 LRA 503.

90. Hobbs v. Beavers, 2 Ind 142, 52 Am Dec 500.

91. Bell v. Redwine, 277 P 1050, 98 Cal A 784; Cummings v. McGill, 2 Murphy (6 NC) 357; Smith v. Cook, 126 SW(2d) (Tex Civ App) 1049; Warman v. Wurzbach, 51 SW(2d) (Tex Civ App) 751; State Bank v. Brown, 105 NW 49, 128 Ia 665.

91a. Swortzell v. Martin, 16 Ia 519; Williams v. Barlow, 59 Ga 530.

91b. Duffy v. Rutherford, 21 Ga 363, 68 Am D 459; Needham v. Cooney, 173 SW(Tex Civ App) 979.

92. Coleman v. Malcolm, 28 SE 861, 101 Ga 303; Giles v. Bank of Southwestern Ga. 29 SE 600, 102 Ga 702; Shotwell v. Munroe, 42 Mo App 669. In this case the purchaser bid in the property for a number of people, and the officer conducting the sale was one, and this was held to avoid the sale. Farnum v. Perry, 43 Vt 473. In this case, however, the officer bought a horse at an execution sale held by him, and sold it to another. It was held that the last mentioned sale transferred the title, and that neither the officer nor his purchaser was charge-

the officer had an agent to make the bids for him.[93] In other words, the sheriff cannot become interested in such sale as a buyer either directly or indirectly.[94] It has been held, however, that where the officer does so act, such sale is not void, as it may actually be beneficial to the creditor, but is only voidable where there is actual fraud.[95] Likewise it has been held that it may be permissible for the sheriff to become a purchaser at a sale where he does so with the permission of the execution creditor and debtor.[96] In regard to such bidding, the sheriff may not even act as agent of another to bid in the property.[97] Inasmuch as the deputy sheriff is an official alter ego of the sheriff, the same disability will extend to such officer. The making the bid through any agency will not validate a sale by an officer to himself through such agency.[98] It has been held, however, that where the deputy is not concerned in the sale he may become a purchaser at such sale although this seems a little inconsistent.[99] After the officer leaves office, even though the property sold is levied upon during his term, nevertheless he may become a purchaser at the sale if it is not conducted by him.[1]

In the absence of a prohibitory statute, a sale to a corporation in which the sheriff may be interested as a stockholder, or to one who is a relative of such officer, is not thereby rendered invalid.[2]

able, as a trustee, in a suit against the debtor in favor of another creditor. Woodbury v. Parker, 19 Vt 353, 47 Am Dec 695; Miller v. Winslow, 126 P 906, 70 Wash 401, Ann Cas 1914B 833.

93. Downing v. Lyford, 57 Vt 507.

94. Price v. Thompson, 1 SW 408, 84 Ky 219, 8 Ky L 201; McKeighan v. Hopkins, 26 NW 614, 19 Neb 33; Robinson v. Clark, 7 Jones's L(52 NC) 562, 78 Am Dec 265; Crook v. Williams, 20 Pa 342; Leger v. Doyle, 11 Rich L(SC) 109, 70 Am Dec 240.

95. Isaac v. Clarke, 9 Gill & J(Md) 107; Farnum v. Perry, supra.

96. Mills v. Goodsell, 5 Conn 475, 13 Am Dec 90; Woodbury v. Parker, supra.

97. Dixon v. Sharp, 1 A. K. Marsh (Ky) 211; Harrison v. McHenry, 9 Ga 164, 52 Am D 435; McLeod v. McCall, 48 NC 87; Knight v. Herrin, 48 Me 533; Caswell v. Jones, 26 A 529, 65 Vt 457, 36 Am St Rep 879, 20 LRA 503 and note. Coleman v. Malcolm, supra.

98. Giles v. Bank of Southwestern Georgia, 29 SE 600, 102 Ga 702; Mark v. Lawrence, 5 Harr & J(Md) 64; Crook v. Williams, 20 Pa 342. See also, Note Ann. Cas 1914B 836.

99. Wyatt v. Clepper, 5 Ala 703; Cowles v. Hardin, 7 SE 896, 101 NC 388, 9 Am St Rep 36. See also, Daniel v. Modawell, 22 Ala 365, 58 Am D 260, which holds sale to a deputy is voidable.

1. Leger v. Doyle, supra.

2. Brackenridge v. Cobb, 21 SW 614, 2 Tex Civ App 161, aff 21 SW 1034, 85 Tex 448. The opinion in this case is far from clear or satisfactory, and it is not an easy matter to determine what is held on this point; and then on review, the supreme court did not clarify the situation.

Hardwick v. Jones, 65 Mo 54. See also, Adams v. Wiscasset Bank, 1 Greenl(Me) 361, 10 Am D 88; Merchants' Bank v. Cook, 4 Pick.(Mass) 405.

In Hardwick v. Jones, supra, it ap-

It does not take a great amount of consideration to conclude that an officer could not control bidders at an execution sale, whether corporation or individual. Unless he were the manager of the corporation, how could he say it should not become a bidder? How can he say to a relative that he should not bid? Of course, the situation would be different if the transaction was fraudulent.

§ 572. Sheriff's Crier at Sale May Purchase When.—Where the sheriff hires a crier or auctioneer to sell the property at the sale, and during the sale such auctioneer or crier would be the agent of the sheriff, it would seem on principle that the auctioneer could not bid at such sale. It is the general rule of law that an auctioneer cannot bid on or purchase or have any interest whatsoever in the property sold at a sale conducted by him.[3] But, it has been held that while an officer cannot buy property at his own sale under an execution, nor one to whom he delegates his power, but if an officer superintends the sale, and employs a crier merely as a mouthpiece, the latter may purchase at the sale.[4]

§ 573. Rule of Caveat Emptor Applies at Execution Sale.—Purchasers at an execution sale must look out for themselves, as the rule of caveat emptor applies.[5] Some authorities go so far as to hold a bidder, who has not paid his bid, is not exonerated, even though the execution debtor had no title to the property sold, and the bidder could receive none.[5a] In the absence of fraud, the purchaser is precluded from asserting that the property or title thereto was defective, lack of quantity or quality, lack of title, or in regard to incumbrances on the subject matter purchased.[6] Where, however, such execution purchaser is induced to buy by reason of the fraud of the execution creditor or debtor, he may seek relief on this basis, against the responsible person even though by an investigation of public records such fraud can be disclosed.[7]

peared the execution had been levied on the land by one sheriff who was a stockholder in the purchaser banking corporation, and that sale was held by another sheriff who was likewise a stockholder in the bank; but this did not invalidate the sale.

But it is submitted the rule would be different if the corporation were but an alter ego of the officer; if it were owned and controlled by him, then a sale to it would not stand up. Anderson, Limitations of the Corporate Entity, Sec. 23 et seq.

3. Cerreta v. Costello, 209 NYS 257, 212 App Div 687.

4. Crook v. Williams, 20 Pa St 342.

5. Fullbright v. Morton, 199 SW 542, 131 Ark 492; Meherin v. Saunders, 63 P 1084, 131 Cal 681, 54 LRA 272; Kreps v. Webster, 277 P 471, 85 Colo 572, 68 ALR 656 and note. Delaware etc. R. Co. v. Blair, 28 NJL 139.

5a. Kreps v. Webster, supra.

6. Pinkston v. Harrell, 31 SE 808, 106 Ga 102, 71 Am St Rep 242, incumbrances; Hand v. Grant, 5 Smedes & M(Miss) 508, 43 Am Dec 528, 10 Smedes & M 514, defects in the debtor's title; Hensley v. Baker, 10 Mo 157, defective or unsound chattel; Syracuse Savings Bank v. Burton, 6 NY Civ Proc 216, defects in the debtor's title; Dickson v. McCartney, 75 Atl 735, 226 Pa 552, 134 Am St Rep 1078, 29 LRA NS 792, 18 AC 500, incumbrances;

Misrepresentation of a debtor in an execution, whose property is sold by an officer, as to the value of the property, where no part of the purchase price will be coming to him, will not vitiate the sale.[8] Based upon equitable principles, where there has been such a mistake in regard to the amount of the property sold as would substantially affect the interest which the purchaser acquired, the purchaser may be relieved from such sale where he has not actually paid over the purchase price.[9] Where the purchaser makes a mistake and there is no fraud or misrepresentation of the debtor, creditor, or officer, such sale will not be set aside.[10]

The modern tendency is to relax the rigid application of the rule of caveat emptor as to execution sales. It is inapplicable to a void sale.[10a] In case of mistake in execution sales courts have often refused to invoke the harsh rule of caveat emptor.[10b] Where an execution sale is tainted with fraud, the doctrine of caveat emptor has been held inapplicable.[10c]

It seems the law demands—and rightly so—that officers' conduct be characterized by the utmost good faith, and that this rule demands that they make a full disclosure of defects of title or property known to them when they offer property for sale under an execution.[10d] So, where an officer sells property under an execution, to which the debtor has no title, which is known to the officer, but which fact the officer does not disclose, the purchaser may recover the purchase money remaining in the hands of the officer.

It is submitted that the purchaser in these circumstances should be permitted to recover whether the officer has the purchase money

7. Fullbright v. Morton, 199 SW 542, 131 Ark 492; Webster v. Haworth, 8 Cal 21, 68 Am Dec 287.

8. Towles v. Turner, 3 Hill(21 SCL) 178.

9. Francis v. Watkins, 76 NYS 106, 72 App Div 15, 64 NE 1120, 171 NY 682. Note 68 ALR 680; Fullbright v. Morton, supra.

10. It has been held in Watson v. Hoboken Planing Mills Co. 140 NYS 822, 156 App Div 8, that where there is a mistake on the part of the purchaser, the court will not relieve him therefrom although in the case of Collier v. Perkerson, 31 Ga 117, the opposite was held. Hartman v. Pemberton, 24 Pa Super 222.

10a. Boggs v. Fowler, 16 Cal 559, 76 Am D 561; Smith v. Painter, 5 Serg & R(Pa) 223, 9 Am D 344; Note 68 ALR 681.

10b. Note 68 ALR 680.

10c. Note 68 ALR 677.

10d. Com. v. Dickinson, 5 B Mon

Long v. McKissick, 27 SE 636, 50 SC 218, quantity; Meherin v. Saunders, supra, defects in the debtor's title.

in his hands or not.[10e] It is true that the cases of Com. v. Dickinson, and Bartholomew v. Warner have not met with favor and have been criticized,[10f] but it is submitted that these cases are supported by reason and justice and well recognized principles. If the officer holding an execution sale knows the execution debtor has no title to the property, every principle of justice and honesty impels him to speak when he knows full well that the bidders are acting on the assumption in making their bids, that the debtor has title thereto, and that a successful bidder will obtain a title to the property. The officer fails by his silence to correct a misapprehension that he knows is present in the minds of the bidders. It is familiar law that a deliberate failure to correct a delusion may constitute fraud.[10g]

§ 574. What Constitutes a Bid; Accepted Bid Is a Sale.—The question of what constitutes a bid may sometimes arise, and become one of considerable importance. It may be defined, however, as a mere offer to purchase but does not constitute a contract until accepted and may be withdrawn at any time before an actual acceptance and before the property is struck off to the bidder. An officer holding an execution sale is without power to modify this familiar rule of law, and it is without his ambit of authority to abridge this right of the bidder by any supposed imposed conditions.[11]

For a withdrawal of a bid by the bidder being the exercise of a lawful right, no liability attaches for costs of readvertisement or otherwise.[11a] Neither may the bidder impose conditions upon his bid, and it is the duty of the officer, when this is attempted, to disregard the bid.[12] If a bidder withdraws his bid he cannot thereafter insist upon same, or contend he is entitled to buy for the amount of the withdrawn bid. He has no objection to another sale

(Ky) 506, 43 Am D 139; Bartholomew v. Warner, 32 Conn 98, 85 Am D 251.

10e. Bartholomew v. Warner, supra.

10f. Note 43 Am D 143; Watertown Sav. Bank v. Matoon, 62 A 622, 78 Conn 388.

10g. 26 CJ 1073.

11. Blossom v. Milwaukee & C. R. Co. 3 Wall.(US) 196, 18 L ed 43; In re Glas-Shipt Dairy Co. 239 F 122, 152 CCA 164; Hibernia Savings & Loan Soc. v. Behnke, 53 P 812, 121 Cal 339; Tillman v. Dunman, 40 SE 244, 114 Ga 406, 57 LRA 784, 88 Am St Rep 28 and note; Jones v. Rogers, 38 So 742, 85 Miss 802; Dunham v. Hartman, 55 SW 233, 153 Mo 625, 17 Am St Rep 741; George v. Pracheil, 137 NW 880, 92 Neb 81; Nebraska Loan & Trust Co. v. Hamer, 58 NW 695, 40 Neb 281; Fisher v. Seltzer, 23 Pa State 308, 62 Am Dec 335; Payne v. Cave, 3 Times R 149, 100 Eng Reprint 502; Keightley v. Birch, 3 Camph 521.

11a. Fisher v. Seltzer, supra.

12. Dewey v. Willoughby, 72 Ill 250; Isler v. Colgrove, 75 NC 334.

that is made.[13] When a bid has once been accepted it then becomes a contract, and has the same force and effect as any other contract after acceptance, and neither party, without the consent of the other, may withdraw or recede from the contractual obligations thus assumed.[14] When a bid has once been accepted and the transaction thereby ripened into a contract, all prior bids are released.[15]

As a rule the matter of bidding and accepting same is the concern of the officer and the bidder, but where the execution creditor's bid is accepted, he cannot be released from the consummated contract without consent of the execution debtor. The reason of this is because such sale amounts to a satisfaction of the judgment, and this satisfaction cannot be vacated or rescinded without the debtor's consent.[15a] No reason appears why, if a bid is withdrawn, an officer may not go back to the next highest bid, and thus create a binding transaction, unless it too, before acceptance, is likewise withdrawn. Creditors subsequently obtaining a judgment may not complain that the officer failed to find a bidder and consummate a resale within the time prescribed by law. The only parties affected by such failure on the part of the officer are the execution defendant and the creditor entitled to the proceeds of sale. The courts will not attempt, as against an officer failing to make a resale, to fasten upon him consequences so remote as the loss resulting to a holder of a subsequent judgment by reason of the diminution of the assets growing out of the failure on the part of the officer to cause to be made good the amount of the withdrawn bid.[16]

There is no formality required by law as to how a bid may be made or accepted; it may be oral, or in writing, or by any sign indicative of an intent; any act showing an offer or an acceptance, as a wink, or nod.[16a]

13. Barnes v. Zoercher, 26 NE 172, 126 Ind 434; Hills v. Jacobs, 7 Rob. (La) 406.

14. Downard v. Crenshaw, 49 Iowa 296; Fuson v. Conn. General Life Ins. Co. 6 NW 7, 53 Iowa 609; Miller v. Achurch, 93 P 232, 50 Ore 478; Nebraska Loan & Trust Co. v. Hamer, supra.

15. Swortzell v. Martin, 16 Iowa 519.

15a. Downard v. Crenshaw, supra.

16. Richardson v. Inglesby, 13 Rich E(SC) 59; Lewis v. Brown, 4 Strob (SC) 293; O'Bannon v. Kirkland, 2 Strob(SC) 29; State v. Yongue, 6 Rich L(SC) 323.

16a. State v. State Board of School Land Commrs. 191 P 1073, 27 Wyo 54, 11 ALR 539 and note.

"An unusual and probably unique method of accepting a bid has been described by Lord Chancellor Eldon. 'When I was attorney general' said his Lordship in Walker v. Advocate-General (1813), 1 Dow 111, 3 Eng Reprint 640, 'they had a case in the exchequer of a female auctioneer. She continued silent during the whole time of the sale; but whenever anyone bid

§ 575. Right of Officer to Reject a Bid.—An officer holding a sale has a right to reject a bid. He may do this if it is made conditional.[17] Or if the bidder is laboring under a disability rendering him incapacitated to contract;[18] or if the bid is grossly inadequate.[19] In fact, an officer is not justified in selling goods to the highest bidder greatly under their value; but he should make a return that they remain in his hands for the want of bidders.[19a] Likewise, if the officer knows the bidder to be insolvent, or where he even believes that the amount bid is beyond the financial ability of the bidder to comply therewith.[20] It has been held that the officer may exact of the bidder a deposit of earnest money as practical evidence of good faith.[21]

§ 576. What Law Governs.—The sale of real estate by virtue of an execution upon a judgment based upon contract, must be governed by the law in force at the time when the contract was made. If the right to have property, sold under execution, appraised before sale, did not exist when the contract was made, but was provided when the judgment was entered, the law requiring appraisal does not apply in these circumstances.[22] But this view is not without opposition. It is even held in some cases that if the law is changed after rendition of the judgment and before a sale under an execution issued thereon, that the law in force at the time of sale controls.[22a]

§ 577. Execution Sales Required to Be Honestly Made without

she gave him a glass of brandy. The sale broke up, and in a private room, he that got the last glass of brandy was declared to be the purchaser.'"

Note 11 ALR 546.

17. Dewey v. Willoughby, 72 Ill 250; Isler v. Colgrove, 75 NC 334.

18. Hotchkiss v. Homan, 25 Pa Co 314.

19. Lankford v. Jackson, 21 Ala 650; Davis v. McCann, 44 SW 795, 143 Mo 172; Rogers etc. Hardware Co. v. Cleveland Building Co. 34 SW 57, 132 Mo 442, 53 Am St Rep 494, 31 LRA 335.

19a. Rogers, etc. Hdw. Co. v. Cleveland Bldg. Co. supra; Davis v. McCann, 44 SW 795, 143 Mo 172; Cole Co. v. Madden, 4 SW 397, 91 Mo 585; State v. Moore, 72 Mo 285; Shaw v. Potter, 50 Mo 281; Conway v. Nolte, 11 Mo 74; Keighley v. Birch (1814) 3 Campb. 521.

20. Hobbs v. Beavers, 2 Ind 142, 52 Am D 500; Michel v. Kaiser, 25 La Ann 57.

21. National Bank of the Metropolis v. Sprague, 20 NJE 159.

22. McCracken v. Haywood, 2 How. (43 US) 608, 11 L ed 397; Rue v. Decker, Fed Cas No. 12112, 3 McLean 575; Rawley v. Hooker, 21 Ind 144; Stewart v. Vermilyea, 8 Blackf(Ind) 56; Lane v. Fox, 8 Blackf(Ind) 58; Harrison v. Stipp, 8 Blackf(Ind) 455.

22a. Howe v. Starkweather, 17 Mass 240; Crane v. Hardy, 1 Mich 56; Allen v. Parish, 3 Oh 187; Fonda v. Clark, 43 Iowa 300; Whitworth v. McKee, 72 P 1046, 32 Wash 83. See also, Swinburne v. Mills, 50 P 489, 17 Wash 611, 61 Am St Rep 932.

Regard to the Wishes of the Parties.—An officer of the law having a writ of execution in his hands, must take all needful and lawful means to enforce it. He must exercise a sound discretion as to time, place, and manner of sale; and he must consult his own judgment and not submit to being so controlled by either party to oppress or injure the other.[23] It should be borne in mind within certain legal bounds it is the duty of the officer to obey directions and instructions of the plaintiff.[23a] But the rights of the plaintiff in an execution do not embrace the right to issue instructions, the carrying out of which will oppress the defendant. Instructions must be lawful and honest before obedience thereto can be exacted. Neither may the officer act in the interest of a bidder at an execution sale; indeed, the law demands that he shall act fairly and honestly as to all parties.[23b] It is the responsibility of the officer holding an execution sale where the subject matter is realty to conduct the sale in such a manner as to bring the most money, and to offer no more for sale than is necessary to raise the amount due in the process in his hands.[24] However, it is not incumbent upon the execution defendant to disclose unsoundness of, or latent defects in, property offered for sale under an execution; the rule of caveat emptor applies.[25]

§ 578. Who May Purchase at Execution Sale.—Either the plaintiff or defendant in the execution or members of their families may purchase at a sale thereunder, and when property is knocked off to any of them, they stand in the exact situation as any other bidder at such sale, with all of the rights and privileges thereof, and attending obligations, duties, and responsibilities.[26] However, in these circumstances the utmost good faith is exacted by the law.[27]

23. French v. Snyder, 30 Ill 339, 83 Am D 193; Kiser v. Ruddick, 8 Blackf (Ind) 382; Swortzell v. Martin, 16 Ia 519; McDonald v. Neilson, 2 Cow.(N Y) 139, 14 Am Dec 431; Fatheree v. Williams, 35 SW 324, 13 Tex Civ App 430.

23a. See Sec. 97, supra.

23b. Swortzell v. Martin, supra.

24. Coulters v. Meiggs, 101 Atl 115 (RI); Reed v. Diven, 7 Ind 189. But see Gregory v. Purdue, 32 Ind 453 at p. 464; Jones v. Kokomo Bldg. Assn. 77 Ind 340 at p. 344; Hewson v. Deygert, 8 Johns.(NY) 333; Marcum v. Thompson, 2 SW(2d) 302, 222 Ky 702.

25. Hart v. Hampton, 7 T B Mon (Ky) 381, 18 Am Dec 186. But, however, see Sec. 570a, supra.

26. Prevost v. Gratz, 6 Wheat.(US) 481, 5 L ed 311; Arkansas Nat'l Bank v. Price, 15 SW(2d) 396, 179 Ark 259; Kilgo v. Castleberry, 38 Ga 512, 95 Am Dec 406; Evans v. Power County, 1 P(2d) 614, 50 Ida 690; Bracker v. Milner, 73 SW 225, 99 Mo A 187; Neilson v. Neilson, 5 Barb(NY) 565; Dick v. Cooper, 24 Pa 217, 64 Am D 652.

27. Patterson v. Drake, 55 SE 175, 126 Ga 478; Roberts v. Hughes, 81 Ill 130, 25 Am Rep 270; Atlee v. Bullard, 98 NW 889, 123 Iowa 274; Bacon v. Early, 90 NW 353, 116 Iowa 532;

In England in order for any party to a proceeding in chancery to purchase, leave of court to do so was necessary.[27a] Where there is more than one execution debtor, and where the relationship is principal and surety, co-debtors or otherwise, anyone may purchase, or all of them jointly may purchase at an execution sale.[28] However, it seems that an attorney, or another standing in the fiduciary relationship to either of the parties, may not purchase at an execution sale.[29]

But the view that an attorney for a party to an execution cannot purchase at a sale thereunder has met with opposition.[29a] Even if there is no objection to the plaintiff's attorney purchasing at such sale, when questioned the onus is on him to show good faith. This is because he is an officer of the court.[30] However, there are cases holding where defendant's attorney purchases at an execution sale with the consent of his client, and that where defendant's attorney purchases his client's property at an execution sale without his client's consent that no presumption is indulged that the execution defendant furnished the consideration or that it was made for the client's benefit.[30a] In case an attorney for a party to an execution purchases at a sale under the process, the client only can complain.[30b] Judicial officers who have any official function to perform in connection with the process, or sale, are prohibited, as a rule, from becoming purchasers at such sale.[30c]

Jones v. Webb, 59 SW 858, 22 Ky L 1100; Bradley v. Heffernan, 57 SW 763, 156 Mo 652; Tonopah Banking Corp. v. McKane Min. Co. 103 P 230, 31 Nev 295; Corinth v. Locke, 20 Atl 809, 62 Vt 411, 11 LRA 207.

27a. Freeman on Executions, Sec. 292.

28. Bacon v. Early, supra.

29. Cunningham v. Jones, 15 P 572, 37 Kan 447, 1 Am St Rep 257; West v. Waddill, 33 Ark 575; Boyd v. Hankinson, 92 F 49, 34 CCA 197, rev 83 F 876; Fisher v. McInerney, 69 P 622, 907, 137 Cal 28, 92 Am St Rep 68; Geyer v. Geyer, 78 Atl 449, 75 NJ E 124; Saunders v. Gould, 19 Atl 694, 134 Pa 445, 2 Monag 753; Ricketts' Appeal, 12 Atl 60, 9 Sad.(Pa) 247.

29a. See note 30a, infra, this section; Blight v. Tobin, 7 T B Mon(Ky) 612, 18 Am Dec 219; Wade v. Pettibone, 11 Oh 57, 37 Am D 408; Jones v. Martin, 26 Tex 57, 80 Am D 641.

30. Johnson v. Johnson, 119 P 22, 66 Wash 113; Arnold v. Ness, 212 F 290; Ross v. Drouilhet, 80 SW 241, 34 Tex Civ App 327; Douglass v. Blount, 67 SW 484, 95 Tex 369, 58 LRA 699. Holding, however, that consent of the client is necessary. Especially where the plaintiff's claim is satisfied in full from the amount of sale to the attorney. Leisenring v. Black, 5 Watts (Pa) 303, 30 Am D 322; Jones v. Martin, 26 Tex 57, 80 Am D 641.

30a. Fisher v. McInerney, supra. See also, note 136 Am St Rep 813 et seq. See also, Douglass v. Blount, supra.

30b. Saunders v. Gould, 16 Atl 807, 124 Pa 237; Whitman v. O'Brien, 29 Pa Super 208.

30c. E. E. Forbes Piano Co. v. Hennington, 53 So 777, 98 Miss 51, AC 1913A 1216; Scott v. Calvit, 2 La 69; Nona M. Co. v. Wingate, 113 SW 182, 51 Tex Civ App 609. But see, Bell

§ 579. Execution Sale as within the Statute of Frauds.—While there is some conflict of authorities, it is submitted that the weight thereof tilts the scale to the side of the holdings that an execution sale is within the statute of frauds.[31] To this extent an execution sale is distinguished from a judicial one which is not within the statute of frauds.[32] On the other hand statutes are to be encountered providing for a penalty for refusing to comply with a bid at an execution sale, and it is held that the statute of frauds is no bar to a recovery of the penalty under these statutes although the bid rests in parol only.[33]

Where the land of one of two sureties of a third person was sold under an execution for the debt, and the other surety bid it off, an agreement whereby the land owner was to pay the bid and take an assignment of the bid to him was not within the statute of frauds.[34] A few adjudications may be found holding that an execution sale is without the operation of the statute of frauds.[35]

§ 580. Character and Office of Venditioni Exponas.—By the levy of an execution a lien is created whose duration is not limited to the return day of the writ, and from this it follows that the officer has the authority notwithstanding the return day has passed, to make the levy productive by sale of the property levied upon and this authority is not dependent upon the issuance of a venditioni exponas, for this latter mentioned writ does nothing more than to compel the

County v. Felts, 132 SW 123, 103 Tex 616, rev 120 SW (Tex Civ App) 1065, 122 SW 269.

31. Remington v. Linthicum, 14 Pet. (US) 84, 10 L ed 364; Robinson v. Garth, 6 Ala 294, 41 Am D 47; White v. Farley, 8 So 215, 81 Ala 563; Chapman v. Harwood, 8 Blackf(Ind) 82, 44 Am D 736; Duvall v. Waters, 1 Bland (Md) 569, 18 Am D 350; Hand v. Grant, 5 Smedes & M(Miss) 508, 43 Am D 528, see also 10 Smedes & M 514; Catlin v. Jackson, 8 Johns. (NY) 520; Elfe v. Gadsden, 2 Rich L (SC) 373; Rugely v. Moore, 54 SW 379, 23 Tex Civ App 10.

32. Halleck v. Guy, 9 Cal 181, 70 Am D 643; Warfield v. Dorsey, 30 Md 299, 17 Am Rep 562; Nichol v. Ridley, 5 Yerg(Tenn) 63, 26 Am Dec 254; Robertson v. Smith, 26 SE 579, 94 Va 250, 64 Am St Rep 723; Attorney General v. Day, 1 Ves 218.

33. Lockridge v. Baldwin, 20 Tex 303, 70 Am Dec 385. The court in this case said:

"The objection that there was no memorandum in writing made to bind the contract of sale is equally untenable. This is not a proceeding to enforce a contract for the sale of land, but to enforce a penalty for not completing the contract of sale agreed upon by the making of the bid."

34. Hockaday v. Parker, 53 NC 16. This holding as a rule of general application is weakened by the fact that North Carolina holds that execution sales are not within the statute. Tate v. Greenlee, infra.

35. Endicott v. Penny, 14 Smedes & M(Miss) 144; Hand v. Grant, 5 Smedes & M(Miss) 508, 43 Am Dec 528, see also 10 Smedes & M 514; Tate v. Greenlee, 15 NC 149; Emley v. Drum, 36 Pa 123; Nichol v. Ridley, supra.

performance, on the part of the officer, of a preexisting duty.[36] The words venditioni exponas mean, "you expose to sale," or that "you sell for the best price you can obtain."[37] The writ known by the name of venditioni exponas is one which directs the sheriff to expose to sale lands and goods which he has theretofore levied upon by virtue of a writ of fieri facias or execution and returned it to the court without making a sale.[38] Under statutory procedure, in some states, the writ we have under consideration performs the function of an alias execution. The Supreme Court of Kansas held that a sale made thereunder, even though the execution defendant had died after the levy and before the issuance of the alias execution was valid without any revivor. The alias execution was treated as venditioni exponas.[39] In some jurisdictions it is necessary to issue this writ to complete a levy already made, and it is there generally held that a sale under the original execution after its return day is void.[40] However, in others, the officer may proceed under original execution where a levy has been made, though the return day has passed before the day of sale, without any new process being issued whatsoever. The situation is not changed by the fact that the execution is actually returned.[41] It is well settled that in the absence of a statute to the contrary, an officer who has entered into the service of execution upon the judgment debtor by levying same on or before the return day and after the actual return of the writ

36. Southern California Lumber Co. v. Ocean Beach Hotel Co. 29 P 627, 94 Cal 217, 28 Am St Rep 115, and note on sale after return date. Colyer v. Higgins, 1 Duv(Ky) 6, 85 Am Dec 601, and note; Howell v. Sherwood, 147 S W 810, 242 Mo 513, see also note 76 Am D 83; Caffery v. Choctaw Coal & Min. Co. 68 SW 1049, 95 Mo App 174.

37. Richmond Cedar Works v. Stringfellow, 236 F 264; Powell v. Governor, 9 Ala 36.

38. Richmond Cedar Works v. Stringfellow, supra.

39. Taylor v. Miller, 13 How.(US) 287, 14 L ed 149; Barber v. Peay, 31 Ark 392; Wolf v. Heath, 7 Blackf (Ind) 154; Rain v. Young, 59 P 1068, 61 Kan 428, 78 Am St R 325. In the course of the opinion the court said: "An execution issued in the lifetime of a judgment debtor and a levy made thereunder, being an entire thing, cannot be superseded after proceedings thereunder have been begun in obedience to the command of the writ. The last execution, under which the property was sold, is, by the provisions of our statute, to be given the same effect as a common law writ of venditioni exponas, which was a process in continuation and completion of a previous execution by which the property had been appropriated and placed in the custody of the law." Holman v. Holman, 66 Barb(NY) 215; Bigelow v. Renker, 25 Ohio St 542.

40. Hightower v. Handlin, 27 Ark 20; Armstrong v. Jackson, 1 Blackf (Ind) 210, 12 Am Dec 225; Buckley v. Mason, 72 NW 1043, 52 Neb 639; Mitchell v. Ireland, 54 Tex 301; Cain v. Woodward, 12 SW 319, 74 Tex 540; Hester v. Duprey, 46 Tex 625.

41. Hensen v. Peter, 164 P 512, 95 Wash 628, LRA1918F 682, 166 P 1119, 97 Wash 702.

itself, continues to hold the property and may prosecute such further proceedings as may be necessary to convert the property, whether real or personal, into money for the purpose of satisfying the judgment. This is especially so where the officer has been interrupted by an injunction or other restraining process, at the instance of the judgment debtor.[42] However, in those jurisdictions where the issuance of the writ of venditioni exponas is required, or where it is thought advisable to issue the same, the execution and levy constitute a proper basis upon which to predicate the issuance thereof.[43] As heretofore indicated, the only office the writ performs is to compel or authorize a sale of property that has theretofore been levied upon.[44] In this respect the writ is considered a part of the execution.[45] Since the former proceedings consisting of the issuance of the execution and levy thereunder are the basis of the writ of venditioni exponas, it seems that a recital of such former proceedings ought to be inserted therein.[46] It seems, that it may in some cases be authorized in the venditioni exponas to levy on other property sufficient to make the balance due on the judgment.[47]

42. Corbin v. Pearce, 81 Ill 461; Rose v. Ingram, 98 Ind 276; Mooney v. Maas, 22 Iowa 380, 92 Am Dec 395; Knox v. Randall, 24 Minn 479; Johnson v. Bemis, 7 Neb 224; Hensen v. Peter, supra; Clerk v. Withers, 2 Ld Raym 1073, 92 Eng Rep 211.

43. Locke v. Brady, 30 Miss 21; Caffery v. Choctaw Coal & Min. Co. supra.

44. U. S. v. Hogg, 112 F 909, 50 CCA 609, 111 F 292; Low v. Skaggs, 105 SW 439, 31 Ky L 1292.

45. Neil v. Colwell, 66 Pa 216; McLanahan v. Goodman, 108 Atl 206, 265 Pa 43.

46. Taylor v. Doe, 13 How(US) 287, 14 L Ed 149; Dryer v. Graham, 58 Ala 623; Fenno v. Coulter, 14 Ark 38; Busey v. Tuck, 47 Md 171; Hall v. Clagett, 63 Md 57.

47. Quinn v. Wiswall, 7 Ala 645; Zug v. Laughlin, 23 Ind 170; Powell v. Baugham, 31 NC 153.

CHAPTER XXIII

RETURN OF PROCESS, GENERALLY

SECS.

§ 581. Return Defined.—A "return," of process, in legal parlance, is a statement in writing, made by a ministerial officer, of the manner in which he executed a process placed in his hands. It is necessary in any instance, and is evidence of the officer's acts simply because the law requires it. If the law does not require such a return, none need be made, even on the execution of writs of court. Nor is an unauthorized return evidence of the facts recited therein; it is nothing more than the private memoranda of the person making it, and can be used as evidence only as other private memoranda can be used.[1]

§ 582. Necessity for Return.—If the law does not require a return of process, then none need be made, even though such process is a writ issuing out of a court of record.[2] It is undoubtedly true, that it is the service of summons that gives jurisdiction to the court, and not the return or proof thereof, but it is also true that the required proof of service must be furnished before a court is authorized to make a finding that it has jurisdiction over the person of the defendant in case of service of summons or in any other case

1. Strandberg v. Stringer, 216 P 25, 125 Wash 358. See Sec. 582, infra.

2. Crocker on Sheriffs (3rd ed.), sec. 47. See Sec. 581, supra.

where proof of service is necessarily determined by the court.[3] If process has been served, the court has jurisdiction, whether it has been returned or not, since it is the service that confers jurisdiction and not the return.[4] It should be noted, however, that it is necessary to make a return for evidentiary purposes, and without such evidence the court is without authority to conclude that it has jurisdiction.[5] In order that a return shall acquire the verity and dignity of an official act, it must be required by law; otherwise, it has no more efficacy than any other private memorandum.[6]

§ 583. Forms of Returns.—The return of service should be made upon the back of the writ or process, or upon a separate sheet of paper and attached thereto.[7] An indorsement of the return of an attachment annexed to the writ instead of on the writ itself is regarded as only an irregularity.[8] In most states, however, the form of the return is prescribed by statute, which should be consulted.

§ 584. In Whose Name Return Should Be Made.—At one time it was the rule that a return should contain the Christian name as well as the surname of the officer making it,[9] but such strict rule would hardly be enforced in our time. In a very early English case it was held that a return was good although the sheriff had not signed it at all.[10] The return ordinarily should be signed by the officer who made it, but if it is made by a deputy it should be signed by the principal officer's name, by the deputy, although, in these circumstances, the principal officer himself may sign the return without mentioning the deputy, who actually made the service.[11]

3. Blaker v. Lushbaugh, 7 Alaska 57; Herman v. Santee, 37 P 509, 103 Cal 519, 42 Am St R 145; Morrissey v. Hammon, 117 P 442, 160 Cal 808; Williamson v. Williamson, 280 P 651, 52 Nev 78, rehearing denied 296 P 1113; Burleigh v. Wong Sung Leon, 139 Atl 184, 83 NH 115; Cranston v. Stanfield, 261 P 52, 123 Ore 314; Marin v. Titus, 122 NW 596, 23 SD 553; Elias v. Boone Timber Co. 102 SE 488, 85 W Va 508.

4. Newman's Estate, 16 P 887, 75 Cal 213, 7 Am St Rep 146; Call v. Rocky Mountain Bell Tel. Co. 102 P 146, 16 Idaho 551, 133 Am St Rep 135 and note; Boyd v. Chesapeake & O. Canal Co. 17 Md 195, 79 Am Dec 646; Brown v. Reinke, 199 NW 235, 159 Minn 458, 35 ALR 413; Kahn v. Mercantile Town Mutual Life Ins. Co. 128 SW 995, 228 Mo 585, 137 Am St Rep 665; Burleigh v. Wong Sung Leon, supra.

5. Albright-Pryor Co. v. Pacific Selling Co. 55 SE 251, 126 Ga 498, 115 Am St Rep 108; Reynolds v. Gladys Belle Oil Co. 243 P 576, 75 Mont 332; City of Dallas v. Crawford, 222 SW(Tex Civ App) 305; Williamson v. Williamson, supra.

6. Crocker on Sheriffs (3rd ed.), sec. 47; Strandberg v. Stringer, supra.

7. Murfree on Sheriffs, sec. 836; Watson on Sheriffs, page 68.

8. Johnson v. Gilkeson, 81 Mo 55.

9. Watson on Sheriffs, page 69.

10. Dalston v. Thorpe, Cro Eliz 767.

11. Sheppard v. Hill, 5 Ark 308; Reinhart v. Lugo, 24 P 1089, 86 Cal

Some authorities incline to the view that it would be the better practice for the return to be made by the deputy, signing the principal's name, by him, but this is in most cases an irregularity and in case of death of the deputy, the principal officer may make such return without mentioning the deputy's name.[12] The better rule is that a return in the name of the deputy alone, he not being the duly elected and recognized office holder, is invalid.[13] But there are to be found authorities maintaining a contrary view.[14] Where, by virtue of statutory enactment, a deputy's authority and power continue after the death of the principal officer until the vacancy is filled, he may make a return in his own name, after the death of the sheriff.[15] It is of no importance, however, that the name of the sheriff is written below that of his deputy instead of above, as is customarily done.[16] An unusual pronouncement was made by the Supreme Court of New York wherein it was held that in a case where a summons and other papers were placed in the hands of a deputy sheriff but he died after making service but before making a return thereof, the court received affidavits made by third parties as to statements made by the deputy while he was sick, as to the service made and the time and place thereof, upon which the court predicated an order for the sheriff to make a return. The hearsay character of this evidence did not seem to have entered into the court's consideration.[17] It is submitted, however, that such precedent would hardly be controlling in subsequent cases. The affidavits here could not have been supported upon any theory of a dying declaration.

395, 21 Am St Rep 52; Boise Valley Traction Co. v. Boise City, 214 P 1037, 37 Idaho 20; Thompson v. Phillips, 200 NW 727, 198 Iowa 1064; Gray v. Wolf, 42 NW 504, 77 Iowa 630; Orchard v. Peake, 77 P 281, 69 Kan 510; McKnight v. Connell, 14 La Ann 396; Kelly v. Harrison, 12 So 261, 69 Miss 856; Bennett v. Vinyard, 34 Mo 216; Bennethum v. Bowers, 19 Atl 361, 133 Pa 332; Swearingen v. Swearingen, 193 SW(Tex Civ App) 442.

12. Goddard v. Harbour, 44 P 1055, 56 Kan 744, 54 Am St Rep 608; Ingersoll v. Sawyer, 2 Pick.(Mass) 276; Kueffner v. Gottfried, 191 NW 271, 154 Minn 70.

13. State v. Fisher, 130 SW 35, 230 Mo 325, AC 1912A 970; Stuckert v. Thompson, 164 SW 692, 181 Mo App 518; Boland v. Mason, 66 Pa 138; Arnold v. Scott, 39 Tex 378; Bennethum v. Bowers, supra; Kelly v. Harrison, supra; Kueffner v. Gottfried, supra; Gray v. Wolf, supra; Thompson v. Phillips, supra; Reinhart v. Lugo, supra.

14. Spafford v. Goodell, 22 F Cas No. 13,197, 3 McLean, 97; Bean v. Haffendorfer, 2 SW 556, 84 Ky 685, 3 SW 138, 8 Ky L 739; Stoll v. Padley, 56 NW 1042, 98 Mich 13; First Nat'l Bank v. Ellis, 114 P 620, 27 Okl 699, AC 1912C 687.

15. Timmerman v. Phelps, 27 Ill 496. In this case the return was signed by the deputy as a deputy without any mention of the sheriff.

16. Zepp v. Hager, 70 Ill 223.

17. Barber v. Goodell, 56 How Pr (NY) 364.

While it is true that a deputy should make a return in the name of the principal officer, a return of the principal officer supplemented by an affidavit of the deputy who actually made service will suffice.[18] A return made without adding the official character of the officer making it, seems to invalidate it.[18a] But, since a deputy officer has no official standing, it would seem that a return in the name of the principal and followed by his official title that the fact the deputy failed to add his official title after his name would not avoid the return.

§ 585. **Construction of Return.**—The return should receive a reasonable construction, but reasonable intendment should be indulged in favor of the return and with a view to holding that an officer of the law has performed his legal duty. If, from such construction, it can be reasonably deduced that service was made, it will sustain a judgment.[19] The language of the statute with respect to returns need not be used; any language may be employed so long as it, with reasonable certainty, appears that the service was made.[20] Where the return of an officer, indorsed on process, is susceptible of different meanings in construction of the return, that meaning will be adopted which is most conformable with an officer's legal duty; this is in accordance with the presumption of a proper discharge of an official duty.[21] The language employed in the whole return will be considered and in case there appears to be two returns they will be construed together.[22] A sheriff, or other officer charged with the duty of serving process, should be certain in the language used in the return, yet the highest degree of certainty is not required.[22a] It has even been held returns upon

18. Kueffner v. Gottfried, supra.

18a. Reinhart v. Lugo, supra.

19. Farmers' State Bank v. Inman, 92 So 604, 207 Ala 284; Morrow v. Norvell-Shapleigh Hardware Co. 51 So 766, 165 Ala 331; Blaker v. Lushbaugh, 7 Alaska, 57; Whittlesey v. Starr, 8 Conn 134; Davis v. Burt, 7 Iowa 56; Westlawn Cemetery Assn. v. Good, Circuit Judge, 213 NW 143, 238 Mich 119; Fleugal v. Lards, 66 NW 585, 108 Mich 682; Blinn v. Chessman, 51 NW 666, 49 Minn 140, 32 Am St Rep 536; State v. Still, 11 Mo App 283; Cain v. Courter, 215 SW(Mo) 17; Wells v. Wells, 213 SW 830, 276 Mo 57; Mantle v. Casey, 78 P 591, 31 Mont 408; Steinhardt v. Baker, 46 NYS 707, 20 Misc 470, 49 NYS 357, 25 App Div 197, aff 57 NE 629, 163 NY 410.

20. Cain v. Courter, supra.

21. McGowin v. Dickson, 62 So 685, 182 Ala 161; Fears v. Thompson, 2 So 719, 82 Ala 294; Mayfield v. Allen, Minor(Ala) 274; Hennes v. Hebard, 135 NW 1073, 169 Mich 670; Sodini v. Sodini, 102 NW 861, 94 Minn 301, 110 Am St Rep 371; Farmers' State Bank v. Inman, supra; Blinn v. Chessman, supra.

22. Pillow v. Sentelle, 39 Ark 61; Farmers' Bank v. Riley, 272 SW 9, 209 Ky 54; Missouri etc. R. Co. v. Scoggin, 123 SW 229, 57 Tex Civ App 349.

22a. Bruce v. Cloutman, 43 NH 37,

different instruments served at the same time ought to be construed together.[23] In some jurisdictions a return of process showing that it had been executed or served without a recitation of what was actually done thereunder has been held sufficient.[24] But where the statute requires that the return disclose the manner of service, then a recitation therein, without more, that it was served or executed is insufficient.[25] But even in the absence of a statutory requirement, good practice would seem to dictate that the certificate show what was done rather than a conclusion of the officer. The objection to the use of the word "levy" in a return of a writ of attachment instead of "attach" is regarded as hypercritical.[26] In order to sustain a return of an officer, resort may be had to judicial notice as to the locality of a municipality, as well as the official character of the officer serving the process.[26a] Where return of an officer is silent as to place of service, a presumption arises that it was served within the territory where the officer could lawfully make the service.[26b] Where process is against two defendants, a return by the officer that he had been unable to find the defendants, naming them, will be construed to mean that he could not find either of them.[26c] Where a summons was directed to a man under the name of Robert J. Nelson, but was, according to return of the officer, served upon John S. Bradley, whom, it was certified was also known as Robert J. Nelson, was sufficient to sustain a judgment against Bradley under the name of Nelson. The officer making this service certified that he personally knew the defendant, and knew him to be Bradley, but was also known as Nelson.[26d] Indeed, process on a defendant by a wrong name is as effectually served as if served on him by his right name; and if in such case a judgment is taken against him, it is as binding as if rendered against him in his right name. It is not the name that is sued, but the person to whom it is applied. A person may be sued in the wrong name but the judgment is binding

84 Am Dec 111; Farmers' State Bank v. Inman, supra.

23. E. A. Rosenham Co. v. Cohen, 32 Ohio Cir Ct 637.

24. Mayfield v. Allen, Minor(Ala) 274; Bridges v. Ridgley, 2 Litt(Ky) 395; Thomas v. State, 62 Miss 184; Benson v. Holloway, 59 Miss 358; Berlin Iron Bridge Co. v. Norton, 17 Atl 1079, 51 NJL 442; McDonald v. Carson, 94 NC 497, but see Ogle v. Coffey, 2 Ill (1 Scam) 239; Com. v. Murray, 2 Va Cases 504.

25. Thomason v. Bishop, 24 Tex 302; Ryan v. Martin, 29 Tex 412; Willie v. Thomas, 22 Tex 175; Graves v. Robertson, 22 Tex 130; Continental Insurance Co. v. Milliken, 64 Tex 46.

26. Johnson v. Gilkeson, 81 Mo 55.

26a. Westlawn Cemetery Assn. v. Good, Circuit Judge, supra; Fleugel v. Lards, supra.

26b Bushey v. Raths, 7 NW 802, 45 Mich 181; Fleugel v. Lards, supra.

26c. Blinn v. Chessman, supra.

26d. Sodini v. Sodini, supra.

if he can be identified as the person intended. The rule is the same whether defendant is a corporation or individual.[26e]

§ 586. In Some Cases It Is Imperative to Show How Service Was Made.—Where there are different methods prescribed by statute by which service may be made as, for instance, by reading to the party to be served, or leaving the process at his residence, and the like, the return should show what was done thereunder.[27] It has been held that a return reciting, "I executed the within by reading to the within named A. B. at his residence at White County on the 17th day of March, 1847," was a good and sufficient return, followed, of course, by the name of the officer serving it.[28] Where one form or method of service only may be resorted to, under certain conditions, and the return shows service was in that manner, then the return ought to show that the appropriate conditions existed, allowing service in the manner it was made, as in case the defendant could not be found, or he was a nonresident, or where service is permitted on an agent in certain contingencies.[29] Where a statute provides for substituted service, and that if the defendant was not within the county of his residence, then that the service could be made by leaving a copy of the process to be served with some member of his family over fourteen years old, and where, under such statute, the return showed that the defendant was so sick that the officer could not see her, and that the process was served by leaving a copy with a member of the family over fourteen years old, was insufficient, since the above mentioned method could only be resorted to in case of absence of the defendant from the county, and

26e. Pennsylvania Co. v. Sloan, 17 NE 37, 125 Ill 72, 8 Am St Rep 337; Vogel v. Brown Township, 14 NE 77, 112 Ind 299, 2 Am St Rep 187, see also 1 Freeman on Judgments, (5th ed.) sec. 83; First Nat'l Bank v. Jaggers, 31 Md 38, 100 Am Dec 53; State v. Barr, 44 SW 1045, 143 Mo 209; Parry v. Woodson, 33 Mo 347, 84 Am Dec 51; McNeal v. Hayes Mach. Co. 103 NYS 312, 118 App Div 130; McGhee v. Romatka, 47 SW 291, 19 Tex Civ App 397, 45 SW 552, 92 Tex 38, 47 SW 282.

27. Gilbreath v. Kuykendall, 1 Ark 50; Pioneer Land Co. v. Maddux, 42 P 295, 109 Cal 633, 50 Am St Rep 67; Crapp v. Dodd, 17 SE 666, 92 Ga 405; Hessler v. Wright, 8 Ill App 229; Underhill v. Kirkpatrick, 26 Ill 84; Cariker v. Anderson, 27 Ill 358; Funk v. Hough, 29 Ill 145; Charless v. Marney, 1 Mo 537; Harris v. Sargeant, 60 P 608, 37 Ore 41; Lenore v. Ingram, 1 Phila(Pa) 519.

28. Gatton v. Walker, 9 Ark 199.

29. Settlemier v. Sullivan, 97 US 444, 24 L ed 1110; Legrand v. Fairall, 53 NW 115, 86 Iowa 211; Kendrick's Heirs v. Kendrick, 19 La 36; Hammond v. Olive, 44 Miss 543; Shapiro v. Goldberg, 64 NYS 88, 31 Misc 755; Lackey v. Donnelly, 25 Pa Dist 771; Hoefling v. Pelican Mutual Life Ins. Co. 23 Pa Dist 117; Goodwin v. Wherry, 12 Pa Dist 34, 26 Pa Co 570; Mitchell etc. Co. v. O'Neil, 47 P 235, 16 Wash 108; Johnson v. Ludwick, 52 SE 489, 58 W Va 464; Matteson v. Smith, 37 Wis 333.

that method of service was unavailable.[30] The absence must be the sort of absence permitted, to be resorted to, for substitute service.[31]

§ 587. Service of Process by Reading.—Where there is no statutory method prescribed, the general rule seems to be that the original process should be served by reading it to the party to be served therewith.[32] However, it does not seem that it is indispensable that the officer himself should read the process himself to the defendant. It is sufficient if it is read by another in the presence of the officer and the defendant.[33] Still, it must be actually read to the defendant personally by someone.[34] If the process is read in the presence of the defendant to be served, that is sufficient whether the reading is addressed to the defendant or not.[35] In some cases, however, it has been held, that the reading of the process in the hearing of the defendant to be served therewith is insufficient.[36] A substitution of the officer's language in reading the process for that of the summons is not permissible.[37] The fact that the party to be served advises the officer that it is unnecessary to read the process, since he, the party to be served knows the contents thereof, does not dispense with the reading of the process.[38] A different situation is presented, however, where the defendant refused to stay or listen to the reading of the process to him.[39] If the defendant refuses to remain where the officer is, or departs to avoid service, or refuses to listen, then the officer should make a return that he served the process on the defendant by offering to read same to him, but that the defendant refused to listen, or otherwise prevented the reading to him, and this is a good return and will warrant the rendition of a judgment against the defendant thereon.[40] The law, also, contemplates a personal presence when the service by reading is made, and the mandates of the law are not satisfied by reading the same over the telephone, and the situation is not different even if the officer returns that he recognized the defendant's voice in the telephonic conversation.[41]

30. Legrand v. Fairall, supra.

31. Hammond v. Olive, supra.

32. Woodley v. Jordan, 37 SE 178, 112 Ga 151; Ball v. Shattuck, 16 Ill 299; Law v. Grommes, 41 NE 1080, 158 Ill 492.

33. Woodley v. Jordan, supra.

34. Crary v. Barber, 1 Colo 172; Metzger v. Huntington, 51 Ill App 377; Adkins v. Selbyville Mfg. Co. 107 Atl 181, 134 Md 497; Steedle v. Woolston, 95 Atl 737, 88 NJL 91.

35. Metzger v. Huntington, supra; Adkins v. Selbyville Mfg. Co. supra.

36. Hynek v. Englest, 11 Iowa 210.

37. Halsey v. Hurd, F. Cas. No. 5966, 6 McLean 14; Maher v. Bull, 26 Ill 348; Chickering v. Failes, 26 Ill 507; Ayres v. Swayze, 5 NJL 812; Rape v. Titus, 11 NJL 314; Steedle v. Wollston, supra; Crary v. Barber, supra.

38. Steedle v. Woolston, supra.

39. Slaght v. Robbins, 13 NJL 340; Steedle v. Woolston, supra.

40. Slaght v. Robbins, supra; Steedle v. Woolston, supra.

§ 588. General or Special Return.—Where, under statutes, there are two kinds of return, general and special, the return of the officer must comply with one or the other. It seems that a general return may be such where an officer merely certifies that he executed the process, but where the return attempts to set out the facts or means by which the service was made, then it must fully comply with the law in that respect and show that everything demanded by the statute was actually done. In other words, if the return contains too much for a general return and not enough for a special return, it will not be sufficient to support a default judgment.[42]

§ 589. Compliance with Law Demanded in Return.—As a general rule, if the return shows how, on whom, when and where the process was served, this, undoubtedly, suffices.[43] However, where it is attempted to make service by leaving the process with a member of the defendant's family, over a certain age, as required by statute, it must be made to appear from the return, in order to be sufficient, that the statute was complied with; that is to say, that the process was left with a member of the family and that the person to whom it was delivered was over the age prescribed by law.[44] Likewise, where the process may be served under statutory provision by being left at the "usual place of abode" of the defendant, a writ left at his "house" is insufficient.[45] The return is fatally defective where it is left with some one at the residence or usual place of abode and the person with whom it was left is not designated.[46]

§ 590. Necessity of Showing Delivery of Copy.—Where a statute requires that with the service of process a copy of it or other document should be delivered to the party served, the fact of such de-

41. Sharpless Separator Co. v. Brilhart, 98 Atl 484, 129 Md 82; Lowman v. Ballard, 84 SE 21, 168 NC 16, LRA 1915D 427, AC 1917B 899; Ex parte Apeler, 14 SE 931, 35 SC 417, see also Myers v. Eby, 193 P 77, 33 Idaho 266, 12 ALR 535; Hutchinson v. Stone, 84 So 151, 79 Fla 157; Wester v. Hurt, 130 SW 842, 123 Tenn 508, 30 LRANS 358, AC 1912C 329; Roach v. Francisco, 197 SW 1099, 138 Tenn 357, 1 ALR 1074; Ex parte Terrell, 95 SW(Tex) 536, see also Gilpin v. Savage, 94 NE 656, 201 NY 167, AC 1912A 861, 34 LRANS 417.

42. Semmes v. Patterson, 3 So 35, 65 Miss 6; Faison v. Wolf, 63 Miss 24; Benson v. Holloway, 59 Miss 358.

43. Barbour v. Newkirk, 83 Ky 529, 7 Ky L 555.

44. Dawson v. State Bank, 3 Ark 505, see sec. 586, supra; Johnson v. Branch of State Bank, 3 Ark 522.

45. Matthews v. Gordy, 2 Houst(Del) 573.

46. Boyland v. Boyland, 18 Ill 551; Tavenor v. Reed, 10 Iowa 416; Lyon v. Thompson, 12 Iowa 183.

livery must appear by the return, as well as the service of the process itself. In the absence of such showing in the return, a default judgment may not be entered.[47] No compliance with the requirement is had to make delivery of a copy of the process or other paper required to be delivered, where an incorrect copy is delivered.[47a] When a delivery of process is required, it must be delivered to the defendant personally and a delivery to another will not suffice.[48] It has been held, even, that a delivery to a third party at the request of the party to be served is ineffective.[48a] A delivery to another, although the defendant admits that he received the summons from such party to whom it was delivered, is insufficient.[49] On the other hand, the enclosing of a summons in an envelope and delivering it to the defendant in person who immediately opened it is a sufficient service.[50] Merely asking the party to be served his name and being given the name of the person to be served, the thrusting of the paper to him thereafter, which fell to the ground out of his sight is insufficient service.[51] Neither is laying the paper on the body of a man in his last sickness, being too ill to comprehend what was being done, sufficient. Depositing a paper in a chair without more, in the presence of the defendant, is not a sufficient service, and a return to this effect would be insufficient upon which to predicate further proceedings.[52] However, it seems that a return showing service of summons on a wife at her home complies with personal service if a copy intended for her is delivered to her husband in her presence and read to her by the officer, she fully understanding the matter, and a return showing this to be done is sufficient.[53] On a similar state of facts, however, it has been held that it was insufficient, and a return to that effect would not support a judgment based thereon.[54] A return showing that the service of

47. Noleman v. Weil, 72 Ill 502; Irions v. Keystone Mfg. Co. 16 NW 349, 61 Iowa 406; Jones v. Marshall, 43 P 840, 3 Kan App 529; Bradley v. Lamb, Har(Ky) 527; Thompson Yards v. Standard Home Bldg. Co. 201 NW 300, 161 Minn 143; Newlove v. Woodward, 4 NW 237, 9 Neb 502; Hines v. Bacon, 207 P 93, 86 Okl 165.

47a. Thompson Yards v. Standard Home Bldg. Co. supra; Hines v. Bacon, supra.

48. Holliday v. Brown, 50 NW 1042, 33 Neb 657, 51 NW 839, 34 Neb 232; Mecca v. Young, 233 NYS 169, 133 Misc 540; Anderson v. Abeel, 89 NYS 254, 96 App Div 370; Correll v. Granget, 34 NYS 25, 12 Misc 209, 67 NY St 892; Ives v. Darling, 206 NYS 493, 210 App Div 521.

48a. Ives v. Darling, supra.

49. O'Connell v. Gallagher, 93 NYS 643, 104 App Div 492; Mecca v. Young, supra.

50. Jackson v. Schuylkill Silk Mills, 156 NYS 219, 92 Misc 442.

51. Anderson v. Abeel, supra.

52. Correll v. Granget, supra.

53. Krotter v. Norton, 120 NW 923, 84 Neb 137.

54. Ives v. Darling, supra.

copy was made by mail does not comply with the law.[55] A return that the process was executed by personal service by leaving a copy at the party's home falls short of proper service.[56] A return reciting that the officer delivered a copy of process to the defendant corporation in person, to a designated person, who was the corporation's local agent, is sufficient.[57] A return showing that the process was given to the defendant, or left with him, or was handed to him is generally regarded as sufficient, these expressions being tantamount to delivery [58] However, it has been held that a return merely that the process was delivered to the defendant is insufficient without adding that it was left with party to whom it was delivered.[59] It has been held, however, that where the statute provided for the execution of a summons by leaving a copy with the defendant, which fact the statute required to be shown in the return, and a return as follows: "Rec'd Sep. 7th, 1912, & on Sep. 9th, 1912, I served a copy of within complaint on W. T. McGowin," was a sufficient compliance with above mentioned statute.[60]

§ 591. Person Served Should Be Identified in Return.—The re-

55. Levinson v. Oceanic Steam Nav. Co. 15 F Cas No. 8202; St. Paul Savings Bank v. Arthur, 53 NW 812, 52 Minn 98, 18 LRA 498; Freedman v. Poirier, 236 NYS 96, 134 Misc 253, 237 NYS 618, 227 App Div 320; Bernath v. Kolosky, 200 P 147, 82 Okl 190; Bennett v. Supreme Tent K. M. W. 82 P. 744, 40 Wash 431, 2 LRANS 389.

56. Morrison v. Covington, 100 So 124, 211 Ala 181; Enewold v. Olsen, 57 NW 765, 39 Neb 59, 42 Am St R 557, 22 LRA 573; Gillian v. McDowell, 92 NW 991, 66 Neb 814; Graves v. Robertson, 22 Tex 130; Krotter v. Norton, supra.

57. Missouri etc. R. Co. v. Birdwell, 123 SW(Tex) 232; Missouri etc. R. Co. v. Scoggin, 123 SW(Tex Civ App) 229. In the opinion on a rehearing in the last cited case it is said: "The return expressly states that there was a delivery to the defendant in person of a true copy of the citation and petition 'at the following times and places, to-wit: By service upon George E. Stoner, its local agent, in person.' Of course, it was impossible to have delivered the process to the defendant in person, because it is a corporation, incapable of receiving it, except through some person who represents it."

58. Buck v. Buck, 60 Ill 105. See also McAllum v. Spinks, 91 So 694, 129 Miss 237; Fenner v. Prudential Ins. Co. 19 Pa Dist 15; Borinski v. McCaleb, 26 Pa Dist 813.

59. Syracuse Molding Co. v. Squires, 15 NYS 321, 61 Hun 48, 21 NY Civ Proc 58, 39 NY St 824, rev 19 NY Civ Proc 241, 13 NYS 547; Duval v. Boston etc. R. Co. 111 NYS 629, 58 Misc 504. In the above cited case the court said: "The constable in his return certifies that he served the within summons and verified complaint personally upon the Boston & Maine Railroad Company, the defendant corporation within named, by delivering true copies thereof to Charles Terry, a freight agent of said defendant corporation, etc. There is no averment that the officer left such copies with person served. It was not sufficient for the constable to certify that he delivered the copies to the freight agent. He should have added that he left the same with him, if such were the fact."

60. McGowin v. Dickson, 62 So 685, 182 Ala 161.

turn of process should show that the service was made upon the person or persons named therein to be served. So, where in a summons the defendant's name is correctly set out, but is incorrect in the return, but which certifies the within defendant was served, that is sufficient. The general rule to be amalgamated from the adjudications is this, that where there is some variation between the name in the summons and in the return, but not wholly different, and the return certifies that officer served "the within defendants," such variation will not vitiate service or return.[61] On the other hand, where a return showed that the service was made upon Rafael V. Vidauri, whereas it should have been served upon Atanacio Vidauri, it is insufficient in the absence of any evidence that both names referred to the same person.[62] A return certifying that the process "came to me on the 13th day of April A. D. 1883, and executed on the same day of April, A. D. 1883, by delivering to the defendant, the G. H. & S. A. R. Co., in person, by and through H. B. Andrews, the Vice President thereof, a true copy of this citation," was held to be fatally defective as showing Andrews and not the officer served the process.[63] Where there are a number of parties to be served, the return should show and identify each of them, and if it fails in this respect it will be insufficient as to those parties not named in the return.[64] A return that the process was "executed on all in my bailiwick but Richard Stratton" fails to comply with the requirements of the law, it not appearing how many of the defendants resided in the bailiwick referred to.[65] However, it has been held that a process returned which was directed to be served upon a number of persons, that it had been executed on the parties is sufficient.[66] Where it is necessary, to accomplish the service, to

61. Houghton v. Tibbets, 58 P 318, 126 Cal 57; Schlacks v. Johnson, 56 P 673, 13 Colo App 130; Peterson v. Little, 37 NW 169, 74 Iowa 223. Where the certificate showed service on Mrs. G. B. Little, G. B. Little, being her husband's name, which was the same as the name in the summons, the judgment was rendered against her as Ora M. Little, this was held to be no ground of complaint, in the absence of a showing she was not known by both names.

Sandwich Mfg. Co. v. Earl, 57 NW 938, 56 Minn 390. Where the given name of defendant was "Joseph" and the return stated "Jasper" was held to be a mere clerical error. Abraham v. Miller, 95 P 814, 52 Ore 8; O'Donnell v. Kirkes, 147 SW(Tex Civ App) 1167, but see Sec. 593, notes 83 et seq infra.

62. Vidauri v. State, 3 SW 347, 22 Tex App 676.

63. Galveston etc. R. Co. v. Ware, 11 SW 918, 74 Tex 47.

64. Dickison v. Dickison, 16 NE 861, 124 Ill 483; Carper v. Woodford, 38 NW 39, 24 Neb 135; Fitzpatrick v. Dorris Bros. 284 SW(TexCivApp) 303.

65. Hackwith v. Damron, 1 TB Mon (Ky) 235.

66. Florence v. Paschal, 50 Ala 28; Cantley v. Moody, 7 Port(Ala) 443.

deliver to each of the defendants a copy of the process, this fact "must appear by the return of officer serving the process that a true copy thereof was delivered to each of the named defendants therein."[67]

§ 592. Sufficiency of Copy to Be Served.—A service of a copy upon the defendant need not indicate whether the seal of the court was thereon.[68] But due care should be exercised to the end that the copy prescribed by law is delivered, otherwise the return is subject to be invalidated. Where, however, the statute requires that a true and attested copy should be presented to the defendant, a return that a true copy was delivered is insufficient.[69] A return that the officer served "a copy of the summons" is equivalent to a return that he served "a copy certified" by the clerk of the court, particularly where the matter is raised by a collateral attack on the judgment.[70]

§ 593. What Should Be Shown by Return to Make It Valid.—It should not be very difficult to make a correct return. The statutes in most jurisdictions prescribe how the return should be made, and it is not a difficult matter to follow the plain mandates of the statute. The time of service should be stated with reasonable certainty.[71] Indicating the year but omission of the century does not render a return invalid, as where the service is certified to have been made "in the year 11, without any abbreviation mark indicating that the year 1911 was meant."[72] The month may also be indicated by numerals.[73] Where it is clear that an error is made in the date of the receipt of process this will be disregarded, as, where the date of receipt is shown to be after the date of service.[74] In construing a return, hypercritical criticisms will be disregarded.[75]

67. Schramm v. Gentry, 64 Tex 143; Vaughan v. State, 29 Tex 273; Rutherford v. Davenport, 16 SW 110, 4 Willson Civ Cas Ct App Sec 244.

68. Sietman v. Goeckner, 127 Ill App 67; Hughes v. Osborn, 42 Ind 450; Lyon v. Baldwin, 160 NW 428, 194 Mich 118, LRA1917C 148 and note; Herold v. Coates, 129 NW 998, 88 Neb 487; Elramy v. Abeyounis, 126 SE 743, 189 NC 278; Commercial Corporation v. Krueger, 262 P 937, 123 Ore 534.

69. Herrington v. Harter, 21 Pa Dist 369, 39 Pa Co 131; Standard Talking Mach. Co. v. Bonani, 23 Pa Dist 201, 41 Pa Co 427; Brenner v. Meltzer, 14 Pa Dist 461.

70. Brown v. Lawson, 51 Cal 615, see also Hall v. Harrisville Southern R. Co. 137 SE 226, 103 W Va 287.

71. Mansfield v. Ramsey, 196 SW (Tex Civ App) 330.

72. O'Donnell v. Kirkes, 147 SW(Tex Civ App) 1167.

73. Cloyes v. Phillip, 149 SW(Tex Civ App) 549; Stephens v. Austin, 298 SW(Tex Civ App) 932; Miller v. Davis, 180 SW(Tex Civ App) 1140.

74. Stephens v. Austin, supra.

75. Farmers' State Bank v. Inman, 92 So 604, 207 Ala 284; Westlawn

If the place of service is required to be indicated, this provision of the statute should be complied with.[76] It is generally sufficient to state that the service was made in a specified county or city.[77] If the county is sufficiently designated, it will not be set aside because the state is omitted, since "the court will take judicial notice" that a designated county is within the state.[78] If the return shows that it was served in another state by an officer of the state where the process was issued, that is insufficient upon which to predicate further proceedings, and may be ignored by the party attempted to be served.[79] It has been held that if an officer's return of service of process is headed with the name of the state and a particular county that the various acts of service which his return sets forth, unless specifically mentioned as performed elsewhere, will be construed to have been done in the county and state named at the head of the return.[80] However, a contrary result has been reached by the Missouri Court of Appeals, wherein it was held that nothing would be presumed in favor of the return, but that the return itself must show that every statutory requisite had been complied with; that where a return was headed up "State of Missouri, County of Pike—ss" it was held that "primarily this caption is to be taken as showing the venue of the return and not the place of service."[81] A return of a summons, "Executed this writ in the city of St. Louis, Mo., this sixteenth day of July 1906 by delivering a copy of the writ and petition as furnished by the clerk to C. L. Whittemore, the adjuster of the said defendant (being an insurance company) under the provisions" etc., was insufficient, it being held to be necessary under the statute authorizing service on an adjuster of an insurance company to show that he was acting in such capacity in the state; and that the return ought to show the adjuster was such for a nonresident insurance company which was unauthorized to do business in the state, since it was only such that was subject to service in this manner.[81a] But where a return recited that the process was served upon "Armour Packing Co., (now Armour & Co.,)" Armour Packing Co. being sued and the defendant named in process, it was held that service would be sustained; and that "(now Armour & Co.,)"

Cemetery Ass'n v. Judge, Wayne Cir. Ct. 213 NW 143, 238 Mich 119.

76. Taylor v. Helter, 201 SW 618, 198 Mo App 643; Lyles v. Haskell, 14 SE 829, 35 SC 391.

77. Lyles v. Haskell, supra; Stephens v. Austin, supra.

78. Zwickey v. Haney, 23 NW 577, 63 Wis 464.

79. Davis v. Richmond, 35 Vt 419.

80. Davis v. Richmond, supra.

81. Taylor v. Helter, supra.

81a. Wealaka Mercantile & Mfg. Co. v. Lumbermen's Mut. Ins. Co. 106 SW 573, 128 Mo App 129.

would be rejected as surplusage.[81b] The return should also certify the person served so that he may be identified therefrom.[82] Under this rule where a summons is directed to "Samuel B. Bancroft," the return is insufficient, it showing service on S. B. Bancroft.[83] But, if the certificate of return had certified that "S. B. Bancroft" was the within named defendant, then it would have been sufficient.[83a] So too, where the process is directed against Sylvanus H. Butterfield, the return showing service on S. H. Sylvanus.[84] Process directed to be served upon Atanacio Vidauri is insufficient when the return shows that it is served upon Rafael Vidauri.[85]

§ 594. Assisting Return by Evidence Aliunde.—Under the better and more enlightened view it seems clear enough that an officer's return may be aided, defects supplied, and errors corrected by parol evidence aliunde.[86] Rule announced by some authorities, however, does not permit the reception of evidence in aid of return.[87] Under the better and more enlightened rule, however, parol evidence may go to the extent of identifying the person served, as where there is an uncertainty with respect thereto; this may occur when there are two persons of the same name in the community and the officer may, by this means, point out which of the two he served, and where the return is insufficient because of variation in the name, as contained in the process and certified in the return, may be explained or supplied by parol evidence of the officer and probably by other persons.[88]

81b. Regent Realty Co. v. Armour Packing Co. 86 SW 880, 112 Mo App 271.

82. Houghton v. Tibbets, 58 P 318, 126 Cal 57; Schlacks v. Johnson, 56 P 673, 13 Colo App 130.

83. Bancroft v. Speer, 24 Ill 227.

83a. See sec. 591, supra.

84. Butterfield v. Johnson, 46 Ill 68.

85. Vidauri v. State, 3 SW 347, 22 Tex App 676. For further illustrations for insufficient returns by variations between the name in the process and that certified by the return see Brown v. Robertson, 28 Tex 555; Reed v. McCutcheon, 217 SW(Tex Civ App) 174; McClaskey v. Barr, 45 F 151; Hendon v. Pugh, 46 Tex 211; Houghton v. Tibbets, supra, but see sec. 591, supra.

86. Morrissey v. Gray, 124 P 246, 162 Cal 638; Morrissey v. Hammon, 117 P 442, 160 Cal 808, see Morrissey v Gray, 117 P 438, 160 Cal 390; Jones v. Gunn, 87 P 577, 149 Cal 687; Hitt v. Carr, 130 NE 1, 77 Ind App 488; Evans v. Davis, 3 B Mon(Ky) 344; Farmers' Bank v. Riley, 272 SW 9, 200 Ky 54; Adler v. Board of Levee Com'rs of New Orleans, 123 So 605, 168 La 877; Green v. Strother, 212 SW 399, 201 Mo App 418, see however, Madison County Bank v. Suman's Adm'r, 79 Mo 527; Jackson v. Tenney, 87 P 867, 17 Okl 495; Elias v. Boone Timber Co. 102 SE 488, 85 W Va 508.

87. Morrison v. Covington, 100 So 124, 211 Ala 181; Kuzak v. Anderson, 108 NE 662, 267 Ill 609; United Drug Co. v. Cordley, 132 NE 56, 239 Mass 334.

88. Reid v. Mercurio, 91 Mo App 673; Slingluff v. Gainer, 37 SE 771, 49 W Va 7; Green v. Strother, supra;

§ 595. Duty to Return Process.—The duty to make a return of process by a sheriff or constable is wholly statutory. No such duty existed at common law. If a party to the action desired a return, this might have been procured by the issuance of a rule directing the officer to make a return.[89] It is readily apparent from this observation that the measure of liability, as well as the duty of an officer to return process, will be found in the statutory enactment of the various jurisdictions but in the absence of such statutorily prescribed duty, it does not exist.

§ 596. Upon Return of Process It Becomes Functus Officio.—It may be stated as a general rule that after process is returned, regardless of the class to which it belongs, it thereupon becomes functus officio, and may not be reissued, and cannot be of any use to an officer attempting to thereafter serve it where these facts appear.[90] This does not mean, however, that where the process has not been fully executed it may not be redelivered to the plaintiff or the officer for the purpose of consummation of the service.[91] So, where a summons has been served upon some of the defendants and returned showing such fact, it is competent and proper for the court to order it to be redelivered to the plaintiff, or to the officer for further service on the other defendants in the same or another county. In such a case where the summons is served after having once been returned and the court assumes jurisdiction of the defendants, a presumption will be indulged, particularly in a collateral attack on the judgment, that the court made the requisite order for the summons to be withdrawn for further service. But at most, a redelivery of the summons after part of the defendants have been served without an order of the court therefor constitutes a mere irregularity which may be taken advantage of by a direct attack but not in a collateral one.[92] Likewise, if the first service of the summons is a nullity, it may be withdrawn after having been returned and properly served.[93]

Adler v. Board of Levee Com'rs of New Orleans, supra; Hitt v. Carr, supra; Farmers' Bank v. Riley, supra; Jackson v. Tenney, supra.

89. Frances v. Clarkson, 2 Dowl PC 532; Richardson v. Trundle, 8 CB(NS) 447; Edmunds v. Watson, 7 Taunt 5.

90. Fanning v. Foley, 33 P 1098, 99 Cal 336; Eaton v. Fullett, 11 Ill 491; Carnahan v. People, 2 Ill App 630; Cook v. Wood, 16 NJL 254.

91. Hancock v. Preuss, 40 Cal 572.

92. Hancock v. Preuss, supra.

93. Coffin v. Bell, 37 P 240, 22 Nev 169, 58 Am St Rep 738, see also Rue v. Quinn, 66 P 216, 137 Cal 651, 70 P 732.

CHAPTER XXIV

RETURN OF EXECUTION

Secs.

§ 597. Sufficiency of Return of Execution, Generally.—The return of an execution or other process is the certification of the officer of his doings in response to the mandate of the writ.[1] The return may not always evidence an affirmative act on the part of the officer, but it should certify what he, the officer, has done in obedience to the commands therein given or the reason of his failure in not fulfilling such commands. One object in requiring the officer to make a return of the writ of execution is that the court and parties interested may know whether the writ has been obeyed and its mandates executed, and, if so, in what manner, and if not executed, then the reason therefor should be certified in the return. It takes both the written certificate on the execution and the filing of the same in the court from whence it issued to complete the duty of the officer with respect to the return. Making the indorsement without returning the writ to the issuing authority, or returning it without the certificate, will not satisfy the requirements of the law. It takes both acts to fulfill the duty of the officer to whom an execution is delivered.[2] The file mark of the clerk indicates the date of re-

1. Jones v. Goodbar, 29 SW 402, 60 Ark 182; Taylor v. Graham, 18 La Ann 656, 89 Am Dec 699; Hutton v. Campbell, 10 Lea(Tenn) 170; Rowe v. Hardy, 34 SE 625, 97 Va 674, 75 Am St Rep 811.

2. Hogue v. Corbit, 41 NE 219, 156 Ill 540, 47 Am St Rep 232. The court in the last cited case said: "The return of an officer to process is not simply his indorsement thereon, but is the actual placing it in the office from which it was issued, and the file mark of the clerk indicates the date of the return." Beall v. Shattuck, 53 Miss 358; State v. Melton, 8 Mo 417; Nelson v. Brown, 23 Mo 13; Roads v. Symmes, 1 Ohio 281, 13 Am Dec 621; Dixon v. White Sewing Machine Co. 18 Atl 502, 128 Pa 397, 5 LRA 659, 15 Am St Rep 683; Jones v. Goodbar, supra.

turn.[2a] Until process is actually delivered to the office of the clerk, the process is still under the control of the officer and he may alter or amend his return.[2b] To return process means that it must be placed in official custody of the proper officer.[2c] It seems that the return of a levy may be written in the hand of another, including the signature of the officer thereto, when it is done in his presence, and at his direction, and this is not only true upon an execution but all acts of an officer may be done in the same manner, or he may sign by mark, or by a rubber stamp,[3] and, doubtless a signature written by or with the authority of the officer would be valid. A return of an execution, or other process, may be signed by a deputy, by signing the sheriff's name thereto, without adding the deputy's name.[3a] Under some statutes the officer making a return is authorized to mail execution or other process with return to the court issuing the same, and where the statute sanctions this method of transmittal it is, of course, sufficient.[4] But in the absence of statute it would seem that there could be no valid objection raised to the officer making his return upon the execution or other process and mailing it to the court or its clerk issuing the writ. Any other method of transmittal, as, by a messenger, and the like, would also seem to be unobjectionable.[5] But where there is no statutory authority therefor, a mailing of a return is not a compliance with the law requiring process to be returned unless actually received by the proper officer, and no presumption, it seems, is indulged that it was so received by a showing that it was mailed.[5a] Inaccuracy in matters of detail will not render a return of execution or other process invalid if it substantially complies with the directions of the law. If more land is described in a sale under an execution and

2a. Cariker v Anderson, 27 Ill 358; Nelson v. Cook, 19 Ill 440; Hogue v. Corbit, supra.

2b. Dixon v. White Sewing Machine Co. supra; Patterson v. Anderson, 40 Pa 359, 80 Am Dec 579.

2c. Phillips v. Beene, 38 Ala 248, as to origin of the word "filing," it is said: "The word 'file' is derived from the Latin word 'filum' which signifies a thread; and its present application is drawn from the ancient practice of placing papers upon a thread, or wire 'for the more safe keeping and ready turning to the same.'" Aaron v. Farrow, 238 P 202, 113 Okla 27; Holman v. Chevaillier, 14 Tex 387; Smith v. Geraty, infra.

3. Lewis v. Watson, 13 So 570, 98 Ala 479, 22 LRA 297, and note, 39 Am St Rep 82 and note; Ellis v. Francis, 9 Ga 325; Cox v. Montford, 66 Ga 62; Dilworth Bros. v. Thomas Canning Co. 26 Pa Dist 1018.

3a. Humphrey v. Wade, 1 SW 648, 84 Ky 391, 8 Ky L 384; Guelot v. Pearce, 38 SW 892, 18 Ky L 1004.

4. Smith v. Geraty, 109 NYS 738, 58 Misc 556.

5. Wilson v. Huston, 4 Bibb(Ky) 332; Cockerham v. Baker, 52 NC 288; Smith v. Geraty, supra.

5a. Smith v. Geraty, supra.

in the return thereof than the execution defendant actually owned, the return and sale will be sustained in so far as it covers land owned by the defendant.[6] A return showing the day when a levy is made is sufficient, without showing the exact time of day the levy was effected.[6a] A return that certain property described and designated has been levied upon is sufficient to show a seizure thereof.[7] Likewise, that an execution sale was certified to have been stopped by an order of the plaintiff is sufficient to show that plaintiff in the execution had ordered the sale to be stopped.[8] But a return that no property except what had theretofore been levied upon was seized is insufficient to comply with law or the commands of the writ.[9]

§ 598. A Nulla Bona Return, Sufficiency Thereof, and When Permissible.—A nulla bona return consists of certification by the officer holding an execution that there are no goods and chattels, lands and tenements, to be found in the county of the officer belonging to the execution defendant. This can only be made after diligent search and inquiry, but where the only property possessed by the debtor is such as is exempt from seizure, or is so incumbered as to exhaust its value, the officer may make a nulla bona return.[10] A nulla bona return may be made in certain instances after it has actually been levied, for illustration where it is asserted upon a substantial ground that the property seized is subject to forfeiture for violation of the United States Revenue Laws.[11] Likewise, if the property levied upon is claimed by a third party who reasonably establishes his title thereto, the officer may release the levy and make a return nulla bona if the plaintiff refuses to indemnify the officer.[12] The fact that previous executions have been returned nulla bona does not warrant an officer, without making

6. Boylston v. Carver, 11 Mass 515, see also Cowls v. Hastings, 9 Metc (Mass) 476.

6a. Cowls v. Hastings, supra.

7. Rohrer v. Turrill, 4 Minn (Gil 309) 407; Folsom v. Carli, 5 Minn (Gil 264) 333, 80 Am Dec 429.

8. State v. McDonald, 9 Humph (Tenn) 606, see also Fowler v. Pearce, 7 Ark 28, 44 Am Dec 526.

9. McDowell v. Robison, 3 Jones L (48 NC) 535.

10. Bank of United States v. Tyler, 4 Pet.(US) 366, 7 L ed 888; Reed v. Lowe, 63 SW 687, 163 Mo 519, 85 Am St Rep 578; Langford v. Few, 47 SW 927, 146 Mo 142, 69 Am St Rep 606; Waterman v. Merrill, 33 NJL 378; Champenois v. White, 1 Wend(NY) 92; Barnes v. Thompson, 2 Swan(Tenn) 313; Russell v. Lawton, 14 Wis 202, 80 Am Dec 769.

11. Grove v. Aldrich, 9 Bing 428.

12. Bayley v. Bates, 8 Johns.(NY) 185; Townsend v. Phillips, 10 Johns. (NY) 98; VanCleef v. Fleet, 15 Johns. (NY) 147; Hart v. Deamer, 6 Wend(NY) 497; Patterson v. Anderson, 40 Pa 359, 80 Am Dec 579.

diligent search and inquiry, in making a like return of a later writ received by him.[13] A return certifying that it was not served for want of property is insufficient where the statute in a particular jurisdiction requires the return to be that the defendant has no goods or chattels whereof to levy the same.[14] A return of an execution with a certificate to the effect that it is returned unsatisfied because the officer found no goods and chattels on which to levy seems sufficient.[15] Such return, however, would, in order to be sustained, have to lean heavily on the presumption that public officers do their duty; and that certifying no goods were found would be sustained because it would be presumed the officer made diligent search and inquiry.[15a] A certificate that no property was found on which to levy the writ is likewise sufficient as a nulla bona return.[16] So too, with respect to a return that an officer knew of no property subject to the writ.[17]

§ 599. Valid and Invalid Returns of Executions Generally.—The return in order to be valid is not required to be couched in any particular language; if the language is sufficient to show what was done in response to the mandates of the writ and requirements of law, then the return may be generally considered as sufficient. The return should be a concise statement of facts, showing what was done by the officer in pursuance of his authority. Conclusions will not answer for facts. The regularity and legality of his acts should appear from the return.[18] A return unauthenticated by a signature of the officer is insufficient.[19] However, the signature may be supplied by amendment. A signature is not, it is held, a part of the

13. Towne v. Crowder, 2 Carr & P 355.

14. Langford v. Few, supra. But see Gunn v. Howell, 35 Ala 144, 73 Am Dec 484; Gibson v. Robinson, 16 SE 969, 90 Ga 756, 35 Am St Rep 250; Reed v. Lowe, supra.

15. Nimmo v. Howard, 10 Atl 712, 42 NJE 487; Newman v. Van Duyne, 7 Atl 897, 42 NJE 485.

15a. For adjudications holding that it will be presumed an officer has done his lawful duty, see Hogue v. Corbit, 41 NE 219, 156 Ill 540, 47 Am St Rep 232; Leonard v. Sparks, 22 SW 899, 117 Mo 103, 38 Am St Rep 646 and note.

16. Ables v. Webb, 85 SW 383, 186 Mo 233, 105 Am St Rep 610; Langford v. Few, supra.

17. Gunn v. Howell, supra; Gibson v. Robinson, supra.

18. Cambers v. Butte First Nat'l Bank, 144 F 717, 156 F 482, 84 CCA 292, see also 133 F 975; Casky v. Haviland, 13 Ala 314; Anderson v. Cunningham, Minor (Ala) 48; Faulkner v. Cook, 103 SW 384, 83 Ark 205; Frazee v. Nelson, 61 NE 40, 179 Mass 456, 88 Am St Rep 391; Johnson v. Gerber, 130 NW 995, 114 Minn 174; State v. Steel, 11 Mo 553; Buckley v. Hampton, 23 NC 322; Fox v. Meyer, 1 Woodw Dec (Pa) 50; Mullins v. Johnson, 3 Humph (Tenn) 306; Rucker v. Harrison, 6 Munf(Va) 181; Reynolds v. Barford, 7 M & G 449, 49 ECL 449, 135 Eng Rep 180.

19. Sheppard v. Hill, 5 Ark 308; Stevens v. Bachelder, 28 Me 218; Bennett v. Vinyard, 34 Mo 216.

return, but is the authentication thereof and while, as we have seen, it is indispensable to a return it can be made by amendment. The signature, or lack of it, to a return has no bearing on the actual fact of service but is simply the evidence thereof, which may be adduced by amendment.[20] In order to be valid, the return should be made upon the execution itself or a paper attached thereto, and it will not suffice to make it upon a separate unattached paper.[21] A return that execution is unsatisfied falls short of the requirement of law.[22] A return is not invalidated by what appears to be manifestly a clerical error or omission as where the return certified that the defendant had "no personal in my county whereof I can cause to be made the judgment and costs," and the omission of the word "property" after the word "personal," will not invalidate the return since it is clear what should be inserted.[22a] A return is not invalidated because it fails to affirmatively show that legal notice of the sale was given, or to state the price for which the property was sold. The presumption of the due performance of the officer's duties will supply this apparent absence of facts in the officer's return.[23] A return of an execution certifying that a bond was "taken and forfeited" seems to be sufficient certification of the fact that a forthcoming bond had been taken and forfeited pursuant to statutory provisions in the particular jurisdiction.[24]

§ 600. Effect of Return.—For some purposes on some persons, an officer's return is conclusive. It may be generally said that such return is conclusive upon the officer, the parties and privies, in the action. However, to have the effect of conclusiveness, the return must be regular on its face, and be served within the limits of the officer's territorial jurisdiction; for beyond this he has no official standing.[25] The purpose of the rule giving conclusive effect to an

20. Excelsior Mfg. Co. v. Boyle, 26 P 408, 46 Kan 202; Wilton Mfg. Co. v. Butler, 34 Me 431; Slingluff v. Collins, 64 SE 1055, 109 Va 717, 17 AC 456 and note.

21. Dickson v. Peppers, 29 NC 429.

22. Hoyt v. Bunker, 32 P 126, 50 Kan 574; McDowell v. Clark, 68 NC 117; Harman v. Childress, 3 Yerg (Tenn) 327.

22a. Skakel v. Cycle Trade Pub. Co. 86 NE 1058, 237 Ill 482.

23. Miller v. Wilson, 32 Md 297; Hanson v. Barnes' Lessee, 3 Gill & J (Md) 359, 22 Am Dec 322; Chase v. Merrimack Bank, 19 Pick.(Mass) 564, 31 Am Dec 163.

24. Wanzer v. Barker, 4 How.(Miss) 363.

25. Dunklin v. Wilson, 64 Ala 162; Independent Pub. Co. v. American Press Ass'n, 15 So 947, 102 Ala 475; Chapline v. Robertson, 44 Ark 202; Jones v. Bibb Brick Co. 48 SE 25, 120 Ga 321; McDuffie Oil etc. Co. v. Iler, 113 SE 52, 28 Ga App 734; Kuzak v. Anderson, 108 NE 662, 267 Ill 609; Moore v. Robbins Mach. etc. Co. 252 Ill App

officer's returns "is to prevent the uncertainty, and confusion, in judicial proceedings, that would otherwise ensue; and it is most usually applied, when there is an attempt to invalidate the proceedings of the officer, or defeat rights acquired under them."[26] This rule, however, is not ecumenical in application and is not operative beyond the ambit of its proper sphere of applicability. It may be stated that the return is evidence of such acts only as may be lawfully performed by the officer by virtue of the process. It is not conclusive as to collateral matters.[27] It is not conclusive where it contains recitals not presumptively within the knowledge of the officer executing the process.[28] A recitation of mere conclusions, whether of law or fact, is not conclusive in an officer's return.[29] A certification of the official capacity of the officer making the service may be controverted.[30] Likewise, it is not conclusive where it is controverted by other parts of the record out of which the process issued;[31] so, if the return is contradicted by the process itself as, where the return antedates the service.[32] Likewise, the capacity of the person served is not conclusive, as where the officer returns that he served an agent of a corporation.[33] It seems also that the return of an officer may be disputed where the assailment thereof is predicated upon fraud or mistake.[34] Where, however,

24, wherein it is said: "The return of an officer in due form can not be impeached by the unsupported testimony of the party served with process." Teal v. Philadelphia & G. S. C. Co. 71 So 364, 139 La 194; Baker v. Baker, 125 Mass 7; Sawyer v. Harmon, 136 Mass 414; Burgert v. Borchert, 59 Mo 80; Decker v. Armstrong, 87 Mo 316; Phillips v. Evans, 64 Mo 17; Priest v. Capitain, 139 SW 204, 236 Mo 446; Mecca v. Young, 233 NYS 169, 133 Misc 540; Bollenbach v. Huber, 148 P 716, 46 Okl 127; Rickard v. Major, 34 Pa Super 107; Fitzpatrick v. Dorris Bros. 284 SW(Tex Civ App) 303; Irvin v. Smith, 27 NW 35, 66 Wis 113, 28 N W 351.

26. Hensley v. Rose, 76 Ala 373; Clarke v. Gary, 11 Ala 98.

27. Turks Head Tailoring Co. v. Anthony, 94 Atl 857, 38 RI 7.

28. Higham v. Iowa State Travelers' Ass'n, 183 F 845; Frank Parmelee Co. v. Aetna Life Ins. Co. 166 F 741, 92 CCA 403; Perry v. Tumlin, 131 SE 70, 161 Ga 392, 132 SE 141, 35 Ga App 50; State of New Jersey v. Shirk, 127 NE 861, 75 Ind App 275; Smolinsky v. Federal Reserve L. Ins. Co. 268 P 830, 126 Kan 506, 59 ALR 1304 and note; Bond v. Wilson, 8 Kan 228, 12 Am Rep 466; Continental Supply Co. v. Whan, 208 P 563, 111 Kan 687; Wilbert v. Day, 145 P 446, 83 Wash 390.

29. Higham v. Iowa State Travelers' Ass'n, supra; Turks Head Tailoring Co. v. Anthony, supra.

30. Connecticut Valley Lumber Co. v. Rowell, 77 Atl 873, 84 Vt 24.

31. Keaton v. Moore, 59 Ga 553; Hunter v. Stoneburner, 92 Ill 75.

32. Hunter v. Stoneburner, supra.

33. Great West Min. Co. v. Woodmas of Alston Min. Co. 20 P 771, 12 Colo 46, 13 Am St Rep 204, see also sec. 110, note 16; Keaton v. Moore, supra.

34. Quinn-Marshall Co. v. Hurley, 272 SW 402, 209 Ky 154; Ramey v. Francis, 184 SW 380, 169 Ky 469; Smoot v. Judd, 83 SW 481, 184 Mo 508; Sutherland v. People's Bank, 69 SE 341, 111 Va 515.

the action is based upon a foreign judgment, then the officer's return upon which such foreign judgment is based is only prima facie evidence of the verity of the return.[35]

§ 601. When Return May Be Impeached.—As to whether or not a return of an officer may be impeached, there is considerable confusion in the authorities, and it is rather difficult to lay down a rule that may be safely followed in all cases. A return, however, does not conclude strangers to the record, but even as to them an officer's return is prima facie evidence of the facts stated therein. But as to strangers, while the return is prima facie evidence, it may be as to them impeached by extrinsic evidence.[36] There are adjudications that deny that an officer's return is such a record as to import absolute verity even as to parties. The position assumed by these decisions, like the rule applicable to strangers is that the return is only prima facie evidence of facts therein stated. But these authorities limit the right to raise an issue as to the return before judgment.[37] In a collateral proceeding an officer's return "imports absolute verity as other judicial records. By direct proceedings, such as a bill in equity, the return may be impeached upon clear averments and proof of want of service, and the existence of a valid defense. This is to the end that a party have his day in court, that a party without fault be not concluded by a record which does not speak the truth."[38] This is the reason that a good defense must be shown to

35. Nat'l Exchange Bank v. Wiley, 25 S Ct 70, 195 US 257, 49 L ed 184; Thompson v. Whitman, 18 Wall.(US) 457, 21 L ed 897; Field v. Field, 74 NE 443, 215 Ill 496, 117 Ill App 307; Van Dyke v. Illinois Commercial Men's Ass'n, 193 NE 490, 358 Ill 458; Smolinsky v. Federal Reserve Life Ins. Co. supra; Continental Supply Co. v. Whan, supra; Sutherland v. People's Bank, supra.

36. U. S. v. McHie, 194 F 894; Fleming v. Moore, 105 So 679, 213 Ala 592; American Fruit Growers v. Walmstad, 260 P 168, 44 Idaho 786; Stewart v. Duncan, 50 NW 227, 47 Minn 285, 28 Am St Rep 367.

37. Ex parte Dayton Rubber Mfg. Co. 122 So 643, 219 Ala 482; Nat'l Metal Co. v. Greene Consol. Copper Co. 89 P 535, 11 Ariz 108, 9 LRANS 1062; McCall v. First Nat'l Bank, 277 P 562, 47 Idaho 519; Boise Valley Traction Co. v. Boise City, 214 P 1037, 37 Idaho 20; Hilt v. Heimberger, 85 NE 304, 235 Ill 235; Dickerson v. Utterback, 207 NW 752, 201 Iowa 255; Thompson Bros. v. Phillips, 200 NW 727, 198 Iowa 1064; Hobart v. Bennett, 77 Me 401; Kueffner v. Gottfried, 191 NW 271, 154 Minn 70; Lake Drainage Com'rs v. Spencer, 93 SE 435, 174 NC 36; Mayhue v. Clapp, 261 P 144, 128 Okl 1; Peterson v. Hutton, 284 P 279, 132 Ore 252; Burton v. Cooley, 118 NW 1028, 22 SD 515; Stewart v. Stewart, 27 W Va 167.

38. Eidson v. McDaniel, 114 So 204, 216 Ala 610; Karnes v. Ramey, 287 SW 743, 172 Ark 125; Great West Min. Co. v. Woodmas of Alston Min. Co. 20 P 771, 12 Colo 46, 13 Am St Rep 204; Du Bois v. Clark, 55 P 750, 12 Colo App 220; Ketchum v. White, 33 NW 627, 72 Iowa 193; Johnson v. Mead, 41 NW 487, 73 Mich 326; Clabaugh v.

the action in which a judgment has been rendered since it would be idle to set aside a judgment, even when rendered without service of process if the same result must follow on service and a hearing.[38a] It is elementary law that in so far as the officer is concerned the return is conclusive, or, differently stated, he is estopped to dispute it.[39] The general rule is that an officer cannot claim absolute verity for his return in his favor, but even in these cases it is prima facie correct in favor of the officer making it. This must be true, since in an action against an officer the plaintiff may dispute the return.[40] Some New York cases seem to hold that an officer's return is conclusive as against him, and as to all others it is but prima facie evidence as to what it certifies.[41] So too, it has been held that where the return shows that a writ was levied subject to a prior attachment, the plaintiff in the subsequent process may show that the former levy was void, and thereby have his levy assume the position of a first lien on the property.[42] In an action against a bidder at an execution sale who fails to comply with his bid to recover the amount so bid or the loss on a resale, it seems the officer's return on the execution under which the sale was held is only prima facie evidence against the defaulting bidder.[43]

§ 602. Evidence to Impeach Return.—An accurate, and yet concise statement of the rule as to the quantum of proof demanded of a litigant to impeach a return of an officer is difficult of statement.

Warner, 199 NW 710, 228 Mich 207; Osman v. Wisted, 80 NW 1127, 78 Minn 295; Jeffries v. Wright, 51 Mo 215; Phillips v. Evans, 64 Mo 17; Goble v. Brenneman, 106 NW 440, 75 Neb 309, 121 Am St Rep 813; Sweeney v. Miner, 95 Atl 1014, 88 NJL 361; Kaull v. Johnson, 218 NW 606, 56 ND 563; Grady v. Gosline, 29 NE 768, 48 Ohio St 665; Deardorf v. Idaho Nat'l Harvester Co. 177 P 33, 90 Ore 425; Levan v. Milholland, 7 Atl 194, 114 Pa 49; Mayhue v. Clapp, supra; Hilt v. Heimberger, supra; Nat'l Metal Co. v Greene Consol. Copper Co. supra.

38a. Thompson Bros. v. Phillips, supra.

39. Hensley v. Rose, 76 Ala 373; Ingram v. Alabama Power Co. 75 So 304, 201 Ala 13; Monroe County v. Clark, 203 SW 264, 134 Ark 100; Winnebago County v. Brones, 28 NW 15, 68 Iowa 682; Cleveland Grain etc. Co. v. Hendricks, 115 So 114, 149 Miss 15; Mandelson v. Paschen, 37 NW 815, 71 Wis 591.

40. Raker v. Bucher, 34 P 654, 100 Cal 214, 34 P 849; Splahn v. Gillespie, 48 Ind 397; McGough v. Willington, 6 Allen (Mass) 505; Duckworth v. Millsaps, 7 Smedes & M(Miss) 308; Barrett v. Copeland, 18 Vt 67, 44 Am Dec 302; McKinstry v. Collins, 56 Atl 985, 76 Vt 221; Ingram v. Alabama Power Co. supra.

41. Newell v. Wigham, 6 NE 673, 102 NY 20, rev. 29 Hun 204; Browning v. Hanford, 5 Denio(NY) 586; Baker v. McDuffie, 23 Wend.(NY) 289; Fitch v. Devlin, 15 Barb(NY) 47.

42. Watson v. Bondurant, 21 Wall. (US) 123, 22 L ed 509; Root v. Columbus etc. R. Co. 12 NE 812, 45 Ohio St 222.

43. Fife v. Bohlen, 22 F 878, see also American Fruit Growers v. Walmstad, supra; Hyskill v. Givin, 7 Serg & R (Pa) 369.

Assailment of such return to be successful is not required to go to the extreme of beyond a reasonable doubt, yet more than "a mere preponderance of the evidence" is demanded to sustain the impeachment. Rule applicable to the ordinary issue of fact is not applied to the issue in these cases.[44] The conclusion reached by the Supreme Court of Wisconsin is justified, that there is no fixed rule as to the quantum of proof to establish the falsity of an officer's return, that "evidence, reasonably, clearly satisfying the trior or triors that the return is false, is sufficient."[44a] In any case, in order to overturn the officer's certificate of return, the evidence must be strong, clear, and convincing.[45] The peace and quiet of society demands that these official acts should not be set aside with the same ease as ordinary acts, and in this respect an officer's return is not like an ordinary issue of fact to be determined by mere preponderance of evidence.[46] One witness is insufficient to overturn the certificate of the officer in these cases, whether the witness is the party served or otherwise.[47] It must not be supposed, however, that a false return in any case cannot be established by parol evidence, since this is the only mode by which the falsity can be established. It is likewise true that parol evidence is generally admissible on the issue of the correctness of return.[48] An officer's return

44. Brown v. Reinke, 199 NW 235, 159 Minn 458, 35 ALR 413; Jensen v. Crevier, 23 NW 541, 33 Minn 372; Lunschen v. Peterson, 139 NW 506, 120 Minn 288; Wedgeworth v. Pope, 12 SW (2d) (Tex Civ App) 1045. In the course of the opinion in this case the court said: "We think it is pretty well established that evidence tending to impeach an officer's return must be conclusive and convincing, and not, like the ordinary issue of fact, determined by a mere preponderance of the testimony."

44a. Raulf v. Chicago Fire Brick Co. 119 NW 646, 138 Wis 126.

45. U. S. v. Gayle, 45 F 107. The judgment was, however, vacated on other grounds; 50 F 169; Golden Gate Development Co. v. Ritchie, 191 So 202, — Fla —; American Fruit Growers v. Walmstad, 260 P 168, 44 Idaho 786; Boise Valley Traction Co. v. Boise City, 214 P 1037, 37 Idaho 20; Long v. Burley State Bank, 165 P 1119, 30 Idaho 392; Wyland v. Frost, 39 NW 241, 75 Iowa 209; Starkweather v. Morgan, 15 Kan 274; Nicholson v. Thomas, 127 SW(2d) 155, 277 Ky 760; Jensen v. Crevier, supra.

46. Driver v. Cobb, 1 Tenn Ch 490; Randall v. Collins, 58 Tex 231; Wedgeworth v. Pope, supra.

47. Cooper v. Jewett, 233 F 618, 147 CCA 426; Bastian-Blessing Co. v. Gewin, 117 So 197, 217 Ala 592; Marnik v. Cusack, 148 NE 42, 317 Ill 362; Nikola v. Campus Towers etc. Corp. 25 NE(2d) 582, 303 Ill App 516; Quinn-Marshall Co. v. Hurley, 272 SW 402, 209 Ky 154; Saucier v. McLean, 125 So 163, 12 La App 158; Piedmont-Mt. Airy Guano Co. v. Merritt, 140 Atl 62, 154 Md 226; Plummer v. Rosenthal, 12 Atl(2d) 530, — Md —; Weisman v. Davita, 199 Atl 476, 174 Md 447; Raleigh Banking etc. Co. v. Nowell, 142 SE 584, 195 NC 449; Gatlin v. Dibrell, 11 SW 908, 74 Tex 36; West v. Dugger, 278 SW(Tex Civ App) 241; Arapahoe State Bank v. Houser, 155 NW 906, 162 Wis 80; Driver v. Cobb, supra.

48. Webster v. Hunter, 50 Iowa 215;

cannot be impeached by any record kept by him, nor will he be permitted to attack his return by his evidence in court. His extra judicial statements cannot be shown on the trial of the issue to overturn his certificate of return, but may be proven where he testifies in support of his return by way of attack upon his evidence.[49] Where it is admitted on the record that the process has been served, the party making such admission may not thereafter object to an irregularity in the return.[50] It seems that an officer's return may be contradicted by other documents accompanying and, in fact a part of the return, as an affidavit of publication; it being his duty to return such document along with the process served.[51] Of course in those cases and jurisdictions where it is permissible to establish the erroneousness or falsity of a return, extrinsic evidence is permissible for that purpose.[52] Where process is returned as served upon two persons, evidence that it was never served upon one of them is permissible to show the falsity of the entire return and as bearing upon the fact that it was not served upon either of them.[53] The fact the defendant who disputes the return did not protect his rights goes to corroborate his evidence of nonservice.[53a] The officer's return seems to withstand the assailment of a single witness even though the officer himself cannot recall making the service. Differently stated, an uncorroborated denial of the party that he was served is unavailing.[54] The rule with respect to the verity with which the return is clothed is not without its limi-

Oklahoma Stockyards Nat'l Bank v. Pierce, 243 P 144, 114 Okla 25; Kavanagh v. Hamilton, infra; Crawley v. Neal, infra.

49. Pinnacle Gold Min. Co. v. Popst, 131 P 413, 54 Colo 451; but a contrary result was reached in Genobles v West, 23 SC 154; Planters' Bank v. Walker, 3 Smedes & M(Miss) 409; Duncan v. Gerdine, 59 Miss 550; Newby v. Miller, 98 NW 1066, 5 Neb (Unoff.) 468; Bates v. Goode, 281 P 558, 139 Okla 141; Pettis v. Jonhston, 190 P 681, 78 Okla 277; Pratt v. Phillips, 1 Sneed(Tenn) 543, 60 Am Dec 162.

50. Young v. South Tredegar Iron Co. 2 SW 202, 85 Tenn 189, 4 Am St Rep 752; Lea v. Maxwell, 1 Head (Tenn) 365.

51. Nevada County v. Williams, 81 SW 384, 72 Ark 394; Good Roads Mach. Co. v. Cox, 212 SW 87, 139 Ark 29; see also Genobles v. West, supra, but see note 49 supra.

52. Blaker v. Lushbaugh, 7 Alaska 57; Crawley v. Neal, 238 SW 1054, 152 Ark 232; Kavanagh v. Hamilton, 125 P 512, 53 Colo 157, AC 1914B 70; Lunschen v. Peterson, supra; Mann v. Meryash. 107 NYS 599; Hawkins v. Payne. 264 P 179, 129 Okl 243.

53. Buck v. Hawley, 105 NW 688, 129 Iowa 406, but, however, see King v Dent, 93 So 823, 208 Ala 78.

53a. Brown v. Reinke, supra.

54. Kochman v. O'Neill, 66 NE 1047, 202 Ill 110, 102 Ill A 475; Marnik v. Cusack, 148 NE 42, 317 Ill 362; Plummer v. Rosenthal, 12 Atl(2d) 530, — Md —; Weisman v. Davits, 199 Atl 476, 174 Md 447; Canard v. Ryan, 45 P(2d) 122, 172 Okla 339; West v. Dugger, 278 SW(Tex Civ App) 241, hold-

tations. It does not apply to matters unnecessary nor required to be certified by the officer, that is, extra-official statements inserted in the return, nor to matters without the personal knowledge of the officer, nor to mere conclusions on his part, as, that process was left at the defendant's residence, or was served upon a corporate defendant's agent, or that the process was delivered to a person of a specified age for the defendant, and the like.[54a] The reason why a return with respect to collateral matters, not necessary to be certified is not accorded the weight that matters required to be certified are, is that as to such matters, the officer is not discharging an official duty with respect thereto. It must not be supposed that a defendant, who for any reason, is not permitted to show its falsity is remediless. He can sue the officer for damages for a false return.[54b]

§ 603. Explanation Sustaining or Contradicting the Return by the Officer.—Sometimes an officer is permitted to explain or correct a return by parol evidence.[55] This may go to the extent of explaining what was meant by the return.[56] An officer has been permitted to testify he was mistaken in a part of his return, as where the return showed a copy instead of the original was served, and the law required the original paper to be served, and in these circumstances the officer may testify, correcting the return.[57] The Supreme Court of South Carolina has held entries made by the officer on separate slips of paper are a part of the record and are admissible in evidence along with the execution in connection with the return, but this is unsound and contrary to the sounder reasons and the great weight of authority.[58] That state has adopted a rule allowing an officer to contradict or impeach his re-

ing that the corroboration of a party must be strong. Wedgeworth v. Pope, supra.

54a. Great West Mining Co. v. Woodmas of Alston Mining Co. 20 P 771, 12 Colo 46, 13 Am St Rep 204; New Jersey v. Shirk, 127 NE 861, 75 Ind App 275; Schott v. Linscott, 103 P 997, 80 Kan 536; Bond v. Wilson, 8 Kan 228, 12 Am Rep 466; Walker v. Lutz, 15 NW 352, 14 Neb 274; Chadbourne v. Sumner, 16 NH 129, 41 Am Dec 720; Vaughn v. Love, 188 Atl 299, 324 Pa 270, 107 ALR 1336 and note; Hays v. Alway, 106 NW 139, 39 SD 586; McClung v. McWhorter, 34 SE 740, 47 W Va 150, 81 Am St Rep 785.

54b. Walker v. Robbins, 14 How. (US) 584, 14 L ed 552; McDonald v. Leewright, 31 Mo 29, 77 Am Dec 631; Stewart v. Stringer, 41 Mo 400, 97 Am Dec 278; McClung v. McWhorter, supra.

55. State v. Caldwell, 17 NE 185, 115 Ind 6.

56. Liston v. Central Iowa R. Co. 29 NW 445, 70 Iowa 714; Hammett v. Farmer, 2 SE 507, 26 SC 566; Leonard v. O'Neal, 16 Lea(Tenn) 158; King v. Russell, 40 Tex 124.

57. Liston v. Central Iowa R. Co. supra, see however note 59 infra, this sec.; King v. Russell, supra.

58. Hammett v. Farmer, supra.

turn.[58a] Undoubtedly, the general rule is that the officer making a return may not impeach it and his evidence for that purpose is inadmissible. So too, his records, as a rule, may not be used to overthrow his return.[59]

§ 604. Burden of Proof in Attacking an Officer's Return.—The general rule with respect to the burden of proof that he who asserts a fact must prove it applies where one seeks to impeach an officer's return. So, where a party to the action avers that the process was not served, it falls upon him to establish the truth of that averment, and it does not seem material that the party holding the burden of proof is required to establish a negative.[60]

58a. Genobles v. West, 23 SC 154.

59. Pinnacle Gold Min. Co. v. Popst, 131 P 413, 54 Colo 451; Bates v. Goode, 281 P 558, 139 Okla 141; Pettis v. Johnston, 190 P 681, 78 Okla 277; see sec. 602, note 49 supra, where authorities are collected.

60. McAdams v. Windham, 68 So 51, 191 Ala 287; Crawley v. Neal, 238 S W 1054, 152 Ark 232; Gibbs v. Ison, 230 P 784, 76 Colo 240; Almand v. Morgan County Bank, 87 SE 716, 17 Ga App 519; Pyle v. Stone, 171 NW 156, 185 Iowa 785; Piedmont-Mt. Airy Guano Co. v. Merritt, 140 Atl 62, 154 Md 226; Clabaugh v. Warner, 199 NW 710, 228 Mich 207; Oertel v. Pierce, 133 NW 797, 116 Minn 266, AC 1913A 854; Lunschen v. Peterson, 139 NW 506, 120 Minn 288; Collier v. Catherine Lead Co. 106 SW 971, 208 Mo 246; First Nat'l Bank v. Anderson, 182 NW 1021, 106 Neb 204; Grayce Oil Co. v. Varner, 260 SW(Tex Civ App) 883; Arapahoe State Bank v. Houser, 155 NW 906, 162 Wis 80.

CHAPTER XXV

FAILURE TO RETURN EXECUTION

§ 605. Failure to Return Execution Debt Prima Facie Lost.—Where an officer fails to return an execution to him directed, there seems to be an assumption in some jurisdictions that the debt represented by the execution is to the creditor prima facie lost, and it is presumed that such execution creditor is entitled to recover the full amount.[1] By return is meant the indorsement of the action of the officer on the writ, and its delivery to the proper custodian of the office out of which it was issued.[1a] He cannot escape for failure to return, however, by pointing out that the execution was issued upon an erroneous or voidable judgment, or some other irregularity that inhered therein.[2] If the officer can establish that the execution or the judgment upon which it was issued is void, or in truth and in fact no judgment existed, then it seems that that is sufficient to exonerate the officer for failure to return.[3] It will not do, however, to attempt to show that the original execution defendant was not in fact liable for the reason that he did not have

1. Harris v. Murfree, 54 Ala 161; Dunphy v. Whipple, 25 Mich 10, see sec. 606, note 14, infra; Pardee v. Robertson, 6 Hill(NY) 550; Swezey v. Lott, 21 NY 481, 78 Am Dec 760 and note; Bowman v. Cornell, 39 Barb.(NY) 69; Ledyard v. Jones, 7 NY 550; Seld's Notes 24; Bank of Rome v. Curtiss, 1 Hill(NY) 275; Dolson v. Saxton, 11 Hun(NY) 565; McCully v. Swackhamer, 6 Ore 438; Moore v. Floyd, 4 Ore 101; Hall & Co. v. Brooks, 8 Vt 485, 30 Am Dec 485, holding officer conclusively liable for amount of execution, but see Watkinson v. Bennington, 12 Vt 404; Goodrich v. Starr, 18 Vt 227, in civil arrest on execution, it was held debtor's insolvency no defense.

1a. Beall v. Shattuck, 53 Miss 358.

2. Shute v. McRae, 9 Ala 931; Samples v. Walker, 9 Ala 726; Godbold v. Planters' etc. Bank, 4 Ala 516; Jones v. Goodbar, 29 SW 462, 60 Ark 182; Hawkins v. Taylor, 19 SW 105, 56 Ark 45, 35 Am St Rep 82; Green v. Taylor, 71 So 375, 111 Miss 232; Cowan v. Sloan, 32 SW 388, 95 Tenn 424; Griswold v. Chandler, 22 Tex 637.

3. People v. Whitehead, 90 Ill App 614; Josuez v. Conner, 7 Daly(NY) 448; Knapp v. Sweet, 24 NYS 817;

the capacity to contract or any other defense available to the execution defendant.[4]

It is likewise no defense for the officer to essay to show that the judgment debtor had transferred the lands levied on prior to the levy made under the execution where the lands, notwithstanding this transfer, were sold on the execution for the amount of the debt.[5] If the execution appears on its face to be invalid, as where it is for an amount in excess of the judgment upon which it purports to have been issued, then the officer may defend on that ground when it is attempted to hold him for failure to return it.[5a] A right of action for failure to return exists only by virtue of statutory enactment, as it did not exist at common law, but at common law the officer, for failure to return an execution was subject to amercement.[5b]

Whenever a question as to the liability of an officer for failure to return an execution arises the local statutes should be consulted. Under the weight of authority, a failure to return an execution does not affect or impair the title of a purchaser at a sale under an execution. So too, of an invalid or defective return.[6] Where a sale has been made and is otherwise regular, the title of the purchaser may not be destroyed or even impaired by the official dereliction on the part of the officer making the sale.[7] There are authorities that hold that the failure in respect of the return by the officer is cured by the making and acknowledging and otherwise executing an official deed to lands sold in so far as title thereto is concerned.[8]

§ 606. Effect of Failure to Make Return as Fixing Liability.—The failure of the officer to make a return within the time prescribed by law operates to fasten upon him liability prima facie

Godbold v. Planters' etc. Bank, supra.

4. Norris v. State, 22 Ark 524.

5. Dunphy v. Whipple, supra.

5a. Fisher v. Franklin, 16 P 341, 38 Kan 251.

5b. Peck v. Hurlburt, 46 Barb.(NY) 559; Swezey v. Lott, 21 NY 481, 78 Am Dec 160 and note; Com v. McCoy, 6 Watts(Pa) 153, 34 Am Dec 445.

6. Wheaton v. Sexton, 4 Wheat.(US) 503, 4 L ed 626; Lewis v. Watson, 13 So 570, 98 Ala 479, 22 LRA 207, 39 ASR 62 and note; Cloud v. El Dorado County, 12 Cal 128, 73 Am Dec 526; Ritter v. Scannell, 11 Cal 238, 70 Am Dec 775; Sheehan v. All Persons etc. 252 P 337, 90 Cal App 393; Gandiago v. Finch, 270 P 621, 46 Idaho 657; Hodges v. Commonwealth Bank & Trust Co., 44 SW(2d) (Tex Civ App) 400; Griggs v. Montgomery, 22 SW(2d) (Tex Civ App) 688.

7. Dorminey v. De Lang, 61 SE 475, 130 Ga 618, 124 Am St Rep 193; Cutting v. Harrington, 71 Atl 374, 104 Me 96, 129 Am St Rep 373; Ritter v. Scannell, supra; Cloud v. El Dorado County, supra; Lewis v. Watson, supra; Wheaton v. Sexton, supra.

8. Hinds v. Scott, 11 Pa St 19, 51 Am Dec 506.

for the amount of the debt. This may be excused by a showing of the uncollectibility of the debt represented by the execution, or that the failure to return the writ was due to directions of the plaintiff or his attorney of record.[9] However, in order to operate as a complete exoneration of the officer for failure to return the execution, it must be a showing of uncollectibility and not a mere showing of insolvency on the part of the execution debtor. Evidence tending to prove such insolvency merely goes to the abatement or in mitigation of the damages.[10]

Under some statutes directions of plaintiff's attorney is no justification for an officer's failure to make return unless the direction is issued in writing.[10a] Even where the execution plaintiff has not been damaged, as, where he has been paid in full, he still may recover nominal damages.[11] It is not permissible for the officer to offer in palliation of his official remissness that he did return the execution after the expiration of the time fixed by law therefor.[12] On the other hand, however, it has been held a tardiness in making return until after the date therefor is not such negligence as to fasten liability on the officer.[12a] If the officer misconstrued the law with respect to the time he had within which to make the return, that will not justify his failure to make the return of the process.[12b] It is permissible for him to show in defense of failing to make a return that the execution discloses on its face, that it was issued for an amount substantially greater than the judgment.[13]

The measure of damages in the absence of anything else appearing is the full amount of the debt represented by the execution.[14] It seems also that there may be shown in mitigation of damages, that prior to the return day the plaintiff's interest in the judgment

9. Bickham v. Kosminsky, 86 SW 292, 74 Ark 413, 4 AC 978; Miller v. Roy, 10 La Ann 744; Hellman v. Spielman, 27 NW 131, 19 Neb 152; Crooker v. Melick, 24 NW 669, 18 Neb 227; Griswold v. Chandler, 22 Tex 637.

10. Noble v. Whetstone, 45 Ala 361; Holmes v. Dunn, 13 La Ann 153; Gallup v. Robinson, 11 Gray (Mass) 20; Brookfield v. Remsen, 1 Abb Dec (NY) 210; Jones v. Huter, 239 NYS 221, 136 Misc 49; Gagen v. Taylor, 246 NYS 347, 231 App Div 830; Cowan v. Sloan, 32 SW 388, 95 Tenn 424.

10a. Davis v. Gott, 113 SW 826, 130 Ky 486; Ridgway v. Moody, 16 SW 526, 91 Ky 581, 13 Ky L 188; Carmical v. Broughton, 61 SW(2d) 612, 249 Ky 749.

11. Governor v. Baker, 14 Ala 652; People v. Johnson, 4 Ill App 346; State v. Buckles, 35 NE 846, 8 Ind App 282, 52 Am St Rep 476; Cox v. Ross, 56 Miss 481.

12. Brookfield v. Remsen, supra.

12a. Musser v. Maynard, 6 NW 55, 55 Iowa 197, 7 NW 500; Com. v. Magee, 8 Pa St 240, 49 Am Dec 509.

12b. Cowan v. Sloan, supra.

13. Fisher v. Franklin, 16 P 341, 38 Kan 251.

14. Moore v. Floyd, 4 Ore 101, see sec. 604, supra note 1; Smith v. Perry, 18 Tex 510, 70 Am Dec 295 and note; note 25 Am Dec 573.

was levied upon by virtue of process against the plaintiff, and was liable to be applied thereon.[15] It is also a defense for the officer to show that he had levied upon property but it had, thereafter and before the sale, been taken from him under mortgage foreclosure proceedings.[16] But, it is no excuse by way of mitigation or otherwise to point out that the judgment creditor can still collect his debt.[17] It is futile for the officer to seek to shield himself from liability by showing that the enforcement of the debt represented in the execution had been enjoined when he is charged with a failure to return an execution.[17a]

It should be kept in mind, however, that liability for failure to make a return rests upon a statutory foundation, and if it cannot be grounded upon that basis it cannot be sustained on common law principles. Resort could be had to amercement at common law, for failure to make return but that exhausted the remedies for such dereliction.[17b] It must also be borne in mind that the statutes authorizing proceedings for failure to make a return of a writ are highly penal in character, and right reason and justice all concur in demanding that they should not be applied strictly against the officer it is sought to penalize for a technical failure to discharge a duty.[17c]

It is a defense to proceedings for a non-return of a writ that officer's term expired before the return day.[17d] It is no defense to a charge of non-return that writ was delivered to the officer too short a time before the return day to enable the officer to serve and make return of it.[17e] Even if an officer accepts an execution against himself he is liable for a non-return.[17f] However, there are other grave consequences that may, in some cases, ensue where an officer fails to make a return; it may convert him into a trespasser ab initio. So where he takes property under a writ of replevin and fails to make return thereof, as the law requires, he is guilty of a conversion. This is true with respect to a failure to make a return in the special statutory proceeding of claim and delivery, although no writ or other process issues out of a court therein. So too, of

15. Wehle v. Conner, 69 NY 546.

16. Governor v. Baker, supra.

17. Ledyard v. Jones, 7 NY 550; Seld's Notes 24; see however Woolcott v. Gray, Brayton (Vt) 91.

17a. Kennedy v. Coleman, 2 Litt(Ky) 6.

17b. See sec. 605, note 5b supra.

17c. Early Stratton Co. v. Cooper, 25 SW(2d) 423, 181 Ark 134; this case, however, was dealing with a defective, rather than a non-return.

17d. Neil v. Beaumont, 3 Head (Tenn) 556; Kinzer v. Helm, 7 Heisk (Tenn) 672; Cowan v. Sloan, supra.

17e. Smith v. Gilmore, 3 Sneed (Tenn) 481; Chaffin v. Stuart, 1 Baxt (Tenn) 296; Cowan v. Sloan, supra.

17f. Cowan v. Sloan, supra; Kinzer v. Helm, supra.

a failure to return a writ of attachment. And, it is unnecessary before proceeding against an officer in these circumstances to make any demand on him.[17g]

An unreturned writ of attachment after the elapse of the period of time for its return cannot be made to serve as a justification to an action of replevin or detinue against the levying officer for seizure of personalty under the writ.[17h] To avoid confusion it should be noted that the rule under discussion is inapplicable to an execution; where there has been a levy upon personalty, a sale may be validly held after the return date, or after a return of the writ if there has been a valid levy during the lawful life of the process.[17i] A premature return may make an officer liable if any injury is sustained by reason thereof; since it is the absolute duty of an officer to retain a writ or process in his hands until by the exigency thereof he is bound to return it.[17j]

§ 607. Burden of Proof with Respect to Return Execution.—General rules with respect to the burden of proof apply in actions and proceedings involving failure to return an execution. Whoever holds the affirmative, as a general rule, likewise has cast upon him the burden of proof.[18]

§ 608. False Return.—A false return, as its name indicates, is one that does not set forth the truth, and is not to be confused with one that is lacking in details, or is not sufficiently full. For a false return, an officer may be liable, but for a meager return or failing to disclose what was done, with sufficient fullness, the officer as a rule, is not penalized or mulcted in damages.[19] So, where an of-

17g. Williams v. Ives, 25 Conn 568; Wiggin v. Atkins, 136 Mass 292; Malchoff v. Knewel, 215 NW 689, 51 SD 520; Shaffner v. Price, 260 NW 703, 63 SD 456, 98 ALR 689 and note; Interstate Surety Co. v. Bangasser, 211 NW 599, 50 SD 618; Carson v. Fuller, 78 NW 960, 11 SD 502, 74 Am St Rep 823; Mitchell v. Pierce, 86 Atl 748, 86 Vt 514.

17h. Womack v. Bird, 63 Ala 500; Dowling v. Bowden, 6 So 765, 25 Fla 712; Fletcher v. Wrighton, 69 NE 313, 184 Mass 547; Williams v. Babbitt, 14 Gray(Mass) 141, 74 Am Dec 670; Munroe v. St. Germain, 42 Atl 900, 69 NH 665; Carson v. Fuller, supra; Shorland v. Govett, 5 Barn & Cr 488, 8 D & R 261; Britton v. Cole, 1 Salk 408.

17i. In re Schwab Printing Co. 59 F (2d) 726; Wheaton v. Sexton, 14 Wheat.(US) 503, 4 L ed 626; Southern Calif. Lumber Co. v. Ocean Beach Hotel Co., 29 P 627, 94 Cal 217, 28 Am St Rep 115 and note; Stein v. Chambless, 18 Iowa 474, 87 Am Dec 411; Ireland v. Linn County Bank, 176 P 103, 103 Kan 618, 2 ALR 184 and note; State v. Treigle, 192 So 152, — La App —; see sec. 466, supra.

17j. Glover v. Rawson, 3 Pinn (Wis) 226, 3 Chandl 243.

18. Musser v. Maynard, 6 NW 55, 7 NW 500, 55 Iowa 197; State v. Schar, 50 Mo 393; State v. Melton, 8 Mo 417; Wilson v. Wright, 9 How Pr (NY) 459.

19. State v. Jenkins, 70 SW 152, 170

ficer has had an opportunity to execute process but has failed to do so, and thereafter was unable to serve it, it is impossible to return it with a certification of his inability to make the service. His remissness in failing to serve it when the opportunity was presented may not be excused or even in a measurable degree palliated that because of subsequent events he is unable to make the service.[20]

So, where a sheriff under a liberari, delivers possession of premises, which had theretofore been held under a lease, for years, he should certify the fact of the lease in his return, and his return without more, that he delivered possession of the premises was held, notwithstanding the rule with respect to failure to make full enough return was insufficient, and he was liable, as for false return.[21] So too, if an officer, "after levying an execution, shall be convinced that the property levied on, is not subject to be sold under the process, and shall therefore determine not to sell it, it would certainly be his duty to make a special return of the truth of the case; and for failing to do so, he would be liable to an action for a breach of official obligation" and would be held answerable for a false return.[22] Where an officer returns that levies under two writs of attachment were contemporaneous, when in fact one levy preceded the other, he is liable to the plaintiff whose writ was first levied for a false return.[22a]

§ 609. False Return as Affected by Irregularity of Process.—A false return upon void process subjects the officer making it to no liability whatever and this rule is not changed by the fact that such process has been theretofore treated by the officer as valid. The doctrine that the officer who receives process, and, treating it as valid, proceeds to execute it, cannot thereafter challenge its defective character, applies only to cases where there is an amendable defect, or to waivable imperfections, or to one affected with irregularities, but has no application to void writs.[23] But if an officer makes a false return of void process resulting in injury to another, he is liable therefor, and voidness of the writ or process is unavailing to shield him from liability.[24]

There can be no liability for a false return of an execution unless

Mo 16; Lawrence v. Buxton, 8 SE 774, 102 NC 129.

20. Martin v. Martin, 50 NC 349, see also Frost v. Dougal, 1 Day(Conn) 128, see also Isham v. Eggleston, 2 Vt 270, 19 Am Dec 714.

21. McMichael v. McKeon, 10 Pa 143.

22. Com. v. Booker, 6 Dana(Ky) 441.

22a. State v. Harrington, 28 Mo App 287.

23. Dunham v. Reilly, 18 NE 89, 110 NY 366.

24. Humphrey v. Case, 8 Conn 101, 20 Am Dec 95.

there is a judgment upon which it issued. The complainant of a false return must show the existence of a judgment before he is entitled to recover.[25] The making of a false return places the officer in the precise situation as in a case where he fails to return after making a levy under a writ of attachment. If an officer makes a false return on a writ of process he thereby forfeits all protection afforded by the writ or process, and becomes answerable for all acts performed under it. An application of this rule is found in a case where an officer broke and entered under a search warrant, and found the property, but returned that he did not find it. This forfeited his right of protection of the search warrant.[25a]

§ 610. Mitigation of Damages for False Return.—The officer may, in mitigation of damages, establish any fact that will go to diminish or lessen the amount for which he is prima facie responsible. He may show that the judgment was uncollectible.[26] He may likewise show that senior process in his hands would have taken all of the proceeds of the sale.[27] But the officer cannot "be permitted in order to reduce damages, to show that the execution directed the collection of a greater sum than was due to the plaintiff," for to permit this would be to embark upon the enterprise of retrying the issues in the case in which the writ issued.[28] It is not permissible to show that the judgment is still collectible.[29]

It seems that the execution plaintiff has the burden of showing that there is a judgment authorizing the issuance of the execution, and if the judgment is void then this element would be lacking and that would be a complete defense to the charge.[29a] It will avail the officer nothing to attempt to assail the judgment upon the ground of insufficiency or irregularity. It seems only the voidness of the judgment will serve as a defense to the officer in these circumstances. The same rules as to mitigation of damages applicable in an action for non-return would apply here.

§ 611. Nominal Damages Allowable for False Return.—An officer as a general rule is only liable for nominal damages in case of a technical false return. So too, where the loss is traceable to some

25. Tombeckbee Bank v. Godbold, 3 Stew(Ala) 240, 20 Am Dec 80.

25a. Boston & M. R. Co. v. Small, 27 Atl 349, 85 Me 402, 35 Am St Rep 379; see sec. 606, supra.

26. Woods v. Varnum, 21 Pick. (Mass) 165, see also Weld v. Bartlett, 10 Mass 470; Ledyard v. Jones, 7 NY 550. Seld's Notes 24.

27. Forsyth v. Dickson, 1 Grant (Pa) 26.

28. Bacon v. Cropsey, 7 NY 195.

29. Ledyard v. Jones, supra but see Stevens v. Rowe, 3 Denio(NY) 327.

29a. Tombeckbee Bank v. Godbold, 3 Stew(Ala) 240, 20 Am Dec 80.

other source than the responsibility of the officer. In other words, it seems that the damages sustained by the complaining party must have been proximately caused by the officer in making a false return.[30] Where it appears that the false return was discovered by the plaintiff in the process in time to have greatly reduced his damages, but that he fails to do so, he cannot recover against the officer the damages it was his duty to have avoided.[31] This is but an application of familiar law that it is the duty of one who is likely to suffer damages to reduce his loss as much as can reasonably be done. The real measure of damages in these cases is the amount of loss sustained by the complaining party.[32] He is not permitted to increase his damages at the expense of his adversary.

When the officer has made a false return prima facie he is liable for the amount of the debt, but this is by no means conclusive because, as we have already seen, he may show any fact or circumstance that may legitimately diminish, abate, or reduce the amount thereof.[33] An officer having levied upon property of an execution defendant sufficient to satisfy the execution, and it is returned thereafter unsatisfied, the officer is prima facie liable to the plaintiff for the amount due on the judgment. It is incumbent upon him, in order to relieve himself from liability, to show some legal excuse for the non-collection. And, it would not do to merely show that the defendant in an execution had been adjudicated a bankrupt, and that the property that had been levied upon had been delivered to the trustee in bankruptcy, but where it appears that the execution plaintiff had filed his claim in the bankruptcy proceedings without attempting to assert a lien under the levy, then the execution plaintiff cannot hold the officer.[34]

The matter of intent with which the officer makes a false return does not, according to some cases, seem to be material; so, when he has, by mistake, made a return showing the application of funds collected on an execution different from the actual application thereof, he is liable for false return with all of the ensuing penalties attaching thereto.[35] But the officer's intent may be taken into

30. State v. Finn, 11 Mo App 400; Parker v. Cohoes, 10 Hun 531, aff. 74 NY 610; Tutein v. Hurley, 98 Mass 211.

31. Prosser v. Coots, 15 NW 448, 50 Mich 262, see also 40 Mich 644.

32. Pierce v. Strickland, 19 F Cas # 11,147, 2 Story 292; Thayer v. Roberts, 44 Me 247; Knopf v. Herta, 180 NW 629, 212 Mich 622; see also 180 NW 632, 212 Mich 631; Taylor v. Richardson, 8 Term 505.

33. Ledyard v. Jones, 7 NY 550; Pierce v. Strickland, supra, see sec. 610, supra.

34. Ansonia Brass & Copper Co. v. Babbitt, 74 NY 395, see also Dorrance v. Henderson, 27 Hun 206, 92 NY 406.

35. Finley v. Hayes, 81 NC 368; Peebles v. Newsom, 74 NC 473.

consideration where he seeks to amend a false return.[35a] In some cases there seems to be a distinction between a false return and one erroneously made.[35b] It would seem that justice and reason would dictate that an officer making an erroneous, but an honest return, should not be visited with the same penalty as an officer intentionally making a false return.

35a. See sec. 612, infra.

35b. Sutherland v. Cunningham, 1 Stew(Ala) 438; this case even holds that presence of fraudulent intent in making return is essential to liability; McIlroy Banking Co. v. Mills, 11 SW (2d) 481, 178 Ark 741; Cross v. Williams, 25 Hun(NY) 62, 63 How Pr 191.

CHAPTER XXVI

AMENDMENT OF RETURN

Secs.

§ 612. Amendment of False Return.—In some jurisdictions it seems that an officer has a right, in case of a false return unintentionally made, to amend it at any time before proceedings are initiated against him to assess the penalty, or to mulct him in damages therefor, but after the inauguration of such proceedings the return is then conclusive, and no amendment can be made. Neither may it be explained at that point of the proceedings by extrinsic evidence.[1] However, some courts hold an amendment of a false return may be made after action therefor has been initiated against the officer, but these authorities seem to sustain the rule that this can only be done where he has in fact performed his duty, and the amendment is sought to show this fact. The amendment can only be made by permission of the court, and such permission can be granted or withheld in the court's discretion.[1a] But a contrary

1. Beal v. Smithpeter, 6 Baxt(Tenn) 356; Mullins v. Johnson, 3 Humph. (Tenn) 396; Hill v. Hinton, 2 Head (Tenn) 124; Broughton v. Allen, 6 Humph(Tenn) 96.

1a. Phoenix Ins. Co. v. Wulf, 1 F 775, 9 Biss 285. This case involved an amendment to inaccurate, rather than a false return. Jeffries (Jefferies) v. Rudloff, 34 NW 756, 73 Iowa 60, 5 Am St Rep 654, holding an amendment may be made after the officer's term of office has expired; Corby v. Burns, 36 Mo 194; Stealman v. Greenwood, 18 SE 503, 113 NC 355; Swain v. Burden, 32 SE 319, 124 NC 16. See also 34 SE 110, 125 NC 43. In this case an amendment of a false return allowed to conform to fact and due to ignorance of law, and no injury had resulted. However, see sec. 613 infra as to holding sheriff or constable to strict accountability with respect to errors of law; Lopez v. Rowe, 57 NE 501, 163 NY 340. This case involved an erroneous return and to correct it an amendment was allowed. Tuck v. Manning, 63 Hun 345, 17 NYS 915; Whitman v. Higby, 24 Pa Co 236, 10 Pa Dist 39.

view has been maintained not without reason.[1b] The cause of action for a false return accrues when the return is made[1c]—when it is filed in the office from which it was issued[1d]—then how can an accrued cause of action be destroyed by the simple expedient of an amendment? It is submitted, that upon principle this cannot be accomplished.

§ 613. In Absence of Fraud or Bad Faith, Generally the Return May Be Amended to Speak the Truth.—The law imposes upon a sheriff or constable a high degree of care and diligence, but his liability varies with conditions under which he acts. He is sometimes virtually an insurer and will not be heard to say that he made a mistake. In these cases his only avenue of escape is that the damage was caused by an act of God or the public enemy. He is not permitted to make legal mistakes. When he accepts the commission of the office he announces to the whole world that he knows the law and that he will abide by it, and that he will call to his aid the skill and ability to execute it. It is only in connection with matters of law that he is an insurer, and it is doubtful in reply to a charge of an error committed with regard to matters of law if he would be permitted, even though motivated by the best of faith, to amend a return in order to correct an error. The situation is different where there is a mistake with respect to a question of fact on the part of an officer. In connection with matters of fact he is only bound to exercise good faith and due diligence. An application of the rule with respect to an amendment to correct a mistake of fact is found in a case where, in the absence of fraud or negligence, an officer's return that appraisers of property levied upon were disinterested when, in point of fact, they were not, he was permitted to amend his return to speak the truth.[2]

§ 614. Process Cannot Be Reissued by Way of Amendment.—When an officer has made a return upon process that has been in his hands, and filed it in the proper office, it then becomes functus officio and has passed beyond his control and he cannot thereafter make any amendment with respect thereto without the permission of the proper court. He is not permitted to alter his return in any

1b. State v. Case, 77 Mo 247.

1c. Balfour v. Browder, 6 Mart NS (La) 708, see also Miller v. Adams, 16 Mass 456.

1d. See Secs. 581 et seq. supra.

2. Strout v. Pennell, 74 Me 260, but see sec. 612 note 1a, supra.

way. If he receives process that has theretofore been returned, and serves it, it not having been theretofore served, such service is void. The vitality, the power, and authority of a process is exhausted when it has been returned.[3]

The law, however, is very liberal in the matter of amendments of returns of officers as it is with respect to amendments in legal proceedings generally. The misprisions of officers may, under appropriate circumstances, be amended by application to, and obtaining permission of the court, and that is the remedy where process has been returned unserved, and it is desired thereafter to be served.[4] An amendment to a return may be made even after judgment or after the incumbent has gone out of office or after a writ of error has been sued out or appeal taken.[5] If the showing is sufficient, the lapse of time between when the return is made and the application for amendment does not seem to be material.[6]

§ 615. Discretionary Power of Court with Respect to Amendments.—Courts eternally strive to have their records speak the truth and it is for that purpose that amendments are allowed to officers' returns.[7] But after all, the matter is left to the sound discretion of the court as to whether the amendment will be permitted.[8] This

3. Fanning v. Foley, 33 P 1098, 99 Cal 336; Eaton v. Fullett, 11 Ill 491; Carnahan v. Peo. 2 Ill App 630; Cook v. Wood, 16 NJL 254.

4. Wilcox v. Moudy, 89 Ind 232; Morrill v. Fitzgerald, 36 Tex 275; Eaton v. Fullett, supra.

5. Von Arx v. Boone, 193 F 612, 113 CCA 480; Tilton v. Cofield, 93 US 163, 23 L ed 858; Morrissey v. Gray, 117 P 438, 160 Cal 390; Hibernia Savings & Loan Soc. v. Matthai, 48 P 370, 116 Cal 424; Herman v. Santee, 37 P 509, 103 Cal 519, 42 Am St Rep 145; Anderson v. Sloan, 1 Colo 33; Loveland v. Sears, 1 Colo 433; Sawdey v. Pagosa Lumber Co. 240 P 334, 78 Colo 185; Blandy v. Modern Box Mfg. Co. 232 P 1095, 40 Idaho 356; Toledo etc. R. Co. v. Butler, 53 Ill 323; Waite v. Green River Special Drainage Dist. 80 NE 725, 226 Ill 207; Smith v. Clinton Bridge Co. 13 Ill App 572; Jeffries (Jefferies) v. Rudloff, 34 NW 750, 73 Iowa 60, 5 Am St Rep 654, see also sec. 612, note 1a supra; Mintle v. Sylvester, 197 NW 305, 197 Iowa 424; McPherson v. Harvey, 167 P 1070, 101 Kan 550; Ramey v. Francis, 184 SW 380, 169 Ky 469; Williams v. Sharpe, 70 NC 582; Peebles v. Newsom, 74 NC 473; Walters v. Moore, 90 NC 41.

6. Spellmyer v. Gaff, 1 NE 170, 112 Ill 29; Paulin v. Sparrow, 110 NE 528, 91 Ohio St 279.

7. Pacific Postal Tel. Cable Co. v. Fleischner, 66 F 899, 14 CCA 166, holding an amendment may be made after suit brought and after the officer has ceased to be such. Nickerson v. Warren City Tank etc. Co. 223 F 843; Borland v. O'Neal, 22 Cal 504; Gavitt v. Doub, 23 Cal 78; Lindley v. Lindley, 194 P 85, 49 Cal App 631; Jones v. Bibb Brick Co. 48 SE 25, 120 Ga 321; Call v Rocky Mountain Bell Tel. Co. 102 P 146, 16 Idaho 551, 133 Am St Rep 135 and note; Waite v. Green River Special Drainage Dist. 80 NE 725, 226 Ill 207; Irions v. Keystone Mfg. Co. 16 NW 340, 61 Iowa 406; McPherson v. Harvey, 167 P 1070, 101 Kan 550; Maloney v. Simpson, 75 Atl 675, 226 Pa 479.

8. Von Arx v. Boone, 193 F 612, 113 CCA 480; Sawdey v. Pagosa Lumber

discretion, like many others dealing with adjective law, will be, throughout the course of the trial, exercised liberally in the interest of justice.[9] In the exercise of a sound liberal discretion an amendment of return may, in a proper case, be made in an appellate court; even in the court of last resort.[9a]

§ 616. Limitation on Right to Amend Returns.—Amendments of returns are not always permitted as a matter of course and are always restricted by the exercise of discretion on the part of the court. Amendments are permitted in the furtherance of justice. But where the interests of other parties have intervened, permission to make amendments is given sparingly and with caution. But where the rights of third parties will not be prejudiced, amendments may be permitted with liberality.[10] In some cases amendments to a return have been denied because of prejudice to the rights of parties to the record.[11] It may be stated, with accuracy, as a general rule, that mere lapse of time, where there are no intervening rights of others, will not be regarded as efficacious grounds for denying an application to amend a return.[12]

It has been held, however, that a return of a deputy sheriff will not be permitted to be amended after a lapse of six years.[13] It has, also, been held that an application would be denied after twelve years, where the officer making the same was dead and there was no memorandum by the deceased officer upon which to predicate the application.[14] But amendments have been permitted after a lapse

Co. 240 P 334, 78 Colo 185; Blandy v. Modern Box Mfg. Co. 232 P 1095, 40 Idaho 356; Spellmyer v. Gaff, 1 NE 170, 112 Ill 29; Mintle v. Sylvester, 197 NW 305, 197 Iowa 424; Little Rock Trust Co. v. Southern Mo. etc. R. Co. 93 SW 944, 195 Mo 669; Wittstruck v. Temple, 78 NW 456, 58 Neb 16; Morrissey v. Gray, supra.

9. McCormick v. Southern Express Co. 93 SE 1048, 81 W Va 87, see secs. 613 supra, 616 note 10 infra.

9a. Call v. Rocky Mountain Bell Tel. Co. supra, see also Frisk v. Reigelman, 43 NW 1117, 44 NW 776, 75 Wis 499, 17 Am St Rep 198.

10. King v. Davis, 137 F 198, aff. 157 F 676, 85 CCA 348; McGrath v. Wallace, 48 P 719, 116 Cal 548; Newhall v Provost, 6 Cal 85; Hodges v. Stuart Lumber Co. 79 SE 462, 140 Ga 569; Chicago Planing Mill Co. v. Mer-

chants Nat'l Bank, 97 Ill 294; Peaks v. Gifford, 5 Atl 879, 78 Me 362; Glidden v. Philbrick, 56 Me 222; Coerver v. Crescent Lead etc. Corp. 286 SW 3, 315 Mo 276; Burr v. Dougherty, 14 Phila (Pa) 6; Pond v. Campbell, 56 Vt 674; Renick v. Ludington, 20 W Va 511.

11. Morrissey v. Gray, 117 P 438, 160 Cal 390; Rehmstedt v. Briscoe, 13 NW 687, 55 Wis 616; Coerver v. Crescent Lead etc. Corp. supra; Hodges v. Stuart Lumber Co. supra.

12. Gilman v. Stetson, 16 Me 124; Briggs v. Hodgdon, 7 Atl 387, 78 Me 514; O'Brien v. Gaslin, 30 NW 274, 20 Neb 347.

13. Thatcher v. Miller, 13 Mass 270, see also Coughran v. Gutcheus, 18 Ill 390.

14. O'Conner v. Wilson, 57 Ill 226, see also McGrath v. Wallace, supra.

of long periods of time as, for instance, eight years.[15] Even an amendment of return was permitted where the process was served on September 5, 1874, and application to amend was made October 20, 1887.[16] Sixteen years has been held not to be too long to permit such amendment.[17] "Mere lapse of time, where the rights of third persons will not be injuriously affected, as a general rule, will not bar an amendment." Neither is it any bar to an application to amend a return that officer making the original return has since gone out of office.[17a] An amendment that will work a reversal of the judgment or render it erroneous or void, will not be allowed.[17b]

§ 617. Necessity of Notice of Application.—The general rule seems to be that the court has the discretion to allow a return to be amended in all cases, with or without notice, but that such amended return cannot affect the rights of third persons acquired in good faith prior thereto; and whenever an amendment is so made it cannot be questioned collaterally by the parties to the suit or those claiming under them as privies.[18] Some authorities go upon the theory that no notice of the application is required where it is manifested that to permit the amendment would not operate injuriously with respect to anyone.[19] Other authorities hold that the motion may be allowed without notice if made during the trial term, but otherwise notice is required.[20] Sometimes it is held that where

15. Peck v. Whitaker, 103 Pa 297; O'Brien v. Gaslin, supra.

16. Shenandoah Valley R. Co. v. Ashby's Trustees, 9 SE 1003, 86 Va 232, 19 Am St Rep 898 and note, but see McGrath v. Wallace, supra.

17. Spellmyer v. Gaff, 1 NE 170, 112 Ill 29. The process was served on 22d day of Dec. 1866, and application to amend was made Aug. 31st, 1882.

17a. Jones v. Gunn, 87 P 577, 149 Cal 687; Woodward v. Brown, 51 P 2, 119 Cal 283, 63 Am St Rep 108, 51 P 542; Herman v. Santee, 37 P 509, 103 Cal 519, 42 Am St Rep 145; Wilkins v Tourtellott, 28 Kan 825; Briggs v. Hodgdon, 7 Atl 387, 78 Me 514; Luttrell v. Martin, 17 SE 573, 112 NC 593; Spellmyer v. Gaff, supra; Morrissey v. Gray, supra.

17b. White River Bank v. Downer, 29 Vt 332; Chicago Planing Mill Co. v Merchants Nat'l Bank, supra; Morrissey v. Gray, supra.

18. Rickards v. Ladd, 20 F Cas No. 11,804, 6 Sawyer 40; Rauch v. Werley, 152 F 509, at page 515; Stetson v. Freeman, 11 P 431, 35 Kan 523; Kahn v. Mercantile Town Mut. Ins. Co. 128 SW 995, 228 Mo 585, 137 Am St Rep 665 and note. In the course of the opinion the court said: "There is no statute, text book or adjudication which has been called to our attention, or which we have been able to find, which holds that the defendant is entitled to notice before the sheriff can amend his return by permission of the court." Cunningham v. Spokane H. Min. Co. 55 P 756, 20 Wash 450, 72 Am St Rep 113.

19. Lungren v. Harris, 6 Ark 474; Kahn v. Mercantile Town Mut. Ins. Co. supra.

20. King v. Davis, 137 F 222, aff 157 F 676, 85 CCA 348; O'Conner v. Wilson, 57 Ill 226; Chicago Planing Mill Co. v. Merchants' Nat'l Bank, 86 Ill 587; Nat'l Surety Co. v. Maffoli, 149

the party sought to be notified is in default or cannot be found, this is sufficient to dispense with service of notice on him, and this is true even if he is represented by an attorney.[21] In no case, however, should an amendment be permitted without notice where it will permit a party to be liable who was not theretofore so liable, or will make one who is not a party to the record liable in a different way, or in a different manner than that apparent from the record.[22]

§ 618. Procedure to Obtain Amendment of Return.—An application to amend a return may be made by motion.[23] The motion ought to be supported by an affidavit or other evidence making out a proper case for allowance of an order to amend.[24] The affidavit showing that it is proper for an amendment, as a rule, ought to be made by the officer making the defective return.[25] But, of course, if the officer who made the defective return is dead or disqualified, then undoubtedly other methods of proof would suffice, if sufficient and competent. If the application is granted, an order embodying the ruling of the court should be formally drawn and presented, to be signed by the court, and filed and then the amendment should actually be made, since the granting of leave to make the amendment is not equivalent to the actual making of the amendment itself.[26] An adverse party may resist the application and may introduce such resistance by way of objections, countervailing evidence, or affidavits.[27]

§ 619. Nature of Amendments Generally Considered.—There are almost innumerable instances where amendments of the sort we have under consideration have been permitted. Intimately associ-

Ill App 255; Stetson v. Freeman, 11 P 431, 35 Kan 523.

21. Sawdey v. Pagosa Lumber Co. 240 P 334, 78 Colo 185; Bushey v. Raths, 7 NW 802, 45 Mich 181; Kidd v. Dougherty, 59 Mich 240, 26 NW 510.

22. Jeffries (Jefferies) v. Rudloff, 34 NW 756, 73 Iowa 60, 5 Am St Rep 654; Coopwood v. Morgan, 34 Miss 308; Blodgett v. Schaffer, 7 SW 436, 94 Mo 652.

23. Wilcox v. Moudy, 89 Ind 232. It was assumed rather than decided that a motion was proper method of obtaining permission to make such amendment. This case also holds that a change of venue of the hearing of such motion can not be granted.

24. Youngstown Bridge Co. v. White, 49 SW 36, 105 Ky 273, 20 Ky L 1175; Missouri Valley Trust Co. v. St. Joseph etc. R. Co. 144 SW 511, 162 Mo App 158; Park Land & Improvement Co. v. Lane, 55 SE 690, 106 Va 304.

25. Fountain v. Detroit etc. R. Co. 210 F 982, see also Mechanical Appliance Co. v. Castleman, 30 S Ct 125, 215 US 437, 54 L ed 272.

26. Chicago etc. R. Co. v. Suta, 123 Ill App 125; Wittstruck v. Temple, 78 NW 456, 58 Neb 16.

27. Jones v. Bibb Brick Co. 48 SE 25, 120 Ga 321; Fisk v. Hunt, 54 P 660, 33 Ore 424.

ated with the subject we have under discussion comes a case where property was attached and held by a constable but the execution was directed to the sheriff but, however, was delivered to the constable who proceeded thereunder. It was held that the amendment was permissible to make the execution conform to the facts. This decision was probably influenced by the fact that the constable was the officer properly entitled to make the sale because he held the goods under the attachment.[28] Erroneous dates of the rendition of the judgment inserted in the execution may be corrected by an amendment.[29] The supplying or correcting of an official signature to return of process is a proper subject for amendment.[30]

Amplification of the description of the copy served is a proper matter to be shown by an amendment to a return.[31] Correction of the name of a party served, as where his initials are transposed, or the showing the name of the person actually served, or by giving more details with respect to with whom process was left at the defendant's place of residence, are all matters that may be properly shown by an amendment.[32] These instances will serve as illustra-

28 Hibberd v. Smith, 50 Cal 511; Pecotte v. Oliver, 10 P 302, 2 Idaho 251; Christy v. Springs, 69 P 864, 11 Okla 710. In this case the execution was directed to the sheriff of the wrong county but this was held a mere irregularity, curable by amendment.

29. Dailey v. State, 56 Miss 475.

30. Lies v. Klaner, 121 Ill App 332; City of Enid v. Rector, 223 P 846, 97 Okl 280. In this case the process was served by one deputy and the return signed by another deputy, and this was held amendable. It is submitted that no amendment is necessary under these circumstances, since the sheriff is the officer recognized in law; it would seem that, so long as the return is made in his name by his authority, that would be sufficient. See sec. 78 supra.

31. Love v. Nat'l Liberty Ins. Co. 121 SE 648, 157 Ga 259.

32. King v. Davis, 137 F 198, affirmed under title of Blaukenship v. Davis, 157 F 676, 85 CCA 348, by memorandum opinion. Defendant served under name of "France;" amendment allowed to show true name "Francis." In the course of the trial court's opinion it is said: "As the service was personal, and not constructive, the weight of American authority is to the effect that the defendant sued in the wrong name, even if he does not appear, is bound by the judgment." Nickerson v. Warren City Tank etc. Co. 223 F 843. In the cited case an amendment was allowed to show the party served was an agent of the defendant corporation instead of a mere employee. Savannah A. & M. R. Co. v. Buford, 17 So 395, 106 Ala 303, amendment allowable to show name of defendant corporation as a "railway" company instead of a "railroad" company. Lewis v. Collier, 47 So 790, 157 Ala 533; Morrissey v. Gray, 124 P 246, 162 Cal 638; McGinn v. Rees, 165 P 52, 33 Cal App 291; Freeman v. Stedham, 128 SE 702, 34 Ga App 143; Call v Rocky Mountain Bell Tel. Co. 102 P 146, 16 Idaho 551, 133 Am St Rep 135; Ramey v. Francis, 184 SW 380, 169 Ky 469; Bean v. Haffendorfer 2 SW 556, 3 SW 138, 84 Ky 685; Stoll v. Padley, 56 NW 1042, 98 Mich 13, see also Fleugel v. Lards, 66 NW 585, 108 Mich 682, holding where officer failed to affix his official title, this was immaterial since court would judicially notice his official posi-

tions with respect to applications of the rule we have under consideration. It should be noted, however, that jurisdictional defects cannot be supplied by amendment of an officer's return, but that only imperfections, not jurisdictional within themselves, may be corrected by such amendments.[33]

§ 620. Amendment Dates Back to Date of Original Return.—An amendment relates back, when it is duly and legally made, by permission of the court, to the time of the original return. The jurisdiction allowing such an amendment is inherent in the court.[34]

§ 621. Lost Return Supplied by Parol.—Where a return of process has been lost, mislaid, or destroyed, it may in general be supplied by parol evidence.[35] The power of courts of record to grant relief by establishing a lost return existed at common law, but it was specifically provided for under an English Parliamentary enactment, and where the common law has been adopted as the rule of decision, after such enactment such statute was likewise adopted, as part of the common law.[36]

§ 621A. Duty of Officer to Amend; Compelling Amendment.—It seems at common law only the officer making the defective return may amend it, and then only by leave of court, but it is his duty, in a proper case, to do so. But a deputy who served the process may amend in the name of the officer who is such at the time of making the amendment although he is the successor of the officer in office at the time of service.[36a] If an officer, it has been held,

tion; First Nat'l Bank v. Ellis, 114 P 620, 27 Okl 699, AC 1912C 687, holding that where deputy made return in his own name curable by amendment to make return in principal's name by deputy. Other cases holding the defect, where a deputy makes a return in his own name is subject to correction by amendment are: Kelly v. Harrison, 12 So 261, 69 Miss 856; Ford v. DeVillers, 2 McCord L(SC) 144; Miller v. Alexander, 13 Tex 497, 65 Am D 73; Eastman v. Curtis, 4 Vt 616; Taylor v. Missouri Pac. R. Co. 279 SW 115, 311 Mo 604; Mudge v. Mudge, 196 NW 706, 111 Neb 403.

33 Ex parte State Bank, 7 Ark 9; Thompson v. Moore, 15 SW 6, 91 Ky 80, 12 Ky L 664, holding that where a statute authorizes a sheriff to ap-

point a special bailiff to serve process by indorsement on the process and such indorsement is made on the original. does not empower the bailiff thus authorized to serve an alias, and that this authority can not be supplied by amendment by making the indorsement after service. City of Enid v. Rector, supra; Lies v. Klaner, supra.

34. Niolin v. Hamner, 22 Ala 578; Smith v. Leavitts, 10 Ala 92; Daniels v. Hamilton, 52 Ala 105; Mills v. Howland, 49 NW 413, 2 ND 30; McDonald v. Barr, 154 Atl 564, 51 RI 337; In re Lake, 10 Atl 653, 15 RI 628.

35. Newhouse v. Martin, 68 Ind 224.

36. Newhouse v. Martin, supra; 8 Henry VI, chap. 12.

36a. Waite v. Green River Special Drainage Dist. 80 NE 725, 226 Ill 207.

makes a return of process that is defective on its face he may be compelled to correct it, but not so if the return appears to be complete within itself.[36b] However, undoubtedly the better rule, and the one sustained in reason and by principle, as well as the great weight of modern authority, is that the court cannot order an officer to amend his return but can only authorize him to do so.[36c]

36b. Mentz v. Hamman, 5 Whart (Pa) 150, 34 Am Dec 546; Note 4 AC 1168; Washington Mill Co. v. Kinnear, 1 Wash Ter 99.

36c. Smith v. Gaines, 93 US(3 Otto) 341, 23 L ed 901; Flynn v. Kalamazoo Circuit Judge, 101 NW 222, 138 Mich 126, 4 AC 1167 and note; Black Hills Brew. Co. v. Middle West Fire Ins. Co. 140 NW 687, 31 SD 318, 141 NW 358, 34 SD 262.

CHAPTER XXVII

DUTY OF SHERIFF IN CONNECTION WITH CRIMINAL CASES

§ 622. Custody of Prisoner after Arrest and before Trial.—In order for the sheriff to retain a prisoner in custody after a preliminary examination and commitment, and before trial, it is necessary that he be directed to do so by proper authority, and the evidence of the authority to so hold the prisoner is generally required to be in writing. An oral direction to retain the prisoner in custody by a committing magistrate or other officer is insufficient.[1] The commitment or other authority to hold the defendant for trial should state as a rule what offense for which he is committed. If he is committed for larceny the order or commitment should state of what property he is accused of stealing, to whom it belonged, and its value, and where the commitment is for rape it should name the person, the use of violence, and the like.[2] In any case the statement of the offense in the commitment must be made with convenient certainty. But if so made it suffices.[3]

The rule with respect to the requirement that the commitment be in writing is so exacting that an oral order made and reduced to writing by the reporter reporting a preliminary examination is insufficient.[4] Until a commitment can be made out, the committing magistrate may direct that the prisoner be held.[5] But it seems apparent that such verbal authority could not warrant holding the prisoner longer than is reasonably necessary to make out and deliver a proper written commitment.[5a] During adjournment of a preliminary hearing it is necessary that the prisoner who is in custody be committed to the sheriff or jailer by formal written commitment. There

1. U. S. v. Harden, 10 F 802, 4 Hughes 455; Erwin v. U. S. 37 F 470, 2 LRA 229; Peo. v. Malowitz, 24 P(2d) 177 at page 179, 132 Cal App 250; Peo. v Wilson, 28 P 1061, 93 Cal 377; Ex parte Branigan, 19 Cal 133; Peo. v. Wallace, 29 P 950, 94 Cal 497; Peo. v. Siemsen, 95 P 863, 153 Cal 387; State v. James, 78 NC 455; State v. Crook, 51 P 1091, 16 Utah 212.

2. Ex parte Branigan, supra.

3. State v. Huegin, 85 NW 1046, 110 Wis 189, 62 LRA 700.

4. People v. Wilson, supra.

5. Hutchinson v. Lowndes, 4 B & Ad 118, 24 ECL 61, 110 Eng Rep 400.

5a. State v James, 80 NC 370; U. S. v. Harden, supra.

is no authority to detain him without a compliance with the rule of law.[6] An officer detaining a prisoner in these circumstances is violating the law and would be liable for false imprisonment.

During the time of the holding of the preliminary hearing, the order theretofore made committing the prisoner to the custody of the sheriff is sufficient authority for the sheriff to hold him for final disposition at the end of the hearing.[7] It hardly need be added that the subject of holding a prisoner before, during and after preliminary hearing is regulated by statutes generally, which should be consulted. If the prisoner is enlarged on bail, then the sheriff has no further concern with respect to him, unless he is recommitted to his custody. Of course, during the trial the prisoner who is not on bail is committed from day to day to the sheriff or jailer.

§ 623. Execution of Sentence.—If the prisoner is acquitted, the duty of the sheriff is to immediately release him from custody, if in custody. If a term of imprisonment in the penitentiary is imposed, then, of course, it is the duty of the sheriff to carry out the judgment in so far as he is directed so to do. If he is required to deliver the prisoner to the warden at the penitentiary, it is his duty to so deliver him; if the prisoner is directed to be delivered to a guard from the penitentiary, then it is the sheriff's duty to so do, and such guard may transport him to the penitentiary. In short, it is the duty of the officer to carry out whatever judgment is rendered in a criminal case. If the death sentence is directed to be imposed, then it is the sheriff's duty to proceed to do so, provided the law in a particular jurisdiction imposes this duty on the sheriff.[8]

At any rate, the authority must exist, for inflicting the death penalty, in the officer who carries it into effect. A death sentence imposed by any other person than the lawful officer is murder.[9] Where the manner, time, and place of inflicting the death penalty is prescribed by law, or by the court it must be followed, and the deviation therefrom would not be a legal execution.[10] Where, in a particular jurisdiction, the execution of the death sentence is by law required to be imposed by the sheriff upon conviction of a

6. State v. James, supra, but see Ex parte Smith, 5 Cow.(NY) 273; U. S. v. Harden, supra.

7. Taintor v. Taylor, 36 Conn 242, 4 Am Rep 58, aff 16 Wall.(US) 366, 21 L ed 287, in the cited case the court was dealing with directions given by a Superior Court but no doubt the same rule would apply before a committing magistrate.

8. 4 Blackstone's Com. 403; 1 Chitty Cr L 784.

9. 4 Blackstone's Com. 362.

10. Murfree on Sheriffs, secs. 1169 and 1170.

prisoner in a competent case, the death sentence of the court must be executed by the sheriff of the county in which the prisoner was tried and it is error for the court to order it to be executed in the county from which the cause was removed or by the sheriff of that county.[11]

§ 624. General Duties of the Sheriff.—Intimately associated with a consideration of the duties of the sheriff in respect to criminal cases, it may be stated that it was his duty at common law to cause inquisitions of lunacy to be legally instituted, and it was his duty to convey insane persons to institutions to which they had been committed. However, these matters as a rule, are now controlled by statutory enactment. The sheriffs and constables are peace officers of the county and it is their duty to see that the peace and order of the community is maintained, and to execute laws generally against vagrants and disorderly persons, and to protect the lives, property, health, and morals of the people.[12]

11. State v. Twiggs, 60 NC 142.

12. Corder v. People, 287 P 85, 87 Colo 251; State v. Wyatt, 89 Atl 217, 4 Boyce(Del) 473; State v. McCarty, 179 P 309, 104 Kan 301, 3 ALR 1283; Scougale v. Sweet, 82 NW 1061, 124 Mich 311; Pearce v. Stephens, 45 NYS 422, 18 App Div 101, aff 48 NE 1106, 153 NY 673; Murfree on Sheriffs, sec. 1172.

CHAPTER XXVIII

EXECUTION OF SEARCH WARRANTS

Secs.

§ 625. Authority of Officer Must Be Derived from Search Warrant.—A search warrant can not be extended beyond the privileges granted in its issuance, and contained within its four corners; nothing further may be done under it; nothing is imported therein by intendment or construction, and only the search for the particular thing described in the warrant may be made. A search warrant for intoxicating liquors can not be used to search and seize documents and records upon the theory that they were the means or instrumentality of the commission of the crime. Constitutional rights are enforced with equal rigidity with respect to the guilty and the innocent.[1]

§ 626. Execution of Search Warrant in Night Time.—At early common law a search warrant issued only for the purpose of finding stolen goods and its execution was prohibited during the night

1. U. S. v. Kraus, 270 F 578; In re No. 191 Front Street, 5 F(2d) 282; Silverthorne Lumber Co. v. U. S. 40 S Ct 182, 251 US 385, 64 L ed 319; Weeks v. U. S. 34 S Ct 341, 232 US 383, 58 L ed 652, LRA1915B 834, AC 1915C 1177; Boyd v. U. S. 6 S Ct 524, 116 US 616, 29 L ed 746; Veeder v. U. S. 252 F 414, 164 CCA 338, 38 S Ct 428, 246 US 675, 62 L ed 933; Sugar Valley Land Co. v. Johnson, 85 So 871, 17 Ala App 409; Gildrie v. State, 113 So 704, 94 Fla 134.

time. However, in our time the mere execution of a search warrant in the night time does not violate the law against the execution of unreasonable searches when such search is authorized by statute. But it would seem that in the absence of statute, the common law rule would control and that a search warrant can only be, lawfully, executed in the daytime.[2] The safe course for an officer to follow would be to execute a search warrant in the daytime only, unless the warrant specially directs otherwise. Of course, if the statute of a particular jurisdiction prohibits the execution of a search warrant in the night time, unless specially directed, such statute should be followed.[2a]

Under some statutes a search warrant cannot be executed at night unless special directions therefor are contained in, or endorsed upon, the warrant. The question then arises what is "daytime" and it has been held that "daytime" continues from dawn to after sunset. "Daytime" has been held to include the period between sunrise and sunset.[2b] When the time of the execution of the warrant is established, the court will take judicial notice of whether it was day or night time.[2c] But evidence has been held proper of experiments three days after the search after sundown. to determine whether it was daytime; the evidence showing that the witness could readily recognize the features of a man farther than across the street at a corresponding time. The search was under a warrant authorizing a search in the daytime only.[2d] At common law it is permissible to execute a search warrant on Sunday and no doubt this would be true with respect to holidays.[2e]

§ 627. Search Warrant Required to Be Executed within Reasonable Time.—It seems to be the generally recognized rule at this time that search warrant should be executed within a reasonable time after they are issued; that it should not be committed to the whim and caprice of an officer as to when same should be served. As to what is a reasonable time varies in different circumstances, taking into consideration all of the facts, circumstances, and surrounding conditions in determining such question. It is usually a jury ques-

2. U. S. v. Borkowski, 268 F 408; Voorhies v. Faust, 189 NW 1006, 220 Mich 155, 27 ALR 706, see also 24 RCL 708, sec. 11 note 15.

2a. Johnson v. U. S. 46 F(2d) 7.

2b. Moore v. U. S. 57 F(2d) 840; Atlanta Enterprises v. Crawford, 22 F (2d) 834; U. S. v. Martin, 33 F(2d) 639; Distefano v. U. S. 58 F(2d) 963; U. S. v. Lepper, 288 F 136, 295 F 1017; 18 USCA sec. 620.

2c. Distefano v. U. S. supra.

2d. Moore v. U. S. 57 F(2d) 840.

2e. State v. Cornwall, 51 Atl 873, 96 Me 172, 90 Am St Rep 331.

tion as to whether a search warrant is executed within a reasonable time. Of course, if the warrant itself fixes the time within which it is to be executed, or the law of a particular jurisdiction directs when it shall be executed, then the direction of the warrant or the mandate of the law must be followed.[3] A delay of three days was held to be reasonable.[4] On the other hand, however, fifteen days' delay, unexplained, was adjudged unreasonable. But a search warrant executed the day after its issuance is a compliance with its direction for instanter execution.[5] Where the time for return of search warrant is fixed by statute, it is unnecessary to insert such time in the warrant, and if the warrant is executed within the time fixed by law the search is valid.[5a] It would, no doubt, be otherwise if the law required the time be inserted in the warrant as a command thereof. The law requires an officer acting under a search warrant to make the search and if anything is seized to remove it and depart from the premises in a reasonable time. If he fails in this, the search becomes illegal, and maugre the fact, his entry and search were lawful he becomes a trespasser ab initio.[5b]

§ 628. Authority to Execute the Warrant.—A search warrant, like any other process directed to an officer to be executed, can only be directed to him either by name or official designation and, like an execution of other process, generally, if the officer summons other officers or deputies or citizens to assist him, then the law protects them, as a rule. In the absence of a prohibitory statute, a search warrant may be directed to a private citizen by name.[6] A warrant may be addressed to any lawful officer of the state, county, or municipality.[7] A warrant addressed to the defendant instead of an officer

3. Elrod v. Moss, 278 F 123; Benton v. U. S. 70 F(2d) 24, cert den 54 S Ct 778, 292 US 642, 78 L ed 1494; Peo. v. Fetsko, 163 NE 359, 332 Ill 110; Peo. v. Wiedeman, 154 NE 432, 324 Ill 66; State v. Nozanich, 192 NE 431, 207 Ind 264; Link v. Com. 251 SW 1016, 199 Ky 781; State v. Guthrie, 38 Atl 368, 90 Me 448; Voorhies v. Faust, 189 NW 1006, 220 Mich 155, 27 ALR 706; Taylor v. State, 102 So 267, 137 Miss 217; State v. Perkins, 285 SW 1021, 220 Mo App 349; Farmer v. Sellers, 72 SE 224, 89 SC 492.

4. Hiller v. State, 208 NW 260, 190 Wis 369.

5. Jordan v. State, 112 So 590, 147 Miss 24; State v. Pachesa, 135 SE 908, 102 W Va 607.

5a. Fry v. U. S. 9 F(2d) 38; Benton v. U. S. supra.

5b. U. S. v. American Brewing Co. 296 F 772 at page 777; Stork Restaurant Corp. v. McCampbell, 55 F(2d) 687, see also Rowley v. Rice, 11 Metc (Mass) 337.

6. U. S. v. Dziadus, 289 F 837; Dunn v. State, 267 P 279, 40 Okl Cr 76; Bishop v. State, 288 P 363, 47 Okl Cr 240; Key v. State, 279 P 931, 43 Okl Cr 450; State v. Quartier, 236 P 746, 114 Ore 657; State v. Montgomery, 117 SE 870, 94 W Va 153; Meek v. Pierce, 19 Wis 300.

7. Mai v. State, 119 So 177, 152 Miss

is a nullity.[8] It is immaterial who carries out a particular part of the search, or functions in connection therewith, whether it is the officer to whom the warrant is directed, or to another as, for instance, a deputy who is assisting the officer in executing the same.[9] And the fact that Federal officers participate in a search being conducted by state officers does not ipso facto convert the proceeding into a Federal undertaking.[9a]

§ 629. Necessity of Possessing Search Warrant.—As is the case with respect to process generally, and particularly warrants of arrest, it is necessary that the officer or other person to whom the search warrant is directed have possession thereof.[10] So, where the search warrant was in the coat of the officer, which was on the premises described in the warrant, and a few feet from the house, it is regarded as sufficiently in his possession to constitute authority to make the search.[11] A position by the defendant that the search was illegal because the warrant was not in possession of the officer making it when the facts show that it was in his pocket ten or twelve feet away, is wholly untenable and entirely lacking in substance.[12]

§ 630. Territorial Limitations in the Execution of a Search Warrant.—As is the case with process generally, in the absence of statute, a sheriff or constable is confined to the territorial limitations of his authority in the execution of a search warrant.[13] Where a search warrant describes premises lying in two different counties and although the description is correct, still it is not permissible for the officer to go out of his county.[14]

§ 631. How Search Warrant Is Served.—It is the duty of an officer at the time he proposes to serve a search warrant to exhibit the same, or to state its contents to the person in charge of the premises.[15] It has been held, however, that the requirement in a

225; Matthews v. State, 100 So 18, 134 Miss 807; State v. Montgomery, supra.

8. Key v. State, supra.

9. Com. v. Rehmeyer, 96 Pa Super 393; Com. v. Orwig, 96 Pa Super 383.

9a. Byars v. U. S. 47 S Ct 248, 273 US 28, 71 L ed 520.

10. See secs. 133, 628 note 6, supra.

11. Hiller v. State, 208 NW 260, 190 Wis 369.

12. Elrod v. Moss, 278 F 123, see also State v. Shaw, 89 SE 322, 104 SC

359, wherein it was held that a warrant of arrest two hundred yards from the place where the arrest was made was sufficiently near to be regarded in his constructive possession.

13. Sec. 100, supra.

14. State v. Shahan, 140 SE 533, 104 W Va 578, see also Henson v. State, 49 SW(2d) 463, 120 Tex Cr 176.

15. Roberts v. Stuyvesant Safe Deposit Co. 25 NE 294, 123 NY 57, 20 Am St Rep 718, 9 LRA 438.

statute that a search warrant be exhibited at the time of serving the same is merely directory.[16] This decision cannot be sustained. It would seem to follow that where there is no one at the premises to be searched, or there is no opportunity for the officer to exhibit the search warrant, such exhibition thereof may be dispensed with.[17] But it must not be supposed that the officer is not under duty to give notice of his official character and the purpose of his visit.[18]

The officer must act upon the situation as it appears to him at the time, so if there is retreat from the door when he approaches, and it is fastened to effectually bar him, this may be regarded as an effective denial of admission as if the occupant had sat inside the door and refused admission. When those in possession of the premises to be searched give no opportunity for formal statement of the contents of the warrant, no ceremony of that character is necessary to the lawful execution thereof.[19]

Exploratory searches are unlawful. A search cannot be justified by what the search discloses. If such were the law, then a search could be justified if it turned out that officers had a keen sense of scent. The lawfulness of a search is determined by the facts as known at the time of its initiation, and not by what subsequent events establish; a lawful search for and seizure of evidence must be made in connection with something else which gives the public a paramount interest in it. This happens when it is done as an incident of a lawful arrest or a lawful seizure of contraband but search and seizure cannot be reasonable, and therefore justified, if it is solely for the purpose of obtaining information generally which may perhaps be proof that a crime has been committed.[20] It must be apparent from what has already been said that the presence of the accused or other person at the place to be searched is not required.[21] This must be true of necessity; otherwise the accused person or the one whose premises are to be searched could effectually avoid the

16. Elms v. State, 26 SW(2d) 211, 114 Tex Cr 642, but see Goodspeed v. State, 25 SW(2d) 858, 114 Tex Cr 334.

17. Jones v. State, 58 So 1011, 4 Ala App 159; Hiller v. State, 208 NW 260, 190 Wis 369; Elms v. State, supra.

18. Justice v. State, 18 SW(2d) 657, 112 Tex Cr 586.

19. Lehrer v. State, 197 NW 729, 183 Wis 339; Hiller v. State, supra.

20. Gouled v. U. S. 41 S Ct 261, 255 US 298, 65 L ed 647; Lefkowitz v. U. S. Atty. etc. 52 S Ct 420, 285 US 452, 76 L ed 877, 82 ALR 775; U. S. v. Shultz, 3 F Supp 273.

21. Smith v. State, 152 NE 803, 198 Ind 156; State v. Dropolski, 136 Atl 835, 100 Vt 259.

search warrant by absenting himself from the premises.[22] An illegal search is not rendered legal by the accused's confession thereafter made.[22a]

§ 632. John Doe Warrant No Protection.—Where a search warrant is issued against "John Doe," an officer would not be warranted in serving the same, since it would be no protection. The law is, where the name of the accused person is known, it must be stated in the affidavit and search warrant. If the name of the owner or occupant of the premises to be searched is unknown, then in that case he must be described, for in all cases where the use of "John Doe" warrants can be avoided, this must be done.[23] However, there are authorities which hold that it is unnecessary, where premises only are to be searched, to name any person in the search warrant, but, that it is sufficient to describe the premises.[24] Under such a warrant, the right does not exist to search the person.[24a]

Premises may be described as belonging to the defendant and another, who was not a defendant, but in addition thereto was sufficiently described.[25] Where the search warrant is for the search of an apartment house or other building occupied by a number of persons, it is sufficient if it states the name of the occupant of a particular apartment or room to be searched.[26] A search warrant is valid which gives the street and number in a city, and also the name of the person who is the occupant, even if the building be an apartment house, occupied by a number of other tenants.[26a]

A single search warrant cannot serve as authority for searching distinct premises occupied by different persons.[27] But where a building is under the control of one, as a lessee, and is occupied and used for a single business, as a garage, it may be described in a search warrant by street and number in a named city.[27a] So, under

22. U. S. v. Camarota, 278 F 388; State v. Dropolski, supra.

22a. U. S. v. Setaro, 37 F(2d) 134.

23. U. S. v. Borkowski, 268 F 408; U. S. v. Doe, 127 F 982; West v. Cabell, 14 S Ct 752, 153 US 78, 38 L ed 643; Ex parte Schaefer, 25 P(2d) 490, 134 Colo App 498; Weaver v. Ficke, 192 S W 515, 174 Ky 432; Brewer v. State, 107 So 376, 142 Miss 100.

24. In re Hollywood Cabaret, 5 F (2d) 651; U. S. v. Fitzmaurice, 45 F (2d) 133; Giacolone v. U. S. 13 F(2d) 108; U. S. v. Fay, 41 F(2d) 365; U. S. v. Williams, 43 F(2d) 184; Gandreau v. U. S. 300 F 21; Snedegar v. State, 150 NE 367, 198 Ind 182; Nelson v. State, 163 NE 95, 200 Ind 292.

24a. Gandreau v. U. S. supra. See sec. 643 note 7 b, infra.

25. Benton v. U. S. 70 F(2d) 24, 54 S Ct 778, 292 US 642, 78 L ed 1494.

26. U. S. v. Barkouskas, 38 F(2d) 837; U. S. v. Wihinier, 284 F 528; U. S. v. Lepper, 288 F 136; Myer v. State, 246 P 1105, 34 Okl Cr 421.

26a. U. S. v. Wihinier, supra; U. S. v. Barkouskas, supra.

27. Hess v. State, 151 NE 405, 198 Ind 1; Nestor v. Com. 261 SW 270, 202 Ky 748; Myer v. State, supra.

27a. Steele v. U. S. 45 S Ct 414, 267 U. S. 498, 69 L ed 757.

a search warrant describing a house and premises as occupied by and in the possession of Henry Hammonds, the officers could not thereunder legally search two rooms of the house, entirely separated from the part occupied by Hammonds, which Hammonds had rented to another, and where some evidence of criminality was located, even though all of said premises were under one roof. The seizure was illegal against the occupant of that part of the house. Only the part of premises under the control of Hammonds was comprehended by the search warrant.[28]

Where the place to be searched is described in the warrant as a single house number, without naming the occupants and where two or more families occupy separate apartments therein, such search warrant directing the officer to search the premises so designated, would be no protection to, or authority for the officer to make a search, since in legal contemplation the warrant describes more than one place. One of several light housekeeping apartments, however humble or unpretentious, is just as sacred, and is entitled to the same protection as a separate mansion used as a home.[29] A search warrant, however, for an entire building, or floor of a building, occupied by different families or different tenants is ordinarily held void, and, it would seem, would be no protection to an officer executing it.[29a]

§ 633. Place to Be Searched.—In the execution of a search warrant, a sheriff or constable is confined in making a search to the particular place described therein, and the rule is not different even though another place nearby belongs to the same party.[30] The description of premises, however, to be searched need only be described with practical accuracy or sufficiently to be identified.[31] Where a search warrant described the premises as 2310½ 7th Avenue in a named city and there was no such number, the officers were not warranted, under this authority, in searching other premises located in the vicinity.[32] Generally, however, a description by street number in a named city is sufficient.[33] Likewise,

28. Nestor v. Com. supra.

29. U. S. v. Innelli, 286 F 731; Wiese v. State, 240 P 1075, 32 Okl Cr 203; Myer v. State, supra.

29a. Hogrefe v. U. S. 30 F(2d) 640; U. S. v. Barkouskas, supra, see sec. 633, infra.

30. Marron v. U. S. 48 S Ct 74, 275 US 192, 72 L ed 231, see sec. 632, supra; Peo. v. Castree, 143 NE 112, 311 Ill 392; Evans v. State, 154 NE 280, 198 Ind 487; Barnard v. State, 124 So 479, 155 Miss 390.

31. U. S. v. Fitzmaurice, 45 F(2d) 133; Rose v. U. S. 45 F(2d) 459; Giacolone v. U. S. 13 F(2d) 108; Peo. v. Martens, 170 NE 275, 338 Ill 170.

32. U. S. v. Sands, 14 F(2d) 670.

33. Nelson v. State, 163 NE 95, 200 Ind 292, but see sec. 632, supra; Goodman v. State, 165 NE 755, 201 Ind 189; Egner v. Com. 289 SW 1108, 217 Ky 503; Grogan v. Com. 1 SW(2d) 779, 222 Ky 484; State v. Leonard, 110 So 557, 162 La 357; People v. Oaks, 231 NW 557, 251 Mich 253.

it is generally held to be sufficient to describe the place to be searched as the residence or other building of a named person.[34]

Rothlisberger v. United States[35] is a most unusual case, not sustainable on principle nor reason. In that case the warrant directed a search of a house at No. 123 of a certain street and as the residence of one of the defendants, the search was made of the house at 121 of that street; one of the defendants was an adult son living in the family at the latter number, and he was the only person named in the warrant; the other defendant was the father, yet all this was held to not invalidate the search or vitiate the warrant. The residence was alleged to be that of the son. Why, may we inquire, have any search warrant at all? If a search warrant is erroneous in every respect, but still authorizes a search, just how far mistaken would a search warrant have to be to invalidate it? It ought to be noted that the learned court said: "We find no justification, upon principle or authority, for thinking that the proceedings under the search warrant were unlawful for either of these reasons" but no authorities were cited, nor any principle quoted, nor is the opinion enlightening as to what principle sustains its pronouncement.

It is regrettable to note that Rothlisberger v. U. S. has been followed. This but illustrates what a menace an unsound or unjust decision may really be; how the constitutional safeguards of the citizen may be swept away. So we now find that to erroneously name the street in a search warrant does not invalidate the warrant or a search under it.[35a] It is to be hoped that the rule of

34. U. S. v. Barkouskas, 38 F(2d) 837; U. S. v. Schullek, 46 F(2d) 532; Shore v. U. S. 49 F(2d) 519, 60 App DC 137, cert den 51 S Ct 656, 283 US 865, 75 L ed 1469; Grogan v. Com. 1 SW(2d) 779, 222 Ky 484; State v. Minor, 1 SW(2d) 106, 318 Mo 827; State v. Higgins, 12 SW(2d) 61, 321 Mo 570; State v. Perkins, 285 SW 1021, 220 Mo App 349; Cruze v. State, 25 SW(2d) 875, 114 Tex Cr 450, 68 ALR 1186; Rothlisberger v. U. S. infra.

35. 289 F 72.

35a. Barrett v. U. S. 4 F(2d) 318; Israel v. U. S. 3 F(2d) 743. Street number was erroneous but was described as defendant's store. This was held immaterial.

Hefferman v. U. S. 50 F(2d) 554. This case, however, does not go to the length that Rothlisberger v. U. S. and U. S. v. Yatsko, infra, go. The street number in Hefferman v. U. S. was correct, but the name of one of three streets forming a junction was erroneous. Martin v. U. S. 99 F(2d) 236. In this case the name of owner was given but the range letter in describing the land was erroneous.

Sparks v. U. S. 90 F 61. This case went about as far afield as is possible to go. The premises were described as the "John Harrison Farm;" this was error; the defendant was charged as Ed Sparks whereas his name was David Ellis Sparks. But all of this was held to be immaterial. What, would the learned court hold was suffi-

these cases will be presented squarely to the U. S. Supreme Court and that they will be repudiated, and that a palingenesis of the constitutional rights of the citizen will take place. There can be no quarrel with the rule enunciated by the U. S. Supreme Court that "it is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended."[35b] But it must be true, under this simple rule, that when streets are erroneously stated, numbers thereof mistakenly inserted, names incorrectly alleged, the search warrant is invalid.

§ 634. Place That May Be Searched.—In the execution of a search warrant the officer possessing the same should be careful to not extend the search to places or to territory not authorized by the warrant. If the warrant merely describes a building, a search of the grounds surrounding the same is not warranted.[36] Where the building described in the warrant is a store, it will not warrant the searching of a part of the same building occupied as a residence.[37] The authority under a warrant to search one building does not authorize the searching of others although located upon the same piece or parcel of ground.[38] The Supreme Court of Tennessee, however, held that a warrant authorizing the search of a building was sufficient authority to search an outbuilding in close proximity thereto which was a part thereof or appurtenant thereto.[39] A warrant may be sufficiently broad in describing the building and premises as to authorize a search of a residence and outbuildings.[40]

There is less basis for the holding of the Federal district court of Texas, than the conclusion reached by the Tennessee Supreme Court, wherein the learned Federal judge held that a lean-to, built at the back of defendant's residence, but with which there was no connecting door, could not be regarded as a part of the residence as respected a search.[41] U. S. v. Mitchell, 12 F(2d) 88, is predicated upon Monaghan v. U. S., 5 F(2d) 424, which sustains the former case, but the latter case is bottomed upon State v. Lowry,

cient to invalidate the warrant?" U. S. v. Yatsko, 23 F Supp 879.

35b. Steele v. U. S. 45 S Ct 414, 267 U. S. 498, 69 L ed 757.

36. Taylor v. State, 98 So 459, 134 Miss 110.

37. State v. Ditmar, 232 P 321, 132 Wash 501.

38. Peo. v. Bawiec, 199 NW 702, 228 Mich 32; Deaton v. State, 102 So 175, 137 Miss 164; Inselman v. State, 280 P 628, 44 Okl Cr 249.

39. Seals v. State, 11 SW(2d) 879, 157 Tenn 538.

40. McSherry v. Heimer, 156 NW 130, 132 Minn 260; Carroll v. State, 296 SW 543, 107 Tex Cr 236.

41. U. S. v. Mitchell, 12 F(2d) 88, see also Monaghan v. U. S. 5 F(2d) 424.

95 So 596, 153 La 177, which was a search of a side room of a shack where gambling was carried on; the defendant's residence was located from seventy-five to one hundred yards; further, the search was without a warrant and the learned Louisiana Supreme Court declared even if the search be conceded to be illegal that this in no way militated against the admissibility of the fruits of the search in evidence. Thus we have error built on error, fallacy grounded on fallacy. But it is immaterial how many stories are added to a building; a faulty foundation is not thereby rendered sound.

§ 635. Amount of Force Authorized in Making Search.—If the officer is possessed of a search warrant that is not in any way irregular or illegal, he may lawfully do all acts necessary to the proper execution thereof. But, in order to warrant the invasion of the citizen's home, an officer must be armed with legal process therefor, and must not transcend the ambit of the authority granted therein, and in no case must unnecessary force or severity be resorted to in the execution of a search warrant. It is the duty of an officer in the execution of a search warrant to do the least damage possible consistent with the carrying out of the mandate of the process.[42]

It cannot be gainsaid that the officer can resort to the restraint of locomotion of parties found in the premises which the officers are legally searching. An application of this principle is found in a case where officers called at a store and served the proprietor with a search warrant, the validity of which was unquestionable, and whereupon the proprietor motioned to his daughter, a girl some eleven or twelve years old, seated at a table near the back of the store. She then came forward to the cash register, and the father said something to her in a whisper. She then walked to the prescription counter and took something from it; whereupon, one of the officers asked her what she had and she replied a can of alcohol which she gave to the officer upon request. The argument that this was an illegal and unconstitutional search, not authorized by the warrant which gave the officers no right to stop the girl, and take the alcohol from her failed to meet with the approval of the court.[43]

It is submitted that the officers would have been clearly within their lawful rights had they forcibly seized the alcohol under these

42. Mellet etc. Brewing Co. v. U. S. 296 F 765; Buckley v. Beaulieu, 71 Atl 70, 104 Me 56, 22 LRANS 819; Marshall v. Com. 125 SE 320, 140 Va 541; Goldsby v. Stewart, 290 P 422, 158 Wash 39.

43. Hadley v. U. S. 18 F(2d) 507.

circumstances. It is pedestrian law that officers armed with a legal search warrant have a perfect right to break doors, if admittance is denied, after a demand therefor upon proper notification of the official character of the demandant, and after giving information of the possession of a search warrant.[44] However, some courts even hold that no demand is necessary. In a case where it appears that officers approached the premises, they were seen by the defendant's wife and she knew who they were and had a strong suspicion as to the purpose of their coming. The officers saw her disappear, and they then left their automobile, pulled the screen off the door and entered the premises, at which time the defendant and his wife were seen coming out of the cellar and where liquor bottles had been turned bottom side up and liquor was running out of them; under these circumstances, the learned Wisconsin court held that no demand was necessary.[45]

This case well illustrates how far courts may go afield in response to supposed public opinion, such as prevailed in many courts of the country during the days of the prohibition fiasco; this holding leaves it in the discretion of the officer to make a demand or not, which should be controlled by law. Search warrants have nothing to do with real estate beyond a search of it and the officers have no right of seizure or possession thereof by virtue of the warrant or even to remain on the premises for a longer time than is reasonably necessary to execute the writ.[45a] There is no authority under a search warrant to levy upon or impound property. This does not mean that the personalty described in the warrant may not be seized.[45b]

§ 636. Amendments of Search Warrants.—A search warrant may be amended, but this cannot be done otherwise than by the issuing authority and, any amendment that is made thereto, must be based upon affidavits or depositions. In other words, a search warrant to be amended must be supported in respect of the amendment in the same manner as when it was issued in the first instance.[46] It seems that the amendment of a search warrant is a judicial act and cannot be authorized over a telephone and the actual mechanical amendment made by the officer at the other end of the line. Neither

44. Banks v. Farwell, 21 Pick.(Mass) 156; Phelps v. McAdoo, 94 NYS 265, 47 Misc 524, 16 NYAC 470, 19 NY Cr 126; Goodspeed v. State, 25 SW(2d) 858, 114 Tex Cr 334.

45. Lehrer v. State, 197 NW 729, 183 Wis 339; Hiller v. State, 208 NW 260, 190 Wis 369.

45a. Stork Restaurant Corp. v. McCampbell, 55 F(2d) 687; U. S. v. American Brewing Co. 296 F 772.

45b. U. S. v. American Brewing Co. supra; Mellet etc. Brewing Co. v. U. S. supra.

46. U. S. Mitchell, 274 F 128.

may the issuing authority of a search warrant leave blanks therein for the purpose of the officer's ascertaining the information and filling in the same.[47]

So, where it appeared that when a search warrant was issued and delivered to an officer it was incomplete, and was altered by insertion of the initials of the defendant; the same change was made in the affidavit. These alterations were made by the consent of the magistrate who issued the warrant but this did not save the invalidation of the warrant. Neither may the situation be saved by the testimony of the officer's touching the result of the search. Such evidence under these circumstances was inadmissible and improperly received. An unlawful search cannot "be cured by another warrant issued upon information thereby secured."[48] It has been held that correctly inserting in a search warrant the date of the month on which it was issued by an officer, after its issuance, did not vitiate it or render a search thereunder illegal.[48a]

§ 637. Duty of Officer to Deliver Copy of Warrant and Issue a Signed Schedule of Property Taken.—It is a part of the duty of an officer executing a search warrant after having made the search, to leave a copy of the search warrant with the person in charge of the premises, or with the person from whom any property is taken, and it is likewise the duty of the officer to draw up a schedule of the property taken and leave it with the person from whom it was so taken. It is unnecessary to deliver a copy of the search warrant before the search is made or before any property is seized thereunder.[49] As to whether this duty is mandatory or merely directory, the authorities are in conflict. It has been held that if the search warrant was valid and the original entry lawful, the search was not rendered unlawful by the mere neglect of the officers to leave a copy of the warrant, or a receipt for the property taken, or by the destruction on the premises of a large part of the property found.[50] On the other hand, the greater weight of authority, and sounder

47. Buchannan v. State, 25 SW(2d) 838, 114 Tex Cr 418; U. S. v. Mitchell, supra.

48. Sherow v. State, 290 SW 754, 105 Tex Cr 650; Chapin v. State, 296 SW 1095, 107 Tex Cr 477; U. S. v. Mitchell, supra; Buchannan v. State, supra.

48a. U. S. Hertel Athletic & Social Club, 25 F(2d) 872.

49. Nordelli v. U. S., 24 F(2d) 665; Giles v. U. S. 284 F 208; Murby v. U. S. 293 F 849; U. S. v. Yuck Kee, 281 F 228.

50. Judge Rudkin, in Giacolone v. U. S. 13 F(2d) 108; U. S. v. Old Dominion Warehouse, 10 F(2d) 736; U. S. v. Clark, 298 F 533; Gandreau v. U. S. 300 F 21; U. S. v. Kaplan, 286 F 963.

reason lies with the position that this requirement is mandatory.[51] The reason for this requirement is greatly fortified when the original development and history of the search warrant is given due consideration. Search warrants crept imperceptibly into the common law according to Lord Camden, who pronounced the judgment in Entick v. Carrington.[52] The earliest use of search warrants seems to have been in connection with stolen goods. Very early, however, they were authorized in connection with the collection of customs. Later they were extended to gambling outfits, tools for counterfeiting money, and finally, they were extended to apply to intoxicating liquors. In the use of the warrants, at early common law, it was required that the person having the goods should be arrested and brought with the goods before the magistrate.[53] It was necessary at common law that the search warrant itself should command that the goods found, together with the person, should be brought before the magistrate to the end that upon examination of facts the goods and the prisoner might be disposed of according to law.[54] The requirement of bringing in the person along with the property existed in respect to search warrants relating to other things than stolen goods, as the scope of its application was expanded.[55] Just when the change grew up, which allowed the goods to be seized and to be brought before the magistrate without also bringing the person having possession thereof, does not clearly appear, but whenever it was, it seems reasonable to suppose that the requirements of leaving a copy of the search warrant and a receipt for the goods taken came about with the change noted, inasmuch as there would have been little reason for such requirement when the goods and the person were both seized and taken together before the magistrate. The requirement that the magistrate should hand a copy of the inventory, if demanded, to the person in possession who was seized along with the goods and brought before the magistrate would have been sufficient.[56] It is sufficient to require the officer to leave a copy of the search warrant with the person found on the premises and from whose possession the property is taken, that the search warrant directs the officer to do and report concerning the same as

51. Tubbs v. Tukey, 3 Cush(Mass) 438, 50 Am Dec 744; Kent v. Willey, 11 Gray(Mass) 368; Paine v. Farr, 118 Mass 74; Gibson v. Holmes, 62 Atl 11, 78 Vt 110, 4 LRANS 451; Nordelli v. U. S. supra; U. S. v. Yuck Kee, supra; Giles v. U. S. supra; Murby v. U. S. supra.

52. 19 Howell's State Trials, 1029.

53. Peo. v. Holcomb, 3 Park. Cr(NY) 656.

54. Peo. v. Holcomb, supra.

55. Com. v. Dana, 2 Metc(Mass) 329.

56. U. S. v. Yuck Kee, 281 F 228.

the law directs.[57] It seems that where the officer is unable to find any person in the place to be searched his duty is discharged by leaving a copy of the warrant and a receipt of the property taken in the place where the property is found.[58] In those jurisdictions that follow the rule that the requirement of delivering a copy of the search warrant and issuing a receipt is directory maintain the view that if the officer's return fails to show that this was done, it may be amended to show the delivery of the copy of the warrant and the issuance of receipt, or it may be established by extrinsic evidence, and that this may be done even after the officer executing the warrant has ceased to be such.[59] An important issue arising in connection with this matter is whether the property taken on the search warrant will be admissible in evidence. If the search is alleged to be illegal, or the view is adopted that the delivery of a copy of such warrant and issuance of receipt are mandatory, then the search is illegal, unless such acts are performed. If the contrary view is maintained then a failure to deliver the copy and issue the receipt does not militate against the legality of the search, and property seized would consequently be received in evidence.

§ 638. Search of an Automobile.—A search of an automobile without a warrant may be permissible where there is probable cause for believing that goods are contained therein in violation of law, or an automobile may also be searched incidental to a lawful arrest of the occupant thereof.[60] But this rule, in the very nature of things has its limitations, as for example, the arrest of a mere guest, without authority or control of a motor vehicle would be no justification for a search of the vehicle without consent of the owner thereof.

In the absence of the existence of "probable cause," search of an

57. Murby v. U. S. supra.

58. U. S. v. Kaplan, supra.

59. Gandreau v. U. S. supra; Nordelli v. U. S. supra.

60. U. S. v. Allen, 16 F(2d) 320; U. S. v. One Cadillac Automobile, 2 F(2d) 886; U. S. v. Hilsinger, 284 F 585; U. S. v. Stafford, 296 F 702; Carroll v. U. S. 45 S Ct 280, 267 U. S. 132, 69 L ed 543, 39 ALR 790 and note; Malmin v. State, 246 P 548, 30 Ariz 258; Faut v. State, 168 NE 124, 201 Ind 322; State v. Graham, 243 P 299, 120 Kan 301; Patrick v. Com. 250 SW 507, 199 Ky 83; Peo. v. Bringardner, 206 NW 988, 233 Mich 449; State v. Pluth, 195 NW 789, 157 Minn 145; Moore v. State, 103 So 483, 138 Miss 116; State v. Pigg, 278 SW 1030, 312 Mo 212; State v. District Court of Fourth Judicial District, 232 P 201, 72 Mont 213; Davis v. State, 63 P(2d) 112, 60 Okl Cr 198; State v. One Buick Automobile, 253 P 366, 120 Ore 640; Carlton v. State, 70 SW(2d) 189, 125 Tex Cr 601; Linthicum v. State, 116 S W(2d) 714, 134 Tex Cr 608; Hunter v. State, 300 SW 63, 108 Tex Cr 337; Wilder v. Miller, 208 NW 866, 190 Wis 136.

automobile is unauthorized and illegal. It takes more than a mere suspicion. Officers are not authorized in stopping every automobile on the highway upon the chance, or the hope of discovering the commission of a crime, and the finding of contraband goods in an automobile after it has been stopped, or discovering the commission of a crime by the search, does not operate to galvanize the illegal search into a legal one.[61] An automobile is not regarded with the same sanctity as that of a residence or dwelling. Less restriction is placed upon the searching of an automobile than a residence.[62] A belief entertained by a police officer based upon information that he regarded reliable, coming from a creditable person, has been held sufficient to warrant the search of an automobile without a warrant.[63] However, where officers merely had information from an undisclosed source that a certain described car might be used on a certain road at a stated time for violation of law, such information is insufficient to warrant searching an automobile that answered the general description of the car about which they had information.[64] But some courts, as regrettable as it is, have held that an anonymous telephone call describing an automobile that would probably come along a certain road at a stated time warranted the searching of an automobile of that general description.[65] An officer may pursue and search an automobile that is being driven without a license tag.[66] On the other hand, a car being operated with defective lights and thus discovered by the officer does not warrant a search without a warrant. Neither will an arrest for reckless driving warrant such search.[67] Highway officers have a right to stop and investigate a truck which reasonably appears to be overloaded in violation of law.[68] It is generally true that no search warrant is necessary

61. U. S. v. Allen, 16 F(2d) 320; U. S. v. Rembert, 284 F 996, however see U. S. v. Bateman, 278 F 231; Batts v. State, 144 NE 23, 194 Ind 609; Adkins v. Com. 259 SW 32, 202 Ky 86; State v. One Hudson Cabriolet Automobile, 190 NYS 481, 116 Misc 399, 39 NY Cr 289; Ashbrook v. State, 219 P 347, 92 Okl 287; Black v. State, 74 P (2d) 1172, 63 Okl Cr 317; Smith v. State, 90 SW(2d) 523, 169 Tenn 633; Carroll v. U. S. supra; State v. Pluth, supra.

62. State v. Owens, 259 SW 100, 302 Mo 348, 32 ALR 383; Faut v. State, supra; Carroll v. U. S. supra.

63. U. S. v. One 1937 Model Studebaker Automobile, 96 F(2d) 104; Peo. v. De Cesare, 190 NW 302, 220 Mich 417; Moore v. State, 103 So 483, 138 Miss 116; Parks v. State, 178 So (Miss) 473; State v. District Court of Fourth Judicial District, supra.

64. U. S. v. Allen, supra.

65. Faut v. State, supra.

66. Brown v. State, 176 So (Miss) 721.

67. Banker v. State, 66 P(2d) 955, 61 Okl Cr 169.

68. Hutchison v. Ross, 89 SW(2d) (Tex Civ App) 495; De Shong Motor Freight Line v. Whisnand, 98 SW(2d) (Tex Civ App) 389.

where the occupant of an automobile admits a violation of law.[69] A lawful search may be based upon "probable cause" gained by the sense of sight or smell.[70] Where the occupant of an automobile told an officer to go ahead and search it, a search made pursuant thereto is legal.[71] Merely seeing a person in an automobile break some bottles will not warrant a search without a warrant.[72] The search is not raised to one of legality where a person is held in custody and his car detained upon a mere suspicion while the car is searched, and it seems wholly immaterial what the search disclosed; it is still illegal.[73] The importance of making a legal search is generally raised in respect to the admissibility of evidence discovered on the search. If the search is illegal, evidence discovered by reason thereof is not admissible upon a proper objection being seasonably made thereto.[74] It ought to be borne in mind that evidence obtained by searching an automobile on mere suspicion, without a warrant, is inadmissible.[74a] An officer's claim

69. State v. Hall, 279 SW 102, 312 Mo 425; State v. Hall, 278 SW (Mo) 1028; State v. Shank, 202 NW 128, 52 ND 94; McAfee v. State, 82 P (2d) 1006, 65 Okl Cr 65.

70. Boyd v. U. S. 286 F 930; Com. v. Warner, 250 SW 86, 198 Ky 784; Eady v. State, 121 So 293, 153 Miss 691, see also 122 So 199, 153 Miss 696; State v. Pigg, 278 SW 1030, 312 Mo 212; State v. Godette, 125 SE 24, 188 NC 497; State v. One Hudson Cabriolet Automobile, 190 NYS 481, 116 Misc 399, 39 NY Cr 289; Carroll v. State, 235 P 935, 30 Okl Cr 301; State v. Kanellos, 115 SE 636, 122 SC 351; Hunter v. State, 300 SW 63, 108 Tex Cr 337; State v. Nilnch, 230 P 129, 131 Wash 344; Wilder v. Miller, supra.

71. Lee v. State, 70 SW(2d) 185, 126 Tex Cr 18, see sec. 639, infra.

72. Waltrip v. State, 114 SW(2d) 555, 134 Tex Cr 202.

73. Adams v. State, 172 So (Miss) 340.

74. Black v. State, 74 P(2d) 1172, 63 Okl Cr 317; Seiver v. State, 60 P (2d) 403, 59 Okl Cr 368; Tucker v. State, 71 P(2d) 1092, 62 Okl Cr 406; Washington v. State, 64 P(2d) 926, 60 Okl Cr 316; Smith v. State, 90 SW (2d) 523, 169 Tenn 633; Adams v. State, supra.

74a. Moring v. U. S. 40 F(2d) 267, 41 F(2d) 1008; U. S. v. Hanley, 50 F (2d) 465; Emite v. U. S. 15 F(2d) 623; Peo. v. Montgares, 168 NE 304, 336 Ill 458. The right to search an automobile in this case was asserted under a warrant describing a soft drink parlor but the right was denied. Doncaster v. State, 151 NE 724, 197 Ind 635; Karlen v. State, 174 NE 89, 204 Ind 146. Evidence obtained by opening door of automobile and entering without permission, without warrant, is inadmissible. Young v. Com. 20 SW(2d) 730, 230 Ky 767, but see Ellis v. State, 109 So 622, 92 Fla 275; Marsh v. Com. 74 SW(2d) 943, 255 Ky 484; Peo. v. Miller, 222 NW 151, 235 Mich 115. Fact car was on private property, it was held in cited case, without license plates when searched does not galvanize the search into a legal one. King v. State, 118 So 413, 151 Miss 580; Strong v. State, 274 P 890, 42 Okl 114; Bowen v. State, 295 P 623, 50 Okl Cr 36; Combest v. State, 299 P 920, 51 Okl Cr 38; Carroll v. State, 235 P 935, 30 Okl Cr 301; Britton v. State, 246 P 666, 34 Okl Cr 391; Marple v. State, 299 P 506, 51 Okl Cr 44, 1 P(2d) 836, 51 Okl Cr 240; Wells v. State, 258 P 585, 37 Okl Cr 305; Huffman v. State, 260 P 782, 38 Okl Cr 307; Hill v. State, 260 P 1071, 38 Okl Cr 317; Shaw v. State, 261 P 977, 38 Okl Cr

that he entered an automobile for some other purpose than a search, and while there observed violation of law will not galvanize search into a legal one.[74b] Even though there is a statute in the particular jurisdiction authorizing officers to serve warrants of arrest out of their counties, this does not authorize an arrest without the boundaries of the officer's county without a warrant. Where the illegality of an arrest consists in its being made out of the county of the officer making it, the fruits of a search made in connection therewith are inadmissible in evidence and a search made in connection therewith being illegal, renders inadmissible any discovery made thereby.[74c] But an automobile may be legally searched, without a warrant, when an officer of the law has reasonable grounds therefor, as where he is reliably informed it contains intoxicating liquor in violation of law. If the search is predicated upon probable cause—and it must to be legal—it may be conducted before an arrest is made.[74d] The fact that after the automobile was first observed and before the search was made, sufficient time elapsed to have procured a search warrant, does not militate against the legality of a search without a warrant, nor render a search made without such warrant illegal.[74e] It is doubtless the law that if an officer has probable cause to believe that an automobile contains stolen property, or other fruits of crime, that he can lawfully make a search thereof without a warrant, or without first making a legal arrest.[74f] The question naturally arises, what is "probable cause?" The books are replete with kaleidoscopic situations calling for a solution of this elusive question. The adjudications on this point are so numerous that an analysis of all of them, if only a minimum amount of space were devoted to each would swell this volume into an unwieldly tome. Indeed the inclination to pursue such course is not without its urge, but we must deny ourselves this genuine pleasure and be content with a statement of some general rules, in addition to the few cases con-

373; Turnage v. State, 267 P 1038, 40 Okl Cr 180; McPherson v. State, 300 SW 936, 108 Tex Cr 265; Gunter v. State, 4 SW(2d) 978, 109 Tex Cr 408; Brasher v. State, 43 SW(2d) 506, 119 Tex Cr 183; Nowlin v. State, 68 SW (2d) 496, 125 Tex Cr 390.

74b. Young v. Com. 20 SW(2d) 730, 230 Ky 767.

74c. Henson v. State, 49 SW(2d) 463, 120 Tex Cr 176.

74d. Martinelli v. US., 45 F(2d) 393; Husty v. U. S., 51 S Ct 240, 282 US 694, 75 L ed 629, 74 ALR 1407 and note, reversing 48 F(2d) 1076; Tranum v Stringer, 113 So 541, 216 Ala 522. Mere belief of officer, it is held in this case, cannot amount to probable cause. Malmin v. State, 246 P 548, 30 Ariz 258; Hanger v. State, 160 NE 449, 199 Ind 727; Peo. v. Bringardner, 206 NW 988, 233 Mich 449.

74e. Husty v. U. S., supra.

74f. Leong Chong Wing v. U. S. 95 F(2d) 903; U. S. v. Austin, 23 F Supp 211.

sidered in the foregoing portion of this section. The officer, before searching an automobile, must be in possession of such reliable and trustworthy information, that, if made in an affidavit and laid before a magistrate, would move him to issue a search warrant. It is unnecessary that the officers' information shall be raised to the dignity of legal evidence of an illegal act. The mandates of the law are satisfied if apparent facts come to the officer's attention, sufficient, under the circumstances, to lead a reasonably discreet and prudent man to believe that contraband goods or the fruits of a crime are contained in the motor vehicle; then "probable cause" exists for the search, and it may be conducted without a warrant.[74g]

§ 639. Search Without a Warrant.—It may be generally stated that under the provision of the Federal Constitution, and those generally encountered in state organic laws, any search of houses or possessions without a warrant, except in connection with a lawful arrest, is illegal and evidence discovered thereby cannot be used to convict the party arrested in connection therewith.[75] An officer of the law before making the search should, in all cases where possible, obtain a search warrant, because if he undertakes a search without a warrant he is held to a strict compliance with the rules of law permitting such search and he probably would have thrown on him the onus probandi.[76] It seems constitutional provisions against illegal search and seizure are not sufficient to prohibit all searches and seizures without a warrant, since the right to search existed in some cases prior to the adoption of the Constitution.[77] It should not be overlooked that if the arrest is made without a warrant, and rests upon a foundation of suspicion only, and is, therefore, illegal, evidence obtained upon a search made in conjunction with such arrest is inadmissible.[77a] The constitutional inhibition against an illegal

74g. U. S. v. Sebo, 101 F(2d) 889, and authorities cited in the opinion. State v. Pluth, 195 NW 789, 157 Minn 145.

75. Peo. v. 738 Bottles of Intoxicating Liquor, 190 NYS 477, 116 Misc 252, 39 NY Cr 270; Youman v. Com. 224 SW 860, 189 Ky 152, 13 ALR 1303 and note; Brent v. Com. 240 SW 45, 194 Ky 504; Section 159, supra.

76. State v. Schoppe, 92 Atl 867, 113 Me 10.

77. Agnello v. U. S. 290 F 671, see however 46 S Ct 4, 269 US 20, 70 L ed 145, 51 ALR 409. In this case the Supreme Court of the U. S. held that the arrest of one conspirator at the residence of one of them did not warrant the searching of the residences of others some distance away. Henderson v. U. S. 13 F(2d) 528, 51 ALR 420 and note; U. S. v. McBride, 287 F 214, see also 284 F 416, 43 S Ct 359, 261 US 614, 67 L ed 827. O'Connor v. U. S. 281 F 396; U. S. v. Snyder, 278 F 650, see however 285 F 1; Peo. v. Case, 190 NW 289, 220 Mich 379, 27 ALR 686; Hall v. Com. 121 SE 154, 138 Va 727.

77a. Snyder v. U. S. 285 F 1, rev. 278 F 650, and authorities cited in opinion; 285 F page 3. Carroll v.

search and seizure extends to the personal effects in the immediate possession of their owner, whether the same are in the possession of the owner or that of another person in his immediate presence.[78] The effects of an accused may be searched in connection with a lawful arrest.[79] A search made with consent of the owner of the premises, or of his person, is legal. The right to complain of an illegal search may be waived.[79a] The search is limited to the consent given and cannot go beyond its scope.[79b] If a person denies ownership of, or interest in premises, or personal property, he will not be heard to say thereafter that the search made at the time of such denial was illegal.[79c] The consent, or invitation to search for a particular specified article or thing seems to be limited thereby and confined thereto.[79d] If the consent to search is not given by the owner in person, authority of another must be shown.[79e] As a general rule, members of the same family, or spouses have not ipso facto by reason of such relationship, authority to consent to a search binding another member of the family or other spouses.[79f]

§ 640. Security of Person against Search.—A search warrant is necessary to search the person, and a search without it is violative of the rights of the citizen. A search of the person grounded on nothing more than suspicion is contrary to the genius of a free people.[80] Under a statute allowing an arrest for an offense with-

State, 235 P 935, 30 Okl Cr 301, see sec. 739, note 74a infra.

78. Adkins v. Com. 259 SW 32, 202 Ky 86; Youman v. Com. 224 SW 860, 189 Ky 152, 13 ALR 1303; Caffini v. Hermann, 91 Atl 1009, 112 Me 282; Peo. v. Foreman, 188 NW 375, 218 Mich 591; Peo. v. De Cesare, 190 NW 302, 220 Mich 417; Webb v. Sardis, 108 So 442, 143 Miss 92; Canteberry v. State, 107 So 672, 142 Miss 462; Ross v. State, 105 So 846, 140 Miss 367; Stogsdill v. State, 253 P 309, 36 Okl Cr 194.

79. See sec. 159, supra.

79a. Giacolone v. U. S. 31 F(2d) 110; Huhman v. U. S. 42 F(2d) 733; U. S. v. Dillon, 279 F 639; U. S. v. Sherry, 294 F 684; U. S. v. Perlman, 38 S Ct 417, 247 US 7, 62 L ed 950; Paramore v. McLennan 231 P 718, 40 Idaho 286; Peo. v. Reid, 168 NE 344, 336 Ill 421; Peo. v. Preston, 173 NE 383, 341 Ill 407; Com. v. Tucker, 76 NE 127, 189 Mass 457, 7 LRANS 1056; Peo. v. Broas, 215 NW 420, 240 Mich 495; State v. Fowler, 90 SE 408, 172 NC 905; Bayne v. State, 274 P 694, 42 Okl Cr 81.

79b. U. S. v. McCunn, 40 F(2d) 295.

79c. U. S. v. Messina, 36 F(2d) 699; Hogg v. U. S. 35 F (2d) 954; Jones v. U. S. 296 F 632; Ragland v. Com. 265 SW 15, 204 Ky 598; Ross v. State, 105 So 846, 140 Miss 367; Strickland v. State, 267 P 672, 40 Okl Cr 94; Peo. v. Reid, supra.

79d. Veal v. Com. 251 SW 648, 199 Ky 634.

79e. Hays v. State, 261 P 232, 38 Okl Cr 331.

79f. Cofer v. U. S. 37 F(2d) 677; U. S. v. Rykowski, 267 F 866; Peo. v. Weaver, 217 NW 797, 241 Mich 616, 58 ALR 733 and note; Veal v. Com. supra, but see Bannister v. State, 15 SW(2d) 629, 112 Tex Cr 158.

80. Tillman v. State, 88 So 377, 81 Fla 558; Pickett v. State, 25 SE 608, 99 Ga 12, 59 Am St R 226; Purkey

out a warrant, where the same is committed in the officer's presence, if the arrest is legally made, there is no doubt that the right of search would ensue, but when the officer makes the arrest upon mere suspicion, then there is no right of search without a warrant.[81] However, it must not be supposed that the right of search does not exist when made in conjunction with a legal arrest.[82]

v. Mabey, 193 P 79, 33 Idaho 281, in which case the author was of counsel. Adkins v. Com. 259 SW 32, 202 Ky 86; Banks v. Com. 261 SW 262, 202 Ky 762; Bishop v. Vandercook, 200 NW 278, 228 Mich 299; Skinner v. State, 280 P 851, 44 Okl Cr 271; Sanders v. State, 281 P 595, 44 Okl Cr 438; State v. McDaniel, 231 P 965, 115 Ore 187, 237 P 373; Town of Blacksburg v. Beam, 88 SE 441, 104 SC 146, LRA 1916E 714; State v. Jokosh, 193 NW 976, 181 Wis 160.

81. Hughes v. State, 58 SE 390, 2 Ga App 29; Stewart v. State, 58 SE 395, 2 Ga App 98; Hughes v. Com. 41

SW 294, 19 Ky L 497; Pickett v. State, supra.

82. Agnello v. U. S. 46 S Ct 4, 269 US 20, 70 L ed 145, 51 ALR 409; Newman v. Peo. 47 P 278, 23 Colo 300; State v. Gulczynski, 120 Atl 88, 2 W W Har(Del) 120; Peo. v. Hord, 160 NE 135, 329 Ill 117; Ragland v. Com. 265 SW 15, 204 Ky 598; Youman v. Com. 224 SW 860, 189 Ky 152, 13 ALR 1303; Azparren v. Ferrel, 191 P 571, 44 Nev 157, 11 ALR 678; Dean v. State, 258 P 812, 37 Okl Cr 396; State v. Goldstein, 224 P 1087, 111 Ore 221; Hughes v. State, 238 SW 588, 145 Tenn 544, 20 ALR 639; Sec. 159, supra.

CHAPTER XXIX

REMEDY FOR ILLEGAL SEARCH AND SEIZURE

SECS.

§ 641. Illegal Search without a Warrant.—We shall presently see in this chapter that there are a number of remedies for an illegal search and seizure, whether that illegal search and seizure be of property or person. A search without a warrant, not authorized by law, renders the officer and others participating therein liable in damages.[1] Even if one is deputized by an officer to assist in the execution of search warrant, and property described in the warrant is seized, it seems one so deputized is liable along with the officer.[1a] But unless one assisting an officer under deputation to make a search has some knowledge, or is chargeable with notice of the illegality thereof, then he is not liable. The rule of liability applies where such assistant acts officiously, and he will be liable along with the officer making an illegal search. So too, all who are actuated by malice in making, participating in, or instigating an illegal search with or without a warrant are jointly and severally liable.[1b] An officer is

1. State v. Reynolds, 125 Atl 636, 101 Conn 224; Fennemore v. Armstrong, 96 Atl 204, 6 Boyce(Del) 35; Young v. Western etc. R. Co. 148 SE 414, 39 Ga App 761; State v. Tonn, 191 NW 530, 195 Iowa 94; Weaver v. Ficke, 192 SW 515, 174 Ky 432; Buckley v. Beaulieu, 71 Atl 70, 104 Me 56, 22 LRANS 819; In re Siracusa, 212 NYS 400, 125 Misc 882; State v. Ware, 154 P 905, 79 Ore 367, 155 P 364.

1a. Roberts v. Stuyvesant Safe Deposit Co. 25 NE 294, 123 NY 57, 20 Am St R 718, 9 LRA 357.

1b. It was held under the Alabama statute that where a bystander, on demand assists an officer, even though the officer is a trespasser, the assistant is not liable; Watson v. State, 3 So 441, 83 Ala 62. Carey v. Sheets, 67 Ind 375, holding that in a proper case malicious prosecution will lie for an illegal search under a search warrant. To the same effect Whitson v. May, 71 Ind 269; Olson v. Trett, 48 NW 914, 46 Minn 225; Miller v. Brown, 3 Mo 127, 23 Am Dec 693; Doane v. Anderson, 60 Hun 586, 15 NYS 459; Reed v. Rice, 2 JJ Marsh (Ky) 44, 19 Am Dec 122; Ingraham v. Blevins, 33 SW(2d) 357, 236 Ky 505; Larthet v. Forgay, 2 La Ann 524, 46 Am Dec 554; Firestone v. Rice, 38 NW 885, 71 Mich 377, 15 Am St R 266. Circumstances of a character reasonably calculated to engender a suspicion that stolen property was on the premises may be shown in an action for illegal search under a warrant in mitigation of damages. Simpson v. McCaffrey, 13 Ohio 608; Reed v. Lucas, 42 Tex 529; Lawton v. Cardell, 22 Vt 524; Hicks v. McCune, 49 Ont L 41; Fennemore v. Armstrong, supra; Weaver v. Ficke, supra.

2. Stork Restaurant Corp. v. McCampbell, 55 F(2d) 687; McClurg v. Brenton, 98 NW 881, 123 Iowa 368, 65 LRA 519, 101 Am St R 323 and note; Regan v. Harkey, 87 SW 1164, 40 Tex Civ App 16; Lawton v. Cardell, supra; Fennemore v. Armstrong, supra.

3. Houghton v. Bachman, 47 Barb (NY) 388.

4. Hunt v. Evans, 10 F(2d) 892, 56 App DC 97; McGill v. Varin, 106 So 44, 213 Ala 649; Weaver v. Ficke, 192 SW 515, 174 Ky 432; Siemiasz v. Landau, 229 NYS 690, 224 App Div 284, 225 NYS 37, 222 App Div 712.

5. Grumon v. Raymond, 1 Conn 40, 6 Am Dec 200.

6. Krehbiel v. Henkle, 121 NW 378, 142 Iowa 677, see sec. 643, supra; Ingraham v. Blevins, 33 SW(2d) 357, 236 Ky 505; Lane v. Pennsylvania R. Co. 76 Atl 1016, 78 NJL 672.

7. Regan v. Harkey, 87 SW 1164, 40 Tex Civ App 16.

liable if he enters a residence to look for stolen goods, or to attempt to discover the commission of a misdemeanor, if he does so without a warrant, or where, after having conducted a legal search under a warrant he re-enters to search for evidence of criminality of the owner or possessor of the premises, or where an officer remains on the premises after having completed search, he is a trespasser.[2] If the officer seizes property upon an illegal search he is liable therefor, notwithstanding the fact that he had process in his hands under which he might have legally seized the property,[3] as under a levy by virtue of a writ of attachment or execution.

§ 642. Liability for Search Under Illegal Search Warrant.—An officer who executes a search warrant, void on its face, is liable for a search made thereunder, but if it is valid on its face, he need not make further inquiry.[4] The issuing authority may be liable for placing in the hands of an officer a void search warrant or one that is illegally issued, though valid on its face.[5] Likewise, where a person maliciously sues out a search warrant without "probable cause," or makes a false affidavit to obtain it, while the issuing authority and the officer executing it would not be liable, the person swearing it out would be.[6]

§ 643. Illegal Search and Seizure of a Person.—It is illegal, giving rise to a cause of action, to seize one and search him without a warrant. This is fundamental. So, where a citizen is seized and searched upon suspicion of having stolen some money or property he has a cause of action against all those participating therein, including the one who made the accusation and the officer perpetrating the wrong against him. It in no way militates against his right of recovery because, upon being seized, he allowed a search to be made to prove his innocence.[7] The rule is the same where the

officer is armed with a search warrant, and seizes and searches one not mentioned or described therein, as, where the search warrant calls for the search of a pool hall or other place of business, and an officer seizes and searches all who may happen to be therein.[7a] Undoubtedly, it is a sound rule of law that where a search warrant merely describes premises and directs a search thereof, that no right of search exists thereunder to search the person found in possession thereof.[7b] If the citizen does not resist the illegal search of his person, or lays down a package he has in his personal possession which is found to contain contraband for which the search is made, the citizen does not thereby approve or consent to the search, and its illegality continues throughout, and the fruits of such search, or the contents of the package are not admissible in evidence.[7c] It must be apparent from a consideration of the foregoing authorities and principles to be amalgamated therefrom that a warrant directing the search of an automobile but naming no person therein would form no basis for a search of the person or occupant thereof.

§ 644. Valid Search Warrant No Protection for Illegal Conduct.—A valid search warrant cannot panoply the officers in perpetration of illegal acts, as, where more force is used than is necessary to properly search, or where a search is made of a place not described in the warrant, or if he abuses his authority granted thereby, he may become a trespasser ab initio, which would embrace liability for all that was done under the warrant, legally or otherwise.[8] So, where the evidence in an action for illegal search showed that the defendant officer entered the house of the plaintiff by virtue of a valid search warrant to search for goods and after having made the search and the goods had been found and taken, together with the plaintiff, before the magistrate who issued the war-

7a. Winkler v. U. S. 297 F 202; Snyder v. U. S. 285 F 1; Grumon v. Raymond, 1 Conn 40, 6 Am Dec 200; Purkey v. Maby, 193 P 79, 33 Idaho 281. The author was of counsel in this case. State v. Nozanich, 192 NE 431, 207 Ind 264; Peo. v. Glennon, 74 NYS 794, 37 Misc 7; Town of Blacksburg v. Beam, 88 SE 441, 104 SC 146, LRA 1916E 714; State v. Massie, 120 SE 514, 95 W Va 233; State v. Wuest, 208 NW 899, 190 Wis 251.

7b. State v. Grames, 68 Me 418; State v. Kollat, 208 NW 900, 190 Wis 255; Jokosh v. State, 193 NW 976, 181 Wis 160; State v. Nozanich, supra; State v. Wuest, supra. See sec. 632 note 24a, supra.

7c. U. S. v. Rembert, 284 F 996; State v. Warfield, 198 NW 856, 184 Wis 56; State v. Wuest, supra.

8 Larthet v. Forgay, 2 La Ann 524, 46 Am Dec 554; Buckley v. Beaulieu, 71 Atl 70, 104 Me 56, 22 LRANS 819; Roberts v. Stuyvesant Safe Deposit Co. 25 NE 294, 123 NY 57, 20 Am St R 718, 9 LRA 438; Siemiasz v. Landau, 229 NYS 690, 224 App Div 284, 225 N YS 37, 222 App Div 712; Lawton v. Cardell, 22 Vt 524.

rant, and the officer again entered the house for the purpose of finding evidence against the plaintiff to be used in convicting him of theft, the second search was illegal for which the plaintiff would be entitled to recover.[9] It is no justification for an illegal search that the owner or possessor of the premises was a violator of the law.[10] A search warrant may be valid in every respect, and authorize a search thereunder, but where a search is made by virtue thereof and nothing found, the warrant is then no authority to make an arrest for any offense whatever. An officer cannot lawfully arrest on the basis of a search warrant in these circumstances for an alleged act of adultery, the act not occurring in his presence.[10a]

§ 645. Illegal Search as a Criminal Offense.—It seems at common law, illegal search or seizure was not a criminal offense. Of course, if the search of the person was in such a way as to constitute an assault and battery, then it would be punishable as such.[11] However, illegal searches are made punishable by statutory provisions in many jurisdictions.[12] The fact that the victim of the illegal search is himself a law violator, it seems, is no defense.[13]

9. Lawton v. Cardell, supra.

10. In re Siracusa, 212 NYS 400, 125 Misc 882. For discussion respecting the search of a person not named in the warrant see sec. 643, supra.

10a. Noce v. Ritchie, 155 SE 127, 109 W Va 391.

11. State v. Leathers, 31 Ark 44.

State v. Reynolds, 125 Atl 636, 101 Conn 224. "If the question recurs, Where is the accused's remedy? the answer must be by a civil action, the only form of remedy known for the protection of the individual against a trespass. It may be that the officer would be guilty of a contempt. If violations of these constitutional rights shall multiply, undoubtedly the General Assembly can provide for a penalty for subsequent violations. A penalty upon an officer for an illegal search made without reasonable ground would furnish adequate protection against such a public wrong. The creation of such a crime must be left to the legislative department of government. No such crime exists under our common law." It is a little difficult to know what the learned court meant by the sentence. "It may be that the officer was guilty of contempt." Contempt of what? It certainly would not be a contempt of court. Under no sort of a stretch of imagination could it be made contempt of court. Of course, there would be some basis perhaps for laying a charge against an officer for contempt of court, where he acts under a search warrant, and abuses his authority thereunder. This would be analogous to those cases where a prisoner is committed to the custody of an officer and he abuses him, that is, the officer acts in contempt of the process; see sec. 250, supra. In those cases he is punishable as for contempt. But in the cited case, the search was made without any process at all. It can not be seen how there could be contempt of court.

12. Poulos v. U. S. 8 F(2d) 120; Siemiasz v. Landau, 229 NYS 690, 224 App Div 284, 225 NYS 37, 222 App Div 72; In re Siracusa, 212 NYS 400, 125 Misc 882.

13. In re Siracusa, supra.

CHAPTER XXX

WRITS OF EXECUTION FOR POSSESSION OF PROPERTY

Secs.

§ 646. Writs of Execution for Possession of Property Generally Considered.—An execution in its broadest sense is the harvesting machinery by which the fruits of litigation are harvested, and no execution can issue in the absence of a judgment. If the judgment is for money then a simple execution or writ of fieri facias is the instrumentality through which the fruits of litigation are realized. If it is for the possession of property, real or personal, the fruition of the litigation is, still, made effective through the instrumentality of an execution. At common law if the judgment awarded the possession of a chattel interest in real estate to the plaintiff this was enforced through the writ of habere facias possessionem. The common law writ usually issuing upon a judgment in favor of the plaintiff in an action of ejectment was habere facias seisinam.[1] As generally understood, especially in modern legal nomenclature, the execution issuing upon a judgment for personal property is a writ of restitution.[2] A writ of restitution is sometimes applied to judgments rendered in favor of a landlord against a tenant upon a judgment for possession, or restitution of real property, held by a tenant, but whose tenancy has been terminated and has been so adjudged.[3] Where, at common law, the defendant in an action in-

1. 2 Bouvier's Law Dictionary (Rawle's 3rd Rev.) page 1408.
2. Penny v. Ludwick, 67 SE 919, 152 NC 375.
3. Johnson v. Nelson, 263 P 949, 146 Wash 500, 58 ALR 1035.

volving the possession of personalty, had a judgment, and the personalty had been taken from his possession prior thereto, there issued to him, for the restoration thereof a writ called de returno habendo.[4] In an action at law, an execution to put the plaintiff in possession of land is sometimes known as a writ of possession, while serving the same purposes, but issuing out of a court of chancery, was known as a writ of assistance.[5] But the purpose and function of all of these various writs may be tersely summed up with the statement that they are writs of execution, issued to place the successful plaintiff in possession of property involved in litigation, when it is the possession of the property itself, instead of a money recovery that is awarded by the judgment. The only other kind of executory process that we need to notice, is that which was formerly known as levari facias. That is the execution in actions in rem and confined to a particular thing. This form of execution issues on judgments upon mechanics' liens and the like.[6]

§ 647. Execution in Ejectment.—Whatever the execution may be called in ejectment, the substantial purpose of it is to place the successful party in possession of the real estate he has recovered from his adversary, and it may be re-executed if, after the sheriff or other officer has placed the party entitled thereto in possession, he is thereafter evicted by his defeated opponent.[7] Or an alias writ may issue to restore the plaintiff in the judgment to possess, if he is turned out by the defeated party. The persistent loser in the litigation where he retakes possession of the realty may also be attacked as for contempt.[8] There are cases, however, holding that an alias writ will not issue, after a plaintiff has been placed in possession, but it is thought that the better view is that this rule is applicable only in case the plaintiff is turned out by a stranger, although it appears that the weight of authority sustains the position that an alias will not issue in these circumstances, and, if the officer had fully executed the original writ, he would not, in those jurisdictions subscribing to the rule that an alias will not issue, be warranted in executing it.[9] The fact that the unsuccessful party's time

4. 1 Bouvier's Law Dictionary (Rawle's Revision) 770; Meyers v. Maybee, 10 UCQB 200.
5. Ballentine Law Dictionary with Pronunciations, page 1374.
6. 1 Bouvier's Law Dictionary (Rawle's 3rd Rev.) page 1114.
7. Waters v. Shinn, 178 F 345; Jackson v. Hawley, 11 Wend(NY) 182.
8. U. S. v. Slaymaker, 27 F Cas No. 16313, 4 Wash 169; VanRensalaer v. Witbeck, 2 Lans(NY) 498.
9. Huerstal v. Muir, 2 P 33, 64 Cal 450; Rousset v. Reay, 31 P 900, 32 P 171, 3 Cal (Unrep Cas) 717, 97 Cal XVIII; U. S. v. Slaymaker, supra. While this case maintains the position that an alias will issue, the opinion admits that a later English case is against such rule, but the discussion is

has not elapsed within which he may apply for a new trial does not forestall the issuance and service of a writ of execution, thereby placing the successful litigant in possession of the realty.[10] In other words, the right to the issuance of a writ of execution upon an ejectment judgment to place the successful party in possession thereof may issue forthwith.[11] It seems that at common law no order of court was necessary, that the judgment, as is true with judgments generally, was a sufficient award of execution.[12] At common law, the writ of execution based upon a judgment in an action of ejectment could not issue after one year and a day after the entry of the judgment unless the judgment was revived.[13] It seems, however, that if the writ is issued out of time or after the expiration of the time limit therefor, that it is merely voidable, and subject to be assailed by a motion to quash. It would seem that a writ so issued would protect the officer in executing it.[14] While there is some authority to the contrary, the execution we have under consideration can not be executed after the return day provided by law.[15] It has been held, however, that this writ may be issued without a return day, and may be executed at any time, and that the direction with respect to return is merely directory and not mandatory.[16] It seems also that where the officer executes the process that we have under discussion, after the return day mentioned therein, it will be presumed that such execution of the writ was commenced before the return day and is thereafter merely a consummation thereof.[17] It is the duty of the plaintiff, in an execution issued upon an ejectment judgment, to point out to the officer holding the writ the real estate covered thereby, and that it, thereupon, becomes the officer's duty to place the plaintiff in possession of same, but this action on the part of the plaintiff is at his peril. And if he takes more than belongs to him, either out of the lands of the defendant, or of a third person, the court will in a summary way restore the party to the possession of which he has been so improperly deprived; and for like reason has the power to correct the execution of the writ of possession.[18]

predicated on the older English adjudications.

10. Dawson v. Chippewa Cir. Judge, 86 NW 80[illegible], 127 Mich 328.

11. Baum v. Roper, 82 P 390, 1 Cal App 436.

12. Doe v. Bennett, 4 B & C 897, 10 ECL 849, 107 Eng Rep 1293.

13. King v. Davis, 137 F 198, 157 F 676, 85 CCA 348; Berry v. Triplett, 2 A K Marsh(Ky) 61; Hess v. Sims, 1 Yerg(Tenn) 143; 1 Freeman on Executions, sec. 27, 2 Freeman on Executions, sec. 470; 7 Ency. Pl. & Pr. 351.

14. Hess v. Sims, supra.

15. U. S. v. Slaymaker, 27 F Cas No. 16313, 4 Wash 169.

16. Witbeck v. VanRensselaer, 2 Hun 55, 64 NY 27; Jackson v. Hawley, supra.

17. Witbeck v. VanRensselaer, supra.

18. Dickinson v. Huntington, 185 F

It is no more the court's duty to direct the officer in this form of execution, and the officer has no more right to apply to the court for directions, than in the service of an ordinary execution to collect money.[19] An execution of this writ requires that the plaintiff shall be put in possession of the premises described in the judgment and every part and parcel thereof, but, if under the direction of the plaintiff, the officer places him in possession of more land than is covered by the judgment, the execution is good in so far as it is warranted by the judgment entered.[20] A mere notification of the party in possession that the officer holds the process issued upon an ejectment judgment is not a sufficient service thereof.[21] In ejectment, where plaintiff's pleading is general in character, and a verdict and judgment equally general, the plaintiff may take possession of lands he claims, at his peril, subject to be put right by the court if he takes more than the premises in question upon the trial; yet, where there is a special verdict, locating the premises, the parties and the sheriff should be guided by an execution upon the judgment following the special verdict. But, where the verdict and judgment are general, then it would seem to be the officer's duty to be guided by the plaintiff's claims, and by what he pointed out as the land covered by the judgment and writ.[22] The fact that the land is submerged under water does not prevent the execution of the writ and placing the plaintiff in constructive possession thereof.[23] Where the plaintiff in ejectment only recovers an undivided interest in the premises and other interest is in the defendant, then it is the duty of the officer to put the plaintiff in possession jointly with the defendant.[24] It would seem that where the plaintiff only recovered an undivided part, and the rest belonged to a third party, then the officer would be under a duty of putting him in possession jointly with the third party. It is not essential, before the writ is regarded as executed, that the defendant should be actually expelled from the land, and his effects removed therefrom. It is sufficient even if his property and effects are upon the premises if he acquiesces in, and submits to the execution of the writ.[25] But the writ is not regarded as fully

703, 109 CCA 523; Den v. O'Hanlin, 18 NJL 127, see also Ex parte Reynolds, 1 Cai(NY) 376; Jackson v. Rathbone, 3 Cow.(NY) 291.

19. Bowie v. Brahe, 11 NY Super 676, 2 Abb Pr 161; Dickinson v. Huntington, supra.

20. Lankford v. Green, 62 Ala 314; Ball v. Lively, 1 Dana(Ky) 60; Newell v. Whigham, 6 NE 673, 102 NY 20.

21. Newell v. Whigham, supra.

22. Jackson v. Rathbone, 3 Cow(NY) 291.

23. Perrine v. Bergen, 14 NJL 355, 27 Am Dec 63; Note 15 Am St R 59; 2 Freeman on Executions, sec. 474.

24. Ash v. McGill, 6 Whart(Pa) 391.

25. Lee Chuck v. Quan Wo Chong Co., 22 P 594, 81 Cal 222, 15 Am St R 50 and note; Smith v. White, 5

executed until the sheriff or other officer has placed the plaintiff in full possession of the premises involved, and until the officer has departed therefrom.[26] The plaintiff or other successful party is entitled to be put in possession, under the writ, of any improvements on the premises that have become fixtures, and also growing crops thereon.[26a]

§ 648. Against Whom an Execution in Ejectment Is Effective.—A writ of execution in an action of ejectment cannot be made to affect the rights of one who was not a party to the action, and who was in possession, in his own right, before the commencement of the suit.[27] However, persons claiming under the defendant may be evicted under the writ, such as the family of the defendant, his agents, servants, and tenants.[28] But the better rule is that the wife of defendant is not bound by the judgment against her husband and cannot be evicted under an execution issuing thereon where she sets up an independent title in herself.[28a] Where the action is prosecuted against a tenant, according to the better opinion, the landlord, not being made a party, is not bound by the judgment and can not be dispossessed, under an execution issuing thereon.[28b]

Dana(Ky) 376; Scott v. Richardson, 2 B Mon (Ky) 507, 38 Am Dec 170 and note. In this case a portion of defendant's goods were removed whereupon the defendant, by words and acts, gave plaintiff possession which was held to be a sufficient execution of the writ. See also, Com. v. Lennon, 52 NE 521, 172 Mass 434, holding removing effects under an execution no defense on officer's part to a prosecution for placing same on side walk contrary to an ordinance. Union v. Bayliss, 40 NJL 60. This case holds it is necessary to remove a party from land but not necessary to remove his property.

26. 2 Tidds Pr 1247; Newell v. Whigham, supra; Witbeck v. VanRensselaer, supra.

26a. McMinn v. Mayes, 4 Cal 409; Alteo v. Hinckler, 36 Ill 275, 85 Am Dec 407; King v. Fowler, 14 Pick. (Mass) 238; Russell v. Blake, 2 Pick. (Mass) 507; Lean v. Bover, 24 Wis 295, 1 Am Rep 185; Huerstal v. Muir, supra.

27. Rogers v. Parish, 35 Cal 127; Mayo v. Sprout, 45 Cal 99; Ford v. Doyle, 37 Cal 346; Seymour v. Morgan, 45 Ga 201; Puckett v. Jameson, 162 S W 801, 157 Ky 172; Thomas v. DeBaum, 14 NJE 37; Jackson v. Hawley, 11 Wend(NY) 182; Birdsall v. Phillips, 17 Wend(NY) 464; Hallenbeck v. Garner, 20 Wend(NY) 22; Smith v. Pretty, 22 Wis 655.

28. Ritchie v. Johnson, 8 SW 942, 50 Ark 551, 7 Am St R 118; Huerstal v. Muir, 2 P 33, 64 Cal 450; Harrod v. Burke, 92 P 1128, 76 Kan 909, 123 Am St R 179; Higginbotham v. Higginbotham, 10 B Mon(Ky) 369; Mattox v. Helen, 5 Litt(Ky) 185, 15 Am Dec 64; Hessel v. Johnson, 16 Atl 855, 124 Pa St 233.

28a. Tevis v. Hicks, 38 Cal 234; Freeman on Executions, sec. 475, but see Johnson v. Fullerton, 44 Pa St 466.

28b. Chaut v. Reynolds, 49 Cal 213; Oetgen v. Ross, 47 Ill 142, 95 Am Dec 468; Magwire v. Labeaume, 7 Mo App 179; Ryerss v. Rippey, 25 Wend(NY) 432; Ryerss v. Wheeler, 25 Wend(NY) 434, 37 Am Dec 243; Smith v. Pretty, 22 Wis 655, but see Smith v. Gayle, 58 Ala 600.

But the converse is true where the landlord defends the action and puts his title in issue. In these circumstances the landlord is bound by the adjudication and is subject to eviction, under a writ of execution issuing thereon.[28c] It is not necessary that one claiming under the execution defendant should have had notice of the suit. He may be evicted regardless of whether he possessed such notice or not.[29] If a third party is in possession by virtue of assertion of rights in himself but is therein under collusion with the execution defendant, he may be evicted under the process.[30] The proper course for the officer would seem to be to apply to the court for an order directing whether or not the writ should be executed.[30a]

§ 649. Execution of a Judgment in Forcible Entry, Forcible Detainer, and Unlawful Detainer.—The enforcement of a judgment in forcible entry, forcible detainer, or unlawful detainer, is usually consummated by a writ commonly called a writ of restitution. These actions are proceedings by a landowner to regain possession of property that has forcibly been entered upon or forcibly detained or, where a tenant unlawfully remains in possession after his right thereto has expired. A sheriff or constable holding a writ of execution in an action of forcible detainer or unlawful detainer is authorized, and it is his duty, to remove from the premises the defendant in the writ of restitution, together with his property and belongings, and all persons holding by, through or under him. But it is generally held that he is without authority to remove therefrom a stranger in possession of the realty involved in the action, who asserts a right thereto in good faith under an independent claim of title.[31] The writ of restitution in the actions we have under consideration is effectual to evict from the premises the family or relatives of the defendant who hold by, through, or under him, and the defendant in the writ who is married is regarded as the head of the family and the writ is properly enforcible against him and all members of his family occupying the premises with him. But, in some instances, the judgment is not enforcible against members of the family who assert in good faith an independent claim thereto.[32]

28c. Valentine v. Mahoney, 37 Cal 389; Russell v. Mallon, 38 Cal 259; Note 15 Am St R 61.

29. Long v. Neville, 29 Cal 131; Long v. Morton, 2 A K Marsh (Ky) 39.

30. Wetherbee v. Dunn, 36 Cal 147, 95 Am Dec 166.

30a. See sec. 649 note 36, infra.

31. Wallace v. Hall, 22 Kan 271, however see Ashby v. Faulkner, 4 Alaska 743; Drum v. Holton, 1 Pin.(Wis) 456, see also Cagwin v. Chicago & N. W. R. Co. 86 NW 220, 114 Iowa 129.

32. Saunders v. Webber, 39 Cal 287, see sec. 648, supra; Gray v. Nunan, 63 Cal 220; Huerstal v. Muir, 2 P 33, 64 Cal 450; Ennis v. Lamb, 10 Ill App 447; Note 15 Am St R 60.

An assertion of ownership of the house located on the premises in question, on the part of the wife, is unavailing against the writ of restitution in the actions we have under consideration,[33] and the fact that she has instituted divorce proceedings prior to the commencement of the action for possession of the premises will not serve to aid her asserted right to remain in possession.[34] A writ of restitution is not rendered necessarily unavailing because the persons living on the premises at the time of the institution of the suit were not made defendants, and if they were agents or servants of the person who was made a defendant to the record, they can be dispossessed under the writ; and the fact that the defendant of record does not live in the county where the land lies does not alter the case.[35] Ordinarily a person not a party to the suit, or not in privity with the defendant therein, can not be dispossessed by a writ issued upon a judgment for recovery of possession, and where persons other than those named in the writ, claimed possession not in privity with the defendant, the officer may refuse to execute the writ against them, but the court has power over its process, and may order such execution against apparent strangers to the writ and judgment who are in possession. Prima facie, all those who come in possession after an action is brought, come into possession under defendant to the record, and they may be evicted unless they overcome by a satisfactory showing that their possession is adverse to that of the defendant. It takes more than a mere assertion of title to hold possession against a writ of restitution, under these circumstances.[36] A writ of restitution is not regarded as executed until the defendant and all of his belongings and effects are removed from the premises and every part and parcel thereof.[37] In addition to the writ of possession, the successful plaintiff is entitled to an execution for costs, and where a plaintiff in an action for forcible entry and detainer, recovered a judgment but afterwards obtained possession peaceably and without prejudice, this was a satisfaction of the judgment except for the costs, and he is not entitled thereafter to have issued to a writ of restitution, but he is entitled to an execution to collect the costs.[38] After the plaintiff has been placed in possession under a writ of restitution, it is his obligation to then maintain his possession, and if he permits

33. Ennis v. Lamb, supra.
34. Gray v. Nunan, supra.
35. DeGraw v. Prior, 68 Mo 158.
36. Huertal v. Muir, supra.
37. Lee Chuck v. Quan Wo Chong Co. 22 P 594, 81 Cal 222, 15 Am St R 50, and note; Newell v. Whigham, 6 NE 673, 102 NY 20; Crocker on Sheriffs, 2d Ed. sec. 571. But see sec. 647, note 25, supra.
38. Barnett v. Palmer, 79 Ill App 403.

the defendant in the writ of restitution to peaceably regain possession of the premises, and such defendant thereafter asserts ownership thereto, the plaintiff may not again regain the possession under an alias writ of restitution in the action, since the judgment is satisfied when the plaintiff is placed in possession thereof. It is necessary for the landlord, in these circumstances, to institute a new action.[39]

§ 650. Possession of Real Property under Mortgage Foreclosure; Execution for.—Generally, possession of real property after a sale on mortgage foreclosure is obtained by a writ of assistance. Strictly speaking, a writ of assistance is not the only way of obtaining possession of property sold under a mortgage foreclosure, as the court may require possession to be surrendered to the purchaser by an order of injunction as well as a writ of assistance.[40] A stranger to the action who was in possession when the suit was brought, and is not claiming by, through, or under any of the parties, cannot be evicted from the premises in execution of the decree. But the rule would be different if possession was acquired during pendente lite.[41] A writ of assistance seems to issue only upon the direction of the court and in the exercise of sound discretion,[42] and that the issuance of such writ is a judicial act, and if issued by the clerk without an order of the court, it is void. What the effect would be of the issuance of a writ of assistance without an order of the court and placing it in the hands of an officer is problematical. If it is valid on its face it would seem that it could

39. Hough v. Norton, 9 Ohio 45; Hinton v. McNeil, 5 Ohio 509, 24 Am Dec 315; Barnett v. Palmer, supra.
40. Sexton v. Harper, 104 So 802, 213 Ala 308; Horn v. Volcano Co. 18 Cal 143; Montgomery v. Tutt, 21 Cal 103, 81 Am Dec 146; Hibernia Sav. & L. Soc. v. Lewis, 47 P 602, 117 Cal 577; Montgomery v. Tutt, 11 Cal 190; McLane v. Piaggio, 3 So 823, 24 Fla 71; Williams v. Sherman, 205 P 259, 35 Idaho 169, 21 ALR 353; Lucas v. Smith, 201 Ill App 273; Chicago Savings Bank & Trust Co. v. Dunn, 204 Ill App 181; Brackney v. Boyd, 123 NE 695, 71 Ind App 592, 125 NE(2d) 238; Bird v. Belz, 6 P 627, 33 Kan 391; Beck v. Kirk, 223 P 499, 69 Mont 592; Penn v. Baltimore, 1 Ves Sr 144; Roberdeau v. Rous, 1 Atk 543; Herr v. Sullivan, infra.
41. Comer v. Felton, 61 F 731, 10 CCA 28; Thompson v. Smith, F Cas No. 13977, 1 Dill(US) 458; Terrell v. Allison, 21 Wall.(US) 289, 22 L ed 634; Anderson v. Thompson, 20 P 803, 3 Ariz 62. This case holds that where a defendant files a disclaimer he can not thereafter set up an independent adverse title. Herr v. Sullivan, 56 P 175, 26 Colo 133; Paine v. Root, 13 NE 541, 121 Ill 77; Kessinger v. Whittaker, 82 Ill 22; Exum v. Baker, 20 SE 448, 115 NC 242, 44 Am St R 449 and note.
42. Peo. v. Doe, 31 Cal 220; San Jose v. Fulton, 45 Cal 316; Williams v. Sherman, 205 P 259, 35 Idaho 169, 21 ALR 353; Kilpatrick v. Argyle Co. 192 NYS 98, 199 App Div 753; Cevasco v. Alexander Gazzola Realty Co. 197 NYS 94.

be proceeded with, and in that case it would seem that it cannot be said to be void. It is doubtful if there is any duty incumbent upon the officer to see that a writ was issued upon an order of the court. Under the writ of assistance, the powers and duties of the sheriff are identical with those under the writ of habere facias possessionem.[43] In some jurisdictions the process by which the purchaser at a foreclosure sale is put in possession of the premises is called a writ of possession.[44] In some jurisdictions also, the purchaser at a mortgage sale may be put in possession of the premises by, what is known as, an equitable writ of execution.[45]

§ 651. **Necessity of Demand for Possession.**—As to whether or not there must be a demand for possession before the issuance of a writ of assistance to place the purchaser at a foreclosure sale in possession is generally regulated by statutes which should be consulted. It seems in any case, however, that service of the copy of the decree, together with the demand for possession, would satisfy the requirements of law.[46] In some jurisdictions it is held that the defendant in a foreclosure proceeding is under a duty to surrender possession to the purchaser upon expiration of the period of redemption without demand.[47] Statutes are to be found requiring the one in possession who is bound by a decree and foreclosure to deliver up the possession of realty covered by a foreclosure proceeding upon demand within a specified time.[48]

§ 652. **Execution of Judgment in Quiet Title Action.**—While there may be other remedies for the enforcement of judgment and the obtaining possession in a quiet title action, a writ of assistance is an appropriate remedy therefor.[49] It would follow, of course, that such writ should be executed by an officer in the same manner as writs of assistance are served in other cases.

43. Sawyer v. Curtis, 2 Ashm(Pa) 127.

44. Sexton v. Harper, 104 So 802, 213 Ala 308; Suttles v. Sewell, 31 SE 41, 105 Ga 129; Morris v. Morgan, 45 SW 1002, 92 Tex 92.

45. Kershaw v. Thompson, 4 Johns. Ch(NY) 609; Tetterbach v. Meyer, 10 Ohio Dec 212, 19 Wkly L Bul 221.

46. Montgomery v. Middlemiss, 21 Cal 103, 81 Am Dec 146; California Mortg. & Sav. Bank v. Groves, 62 P 259, 129 Cal 649; McLane v. Piaggio, 3 So 823, 24 Fla 71; Lucas v. Smith, 201 Ill App 273; Howard v. Bond, 3 NW 289, 42 Mich 131; Hald v. Day, 59 P 189, 36 Ore 189, see also note AC 1913D 1120.

47. Hays v. Wilstach, 82 Ind 13.

48. Whiteman v. Taber, 83 So 595, 203 Ala 496.

49. Brady v. Carteret Realty Co. 90 Atl 257, 82 NJE 620, AC 1915B 1093 and note, see also 85 Atl 823, 81 NJE 86.

§ 653. **Possessory Process Not Affected by Agreement of, or Declarations by Officer.**—Possessory process can not be affected in any way by the officer having the same for execution. It can not be modified, altered, or changed by his declarations. Neither may it be affected by any stipulations or agreement by such officer. He has but one duty, and that is to carry out the mandates of process. His power and authority is strictly measured by his process. He has such power as, is therein granted, and is limited thereby.[49a]

§ 654. **Execution of Judgment in Replevin.**—Some authorities denominate the process to be issued to carry into execution a judgment in replevin as a writ of restitution where the property involved is to be delivered to the plaintiff. Of course, if an alternative judgment is rendered for a money recovery, in the event the property cannot be delivered, then the writ of restitution should also provide therefor, and to that extent would be a simple execution for the collection of money.[50] It may be stated without the necessity of citation of authorities, in respect to the rules regarding executions in consuetudinary actions apply to executions in replevin; so the rule obtaining in traditional actions that an officer who is a party to the action may not serve an execution issued therein is applicable to actions in replevin.[51] In some jurisdictions the action of replevin is known as claim and delivery.

If the officer is directed by the final executory process to take the property from the defendant and deliver it to the plaintiff, it is his duty so to do. The property should be described with reasonable certainty so as to enable the officer to identify the same.

§ 655. **Execution on the Judgment Based on Mechanic's Lien.**—The ordinary writ for enforcing a judgment based upon a mechanic's lien is a levari facias writ.[52] In many jurisdictions, a judgment in an action upon a mechanic's lien is enforcible by process denominated an execution.[52a] The nomenclatural designation of the execu-

49a. McComb v. Reed, 28 Cal 281; McArthier v. Boynton, 74 P 540, 19 Colo App 234; McGovern v. Payn, 32 Barb(NY) 84.

50. Evans v. Kloeppel, 73 So 180, 72 Fla 267; Penny v. Ludwick, 67 SE 919, 152 NC 375; Aldridge v. Loftin, 10 SE 210, 104 NC 122; Hammond v. Morgan, 4 NE 328, 101 NY 179, 3 How Pr NS 438; Marks v. Willis, 58 P 526, 36 Ore 1, 78 Am St R 752.

51. Snydacker v. Brosse, 51 Ill 357, 99 Am Dec 551.

52. Nat'l Foundry Etc. Works v. Oconto Water Co. 53 F 43, 59 F 19, 7 CCA 603; Williams v. First School Dist. 18 Pa 275; Hart v. Homiller's Ex'r 23 Pa 39.

52a. Pearce v. Knapp, 127 NYS 1100, 71 Misc 324; Belfer v. Ludlow, 126 NY S 130, 69 Misc 486, 127 NYS 623, 143 App Div 147, 95 NE 1123, 202 NY 539; South Texas Lumber Co. v. Epps, 150 P 164, 48 Okl 372.

tory process in an action for the enforcement of a mechanic's lien is relatively unimportant to the officer, into whose hands it is placed, but he is concerned with the proper service thereof. And, in this connection, it may be served in accordance, largely with an execution or order of sale in an action to foreclose a mortgage. Doubtless after there has been a sale under a judgment or decree foreclosing a mechanic's lien, a writ of assistance will issue to put the purchaser in possession, and it would be the duty of the officer to execute the writ in accordance with its mandates.[52b]

§ 656. Use of Force in the Execution of Possessory Process.—The rule with respect to the breaking and entering under civil process is applicable to a writ issued on a judgment in replevin. If an officer breaks an outer door of a residence or dwelling and seizes property under a writ of replevin, the writ is no protection and he is a trespasser and may be sued in trover for conversion.[53] The keeper of a lodging house, hotel, or inn, to some extent, extends a license to persons to enter who are seeking rooms or lodgings, but this license does not embrace an entry by an officer to replevin goods of a guest therein. The same rule is applicable where a store or business is conducted in a residence.[53a] The rule, however, is different in the execution of possessory process involving the possession of real property itself. If a writ for the possession of real property itself, which includes the appurtenances thereunto appertaining, is delivered to an officer, it is lawful for him, after declaring the cause of his coming and demanding to have it opened to him, to break down the door of the house to execute possessory process calling for the delivery of the possession of realty, for after the judgment on which such writ has been issued, the house is no longer to be considered as the dwelling of the person in possession thereof. The reason underlying this rule is that the entry of the judgment terminates the right to possession of the house and premises. The house ceases to be the man's "castle," in these circumstances.[54] This is probably the only exception to the rule that outer doors may not be broken to serve civil process against

52b. See generally note AC 1913D 1120.

53. Haskins v. Haskins, 67 Ill 446; Snydacker v. Brosse, 51 Ill 357, 99 Am Dec 551 and note; State v. Beckner, 31 NE 950, 132 Ind 371, 32 Am St R 257; Keith v. Johnson, 1 Dana(Ky) 604, 25 Am Dec 167, and note. The principal case is apparently contra as to a writ of replevin. Gusdorff v. Duncan, 50 Atl 574, 94 Md 169; Kelley v. Schuyler, 39 Atl 893, 20 RI 432, 78 Am St R 887, 44 LRA 435.

53a. Gusdorff v. Duncan, supra.

54. Page v. DePuy, 40 Ill 506; Ennis v. Lamb, 10 Ill App 447; Semayne's Case, 5 Coke 91a–91b, 11 ERC 629.

an occupant or dweller in the residence, but the reason of this exception to the general rule is that it is the residence itself, the delivery of which is called for in the possessory process. The right to break and enter a residence or dwelling for the purpose of evicting an occupant from the premises called for in a possessory execution is not absolute, under all conditions, and if an officer exceeds the authority conferred by the process itself, he will be liable. Such process does not authorize the officer in doing damage to property and effects against whom the process is directed, and whom he is removing from the premises.[55] So too, if, in dispossessing by virtue of the process we have under consideration, one is injured through the negligence or fault of the officer in the process, he is liable therefor.[56] So too, the eviction of one who is, at the time, ill resulting in the personal injury or death, makes the officer liable therefor, and this rule extends also to the members of the family. So, where an officer executed possessory process and evicted the occupant of the premises and his family, including a small child who was afflicted with measles, and the eviction resulted in the death of the child, the officer is liable and contributory negligence may not be interposed as a defense.[57] And all who help, aid, or assist the officer in execution of process resulting in damages proximately caused, by the commission of a tort, to the evicted party are equally liable.[58] It must not be supposed, however, that every trivial act on the part of the officer and his assistants in the execution of possessory process for realty will operate to make them liable, or to convert their entry and efforts into a trespass ab initio; so, where an officer and his bailiffs entered, under a writ of possession for realty described therein, which entry was lawful, and a keeper was left in possession during the night, who reclined upon a bed located therein, did not constitute such a tort, as a matter of law converted the entry into a trespass ab initio and, while it was an abuse of authority, it was so trivial in character, and came within the ambit of the rule, that every trifling departure from lawfully conferred authority does not operate to convert the execution of the process into a trespass.[59]

55. Bradshaw v. Frazier, 85 NW 752, 113 Iowa 579, 86 Am St R 394, 55 LRA 258 and note; Murray v. Mace, 59 NW 387, 41 Neb 60, 43 Am St R 664; McLaughry v. Porter, 33 NYS 464, 86 Hun 316, 67 NY St 190; Hotel keeper liable for ejecting a sick guest when; McHugh v. Schlosser, 28 Atl 291, 159 Pa 480, 23 LRA 574; Snydacker v. Brosse, supra.

56. McLaughry v. Porter, supra.

57. McLaughry v. Porter, supra; Bradshaw v. Frazier, supra.

58. Hyde v. Cooper, 26 Vt 552; Bradshaw v. Frazier, supra; McLaughry v. Porter, supra.

59. Page v. DePuy, 49 Ill 506.

§ 657. Liability for False Return of Possessory Process.—The rules with respect to liability for making false return of possessory process are the same as those applicable to such return of ordinary process.[60]

§ 658. Amendment of Returns of Possessory Process.—The rule with respect to the amendment of possessory process and returns thereof are those usually applicable to other kinds of writs and process.[61]

60. Bowie v. Brahe, 2 Abb Pr 161, 11 NY Super 676, see sec. 608 supra.

61. Galbreath v. Mitchell, 32 Ark 278, see sec. 612 et seq. supra; Irvin v. Smith, 31 NW 909, 68 Wis 220.

CHAPTER XXXI

SHERIFF OR CONSTABLE AS PARTIES LITIGANT

Secs.

SECS.
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704. Measure of Damages as Applied against Officers.
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§ 659. The Right of a Sheriff to Maintain an Action Generally against the Plaintiff, in Process.—The sheriff is under a duty to obey legal and reasonable instructions of the plaintiff, and if in so doing he entails liability resulting in loss, it is permissible for him to maintain an action against the plaintiff to recover the loss he has sustained. However, in order to so recover, the sheriff must not perform an unlawful act. This would bar his right of recovery. The officer may, of course, in a proper case, demand indemnity.[1] This would be the safer course to pursue.

§ 660. An Officer May Sue for Compensation When.—An officer has a right of action against a plaintiff, or another, who has engaged his official services, for his compensation.[2] It is true that an officer has a lien upon property in his hands for his lawful costs and charges, and he may maintain an action to subject such property to a satisfaction thereof. He cannot be made to deliver up property in his hands until his charges are paid, but in addition to his right to hold on to property in his hands until his costs and charges are paid he has a right of action to foreclose his lien thereon.[3] An of-

1. Long v. Neville, 36 Cal 455, 95 Am Dec 199, see sec. 509, supra; Bond v. Ward, 7 Mass 123, 5 Am Dec 28; Chamberlain v. Beller, 18 NY 115; Freeman on Executions (2d Ed) 275.

2. Lane v. McElhany, 49 Cal 421; Naylor v. Vermont Loan & Trust Co. 55 P 297, 6 Idaho 251; Jones v. Gould, 104 NYS 935, 119 App Div 817; Herbert v. Dufur, 32 P 302, 23 Ore 462; Rawstorne v. Wilkinson, 4 Maule & S 256, 105 Eng Rep 829; Tyson v. Paske, 2 Ld Raymd 1212, 92 Eng Rep 300, 1 Salk 333; Leyster v. Bromley, Cro Car 286, 79 Eng Rep 852.

3. Hall v. U. S. Reflector Co. 66 How. Pr(NY) 31, 4 NY Civ Proc 148; Bowe v. U. S. Reflector Co. 66 How. Pr(NY)

ficer, however, has no lien upon property where the process under which it was seized has been set aside or quashed, and he would not be entitled to subject the same, or any part thereof, to a satisfaction of his claim for compensation or poundage and, of course, the same would be true with respect to property that he, for any reason, had wrongfully seized.[4] Of course, the mere fact that the plaintiff wrongfully sued out, the process would not militate against the officer's right to collect his compensation for which he can maintain an action against the plaintiff and that too, without any prior demand.[5] In a proper case, he may sue the county for compensation, but this cannot be done, as a rule, until there has been a demand made or a claim filed therefor.[6] A sheriff may include in his compensation, items of expense, such as a watchman or keeper that he has placed in charge of property that he has seized under process, and if, in a particular jurisdiction, payment by the officer is a condition precedent to his right of recovery, it is sufficient payment if he is given his note therefor.[7] It is imperative that a sheriff or constable should have a right of action for his compensation for, since in the absence of a statute, the common law rule was that he had no right to demand compensation before performing his service. Indeed, at one period in the history of the common law, the sheriff was not entitled to charge for services.[8]

§ 661. Right of Action in Favor of Sheriff on Bonds.—A sheriff or constable, of course, has a right of action upon bond given to indemnify him for doing an act by reason of the commission of which he has sustained damage.[9] Even a deputy sheriff or deputy constable may maintain an action on a bond given to him for his indemnity.[10] But an officer must be cautious to not take a bond to indemnify him for the commission of a trespass or the perpetration

41, 4 NY Civ Proc 154, aff 36 Hun(NY) 407, 8 NY Civ Proc R 33, 2 How. Pr (NYNS) 440.

4. Longnecker v. Shields, 28 P 659, 1 Colo App 264; Ward v. Barnes, 22 SE 133, 95 Ga 103; Read v. Barnes, 22 SE 213, 95 Ga 108; Lawlor v. Magnolia Metal Co. 44 NE 1125, 149 NY 591, 38 NYS 36, 2 App Div 552, 3 NYAC 100, 74 NY St 465.

5. Lane v. McElhany, supra.

6. Taylor v. Canyon Co., 56 P 168, 6 Idaho 466; McCord v. Page County, 162 NW 242, 179 Iowa 1032.

7. Southwestern Commercial Co. v. Owesney, 85 P 724, 10 Ariz 49.

8. Preston v. Bacon, 4 Conn 471; Peck v. City Nat'l Bank, 16 NW 681, 51 Mich 353, 47 Am Rep 577; O'Brien v. Allen, 83 NYS 251, 40 Misc 603; Sneary v. Abdy, 1 Ex D 299; White v. Hough, Str 862; Hopman v. Barber, Str 814; Hescott's Case, 1 Salk 330.

9. Teague v. Collins, 45 SE 1035, 134 NC 62; Evans v. Graham, 17 SE 200, 37 W Va 657.

10. Lindsey v. Parker, 8 NE 745, 142 Mass 582. The action in this case was brought by and in the name of a deputy sheriff.

of illegal act, since the bond would be void in these circumstances.[10a] In an action on an indemnity bond, the officer may recover his counsel fees paid out in connection with an action brought against him.[10b] The fact that a judgment was rendered against an officer by stipulation which judgment is the basis of his claim for indemnification does not militate against the officer's right of recovery on the indemnity bond, so long as his conduct is in good faith, and free from fraud or collusion, or if it appears there was no legitimate defense to the action against the officer.[10c]

§ 662. Right of Action to Protect Property Seized under Process.—A sheriff or constable who levies upon chattels by virtue of an execution or attachment "acquires a special property therein, and may sue any one who takes them from his possession, as for goods rescued, either to recover the possession thereof, or damages for the conversion."[11] He may, of course, bring an action of replevin therefor.[12] An action of trover will likewise lie.[13] The same rule applies with respect to his right of action where the property is taken from his custodian, even if that custodian is the execution defendant. Also a bailee for hire may be sued for conversion where the officer delivered the property to him.[14] The plaintiff in the process under which the officer seized the property cannot sue for damages for conversion, or for its possession.[15] The situation is the same where the party interfering therewith is another

10a. See sec. 509, supra.

10b. Lindsey v. Parker, supra.

10c. Lindsey v. Parker, supra.

11. Higdon v. Warrant Warehouse Co. 63 So 938, 10 Ala App 496; Davidson v. Waldron, 31 Ill 120, 83 Am Dec 206 and note; Williams v. Herndon, 12 B Mon(Ky) 484, 54 Am Dec 551 and note, see also note 58 Am Dec 360; Guttentag v. Huntley, 139 NE 501, 245 Mass 212; Keith v. Ramage, 214 P 326, 66 Mont 578; Dickinson v. Oliver, 88 NE 44, 195 NY 238, 99 NYS 432, 112 App Div 806; Ansonia Brass & Copper Co. v. Pratt, 10 Hun(NY) 443; Scott v. Morgan, 94 NY 508; Cohen v. Sobel, 114 NYS 774, 62 Misc 306; Florea v. Shultz, 216 NYS 412, 127 Misc 420, see sec. 671, infra; Gilfillan v. King, 86 Atl 925, 239 Pa 395; Crocker on Sheriffs (2d Ed.) sec. 826; Smith on Sheriffs, Constables, and Coroners, 528; Clerk v. Withers, 6 Mod 292; Wilbraham v. Snow, 2 Saund 47.

12. Flanagan v. Newman, 38 P 431, 5 Colo App 245, see also note 11 supra, this section. Field v. Fletcher, 78 NE 107, 191 Mass 494; Conlen v. Lemmerman, 93 Atl 722, 87 NJL 84.

13. Jetton v. Tobey, 34 SW 531, 62 Ark 84; Holy Trinity Nat'l Cath'l Church v. O'Dowd, 167 Atl 556, 86 NH 298; Clearwater v. Brill, 63 NY 627; Williams v. Herndon, supra.

14. Polite v. Jefferson, 5 Har(Del) 388; Guttentag v. Huntley, supra; Jetton v. Tobey, supra; Conlen v. Lemmerman, supra; Field v. Fletcher, supra; Flanagan v. Newman, supra.

15. Cohen v. Sobel, supra, but see McCaffey Canning Co. v. Bank of America, 294 P 45, 109 Cal App 415; Commonwealth Bank v. Shier, 38 SCL 233; Dufour v. Anderson, 95 Ind 302; Tuttle v. Jackson, 4 NJL 115; Keith v. Ramage, supra.

officer acting under process.[16] It seems that an action for such unlawful interference is the only remedy the officer has, as it is doubtful if contempt proceedings for such interference could be maintained.[17] Of course, he must have actually levied upon the goods under valid process in order to authorize the maintenance of an action for interference with his possession.[18] It seems that he may maintain such an action against the defendant in the process who, after a levy, unlawfully regains possession of the property seized.[19] It is no defense that the defendant in an action of trover is the owner of property he took after a levy thereon by virtue of process against another.[19a] It seems that where the officer, after making a levy, leaves the property in the custody of the defendant in the process, who converts it, the officer cannot maintain an action for the conversion.[19b] But the rule is different where a stranger to the writ takes the property from defendant, with whom the officer has left it after levying upon it; the officer can maintain the action in these circumstances.[19c]

§ 663. When a Sheriff Cannot Maintain an Action for Loss Sustained.—Where a sheriff or constable is at fault, or negligent, or is guilty of breach of duty, he may not maintain an action to save himself harmless for loss sustained. In other words, where he is guilty of neglect he cannot recover money which he has paid in consequence of it.[20] When a sheriff or constable has relied upon the defendant to pay an amount due on an execution in the hands of an officer, and which said defendant in the execution failed to do, whereupon the officer himself paid it, he has, neither at law or in equity, any cause of action against the execution defendant. In these circumstances, the payment was purely voluntary on the part of the officer with respect to the defendant, and it will be inferred that it was made to save himself the penalty incurred by his official neglect. In such a case no promise or agreement can be raised by implication on behalf of the officer on the part of the defendant, on which the officer may base a claim for reinbursement, either at law

16. Pracht v. Gunn, 74 NYS 991, 69 App Div 396; Flanagan v. Newman, supra.

17. Gates v. Peo. 6 Ill App 383.

18. Mulheisen v. Lane, 82 Ill 117; Clark v. Norton, 6 Minn 412.

19. Arthur McArthur Co. v. Beals, 137 NE 697, 243 Mass 449, see also Blodgett v. Adams, 24 Vt 23; Weidensaul v. Reynolds, 49 Pa 73, but however see Merritt v. Miller, 13 Vt 416.

19a. Weidensaul v. Reynolds, supra.

19b. King v. Fearson, 14 F Cas No. 7789, 3 Cranch CC 255; Holliday v. Camsell, 1 Term 658.

19c. Mangum v. Hawlet, 30 NC 44, see note 14 supra, this section.

20. Boynton v. Morrill, 111 Mass 4; Koons v. Seward, 8 Watts(Pa) 388; Pitcher v. Bailey, 8 East 171.

21. Sandford v. McLean, 3 Paige(N

or in equity.[21] It has been held where, due to an officer's own neglect, he fails to collect money on an execution in his hands, and by reason thereof he has been compelled to pay the same to the plaintiff therein, the officer cannot recover the amount from the execution defendant. The reason of this rule is that it would tend to lead to the neglect of the officer's duties, if the court should encourage him to delay by holding out the hope that he could hold himself harmless by any expedient. It is another name for encouragement to violate his official duty. The officer is in no better position where he takes an assignment of the debt, even though the debtor promised to pay him after the assignment was made.[22] But this position is not without opposition and perhaps, the weight of authority is now in accord with opposition especially if the officer takes an assignment of the judgment.[22a] But, it seems where the officer voluntarily makes the payment that he is wholly without a remedy.[22b] However, the rule would be different if the officer had paid the amount of the execution out of his own private funds upon the faith of a promise on the part of the defendant to reimburse him. This would be a loan by the officer to the execution defendant of a sufficient sum of money to liquidate the execution.[23] While an officer cannot voluntarily advance his money when he is not liable for a judgment and thereby assert his right of subrogation against the party for whom the money is paid, however, if he fails to levy and make the money on an execution in his hands, such failure being induced by conduct of the debtor and to avoid legal proceedings against the officer, either threatened or commenced against him and his sureties, he makes payment, then, under these circumstances, the right of subrogation may be asserted by him.[24] It seems that where an officer has paid a judgment rendered against him, by reason of the dereliction of his deputy, he is subrogated to all the rights the creditor plaintiff would have, and is entitled to assert such rights.[25] The common law rule is that if the sheriff or constable pays the debt out of his

Y) 117, 23 Am Dec 773; Smith v. Herman, 1 Cold(Tenn) 141.

22. Crutchfield v. Haynes, 14 Ala 49; Boren v. McGehee, 6 Port(Ala) 432, 31 Am Dec 695; Bigelow v. Provost, 5 Hill(NY) 566; Lintz v. Thompson, 1 Head.(Tenn) 456, 73 Am Dec 182.

22a. Burbank v. Slinkard, 53 Ind 493; Stewart v. Com. 272 SW 906, 209 Ky 372; Heilig v. Lemly, 74 NC 250, 21 Am Rep 489, see also note 99 Am St R 505; Beal v. Smithpeter, 6 Baxt. (Tenn) 356; Evarts v. Hyde, 51 Vt 183; Lintz v. Thompson, supra.

22b. Stewart v. Com. supra.

23. Walker v. Bradbury, 57 Mo 66.

24. Staples v. Fox, 45 Miss 667, 680, see also Grenada Bank v. Young, 104 So 166, 139 Miss 448.

25. Downer v. South Royalton Bank, 39 Vt 25.

own funds the payment in general is voluntary and the judgment satisfied, but he may have equitable rights, and this would be true if the debt paid was protected by security, separate and apart from the judgment, and the payment is made because the officer had incurred legal responsibility, then he would be entitled to have that security delivered over to him for his indemnity.[26]

§ 664. Right of Action on Bail Bonds.—Where a prisoner arrested in a civil action has given bond for jail limit privileges, and the prisoner escapes, the sureties on the bond are liable to the sheriff for such escape, and the officer may bring an action therefor.[27] But if it appears that the debtor was given permission to go beyond the jail limits by the sheriff or his deputy, then no recovery could be had on the jail limits bond.[28] When an officer has taken a bail bond, and is thereafter held as bail himself growing out of an arrest in a civil action, it seems that he may maintain an action on the bail as a common law bond.[29] As to when a cause of action accrues on a bail bond in favor of the officer, the authorities are somewhat in conflict. On the one hand it is held that the officer may maintain an action thereon when the proceedings are inaugurated looking to the fixing of his liability,[30] while, on the other hand, it is maintained by other authorities that the officer must have either paid out the money or that a judgment has been rendered against him for it.[31]

§ 665. Ordinarily Actions Not Maintainable by Deputy.—As a general rule, a cause of action accruing in connection with the discharge of the official duties of the sheriff or constable should be maintained in the name of the principal officer, and not in the name of a deputy.[32] It seems, however, that a deputy sheriff may be joined with the sheriff for the recovery of property, or its value that has been levied upon by the deputy and has been removed from his custody.[33]

§ 666. Right of Action to Recover Overpayment to Plaintiff.—Where there has been an overpayment to a plaintiff in an execution,

26. Staples v. Fox, 45 Miss 667, 680; Reed v. Pruyn, 7 Johns.(NY) 426, 5 Am Dec 287; Sherman v. Boyce, 15 Johns.(NY) 443.

27. Seymour v. Harvey, 8 Conn 63; Kip v. Brigham, 7 Johns.(NY) 168.

28. Wemple v. Glavin, 5 Abb NC(N Y) 360, 57 How. Pr 109.

29. Higgins v. Glass, 47 NC 353.

30. Rosenstein v. Sammons, 1 Hill (NY) 59.

31. Pool v. Hunter, 49 NC 144.

32. Britton v. Frink, 3 How. Pr(NY) 102, but see sec. 661, note 10, supra; Hampton v. Brown, 35 NC 18, see however, Polley v. Lenox Iron Works, 4 Allen(Mass) 329.

33. Burton v. Winsor Utah Silver Min. Co. 2 Utah 240.

the sheriff or constable is the proper party to bring an action for such excess.[34]

§ 667. Joint Action by Officers.—It seems that where two or more officers levy upon the same property under the authority of separate executions, severally issued to them, and their possession of said goods is interfered with in such manner as to give cause of action, they may not join in the prosecution thereof.[35]

§ 668. An Officer Paying an Execution in His Hands May Not Have the Benefit of an Alias.—Where an officer, by his neglect or otherwise, has become liable for the amount of an execution in his hands and has paid the same to the plaintiff therein, he is not as a general rule entitled to have an alias execution against the defendant for the purpose of saving himself harmless on account of such payment.[36] The situation seems to be different where the payment is made at the request of the execution defendant. In these circumstances, it seems that the officer might have the benefit of an alias execution against the execution defendant.[37]

§ 669. Right to Sue Defaulting Bidder at Execution Sale.—It is pedestrian law that a sheriff may sue a defaulting bidder at an execution sale.[38] However, the officer cannot do this if he has sold the property on some illegal condition as, for instance, upon the understanding that he would deliver the entire property to the purchaser, whereas only the interest in partnership property had been sold.[39]

§ 670. An Action by Sheriff against Receiptor of Property.—Where a receiptor fails to deliver the property for which he has given a receipt, and which has been delivered to him, he is subject to suit by the officer therefor.[40] The receiptor cannot urge that the value of the property was less than the amount stated in the receipt.[41] In fact, practically the only defense for nondelivery by a receiptor, is a showing on his part that the property was lost by

34. Britton v. Frink, 3 How. Pr(NY) 102; Longenecker v Zeigler, 1 Watts (Pa) 252.

35. Warne v. Rose, 5 NJL 809, see also Maffet v. Tonkins, 6 NJL 228.

36. Roundtree v. Weaver, 8 Ala 314; Hall v. Taylor, 18 W Va 544; Neely v. Jones, 16 W Va 625, 37 Am Rep 794; Beard v. Arbuckle, 19 W Va 135.

37. Evans v. Billingsley's Adm'r, 32 Ala 395, see sec. 663, supra.

38. Fife v. Bohlen, 22 F 878; Glenn v. Black, 31 Ga 393; Armstrong v. Vroman, 11 Minn 220, 88 Am Dec 81.

39. Andrews v. Keith, 34 Ala 722.

40. Bacon v. Thorp, 27 Conn 251, see sec. 674 infra; Ames v. Taylor, 49 Me 381; Foss v. Norris, 70 Me 117; Phelps v. Gilchrist, 30 NH 171.

41. Cornell v. Dakin, 38 NY 253.

an act of God or the public enemy.[42] But it would seem to be a defense in favor of the receiptor, if he established that the officer had not been subjected to any liability on account of the failure to restore the property to the officer.[43] Some authorities also hold that the receiptor may defend on the ground that the property covered by his receipt did not belong to the defendant in the process, or that it was in fact the property of the receiptor.[43a] But the sounder rule is, no doubt, that a receiptor cannot defend on the ground the property did not belong to the defendant in the process. Neither may the receiptor set up ownership in himself in defense for non-delivery of the property called for in his receipt[43b] and further, it appears that by signing a receipt he thereby admits ownership of the property in the defendant in the process.[43c] Signers on a redelivery bond cannot set up ownership in any other person than the defendant in the process.[43d] No sort of arrangement between the receiptor and the creditor, in the action, will operate to deprive the officer of his right of action against the receiptor for his failure to redeliver the property covered by the receipt. An acquittance or release from the creditor in the execution will not serve to shield the receiptor against the officer's action.[44] However, if the property is properly restorable and was restored to the execution defendant, this is a defense, in so far as the value of the property is concerned, but still the officer has a right of action against the receiptor in a proper case for the amount of his fees and costs.[45] It does not lie in the mouth of the receiptor to contend that there were irregularities in the proceedings in the original action.[46] A reversal of the judgment will not bar an action by an officer against his receiptor.[47] Where the defendant in the process gives a receipt for property

42. Cornell v. Dakin, supra.

43. Fisher v. Bartlett, 8 Greenl(Me) 122, 22 Am Dec 225; Perry v. Williams, 39 Wis 339; Foss v. Norris, supra.

43a. Blevin v. Freer, 10 Cal 172, holding receiptor may defend on the ground that he is owner of the property where he makes such claim at the time of giving receipt. Fisher v. Bartlett, supra.

43b. Pierce v. Whiting, 63 Cal 538; Birdsall v. Wheeler, 20 Atl 607, 58 Conn 429; Staples v. Fillmore, 43 Conn 510; Haxtum v. Sizer, 23 Kan 310; Wolf v. Hahn, 28 Kan 588; Case v. Steele, 8 P 242, 34 Kan 90; Peterson v. Woollen, 30 P 128, 48 Kan 770; Burk v. Webb, 32 Mich 173; Cooper v. Davis Mill Co. 67 NW 178, 48 Neb 420; Stowell v. Drake, 23 NJL 310; Cornell v. Dakin, 38 NY 253; Dezell v. Odell, 3 Hill(NY) 215, 38 Am Dec 628; Johnson v. Oliver, 36 NE 458, 51 Ohio St 6.

43c. Bursley v. Hamilton, 15 Pick. (Mass) 40, 25 Am Dec 423; Adams v. Fox, 17 Vt 361; Perry v. Williams, 39 Wis 339; Bleven v. Freer, supra.

43d. Cooper v. Davis Mill Co. supra, see also generally authorities cited note 43 supra this section.

44. Torrey v. Otis, 67 Me 573.

45. Phelps v. Landon, 2 Day(Conn) 370.

46. Marshall v. Marshall, 2 Houst (Del) 125; Bean v. Ayers, 70 Me 421.

47. Phelps v. Landon, supra.

levied upon he cannot, thereafter, assert his non-ownership thereof.[47a] So too, where an officer takes a receipt for goods that he has placed in charge of a keeper, the officer cannot dispute that such property belonged to the defendant in the process.[47b]

§ 670A. Liability of Garagemen and Warehousemen to Sheriff for Goods Stored.—There is another relationship frequently created by officers when they seize property under executory process, and that is where the property is placed with a warehouseman, or garage keeper, in case a motor vehicle is levied upon. It seems that this arrangement does not create the consuetudinary relationship of officer and receiptor or keeper. An employee of a garage has no authority ordinarily to have the garage assume the role of keeper or receiptor.[47c] In these circumstances the relationship is one of bailment for hire, with attendant rights and responsibilities, and subject to the general rules of law pertaining to bailments for hire; and where an officer has seized under process, an automobile, and stored it in a public garage the garageman is liable therefor in trover, or other action as a modern ersatz therefor, for conversion, and a prima facie case against the garageman is made out if the garage keeper makes a misdelivery; that alone is a conversion and his negligence is not in issue.[47d] The rules respecting bailments have been found ample for a solution of such controversies. If the garage keeper fails to redeliver a motor vehicle left with him for storage by an officer, that, prima facie, makes him guilty of conversion. If garageman acts in good faith in making a delivery to another than the officer placing the motor vehicle for storage it in no way militates against nor lessens his liability.[47e] Where the garage keeper allows another to drive such vehicle from the garage he is negligent, fastening liability upon him for the value of the motor vehicle.[47f] The fact that no receipt was taken for the motor vehicle, and that entire transaction was verbal does not change the rights and liabilities of the parties thereto. Neither is it material that there was written deputation of the garageman.[47g] However, the mere fact that the bailee took the bailed property beyond the territorial limits of the officer does not operate to dissolve the levy, or make the officer liable.[47h] Doubtless the rules would be the same, where the goods are stored in a public warehouse, as those applicable to storage arrangements by any other citizen.

47a. Easton v. Goodwin, 22 Minn 426.

47b. Peo. v. Reeder, 25 NY 302.

47c. Guttentag v. Huntley, 139 NE 501, 245 Mass 212.

47d. Cascade Auto Co. v. Petter, 212 P 823, 72 Colo 570; Guttentag v. Huntley supra, see also Hale v. Boston & W. R. R. Co. 14 Allen (Mass) 439, 92 Am Dec 783; Murray v. Postal Telegraph-Cable Co. 96 NE 316, 210 Mass 188, AC 1912C 1183 and note; Stines v. Dillman, 4 SW(2d) (Mo) 477; Manhattan Fire & M. Ins. Co. v. Grand Central Garage, 9 P(2d) 682, 54 Nev 147; Aetna Ins. Co. v. Marble Hill Garage, 262 NYS 93, 146 Misc 337; Hogan v. O'Brien, 208 NYS 477, 212 App Div 193.

47e. Doyle v. Peerless Motor Car Co. 116 NE 257, 226 Mass 561.

47f. Doherty v. Ernst, 187 NE 620, 284 Mass 341.

§ 671. Officer's Right of Action against Another Officer Who Levies on Goods Held under Execution or Other Process.—Where an officer seizes the goods of a debtor on an execution or attachment, he has special property in the goods, and, if they are taken from him by another officer, or an individual for that matter, he has a cause of action against the taker who is a wrongdoer in the premises. The reason of the rule is because the officer making the levy is accountable to the judgment creditor for the value of the goods, and it would be unjust if he could not indemnify himself by the recovery of damages for the wrongful taking, but this right for wrongful taking resides in the officer only, and the execution creditor has no such interest in the property in the officer's possession by virtue of the levy that will enable him to maintain an action against the wrongdoer. His remedy is against the officer making the levy, and the officer, in turn, has the exclusive right of action against another officer or any other person taking and converting goods, or in any other way interfering therewith.[48] It is wholly immaterial that the officer making the first levy and, therefore, lawfully entitled to possession of the goods is a constable and the process has issued out of a justice's court, while the second officer interfering with such possession is a sheriff and his process is issued out of a court of record.[49] One limitation on the right of recovery of an officer, in these circumstances, is that of his liability to the plaintiff in the process under which the levy is made.[50]

§ 672. Right of Action of Officer as an Assignee of a Judgment.—The official capacity of a sheriff or constable does not militate against his right to purchase a judgment or a cause of action in

47g. Titcomb v. Bay State Grocery Co. 150 NE 874, 254 Mass 599; Guttentag v. Huntley, supra.

47h. Titcomb v. Bay State Grocery Co. supra.

48. Mulheisen v. Lane, 82 Ill 117, see sec. 662, supra; Robins v. Brown, 32 La Ann 430; Ladd v. North, 2 Mass 514; Foulks v. Pegg, 6 Nev 136; Dickinson v. Oliver, 88 NE 44, 195 NY 238, 111 NYS 1116, 127 App Div 932; Hampton v. Brown, 35 NC 18; Alexander v. Collins, 3 Rich. L (SC) 62; Tronson v. Robson, 37 Wis 353.

49. Foulks v. Pegg, supra.

50. Robins v. Brown, supra.

the absence of statutory interdiction, and where a sheriff or constable purchases a judgment or other claim, he has all of the rights and privileges with respect thereto the same as any other purchaser would have under like or similar circumstances. But an officer purchasing a judgment must act in good faith in order for the transaction to be valid.[51]

§ 673. Action or Defense Not Maintainable on Void Process.—There is no doubt but what process, regular on its face, issuing out of a proper court, protects an officer in so far as the doing of an act thereunder is concerned, for which he is called upon to answer. He is protected so long as his acts are within the ambit of his process.[52] But the situation is entirely different where an officer seeks to assert a right based upon void process. In order for an officer to assert a right, by virtue of process in his hands, he must establish a legal and valid writ or process under which he acted. Otherwise he is not entitled to maintain an action, or defend by virtue thereof.[53] The rule is the same where an officer is sued by a stranger to the process for seizing property of such stranger, and the officer essays to justify under the process.[53a] Some cases hold it is unnecessary to prove the judgment where the process issued out of a court having jurisdiction of the subject matter.[53b]

§ 674. Right of Action in Favor of Sheriff or Constable against Receiptor.—That a right of action exists in favor of the sheriff or constable against one from whom he has taken a receipt is beyond the peradventure of doubt, and the receipt itself measures the rights

51. Mooney v. Parker, 18 Ala 708; Spaugh v. Huffer, 14 Ind 305; Dunn v. Snell, 15 Mass 481; Allen v. Holden, 9 Mass 133, 6 Am Dec 46; Heilig v. Lemly, 74 NC 250, 21 Am Rep 489; Moss v. Moorman, 24 Grat(Va) 97; Clevinger v. Miller, 27 Grat(Va) 740; Hall v. Taylor, 18 W Va 544; Beard v. Arbuckle, 19 W Va 135.

52. Sec. 88, supra.

53. Townsley-Myrick Dry Goods Co. v. Fuller, 24 SW 108, 58 Ark 181, 41 Am St R 97, see also 22 SW 564; Clark v. Norton, 6 Minn (Gil 277) 412; Rue v. Perry, 41 How Pr(NY) 385, 63 Barb 40; Burrall v. Acker, 23 Wend (NY) 606, 35 Am Dec 582, 21 Wend 605; Dunlap v. Hunting, 2 Denio(NY) 643, 43 Am Dec 763; Earl v. Camp, 16 Wend(NY) 562.

53a. Coyburn v. Spence, 15 Ala 549, 50 Am Dec 140, and note; Carpenter v. Innes, 26 P 140, 16 Colo 165, 25 Am St R 255 and note; Consolidated Amusement Co. Ltd. v. Jarrett, 22 Hawaii, 537; Johnson v. Holloway, 82 Ill 334; Schemerhorn v. Mitchell, 15 Ill App 418; Andrews v. Smith, 3 NW 181, 41 Mich 683; Bruen v. Ogden, 11 NJL 370, 20 Am Dec 593; Coltraine v. McCaine, 3 Dev(NC) 308, 24 Am Dec 256; Townsly-Myrick Dry Goods Co. v. Fuller, supra.

53b. Outhouse v. Allen, 72 Ill 529; Clay v. Caperton, 1 T B Mon(Ky) 10, 15 Am Dec 77.

of parties as well as fixes the ambit of liability.[54] And, where the contract or receipt is alternative in form, that the property will be returned by the receiptor, or a stipulated price, in the event of failure to return, will be paid therefor, it absolutely fixes the liability of the receiptor, and he may only, as a rule, offer as an excuse for failure to return, that he was prevented from so doing by an act of God or the public enemy.[55] It is no defense for the receiptor to advance the contention that the officer was a de facto one instead of a de jure one. The principle of estoppel comes into play to stay the tongue of the receiptor who would deny the lack of official capacity of the dignity of a de jure officer.[56] A receiptor will likewise not be heard to say that the value of the property was different from that in the undertaking or receipt wherein the acknowledgment of the possession of the property was made.[57] The assertion on the part of the receiptor that levy was excessive will avail him nothing.[57a]

§ 675. Rights of Action of Sheriff against His Deputies.—In some jurisdictions, summary remedies are provided for sheriffs against deputies for their defaults and misdeeds whereby damages result to the principal officer. The statute of the particular jurisdiction wherein the question arises should be consulted and followed. In a proper case, a sheriff may have recourse against his deputy where he has been guilty of misfeasance, nonfeasance, or malfeasance, for which there has been visited upon the principal officer, liability in damages.[58]

§ 676. In Some Cases Sheriff's Sureties May Be Subrogated to Right of Action against Deputy's Sureties.—In a proper case, where the sheriff's bondsmen have been compelled to pay, by reason of the default or misconduct of a deputy, and the deputy has given bond to the sheriff, they may be subrogated to a right of action given to the sheriff against the deputy or his bondsmen, or to other rights in and to property to the end they may secure themselves against loss as far as possible.[59]

54. Peo. v. Reeder, 25 NY 302; Dezell v. Odell, 3 Hill(NY) 215, 38 Am Dec 628.

55. Foss v. Norris, 70 Me 117; Cornell v. Dakin, 38 NY 253.

56. Brewster v. Vail, 20 NJL 56, 38 Am Dec 547; Kelly v. Breusing, 32 Barb(NY) 601, aff 33 Barb 123.

57. Cornell v. Dakin, supra.

57a. Dezell v. Odell, supra.

58. Nelms v. Williams, 18 Ala 650.

59. Philbrick v. Shaw, 61 NH 356; Brinson v. Thomas, 55 NC 414; Blalock v. Peake, 56 NC 323.

§ 677. Advantages When Sheriff or Constable Is Defendant.—The position of an officer, such as a sheriff or constable, from the standpoint of a defendant, is an advantageous one. He is protected generally by process, valid on its face, if issued out of a tribunal having jurisdiction of the subject matter; and there is a presumption that attaches that his acts and conduct are legal and regular, and that he has done such acts only as are necessary to the discharge of his duties. He is entitled to have his acts receive the most favorable construction, where he has, apparently, acted in good faith.[60]

§ 678. Sheriff or Constable Proper Party Defendant; Not Deputy.—Since the sheriff or constable is the one officer that is recognized in law, where it is claimed that there has been a default or misconduct on the part of one of his deputies, it is proper to bring the action against the sheriff himself and not the deputy.[61] It hardly need be added, however, that where the deputy is guilty of the commission of a positive tort, he may be joined as a party defendant.[62]

§ 679. Liability of Sheriff or Constable for Extortion.—An officer, such as a sheriff or constable, is liable in a civil action for extortion, not only when committed by himself, but when committed by his subordinates, and under the law in England, the damage is trebled.[63] The liability of the sheriff for extortion perpetrated by his deputy, is confined, of course, to a civil action and does not extend to a criminal prosecution.[64]

§ 680. Liability for Statutory Penalty.—In many states there are statutes prescribing penalties for failure of officers to discharge their lawful duties. These statutes are highly penal in character, and are strictly construed. If one would claim the benefits of these statutes, they are so rigidly construed that he must bring himself clearly within their terms.[65] If the default is the failure to pay

60. Smith v. Hightower, 7 SE 165, 80 Ga 669; Pierce v. Jackson, 18 Atl 319, 65 NH 121; Sec. 88, supra.

61. Fox v. Cone, 13 SW(2d) (Tex) 65; Sec. 78, supra; Cameron v. Reynolds, 1 Cowp 403, 406; Sanderson v. Baker, 3 Wils 309, 314; Lane v. Cotton, 1 Salk 18.

62. Cheek v. Odom, 100 So 782, 20 Ala App 31; Hoge v. Raymond, 25 Kan 665; Waterbury v. Westervelt, 9 NY 598; Fox v. Cone, supra.

63. Woodgate v. Knatchball, 2 Term 148; Buckle v. Bewes, 6 Dowl & R 1, 4 Barn & Cr 154.

64. Sanderson v. Baker, 3 Wils 309, 314.

65. Coffey v. Wilson, 21 NW 602, 65 Iowa 270; Basset v. Bowmar, 3 B Mon (Ky) 325; Skinner v. Wilson, 61 Miss 90; Moore v. McClief, 16 Ohio St 50.

over money, and the party seeking to inflict the statutory penalty has demanded more than he is lawfully entitled to, this is sufficient to refuse the penalty.[66] The mere payment, however, of illegal fees, without protest, is not a waiver of the party's right to claim a penalty against the officer for collecting illegal fees, the collection of such fees being the statutory basis for claiming the penalty.[67]

§ 681. Liability of an Officer for Failing to Serve Process.—Liability of an officer for failure to serve process is generally recognized. This liability is often fixed and determined by statutory enactments.[68] Some statutes provide for fixed penalties for such defaults.[69] An officer, however, may not be penalized or mulcted in damages for failure to pay over money where there are contending claimants. The penalty may be assessed only when he admits by his return he has collected, and it is shown that he has not paid it over. It would be unjust to apply the penalty where, in good faith, he is unable to determine which claimant is entitled thereto.[70] The penalty will be applied only when it is the officer's plain and undisputed duty to pay and his neglect so to do is wilful. If there is a well grounded doubt of his duty, or his liability, or where the money so received by him has been lost without his fault or negligence, or if he has paid out the money to another through an honest mistake, the penalty will not be applied.[70a] Neither may an officer have such penalties visited upon him when the gravity of his misconduct is nothing more or less than an irregularity in making his return.[71] Likewise, he is clearly not liable, and is justified in refusing to levy a void execution.[72]

Where the action taken against an officer is grounded upon the failure to levy an execution, he may show in defense to the charge made against him that the debtor does not own any more property than is exempt from seizure, and it seems that he may make this defense even though there has been no attempt to levy, since the

66. Shumway v. Leakey, 14 P 841, 73 Cal 260.

67. McClure v. Locke, 61 NH 14.

68. State v. Walworth, 3 Atl 543, 58 Vt 502.

69. Alston v. Falconer, 42 Ark 114; Hawkins v. Taylor, 19 SW 105, 56 Ark 45, 35 Am St R 82.

70. Johnson v. Gorham, 6 Cal 195, 65 Am Dec 501; Wilson v. Broder, 10 Cal 486; Giffin v. Smith, 2 Nev 378.

70a. R. G. Craig & Co. v. Smith, 85 SW 1124, 74 Ark 364; J. H. Allen & Co. v. Christensen, 127 NW 185, 111 Minn 414; Roche v. Dunn, 106 NW 966, 97 Minn 529; Hull v. Chapel, 74 NW 156, 71 Minn 408; Wilson v. Broder, supra; Giffin v. Smith, supra.

71. Hawkins v. Taylor, supra.

72. State v. Armstrong, 25 Mo App 532.

law presumes that the execution defendant would claim his exemptions.[73] Where a debtor owns property not exceeding the amount that is exempt from execution, though such ownership is unknown to the officer, he and his bondsmen are not liable for his failure to levy an execution thereon in the absence of a showing that judgment, under the statute of the particular jurisdiction, was subject to be satisfied therefrom, as, where it was based on a tort.[74]

Where, however, the claim for the penalty is made out, then it is remorselessly applied, and it will avail the officer nothing to point to the fact that his conduct was characterized by good faith, unless there is a foundation in fact for the officer's contention. To shield himself from liability, it is not sufficient for the officer to set up that he acted honestly and in good faith, and intended no disobedience of the precept of the court contained in the process. Whether he did so or not is not to be judged by himself, but by the court. What may have been his secret thought and motive, cannot certainly be known, but the facts themselves must disclose what the situation really is, and from that the honesty of purpose of the officer is determined, and not his avouchment of the purity of his motives, and honesty of his intentions. Courts are not easily moved by an assertion that official misconduct or failure of duty was due to ignorance of law imposing the duty. Honesty alone cannot panoply a derelict officer against consequences plainly set forth in the statutory law, but an officer must not only be honest, but he must be diligent as well. He not only must purpose and intend to perform his duty, but he must use intelligence to discover what that duty is, and if his own intelligence is not sufficient to deal with the situation, with which he is confronted, he must consult counsel.[75]

It is a good defense, of course, that the officer released the property from levy because the same belonged to a third party.[76] If the officer relies upon the fact that the debtor's property had passed into the hands of an assignee for the benefit of creditors, the onus is upon him to establish that the transaction was completed and

73. Abbott v. Gillespy, 75 Ala 180; Wilson v. Strobach, 59 Ala 488; Barnard v. Brown, 13 NE 401, 112 Ind 53; State v. Neff, 74 Ind 146; Durbin v. Haines, 99 Ind 463; Taylor v. Duesterberg, 9 NE 907, 109 Ind 165; Campbell v. Gould, 17 Ind 133; Williams v. Osborne, 95 Ind 347; State v. Harper, 22 NE 80, 120 Ind 23.

74. State v. Harper, 22 NE 80, 120 Ind 23.

75. Gladden v. Cobb, 6 SE 161, 73 Ga 235; Morgan v. Spring, 72 Ga 257; Charles v. Foster, 56 Ga 612; York v. Clopton, 32 Ga 362.

76. Chapman v. Smith, 16 How(US) 114, 14 L ed 868.

that the assignee or trustee had qualified as such.[77] It is incumbent upon the complaining party who would hold an officer liable for failure to seize goods of an execution debtor to show that they are within the officer's county.[78] Also, where a statute provides for the officer possessed with process to levy within a specified time, unless directed by the plaintiff or his agent, the burden of establishing the failure of such action in such case rests upon the execution plaintiff.[79] Where an officer, under a writ or process in his hands, collects the money thereon and improperly pays it out, he is liable therefor, but where this is through an honest mistake, he cannot be penalized, as we have seen.[80] If the property is claimed by a third party who brings an action therefor, whereupon the officer returns the execution showing the pendency of the action involving the property, which is ultimately terminated in his favor, it thereupon becomes his duty to withdraw the execution and finish the sale, and if he fails in this he is liable, and may be held in an action or appropriate proceeding therefor.[81]

§ 682. Admissibility of Evidence in an Action against an Officer for Failure to Perform His Duty.—In an action against an officer for negligence for not arresting a debtor on a capias, who was charged with having obtained a bill of merchandise by means of false representations as to his financial standing, it is competent to show what the debtor said in regard to the circumstances at the time he purchased the goods, in an action or proceeding to hold the officer for failure to discharge his duty.[82]

§ 683. Insufficient Defenses.—It is insufficient, when a sheriff or constable is sought to be held for failure to collect money on an execution, for him to show that the execution defendant filed an affidavit of illegality of the process or irregularities in the steps preceding the sale.[83] The officer cannot defend when in default as to his duties upon the ground that an execution is voidable, or has been irregularly issued.[84]

77. Beard v. Clippert, 30 NW 323, 63 Mich 716.

78. State v. White, 88 Ind 587.

79. State v. Emmons, 88 Ind 279; Montgomery v. State, 53 Ind 108.

80. First Nat'l Bank v. Hanchett, 16 NE 907, 126 Ill 499, see note 70a supra, this section.

81. Cox v. Currier, 17 NW 767, 62 Iowa 551.

82. Hatch v. Saunders, 33 NW 178, 66 Mich 181. A sufficient form of an affidavit for arrest of the debtor is appended to the opinion in this case.

83. Treadwell v. Beauchamp, 9 SE 1040, 82 Ga 736.

84. Gladden v. Cobb, 6 SE 161, 73 Ga 235; Singer Sewing Mach. Co. v. Barnett, 76 Ga 377.

§ 684. Issues in Actions against an Officer.—The issues involved in the original action out of which an execution issued, may not be drawn in question, collaterally, in an action against an officer.[85] Where an officer is sued and he pleads a general denial or general issue he cannot offer evidence in justification.[86] The officer cannot justify under process against a stranger, and this is true, even if the process is against the husband of the plaintiff in an action against the officer.[86a]

§ 685. Instances When Officer Not Liable for Conversion.—An officer cannot be held liable for a conversion where, by virtue of the order of the court, he sells goods which he had under attachment and pays over the proceeds to creditors and where, at the same time, proceedings are pending in another jurisdiction wherein the attachment debtor is adjudicated a bankrupt, of which the officer had no notice at the time of making payments.[87] Where an officer levies upon the defendant's right, title, and interest in a certain leasehold upon which was, at the time of making the levy, erected a sawmill and the sale was of the leasehold interest, with improvements thereon, it did not constitute a conversion of the sawmill, as personalty, since the sheriff merely sold it as a part of the realty, and would no more be liable for it as personalty than for any other interest in realty.[88] It seems, however, that an officer may so interfere with the property as not to constitute a valid levy, but yet sufficient to support an action for conversion or trespass.[89]

It seems that the Supreme Court of Montana reached a most anomalous result, wherein it was held in an action against the sheriff for levying an execution on plaintiff's property, issued on void judgments, that the plaintiff could collaterally attack such judgment in proceedings against the sheriff, when offered in evidence of the officer's conduct.[90] But this could not be the law since it flies in the face of the rule that process, regular on its face, issued out of a court having jurisdiction of the subject matter, protects the officer.[91] The true rule to be amalgamated from the authorities, in the light of analogous principles, is that, so long

85. Lashus v. Matthews, 75 Me 446.

86. Daniel v. Hardwick, 7 So 188, 88 Ala 557; Glazer v. Clift, 10 Cal 303; Fisher v. Kelly, 46 P 146, 30 Ore 1.

86a. Daniel v. Hardwick, supra.

87. Conner v. Long, 104 US 228, 26 L ed 723, see also Hussey v. Danforth, 77 Me 21.

88. Kile v. Giebner, 7 Atl 154, 114 Pa St 381, see also Titusville Novelty Iron Works' Appeal, 77 Pa St 103.

89. Dixon v. White Sewing Mach. Co. 18 Atl 502, 128 Pa St 397; Welsh v. Bell, 32 Pa St 12; Paxton v. Steckel, 2 Pa St 93.

90. Palmer v. McMaster, 19 P 585, 8 Mont 186.

91. Sec. 88, supra.

as the officer relies on process, as a protective or defensive weapon, he is protected by it, if it is regular on its face and issued out of a court having jurisdiction of the subject matter; but when a right by virtue of it is asserted affirmatively by way of an action or affirmative defense, then he must show valid process issued on a valid judgment.[91a]

§ 686. Right of Action against Sheriff for Wrongful Seizure of Exempt Property.—Liability for wrongful seizure of exempt property arises against all those who participate in, or are responsible for such seizure. This, of course, includes the plaintiff or person who caused the levy to be made, but it seems no liability attaches to the plaintiff unless he, in some manner, participated in, or counseled the levy to be made.[92] Where a statute prescribes that "if any officer or other person, by virtue of any execution or other process" shall take or seize exempt property that he shall be liable to the injured party for three times the value of the property so seized, it is broad enough to make a plaintiff liable where he authorizes or ratifies with knowledge the act of the officer in the seizure.[92a]

One whose exemption rights have been violated has a cause of action for conversion, or any existing statutory substitute for that action, and where the old forms of trespass, and trespass on the case, are still recognized, they may be resorted to for assertion of exemption rights,[93] and where exempt wages are levied upon with hope of coercing payment on the part of the debtor to prevent his employer from being annoyed, malicious prosecution will lie, and it would seem where the officer is aware of the creditor's purpose he too would be liable.[93a] Mandamus will not lie to compel an officer to exercise his discretion to recognize the claimant's exemption; it being a matter of discretion as to whether or not the officer will turn over to the debtor property claimed as exempt. Neither

91a. See sec. 673, supra.

92. Haswell v. Parsons, 15 Cal 266, 76 Am Dec 480; Seerie v. Brewer, 90 P 508, 40 Colo 299, 122 Am St R 1065; Nix v. Goodhile, 63 NW 701, 95 Iowa 282, 58 Am St R 434 (In 58 Am St R is Nix v. Goodhill); Kiff v. Old Colony & Newport R. Co. 117 Mass 591, 19 Am Rep 429; Woods v. Keyes, 14 Allen (Mass) 236, 92 Am Dec 765; Church v. First Nat'l Bank, 238 NW 192, 255 Mich 595, 82 ALR 645; White v. Stribling, 9 SW 81, 71 Tex 108, 10 Am St R 732, and note; Findel v. Chester, 13 P(2d) 442, 169 Wash 151.

92a. Seerie v. Brewer, supra.

93. Donnell v. Jones, 17 Ala 689, 52 Am Dec 194; Hutchinson v. Whitmore, 51 NW 451, 90 Mich 255, 30 Am St R 431; McCoy v. Brennan, 28 NW 129, 61 Mich 362, 1 Am St R 589; Oliver v. Wilson, 80 NW 757, 8 ND 590, 73 Am St R 784; Van Dresor v. King, 34 Pa 201, 75 Am Dec 643.

93a. Nix v. Goodhile, supra.

will an injunction lie to prevent a levy on exempt property, and this, too, notwithstanding the fact that it is exempt wages that is sought to be protected, and the employer has a rule that any employee whose wages are levied upon will be discharged.[93b]

No notice or demand is necessary to be given before proceeding against an officer levying upon exempt property if the right of exemption clearly exists under the law.[94] The officer's bondsmen may likewise be liable along with him.[95] Where the plaintiff in the execution did not have anything to do with the levying upon exempt property but did thereafter purchase the same at a sale thereof, he does not incur liability for damages thereby. Neither is the plaintiff in the process liable where he did not give the officer any directions with respect to levy or sale, but did direct the officer to remove goods levied upon from defendant's house.[96]

A debtor cannot be deprived of his exemptions by circumvention or subterfuge, so where the creditor and debtor are residents of the same state and the debtor is employed by a railroad therein, but which railroad runs through another state and has offices therein; the creditor cannot defeat the debtor's right to exemption by assigning the claim to a resident of the latter state so that he would be enabled to garnishee the debtor's wages as an employee of the aforementioned railroad. So, where the debtor's wages are collected by this method the creditor is liable to him in an action for return thereof.[96a] The rule seems to be that unless a purchaser at a sale had notice of the debtor's right of exemption, he does not incur any liability. But if the purchaser has notice of the right of exemption before he bids in the property, he acquires no title.[97]

The right to exemptions may be lost by waiver, estoppel, or laches, and where this is the case and a suit is brought for levying on exempt chattels, waiver, estoppel or laches may be pleaded and relied upon as a defense.[97a] In some jurisdictions the right

93b. Oliver v. Wilson, supra; but a contrary result was reached in State v. Goodner, 73 P 690, 32 Wash 550, 98 Am St R 858; Sturges v. Jackson, infra this section, note 97c.

94. Lynd v. Picket, 7 Minn (Gil 128) 184, 82 Am Dec 79.

95. State v. Moore, 19 Mo 369, 61 Am Dec 563.

96. Brock v. Berry, 31 So 517, 132 Ala 95, 90 Am St R 896 and note; Russell v. Walker, 23 NE 383, 150 Mass 531, 15 Am St R 239, but there is some authority to the contrary; Duperron v. Van Wickle, 4 Rob (La) 39, 39 Am Dec 509.

96a. Stark v. Bare, 17 P 826, 39 Kan 104, 7 Am St R 540.

97. Johnson v. Babcock, 8 Allen (Mass) 583, but see Bonsall v. Comly, 44 Pa St 442; Twinam v. Swart, 4 Lans(NY) 263.

97a. Church v. First Nat'l Bank, 238

to exemptions is dependent upon a demand therefor, or an assertion thereof, and where this is the law, the right is waived, or lost when conditions of the statute are not complied with by making the claim.[97b] The exemption right may, like legal rights, generally, be waived or lost by delay or laches.[97c] It is not sufficient to bar the right to claim exemption on the ground of waiver or estoppel that the debtor disclaimed ownership of the property thereafter claimed as exempt.[97d] But if a debtor actively procures his exempt property to be levied upon that amounts to a waiver, or will operate as an estoppel, and will be a good defense for an officer when sued for seizing exempt property.[97e]

§ 687. Liability of an Officer for an Attempt to Make Levy on Exempt Property.—An officer, by the weight of authority, who attempts to levy upon property exempt from levy is a trespasser ab initio, and is liable for all damages flowing from a seizure, and the matter of negligence is not an element of his liability. It is immaterial, whether exemption is that allowed by law to a debtor for the protection of himself and family, or is non-leviable on some ground, such as of public policy and the like. In any case an officer seizing same is a trespasser.[98] The owner of exempt property that an officer essays to levy upon may resist this trespass and invasion of his rights in a reasonable manner, and is not liable therefor, either criminally or civilly, if he does not use force disproportionate to the necessities of the case.[99]

The illative result of these judicial enunciations is that if ex-

NW 192, 255 Mich 595, 82 ALR 645 and note.

97b. Smith v. Chadwick, 51 Me 515, note 82 ALR 648 et seq.; Colson v. Wilson, 58 Me 416; Davis v. Webster, 59 NH 471; Buzzell v. Hardy, 58 NH 331; Frost v. Shaw, 3 Ohio St 270; Butt v. Green, 29 Ohio St 667; Zielke v. Morgan, 7 NW 651, 50 Wis 560; Wicker v. Comstock, 9 NW 25, 52 Wis 315; In re La Mont, 59 NW 456, 88 Wis 107.

97c. Alley v. Daniel, 75 Ala 403, note 8 ALR 650; Sturges v. Jackson, 40 So 547, 88 Miss 508, 6 LRA(NS) 491 and note, 117 Am St R 754 and note; Bong v. Parmentier, 58 NW 243, 87 Wis 129; Church v. First Nat'l Bank, supra.

97d. Coey v. Cleghorn, 79 P 72, 10 Idaho 166, 109 Am St R 199.

97e. Dowling v. Wood, 101 NW 113, 125 Iowa 244, 106 Am St R 301; Sebright v. Moore, 33 Mich 91; Coey v. Cleghorn, supra.

98. Stephens v. Lawson, 7 Blackf (Ind) 275; Nix v. Goodhile, 63 NW 701, 95 Iowa 282, 58 Am St R 434, (Nix v. Goodhill in 58 Am St R 434); Kiff v. Old Colony, etc. R. Co. 117 Mass 591, 19 Am Rep 429; Rustad v. Bishop, 83 NW 449, 80 Minn 497, 81 Am St R 282; Castile v. Ford, 73 NW 945, 53 Neb 507; McNally v. Wilkinson, 38 Atl 1053, 20 RI 315, holding successive garnishments against exempt wages illegal; Findel v. Chester, 13 P(2d) 442, 169 Wash 151; note 81 Am Dec 467; Sec. 686, supra.

99. State v. Hartley, 52 Atl 615, 75 Conn 104; Peo. v. Clements, 36 NW 792, 68 Mich 655, 13 Am St R 373.

empt property is attempted to be levied upon by an officer, and the owner thereof resists such invasion of his rights, and in the course of resistance, the exemption claimant is injured, a right of action would exist in his favor against the levying officer. No such right of resistance, however, can be asserted by a third party whose property is levied upon, in good faith, by virtue of process in the hands of the officer though not directed against the owner thereof.[1] A different question is presented, however, where the true owner of property which has been seized under a writ against another peaceably repossesses himself of it. In these circumstances he has a right to retain it, and if an officer forcibly retakes it from the owner, he is liable for any damages proximately caused thereby, whether it is personal injury or merely damage to, or conversion of the property.[2]

§ 688. Liability of Officer for Levying upon the Property of a Stranger to His Process.—The process in the hands of the officer gives him no authority to seize property belonging to a stranger thereto, and if he does so, he is liable therefor. As a rule, however, the officer must be apprised of the ownership of a stranger to his writ. But where he levies on the goods of one party under process against another, proof of the sale makes a prima facie case of conversion; indeed, it would seem proof of seizure would suffice.[3] The officer may not resort to the subterfuge of claiming that he is merely selling the execution debtor's interest in the property, if any.[4] It is no defense in replevin action against the officer, by the wife of the execution debtor, where the property levied upon is

1. State v. Richardson, 38 NH 208, 75 Am Dec 173 and note; State v. Cassidy, 54 NW 928, 4 SD 58.

2. Wentworth v. Peo. 4 Scam(Ill) 550; Com. v. Kennard, 8 Pick(Mass) 133; Elder v. Morrison, 10 Wend(NY) 128, 25 Am Dec 548; Brownell v. Durkee, 48 NW 241, 79 Wis 658, 24 Am St R 743, 13 LRA 487; Gilman v. Williams, 7 Wis 329, 76 Am Dec 219, but see State v. Fifield, 18 NH 34; Faris v. State, 3 Ohio St 159; State v. Downer, 8 Vt 424, 30 Am Dec 482; State v. Buchannan, 17 Vt 573; State v. Richardson, supra.

3. Chapman v. Smith, 16 How(US) 114, 14 L ed 868, see sec. 687, note 2 supra; Hanchett v. Williams, 24 Ill App 56; Macias v. Lorio, 6 So 538, 41 La Ann 300; Hopkins v. Swensen, 42 NW 1062, 41 Minn 292; Vaughn v. Fisher, 32 Mo App 29; Vaughn v. Allgaier, 27 Mo App 523; State v. Rucker, 19 Mo App 587; McCarthy v. O'Marr, 47 P 953, 19 Mont 215, 61 Am St R 502; Yank v. Bordeaux, 58 P 42, 23 Mont 205, 75 Am St R 522; Carpenter v. Lott, 31 Hun(NY) 349; Kelly v. Baird, 252 NW 70, 64 ND 346; Dixon v. White S. M. Co. 18 Atl 502, 128 Pa St 397, 15 Am St R 683, 5 LRA 659; Harris v. Tenney, 20 SW 82, 85 Tex 254, 34 Am St R 796; Brownell v. Durkee, 48 NW 241, 79 Wis 658, 24 Am St R 743, 13 LRA 487.

4. Rankin v. Ekel, 1 P 895, 64 Cal 446.

her separate property, that it was left in the possession of the husband, by the officer, after the levy.[5] It is necessary, of course, to allege and prove an illegal and wrongful seizure in order to maintain the action against an officer.[6] While it is true that there may be a conversion of a chose in action, as an open account,[6a] it takes more than a seizure of the account books wherein a record of the accounts is found.[6b]

Where the wife of the defendant in the process brings an action against the officer for levying upon her separate property, it is competent for the husband to testify that he acted under her directions, and used her money in purchasing the property in question.[6c] An action of conversion will not lie against an officer who seizes property in which the party against whom the process is directed owns a share or interest.[7] It hardly need be noted that the principal issue in the action is the ownership of the property, and an officer may defend by making an issue of the claimant's title to the property in question, but if he does so, he must allege ownership in the defendant in the writ.[8] Where an officer is sued for levying upon property of a stranger to the process, it is proper for the officer to plead a general denial to plaintiff's allegations against the officer, and plead affirmatively his official position and to justify the seizure under process, and aver ownership of the property to be in the defendant in the process. These defenses are not inconsistent, and a motion to elect will not lie.[8a]

The question of who was possessed of the property at the time the same was seized may become important; if it was in the possession of the party against whom the process is directed, then the process alone is a prima facie justification to seize it if the process is regular on its face, and issued by competent authority.[9]

5. Gutsch v. McIlhargey, 37 NW 303, 69 Mich 377.

6. Kreher v. Mason, 33 Mo App 297; Sprague v. Parsons, 13 Daly(NY) 553.

6a. Englehart v. Sage, 235 P 767, 73 Mont 139, 40 ALR 590 and note.

6b. Kreher v. Mason, supra.

6c. Gutsch v. McIlhargey, supra.

7. Beezley v. Crossen, 17 P 577, 16 Ore 72.

8. Zaro v. Dakan, 18 P 680, 76 Cal 565; Williams v. Eikenbury, 34 NW 373, 22 Neb 210; Krewson v. Purdom, 3 P 822, 11 Ore 266.

8a. Williams v. Eikenbury, supra.

9. Brinchman v. Ross, 8 P 316, 67 Cal 601; Sexey v. Adkinson, 34 Cal 346, 91 Am Dec 698, however see Masters v. Siller, 56 P 1067, 7 Okla 668, 8 Okla 271; Babe v. Coyne, 53 Cal 201. This case seems to take some note of the fact the attachment affidavit was also introduced in evidence along with the writ, but it is manifest that it is not essential to a full justification where the property at the time of seizure is in the possession of the defendant in the process. Brinchman v. Ross, supra. Indeed the Supreme Court of the United States reversed the Supreme Court of Michigan because the latter court looked to the

It seems where personal property at the time of its seizure is in the possession of the defendant in the process, before an officer can be held for levying thereon it is necessary to allege and prove, that after being advised of the ownership of the claimant, the officer refused to surrender it up.[9a] Where a stranger to the process brings an action for property seized thereunder, by an officer, the law is that the officer should be allowed rather a wide scope of cross-examination of the claimant to disprove his title to the goods levied upon or that property seized is not that claimed by the plaintiff in the action.[9b]

But if the property is in the possession of a stranger to the writ, then the exact converse of the above stated principle is the true rule, and that is, such seizure is prima facie wrongful and illegal. The reason of this is, possession of property raises a presumption of ownership.[10] If an officer is sued for levying upon property of a stranger to the writ, and he attempts to justify under his process, then the onus is cast upon him to prove every fact necessary to establish the validity of the process, and a rightful levy thereunder, including the fact, where the levy is made under an attachment that the defendant was indebted to the plaintiff. He must prove a valid judgment, when the levy is made under an execution.[11] If a claimant's title to property levied upon rests upon a mere colorable sale by the debtor to the claimant and it was in the debtor's possession when seized, then the writ, fair on its face issuing out of a competent court is a sufficient justification. But if the sale is good between the parties, but void only as to creditors, then the officer can justify the taking in such case, only by showing that he represented a creditor, and that the writ under which the seizure was made was regularly issued.[11a]

affidavit and held it defective, and then would not permit the officer to justify under the writ of attachment on account of such defect: Matthews v. Densmore, 109 US 216, 27 L ed 912. reversing 5 NW 669, 43 Mich 461; Damon v. Bryant, 2 Pick.(Mass) 412.

9a. Fuller Desk Co. v. McDade, infra.

9b. Brinchman v. Ross, supra.

10. Fuller Desk Co. v. McDade, 45 P 694, 113 Cal 360; Thornburgh v. Hand, 7 Cal 554; State v. Hope, 88 Mo 430; Rinchey v. Stryker, 28 NY 45.

11. Darville v. Mayhall, 61 P 276, 128 Cal 617; Paige v. O'Neal, 12 Cal 483; Bickerstaff v. Doub, 19 Cal 109, 79 Am Dec 204; Treat v. Dunham, 41 NW 876, 74 Mich 114; Howard v. Manderfield, 17 NW 946, 31 Minn 337; Homberger v. Brandenberg, 29 NW 123, 35 Minn 401; Franklin v. Gumersell, 9 Mo App 84; Ford v. McMaster, 11 P 669, 6 Mont 240; Oberfelder v. Kavanaugh, 32 NW 295, 21 Neb 483; McDonald v. Prescott, 2 Nev 109, 90 Am Dec 517; Keys v. Grannis, 3 Nev 548; VanEtten v. Hurst, 6 Hill(NY) 311, 41 Am Dec 748; Noble v. Holmes, 5 Hill (NY) 194; Fisher v. Kelly, 46 P 146, 30 Ore 1; Thornburgh v. Hand, supra.

Where an officer seeks to justify a levy under process, greater particularity is demanded where the process issued out of an inferior court rather than a court of record. To justify under such process the officer must show, where the process is an execution, that it issued upon a judgment "duly given and made" within the meaning of a controlling statute, and an averment that judgment was "duly rendered" will not suffice.[11b] On the other hand, the weight of authority supports the rule that if the plaintiff claims the property under a transfer from the defendant in the process, then the officer may establish that such transfer was fraudulent and void, and it seems that this need not be necessarily pleaded.[12]

An officer making a levy which turns out wrongfully and for which he is sued, cannot establish in mitigation of damages a release of the levy, unless he also proves that he restored the property to the true owner.[13] If property is levied upon while in the possession of the defendant in the process and is claimed by a third party by virtue of a prior purchase, the onus probandi is thrown upon him to not only prove a valid purchase but also to establish that the plaintiff in the process, or the officer possessing it, had notice of the sale by the defendant in the process prior to the levy and seizure thereof.[14] However, it should be noted that, under some authorities, the retention of possession of the property by the seller is conclusively presumed to be fraudulent while under others, it is only prima facie fraudulent. In those jurisdictions where it is conclusively presumed to be fraudulent, it then, of course, would be unavailing to the claimant to make a showing that he had purchased the property, where he had left it with the defendant in the process, and in the jurisdictions where such circumstance is only prima facie fraudulent, still it is a question of fact for the determination of the trior or triors thereof.[15]

11a. Budee v. Sprangler, 20 P 762, 12 Colo 221; Keys v. Grannis, supra.

11b. Harmon v. Comstock Horse, etc. Co. 23 P. 471, 9 Mont 248.

12. Joshua Hendy Machine Works v. Connolly, 18 P 327, 76 Cal 305; Beach v. Miller, 22 NE 464, 130 Ill 162, 17 Am St R 291; Kenney v. Goergen, 31 NW 210, 36 Minn 190; Tupper v. Thompson, 4 NW 621, 26 Minn 385; Furman v. Tenny, 9 NW 172, 28 Minn 77; Batcher v. Berry, 13 P 45, 6 Mont 448; Carter v. Bowe, 41 Hun(NY) 516, 5 NY St 15.

13. Kreher v. Mason, 25 Mo App 291, see also 20 Mo App 29.

14. West v. St. John, 19 NW 238, 63 Iowa 287.

15. 24 Am Jur page 201, sec. 42.

§ 689. Right of Action against Officers in Favor of Lien Holders.—An execution or other process is no protection for an officer for seizing and selling goods upon which there is a chattel mortgage, conditional sales contract, or other lien, unless there is statutory authority for such seizure and sale. The holder of such lien may maintain an action for the possession of the property where he is in possession thereof at the time of seizure or immediately entitled thereto.[16] An action will lie for possession or conversion, against an officer, in favor of the seller, for levying on the subject matter of a conditional sales contract.[17] In a proper case the holder of a landlord's lien may maintain an action for property covered thereby and seized in an execution or attachment against the tenant.[18] A chattel mortgagee has a right of action, if in possession, or entitled immediately thereto, against a levying officer for the possession of property or for conversion thereof, where the officer levies upon the same under an execution or attachment against the chattel mortgagor.[19]

Where an officer seizes under process chattels covered by a chattel mortgage, to show that the same is covered by another prior outstanding chattel mortgage held by another is unavailing.[19a] An officer who holds a writ against the purchaser of goods and levies the same upon them while in transit may be subject to an action, at the instance

16. Norris v. McCanna, 29 F 757, see sec. 365 supra; Gaylor v. Dyer, 10 F Cas No. 5,283, 5 Cranch CC 461; Holt Mfg. Co. v. Collins, 97 P 516, 154 Cal 265; Rocky Mountain Seed Co. v. McArthur, 272 P 1117, 85 Colo 1; Forbes v. Martin, 32 Atl 327, 7 Houst (Del) 375; Blackfoot City Bank v. Clements, 226 P 1079, 39 Idaho 194; Coleman v. Reel, 39 NW 510, 75 Iowa 304, 9 Am St R 484 and note; Stewart v. Smith, 14 NW 310, 60 Iowa 275; Jacquart v. Jennings, 235 P 101, 118 Kan 224; Malden Center Garage v. Berkowitz, 168 NE 916, 269 Mass 303; Williams v. Raper, 34 NW 890, 67 Mich 427; John S. Brittain Dry Goods Co. v. Buchanan, 79 Mo App 528; K-M Supply Co. v. Moran, 55 SW(2d) (Mo App) 419; Morey & Co. v. Schaad, 121 Atl 622, 98 NJL 799; Carroll v. Anderson, 218 P 1038, 30 Wyo 217.

17. Malden Center Garage v. Berkowitz, supra; John S. Brittain Dry Goods Co. v. Buchanan, supra; Morey & Co. v. Schaad, supra; Gaylor v. Dyer, supra; Holt Mfg. Co. v. Collins, supra; Forbes v. Martin, supra.

18. Remington v. Linthicum, 20 F Cas No. 11,696, 5 Cranch CC 345; Hand v. Howell, 38 Atl 748, 61 NJL 142, 43 Atl 1098, 61 NJL 694; In re Connor 12 Rich.L(SC) 349.

19. Capital Loan Co. v. Keeling, 259 NW 194, 219 Iowa 969; Rankine v. Greer, 16 P 680, 38 Kan 343, 5 Am St R 751; Burton v. Jennings, 148 Atl 424, 158 Md 254; Perry v. Chandler, 2 Cush.(Mass) 237; Brackett v. Bullard, 12 Metc(Mass) 308; Booth-Law Co. v. Spruce, 267 SW (Tex Civ App) 339; State Exchange Bank v. Smith, 166 SW (Tex Civ App) 666; Sanders v. Farrier, 271 SW (Tex Civ App) 293; K-M Supply Co. v. Moran, supra; Blackfoot City Bank v. Clements, supra; Rocky Mountain Seed Co. v. McArthur, supra; Carroll v. Anderson, supra; Jacquart v. Jennings, supra.

19a. Rankine v. Greer, supra.

of the seller, if he refuses to recognize the latter's right of stoppage in transitu.[20] The goods remain subject to the seller's right of stoppage in transitu until they are actually received by the buyer, and the right continues after goods are delivered to a drayman or trucker employed by the buyer. The right exists even if delivered to an officer at the buyer's place of business, if before arrival thereat, the officer has seized the same under process, and if he refuses to recognize the right of the seller to reclaim the goods in these circumstances the officer is liable to the seller therefor.[20a] If the levying officer pays the freight or transportation charges to obtain possession of the goods, then before the seller can reclaim the goods from the officer, the seller will be required to reimburse the officer.[20b] It seems that the holder of a lien of any sort upon goods, who is in possession of them, would be entitled to maintain an action against an officer levying thereon, under process against any one other than the lien holder, whether the lien is under any sort of contract of bailment, or a mechanic's lien, or a freightage lien, or a consignee's lien, who has made advancements on the goods.[21]

Before such lien holder is entitled to maintain a possessory action, or trover, or any action given by statute for the trial of a property right, he must be in possession, or immediately entitled thereto.[22] Before any action can be maintained against an officer for a levy in any of the circumstances hereinabove mentioned, it would seem that he must have had notice or be charged with notice by reason of registration, of the existence of such lien, or had knowledge of facts which upon diligent inquiry would lead to notice; the facts in the possession of the officer being such as would lead a prudent man to investigate.[23] But an officer cannot, lawfully, be resisted in his attempt to seize property subject to a lien unless the officer had notice of such lien, or reasonable cause to believe

20. Harris v. Tenney, 20 SW 82, 85 Tex 254, 34 Am St R 796.

20a. In re M. Burke & Co. 140 F 971; Bayonne Knife Co. v. Umbenhauer, 18 So 175, 107 Ala 496; Weber v. Baesler, 34 P 261, 3 Colo App 464; Note 19 Am Rep 87; Harris v. Tenney, supra.

20b. Spangler v. Butterfield, 6 Colo 356; Rucker v. Donovan, 13 Kan 251, 19 Am Rep 84.

21. Campbell v. Conner, 70 NY 424; Truslow v. Putnam, 40 NY (1 Keyes) 568, 4 Abb Dec (NY) 425; Brownell v. Carnley, 10 NY Super 9.

22. Consol. Hair Goods Co. v. Adams Clark Bldg. Corp. 7 NE(2d) 623, 289 Ill App 576; Curd v. Wunder, 5 Ohio St 92; Walter Connally & Co. v. Steger, 4 SW(2d) (Tex Civ App) 83; Sanders v. Farrier, 271 SW (Tex Civ App) 293.

23. Coleman v. Reel, 39 NW 510, 75 Iowa 304, see note 24a infra, this section; Crawford v. Nolan, 34 NW 754, 72 Iowa 673, see also Plano Manuf'g Co. v. Griffith, 39 NW 214, 75 Iowa 102; Stewart v. Smith, 14 NW 310, 60 Iowa 275; Fox v. Cronin, 2 Atl 444, 4 Atl 314, 47 NJL 493, 54 Am Rep 190; Hand v. Howell, supra.

that it existed.[23a] The form of notice seems to be wholly immaterial so long as the officer had actual knowledge or notice of the lien, or was charged therewith under recording statutes.[24]

If the officer has knowledge of such facts as would lead a prudent man to make inquiry, and such investigation if pursued with ordinary diligence would give knowledge of facts, amounting to notice of which he is sought to be charged, then he is chargeable therewith.[24a] An officer who knowingly levies upon chattels covered by a lien of a stranger to the process is in no better position than if he possessed no process, unless there is a statute in the particular jurisdiction authorizing such levy.[24b] In many states, however, there are statutory provisions for the levying upon property subject to a mortgage or other lien. The statutes of the particular jurisdictions should be consulted and followed. If the officer has notice that the property is mortgaged, that is sufficient even though he does not know to whom.[25] If the lien holder is not in possession, or immediately entitled to possession at the time the property is seized by an officer, he cannot maintain trover or a possessory action therefor, but he may resort to equity.[26]

§ 690. Conversion by an Officer in Levying upon Property Sold in Violation of Bulk Sales Law.—In some jurisdictions an officer levying an attachment or other process at the suit of a creditor of the vendor, upon property sold in bulk without complying with the Bulk Sales Law, is guilty of conversion and liable in damages therefor. This seems to be the rule where the statute makes such merely voidable at the instance of creditors, and between the parties the transaction is final and binding, with the title passing to the purchaser where it will remain until divested by proceedings instituted by a creditor for that purpose.[27] The Vermont court, in Newman v. Garfield,[27a] distinguished between cases of actual fraud, and cases where the same is made fraudulent by statute.

In a majority of jurisdictions an attachment will lie where there has been a sale of a stock of merchandise, or other property, in

23a. State v. Downer, 8 Vt 424, 30 Am Dec 482, see sec. 688 supra.

24. Andrews v. Dixon, 3 B & Ald 645, 5 ECL 371, 106 Eng Rep 797; Hand v. Howell, supra.

24a. Knapp v. Bailey, 79 Me 195, 1 Am St R 295.

24b. Tannahill v. Tuttle, 3 Mich. 104, 61 Am Dec 480 and note.

25. Coleman v. Reel, supra.

26. Consol. Hair Goods Co. v. Clark Bldg. Corp. 7 NE(2d) 623, 289 Ill App 576; Curd v. Wunder, 5 Ohio St 92.

27. Newman v. Garfield, 104 Atl 881, 93 Vt 16, 5 ALR 1507.

27a. Note 27 supra.

violation of the Bulk Sales Statute; and, in those jurisdictions an officer would not be liable for levying thereon at the suit of a creditor; indeed he would be liable if he failed or refused to do so.[27b] A concession is made in the opinion in Newman v. Garfield,[27c] that the rule in some jurisdictions sustains an attachment in such case. An attachment, as a remedy, is provided by the Bulk Sales Statutes in some states.[27d] Where such provision is found in the Bulk Sales Statute, the officer, of course, assumes no liability by seizing the goods under an attachment or other executory process. The remedy under some statutes is by garnishment of the buyer, and where this rule obtains the officer cannot be held liable for serving same.[27e]

§ 691. Officer Not Required to Repay Money Collected in Some Instances.—In some circumstances the officer, where he acts honestly and the facts and circumstances justify it, may keep money to pay an attorney to protect himself against loss on account of a levy made.[28] A reversal of a judgment upon which an officer has made collection does not operate to deprive him of commission for such collection, and he will not be required to repay the same if the execution under which the collection was made was regular on its face, and from a court having jurisdiction of the subject matter.[29] However, an execution issued upon a void judgment will not authorize the officer to retain any money collected thereunder.[30] Where the process, by virtue of which money has been realized, was improperly issued, the court, by reason of its inherent power over its officers, and the sheriff or constable being an officer thereof, can compel him to return the money collected thereunder.[31]

§ 692. Liability for Money Collected.—An officer may be compelled to account for money collected upon legal process, or in his

27b. Kight v. Stephen Putney Shoe Co. 73 SE 740, 137 Ga 493; Riley Penn. Oil Co. v. Fried, 190 SW 1038, 195 Mo App 212; Joplin Supply Co. v. Smith, 167 SW 649, 182 Mo App 212; Ainsworth v. Roubal, 105 NW 248, 74 Neb 723, 2 LRA(NS) 988; Galbraith v. Oklahoma State Bank, 130 P 541, 36 Okla 807; Schumacker-Benzley Co. v. Riddle, 52 Pa Super 6; George A. Kelly Co. v. Snyder, 58 Pa Super 1; Prokopovits v. Kurowski, 174 NW 448, 170 Wis 190.

27c. Note 27, supra.

27d. Brinson v. Monroe, 158 So 558, 180 La 1064, 96 ALR 1206.

27e. Owosso Carriage & Sleigh Co. v. Sweet, 179 SW 257, 107 Tex 307, LRA1916B 970.

28. Johnson v. Haynes, 37 Hun (NY) 303.

29. Clark v. Lamb, 76 Ala 406.

30. Wilson v. Sawyer, 37 Ala 631; Wragg v. Swart, 10 Johns.(NY) 93.

31. McMann v. Superior Court, 15 P 448, 74 Cal 106.

official capacity.[32] He must account for anything received in lieu of money, as a mortgage or other property.[33] If the officer fails to pay money collected, to the party lawfully entitled thereto, he is liable therefor, and may be sued on account thereof. An application of this principle is found in cases where the money is paid to the nominal, instead of the real plaintiff; or where he pays surplus in his hands after the plaintiff's claim is satisfied, to the process debtor, after being notified that there had been an assignment by him of the property sold to another; he is likewise liable for paying funds in his hands to a junior lien holder, when the senior lienor is lawfully entitled thereto.[34] An officer is also liable where he pays over money in his hands which has been legally attached by garnishment.[34a] If the officer treats process as valid under which money is collected, he is required to pay it over, notwithstanding the invalidity of such process. The reason of this is that he cannot be permitted to collect money under process as valid and then assert its invalidity. The principle of estoppel operates here.[35] Prior rights of others, to whom the money has been paid by the officer, or a prior right of another, although not paid out, is a sufficient defense to a charge of nonpayment of money.[36]

§ 693. When Replevin or Detinue Lies against an Officer.—We have already had occasion to advert to the fact that property seized under process, and in the hands of an officer or properly in custodia legis, may not be seized by another officer upon any process whatsoever.[37] This does not apply, however, where the property seized is for any reason not subject thereto, as, where the property of a third party is taken.[38] Where the claimant to the property taken

32. Baker v. Sparks, 81 So 609, 202 Ala 653; Meeks v. Carter, 63 SE 517, 5 Ga App 421; Works v. Byrom, 128 P 551, 22 Idaho 794; Ferguson v. Tutt, 8 Kan 370; Studebaker v. Johnson, 21 P 271, 41 Kan 326, 13 Am St R 287; Norton v. Nye, 56 Me 211; Nash v. Muldoon, 16 Nev 404; Robinson v. Brennan, 90 NY 208.

33. Diamant v. Chestnut, 169 NW 927, 204 Mich 237; Calvin v. Bruen, 39 Ohio St 610; Robinson v. Brennan, supra.

34. Tompkins v. Hemphill, 34 NW 844, 73 Iowa 257; Adler v. Lang, 28 Mo App 440; Titman v. Rhyne, 89 NC 64; Zantzinger v. Old, 1 L ed 375, 2 Dall(Pa) 265; Borlin v. Com. 1 Atl 404, 110 Pa St 454.

34a. Tompkins v. Hemphill, supra.

35. Baker v. Sparks, 81 So 609, 202 Ala 653; Dane v. McArthur, 57 Ala 448; James v. Gurley, 48 NY 163; Bostwick v. Benedict, 57 NW 78, 4 SD 414.

36. State v. Early, 81 Ind 540; Chase v. Bell, 32 La Ann 460; Thomasson v. Kennedy, 3 Rich.E(SC) 440; Summers v. Caldwell, 2 Nott & McC (SC) 341.

37. Secs. 237, 356, supra.

38. Rhodes v. Patterson, 3 Cal 469; Wyatt v. Freeman, 4 Colo 14; Schneider v. Burke, 86 Ill App 160; Cope v. Brentz, 190 Ill App 504; Hadley v. Hadley, 82 Ind 75, see also Had-

under process is a joint owner thereof. and the interest of the process defendant is not susceptible of being segregated, then the officer is entitled to the entire property, and such joint owner may not maintain an action of replevin or detinue therefor. The same rule is applicable with respect to a mortgagee whose lien affects a part of the property, or covers the interest of one of the joint owners.[39]

In some instances, even the process debtor may maintain an action of replevin against an officer, but this seems rather rigidly confined, in the absence of statutory enactment to the contrary, to cases where the judgment or process is void. If the process is void on its face, then relevin or detinue will lie, or any other appropriate statutory action at the instance of the defendant in the process or by another claiming as successor in interest.[40] No right of replevin, or other action seeking possession of goods taken under process can be maintained against an officer where he holds same under voidable process.[40a] Where a debtor confesses judgment in favor of another for the purpose of defrauding the former's creditors, such judgment and an execution issued thereon are not nullities and the officer holding such process may defend his possession of property seized thereunder against all persons except the creditors of the judgment debtor.[40b]

"At common law it was contempt of the court issuing an execution, for the judgment debtor to replevy property taken under it. The general rule is well settled that neither the defendant in execution nor any one claiming under him can maintain replevin against an officer levying an execution, for the reason the property is in the custody of the law." But on the other hand, "a void judgment is in legal effect no judgment. From it no rights can be obtained, being worthless in itself all proceedings founded on it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it are void" and an execution issued thereon under which the debtor's property is seized is no bar to his right of replevin against the officer, and, of course, the

ley v. Hadley, 82 Ind 95; Mitchell v. McLeod, 104 NW 349, 127 Iowa 733; Rankine v. Greer, 16 P 680, 38 Kan 343, 5 Am St R 751; Scott v. Wagner, 42 P 741, 2 Kan App 386; Philips v. Harriss, 3 JJ Marsh.(Ky) 122, 19 Am Dec 166; Hawk v. Lepple, 17 Atl 351, 51 NJL 208, 14 Am St R 677, 4 LRA 48; Scott v. McGraw, 29 P 260, 3 Wash 675.

39. Branch v. Wiseman, 51 Ind 1; Agricultural Credit Co. v. O'Rourke, 211 P 200, 65 Mont 517.

40. Gardner v. Bunn, 23 NE 1072, 132 Ill 403, 7 LRA 729, 18 Ill App 94; Wilson v. Martin, 7 NW 83, 44 Mich 509; Pitkin v. Burnham, 87 NW 160, 62 Neb 385, 89 Am St R 763, 55 LRA 280 and note; Munis v. Herrera, 1 NM 362.

40a. Pitkin v. Burnham, supra.

40b. Pitkin v. Burnham, supra.

execution defendant is not in contempt of court for bringing the action. And the fact that the execution is regular on its face does not change the rule in so far as the right to bring a possessory action is concerned.[41]

But, it must not be supposed that the officer could be sued in trover as for conversion upon seizing the property, if the execution is regular on its face.[41a] However, it would seem to follow that if an officer seized property under an execution issuing on a void judgment and a demand for return of the property was made upon the basis that judgment was void, and such demand were refused, then trover would lie. By this means the officer would be put on notice of the vice of the process.[41b] But where process issued by virtue of an unconstitutional ordinance or statute an action of replevin will not lie to recover property seized thereunder.[41c] If, at the time of commencing the action of replevin or other possessory proceeding for recovery of property alleged to have been wrongfully taken under execution issued against the plaintiff in the replevin action, no judgment had been actually rendered against the plaintiff in such action, but notwithstanding this, his property had been seized under an execution, he may maintain an action or proceeding to recover same, and the entry of a judgment thereafter would not operate in the retrospect and breathe validity into the preceding steps that had been taken.[42]

But where the execution defendant contends the property seized is exempt, or that the same is not subject to seizure for any reason, other than voidness or invalidity of the process, he cannot thereafter, on the trial, contend that the process or judgment on which it issued is void; nor may he question on the trial the manner in which the sale was conducted, nor the place where it was held when he was present thereat. The underlying principle sustaining this position is that "where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold." He is not permitted to, in this manner, ambush his adversary. He is estopped from doing it by

41. Schmieg v. Burkhardt, 215 Ill App 240; Colwell v. Swick, 190 Ill App 369; Balm v. Nunn, 19 NW 810, 63 Iowa 641; Karr v. Stahl, 89 P 669, 75 Kan 387; Nimocks v. McGehee, 52 So 626, 97 Miss 321; George v. Chambers, 11 Mees & W 149.

41a. See sec. 88, supra.

41b. Westenberger v. Wheaton, 8 Kan 169.

41c. Karr v. Stahl, supra.

42. Campbell v. Williams, 39 Iowa 646.

a settled principle of law. Where a claim is made that property is immune from levy by virtue of the exemption statute, the validity of the judgment upon which the process issued is unassailable in an action brought to vindicate the right of exemption.[42a]

The claim of exemptions in property seized cannot be asserted or protected in an action of replevin, detinue, or other possessory action, in the absence of a statute permitting such an action or proceeding, where the process under which it is seized is legal.[43]

§ 694. Maintenance of an Action against an Ex-officer for Wrongful Seizure of Goods.—An ex-sheriff or ex-constable is subject to be sued for the wrongful seizure of goods, during his term in office, by a stranger to the writ.[44]

§ 695. Right to Maintain Action even though Other Remedies Exist.—The right to maintain a civil action against an officer for wrongs committed by him is not destroyed, or impaired by the existence of a statutory, summary, or other remedy.[45]

§ 696. Mandamus to Compel an Officer to Perform His Duty.—A writ of mandamus will issue to compel an officer to execute a writ of possession. Where the court has issued its mandate in the form of a writ of possession to an officer, directing and commanding him to cause the successful party in the action to forthwith have possession of the property described in accordance with the judgment, the duty of the officer to place such party in possession is unequivocal and ministerial in the discharge of which he has no discretion. The reason that a writ of mandamus will lie is that the court in the execution of its mandate will compel the officer to place the successful party in the judgment in immediate possession and give him the benefit of its judgment. It will not do to contend that he has another remedy. It may be true that, for such neglect, the officer would be held for contempt for not obeying the mandate of the writ of possession, but such proceedings would not give

42a. Redenger v. Jones, 75 P 997, 68 Kan 627.

43. Spring v. Bourland, 11 Ark 658, 54 Am Dec 243; Funk v. Israel, 5 Iowa 438; Westenberger v. Wheaton, 8 Kan 169; Buis v. Cooper, 63 Mo App 196; Hawk v. Lepple, 17 Atl 351, 15 NJL 208, 14 Am St R 677, 4 LRA 48, but see Harris v. Austell, 2 Baxt(Tenn) 148; Gilman v. Williams, 7 Wis 329, 76 Am Dec 219.

44. Duke v. Vincent, 29 Iowa 308.

45. Abbott v. Norman, 204 SW 303, 134 Ark 535; Nat'l Bank of New Zealand v. Finn, 253 P 757, 81 Cal App 317; Briley v. Copeland, 14 Ill 38; Englehart v. Sage, 235 P 767, 73 Mont 139, 40 ALR 590.

the plaintiff the benefit of his judgment—the possession of his property. Neither should the plaintiff be relegated to a suit for damages against the officer. Such right of action with its attendant delays and expenses is not a sufficient and adequate remedy. It is not a remedy commensurate with the plaintiff's right. The law is that to supersede the right to mandamus there must be, not only a legal remedy, but one that will effectually afford relief on the subject.[46]

Of course, the writ of mandamus will not lie to compel the execution of a writ of possession against strangers to the process.[47] Neither will a writ of mandamus lie to compel an officer to execute a writ of possession that has not been issued at the time of application.[48] It is generally held that a writ of mandamus will not lie to compel the levy of a simple execution, since there are other plain, speedy, available, and adequate remedies for this dereliction of duty.[49] As to whether mandamus will lie to protect the right of exemption the authorities are in hopeless conflict; with the Supreme Court of Washington holding that it is a proper remedy to protect the exemption right by compelling an officer to release exempt property, and this too, although by statute in that state replevin will lie where exempt property is seized,[49a] while North Dakota holds the exact converse; but the latter court was influenced by a consideration of some supposed discretion reposed in the officer with respect to releasing a levy upon exempt property.[49b]

It is submitted that the Washington decision is bottomed upon the sounder ground. It is the later adjudication also, but its force is weakened to some extent by its silence with respect to the North Dakota holding. No substantial reason appears why a mandamus will not lie to protect this right. These are the only opinions on the matter that our research has disclosed.

The authorities, however, are in substantial accord that an injunction will not lie to protect the exemption right in the absence of statute allowing same.[49c]

46. Fremont v. Crippen, 10 Cal 211, 70 Am Dec 711; North Pac. Coast R. Co. v. Gardner, 21 P 735, 79 Cal 213; Quan Wo Chung v. Laumeister, 23 P 320, 83 Cal 384, 17 Am St R 261; Webster v. Ballou, 81 Atl 1009, 108 Me 522, AC 1913B 567; State v. Stokes, 73 SW 254, 99 Mo App 236.

47. Fogarty v. Sparks, 22 Cal 142.

48. Reeves v. State, 41 So 927, 145 Ala 510.

49. State v. Beck, 93 NE 664, 175 Ind 312; State v. Chambers, 26 Ohio Cir Ct Rep 404.

49a. State v. Gardner, 73 P 690, 32 Wash 550, 98 Am St R 858; State v. Creech, 51 P 363, 18 Wash 186; 1 Remington's Compiled Statutes of Wash. 1922, sec. 708.

49b. Oliver v. Wilson, 80 NW 757, 8 ND 590, 73 Am St R 784.

49c. Driggs' Bank v. Norwood, 4

§ 697. **Negligence Basis of Liability of an Officer.**—An officer's liability, when predicated upon negligence, may often depend upon whether he is guilty of slight, ordinary, or gross negligence, except in some cases where he is practically an insurer. In this connection it may be said that the responsibility of an officer who levies upon a boat, automobile, or other vehicle in which articles are left by the process defendant, but not forming a part thereof at the time of the seizure, and not levied upon, the officer is merely responsible as a bailee without hire; that is, he is liable for gross negligence only.[50] The common law rule is that an officer is absolutely liable for the forthcoming or deliverance of property levied upon by him under an execution, except where the loss was occasioned by an act of God or the public enemy, or inevitable accident.[51]

The severity of the common law rule has been somewhat mollified in some jurisdictions in the light of neoteric adjudications and the officer's liability, under this view, is not that of an insurer, but is dependent upon negligence where property seized by him has been lost or destroyed.[52] And this is probably the generally prevailing view in our time. It may be stated as a general rule that an officer is liable where property, seized by him, has been lost or destroyed, when he is guilty of ordinary negligence, or has failed in the exercise of reasonable care and diligence to preserve and protect it.[53] The burden of proof with respect to an officer's negligence rests upon the party asserting such negligence; that is, in accordance with the general rule, the party holding the affirmative of an issue has the duty of discharging the burden of proof.[54]

In an action for damages against an officer, and the surety on his bond, where the complaint alleged that the sheriff levied on

SW 448, 49 Ark 136, 4 Am St R 30. Richards v. Kirkpatrick, 53 Cal 433; Camp v. Mullen, 35 So 399, 46 Fla 498; McMichael v. Grady, 15 So 765, 34 Fla 219; Parsons v. Hartman, 37 P 61, 25 Ore 547, 42 Am St R 803, 30 LRA 98.

50. Briggs v. Dearborn, 99 Mass 50.

51. In re Shirley, 9 F 901, holding that upon seizure the officer becomes vested with the title to the property. Hartleib v. McLane Adm'r, 44 Pa St 510, 84 Am Dec 464.

52. Cresswell v. Burt, 16 NW 730, 61 Iowa 590; Standard Wine Co. v. Chipman, 97 NW 679, 135 Mich 273,

106 Am St R 394 and note; Palmer v. Costello, 41 App DC 165, LRA1915A 193 and note.

53. Price v. Pace, 296 P 189, 50 Idaho 353; Aker v. Coleman, 88 P(2d) 869, 60 Idaho 118; Reigl v. Converth. 232 P 251, 117 Kan 461; Conover v. Com. 2 AK Marsh.(Ky) 566, 12 Am Dec 451; Kusah v. McCorkle, 170 P 1023, 100 Wash 318, LRA1918C 1158; Phillips v. Eggert, 129 NW 654, 145 Wis 43, AC 1912A 1112, 32 LRA(NS) 132; Palmer v. Costello, supra.

54. Mills v. Gilbreth, 47 Me 320, 74 Am Dec 487.

property under an execution; that third party claims were filed; that the sheriff instituted interpleader proceedings, which were determined in favor of the execution plaintiff, and that a goodly portion of the property had slipped from the sheriff's control, but not because he considered himself not further bound to keep the property for failure of the execution plaintiff to give an indemnity bond, was sufficient allegation of negligence as against a general demurrer.[55] It hardly need be noted that a principal officer is liable for the negligence of his deputy which proximately causes the loss of property held in the deputy's official capacity.[56] It has been held that the officer is not liable for loss of property by fire, simply because it occurred during the temporary absence of a keeper whom he had placed in charge thereof.[57]

§ 698. **Necessity of a Demand as a Condition Precedent to an Action against an Officer.**—If a time is fixed by law by which an officer is to perform a duty or pay over money, after the expiration of that time, no demand is requisite before bringing an action, but, if, on the other hand, such time has not expired then a demand is necessary.[58] No demand is necessary when it would amount to nothing more or less than a useless ceremony; so when an officer has attached goods and improperly released them, there is no necessity of demand that he retake possession thereof. It is immaterial whether release of the attached goods was intentionally or negligently done.[59] It may be stated as a general rule, however, that where money has come into an officer's hands lawfully, and the time for a disbursement of the same has not expired, a demand upon him is a condition precedent to bringing an action.[60] Sometimes this subject is regulated by statute. So, where a judgment has been rendered against an officer, his bond cannot be proceeded against to recover the amount of the judgment until there has been a demand made on him to pay the judgment.[60a] However, it seems that where a judgment is rendered in favor of an officer or his bondsmen, on the ground that a demand was not made, when same is a condition precedent to a suit or action, such judgment is not a bar to a later action, after proper demand has been made. The reason for this rule is that the former judgment only decided that the officer and the sureties on his bond are not liable with-

55. Aker v. Coleman, supra.
56. Price v. Pace, supra.
57. Price v. Stone, 49 Ala 543.
58. Nutzenholster v. State, 37 Ind 457.
59. Isenman v. Burnell, 130 Atl 868, 125 Me 57; Townsend v. Libbey, 70 Me 162.
60. Tracy v. Merrill, 103 Mass 280.
60a. Tracy v. Merrill, supra.

out proof of neglect of the officer on demand by the claimant to pay the debt, and that is a different cause of action than one presented in an action after all precedent steps have been taken.[60b]

§ 699. **Demand as Necessary to Set in Operation a Statute of Limitations.**—A cause of action on the bond of an officer for failure to account for money collected by him does not accrue, so as to set in operation the statute of limitations, until there has been a demand, or until the officer has made a return to the court, which should be followed by the payment of money. Where an officer has collected money not upon any process, as, where it is paid to him as a tender, the cause of action does not accrue, and consequently the statute of limitations does not begin to run, until a demand is made. The law will not presume an officer is guilty of malversation with respect to money in his hands, as a general rule, until the money has been demanded of him; so the statute of limitations does not begin to run in favor of an officer, who has converted money deposited with him, as a tender, by a defendant until a demand therefor has been made, or until the officer has made a return showing that he has the money. The rule is the same where the officer's return shows that he is under a duty to do or perform any other act which is the subject of the suit.[61]

In an action for the approval of insufficient sureties on a replevin bond, which is required to be taken and approved by the officer, the statute of limitations begins to run from the date of final judgment in the replevin action.[62] So too, a cause of action against an officer for the unauthorized release of attachment accrues only on the final determination of the attachment suit.[63] A cause of action against an officer for not paying over the proceeds of attached property does not accrue until there has been a final judgment in the attachment suit, establishing plaintiff's right to such proceeds, as has already been suggested. This rule is not varied, nor rendered inapplicable, by the fact that there was an order of court made during the pendency of the action requiring such proceeds to be paid to the clerk of the court.[64] Where an officer makes a false return, a cause of action by one injured thereby does not accrue until the injured party has notice of the making of such return. And the operation of the statute of limitations is, as of that

60b. Tracy v. Merrill, supra.
61. Tracy v. Merrill, 103 Mass 280, see also State v. Finn, infra, this section; Kirk v. Sportsman, 48 Mo 383; State v. Lidwell, 11 Mo App 567.
62. Harriman v. Wilkins, 20 Me 93.
63. Lesem v. Neal, 53 Mo 412.
64. State v. Finn, 11 SW 994, 98 Mo 532, 14 Am St R 654.

date, set in motion. However, the operation of the statute of limitations is not stayed until money is paid on a judgment based on a false return of the summons therein. But it may be stated, as a general rule, that the cause of action accrues, and the statute of limitations begins to run from the making of a false return.[64a]

§ 700. Summary Proceedings.—In most states there are to be found statutory enactments authorizing summary proceedings against officers, and sometimes their bondsmen, for misfeasance, nonfeasance, or malfeasance, on the part of such officers. The statutes in any jurisdiction where the question arises should be consulted in connection therewith. Whatever would be a defense in an ordinary action at law or suit in equity would be a defense to a summary proceeding.[64b]

§ 701. Duty to Pay Over Money or Deliver Property Taken under Search Warrant.—Money or property found by an officer in the execution of a search warrant is regarded as coming into his hands in his official capacity, and it is the duty of such officer to pay over the same or deliver the property seized to the lawful owner thereof, upon proper application therefor, or in accordance with the directions issued by the court out of which the search warrant issued, and an action will lie in case of a default in this respect. The officer may be warranted in holding such property for evidence in a future criminal prosecution, but except as hereinafter noted, he is not warranted in treating it as derelict.[65] In a proper case, of course, such articles may be forfeited and destroyed, proper proceedings being had therefor.[66] It is the duty, however, of an officer, in making a search, and finding the money or property searched for, to take it into his possession, subject to such disposition thereof thereafter as the law directs.[67]

§ 702. Liability of an Officer for Levying on Exempt Property.—An action will lie against an officer, in general, for levying on property which is exempt to the debtor. However, the remedy is usually confined to an action for damages or trover.[68] As to whether

64a. Foley v. Jones, 52 Mo 64; Lesem v. Neal, 53 Mo 412, at page 421.

64b. See sec. 705, note 94 infra.

65. U. S. v. Wilson, 23 F(2d) 112; Norton v. Nye, 56 Me 211; State v. Ware, 154 P 905, 155 P 364, 79 Ore 367.

66. Glennon v. Britton, 40 NE 594, 155 Ill 232; Gray v. Kimball, 42 Me 299.

67. Boston & M. R. Co. v. Small, 27 Atl 349, 85 Me 462, 35 Am St R 379.

68. Haswell v. Parsons, 15 Cal 266, 76 Am Dec 480; McCoy v. Brennan, 28 NW 129, 61 Mich 362, 1 Am St R 589;

or not a duty rests upon a claimant to make claim thereto, the authorities are in conflict. Some authorities hold that in the absence of an express statutory requirement demanding it, a claim as a general rule is unnecessary[69] except as hereinafter noted. Some decisions holding that a claim for exemption is unnecessary are influenced by a consideration of the nature of the exemption statute in the particular jurisdiction and the articles seized where, from a consideration of these matters, it is clearly apparent that the articles or property is exempt, then a demand would be superfluous, or it would be an idle ceremony to make a demand therefor when it is apparent that such property is exempt.[70]

There are other decisions that hold that as a condition precedent to be entitled to exempt articles a claim therefor must be made, or a right thereto, in some manner, imparted to the officer.[71] In the absence of a controlling statute, the right of replevin does not exist in favor of the claimant of exemptions against an officer who has seized a claimant's property directed against such claimant.[72] The sounder rule seems to be that where there are certain enumerated articles that are absolutely exempt, and which the officer is bound, at his peril, to notice, and not seize on process unless turned out to him by the debtor waiving his right to the exemption. But there are other articles, and in some jurisdictions, the exemption, by the terms of the law, depends upon the selection to be made by the debtor, and without such selection the right of exemption does not exist, and without selection it is the duty of the officer to proceed with the levy. In this latter mentioned class of property, or in those jurisdictions where the right to exemption is dependent upon selection or some other condition no right of action can exist until the conditions upon which the exemption is dependent are com-

Hutchinson v. Whitmore, 51 NW 451, 90 Mich 255, 30 Am St R 431; Church v. First Nat'l Bank, 238 NW 192, 255 Mich 595, 82 ALR 645; Oliver v. Wilson, 80 NW 757, 8 ND 590, 73 Am St R 784; Spangler v. Corless, 211 P 692, 61 Utah 88, 28 ALR 72.

69. Parsons v. Thomas, 17 NW 526, 62 Iowa 319, see sec. 419 supra; Winstead v. Hicks, 121 SW 1018, 135 Ky 154, 135 Am St R 446; Johnson v. Lang, 51 Atl 908, 71 NH 251, 93 Am St R 509.

70. Woods v. Keyes, 14 Allen (Mass) 236, 92 Am Dec 765; Vanderhorst v. Bacon, 38 Mich 669, 31 Am Rep 328; Lynd v. Picket, 7 Minn (Gil 128) 184, 82 Am Dec 79; Johnson v. Lang, supra.

71. Angell v. Johnson, 2 NW 435, 51 Iowa 625, 33 Am Rep 152.

72. Spring v. Bourland, 11 Ark 658, 54 Am Dec 243; Funk v. Israel, 5 Iowa 438; Westenberger v. Wheaton, 8 Kan 169; Buis v. Cooper, 63 Mo App 196; Hawk v. Lepple, 17 Atl 351, 51 NJL 208, 14 Am St R 677, 4 LRA 48. but however see Harris v. Austell, 2 Baxt(Tenn) 148; Turner v. Staley, 3 Tenn Civ App 47; Gilman v. Williams, 7 Wis 329, 76 Am Dec 219.

plied with, and it would seem that in such cases a demand, as a condition precedent to an action could not be dispensed with.[72a]

It may be stated as a general rule that the levying officer is under no duty to advise the process debtor of his rights with respect to exemptions,[73] but a different rule, however, obtains in Missouri, but in that state, if the claimant learns of his right in time to assert it, the levying officer is not liable for failing to apprise the debtor of his right in respect to such exemptions.[73a] It has even been held, however, that an action for malicious prosecution will lie against one who maliciously, and without probable cause, garnishees earnings of his debtor, and that there is malice and lack of probable cause where the debtor knows the earnings to be exempt but seeks to coerce the debtor into payment out of his exempt earning to prevent his discharge by the debtor's annoyed employer,[74] and, no doubt, an officer knowingly participating in the misconduct of a creditor, as hereinabove suggested, would be liable severally or jointly with such creditor. If an officer in seizing exempt property knows it to be such, or acts maliciously, or oppressively, or acts in defiance of the debtor's legal right to claim an exemption punitive damages may be assessed against him. Mental suffering in such cases may be considered in fixing the damages.[74a] Ordinarily, however, and in the absence of aggravating circumstances, the measure of damages is the value of the exempt property, together with interest thereon from the date of seizure.[74b]

§ 703. Liability for Money Collected on an Execution and Disbursement Thereof.—With respect to costs awarded by a judgment and collected on an execution, the sheriff or constable is under a duty to pay it to the party entitled thereto. In the absence of statutory provision to the contrary, the great weight of authority is to the effect that such costs belong, absolutely, to the party, to whom they are awarded, and the sheriff or constable may safely pay the same to

72a. Mann v. Welton, 32 NW 599, 21 Neb 541; Frost v. Shaw, 3 Ohio St 270.

73. Parsons v. Evans, 145 P 1122, 44 Okla 751, LRA1915D 381, see also sec. 421, supra.

73a. State v. Barada, 57 Mo 562, see sec. 421, supra; State v. O'Neill, 78 Mo App 20.

74. Nix v. Goodhile, 63 NW 701, 95 Iowa 282, 58 Am St R 434 (Nix v. Goodhill in 58 Am St Rep 58).

74a. Matteson v. Munro, 83 NW 153, 80 Minn 340; Lynd v. Picket, 7 Minn(Gil 128) 184, 82 Am Dec 79 and note; Cronfeldt v. Arrol, 52 NW 857, 50 Minn 327, 36 Am St R 648 and note; Friel v. Plumer, 43 Atl 618, 69 NH 498, 76 Am St R 190, but see note 68 Am St R 272; Stringer v. Elsaas, 163 NW 558, 37 ND 20.

74b. Winstead v. Hicks, 121 SW 1018, 135 Ky 154, 135 Am St R 446; State v. Bacon, 24 Mo App 403.

him, along with the balance of the judgment, and when he has done so, he will be free from obligation to the clerk of the court, witnesses, and the like.[75] So, the rule seems to be well settled that where judgment has been rendered in favor of the plaintiff, the whole judgment, including costs, belongs to him. He is supposed to have paid all costs in advance, and where property is seized, sold for cash to satisfy the charge, and has been bid in by the plaintiff in the execution, the sheriff has no right on his refusal to pay the costs to resell the property, and any sale attempted for that purpose is void.[76]

An officer making a sale under execution is responsible for the safekeeping of the money arising therefrom.[77] Of course, he is not liable for disbursement or disposition of money collected on an execution unless he has in some way violated a legally imposed duty.[78] Even an agreement between the parties may not be sufficient in all cases to release a sheriff with respect to the care, control, and distribution of funds in his hands collected on an execution, or otherwise lawfully.[79] If he leaves the money in the hands of a third party, the officer is responsible therefor.[80] Unless authorized by a proper court order, an officer who loans money in his official custody is responsible therefor, and even where a court order is made, he is under duty of strict compliance with the order to relieve himself from liability.[81] As a common law proposition, the officer may pay the money into court, and discharge his responsibility thereby, but under the rules generally recognized now, it is his duty to pay the same to the party to whom it belongs.[82] If the officer deposits money, collected by him in his official capacity, on an execution or otherwise, in a bank, and the bank fails, he is liable, as a general rule, if he were negligent in any way, or was guilty of bad faith.[83]

75. Armsworth v. Scotten, 29 Ind 495; Clay v. Moulton, 70 Me 315; Nutter v. Varney, 10 Atl 615, 64 NH 334; McClure v. Fullbright, 146 SE 74, 196 NC 450; Howard Bldg. & Loan Ass'n v. Phila. & R. R. Co. 102 Pa 220; Sims v. Anderson, 1 Hill(SC) 394; DeLaGarza v. Carolan, 31 Tex 387.

76. Kershaw v. Delahoussaye, 9 Rob.(La) 77; Williams v. Gallien, 1 Rob.(La) 94.

77. Robinson v. Garth, 6 Ala 204, 41 Am Dec 47; Coursey v. Cornwell, 65 SW(Tex Civ App) 73.

78. Porter v. Burtis, 221 NW 741, 197 Wis 227.

79. New Orleans v. Waggaman, 31 La Ann 299, see sec. 670A, supra.

80. Watkins v. Cawthorn, 33 La Ann 1194.

81. Lindsey v. Cock, 40 Ga 7; Hubbard v. Elden, 2 NE 434, 43 Ohio 380.

82. Nelson v. Kerr, 2 Thomp & C 290, aff. 59 NY 224; Buckley v. Sharp, 196 NYS 327, 114 Misc 206; Frazier's Appeal, 9 Atl 493, 6 Sad(Pa) 492; Nelson v. Williams, 4 Hayw(Tenn) 161.

83. Wells-Dickey Co. v. Benjamin, 239 P 771, 74 Mont 170; Ikert v. Wells,

§ 704. Measure of Damages as Applied against Officers.—General rules with respect to the measure of damages are applicable to these cases, for example, an officer selling exempt property is liable for the reasonable market value thereof.[84] Like other cases where no substantial damages have been shown but a right has been invaded, an officer is liable for at least nominal damages.[85] In case of conversion of property, the damage is the reasonable market value thereof.[86] The general rule that actual compensation will be awarded in cases generally applies in cases against officers.[87] As in other cases, unless the misconduct is intentional or in bad faith, attorneys' fees are not allowable.[88] It seems in those jurisdictions where appraisers are appointed to appraise property, and the value of the property is involved in an action, that such appraisal is prima facie evidence of the value, but is not conclusive.[89] The rule with respect to the measure of damages for false arrest, in the absence of a showing of circumstances so as to bring it within the rule with respect to the granting of punitive damages, the measure of recovery is the same in the case where an officer is sued as in other cases. The plaintiff in such an action may recover for the value of time during his detention and other losses, as well as bodily and mental injuries sustained by reason thereof.[90]

§ 705. Defenses by Officers.—An officer of the law who has been sued has an absolute right to conduct his own defense, regardless of who else may be interested in defending the action, and this is true also in those cases where he has been indemnified against liability.[91] And, of course, he is liable to be taxed with costs in case of failure the same as any other litigant and, under some statutes, in addition, he may be penalized.[92] Where he has his in-

13 Ohio Cir Ct NS 213, 32 Ohio Cir Ct 82.

84. State v. Bacon, 24 Mo App 403, see sec. 702, notes 74a and 74b.

85. Brown v. Bridges, 8 SW 502, 70 Tex 661.

86. Norris v. McCanna, 29 F 757; Ellis v. Allen, 2 So 676, 80 Ala 515; Jones v. Peo., 19 Ill App 300; Warren v. Kelley, 15 Atl 49, 80 Me 512; Vaughn v. Fisher, 32 Mo App 29; Hamilton v. Lau, 37 NW 688, 24 Neb 59; Barlass v. Braasch, 42 NW 1028, 27 Neb 212.

87. Keith v. Haggart, 48 NW 432, 2 ND 18, see sec. 702, supra.

88. Leonard v. Maginnis, 26 NW 733, 34 Minn 506.

89. Carson v. Golden, 36 Kan 705.

90. Hays v. Creary, 60 Tex 445; Bonesteel v. Bonesteel, 30 Wis 511.

91. Peck v. Acker, 20 Wend(NY) 605.

92. Lawyers Co-op. Pub. Co. v. Bennett, 16 So 185, 34 Fla 302; Van Gelder v. Hallenbeck, 2 NYS 252, 15 NY Civ Proc 333, 18 NY St 19, 49 Hun 612; Baughn v. Allen, 73 SW (Tex Civ App) 1063.

demnitor substituted in his place as a party, he is not entitled to costs unless he has expended the same, and particularly, he is not entitled to the allowance of costs for counsel fees where he is represented by a district, prosecuting, or other attorney, paid a salary by the state or county.[93] Whatever would be a defense in a consuetudinary action would likewise be a valid defense in summary proceedings.[94]

93. Coddington v. Harburger, 137 NYS 536, 77 Misc 211.

94. Billingsly v. Rankin, 2 Swan (Tenn) 82.

CHAPTER XXXII

COMPENSATION OF SHERIFFS AND CONSTABLES

SECS.

§ 706. Compensation of a Sheriff at Common Law.—At ancient common law, the sheriff and the constable were not entitled to any compensation whatever, so it is apparent that the right to compensation is wholly statutory, and the measure thereof is dependent upon the terms of the statute.[1] Since the right of a sheriff or constable to compensation is dependent upon, and measured by the terms of the statutory enactment, and such statutes being in derogation of the common law, they are strictly construed [2] and when an officer claims compensation, it is incumbent upon him to point to the particular statutory provision authorizing the allowance thereof.[3] Generally, where sheriff or constable collects fees, or compensation not authorized by statutory law, a recovery thereof by an action at law or suit in equity will lie.[3a] In an action by an officer to recover compensation due him, a setoff, against such claim, is proper, where he has theretofore been overpaid [3b]

A sheriff or constable is not entitled to compensation, as a general rule, for services performed in the discharge of his public duties unless, of course, it is otherwise expressly provided for by statute.[4] However, where a city, county, or other political subdivision engages an officer to do special detective work, which is not a part of his legally imposed official duties, he may recover therefor.[4a] The compensation of a sheriff or constable being governed by statute, these should be considered in the jurisdiction where the question arises. An agreement between an officer and a litigant for compensation in excess of that allowed by statute is against public policy and is void.[4b] Even expenses allowable to an officer in the discharge of his duties are restricted to those authorized by statute.[4c]

An officer cannot charge a litigant extra for services rendered in the discharge of his duties; so an officer cannot charge for watching property seized under process, nor for boxing it, nor cartage, storage, nor insurance thereon. Neither may he charge for preparing property, levied upon, for sale.[4d] Where a reward is offered, and to earn the same an officer is compelled to perform services outside of the ambit of his legally imposed duties, he may, upon

1. Preston v. Bacon, 4 Conn 471; Shipp v. Rodes, 245 SW 157, 196 Ky 523; Cape Sable Co's Case, 3 Bland (Md) 606; C. B. Rogers & Co. v. Simmons, 29 NE 580, 155 Mass 259; Riopee v. Worcester, 99 NE 478, 213 Mass 15; Farnsworth v. Melrose, 122 Mass 208; Hartley v. Granville, 102 NE 942, 216 Mass 38, 48 LRANS 392, AC 1915A 725; Peck v. City Nat'l Bank, 16 NW 681, 51 Mich 353, 47 Am Rep 577; Shed v. Kansas City, St. J. & C. B. R. Co., 67 Mo 687; Baca v. Torrance County, 214 P 757, 28 NM 458; Campbell v. Cothran, 56 NY 279; Crofut v. Brandt, 58 NY 106, 47 How Pr 263, 17 Am Rep 213, 5 Daly 124, 46 How Pr 481; O'Brien v. Allen, 83 NYS 251, 40 Misc 693; Tyler County Court v. Long, 77 SE 328, 72 W Va 8, AC 1915B 808.

2. Tyler County Court v. Long, supra; Baca v. Torrance County, supra.

3. Northern Alabama R. Co. v. Lowery, 57 So 260, 3 Ala App 511; Brannin v. Sweet Grass County, 293 P 970, 88 Mont 412.

3a. U. S. v. Gillmore, 189 F 761; Peo. v. Van Ness, 21 P 554, 79 Cal 84, 12 Am St R 134; Tyler County Court v. Long, supra, note AC 1915B 811.

3b. Puterbaugh v. Wadham, 123 P 804, 162 Cal 611.

4. Buek v. Nance, 70 SE 515, 112 Va 28, AC 1912C 1293; Hartley v. Granville, supra.

4a. Hartley v. Granville, supra.

4b. Wilcoxson v. Andrews, 33 NW 533, 66 Mich 553; Grayrock Land Co. v. Wolff, 121 NYS 953, 67 Misc 153; Peck v. City Nat'l Bank, supra.

4c. Follansbee v. St. Clair Co., 35 NW 257, 67 Mich 614.

4d. Fletcher v. Aldrich, 45 NW 641, 81 Mich 186; Shed v. Kansas City, St. J. & C. B. R. Co., 67 Mo 687; Crofut v. Brandt, 58 NY 106, 47 How Pr 263, 17 Am Rep 213, 5 Daly 124, 46 How Pr 481.

compliance with the terms of the offer collect same; but not so, where he does no more than his legal duty requires; so it is contrary to public policy and sound morals, and a violation of well established legal principles, to permit a public officer to accept an offer of reward for the performance of a service which the law enjoins on him as a duty, and in such case he cannot demand, nor enforce by law the payment thereof, although he has performed the act or service for which it was offered, as apprehended the wanted person, discovered stolen property, or obtained information.[4e]

If the reward is offered for the apprehension of a named person, and he is arrested by an officer, who holds a warrant for the arrest of such person, then the presumption is indulged that the arrest was made in the official, rather than the private capacity of the officer, and he cannot claim the right to the reward by asserting he acted in the capacity of a citizen in making the arrest.[4f] But if public money is appropriated to offer as a reward, and in the appropriation, officers of the law are included in the offer, or if, by statute, officers are authorized to collect rewards, then they may do so.[4g]

§ 707. A Sheriff May Look to Whom for His Compensation.—Of course, the statute in the particular jurisdiction will govern as to whom a sheriff or constable must look for his compensation. A presumption is indulged that the fees of a sheriff or constable are paid as the services are rendered.[5] It seems to be a general rule that where a sheriff or constable levies upon property and the same passes, thereafter into a court of bankruptcy for administration, that the officer is entitled to be paid his costs before surrendering the property to a receiver or trustee acting under authority of the bankruptcy court.[5a] An officer is entitled to be reimbursed for his costs and expenses in keeping property lawfully seized by him un-

4e. Bronnenberg v. Coburn, 11 NE 29, 110 Ind 169; Studley v. Ballard, 47 NE 1000, 169 Mass 295, 61 Am St R 286; Pool v. Boston, 5 Cush(Mass) 219; Dunham v. Stockbridge, 133 Mass 233; Brophy v. Marble, 118 Mass 548; Burkee v. Matson, 130 NW 1025, 114 Minn 233, 34 LRANS 924; Rogers v. McCoach, 120 NYS 686, 66 Misc 85; Somerset Bank v. Edmund, 81 NE 641, 76 Ohio St 396, 10 AC 726, 10 LRA NS 1170; Kasling v. Morris, 9 SW 739, 71 Tex 584, 10 Am St R 797; Russell v. Stewart, 44 Vt 170; Buek v. Nance, 70 SE 515, 112 Va 28, AC 1912C 1293 and note; Hartley v. Granville, supra.

4f. Somerset Bank v. Edmund, supra.

4g. Note 10 AC 729.

5. Gurley v. Lee, 11 Gill & J(Md) 395.

5a. In re Schmidt & Co., 165 F 1006, 91 CCA 664, 21 ABR 593; Taubel-Scott-Kitzmiller Co. v. Fox, 44 S Ct 396, 264 US 426, 68 L Ed 770, 2 ABRNS 912; Zeiber v. Hill, 30 F Cas 18,206, 1 Saw 268, 8 NBR 239.

der state court process, which thereafter passes into, and is administered by a court of bankruptcy.[5b]

Generally, it is the duty of an officer to look to the party placing process in his hands for compensation and reimbursement for expenses, and this is true without regard to who is successful in the action. The party for whom the services are rendered in the first instance must pay for the same, and then at the termination of the suit the costs will be taxed and will belong to the successful party.[6] An officer has a right to refuse to deliver a certificate of sale, or other muniment of title, until his fees and lawful charges have been paid. The rule is the same where the judgment creditor bids in the property. But there is conflict of authority on the matter.[7]

§ 708. An Officer Not Entitled to Compensation where the Services Performed Are Beyond the Territorial Limits of His Authority.—In the absence of a statute authorizing such payment, an officer is not entitled to compensation or expenses, for services performed beyond the territorial limits of his county.[8] The very sound reason underlying these holdings is that "manifestly, a sheriff cannot perform any official duty outside of the state" or territory within which he may lawfully exercise his authority.[8a]

§ 709. An Officer Is Not Entitled to Make Profit on Property in His Lawful Custody.—An officer is not entitled to devote personal property in his custody to profitable employment, and retain the proceeds of the gain therefrom,[9] and if he employs property in his possession gainfully, he can be required to account for any profit derived therefrom.[10] But an injunction will not lie to restrain an officer from turning over to another to use property in his possession under seizure by virtue of a writ.[10a] Indeed, it may be his

5b. In re Schmidt & Co., supra; Zeiber v. Hill, supra.

6. Houssiere Latrielle Oil Co. v. Jennings-Heywood Oil Synd., 40 So 727, 116 La 347; Joyce v. Morgan, 23 Atl 78, 66 NH 487; Craft v. Merrill, 14 NY 456; Jackson v. Anderson, 4 Wend (NY) 474; McCarthy v. Hughes, 88 Atl 984, 36 RI 66, AC 1915D 26; American Wrecking Co. v. McManus, 181 NW 235, 183 NW 250, 174 Wis 300; Zeiber v. Hill, supra.

7. Roberts v. Ingalls, 135 P 927, 36 Nev 325, AC 1915C 1119, 48 LRANS 542, and note.

8. Brannin v. Sweet Grass County, 293 P 970, 88 Mont 412; Northern Trust Co. v. Snyder, 89 NW 460, 113 Wis 516, 90 Am St R 867.

8a. Northern Trust Co. v. Snyder, supra.

9. Price v. Cutts, 29 Ga 142, 74 Am Dec 52.

10. Callaway v. Bobo, 15 La Ann 467.

10a. Sumner v. Bell, 44 SE 973, 118 Ga 240.

duty, when he seizes productive real or personal property, to collect the rents, issues, and profits thereof, and to account for the same to the court, and it would seem he might be guilty of neglect for failing in this respect.[11] However, he is not responsible for a mere temporary use of property seized by him which results in no injury to the property and no particular gain to the officer.[12] If he allows another to use the property unlawfully, it may convert his lawful possession into that of a trespasser ab initio.[13] But the better rule seems to be that the officer is responsible for property seized. He must have the property forthcoming to be delivered in conformity with law or the judgment of the court. He is not, in the absence of statute, required to deliver it to anyone during pendency of the case. He may retain it in his own possession, or deliver it to another, but if he delivers it to another, he does this at his peril and when he is called upon to deliver the property, as the law directs or the judgment of the court requires and he fails, he may be attached as for contempt of court, and the party aggrieved may bring an action for damages against him, or on his official bond, as for a breach of his official duty. But how he shall dispose of it during the pendency of the case is a matter left largely to his discretion. The law requires him to take care of the property, but does not set forth the details to be followed in so doing. He may intrust it to others at his peril. If he derives a return from its use, he may be liable as for hire, and he may not be allowed to charge for the keeping.[13a]

An officer is not converted into a trespasser ab initio by threshing grain he has lawfully in his possession, and placing same in an elevator, although such conduct may render him liable to an aggrieved party.[13b] It would seem, in order for an officer to hire out personal property in his custody to another he should first procure the approval of the court so to do. If property seized under process is replevined from the officer, he is not entitled to claim damages for being deprived of the use and benefit thereof.[14] It has been held that an officer has no authority to use property levied upon and in his custody for the purpose of gain or to pay the expenses of keeping.[15]

11. Conte v. Handy, 34 La Ann 862.
12. Paul v. Slason, 22 Vt 231, 54 Am Dec 75.
13. Collins v. Perkins, 31 Vt 624.
13a. Sumner v. Bell, supra.
13b. Ladd v. Newell, 24 NW 366, 34 Minn 107.
14. George v. Dardanelle Bank & Trust Co., 244 SW 25, 155 Ark 167; Tandler v. Saunders, 22 NW 271, 56 Mich 142.
15. Bushey v. Raths, 7 NW 802, 45 Mich 181; George v. Dardanelle Bank & Trust Co., supra; Tandler v. Saunders, supra.

§ 710. No Extra Compensation for Performance of Official Duty.—An officer of the law whose compensation is fixed by statutory enactment cannot, by contract or otherwise, collect extra compensation for the discharge of his official duties.[16] This cannot be accomplished indirectly by making a contract for extra compensation for doing his duty and then suing on quantum meruit.[17] But, an officer may recover compensation for services performed outside of his official duties although in some respects related thereto, where he acts as an individual for parties, and not in his official capacity.[18] If a sheriff or constable is engaged to go without the territorial ambit of his lawful authority to make an arrest, perform a service, or search for a fugitive, it seems that he may recover therefor from the person engaging him to perform the service.[19] It would seem that Brown v. Godfrey enunciates a sound rule, for it must be readily apparent that whenever an officer proceeds without the territorial limits of his authority he ceases to be such, and he cannot be acting in an official capacity and he must be, while there, performing services in his private capacity for which it would appear he might collect reasonable compensation either upon an express promise or implied contract.[20]

§ 711. Compensation as Affected by Irregularity of Process.—The protection by process rule merely goes to the extent that where an officer acts under process, valid on its face, issued out of a court having jurisdiction of the subject matter, such may be set up by him when he is assailed. In other words, the rule is one of protection only. It may be resorted to by him as a shield but not used as a sword. In other words, he may only resort to the rule where it is necessary for his defense, and not where he is the aggressor. Therefore, where an officer acts under void process, though regular

16. Preston v. Bacon, 4 Conn 471; Vandercook v. Williams, 1 NE 619, 8 NE 113, 106 Ind 345, see sec. 706, supra; Fort Wayne v. Lehr, 88 Ind 62; Miller v. Embree, 88 Ind 133; King v. Shepherd, 26 NW 82, 68 Iowa 215; Day v. Townsend, 30 NW 753, 70 Iowa 538; Shattuck v. Woods, 1 Pick.(Mass) 171; Willemin v. Bateson, 29 NW 734, 63 Mich 309; Andrews v. Wilcoxon, 33 N W 533, 66 Mich 553; Phoenix Ins. Co. v. McEvony, 72 NW 956, 52 Neb 566; Edgerly v. Hale, 51 Atl 679, 71 NH 138; Crofut v. Brandt, 58 NY 106, 47 How 263, 17 Am Rep 213, 5 Daly 124, 46 How Pr 481; Hatch v. Mann, 15 Wend(NY) 44; Brown v. Godfrey, 33 Vt 120.
17. Andrews v. Wilcoxon, supra, see sec. 706, supra.
18. U. S. v. Stowe, 19 F 807; Blake v. Baldwin, 5 Atl 299, 54 Conn 5; Brown v. Godfrey, supra.
19. Brown v. Godfrey, supra; Day v. Townsend, supra.
20. Brannin v. Sweet Grass County, 293 P 970, 88 Mont 412, see sec. 708, supra; Northern Trust Co. v. Snyder, 89 NW 460, 113 Wis 516, 90 Am St R 867.

on its face, or under a judgment that is later set aside, he cannot collect his fees and commissions for services rendered thereunder. Process issued on a void judgment is likewise void although it may be regular on its face, and true it is, it would protect the officer and save him from a loss, but it cannot be used to make a gain.[21] It would seem to be an inescapable conclusion, that where an officer levies upon exempt property of his own volition, without any direction from the plaintiff in the action, or arrests one who is exempt from arrest in a civil action, he would not be entitled to compensation for the services thus rendered.[22]

§ 712. Collection of Fees in Advance of Rendition of Service.—At common law, it was the duty of the sheriff to execute the King's writs without reward, and it is possibly true that in some states of the United States of America a state's process must be served without compensation. In some states, however, the sheriff is paid a salary but it is his duty to collect fees fixed by law and they go to the county. In many states an officer, whether sheriff or constable, is entitled to make a demand for his fees in advance, except where he serves process or performs services for the state or county. In the absence of statutory authority therefor, an officer has no right to demand his fees or compensation in advance. He must perform, in some jurisdictions, the duties imposed by law, and he is remitted to the ordinary proceedings in the courts to effect a collection.[22a] Of course if there is statutory authorization therefor, an officer is within his right in demanding his fees in advance, and where such statutes obtain, then he may refuse, as a general rule, to perform any service until his fees and lawful charges are paid.[22b] If the officer has in his hands money of the plaintiff sufficient to cover his fees and he is directed by the plaintiff to serve process, he cannot defend, when for failure to serve such process, on the ground his fees were not paid in advance.[22c] If an officer undertakes the service of process without demanding the advance payment of his fees, then he is under a duty to complete same without such payment, and he may not refuse to make a return of the process after having served the same until his fees and charges are paid.[22d] Where an officer is paid a salary, and is required to collect fees and pay same into the county, and it is his duty to collect such fees in advance of rendering service, his failure to so collect does not affect his liability to the county, neither does such failure to collect impair his right so to do, after the rendition of the service.[22e]

21. Wilson v. Sawyer, 37 Ala 631; Collier v. Windham, 27 Ala 291, 62 Am Dec 767; Nowlin v. McCalley, 31 Ala 678; Shropshire v. Pullen, 3 Bush (Ky) 512; Sturbridge v. Winslow, 21 Pick.(Mass) 83; Horton v. Hendershot, 1 Hill(NY) 118.

22. Wragg v. Swart, 10 Johns.(NY) 93.

22a. McFarlan v. State, 48 NE 625, 149 Ind 149; Beach v. State, 43 NW 177, 27 Neb 398; Thompson v. State, 118 P 614, 6 Okl Cr 334.

22b. Cooper v. Stonecypher, 35 SE 675, 111 Ga 818; Naylor v. Vermont Loan etc. Co., 55 P 297, 6 Idaho 251; Brockhurst v. Kaiser, 67 Atl 75, 75 NJL 162.

22c. Cooper v. Stonecypher, supra.

§ 713. Money Arising from Execution Sales, Commissions May Be Charged on Amount of Execution Only.—If an officer sells the property at an execution sale for more than sufficient to liquidate the execution, including costs, he may charge commissions or fees for making the sale where the law authorizes it, based upon the amount of the execution, but he is not entitled to anything in excess thereof; that is, he cannot charge a commission or fees on the surplus, which belongs to the debtor.[23] So, too, where property is sold for less than the amount due on the execution, the officer's fees are computed on the money raised by the sale, and not on the amount due on the execution.[23a] Where an officer sells realty under process and the property is thereafter redeemed, he is entitled to charge a commission fixed by law for the sale but cannot charge a commission on the redemption money.[23b]

§ 714. Amount of Commissions on Sales of Property.—Where the law requires real estate to be sold in parcels and then as a whole, or vice versa, the transaction constitutes a single sale, for which the officer can charge one fee.[24] Where an officer is allowed a fee fixed by statute for holding a sale, he cannot charge such fee for each piece or parcel of property or land sold under a single execution. So, too, where an officer is allowed a certain percentage upon a stated sum, and is then decreased on sums in excess thereof, and

22d. Alexander v. State, 42 Ark 41; Adams v. Dinkgrave, 26 La Ann 626; Wait v. Schoonmaker, 15 How Pr (NY) 460; Jones v. Gupton, 65 NC 48; Carlisle v. Soule, 44 Vt 265; American Wrecking Co. v. McManus, 181 NW 235, 183 NW 250, 174 Wis 300.

22e. Naylor v. Vermont Loan & Trust Co., 55 P 297, 6 Idaho 251.

23. Sinnickson v. Gale, 16 NJL 21.

23a. Bryan v. Buckmaster, 1 Ill (Breese) 408.

23b. Coeur d'Alene Hardware Co. v. Cameron, 42 P 509, 4 Idaho 494. The statute under which the sheriff in the last cited case asserted his right to charge a commission on redemption money is as follows: "For commission for receiving and paying over money on execution or other process, when land or personal property has been levied on and sold, on the first one thousand dollars two per cent, on all sums above that amount one per cent."

24. Wooden v. Allen, 22 Kan 532; McLennan County v. Graves, 64 SW 861, 94 Tex 635, reversing 62 SW 122, 26 Tex Civ App 49.

he holds an execution sale and sells property to different persons, but under a single execution, there is but a single sale for the purpose of computing the officer's fees or commissions.[24a] In any case, however, the amount of sheriff's fees and commissions for making the sale must rest upon statutory authority and, unless a basis therefor may be found in the statutory law of a particular jurisdiction, then there is no authority therefor.[25] Where the execution plaintiff is the purchaser at an execution sale, as to whether or not the officer holding the same is entitled to commissions, the authorities are divided. Under many authorities the officer is not entitled to commissions on such sales, while in others he is entitled thereto.[26] But in any case the local statute must be looked to, and as a rule will throw the light on the question necessary for its solution. Under some statutes, the execution plaintiff, when he purchases at a sale under the writ, is required to pay a percentage of the officer's commission,[27] while other decisions make the question of the officers commissions turn upon the point as to who is to receive the money arising from the sale, and it is there held that an officer is not entitled to commission upon the sale where the property is sold by him, and is bid in by one who is entitled to the whole of the proceeds, and this seems to be true whether the purchaser was the plaintiff in the process or not. These decisions go upon the theory that it is only in cases where the sheriff actually receives and disburses the money, and that in no case should commission be allowed or charged when the property sold by him is bid off and purchased by the party entitled to receive the money.[28] However, if an officer acts in his private capacity instead of his official character, in selling property, the law with respect to his right to collect commission is not controlling. In these circumstances his right to such

24a. Wooden v. Allen, supra; McLennan County v. Graves, supra.

25. Fitts v. Rose, 19 Ga 165; Thompson v. First Div. St. P. & P. R. Co., 4 NW 603, 26 Minn 353; Harrison v. Maroney, 35 NJE 41.

26. Kelly v. Barnet, 140 P 605, 24 Cal App 119; Litchfield v. Ashford, 30 NW 649, 70 Iowa 393; Richey v. Ferguson, 143 P 497, 93 Kan 152; Sharvey v. Central Vermillion Iron Co., 58 NW 864, 57 Minn 216; Jurgens v. Hauser, 47 P 809, 19 Mont 184; Roberts v. Ingalls, 135 P 927, 36 Nev 325, 48 LRANS 542 and note, AC 1915C 1119 and note; Major v. International Coal Co., 81 NE 240, 76 Ohio St 200; Berry v. Kiefer, 133 P 1126, 38 Okla 377; Coleman v. Ross, 12 P 648, 14 Ore 349; Peery v. Wright, 45 P 46, 13 Utah 480; Soderberg v. King County, 45 P 785, 15 Wash 194, 55 Am St R 878, 33 LRA 670; Lyman v. Thorn, 157 P 887, 24 Wyo 326, AC 1918A 368.

27. Duncan v. Idaho County, 245 P 90, 42 Idaho 164.

28. Major v. International Coal Co., supra, see also Northwestern Lumber Co. v. Remusat, 168 NE 774, 33 Ohio App 183.

compensation would be governed by contract, either express or implied.[29]

Where the plaintiff in an execution, or other process, bids an amount in excess of what is due to him, upon the erroneous notion that he is required to bid the amount of the execution plus costs and commissions, the surplus in the amount of the sheriff's fees and commissions thus bid belongs to the defendant in the process, since, under the law of the particular jurisdiction the officer was not entitled to make a charge for fees and commissions against the plaintiff-purchaser and the debtor can recover same from the county, the officer having paid the fees and commissions into the county treasury—the statutes of the particular jurisdiction requiring such money to be paid over by an officer collecting same.[29a] An officer is bound by the statute regulating his commissions on sales only when he is acting officially, so where an officer has property under levy on a number of executions, some of which have a priority over others, and all execution plaintiffs agree that the officer sell the property and prorate the avails raised from the sale, thereby waiving all priorities, then the officer may charge a reasonable fee for the services thus rendered, and the statute with respect to commissions is not controlling nor binding, —since the officer is not acting officially.[29b]

§ 715. Liability of Attorney for Officer's Compensation.—As to whether or not an attorney is liable for compensation of an officer to whom he delivers process, the authorities are divided. One line of cases holds that such attorney is liable therefor,[30] while other cases maintain a converse position.[31] Sometimes the court is swayed in reaching one position or the other by the custom prevailing in the community.[32]

While the Connecticut court did not make bold to assert the liability for fees of the practitioners at its bar, it did hold that they were presumptively liable.[33] It is submitted, however, notwithstanding the array of authority therefor, that this position is un-

29. Blake v. Baldwin, 5 Atl 299, 54 Conn 5; Northern Finance Corp. v. Forked Leaf White Oak Lumber Co., 262 SW(Mo App) 437.

29a. Soderberg v. King County, supra.

29b. Blake v. Baldwin, 5 Atl 299, 54 Conn 5.

30. Heath v. Bates, 49 Conn 342, 44 Am Rep 234; Higgins v. Russo, 43 Atl 1050, 72 Conn 238, 77 Am St R 307 and note; Tilton v. Wright, 74 Me 214, 43 Am Rep 578 and note; Towle v. Hatch, 43 NH 270, see also Doughty v. Paige, 48 Iowa 483; Walbank v. Quarterman, 3 CB 94.

31. Preston v. Preston, 1 Doug. (Mich) 292; Judson v. Gray, 11 NY 408; Wires v. Briggs, 5 Vt 101, 26 Am Dec 284.

32. Doughty v. Paige, supra.

33. Heath v. Bates, supra.

sound; for an attorney merely acts as an agent of his client, and the principal is disclosed, and there is no reason why, unless the attorney acts on his own responsibility, he should be compelled to occupy the role of litigant and "foot the bills." [33a]

§ 716. Right of Sheriff to Recover for Deputies Guarding Property.—Where a sheriff is requested to swear in some special deputy sheriffs to guard the property of an individual or corporation upon an agreement of such individual or corporation to pay therefor, the sheriff is entitled to recover for deputies thus sworn in for that purpose; there being no disturbance or riot; the fact that in the particular jurisdiction it was, under a statute, the duty of sheriff and his deputies to keep the peace, to suppress riots, and unlawful assemblies, does not bar the right of the sheriff to collect the outlay for such special deputies; and, neither did a statute in force in the state providing that the sheriff could not, directly or indirectly, ask or receive for any service to be by him performed in the discharge of any of his official duties, any greater fees than were allowed by law, militate against the right of the sheriff to collect, in these circumstances.[33b]

§ 717. Officer Not Entitled to Charge or Be Reimbursed When.—An officer is not entitled to be reimbursed for expenses in the discharge of his duty where the same is occasioned by his own neglect.[34] Neither may he recover for superfluous services.[35] Neither may he recover for services rendered which may fairly come within the contemplation of the law as being covered by his salary or other compensation.[36] Nor may he recover for services not required by an order of court, nor within the contemplation of any governing statute.[37] Where the law authorizes reasonable compensation for the purpose of keeping property levied upon, an officer is entitled to be paid for such service, and even where the compensation is not fixed, nor taxed in the suit, it does not affect his right thereto.[38] Where the statute authorizes an allowance for taking care of property seized, the "allowance" must be made before he is entitled to charge therefor.[39] The misconduct of the Justice

33a. Judson v. Gray, supra; Heath v. Bates, supra.

33b. Sullivan v. Utah & N. R. Co., 28 P 307, 11 Mont 236.

34. Gill v. Wilkinson, 30 Ga 760.

35. Sewer Dist. No. 1 of Fort Smith v. School Dist. of Fort Smith, 66 SW 152, 70 Ark 59; Feusier & Co. v. Virginia City, 3 Nev 58.

36. Rockwell v. Monroe County, 10 Iowa 591, see sec. 706, supra; Sullivan v. Utah & N. R. Co., 28 P 307, 11 Mont 236.

37. St. Clair v. Irwin, 15 Ill 54.

38. Baldwin v. Hatch, 54 Me 167.

39. Bower v. Rankin, 61 Cal 108.

of the Peace in issuing an excessive number of warrants of arrest will not deprive the officer of compensation for serving them.[40]

§ 718. Compensation of Deputies.—A deputy sheriff or constable is, of course, entitled to compensation, but only in such an amount, and in accordance with the terms and provisions of a controlling statute, whether the statute fixes the amount, or confers on some board, or court, or on the principal officer, the power so to do.[41] A deputy is only entitled to a day's pay out of each day and it does not seem to matter how many hours he is on duty.[42] A contract may be entered into between the sheriff, or constable, and his deputy, in some states, for a division of fees, or for a specific salary. All fees, as a rule, earned by a deputy belong to the principal officer, and the deputy must look to him for his compensation where the office of sheriff or constable is upon a fee basis.[43] If not prohibited by law, the subject matter of a deputy's compensation may be left to a contractual understanding between the principal officer and the deputy. The deputy's compensation is authorized to be fixed in this manner in some states.[44]

§ 719. Statutory Fees Cannot Be Increased.—The statute measures the compensation of officers, such as sheriffs and constables, and this cannot, in any way legally, be increased.[45] When a sheriff or constable's compensation is fixed in accordance with law, he cannot recover for any additional official duties whatsoever.[46] The rule

40. Davison v. Franklin County, 18 Pa Co 374.

41. Christian County v. Merrigan, 61 NE 479, 191 Ill 484, 92 Ill App 428; Peo. v. Cermak, 239 Ill App 195; Mathena v. Losey, 165 NE 253, 88 Ind App 634; State v. Nolte, 285 SW 501, 315 Mo 84; Henry v. Yamhill County, 62 P 375, 37 Ore 562.

42. Christian County v. Merrigan, supra. This is true where there is a statute providing eight hours is a day's work; such statute applies only to mechanical trades, arts, and service and does not apply to public officers, such as deputies sheriff.

43. Bynum v. Knighton, 73 SE 400, 137 Ga 250, AC 1913A 903 and note; Bale v. Mudd, 63 SW 451, 23 Ky L 594.

44. Bynum v. Knighton, supra.

45. Trapp v. State, 25 So 194, 122 Ala 394; Kierman v. Swan, 63 P 768, 131 Cal 410; Lang v. Walker, 35 So 78, 46 Fla 248; McMichael v. Southern R. Co., 43 SE 850, 117 Ga 518; Irvin v. Alexander County, 63 Ill 528; Carroll County v. Durham, 76 NE 78, 219 Ill 64; Landis v. Lincoln County, 50 P 530, 31 Ore 424; Lenhart v. Cambria County, 64 Atl 876, 216 Pa 25; Mullins v. Marion County, 51 SE 535, 72 SC 84.

46. Avery v. Pima County, 60 P 702, 7 Ariz 26, see sec. 706 supra; Colorado Mortg. etc. Co. v. Messemer, 55 P 611, 12 Colo App 361; Floyd County v. Foster, 37 SE 90, 112 Ga 133; Coles County v. Messer, 63 NE 391, 195 Ill 540; Sterling v. Cumberland, 39 Atl 1003, 91 Me 316; Fletcher v. Kalkaska Cir. Judge, 45 NW 641, 81 Mich 186; Miesen v. Ramsey County, 112 NW 874, 101 Minn 516; Sullivan v. Utah & N. R. Co., 28 P 307, 11 Mont 236; O'Shea v. Kavanaugh, 91 NW 578, 65

that an officer is entitled to such compensation, only, as finds warrant in a statutory authority is so strictly adhered to that a contract for a gross sum in lieu of fees is void.[46a]

§ 720. Double Mileage for Single Trip.—As to whether an officer, where he makes a single trip and conveys more than one prisoner, or serves more than one process in different actions, may be allowed double mileage, the authorities are in dispute; this dispute arises largely from the construction of statutory enactments. Some adjudications deny the right of an officer to collect increased mileage,[47] while others grant the right thereto.[48] The question of mileage, as a rule, is easily determinable from an examination of the local statute.

§ 721. An Officer Is Entitled to Collect Compensation for Necessary Legal Services Only.—Where an officer performs services over and above that exacted of him by law, he cannot collect compensation for the services in excess of the legal requirement. This is well illustrated by a case where an officer evicted one from a house and premises and, in addition thereto, removed the goods of the one evicted, some distance, to the residence of his daughter for which the evicted one refused to pay. It was held that the officer could not recover compensation therefor.[49] So if process, as an attachment or execution, is not served there cannot be a charge for fees, service, mileage or expenses, as a rule; a shorthand rendition of the rule is,[49a] "if there is no service, there are no fees." The cause of failure to serve process is immaterial, in so far as making a change by an officer is concerned.[49b] It has been held in Minnesota that a

Neb 639; State v. Beard, 29 P 531, 21 Nev 218; Edgerly v. Hale, 51 Atl 679, 71 NH 138; Hudson County v. Kaiser, 69 Atl 25, 75 NJL 9, aff. 71 Atl 1133, 76 NJL 829; Marquam v. Sears, 58 P 660, 30 Ore 61.

46a. Gilman v. Des Moines Valley R. Co., 40 Iowa 200.

47. Barnes v. Marion County, 6 N W 697, 54 Iowa 482; Redfield v. Shelby County, 19 NW 828, 64 Iowa 11; Wire v. Edwards County, 293 P 753, 131 Kan 725; Logan County v. Doan, 51 NW 598, 34 Neb 104.

48. Campbell v. U. S., 65 F 777, 13 CCA 128; U. S. v. Fletcher, 13 S Ct 434, 147 US 664, 37 L Ed 322; Sherman v. Santa Barbara County, 59 Cal 483; Lake County v. Campbell, 123 P 317, 52 Colo 440; State v. Ward, 82 NW 686, 79 Minn 362; Steenerson v. Polk Co., 71 NW 687, 68 Minn 509; McGee v. Dillon, 103 Pa St 433; Gulf C. & S. F. R. Co. v. Dawson, 7 SW 63, 69 Tex 519.

49. St. Clair County v. Irwin, 15 Ill 54; Grubb v. Louisa County, 40 Iowa 314; Commr's of Republic County v. Kenot, 16 Kan 157; Allen v. Spoon, 72 NC 309.

49a. Yavapai Co. v. O'Neil, 29 P 430, 3 Ariz 363; Thralls v. Sumner Co., 24 Kan 594; Titus v. Howard Co., 17 Kan 363; Labette Co. v. Franklin, 16 Kan 450; Lynch v. Butler, 43 Hun 605, 7 NY St 327; Schneider v. Waukesha Co., 70 NW 228, 103 Wis 266.

49b. Labette Co. v. Franklin, supra.

sheriff or constable is entitled to charge mileage for traveling to serve a criminal warrant, although he does not make the arrest, if the failure is through no fault of his.[49c]

§ 722. Illegal Fees.—In most states there are statutes prohibiting the receipt of illegal fees. Sometimes criminal prosecution is provided for, but it may be said that as a general rule agreements for compensation, or fees not authorized by statute are void, as against public policy.[50] Proceedings for the summary removal of an officer are not criminal in nature and character.[51] At most, they are only quasi criminal.[52] And, where an officer collects illegal fees in violation of statute, or does any other act prohibited by a statutory enactment, it is wholly unnecessary to either allege or prove that he acted with evil intent, in the absence of a statutory provision requiring it; it is not necessary in an action charging an officer with collecting illegal fees, or refusing, or neglecting to perform an official duty, which are grounds for removal, to allege or prove criminal intent or evil or corrupt motive. No intent to violate the law is needed in the absence of a specific statute making it an element or cause of removal.[53]

§ 723. Right of Assignment of Officer's Salary.—It seems that a sheriff or constable may assign fees or compensation coming to, or due him from a county, where the same has already been earned, but he may not make an assignment of contingent or future compensation. This is held to be against public policy.[54] It seems, also, that where the salary or compensation is earned periodically, it is

49c. Davis v. Le Sueur Co., 35 NW 364, 37 Minn 502, see also Thomas v. County Commissioners, 15 Minn (Gil 254) 324; but this holding was questioned in Schneider v. Waukesha County, supra, and in Yavapai Co. v. O'Neil, supra.

50. Wilcoxson v. Andrews, 33 NW 533, 66 Mich 553; Follenbee v. St. Clair Co., 35 NW 257, 67 Mich 614; Plummer v. Edwards Twp., 49 NW 876, 87 Mich 621; Fletcher v. Aldrich, 45 NW 641, 81 Mich 186; Burk v. Webb, 32 Mich 173; Peck v. City Nat'l. Bank, 16 NW 681, 51 Mich 353, 47 Am Rep 577; Phoenix Ins. Co. v. McEvony, 72 NW 956, 52 Neb 566; State v. Bisaner, 2 SE 368, 97 NC 503.

51. Peo. v. Rainey, 89 Ill 34, see sec. 706, supra.

52. Archbold v. Huntington, 201 P 1041, 34 Idaho 558.

53. Sharp v. Brown, 221 P 139, 38 Idaho 136; Archbold v. Huntington, supra.

54. Fischer v. Liberty Nat'l Bank & Trust Co., 61 F(2d) 757, 53 F(2d) 856, 53 S Ct 403, 288 US 611, 77 L Ed 985; Boster v. First Nat'l Bank, 5 F Supp 15; Schloss v. Hewlett, 1 So 263, 81 Ala 266; Ex parte Stewart, 64 So 36, 185 Ala 216; Stewart v. Sample, 53 So 182, 168 Ala 270; Trow v. Moody, 150 P 77, 27 Cal App 403; Walker v. Rich, 249 P 56, 79 Cal App 139; Vollmer v. Vollmer, 266 P 677, 46 Idaho 97; Kip v. People's Bank & Trust Co., 164 Atl 253, 110 NJL 178; George C. Diehl C. E. Inc. v. Sheehan, 251 NYS 254, 233 App Div 258, 180 NE 360, 258 NY

not permissible to make an assignment for less than a whole period.[55]

§ 724. De Facto Officer Is Not Entitled to Compensation.—Where there is a contest for the office of sheriff, or constable, he who is entitled to the office is also entitled to its receipts, perquisites, and emoluments. The fact that the officer de jure is not in office, and the same is occupied by his adversary, who has received all of the pay and compensation thereof, does not change the situation. The de jure officer is entitled to recover from the de facto one, but the latter is entitled to deduct necessary expenses in earning the compensation.[56] According to some cases payment of the salary by the county to a de facto officer, holding the office by color of right is a defense to an action thereafter brought by the de jure officer,[56a] but this is opposed by other courts.[56b] So too, where one is ineligible to hold the office of sheriff or constable, he is not entitled to receive compensation from the county although his right to the office remains unquestioned. Where an officer is a defaulter with respect to public funds during a preceding term of office and, there being a statutory or constitutional provision disqualifying a defaulter from holding office, he cannot collect compensation for his services as a sheriff or constable although holding the office, and discharging the duties thereof; neither can he collect for the per diem provided by law for finding a prisoner, nor for money laid out or expended for hiring bailiffs.[57]

Where one holds the office of sheriff or constable when he is ineligible or disqualified so to do, he not only cannot collect compensation or expenses laid out in the discharge of his official duties, either from the public treasury, or from an individual litigant, but he is a trespasser in the execution of process and may, in each case,

624; Kaminsky v. Good, 265 P 780, 124 Ore 618.

55. Wilkes v. Sievers, 97 P 677, 8 Cal App 659; Stevenson v. Kyle, 24 SE 886, 42 W Va 229; Trow v. Moody, supra.

56. Lopez v. Payne, 196 P 919, 51 Cal App 447; Mayfield v. Moore, 53 Ill 428, 5 Am Rep 52; McCue v. Wapello County, 10 NW 248, 56 Iowa 698, 41 Am Rep 134; Matthews v. Copiah County, 53 Miss 715, 24 Am Rep 715; Roberts v Roane County, 23 SW(2d) 239, 160 Tenn 109; Bier v. Gorrel, 3 SE 30, 30 W Va 95, 8 Am St R 17.

56a. Shaw v. Pima Co., 18 P 273, 2 Ariz 399; Tanner v. Edwards, 86 P 765, 31 Utah 80, 120 Am St R 919, 10 AC 1091; McCue v. Wapello County, supra.

56b. Havird v. Boise, 24 P 542, 2 Idaho 687; Samuels v. Harrington, 86 P 1071, 43 Wash 603, 117 Am St R 1075; Rasmussen v. Carbon County, 56 P 1098, 8 Wyo 277, 45 LRA 295.

57. Matthews v. Copiah County, supra.

57a. Patterson v. Miller, 3 Metc. (Ky) 493; Rodman v. Harcourt, 4 B Mon(Ky) 224; Fowler v. Bebee, 9

be sued for, and mulcted in damages by those on, or against whom he executes process.[57a] Whenever a public officer proffers against a state, county or city a claim for compensation for official services, he puts his title to the office in issue, and must stand or fall by the result of that inquiry.[57b]

§ 725. As a General Rule an Officer Is Not Entitled to Collect a Reward Offered for Apprehension of Accused Persons.—As a general rule, an officer is not entitled to collect a reward offered for apprehension of an accused person. The principle underlying this rule is that it is against public policy to reward an officer for simply discharging his duty.[58] So, it may be differently stated that a sheriff cannot collect a reward for making an arrest within his county of a resident thereof for a felony committed therein.[58a] However, it seems that where a special officer holds a warrant directed merely to constables generally in the county and who relies upon the offer of reward, makes the arrest, he may recover the same. But an officer, who has a warrant directed to him to arrest the person for whom a reward is offered, and he makes the arrest even outside of his bailiwick he cannot claim the reward; it being his official duty to make the arrest.[59]

A deputy sheriff engaged during a railroad strike to protect railroad property is not entitled to a reward for the arrest and conviction of persons interfering with such property in the deputy's county. In other words, it seems that a member of a posse comitatus cannot demand a reward for making an arrest that it was his duty to make.[60]

Mass 234, 6 Am Dec 62; Green v. Burke, 23 Wend(NY) 490; Riddle v. Bedford Co., 7 Serg & R(Pa) 386; Pearce v. Hawkins, 2 Swan(Tenn) 87, 58 Am Dec 54; Matthews v. Copiah County, supra.

57b. Peo. v. Hopson, 1 Denio(NY) 574; Matthews v. Copiah County, supra; Lightly v. Clouston, 1 Taunt. 112.

58. Hayden v. Souger, 56 Ind 42, 26 Am Rep 1, see sec. 706, supra; Means v. Hendershott, 24 Iowa 78; Hawkeye Ins. Co. v. Brainard, 33 NW 603, 72 Iowa 130; Pilie v. New Orleans, 19 La Ann 274; Davies v. Burns, 5 Allen (Mass) 349; Pool v. Boston, 5 Cush (Mass) 219; Kick v. Merry, 23 Mo 72, 66 Am Dec 658; Smith v. Whildin, 10 Pa 39, 49 Am Dec 572; Stamper v. Temple, 6 Humph(Tenn) 113, 44 Am Dec 296; Ring v. Devlin, 32 NW 121, 68 Wis 384, note 26 Am Rep 5.

58a. Witty v. Southern Pac. Co., 76 F 217; Lees v. Colgan, 52 P 502, 120 Cal 262, 40 LRA 355; In re Russell, 51 Conn 577, 50 Am Rep 55; Stophlet v. Hogan, 53 NE 604, 179 Ill 150, 44 LRA 809, 74 Ill App 631; Warner v. Grace, 14 Minn(Gil 364) 487; Thornton v. Missouri Pac. R. Co., 42 Mo App 58; Somerset Bank v. Edmund, 81 NE 641, 76 Ohio St 396, 11 LRANS 1170, 10 AC 726.

59. Hayden v. Souger, supra.

60. St. Louis etc. R. Co. v. Grafton, 11 SW 702, 51 Ark 504, 14 Am St R 66, see sec 706 supra.

CHAPTER XXXIII

EXPIRATION OF TERMS AND REMOVAL OF SHERIFFS AND CONSTABLES

SECS.

§ 726. Expiration of Term of Office; Common Law, Effect of.—The common law rule seems to be that the sheriff continued the duties of his office after the expiration of his term until a writ of discharge was issued to him, and this would be the governing rule in this country in the absence of statute.[1] In most, if not all states, however, the matter of termination of office and the installation of a successor therein is regulated by statute which, of course, would be controlling.

§ 727. Liability of Bondsmen where Sheriff Succeeds Himself.—Since an officer who has levied upon chattels should sell them, even if the term of his office has expired,[2] it is held that where an officer has so levied and he is re-elected to the office, he would make the sale, as the old sheriff instead of the new, and, consequently the bondsmen who were such during his first term of office would be liable for his defalcation, even though it occurs during the second term, so long as it is with respect to chattels levied upon during his first term.[3] The liability of sureties on a bond of an officer

1. Murfree on Sheriffs, sec. 1035.

2. Sec. 570, supra.

3. State v. Hamilton, 16 NJL 153; Sidner v. Alexander, 31 Ohio St. 378; Calvin v. Bruen, 39 Ohio St 610; Brobst v. Skillen, (also as Collins v. Skillen,) 16 Ohio St 382, 88 Am Dec 458; Hubbard v. Elden, 2 NE 434, 43 Ohio St 380.

for defalcation actually occurring during his succeeding term, although in connection with a proceeding begun during a preceding term, is not confined to process, but the rule may come into operation in other situations, as, where he receives the purchase price of land sold on partition, which sale was made during the first term but the collection was made during the second term. The same rule is applicable where the officer makes the collection after going out of office,—the sale being made while he was in office; even though he is not an officer at all when the collection is made, still his bondsmen are liable.[3a] But if the defalcation occurs during his second term and can be properly referable thereto, then, of course, the sureties on his bond of the second term are liable therefor. An application of this rule is illustrated in a case where the sheriff was re-elected and failed to make a return on a writ, though he had received the process during the first term, but the return day occurred during his second term. In these circumstances the bondsmen in the second term are liable, and not the sureties during the first term.[4]

Where an officer's term is, by legislative enactment, extended beyond the term for which he was elected, and a new bond is required, he thereby becomes his own successor at the expiration of his elected term; but the liability of the sureties on his bond continues until he qualifies as his own successor, or until he is displaced by a successor in office.[5] Where the tenure in office is for a certain time and until the successor is elected and qualified, the sureties on the officer's bond are bound until the original incumbent is displaced by his successor.[5a]

§ 728. Officer Levying Attachment Duty of Successor to Sell.—The mere levy of an attachment does not give the right to the levying officer to make a sale after the expiration of his term, and in these circumstances the property should be delivered to the successor in office, whose duty it would be to do all necessary things in connection therewith.[6] It has been held, however, that the old

3a. Brobst v. Skillen, (also as Collins v. Skillen,) supra; Calvin v. Bruen, supra; Hubbard v. Elden, supra.

4. Sherrell v. Goodrum, 3 Humph (Tenn) 419.

5. State v. Kurtzeborn, 9 Mo App 245.

5a. Harris v. Babbitt, 11 F Cas 6114, 4 Dill 185; Placer Co. v. Dickerson, 45 Cal 12; Welch v. Seymour, 28 Conn 387; State v. Berg, 50 Ind 496; Chelmsford Co. v. Demarest, 7 Gray (Mass) 1; Bigelow v. Bridge, 8 Mass 275; Thompson v. State, 37 Miss 518; Moss v. State, 10 Mo 338; State v. Kurtzeborn, 9 Mo App 245; Dover v. Twombly, 42 NH 59; State v. Mann, 34 Vt 371.

6. Kent v. Roberts, F Cas No. 7715, 2 Story 591; Bondurant v. Buford, 1 Ala 359, 35 Am Dec 33; Colyer v. Higgins, 1 Duv (Ky) 6, 85 Am Dec 601; Johnson v. Foran, 58 Md 148.

sheriff should make the sale where he has attached property before going out of office.[7] But if there has been no levy of an execution when the officer goes out of office, then the successor is the proper officer to make the levy and hold the sale [7a]

§ 729. Duty of Outgoing Sheriff to Deliver Property, Prisoners, and Papers to Successor.—It is the duty of the outgoing sheriff to deliver to his successor all of the property belonging to the office, and all property he holds under levy of an attachment, and also to turn over to the incoming sheriff the jail and prisoners confined therein. Likewise, he is required to deliver to his successor all process in his hands, upon which execution has not been commenced.[8] A tender, however, of the property, papers, and the like, to the successor relieves the old sheriff of his responsibility in connection therewith.[9] Mandamus will not lie to determine the right to an office but may be maintained to compel the outgoing sheriff to deliver up the property, papers, and effects, to which the new sheriff is entitled.[10] Local statutes should be consulted with respect to the manner and means of succession in the sheriff's office.

§ 730. Succession in Case of Death, Resignation, or Abscondence of the Sheriff.—The matter of filling a vacancy occurring by the death, resignation, or abscondence of a sheriff is generally provided for in statutes in the various jurisdictions, but if an officer absconds, a deputy may act until there shall be a judicial declaration of the vacancy.[11] In various jurisdictions it is provided by statute for deputies or undersheriffs to carry out the duties of deceased officers.[12] It seems in some jurisdictions that in case an ex-sheriff shall die before finishing the execution of process in his hands as such ex-sheriff, the same may be consummated by an ex-undersheriff or ex-deputy. But where such is the case the ex-undersheriff or deputy sheriff is responsible, and the deceased ex-sheriff's sureties on his bond are not responsible therefor.[13]

§ 731. Duty of Ex-sheriff to Make Deeds to Land Sold.—In the

7. McKay v. Harrower, 27 Barb(NY) 463.

7a. Bondurant v. Buford, supra.

8. Fockler v. Martin, 32 Iowa 117; Sauvinet v. Maxwell, 26 La Ann 280.

9. Fockler v. Martin, supra.

10. U. S. v. Malmin, 272 F 785; Territory v. Mohave Co., 12 P 730, 2 Ariz 248; Huffman v. Mills, 18 P 516, 39 Kan 577; Lauritsen v. Seward, 109 NW 404, 99 Minn 313; Cruse v. Harpham, 73 NW 212, 52 Neb 831.

11. Ballance v. Loomiss, 22 Ill 82.

12. Firth v. Haskell, 20 NE 164, 148 Mass 501; Newman v. Beckwith, 61 NY 205, rev. 5 Lans. 80; Paddock v. Cameron, 8 Cow(NY) 212; State v. McGregor, 10 NE 66, 44 Ohio St 628.

13. Newman v. Beckwith, 61 NY 205, rev. 5 Lans 80.

absence of statute, it is the duty of an ex-sheriff who has sold land, to make conveyances therefor, whether he has ceased to be an officer by expiration of his term or by resignation or removal.[14] A deed for property may be made by an ex-sheriff where it had been advertised for sale, but had not been sold when he went out of office, and such deed is valid. This is true even though the successor in office is empowered to make the sale, upon being ordered so to do by the court rendering the judgment.[14a] Even a deputy sheriff may make a deed after he and his principal have gone out of office where the deputy made the sale.[14b] So too, where a levy has been made by a deputy, he may conduct a sale, after he and his principal have gone out of office, where he made the levy.[14c] But it seems apparent that an ex-deputy could not make a sale, or execute a deed, where his former principal is still in office.[14d]

§ 732. Effect of Death, Resignation, or Removal of Deputy before Completion of Execution of Process.—It hardly need be observed that where process is being executed by a deputy, at the time of his death or resignation, or removal, the principal officer takes over the execution thereof. This could not be otherwise since the sheriff is regarded as the one officer. It is unnecessary for a deputy sheriff or constable, who begins the execution of process to finish it, as is the case with the principal officer.[15]

§ 733. Deputy Sheriff as Not Entitled to Complete Process after Going Out of Office.—Where a deputy sheriff goes out of office before he has completed the execution of process, his rights thereunder terminate and cease. This is true because the sheriff is considered the one officer. The rule is, of course, if a sheriff or constable begins the execution of process, it is lawful, and is his duty to consummate its execution, but no such rule is recognized with respect to a deputy.[16]

14. Peo. v. Boring, 8 Cal 406, 68 Am Dec 331; Trimble v. Breckenridge, 4 Bibb(Ky) 479; Graves v. Hayden, 2 Litt.(Ky) 61; Lemon v. Craddock, Littell's Select Cas(Ky) 251, 12 Am Dec 301; Winslow v. Austin, 5 JJ Marsh.(Ky) 408; Allen v. Trimble, 4 Bibb(Ky) 21, 7 Am Dec 726; Evans v. Ashley, 8 Mo 177; Bradley v. Smith, 190 P 1087, 79 Okl 29, 10 ALR 1339 and note.

14a. Head v. Daniels, 15 P 911, 38 Kan 1; Tuttle v. Jackson, 6 Wend (NY) 213, 21 Am Dec 306.

14b. Lofland v. Ewing, 5 Litt.(Ky) 42, 15 Am Dec 41; Jackson v. Collins, 3 Cow(NY) 89.

14c. Lofland v. Ewing, supra, see also Firth v. Haskell, 20 NE 164, 148 Mass 501.

14d. See sec. 733 infra.

15. Ingersoll v. Sawyer, 2 Pick. (Mass) 276, see also Firth v. Haskell, 20 NE 164, 148 Mass 501; Ferguson v. Lee, 9 Wend(NY) 258; Sec. 78, supra.

16. Ferguson v. Lee, 9 Wend(NY) 258; Sec. 78, supra.

§ 734. Substitution of an Officer in Pending Actions.—Where a sheriff or constable brings a civil action in his official capacity, the action does not abate on his death. Such an action cannot be continued by his personal representative, but since the action is brought officially it would have to be continued by his successor in office, who should be substituted by the court upon a suggestion and proof of death.[17] The rule seems to be that where an action is brought against a public officer, personal in its nature, as for neglect of duty, in the absence of statutory provisions for continuing it against his successor, it abates upon his death or retirement from office whether by resignation or otherwise. This is a general rule and applies to public officers of all classes.[18] Of course, an action for damages for negligence would not, ordinarily abate on the officer going out of office.

The rule is different in an action by or against a sheriff, constable, or other officer, and does not abate on his death, resignation, or retirement on the expiration of his term, where the action in its nature is against the office. The rule is the same whether the officer is a plaintiff or a defendant. If the action is by or against the office to all intents and purposes, instead of by the officer in person, then a change in office does not affect the action, but there may be a substitution of the successor in office and the action continued.[19] An injunction suit, seeking to stay the hands of a sheriff or constable with respect to the enforcement of a statute, abates on the termination of the incumbency of the defendant.[20]

§ 735. Going Out of Office as No Defense to Liability.—The mere fact that a sheriff or constable goes out of office by resignation, or the expiration of his term, or removal, is no shield against his amercement in a proper case, or against any other appropriate rem-

17. Orser v. Glenville Woolen Co., 60 Barb(NY) 371, 11 Abb Pr NS 85.

18. Irwin v. Wright, 42 S Ct 293, 258 US 219, 66 L Ed 573; Pullman Co. v. Knott, 37 S Ct 428, 243 US 447, 61 L Ed 841, 69 So 703, 70 Fla 9; Gorham Manuf. Co. v. Wendell, 43 S Ct 313, 261 US 1, 67 L Ed 505; U. S. v. Butterworth, 18 S Ct 991, 169 US 600, 42 L Ed 873, 10 App DC 204; Richardson v. McChesney, 31 S Ct 43, 218 US 487, 54 L Ed 1121; Beachy v. Lamkin, 1 Idaho 50.

19. Ex parte La Prade, 53 S Ct 682, 289 US 444, 77 L Ed 1311; Murphy v. Utter, 22 S Ct 776, 186 US 95, 46 L Ed 1070; Thompson v. U. S., 103 US 480, 26 L Ed 521; Sheehan v. Osborne, 69 P 842, 6 Cal(Unrep Cas) 979, rev. on other grounds, 71 P 622, 138 Cal 512; Nance v. Peo., 54 P 631, 25 Colo 252; Parks v. Hays, 53 P 893, 11 Colo App 415; Mugge v. Jackson, 39 So 157, 50 Fla 235; Scott v. Artman, 86 NE 595, 237 Ill 394; Marion County v. Marion Circuit Court, 89 SW 704, 28 Ky L 586; State v. Cole, 41 NW 245, 25 Neb 342; Dickinson v. Oliver, 99 NYS 432, 112 App Div 806, 89 NYS 52, 96 App Div 65, 88 NE 44, 195 NY 243; U. S. v. Butterworth, supra.

20. Irwin v. Wright, supra.

edy for misfeasance, malfeasance, or nonfeasance. The rule is, that for this purpose he still remains a quasi officer. The reason of the rule is that a sheriff or constable cannot escape the consequences of his wrongdoing by a resort to the expedient of vacating the office.[21] As a condition precedent to the amercement of an ex-sheriff or constable, he must have undertaken the execution of the process or the discharge of a duty, and be guilty of a default in respect thereof during his term of office, before he can be amerced after ceasing to be such officer.[22] Also, he may be amerced after he has gone out of office for misconduct which would have warranted the same while in office.[23]

§ 736. Removal of Sheriff or Constable.—In most jurisdictions there are methods provided for the removal of sheriffs, constables, or other officers. A statute has been sustained that was passed by the legislature providing for sheriffs then in office to hold the same until a day fixed therein.[24] Where a sheriff is a constitutional officer, however, and a method for removing him is prescribed in the constitution, then that method of removal is exclusive, and not subject to legislative change, and where the causes for removal are set forth in the constitution, they are exclusive.[25] Where the office of sheriff, or constable, is appointive, then the right of removal resides in the appointive power.[26] Misconduct of a deputy, in which the principal officer had no part, cannot be made a basis for the latter's removal.[27] Where, however, the constitution places no limit upon the power of the lawmaking body of a particular jurisdiction, with respect to providing for the removal of a sheriff, constable, or other officer, it is within the province of that body to provide the grounds, and procedure for the removal of such officers, and the power of removal may be by the legislature conferred upon the governor.[28] Statutory provisions may be enacted for the removal of a sheriff or constable in a summary manner by a court.[29]

Where a constitutional provision provides for the removal of a sheriff or constable by the governor, without specifying the cause

21. Armstrong v. Grant, 7 Kan 285; Cox v. Ross, 56 Miss 481; Tapp v. Bonds, 57 Miss 281; Hustick v. Allen, 1 NJL 168; Graham v. Newton, 12 Ohio 210.

22. Maclin v. Hardie, 25 NC 407; Parker v. Woodside, 29 NC 296.

23. Hustick v. Allen, supra; Armstrong v. Grant, supra.

24. Pratt v. Allen, 13 Conn 119.

25. Brown v. Grover, 6 Bush(Ky) 1.

26. Peo. v. Nellis, 94 NE 165, 249 Ill 12; Quinn v. Portsmouth, 10 Atl. 677, 64 NH 324; State v. Hough, 87 SE 436, 103 SC 87; Fields v. State, Mart & Y(Tenn) 168.

27. State v. Budd, 1 So 453, 39 La Ann 232.

28. State v. Ballantyne, 150 SE 46, 152 SC 365, 66 ALR 574.

29. Robinson v. State, 28 SW(Tex) 566.

therefor, such removal must be predicated upon legal cause, and where a statute or constitution merely provides that the governor may remove from office, a sheriff (or other designated officer) giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense, arbitrary power is not conferred on the governor to remove such officer at will, and such removal may not be made except for legal cause.[30] Where a statute authorizes the removal of a sheriff or constable from office for any sufficient cause, including incapacity or misbehavior in office, a constable may be removed from office thereunder for any sufficient cause, including such as official incapacity, misbehavior, or for a conviction of malpractice in office, but this provision is restricted to a removal for sufficient legal cause and especially one that relates to the administration of the office and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. A removal must be for a sufficient legal cause, and not one that may be deemed sufficient by a board, commission, or officer having power of removal.[31] Consequently, it may be stated, as a general rule, that rudeness or incivility does not amount to illegality of conduct or oppression under color of office and is not a ground for removal.[32] The mere threatening to levy an execution which savors of extortion in order to collect his fees is no sufficient ground for removal of sheriff or constable.[33] Of course, a sheriff may be removed in appropriate proceedings lawfully instituted, for failing to enforce the laws.[34] It is generally true that an officer may be removed, under statutory provision, for collecting or receiving illegal fees.[35] Conduct of sufficient gravity may warrant the removal of the officer guilty thereof, although it took place before his election.[36] In some jurisdictions an officer may be removed for misconduct in office during a prior term.[37] However, this view is not without opposition.[38]

30. State v. Verage, 187 NW 130, 177 Wis 295, 23 ALR 491.

31. Lancaster v. Hill, 71 SE 731, 136 Ga 405, AC 1912C 272; State v. Duluth, 55 NW 118, 53 Minn 238, 39 Am St R 595.

32. Matter of King, 53 Hun 631, 6 NYS 420, 35 NY St 792, 2 Silvernail 356; Lancaster v. Hill, supra; see also Clerk's Case, Cro Jac 506; Earle's Case, Carth 173; Reg. v. Treasury Commr's, 2 Per & Dav 498, 10 Ad & El 374, 37 ECL 121, see also note AC 1912C 275.

33. Lancaster v. Hill, supra.

34. State v. Reichman, 188 SW 225, 597, 135 Tenn 653, 685, AC 1918B 889, but see State v. Donahue, 135 NW 1030, 91 Neb 311, AC 1913D 18 and note, see also State v. Howse, 183 SW 510, 134 Tenn 67, AC 1917C 1125. This case holds an officer may be removed for conduct occurring in a preceding term.

35. U. S. v. McPherson, 26 F Cas No. 15704, 1 Hayw & H 105; U. S. v. Merryman, 26 F Cas No. 15,759a, 200 Hayw & H 337.

36. Matter of Guden, 75 NYS 794, 71 App Div 422, 64 NE 451, 171 NY 529.

37. State v. Welsh, 79 NW 369, 109 Iowa 19; Territory v. Sanches, 94 P 954, 14 NM 493, 20 AC 109; State v. Howse, supra.

38. Thurston v. Clark, 40 P 435, 107 Cal 285.

CHAPTER XXXIV

CORONER'S INQUEST AND PROCEDURE THEREAT

SECS.

§ 737. Duty of Coroner to Hold Inquest.—The duty of a coroner to hold an inquest over a dead body is generally regulated by statutes, which should be consulted in each jurisdiction for guidance with respect thereto. However such statutes are generally limited, in the requiring of the holding of an inquest, to cases in which the death presumptively resulted from violence, or the facts and circumstances surrounding the death are such as to indicate that the death was produced by violent means.[1]

In England it was the duty of the proper coroner to hold an inquest over all of the bodies of persons who had died in prison. The reason assigned for this rule is that it was for the protection of the prison keepers.[2]

In the very nature of things a large amount of discretion must be committed to the coroner as to whether or not an inquest will be held. However, there are statutes expressly declaring that no inquest shall be held except where it is provided for within the

1. Peoria Cordage Company v. Industrial Board of Illinois, 110 NE 996, 284 Ill 90, LRA1918E 822; Lancaster County v. Holyoke, 55 NW 950, 37 Neb 328, 21 LRA 394; Moore v. Box Butte Company, 111 NW 469, 78 Neb 561.

2. Rex v. Graham, 93 LTNS 371, 69 JP 324, 21 TR 576.

terms of the statute itself;[3] but still considerable discretion is reposed in the coroner as to when the facts of a given case come within the statutory enactment providing for an inquest.[4] If a coroner has improperly or illegally held an inquest there is no appeal or review of this decision. Probably his fees therefor could be challenged, or, if he is paid a salary, it might be contested; or, under some statutes charges for removal from office could be filed. If the inquest has not been held, but is determined upon, then it seems an injunction will lie to prevent it.[4a] Even though the coroner acts illegally in holding an inquest, no question can be made by reason thereof on the right of jurors and witnesses to lawful fees or compensation.[4b]

The result of the inquisition may not be resorted to for the purpose of showing that the coroner acted illegally or improperly in holding the inquest, as where it is determined that the death was produced by natural causes.[4c]

Two reasons have been assigned for the holding of an inquisition, and they are: first, to lay a foundation for a criminal prosecution in case the death was feloniously brought about, and, secondly, to make such investigation and take measures to prevent the guilty party from escaping. The requirements of law are satisfied if there is a reasonable basis to suspect that the death was felonious.[5]

An inquest is proper if the death appears to have been produced by suicide.[6] However, if it appears clearly that the death was the result of illness, or from natural causes, or was a pure accident without fault or negligence on the part of anyone, or by an act of God, or was due to the negligence of the deceased himself, then under most statutes an inquest is not necessary.[7] In case death

3. Moore v. Box Butte Company, supra.

4. Peoria Cordage Company v. Industrial Board of Illinois, supra; Lancaster County v. Holyoke, supra; State v. Perry, 150 NE 78, 113 Ohio St 641.

4a. Haytock v. Nickel, infra; Finarty v. Marion Co., 103 NW 772, 127 Ia 543.

4b. Moore v. Box Butte Company, supra.

4c. Huntly v. Zurich General Accident and Liability Insurance Company, infra; Boisliniere v. St. Louis Co., 32 Mo 375; Morgan v. San Diego Co., infra.

5. Peoria Cordage Company v. Industrial Board of Illinois, supra; Stults v. Allen County, 81 NE 471, 168 Ind 539, 11 A. C. 1021 and note; Lancaster County v. Mishler, 100 Pa 624, 45 Am Rep 402.

6. Huntly v. Zurich General Accident and Liability Insurance Company, 280 Pac. 163, 100 Cal App 201.

7. Lancaster County v. Holyoke, supra; Miller v. Cambria, 29 Pa Super 166; In re Ross, 19 Pa Dist & Co 701; Haytock v. Nickel, 19 Pa Dist & Co 671, 24 North Co 96; In re Coroner's Inquest, 1 Pa Co 14, 3 Kulp 451; In re Voigt's Fees, 2 Pa Dist & Co 104; Albaugh-Dover Company v. Industrial Board of Illinois, 115 NE 834, 278 Ill 179; Clark Co. v. Callaway, 12 SW 756, 52 Ark 361.

is sudden and accidental, a coroner is usually safe in holding an inquest.[8] However, the coroner should not act arbitrarily or captiously in holding an inquest to increase his fees.[9] In all cases it seems, however, on the decision of the coroner to hold an inquest a presumption is raised—which, of course, is rebuttable—that he acted in good faith and on a sufficient basis.[10] As a necessary consequence of the operation of this rule, it will not be assumed that the coroner in holding an inquest was actuated by malice, or a desire for revenge, or that he was prompted in holding the inquest for the purpose of private gain.[11] Some courts have gone so far as to hold a wide latitude is allowed the coroner in determining whether an inquest is necessary or will be held.[12]

It is not necessary in every case under the statutes, even where the death is produced feloniously, to hold an inquest, as where the person who did the killing is known and is in custody.[13] So, too, in some jurisdictions a coroner's inquest may be dispensed with if an oath is made as to the cause of death and filed with the coroner.[14]

The sounder rule is that a coroner is not required to make any preliminary investigation before holding an inquisition,[14a] but the numerical weight of authority countervenes this position.[14b] It is submitted the reasoning of the Supreme Court of Missouri is unanswerable, and is not weakened by the array of authority to the contrary, the court saying:

"How is the coroner to be guided in exercising his jurisdiction in a given case? and when is it properly invoked in acting in this capacity? There is not (nor could there be in the nature of things) any *classification of circumstances by law* circumscribing his action, or fixing precisely the limits of his authority. The nature of his duties and the object to be attained must guide his discretion, acting, as we must presume he does, under a sense of his obligations as an officer and the sanction of an oath. When called upon

8. Albaugh-Dover Company v. Industrial Board of Illinois, supra; Sevier v. Gleason, 32 Haw 387.

9. State v. Perry, supra; Lancaster County v. Mishler, supra; Coty v. Baughman, 210 NW 348, 50 S Dak 372, 48 ALR 1205 and note.

10. Lancaster County v. Mishler, supra.

11. Jameson v. Bartholomew County, 64 Ind 524; see also, 86 Ind 154.

12. Morgan v. San Diego Co., 86 P 720, 3 Cal App 454.

13. State v. Hogan, 85 So 557, 204 Ala 325.

14. Patrick v. Employers Mutual Liability Ins. Company, 118 SW(2d) (Mo App) 116.

14a. Boisliniere v. St. Louis County, 32 Mo 375.

14b. Young v. Pulaski Co., 85 SW 229, 74 Ark 183, 4 AC 1161; Stults v. Allen Co., supra; In re Coroner's Inquest, 7 Dist 566, 20 Pa Co 660; Lancaster County v. Holyoke, supra.

to act, he will decline or proceed to the investigation accordingly as the circumstances of the particular case are, or are not, of such a suspicious character as to render proper an official examination, and of these he is the sole judge. But if he act, and the result shows the death to have been caused neither by violence, nor to have been the result of casualty, it does not follow that the inquest was improper, or that his authority was illegally exercised or abused; for the circumstances in this class of cases may furnish no stronger grounds for supposing criminal agency than in cases where the verdict of the jury may disclose a natural death. The law has imposed no limits on the discretion of the coroner, by means of any preliminary inquiry or otherwise, for the purpose of restricting his action in making inquests; and when he acts, the presumption is he has acted in proper cases."[14c]

§ 738. Time of Holding an Inquest.—If the inquest is regarded as the discharge of a ministerial duty, it may be held, it seems, at any hour of any day of the week, and therefore it is not invalid because held on Sunday or a holiday; but the situation seems to be different where the inquest is regarded as the exercise of judicial power.[15]

§ 739. Place and When Inquest to Be Held.—In general the inquest must be held in the territorial jurisdiction of the coroner and the body must be found within that jurisdiction before the coroner of the particular territorial jurisdiction would have a right to proceed. The inquest, it is sometimes declared, should be held at the place where the death occurred.[16] Where the body has been removed from the county where the death occurs, it seems that the inquest may be held in the county to which it was removed.[17]

14c. Boisliniere v. St. Louis Co., supra.

See also,

Huntly v. Zurich General Accident and Liability Insurance Company, supra, note 4c this section, Morgan v. San Diego Co., supra, note 4c this section, both holding the result does not determine whether the inquisition was properly held.

15. State v. Perry, 150 NE 78, 113 Ohio St 641; Devine v. Brunswick-Balke-Collander Co., 110 NE 780, 270 Ill 504, AC 1917B, 887; Rex v. Ferrand, 3 B. & Ald. 260, 106 Eng Reprint 659, 7 ERC 144; Lancaster County v. Mishler, 100 Pa 624, 45 Am Rep 402. Some of the authorities holding a coroner's inquest is judicial in character are: Peo. v. Jackson, 84 NE 65, 191 NY 293, 15 LRA(NS) 1173, 14 AC 243; In re Cooper, 5 Ont Pr 256; Blaney v. State, 21 Atl 547, 74 Md 153.

See Sec. 28, supra.

16. In re Senior, 117 NE 618, 221 NY 414, 167 NYS 96, 140, 179 App Div 746; Giles v. Brown, 1 Mill.(SC) 230; Rio Grande County v. Wilson, 55 P 1082, 26 Colo 29.

17. Bathelomew County v. Jameson, 86 Ind 154; see also, 64 Ind 524.

In any case, as a general rule, the inquest may be held in the jurisdiction where the body is found, without regard to where the death occurred.[18] The fact that a partial autopsy was held in the county where the body was found does not fix the place of holding the inquest.[19]

At one time, under the common law, the holding of the inquest was confined to the territory where the injury causing the death had been received. The reason for this rule was that the result of the inquest performed the function of an indictment, and the technical requirements of the law with respect to venue were imperatively required to be observed.[20] Under the operation of this common law rule, if the blow were struck in one county and then before death, the injured party was removed to another, where he died, the coroner of the place of death had no jurisdiction.[21]

The place of holding an inquest in the United States is largely regulated by statute in our time.[22]

§ 740. The Coroner's Jury.—A coroner's jury is usually a "picked up" or summoned jury, and not one drawn from the regular jury box, and if a sufficient number, who have been called for jury duty and regularly subpoenaed or summoned, fail to appear, the jury may be completed from the bystanders. The number of jurors required to complete the panel is generally regulated by statute.[23] When sufficient veniremen or talesmen are present, the duty of the coroner is then to select a jury, and it seems that he should examine the jurors on their voir dire, since they are required to possess the same qualifications as jurors in consuetudinary actions at law.[24] The jurors who act may be subpoenaed by the coroner in person or in accordance with any statutory mode prescribed in a particular jurisdiction.[25] At common law, however, this duty

18. Rio Grande County v. Wilson, supra.

19. Huntly v. Zurich General Accident and Liability Insurance Company, 280 P 163, 100 Cal App 201.

20. 2 Hale's Pl Cr 66; Peoria Cordage Company v. Industrial Board of Illinois, 119 NE 996, 284 Ill 90, LRA 1918E 822.

21. Reg. v. Great Western R. R. Company, 3 R & Can Cas 161, 3 QB 333, 43 ECL 749, 6 Jur 823. However see, Reg. v. Grand Junction R. Co., 3 Per & Dav 57, 11 Ad & El 128.

22. 4 AC 1163.

23. Reg. v. Dutton, 1 QB 486, 7 ERC 172 and note; Germania Life Ins. Co. v. Ross-Lewin, 51 P 488, 24 Colo 43, 65 Am St Rep 215; Peoria Cordage Company v. Industrial Board of Illinois, 119 NE 996, 284 Ill 90, LRA1918E 822; Morris & Co. v. Industrial Board of Illinois, 119 NE 944, 284 Ill 67, LRA1918E 919.

24. Withipole's Case, W. Jones 198, 82 Eng Reprint 105, Cro Car 134, 79 Eng Reprint 718, Ley 81, 80 Eng Reprint 645, 7 ERC 171; Crocker on Sheriffs (3rd Ed.) Sec. 951.

25. Crocker on Sheriffs (3rd Ed.) Sec. 951; Davis v. Bibb, 42 SE 403, 116 Ga 23.

seemed to devolve upon an appropriate officer, and could be discharged either by a sheriff or constable.[26]

§ 741. Effect of Disobedience of Summons.—A coroner no doubt possesses power when conferred by statute to punish as for contempt anyone, regularly subpoenaed or summoned for jury duty at an inquest, who contumaciously refuses to attend.[27] When the jury has been assembled, they should be sworn, first on their voir dire, and then questioned with respect to their competency and qualification, and after a sufficient panel has been chosen, then they should be sworn in accordance with the statutory oath.[28] It seems that the swearing of the jury and every step taken throughout the proceedings should be in the presence of both the jury and the coroner, and the swearing in of the jury, at least, should take place in the presence of the dead body.[29] A post-mortem, however, should not be made in the presence of the jury.[30] The very nature of the proceeding is such as not to allow peremptory challenges to the jurors. It seems, too, that there can be no challenges for cause, nor motions to quash the panel entertained.

§ 742. Attendance of Witnesses.—Coroners as a rule have power to compel the attendance of witnesses.[31] This power must be conferred by statute, or must be provided for in the organic law, or it does not exist.

§ 743. Swearing of Witnesses—After the witnesses have been subpoenaed and appear, they are sworn as other witnesses in ordinary actions and suits.[32]

§ 744. Contempt by Witnesses.—If a witness refuses to attend, or after attending is otherwise guilty of an act amounting to contempt of court, he may be punished by the coroner, or his attendance may be compelled by attachment.[33] A justice of the peace,

26. City Coroner v. Cunningham, 2 Nott & McC (SC) 454; Jameson v. Bartholomew County, 64 Ind 524, see also, 86 Ind 154; State v. Moorhead, 159 NW 412, 100 Neb 298.

27. Ex parte McAnnully, 2 T. U. P. Charlt. P. 310.
See Sec. 744, infra.

28. State v. Knight, 84 NC 789.

29. State v. Mackles, 108 So 410, 161 La 187; Rex v. Ferrand, 3 B. & Ald 260, 106 Eng Reprint 659, 7 ERC 144; United States Life Ins. Co. v. Vocke, 22 NE 467, 129 Ill 557, 6 LRA 65; Lancaster County v. Holyoke, 55 NW 950, 37 Neb 328, 21 LRA 394.

30. Peo. v. Fitzgerald, 11 NE 378, 105 NY 146, 59 Am Rep 483.

31. Com. v. Warden of Jail, 9 Pa Dist & Co 395, 41 York 82, 75 Pittsb Leg Journal 763, 6 Wash 120; Crocker on Sheriffs (3rd Ed.) Sec. 652.

32. Com. v. Higgins, 5 Kulp(Pa) 269; State v. Knight, 84 NC 789.

33. Com. v. Higgins, 5 Kulp(Pa) 269; Com. v. Warden of Jail, 9 Pa Dist

acting as a coroner, has the same power as a coroner to enforce the attendance of witnesses, and to compel witnesses to answer interrogations propounded to them.[33a]

The power of a coroner to punish contempts must be found in an applicatory statute, or it does not exist.[33b] Under appropriate statutory authority a coroner may be invested with authority to punish contempts generally as when an inquest hearing is obstructed or disturbed, and the warrant therefore must be found in a statutory enactment or constitutional provision.[33c] An ineluctable conclusion results from a consideration of the authorities that the coroner possesses no inherent power to punish contempts.

§ 745. Instructions to the Jury.—It seems that after the jury has been selected and the inquest is ready to proceed, the first duty of the coroner is to instruct the jury as to their duties in the premises.[34]

The jury may ask for, and it is the coroner's duty to give, his opinion on the law touching the jury's duty.[34a]

§ 746. View of Body.—Before the taking of evidence actually commences, it is the duty of the coroner and the jury to view the body together, and unless this is done, the inquest is void.[35]

§ 747. Examination of Witnesses.—The examination of witnesses before the coroner is rather informal, and likewise largely in the discretion of the coroner as to the manner and scope of the same.[36]

The accused has no right to be present or to be confronted with witnesses, or to offer any witnesses in his own behalf. Neither has he any right either by his counsel or in person to cross-examine witnesses, unless such right finds sanction in a statutory provision

& Co 395, 41 York 82, 75 Pittsb Leg Journal 763, 6 Wash 120; Kuhlman v. San Francisco Superior Ct., 55 P 589, 122 Cal 636; Peo. v. Taylor, 59 Cal 640; In re Coroner, 11 Phila(Pa) 387.

33a. Faucett v. State, 134 P 839, 10 Okla Cr 111, LRA1918A 372.

33b. Kuhlman v. San Francisco Superior Ct., supra.

33c. Kuhlman v. San Francisco Superior Ct., supra.

34. Crocker on Sheriffs (3rd Ed.) Sec. 954; Rex v. Ferrand, 3 B. & Ald 260, 106 Eng Reprint 659, 7 ERC 144.

34a. Crocker on Sheriffs (3rd Ed.) Sec. 961.

35. Rex v. Ferrand, 3 B. & Ald. 260, 106 Eng Reprint 659, 7 ERC 144; Peo. v. Jackson, 84 NE 65, 191 NY 293, 15 LRA(NS) 1173, 14 AC 243.

36. Aetna Life Ins. Co. v. Millward, 82 SW 364, 118 Ky 716, 26 Ky Law 589, 4 AC 1092, 68 ALR 285.

of the particular jurisdiction.[37] The state's attorney, however, may be present and cross-examine witnesses.[38]

The view of the body by the jury is of such great importance that if a burial has taken place, the body must be exhumed, to the end that such view may be had, and if a view of the body cannot be had, there is no authority to hold an inquest.[39] If there is nothing left of the body except the bleached skeleton, it will not warrant the holding of an inquest.[40]

It is sometimes provided by statute, under conditions prescribed therein, that an accused may be present and represented by counsel and cross-examine witnesses.[40a]

It must not be supposed that the accused may not have counsel at an inquest. Although such counsel cannot interrogate or cross-examine witnesses, still he may advise the accused or suspected person with respect to rights in answering or refusing to answer questions.[40b]

Witnesses called on an inquest, except as hereinbefore noted, have no right to be represented by counsel; neither may other interested parties claim such right of representation.[40c]

Generally it is the province and duty of the coroner to examine witnesses called.[40d]

The accused or suspected person cannot be compelled to testify at an inquest. The rule as to compelling witnesses to testify does apply to the accused or suspected person.[40e]

Any witness testifying at a coroner's inquest may refuse to answer a question tending to incriminate him.[40f]

37. Aetna Life Ins. Co. v. Millward, supra; State v. Griffin, 82 SE 254, 98 SC 105, AC 1916D 392 and note; Boehm v. Sovereign Camp W. W., 84 SW 422, 98 Tex 376, 4 AC 1019 and note; Matter of Collins, 11 Abb Pr (NY) 406, 20 How Pr 111.

38. In re Coroner's Inquest, 7 Dist 566, 20 Pa Dist 685.

39. Sejrup v. Shepard, 275 NW 687, 201 Minn 132; Meads v. Daugherty, 25 SE 915, 98 Ga 697; Burnett v. Lackawanna Co. 9 Pa Co 95; In re Voigt's Fees, 2 Pa Dist & Co 104; Fayette v. Batton, 108 Pa 591; Rambo v. Chester County, 1 Chester Co 416; Lancaster County v. Holyoke, 55 NW 950, 37 Neb 328, 21 LRA 394.

40. Meads v. Daugherty, 25 SE 915, 98 Ga 697.

40a. Ex parte Meyers, 26 SW 196, 33 Tex Cr. 204; Boehm v. Sovereign Camp W. W. 84 SW 422, 98 Tex 376, 4 AC 1019 and note.

40b. Crocker on Sheriffs (3rd Ed.) Sec. 955.

40c. State v. Griffin, supra; Aetna Life Ins. Co. v. Millward, supra; Matter of Collins, supra.

40d. Crocker on Sheriffs (3rd Ed.) Sec. 955.

40e. Peo. v. Taylor, 59 Cal 640.

40f. Peo. v. Taylor, supra; Garrett v. St. Louis Transit Co. 118 SW 68, 219 Mo 65, 16 AC 678; Masterson v. St. Louis Transit Co. 103 SW 48, 204 Mo 507; Counselman v. Hitchcock, 12 S Ct 195, 142 US 547, 35 L ed 1110.

The refusal to answer a particular interrogatory, or to testify generally, on the ground that evidence might incriminate the witness, may not be used thereafter to impeach the evidence of the witness.[40g]

While the accused person may not adduce evidence to prove his innocence, still it is the coroner's duty to call all persons as witnesses who possess any knowledge of the matter under investigation; and it is immaterial whether the evidence be for or against the accused or suspected person, it is the duty of the coroner to adduce it.[40h]

§ 748. Public Hearing.—It seems that the better practice is that the hearing be public, and this is particularly true where the inquest is treated as judicial in its nature.[41]

After the inquest is concluded, then the jury should retire and consider its verdict. During the jury's deliberation only the jurors may be present; the coroner is not excepted from the operation of this rule of law.[41a] However, in the United States, a jury's verdict is not binding on anyone. It may not be set aside, nor appealed from. But at one time, at common law in England, the situation was different. The verdict of the jury served as an indictment, and could be made the basis of a prosecution.[42]

It is the duty of the coroner to receive the verdict, and there is a presumption that the evidence sustained it; and the fact that the verdict is in the form of an opinion of the jurors does not in any way militate against its validity. The jury has no right to recall its verdict after it has once been filed.[43] The jury's verdict should state what the evidence shows with respect to the identity of the deceased, the time, place, and cause of his death, and the name of the person guilty of the homicide, if known, and if unknown, it should be so stated.[44]

40g. See authorities note 40f, supra, this section.

40h. Matter of Collins, supra.

41. State v. Griffin, 82 SE 254, 98 SC 105, AC 1916D 392 and note. See however, Boehm v. Sovereign Camp W. W. 84 SW 422, 98 Tex 376, 4 AC 1019 and note.

41a. Crocker on Sheriffs (3rd Ed.) Sec. 959.

42. Peoria Cordage Company v. Industrial Board of Illinois, 119 NE 996, 284 Ill 90, LRA19 SE 822; Smalls v. State, 28 SE 981, 101 Ga 570, 40 LRA 369.

43. State v. Moorhead, 159 NW 412, 100 Neb 298; Armour v. State Industrial Board, 113 NE 138, 273 Ill 590; New York Life Ins. Co. v. McNelly, 79 P(2d) 948, 52 Ariz 181; Fountain County v. Van Cleave, 49 NE 978, 19 Ind App 643.

44. Giles v. Brown, 1 Mill (SC) 230; Patterson v. Jackson, 211 Ill App 646 (coroner's jury has no power to fix civil liability); Bishop v. Chicago Railways Company, 204 Ill App 205 (coroner's jury has no power to fix civil liability); In re Smith, 4 Lanc Law Review 302.

While it is true that a jury's verdict is not binding on anyone, is not res adjudicata, and concludes no rights, still it ought to be noted that a second inquest cannot be held where a legal one has already been had and it has not been legally set aside or annulled.[44a]

§ 749. Autopsy in Connection with Inquest.—It is a general rule that a post-mortem or autopsy may not be performed, or caused to be performed by the coroner, unless an inquest is regularly held, without the consent of the next of kin of the deceased.[45] The autopsy or post-mortem is regarded by some courts as an integral part of an inquest.[46]

§ 750. Reduction of Evidence to Writing.—The evidence heard at a coroner's inquest is usually required to be reduced to writing and signed by the witnesses and filed in some public office and is subject to inspection generally; but the requirements are satisfied if the substance of the evidence is reported and signed by the witnesses.[47] The record should indicate under the coroner's certificate that the witnesses were sworn and that the record is correct and true.[48] However, in view of stenographic competency, the inquests are generally heard and reported in shorthand and transcribed and thereafter signed. This procedure has greatly lessened the labor attendant upon inquests.

§ 751. Inquest Over Several Bodies.—It seems where a number of persons are killed at one and the same time that there may be a joint inquest over all of the bodies.[49] However, it seems where the bodies have been removed to different places that an inquisi-

44a. Fountain County v. Van Cleave, supra; Crocker on Sheriffs (3rd Ed.) Sec. 960a.

But see Sec. 950.

Smith's Coroners and Constables (2nd Ed.) 23; Peo. v. Budge, 4 Park Cr (NY) 519; Morgan v. San Diego Co. 86 P 720, 3 Cal App 454.

45. Sandy v. Morgan, 87 NE 131, 171 Ind 674, 131 Am St Rep 273, 85 NE 722, 42 Ind App 268; Finley v. Atlantic Transport Company, 115 NE 715, 220 NY 249, LRA1917E 852, AC 1917D 726, 157 NYS 1124, 172 App Div 907; Darcy v. Presbyterian Hospital, 95 NE 695, 202 NY 259, Ann Cas 1912D 1238; see also, 96 NE 1113, 203 NY 547, 122 NYS 1126, 137 App Div 924.

46. Coty v. Baughman, 210 NW 348, 50 S Dak 372, 48 ALR 1205 and note.

47. In re Marvin Shaft Inquest, 3 Pa Co 10; In re Coroner's Inquest, 1 Pa Co 14, 3 Kulp 451; United States v. Faw, 25 Fed Cas No. 15077, 1 Cranch C. C. C. 456.

48. Peo. v. Collins, 20 How Pr (NY) 111; Peo. v. White, 22 Wend (NY) 167; see however, 24 Wend 520.

49. St. Clair v. Bollman, 15 Ill App 279; Francis v. Tioga, 8 Pa Co 163.

tion may be held where the bodies are.[50] It has been held, however, that separate inquests are necessary in all cases.[51]

§ 752. Signing of Inquisition and Return.—The inquisition and return of an inquest should be made out by the coroner and signed by him, wherein the names of the jurors should appear in full, and not by initials. However, the jurors may sign, wherever required, by marks.[52]

§ 753. Warrant and Arrest of Accused.—In some jurisdictions it is the coroner's duty, upon a verdict being rendered that a certain person is guilty of an offense in connection with the death, to issue a warrant of arrest for such person, and to deal with him thereafter as the law directs.[53] However, this matter is covered by local statutory enactments, which should be consulted.

The fact that the suspected person is arrested because of a finding by a jury at an inquest does not deprive him of his rights given by law in a criminal case. An inquest cannot take the place of a preliminary hearing or examination.[53a]

50. Fayette v. Batton, 108 Pa 591; Rambo v. Chester County, 1 Chester Co 416.

51. In re Marvin Shaft Inquest, 3 Pa Co 10; Weaver v. Northampton County, 2 Lehigh Val. LR 408.

52. In re Coroner's Inquest, 1 Pa Co 14, 3 Kulp 451; In re Marvin Shaft Inquest, 3 Pa Co 10; In re Evans, 4 Pa Co 89; In re Smith, 5 Pa Co 88; In re Crosby, 3 Pittsb (Pa) 425; State v. Evans, 27 La Ann 297.

53. Crocker on Sheriffs (3rd Ed.) Sec. 968 et seq.

53a. In the Matter of Ramscar, 63 How Pr (NY) 255.

The following forms are suggested. It should be understood, however, that they are not drawn with regard to the law of any particular jurisdiction and before they are used or relied upon they should be checked with local law. They are merely supplied here as general forms.

NO. 1

Oath of Office of Sheriffs, Coroners and Constables

I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of ....., and that I will faithfully discharge the duties of the office of sheriff (under sheriff, deputy sheriff, or coroner) of the County of ..... (or of constable of the town, precinct or district of .....) according to the best of my ability.

NO. 2

Sheriff's Bond

Know all men by these presents, that we ..... are held and firmly bound unto the people of the state of ....., in the penal sum of $.....; for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seal and dated the ..... day of ....., 19.....

Whereas, the above bounden ..... hath been elected to the office of the sheriff of the county of ..... at the general election held therein (or at a special election held therein) on the ..... day of ..... Now therefore, the condition of the above obligation is such, that if the said ..... shall well and faithfully in all things perform and execute the office of sheriff of the said county of ..... during his continuance in the said office, by virtue of the said election, without fraud, deceit or oppression, then the above obligation to be void, otherwise to remain in full force and effect.

.....(L. S.)
.....(L. S.)
.....(L. S.)

Sealed and delivered in the presence of

.....
Witness
.....
Witness

NO. 3

Bond Given by One Appointed to Fill a Vacancy

(Insert the following in place of the recital in No. 2)

Whereas, the above bounden ..... has been appointed by the governor of the state of (or other appointing authority, as the board of county commission, as the case may be) ....., to execute the duties of the office of sheriff of the county of ..... during the vacancy therein, caused by the death of ....., late sheriff of said county, (or, caused by the resignation or removal from office of ....., late sheriff of said county). Now therefore the condition, etc.

NO. 4

Renewed Bond

(Insert the following in place of the recital in No. 2)

Whereas, the said ..... was duly elected sheriff of the county of ..... at the general (or at a special) election held therein on the ..... day of ....., 19....; and whereas, the said ..... did duly enter upon the duties of the said office and hath continued in said office until this time, and now is the sheriff of said county. Now therefore, the condition, etc.

NO. 5

Oath of the Surety

State of .....
County of ..... } ss.

A. B. and C. D., the sureties on the within bond, being severally duly sworn, each for himself says: That he is a freeholder within the state of ....., and is worth the sum of ..... thousand dollars, over and above all debts whatsoever owing by him, and exclusive of property exempt.

A. B. .....
C. D. .....

Sworn to this ..... day of ....., 19.... before me R. H., Clerk of County of ....., or, County Judge of County of .....

.....
(Clerk or County Judge)

NO. 6

Clerk's Approval to Be Indorsed on the Bond

I approve of the within bond, as to its form and manner of execution, as well as to the sufficiency of the surety.

J. B., Clerk of ..... County,
or, County Judge of ..... County.

NO. 7

Clerk's Certificate that the Sheriff Has Qualified

State of .....
County of ..... } ss.

I certify that C. D., sheriff elect of the county of ..... has this day taken the constitutional oath of office, and caused the same, together with the bond required by law, duly approved by me, by my certificate thereof, indorsed thereon, to be filed in my office.

In witness whereof I have hereunto set my hand and affixed my seal of office this ..... day of ....., 19....

A. B., Clerk of ..... County.

(L.S.)

NO. 8

Assignment by the Old Sheriff to the New Sheriff

THIS INDENTURE, made the ..... day of ....., 19...., between A. B., late sheriff of the county of ..... of the one part, and C. D., now sheriff of the said county, of the other part, as follows:

Whereas, the said C. D. has this day served on the said A. B. the certificate of the clerk of the said county, that the said C. D., has taken the constitutional oath of office, and has caused the same, with the bond required by statute, duly approved by said clerk, to be filed in the office of the clerk aforesaid: Now, therefore, this indenture witnesseth that the said A. B., as such late sheriff as aforesaid, in pursuance of the statute in such cases made and provided, hath delivered possession and set over to the said C. D., as such sheriff, the county jail (or jails) of the said county and the appurtenances; and also the following processes, papers and prisoners, to-wit:

A summons and complaint and copies thereof, to the ..... court at the suit of ..... against ..... dated ....., A. B., Attorney.

A summons, affidavits and order of Hon. C. H. D., a ..... of the ..... court, and copies thereof, to hold the defendant to bail in the sum of $..... wherein ..... is plaintiff and ..... defendant. A. B., Attorney.

An execution upon a judgment in the ..... court in which ..... is plaintiff and ..... is defendant, for $..... rendered ....., 19...., received ....., 19...., at ..... o'clock, p. m., A. B., Attorney.

An execution against the body of ..... at the suit of ..... for $..... docketed ..... and received ..... A. B., Attorney.

The defendant has been arrested thereunder, and is now upon the liberties of the jail of said county.

Also the bond of said ..... with ..... as his surety, for the liberties of said jail, in the penalty of $..... and dated ....., 19....

Also the body of ..... confined in the said jail for grand larceny upon the warrant of commitment of .... and also the said warrant

Also, the jail records, now at the jail; three stoves; ..... blankets, ... cords of wood, etc.

In witness whereof, the said party of the first part has hereunto affixed his seal and the name of office the day and year first above written.

A. B., (L. S.)
Late Sheriff of ..... County.

NO. 9

Acknowledgment of the New Sheriff of the Receipt of the Jails, etc., Indorsed on a Duplicate of Such Indenture

I acknowledge the receipt, this ..... day of ....., 19...., of the property, processes, documents and prisoners specified in the indenture between A. B., late sheriff of ..... county, and myself, as present sheriff of said county, of which the within is a duplicate.

C. D., Sheriff of County.

NO. 10

Designation of Place of Keeping the Sheriff's Office

To all whom it may concern: Take notice, that the office of the sheriff of ..... will be kept at ..... in the ..... of ..... in said county.

Dated ....., 19....

A. B., Sheriff of County.

NO. 11

Appointment of Under Sheriff, Deputies and Jailer

Know all men by these presents, that I, the undersigned, sheriff of the county of ..... do hereby appoint ..... of ..... in said county, under sheriff, (deputy sheriff, or deputy sheriff and jailer) in and for said county.

In witness whereof I have hereunto set my hand and seal this ..... day of ....., 19....

A. B., Sheriff. (L. S.)

NO. 12

Deputy's Bond

Know all men by these presents, that we ..... are held and firmly bound unto A. B., sheriff of the county of ..... and state of ....., in the sum of ..... thousand dollars, to be paid to the said ..... or his certain attorney, executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents. Sealed with our seals and dated the ..... in the year one thousand nine hundred and .....

Whereas, the above bounden ..... has been appointed to the office of under sheriff, (deputy sheriff, or deputy sheriff and jailer) of the said county of ..... by the said ..... as such sheriff: Now the condition of this obligation is such that if the above bounden ..... shall well and faithfully execute and discharge the duties of the said office of under sheriff during his continuance therein, without any deceit, fraud, delay, neglect or oppression, and shall save harmless and indemnify the said A. B., his executors and administrators from and against all acts or doings, or neglect of duty of him the said ..... as such under sheriff, and pay off and discharge and save him harmless of and from all judgments, penalties, fines, costs, charges and damages in any action or proceeding that may be brought against the said ..... as such sheriff, by reason of any act or omission done, committed or suffered by the said ..... as such under sheriff; and will likewise pay and discharge and save the said A. B., harmless from any costs and expenses he may incur or be put to in defending any action or proceeding commenced against him as such sheriff, by reason of any acts or doings, or neglect of duty of him the said .... as such under sheriff, whether such action or proceeding is rightfully brought against the said A. B., as such sheriff, or not; and that the said ..... will pay to the said A. B., as such sheriff, his proportion of the legal fees received by him the said ..... at any time, as such under sheriff as aforesaid; and also that said ..... will, at the termination of his appointment as such under sheriff, account to and with the said A. B., his representatives, assigns or duly authorized agent, for all moneys collected or received by him as such under sheriff as aforesaid, including all legal fees for services as such under

sheriff, and will pay over all moneys collected by him as aforesaid and remaining in his hands, as well as the portion or share of the legal fees received by him the said ..... as such under sheriff as aforesaid, to which the said A. B. is entitled; then this obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered in the presence of

.....(L. S.)
.....(L. S.)
.....(L. S.)

.....
Witness
.....
Witness

NO. 13

Acknowledgment of Bond by Parties

State of .....
County of ..... } ss.

Personally appeared before me this ..... day of ....., 19...., to me known to be the persons described in and who executed the foregoing instrument, and who severally acknowledged that they executed the same for the use and purposes therein mentioned.

A. B., Justice of the Peace of said County.

NO. 14

Request to Appoint a Special Deputy

To A. B., Esq.,

Sheriff of ..... County:

Please to deputize ..... as special deputy at the instance and request of the plaintiff and at his peril, (or at my instance and peril,) to execute a writ of execution against property at the suit of ..... against ..... for $....., docketed ..... in the office of the clerk of ..... county; and for so doing, this shall be your indemnity.

C. D.

NO. 15

Deputation of Special Deputy

I hereby deputize and appoint A. B., of ..... to execute the within (attachment against defaulting witnesses,) according to the exigency thereof.

Dated, ..., 19....

C. D., Sheriff of County.

NO. 16

Resignation of the Sheriff

To His Excellency, J. T. H.,
Governor of the State of .....:

Sir:

I hereby resign the office of sheriff of the county of ....., to take effect upon the appointment of a person to execute the duties of the office.

A. B., Sheriff of County.

NO. 17

Representation that the Sheriff Is in Custody for the Nonpayment of Money

State of .....
County of ..... } ss.

In pursuance of the statutes of this state, I, the undersigned, one of the coroners of said county, do represent that ....., sheriff of said county, has been committed to my custody as such coroner, by virtue of an execution (or attachment) for the nonpayment of money received by him, in virtue of his office of sheriff, and that he has remained so committed for the space of thirty days, successively.

Dated .....

C. D., Coroner of County.

NO. 18

Designation of a Coroner to Execute the Office of Sheriff

State of .....
County of ..... } ss.

A vacancy having occurred in the office of sheriff of ..... county, and there being no under sheriff of said county in office, (or the office of under sheriff of the said county having become vacant;) (or the under sheriff of said county having become incapable of executing the said office,) and there being more than one coroner in office, I, the county judge of said county (or other authority), in pursuance of the statutes in such case, hereby designate ....., one of the coroners of said county, to execute the office of sheriff of said county, until a sheriff thereof shall be elected or appointed and qualified.

Given under my hand and seal, this ..... day of, etc.

J. W., County Judge. (L. S.)

NO. 19

Appointment of a Person to Execute the Office of Sheriff

State of .....
County of ..... } ss.

Vacancies in the office of sheriff and under sheriff of said county having occurred, and A. B., the coroner solely in office, (or all the coroners of said county in office having successively) neglected or refused to execute, within the time required, the bond required in such case, I, the county judge of said county (or other authority), do hereby appoint C. D., of ..... to execute the office of sheriff of the said county, until a sheriff shall be duly elected, or appointed and qualified.

Given under my hand and seal, etc.

J. W., County Judge of County.

NO. 20

Notice of Said Designation

To A. B.:

Sir: You have been this day designated by the county judge of ..... County (or other authority), to execute the office of sheriff of said county, until a sheriff thereof shall be elected, or appointed and qualified.

Dated .....

J. B., County Clerk.

NO. 21

Removal from Office of Under Sheriff or Deputy

To C. D.:

Sir: You are hereby removed from the office of under sheriff, (or deputy sheriff) of the county of ..... and will forthwith hand over all processes and papers in your hands as such under sheriff (or deputy) for service.

Dated .....

A. B., Sheriff.

NO. 22

Resignation of the Under Sheriff or Deputy

To A. B., Sheriff of the County of .....:

Sir: I hereby resign the office of under sheriff (or deputy sheriff) of the county of .....

C. D.

NO. 23

Admission of Receipt of Criminal Process by the Sheriff

THE PEOPLE vs. C. D.	Bench Warrant of District (or other officer) Attorney of ..... County, on indictment for forgery. Dated and received by me for execution ....., 19....

A. B., Sheriff,
By E. F., Deputy.

NO. 24

Return of Rescue and Resistance to Criminal Process

State of .....
County of ..... } ss.

I, the sheriff of said county, do certify and return to the court of ..... in and for ..... county, now here, that by virtue of the within warrant, delivered to me for execution on the ..... day of .....,19...., I did on the ..... day of ....., 19...., proceed, as by the said writ I was commanded, to execute the same; and that when I had arrived at the dwelling of the said ..... in ..... in said county, and had demanded admittance after having duly announced the purpose of my coming, I was resisted and violently assaulted by said .... and ....., his son, and one ....., then present, and was violently beat and bruised by the said ....., and that in consequence of said resistance I was unable to execute the said writ alone or with the aid of my deputies, but was compelled to raise the power of the county to aid in enforcing the execution of the same.

Dated ....., 19....

A. B., Sheriff of County.

NO. 25

Return of Rescue and Resistance to an Execution

State of .....
County of ..... } ss.

I, the sheriff of said county, do certify and return to the ..... court now here, that by virtue of the within execution, to me directed and delivered for execution, I did on the ..... day of ....., 19...., between the hours of ten and eleven o'clock in the forenoon proceed to the residence of the defendant in ..... in said county to execute the same as I am therein commanded, and that having been invited into the dwelling house of the defendant by the said defendant, I then and there in due form levied on one pianoforte then in the possession of the said defendant under and by virtue of the said execution, and while taking the same into

my possession, I was violently resisted by the said ..... and one ..... and ..... then and there aiding the said defendant, and who then and there violently and with force rescued the said levy and ejected me from the house, and that before I could command assistance to retake the same the said pianoforte was removed and I have not been able to find the same.

Dated ....., 19....

A. B., Sheriff of County.

NO. 26

Return to Warrant on Arrest

I have arrested the within named defendant, and have him now here in my custody before the court, as I am within commanded.

Dated ....., 19....

A. B., Sheriff.

NO. 27

Return of Arrest and Commitment to Jail

I have arrested the within named defendant and have committed him to jail.

Dated ....., 19....

A. B., Sheriff

NO. 28

Return Where Some Found and Others Not Found

I have arrested the within named defendant, ..., and have him now here before the court; but the within named ....., cannot be found.

Dated ....., 19....

A. B., Sheriff.

NO. 29

Return to Warrant for Larceny Where the Property Is Found

I have arrested the within defendant and have also taken the property alleged to be stolen, which I found on the person of the defendant, or in the possession of the defendant, and have him and the said property now here before the court.

Dated ....., 19....

A. B., Sheriff.

NO. 30

Return Where the Magistrate Issuing the Warrant Is Absent

I have arrested the within defendant as I am within commanded; and I further return that on making such arrest, I forthwith brought the said defendant to the office of the magistrate before whom the within warrant is made returnable, but that said magistrate was then absent therefrom and could not be found, to proceed upon the said warrant.

Dated ....., 19....

A. B., Sheriff.

NO. 31

Return Where the Magistrate Issuing the Warrant Has Gone Out of Office

I have arrested the within defendant as I am within commanded; and I further return, that at the time of such arrest, the magistrate issuing the within warrant had ceased to be such magistrate, by the expiration of his term of office, (or by resignation of his said office, or removal from office, or removal from the town, or county then certify the disposition made of the prisoner).

Dated ....., 19....

A. B., Sheriff.

NO. 32

Indorsement of Warrant in Another County

State of .....
County of ..... } ss.

It appearing satisfactorily to me by the oath of ..... that the signature of ..... to the within warrant, is in the handwriting of said ....., the justice of the peace within mentioned; I do hereby therefore authorize ..... the person bringing this warrant, or any other officer to whom such warrant may be directed, to execute the same in said county of .....

A. B., Justice of the Peace of ..... County.

NO. 33

Return to Such Warrant Where the Defendant Desires to Be Let to Bail in the County Where Arrested

I have arrested the within defendant, in pursuance of the within warrant, and of the indorsement thereon.

Dated, ..., 19....

A. B., Sheriff of County.

NO. 34

Certificate of Magistrate Letting the Prisoner to Bail

I certify that the within defendant, having been brought before me by the officer making return thereto, and such defendant requiring to be let to bail by me, I have taken his recognizance and with ..... and ..... of ..... in said county, in the sum of $..... for his appearance at the next court having cognizance of the offense, in the county of ..... and have delivered such recognizance and this warrant to such officer (or otherwise as the law directs).

Dated, ..., 19....

C. A., Justice of Peace of County.

NO. 35

Return to Search Warrant for the Delivery of Official Books and Papers

I have searched the place designated in the within warrant and cannot find the within mentioned official books and papers or any of them (or have found the within mentioned books and papers, and have the same here).

Dated, ..., 19....

A. B., Sheriff.

NO. 36

Return to Search Warrant for Stolen Goods

I have executed the within search warrant as I am within commanded, by making diligent search in the place designated in the warrant for the goods therein described; but cannot find the said goods, or any part thereof.

Dated ....., 19....

A. B., Sheriff of County.

NO. 37

The Same When Goods Are Found

I have executed the within search warrant, as I am commanded, and have found the said goods in the place designated, and have them now here, as I am within commanded.

Dated ....., 19....

A. B., Sheriff of County.

NO. 38

The Same Where Goods Are Found, and Person in Whose Possession They Were, Arrested

I have executed the within search warrant as I am within commanded, and have found the said goods in the place designated, in the possession of C. D.; and there being reason to believe that he is the person who stole them, have arrested him and have him now here with the said goods.

Dated, ..., 19....

A. B., Sheriff,
by C. B., Deputy,
or, E. F., Constable.

NO. 39

The Same Where Other Goods Are Found in the Place Designated, Supposed to Be Stolen, Are Taken

I have executed the within search warrant as I am within commanded, and have found the said goods in the place designated; and I have also found in the same place a piece of silk and a piece of linen, and which it is reasonable to believe were stolen also, and I have the same, with the goods described now here before the court as I am within commanded.

Dated, ..., 19....

A. B., Sheriff.

NO. 40

Return to Search Warrant under the Statutes to Prevent Gambling

I have made diligent search at the place designated and on the person of the defendant for the gambling apparatus described in the within warrant, and have found and taken the following ....., which I have now here before the court as I am within commanded.

Dated, ..., 19....

A. B., Sheriff.

FORMS ON THE INVESTIGATION OF THE ORIGIN OF FIRES

NO. 41

Subpoena for Witness

The People of the State of ..... to A. B., C. D., and E. F.:

We command you and each of you that all business and excuses being laid aside you be and appear before the undersigned sheriff (or one of the coroners) of the county of ..... at ..... and ..... on, etc., to testify and give evidence upon an inquest then and there to be had to investigate the origin of the fire at the dwelling of G. F., on ..... street, in ..... on the ....., 19...., and hereof fail not at your peril.

Witness the hand of the sheriff (or coroner) this ..... day of ....., 19....

G. H., Sheriff of County,
or, J. K., Coroner of County.

This form could be used where a prosecuting or district attorney has power to summons witnesses on an investigation.

NO. 42

Oath to Foreman of Jury

You do swear that you will well and truly inquire whether the dwelling house of E. F., situate on ..... street in ..... which was lately injured (or destroyed) by fire, was maliciously set on fire, (or attempted to be set on fire) and how and in what manner such fire happened (or was attempted) and all the circumstances attending the same and who are guilty thereof, either as principal or accessory and in what manner; and that you will make a true inquisition thereof according to the evidence offered you or arising from an investigation of the place where the fire was (or was attempted;) so help you God.

NO. 43

Oath to the Jurors

The same oath which K. L., the foreman of this inquest hath on his part taken, you and each of you do now take, and shall well and truly observe and keep on your part, so help you God.

NO. 44

Oath to Witness

The evidence you shall give upon the inquest concerning the burning (or attempted burning) of the dwelling house of E. F. situate on ..... street in ..... lately destroyed (or injured) by fire, shall be the truth, the whole truth and nothing but the truth, so help you God.

NO. 45

Examination of Witnesses before the Jury

State of .....
County of ..... } ss.

Examination of witnesses produced, sworn, and examined on ..... day of ..... at ..... before A. B., sheriff (or C. D., one of the coroners) of the county of ..... and ..... jurors, good and lawful men of the said county, duly summoned and sworn by the said sheriff (or coroner) to inquire whether the dwelling house of E. F., situate on ..... street in ..... which was lately injured (or destroyed) by fire, was maliciously set on fire or attempted to be, and how and in what manner such fire happened or was attempted, and all the circumstances attending the same, and who are guilty thereof, either as principal or accessory, and in what manner, and to make true inquisition, according to the evidence, or arising from an investigation of the place where the fire was (or attempted).

M. N., being duly sworn and examined, testifies and says that—

(Signed) M. N.

Subscribed and sworn before me
this ..... day of ....., 19....

A. B., Sheriff,
or, C. D., Coroner.

The testimony of the other witnesses to follow.

Certificate to Be Annexed to the Testimony

I do hereby certify that the foregoing testimony of the several witnesses appearing upon the inquest was reduced to writing by me, and that the foregoing testimony is the whole of the testimony taken on such inquest, and that the same is correctly stated as given by the witnesses respectively.

A. B., Sheriff,
or, C. D., Coroner.

NO. 46

Inquisition

State of .....
County of ..... } ss.

Inquisition taken at ..... in said county, on the ..... day of ....., 19...., before A. D., Sheriff (or C. D., one of the coroners) of said county upon inspecting the place where the fire was (or attempted) upon the oath of .....
.....
....., good and lawful men of the said county duly summoned and sworn to inquire whether the dwelling house of E. F., situated on ..... street ..... was maliciously set on fire, (or attempted to be) and how and in what manner such fire happened, (or was attempted) and all the circumstances attending the same, and who were guilty thereof, either as principal or accessory, and in what manner; do say upon their oaths aforesaid, that the said dwelling was wilfully and maliciously set on fire, (or attempted to be) by E. F., for the purpose of defrauding ..... insurance company of the amount of the policy issued to him by said company on the premises; and that there were no accessories.

In witness whereof as well the said sheriff (or coroner) as the jurors aforesaid have to this inquisition set their hands and seals on the day of the date thereof.

A. B., Sheriff (L. S.)
E. H., Foreman (L. S.)
H. I., Juror (L. S.)
K. L., Juror (L. S.)
etc., etc.

OR: that the same was fired by one ....., an evil disposed person in consequence of ill feeling towards the owner,

and that M. N. was present and aided the said ..... in setting fire to the building.

OR: that they are unable to ascertain the origin and circumstances of the fire.

OR: that the same was wilfully set on fire by some person or persons to the jury unknown.

OR: that the same caught fire in consequence of a defect in the chimney.

OR: accidentally, in consequence of a stove standing too near a wooden partition.

NO. 47

Warrant to Arrest the Party Charged by the Inquest with the Crime

To the Sheriff or any Constable or Marshal of the County of .....:

Whereas, by the inquisition of .....
.....
good and lawful men of said county, taken upon their several oaths before me, the sheriff (or one of the coroners) of said county, at ..... in which E. F. is charged with having designedly set on fire the dwelling house of said E. F. for the purpose of defrauding the ..... insurance company of the amount of the policy held by the said E. F. on the premises; you are therefore hereby commanded in the name of the people of the state of ..... forthwith to arrest the said E. F. and bring him before me at ..... to be dealt with according to law.

Given under my hand and seal this ..... day of ....., 19....

A. B., Sheriff.

NO. 48

Warrant of Commitment of the Incendiary

The People of the state of ..... to the sheriff (or any constable or marshal) of the county of ..... and to the keeper of the common jail of said county:

Whereas, E. F., having been charged upon inquisition taken before A. B., the sheriff, (or C. D., one of the coroners) of said county of the oath of ..... with having designedly set on fire the dwelling house owned by him for the purpose of defrauding the ..... insurance company of the amount of the policy issued by it to him on the premises, and the said E. F. having been brought before the said A. B. (or C. D.) to answer to the said charge, and having taken the examination of the said E. F.

These are therefore to command you and the said sheriff, constable or marshal, that you forthwith convey and deliver to the keeper of the said jail, the said E. F. and you, the said keeper are hereby required to receive the said E. F. into your custody in the said common jail, and him there safely keep until he shall be discharged by due course of law.

Given under my hand and seal at ..... in said county, the ..... day of ....., 19....

A. B., Sheriff,
or, C. D., Coroner.

NO. 49

Recognizance by Witnesses at the Inquest

State of .....
County of ..... } ss.

Be it remembered that on this ..... day of ..... 19.... I. K., L. M. & N. O. of ..... in said county, personally appeared before me, A. B., Sheriff (or C. D., one of the coroners) of said county, and severally acknowledged themselves to be indebted to the people of the state of ..... each separately in the sum of ..... dollars, to be made and levied of their goods and chattels, lands and tenements to the use of the said people, if default shall be made in the condition following: The condition of this recognizance is such that if the above bounden I. K., L. M. & N. O., shall personally be and appear at the next court of ....., to be held in and for the said county of ..... to give evidence in behalf of the people against E. F. for wilfully setting fire to his dwelling house, sit-

uated on ..... street in ..... on or about ..... as well to the grand jury as the petit jury, and do not depart the said court without leave, then this recognizance to be void and of no effect; otherwise to remain in full force.

D. K.
L. M.
N. O.

Subscribed and acknowledged the day and year first above written.

A. B. Sheriff,
or C. D., Coroner.

NO. 50

Recognizance by Witness with Sureties

State of .....
County of ..... } ss.

Be it remembered that on this ..... day of ....., 19...., J. K. and M. N. and O. P. all of the town of ..... in said county, personally came before me, the sheriff (or one of the coroners) of the said county, and severally acknowledged themselves to be indebted to the people of the state of ....., in manner following: the said J. K. in the sum of ..... and the said M. N. and O. P. in the sum of ....., each to be levied of their respective goods and chattels, lands and tenements to the use of the said people, if default shall be made in the following conditions:

The conditions of the above recognizance is such that if the above bounden J. K. shall personally be and appear at the next ..... court, to be held in and for the said county of ..... to give evidence in behalf of the people against E. F. for wilfully setting fire to his dwelling house, situate on ..... street in ..... on ..... or about ..... as well to the grand jury as the petit jury and do not depart the said court without leave, then this recognizance to be void and of no effect; otherwise to remain in full force.

J. K.
L. M.
N. O.

Subscribed and acknowledged the day and year first above written.

NO. 51

Sheriff's Proclamation

PROCLAMATION.—Whereas a court of .... is appointed to be held at the court house in ..... in and for the county of ..... on the ..... day of ..... 19..... proclamation is therefore hereby made in conformity to a precept to me directed and delivered by the district attorney of ..... county on the ..... day of ....., 19..... to all persons bound to appear at the said court by recognizance or otherwise, to appear thereat, and all justices of the peace, coroners and other officers who have taken any recognizance for the appearance of any person at such court, or who have taken any inquisition or the examination of any prisoner or witness, are required to return such recognizance, inquisition and examination to the said court at the opening thereof, on the first day of its sitting.

Given under my hand at the sheriff's office in the ..... of ..... on the ..... day of ..... 19.....

A. B., Sheriff of County.

NO. 52

Return to the Precept of the District Attorney

State of .....
County of ..... } ss.

I have executed the within precept as I am within commanded, by having duly summoned the jurors drawn for the court mentioned therein, to appear thereat; by making immediate proclamation as therein commanded, and causing the same to be published in a public newspaper printed in said county once a week from the receipt of the said precept, until the time appointed for said court,* and by having the prisoners in jail brought before the court with all process and proceedings in any way concerning them in my hands.

Dated ..... 19.....

A. B., Sheriff of County.

NO. 53

Return to Precept Where the Prisoners Are Not All Brought into Court

The same as the last, to the asterisk; then add: "and that I am ready to bring before the court now here the prisoners in jail as it may direct."

Dated ....., 19.....

A. B., Sheriff of County.

NO. 54

Summons to Constable to Attend Court

SHERIFF'S OFFICE OF ..... COUNTY
..... 19.....

To C. D., Constable of the town of ..... in said county:

Sir: You are hereby summoned to attend as a constable, at the sitting of the ..... court at the court house in the ..... of ..... on the ..... day of ..... at ten o'clock in the forenoon.

A. B., Sheriff.

NO. 55

Certificate of the Attendance of Constable at Court

State of .....
County of ..... } ss.

I certify that the following constables were summoned by me to attend the sitting of the ..... court, held at the court house in the ..... of ..... commencing on the ..... day of ....., 19.... and that they have attended as such constables, the number of days set opposite their names respectively:

A. B., four days.
C. D., five days.

Dated ....., 19.....

E. F., Sheriff of County.

NO. 56

Calendar of Prisoners in Jail, for the Court

To the court of ..... of ..... county, now here:

I, the undersigned, sheriff of the said county, do certify that the following calendar is a correct list of the prisoners now detained in the jail of said county, the times when committed, by what process, and the cause of commitment. (Here set out.)

Dated ....., 19.....

A. B., Sheriff.

NO. 57

Directions to Deputy to Summon Jurors, and His Return

To C. D., Deputy Sheriff:

You will summon the persons named below, to appear at the court of ..... to be held at the court house in ..... on the ..... day of ....., 19..... next, at ..... o'clock, a. m., as grand and petit jurors as indicated below, opposite their respective names. They are to be summoned at least ..... days before the first day of the court, by notifying each of them personally, that they are drawn as such jurors, and informing them of the time and place where they are required to attend; or if they cannot be found, then they may be summoned by leaving at their respective place of residence, with some person of proper age, a written or printed notice (copies of which are herewith enclosed). And you will return this to me as soon as the service is complete, and previous to the sitting of the court, first noting opposite the names of the persons summoned respectively, the time when summoned, and the manner in which they were summoned, whether personally or by leaving a notice at their respective places of residence, and signing the certificate below.

Yours, etc.

Dated ....., 19....

A. B., Sheriff of County.

Return of Service

PERSONS TO BE SUMMONED:	WHEN SUMMONED:	HOW SUMMONED:
Grand Jurors		
A. B.	May 14, 1940	Personally
C. C.	" 17, "	By leaving notice with his wife, in his absence
Petit Jurors		
E. F.	" 18, "	Personally

The above named grand and petit jurors were duly summoned by me for the term of the court above designated, at the times and in the manner set opposite their names respectively.

Dated ....., 19....

A. B., Deputy Sheriff
For ..... Sheriff
of County.

NO. 58

Notice to a Juror Who Cannot Be Summoned Personally

Mr. D. C., of ..... Merchant:

Sir: You have been drawn to serve as a ..... juror at a court ..... to be held at the court house in ..... on the ..... day of ....., 19..... at 10 o'clock, a. m., whereat you are required to attend without fail.

Dated ....., 19....

A. B., Sheriff of County.

NO. 59

Return of Jury List of Summoning Jury

State of .....
County of ..... } ss.

To the court of ..... of ..... county, now here:

I, the sheriff of said county, to whom the within lists of jurors for said court were delivered for service, herewith return the same to the court now here; and I certify and return that all the said grand and petit jurors therein named, were duly personally summoned to attend said court at the time and place mentioned in the said lists, at least ..... days previous to the sitting of the said court at the time and place mentioned in the said lists, at least ..... days previous to the sitting of the said court; except A. B. and C. D., who could not be found, but who were in like manner duly summoned to attend, as aforesaid, by leaving at their respective places of residence, with persons thereat of proper age, a partly printed and partly written notice, stating that they were drawn as such jurors, and designating the court, time and place at which they were required to appear; and E. F., who has removed from the county, and G. H., who cannot be found in the county, and who has no known place of residence therein.

Dated ....., 19.....

A. B., Sheriff of County.

NO. 60

Return of New Grand Jury or Talesmen

State of .....
County of ..... } ss.

Pursuant to the direction of the court of ..... of said county, now here, contained in the annexed certified copy of order of said court, I have summoned the following persons to appear forthwith, to serve as grand jurors (or petit jurors,) to-wit: A. B., farmer of ....; C. D., mechanic of .....

Dated ....., 19....

A. B., Sheriff.

NO. 61

Return to Jury List Drawn at the Court

State of .....
County of ..... } ss.

I, the sheriff of said county do certify and return that I have duly personally summoned to attend this court forthwith, (or at .....) the following persons as jurors, whose names were duly drawn by me in the presence of the court for that purpose: A. C., D. E., F. G., etc., and that C. D. and G. H. could not be found, and that service was made on them by leaving a written notice of the time and place where they were to appear at their respective places of residence with persons of suitable age.

Dated ....., 19....

A. B., Sheriff.

NO. 62

Return to Venire for Foreign Jury

The execution of the within venire will appear by the schedule hereto annexed.

A. B., Sheriff.

(Attach the clerk's list of jurors to the venire, and make certificate thereon, as No. 59.)

NO. 63

Proof of Service of a Subpoena, or Summons in a Civil Case

State of .....
County of ..... } ss.

..... being duly sworn, says that he duly subpoenaed (or summoned) the several persons named below, at the times and places set opposite to their respective names, by delivering to each of such persons, personally, a copy of the subpoena (or summons) hereto annexed, (or a ticket containing the substance thereof) and at the same time showing to each of them respectively, the annexed

original subpoena (or summons) and paying to each of said witnesses, respectively, the sum also set opposite to their respective names, for their fees in going to, and returning from the place where they are by said subpoena (or summons) required to attend, and also for one day's attendance thereat, to-wit:

H. H.,	Jan. 18 at		In said County	$——
C. D.,	" " "		" " "	$——
E. F.,	" " "		" " "	$——

.....
Signature of Affiant.

Subscribed and sworn to before me, ..., this ..... day of ....., 19.....

A. B.

NO. 64

Proof of Service of a Subpoena in a Criminal Case

The same as the last in all respects, except as to the payment of fees to the witnesses.

NO. 65

Proof of Service of a Subpoena Where the Service Is Made by Reading the Subpoena

State of .....
County of ..... } ss.

A. B., being duly sworn, deposeth and saith, that on the ..... day of ....., 19....., he served the within subpoena upon the within named ..... and ..... by reading the same to them respectively, (or stating the contents thereof). (If the subpoena is issued in a civil cause, before a justice of the peace, add) and by paying (or tendering to each of them respectively) the sum of $..... for one day's attendance at the place mentioned in said subpoena.

.....
Signature of Affiant.

Subscribed and sworn before me ..... this ..... day of ....., 19.....

A. B.

NO. 66

Proof of Service of Subpoena, Where the Witness Conceals Himself

The same as proof of service of a summons under the same circumstances. See forms Nos. 112, 113.

NO. 67

Attachment against a Witness

The People of the State of ....., to the Sheriff of the County of ....., greeting:

We command you that you attach ..... and bring him ..... forthwith personally before our circuit court (county court) held in and for our county, of ..... on ....., at, etc., to answer unto us for certain trespasses and contempts against us in not obeying our writ of subpoena, commanding him to appear on, etc., at, etc., before said court, to testify in a suit there to be tried between ..... plaintiff and ..... defendant, on the part of the plaintiff (or defendant); and you are further commanded to detain him in your custody until he shall be discharged by our said court; and have you then there this writ.

Witness, ..., judge of said court, (or county judge of said county) at the court house in the town of ..... in said county, the ..... day of ....., 19....

J. B., Clerk.

A. B., Attorney.
(endorsed on the writ.)
Allowed this ..... day of ....., 19.....
C. H. D., Judge of said Court,
or, J. W., County Judge.

NO. 68

The Same in a Criminal Case

The People of the State of ....., to the Sheriff of the County of ..... greeting:

We command you that you attach ..... and bring him forthwith personally before our court of ..... held in and for our county of ..... at, etc., to answer unto us for certain trespasses and contempts against us in not obeying our writ of subpoena, commanding him to appear on, etc., at, etc., before said court, (or not appearing in pursuance of his recognizance) to testify on an indictment there to be tried against ..... on the part of the people, (or defendant) and you are further commanded, etc., (as the last, and to be indorsed in the same way).

NO. 69

Return to Such Attachments

I have arrested the within named ..... as I am within commanded, and have him now here before the court.

Dated ....., 19.....

A. B., Sheriff.

NO. 70

Return When the Witness is Sick

At the delivery of the within attachment to me for execution, the within named defendant then was and still continues so sick and unwell, that it would be dangerous to bring him before the court here, as I am within commanded; wherefore I have not the body of the said ..... before the court now here, according to the command of the within attachment.

Dated, ..., 19.....

A. B., Sheriff of ..... County.

NO. 71

Permit of Jail Physician to Furnish Liquor

State of .....
County of ..... } ss.

I hereby permit to be furnished for A. B., a prisoner now confined in the jail of said county, at, etc., one pint of cognac brandy to be given to the said A. B., ... times a day at ..... etc., ... in quantities not exceeding one tablespoonful at each time; and that it satisfactorily appears to me that the said liquor in the quantities mentioned is absolutely necessary for the health of the said prisoner.

Dated ....., 19....

C. D., Physician of said jail.

NO. 72

Account of Goods Purchased for Employment of Prisoners

The County of .....

To A. B., sheriff of said county, ...Dr.

To ..... purchased for employment of disorderly persons in the jail of said county, $500.00

Dated, ..., 19.....

State of .....
County of ..... } ss.

A. B., sheriff of said county, being sworn, says, that the above account is a correct statement of the articles purchased by this deponent, under and pursuant to the order of ..... of said county, a copy of which is hereto annexed and further saith not.

A. B.

Subscribed and sworn before me .....
this ..... day of ....., 19.....

C. D., Justice of the Peace.

NO. 73

Reports of Disposition Thereof

To the ..... of the County of .....:

The following is a true account and statement of the materials purchased by me, under and pursuant to the order of ....., made on the ..... day of ....., 19.....

A. B., sheriff of the county of .....

In account with said County:

To cash received of the county treasurer, under the order of ....., for the purchase of materials for the employment of disorderly persons confined in the jail of said county		$500.00
To sales of articles, over cost of materials		100.00
		$600.00
By cash paid to county treasurer, amount of purchase	$500.00	
By cash paid to county treasurer, amount of purchase	50.00	
	$550.00	
By cash C. D., one of said convicts, his share of said earnings	10.00	
By cash E. T., one of said convicts, his share of said earnings	20.00	
By cash G. H., one of said convicts, his share of said earnings	20.00	
		$600.00

State of .....
County of ..... } ss.

A. B., sheriff of said county, being duly sworn, says, that the above statement is true and just in all respects.

A. B.

Subscribed and sworn to before me
..... this ..... day of ....., 19.....

C. D., Justice of Peace.

NO. 74

Sheriff's Account for Transporting Prisoners to State Prison

State of .....:

To A. B., sheriff of ..... county, Dr.

For transporting ..... convicts from ..... in said county, to ..... prison, as follows:

Transportation ..... miles

Maintenance of convicts ..... days at $.....

State of .....
County of ..... } ss.

A. B., being sworn, says that he is the sheriff of said county of ....., and that he transported the convicts named in the foregoing account, from ..... in said county, to the state prison at ..... on the ..... day of .....; that the whole distance traveled by deponent and said convicts, from the place of conviction to said prison, is ..... miles, and that they were thus conveyed by the most direct and expeditious route; that he was necessarily employed ..... days in carrying said convicts to said prison, from said place of conviction; and that the said account, amounting in the whole to ..... is in all respects correct and true, according to the best of his knowledge and belief. And further this deponent saith not.

A. B.

Subscribed and sworn before
me ..... this ..... day of ....., 19.....

C. D., Justice of the Peace.

NO. 75

Sheriff's Account for Transporting Prisoners to House of Refuge on Reform School

The same as last in all respects, substituting the name of the proper county, in place of the state of ....., and the house of refuge or reform school, instead of the state prison.

NO. 76

Account against the United States for Supporting Prisoners

The United States of America. Dr.

To A. B., Sheriff of ..... County, ...:

For supporting C. D., a prisoner of the United States, charged with and in the jail of said county from ..... day of ....., 19.., to ..... day of ....., 19....., both inclusive, ... days at $..... per week, $..... turnkey's fees, receiving and discharging, $.....

Received this ..... day of ....., 19....., of the United States from J. M., marshal of the ..... district of ....., ... dollars, in full of the above account, for which I have signed duplicate receipts.

A. B., Sheriff of County.

NO. 77

Concurrence of Judge of Court, in Calling a Jury to Inquire as to the Sanity of a Prisoner Sentenced to Be Executed

State of .....
County of ..... } ss.

It appearing to me that there is reason to believe that A. B., lately convicted of murder before the undersigned, Judge of the ..... court of this state, at ..... court held at ....on, etc., and who is now under sentence of death in the jail of said county, has become insane since the said conviction; I do therefore, in pursuance of the statute in such case made and provided, concur with C. D., the sheriff of the said county, in calling a jury to make inquest whether the said A. B. be of sane mind or no.

Dated ..... 19.....

C. H. D., Judge ..... Court.

NO. 78

Notice to the District Attorney of the Holding of the Inquest

To E. F., Esq., District Attorney of ..... County:

Sir:

Take notice that with the concurrence of the Hon. C. H. D., the Judge of ..... court before whom A. B., now in the jail of said county under the sentence of death, was convicted, I shall proceed to execute an inquest at the jail of the said county in ..... on the ..... day of ....., 19....., at ..... o'clock ..... noon, to determine whether the said A. B. be of sane mind or not.

Dated ....., 19.....

C. D., Sheriff of County.

NO. 79

The Like in the Case of a Pregnant Female

Sir: Take notice that on the, etc., I shall proceed to execute an inquest to determine whether A. B., a prisoner now confined in said jail under sentence of death, be pregnant and quick with child or not.

Dated ....., 19.....

C. D., Sheriff of ..... County.

NO. 80

Subpoena of District Attorney

The People of the State of ..... to ....., Greeting:

We command you that, laying aside all business, you be and appear at the jail of the county of ..... in ..... on the ..... day of ....., 19..... to testify and give evidence upon an inquest then and there to be taken before C. D., sheriff of said county, to determine whether A. B., a prisoner therein confined, and now under sentence of death, be insane or not; (or be pregnant and quick with child or not;) and hereof fail not at your peril.

Witness our said district attorney of said county, at the ..... of ..... in said county this ..... day of ....., 19.....

C. B., District Attorney.

NO. 81

Oath to Jurors

You do each for yourself swear that you will well and truly inquire whether A. B., the prisoner now here, be of sane mind or not, (or be pregnant and quick with child or not,) and that you will true inquest make thereof, according to the evidence. So help you God.

NO. 82

Where a Juror Is Objected to

You shall true answers make to such questions as shall be put to you touching the objection or challenge to you as a juror. So help you God.

NO. 83

To a Witness in Such Case

You shall true answers make to such questions as shall be put to you, touching the challenge of ....., a juror. So help you God.

NO. 84

Oath of Witness on Inquest

The evidence you shall give touching the sanity of A. B., the prisoner now here, shall be the truth, the whole truth, and nothing but the truth. So help you God.

NO. 85

In Case of Pregnant Female

The evidence you shall give upon this inquest whether A. B., the prisoner now here, be pregnant and quick with child or not, shall be the truth, the whole truth and nothing but the truth. So help you God.

NO. 86

Inquisition as to the Sanity of Prisoner

State of .....
County of ..... } ss.

Inquisition taken before the undersigned, sheriff of the county of ..... with the concurrence of C. H. D. Judge of the ..... court, before whom A. B., now confined in the jail of the said county under sentence of death, was convicted, at the said jail, on, etc., upon the oaths and affirmations of E. F., etc., twelve electors of the said county, summoned by me to inquire as to the sanity of the said A. B. The said jurors being each duly sworn and charged to inquire touching the sanity of the said prisoner, do upon their oaths and affirmations say that the said A. B. is not in a sound state of mind, but is of insane mind (or is of sane mind).

In witness whereof, we, the said sheriff, as well as the said jurors, have to this inquisition set our hands and seals at the time and place aforesaid.

Dated ....., 19....

Jurors.
A. B.,
E. F., etc.

E. D.,
Jurors.
C. D., Sheriff.

NO. 87

Inquisition in Case of Pregnant Female

State of .....
County of ..... } ss.

Inquisition taken before the undersigned, sheriff of ..... county, at the jail in ..... in said county, on the ..... day of ..... upon the oaths and affirmations of E. F., & etc., six physicians of said county summoned by me to inquire whether A. B., a prisoner now confined in said jail under sentence of death, be pregnant and quick with child or not. And the said jurors each being sworn and charged to inquire whether the said A. B. be pregnant and quick with child, and upon their oaths and affirmations say that the said A. B. is now pregnant and quick with child, (or is not pregnant and quick with child).

In witness whereof, etc., as in the last.

NO. 88

Invitation to Attend the Execution of a Criminal

Sir: Pursuant to the statute in such case, you are hereby invited to be present at the execution of ..... at the jail of said county in ..... on the ..... day of ....., 19.....

Dated ....., 19.....

A. B., Sheriff.

To Hon. C. H. D., Justice of the Supreme Court.

NO. 89

Certificate of the Execution of a Criminal

State of .....
County of ..... } ss.

I, the sheriff of the county of ..... and other public officers and persons whose names are hereto subscribed, do certify that ..... who was sentenced by the court of ..... held in and for the county of ..... on the ..... day, etc., ... to be executed on this day, between the hours of ten o'clock in the morning and twelve at noon, was at the time mentioned, in pursuance of the said sentence, executed by hanging by the neck until he was dead, in the jail yard of the jail in the said county; and we, the undersigned, do certify that we witnessed the said execution, and that the same was conducted and performed in conformity to the provisions of law of this state concerning capital punishment, and of the said sentence.

In witness whereof, we have at the said jail subscribed our names hereto, this ..... day of ..... in the year one thousand nine hundred and .....

(Signed) A. B., Sheriff
C. H. D., Justice of Supreme Court.
E. B., District Attorney.
C. D., etc.

NO. 90

Admission of Receipt of Papers for Services

(Title of action.)

Received summons and complaint, and order to hold to bail, and copies to serve, this ..... day of ....., 19....

A. B., Sheriff,
By E. F., Deputy.

NO. 91

Undertaking on Arrest

(Title of action.)

The above defendant having been arrested by the sheriff of the county of ..... and being now in his custody, under and pursuant to an order made by the Hon. G. H. D., a ..... of ..... court of this state, (or county judge of the county of .....) requiring the defendant to be held to bail in the sum of ..... dollars: Now, therefore, we, E. F., hide and leather dealer, residing in ..... in said county, and G. H., gentleman, residing in the same place, do undertake in the said sum of ..... that the defendant shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce the judgment therein.

Dated ....., 19.....

E. F.
G. H.

NO. 92

Affidavit of Justification

(Title of action.)

State of .....
County of ..... } ss.

E. F. and G. H., the sureties in the above undertaking being severally duly sworn, each for himself, deposes and says that he is a resident and householder (or freeholder,) within the state, and that he is worth the sum of (the sum mentioned in the order fixing bail) over and above all debts and liabilities and exclusive of property exempt from execution.

E. F.
G. H.

Subscribed and sworn before
me this ..... day of ....., 19.....
.....
Notary Public.

NO. 93

Certificate of Acknowledgment

(Title of action.)

State of .....
County of ..... } ss.

Personally appeared before me this ..... day of ....., 19...., E. F. and G. H., to me known to be the surety described in, and who executed the within undertaking, and who severally acknowledge that they executed the same for the uses and purposes therein mentioned.

A. B., County Judge of ..... County.

NO. 94

Certificate to Copy Delivered to Attorney

I certify that the within is a true copy of the undertaking, taken on the arrest of the defendant in the within entitled action.

Dated ....., 19.....

A. B., Sheriff of ..... County.

NO. 95

Notice of Justification of Bail

(Title of action.)

Sir: Take notice that the bail in the undertaking taken on the arrest of the defendant in this action, will justify before the Hon. ....., county judge of ..... County, at his office in ..... on the ..... day of ....., 19....., at ..... o'clock in the ..... noon.

Dated ....., 19....

C. D., Sheriff.

To A. B., Attorney for Plaintiff.

NO. 96

Return of Arrest under Order, and of Holding to Bail

I have arrested the within defendant, pursuant to the within order, and at the same time delivered to him a copy thereof, and of the affidavit on which the order was granted; and I have taken from said defendant, the undertaking of E. F., hide and leather dealer, residing in ..... and G. H., gentleman, residing in the same place, a copy of which, duly certified by me, is returned herewith.

Dated ....., 19.....

A. B., Sheriff of ..... County.

NO. 97

Return Where the Defendant Makes a Deposit Instead of Bail

I have arrested the within defendant, pursuant to the within order, and at the same time delivered to him a copy thereof, and of the affidavit on which the order was granted; and I have received from said defendant the sum of ..... dollars instead of bail, and have deposited the same with the county clerk of ..... county.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 98

Certificate of Deposit of Amount Instead of Bail

(Title of action.)

The above defendant having been arrested by me, under and pursuant to an order of ..... requiring such defendant to be held to bail in the sum of $....., I hereby certify that I have received from said defendant the said sum of $..... instead of bail.

Dated ....., 19.....

A. B., Sheriff.

NO. 99

Certificate of Clerk of Deposit with Him

(Title of action.)

I certify that A B., sheriff of the county of ....., has this day paid into court the sum of ..... dollars, being the amount mentioned in the order of arrest in this action.

Dated ....., 19....

J. B., Clerk of ..... County.

NO. 100

Return Where the Defendant is Committed for Want of Bail

I have arrested the within defendant, pursuant to the within order, and have him in my custody in the common jail of the county of ..... for want of bail after giving him reasonable time to procure bail.

Dated ....., 19....

A. B., Sheriff.

NO. 101

Return of Arrest and Rescue

I have arrested the within defendant as I am within commanded, but the said defendant, before he could be conveyed to jail, forcibly rescued himself, on, etc., at, etc., and escaped out of my custody; and since, the said defendant can not be found in my county.

Dated ....., 19....

A. B., Sheriff of ..... County.

See comment to Form No. 109.

NO. 102

Return of Arrest and that Defendant is Sick

I have arrested the within defendant, who at the time of his arrest, and still, on this ..... day of ....., 19....., the last day of the return of this order (or execution, or warrant, or ne exeat), is so sick that, for fear of his death, I cannot have him as I am within commanded.

Dated ....., 19.....

A. B., Sheriff of ..... County.

NO. 103

Return of Arrest and Death of Defendant

I have arrested the within defendant and held him in my custody until on the ..... day of ....., 19....., when he died by reason of sickness, (or by suicide, or was murdered), therefore I cannot have the body of the said ..... as I am within commanded.

Dated ....., 19.....

A. B., Sheriff of ..... County.

NO. 104

Return of Exemption from Arrest

I arrested the within defendant, as I am within commanded; and the said defendant claiming exemption therefrom, by reason of having been duly subpoenaed to attend as a witness upon the trial of a certain cause then pending in the ..... court of this state, between ..... plaintiff, and ..... defendant, on the part of defendant, and then to be tried at a ..... court, to be held at ..... in said ..... and having been required thereto by me, did make an affidavit of such fact, and that he had not been so subpoenaed by his own procurement, with intent of avoiding service of process, I did release the ..... from such arrest; and afterwards the said ..... could not be found in my county; wherefore I cannot have him as I am within commanded.

Dated ....., 19.....

A. B., Sheriff of ..... County.

NO. 105

Affidavit of a Witness to Obtain Discharge from Arrest

(Title of cause.)

State of .....
County of ..... } ss.

A. B., being duly sworn, deposeth and saith that he has been legally subpoenaed as a witness to attend before the court of ..... in and for the county of ..... now in session at ..... on the trial of an indictment against C. D., on the part of the people, and that he, this deponent, has not been so subpoenaed by his own procurement, with intent of avoiding service of process; and further this deponent saith not.

A. B.

Sworn to before me this ..... day of ....., 19.....

C. D., Sheriff of ..... County.

NO. 106

Return of Privilege

At the coming to me of the within order of arrest (or capias ad satisfaciendum), the congress of the United States (or the legislature of the state of .....) was then and still is in session; and that during all the time the within defendant was and is a member of the senate of the United States (or of the assembly of the state of .....) (or for the ..... th congressional district of the state of .....) (or for the first assembly district of the county of .....); wherefore I cannot have the body of the said .... as I am within commanded.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 107

The Same

The within named ..... at the delivery of the within order of arrest, (or capias ad satisfaciendum, or writ of ne exeat), and until the return day of the said writ, was minister plenipotentiary from the King of Great Britain at the government of the United States; wherefore I cannot have his body at the time and place within named, as I am within commanded.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 108

Return upon Affidavits before Filing

I certify and return, that at the time of the arrest of the defendant in the within entitled cause under the order made therein by Hon. C. H. D., to-wit: ..... on ..... 19...., I delivered to the said defendant copies of the within affidavits, personally.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 109

Return to Process that the Defendant Cannot Be Found

The within defendant cannot be found in my county.

Dated ....., 19....

A. B., Sheriff.

This return will be a proper return to all process where the defendant cannot be found, whether it be to a summons, judge's order, attachment, execution, or ne exeat. In some jurisdictions the return is required that "the within ..... is not to be found in ..... County."

NO. 110

Service of Summons and Complaint upon a Single Defendant

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., 19...., I served the within summons and annexed complaint, upon the within named defendant, in ..... in said county, by delivering to him, personally, copies thereof.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 111

Where Several Defendants Are Served at Different Times

State of .....
County of ..... } ss.

I certify that I served the within summons and annexed complaint, upon the several defendants therein named, by delivering to each of them personally, copies thereof, at the times and at the places in said county set opposite their names respectively, to-wit:

A. B., on the ..... day of ....., 19...., at A
C. D., on the ..... day of ....., 19...., at B
E. F., on the ..... day of ....., 19...., at C.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 112

Certificate that Defendant Evades Service, etc.

State of .....
County of ..... } ss.

I certify that the within defendant is a resident of ..... in said county, and that I have made proper and diligent efforts to serve the within summons and annexed complaint upon him, but that such defendant cannot be found within my county, (or, avoids or evades such service,) so that the same cannot be made personally upon him by such proper diligence and effort.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 113

Proof of Service in Such Case

State of .....
County of ..... } ss.

A. B., being sworn, says that on the ..... day of ....., 19...., he made service of the within summons and annexed complaint upon the within defendant ..... in said county in pursuance of the annexed order, (by leaving copies of such summons and complaint at the residence of said defendant, with his wife, a person of proper age,) and by putting other copies thereof, properly folded (or enveloped) and directed to said defendant at ..... his said place of residence, into the post office in said ..... and paying the postage thereon; and further saith not.

A. B.

Subscribed and sworn before me
this ..... day of ....., 19....
C. D., Justice of the Peace.

If the officer cannot get into the house, or there is no person who will receive the papers, insert, in place of the part in brackets the following: "affixing the same to the outer door of the residence of said defendant, the said house being closed," "or admittance being refused," "or, there being no person of suitable age to receive the same, or there being no person of suitable age who would receive the same."

NO. 114

Certificate of Service of a Summons on a Corporation

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., 19...., I served the within summons (and annexed complaint) upon the within named defendants, by delivery to A. B., the president (or managing agent) of said corporation, personally, copies thereof, in ..... in said county.

Dated ....., 19....

C. D., Sheriff,
by D. E., Deputy.

NO. 115

Certificate of Service of a Summons on a Foreign Corporation, Which Has Designated a Person Residing in the County on Whom Process May Be Served

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., 19...., I served the within summons (and annexed complaint) upon the within defendant, in ..... in said county, by delivering to A. B., the person designated by said corporation on whom process issued by authority of, or under any law of this state, may be served, a copy of said summons (or copy of said summons and complaint) personally.

Dated ....., 19....

A. B., Sheriff of ..... County.

No. 116

The Same, Where No Person Is So Designated

State of .....
County of ..... } ss.

I certify that not finding any officer of the within named defendant on whom to make service of the within summons; and the said corporation having failed to designate a person on whom such papers might be served, I served the within summons upon the within named defendant by delivery to C. D., a copy thereof personally, on the ...., at ..... in said county; said C. D. at the time being or acting as the agent of the said defendant within this state (or doing business for it within this state).

Dated ....., 19....

A. B., Sheriff.

NO. 117

Certificate of Service upon an Infant under Fourteen Years of Age

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., 19...., I served the within summons (and annexed complaint) upon the within minor defendant, by delivering to him personally copies thereof, in .... in said county, and also by delivering at the same time and place like copies personally, to ....., the father (mother or guardian) of said infant, (or to ....., the person having the care and control of such minor; or to ....., the person in whose service he was then employed, such infant having no father, mother or guardian within this state).

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 118

The Same upon a Lunatic and His Committee or Guardian

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., 19...., I served the within summons upon the within named defendant, by delivering to him personally, a copy thereof, in ..... in said county; and by delivering a like copy to the committee (or guardian) of said defendant, on the ..... day of ..... in ....., in said county, personally.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 119

Undertaking of the Plaintiff to Obtain Delivery of Personal Property

(Title of action.)

Whereas the plaintiff in this cause has commenced (or is about to commence) an action against the defendant for the recovery of

certain articles of personal property mentioned in the affidavit of the said plaintiff, to-wit: .....

Now, therefore we A. B., and C. D., both of ....., merchants, do acknowledge ourselves to be bound in the sum of ..... for the prosecution of the said action for the return of the said property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff. Dated ....., 19....

(Signed, acknowledged, and surety to justify as in Nos. 92, 93.)

NO. 120

Approval Thereof by the Sheriff

I approve of the sureties in the within undertaking.

E. F., Sheriff of ..... County.

NO. 121

Undertaking by Defendant Who Requires Return of the Property

(Title of action.)

Whereas, C. D., the defendant in this cause, requires the return to him of certain personal property taken by A. B., sheriff of the county of ..... in this action, upon the affidavit and order of the plaintiff under the provisions of the Code, for the obtaining possession of personal property, to-wit: .....

Now, therefore, we, E. F., and G. H. farmers, of ....., are bound in the sum of (at least double the value of the property as stated in the plaintiff's affidavit,) for the delivery of such property to the plaintiff, if delivery thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant.

(Signed, acknowledged, and surety to justify, as Nos. 92, 93.)

NO. 122

Notice of Claim by a Third Person

(Title of action.)

Sir: Take notice that C. D., claims the property taken by me under the order in this action, and has made affidavit of his title thereto, and right to the possession thereof, and of the grounds of such right and title, and served the same on me, and that I do therefore require to be indemnified by the plaintiff against such claim, and in default of such indemnity, I shall not deliver such property to the plaintiff, nor keep the same.

A. B., Sheriff of ..... County.

Dated ....., 19....

To E. F., Esq., Plaintiff's Attorney.

NO. 123

Indemnity against Such Claim

(Title of action.)

Whereas, C. D. claims to be the owner of, and to have the right of possession of certain personal property which has been taken by A. B., sheriff of the county of ..... upon the affidavit and order of the plaintiff here, under the provisions of the Code for obtaining possession of personal property, to-wit:

Now, therefore, we, G. H. and S. K., of ....., merchants, do undertake and agree to indemnify and save harmless the said A. B., sheriff as aforesaid, against said claim.

(Signed, acknowledged, and surety to justify, as in Nos. 92, 93.)

NO. 124

Return to Order for Delivery of Personal Property

State of .....
County of ..... } ss.

I certify and return that on the ..... day of, etc., I executed the order indorsed thereon, for the delivery of the personal property mentioned in the within affidavit, by taking possession of the same, (or all thereof to be found in my county, to-wit: .....) and at the same

time I delivered to the defendant (or to the agent of the defendant from whom the possession of the property was taken; or, and the said defendant and his agent from whom the possession of the property was taken not being found, I left at the usual place of abode of the defendant (or said agent) with a person of suitable age and discretion,) a copy of the within affidavit and order of the undertaking required in such case, duly approved by me,[1] (and the defendant having failed to except to the surety therein, and also having omitted to require a return of the said property,)[2] and no person having made claim thereto, I did, at the expiration of the time prescribed by the statute for seeking such delivery and making such claim, to-wit: on the ..... day of ....., 19...., deliver the property so taken to the plaintiff, as by the said order I am commanded; and that on the ..... day of ....., 19...., I delivered said undertaking to the defendant.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 125

Where the Defendant Excepts to the Surety

After[1] add: "And the defendant having excepted to the surety therein, and the same having duly justified," and then from[2] to the end.

NO. 126

Where the Defendant Claims the Redelivery of the Property

After[1] add: "And the defendant not having excepted to such bail, claimed the redelivery of the said property by giving to me an undertaking in due form, and the sureties therein having justified, and no other person having made claim to the said property, in due form of law, I redelivered the said property to the defendant, together with the first mentioned undertaking; and the last mentioned undertaking, I delivered to the plaintiff."

NO. 127

Where Another Claims the Property and the Plaintiff Indemnifies

After[2] add: "And one E. F. having made claim to said property by affidavit in due form of law, and the plaintiff having given the indemnity required by the Code, I delivered the said property to the plaintiff, and the first mentioned undertaking to the defendant."

NO. 128

Where the Plaintiff Refuses to Give the Indemnity

After[2] add: "And one E. F. having made claim to said property in due form of law, and the plaintiff neglecting and refusing to give the necessary indemnity after being thereto required, I relinquished the possession of the said property and delivered the said undertaking to the defendant."

NO. 129

Undertaking on Arrest Where Personal Property Is Secreted

(Title of cause.)

This action has been brought to recover possession of the following described personal property, to-wit: ..... alleged to be unjustly detained by the defendant, and concealed or removed or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof; and whereas the said defendant has been arrested in said action by the sheriff of the county of ..... under and pursuant to an order of Hon. C. H. D., a judge or justice of the ..... court of this state, requiring the said defendant to be held to bail in the sum of ..... dollars:

Now, therefore, we ....., merchant, and ....., farmer, both residing at ..... in said county, do acknowledge ourselves to be bound in the sum of ..... dollars, for the delivery of said personal property to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. Dated ....., 19....

A. B.
C. D.

(Sureties to acknowledge and justify as in Nos. 92, 93.)

NO. 130

Return to an Order for the Delivery of Personal Property Where None of the Goods Are Found

I have made diligent search, but no part of the within described goods could be found in my county, so that I could make delivery thereof, as I am within commanded.

Dated ....., 19....

A. B., Sheriff.

NO. 131

Indorsement of Receipt Papers or Process

Received ..... day of ....., 19...., at ..... o'clock ..m.

A. B., Sheriff of ..... County.

NO. 132

Certificate on Copy of Attachment Served

I certify that the within is a copy of the attachment issued in this action, with all the indorsements thereon.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 133

Garnishment, or Notice to Creditors of Attachment

(Title of action.)

To A. B.

(or, The ..... Insurance Company.)

(or, The ..... Bank.)

Take notice that, by virtue of the warrant (or writ) of attachment issued in this cause, with a certified copy of which you are herewith served, I attach all the interest of the defendant (in a debt due from you to the said defendant of about $.....; or, in and to the shares of capital stock of said bank with the interest, dividends or profits thereon owned by the defendant; or, the claim of the defendant against said insurance company for loss by fire on a policy of insurance by said company, issued about, etc.).

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 134

Inventory and Appraisal of Property Attached

(Title of action.)

Inventory of the property of the defendant in this cause, so far as the same has come to the hands, possession or knowledge of the sheriff of the county of ..... by virtue of a warrant (or writ) of attachment issued by the Hon. C. H. D., taken with the assistance of ....., two disinterested freeholders summoned and sworn by the said sheriff to assist in taking the same this ..... day of ....., 19....

A claim against A. B., in favor of the defendant, for $100.00, $100.00

A claim against C. D., for $250.00, but of no value, as C. D. is insolvent.

A claim against the ..... Insurance Company upon a policy of insurance to the defendant, dated on or about the ..... day of ....., 19...., for $....., on which there is claimed to be due $1000, but which the company repudiates.

A house and lot on ..... street, ..., lately occupied by the defendant, 700.00

One bay horse, 50.00

One mahogany sofa, 25.00

Dated ....., 19....

(Signed) E. F.
C. D.
Appraisers.

A. B., Sheriff of ..... County.

NO. 135

Oath of Appraisers Annexed

State of .....
County of ..... } ss.

E. F. and C. D., the above named appraisers, being severally duly sworn, each for himself says: that he will well and truly make a full and just inventory, and well and truly appraise the property of the defendant in the above entitled cause seized by the sheriff of ..... county by virtue of the attachment in said cause, according to the best of his ability.

E. F.
C. D.

Subscribed and sworn before me
this ..... day of ....., 19....
A. B., Sheriff of ..... County.

NO. 136

Form of Oath Administered

You and each of you shall well and truly make a full and just inventory, and well and truly appraise the property of the defendant ..... seized by the sheriff of ..... county by virtue of the attachment issued against him at the suit of ..... according to the best of your ability. So help you God.

NO. 137

Certificate Indorsed on Inventory

I certify that the within is the inventory and appraisal of the property of the defendant within named, attached by me under and pursuant to the warrant (or writ) of attachment issued by the Hon. C. H. D.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 138

Bond of Indemnity upon a Claim to Attached Property

(Penal part as No. 12)

Whereas, an attachment has been issued in an action in the supreme court in favor of the above named A. B., against C. D., upon which the above named A. C., sheriff of said county of ..... has attached and taken into his custody certain goods and chattels, viz:

And whereas, G. H., of ..... or some other person, claims the same, (and a jury has, by their inquisition, found the said property in said claimant:)

Now, therefore, the condition of this obligation is such, that if the above bounden A. B., shall and does well and sufficiently indemnify, save and keep harmless the said A. C., sheriff as aforesaid, of, from and against the said claim, and shall pay all costs and damages that the said A. C. may incur or be put to in consequence of such claim, and shall pay off, discharge and cancel all judgments, damages and costs that may be rendered against said A. C., by reason of such seizure, then this obligation to be void, otherwise to be and remain in full force and virtue.

Signed, sealed and delivered in the presence of:

.....

Witness

.....

Witness

(Add affidavit of justification and acknowledgment as Nos. 92, 93.)

NO. 139

Undertaking by Plaintiff to Prosecute Actions Concerning Attached Property

(Title of action.)

Whereas, A. B., sheriff of the county of ....., has attached a certain claim of the defendant against C. D., concerning which it is necessary to commence one or more actions; and, whereas, the said sheriff has consented that such action may be prosecuted by the above named plaintiff, or under his direction:

Now, therefore, we ..... of ....., merchants,

undertake that the plaintiff will indemnify said A. B., sheriff as aforesaid, from all damages, costs and expenses on account of said actions, or either of them, not exceeding the sum of ..... in any one action.

Dated ....., 19....

(Surety to sign, justify and acknowledge as Nos. 92, 93.)

NO. 140

Execution on a Judgment Where Property Was Attached

The People of the State of ....., to A. B., Sheriff (or late sheriff) of the County of ....., Greeting:

Whereas, an attachment was duly issued by the Hon. C. H. D., one of the judges or justices of the ..... court at the suit of E. F., against G. H. to the said A. B., as sheriff of said county, and that such proceedings were thereupon had that the said sheriff seized and attached certain real and personal property of the defendant, to-wit: (describe it)

And, whereas, the said A. B. still holds the same by virtue of the said warrant (or writ) and seizure. And, whereas, judgment was duly rendered in the ..... court of this state in the action commenced by said attachment in favor of the plaintiff and against the defendant for ..... dollars and ..... cents recovery, and ..... dollars and ..... cents costs, the judgment roll whereof was filed in ..... county on the ..... day of ...., 19...., which judgment was docketed in said county of ..... on the ..... day of ....., 19....; and, whereas, there is now actually due on said judgment with interest thereon from the ..... day of ....., 19...., $.....

You are therefore required to satisfy the said judgment of the real and personal property so attached and held by you and to return this execution with your proceedings thereon to the clerk of the county of ..... within ..... days after your receipt of the same.

(Tested and dated as required by local law.)

E. R.
Clerk

(Seal)

NO. 141

Return to the Attachment

State of .....
County of ..... } ss.

I have executed the within writ, by attaching all the property of the defendant to be found in my county, and making and filing an inventory and appraisal thereof in due form, and taking possession of such property; that one A. B., having made claim to the same (or to the following, to-wit: .....) in due form of law, and a jury duly summoned and sworn by me by their inquest having found the title to the said property in the said claimant, and the attaching creditor having neglected and refused, after being duly thereunto required to indemnify me against said claim, I released to the said claimant the property so claimed by him, (or, the attaching creditor having indemnified me, I refused to deliver up such property to such claimant, notwithstanding such finding;) and that the perishable property mentioned in the said inventory was by me sold in due form of law under the direction of the officer issuing the warrant (or writ) for the sum of $..... over and above my expenses, allowed by law and that I have collected of the debts due the said defendant upon the claim against A. B., for ..... the sum of $..... ...., and that I commenced an action against C. D., in the .... court on the claim against him, and that judgment was obtained thereon, but nothing has been collected upon the execution issued therein; and that I have retained possession of the property and the proceeds of such sales, and the moneys realized on said debts until the issuing and delivery to me of an execution on the judgment in this cause; and that I have applied the amount of such sales, deducting my expenses allowed by law upon said execution in the amount of $.... ..... and that I have levied upon the property so attached, and have sold the following, to-wit: ...., for which I have realized the balance of the said execution, besides my fees; and that I have delivered the balance of said property to the defendant.

Dated ....., 19....

A. C., Sheriff.

NO. 142

When the Warrant or Writ Has Been Discharged

State as above, all that has been done under the attachment and then add: "that having been served with an order of the court, discharging the said warrant (or writ) of attachment, I released the said property from said attachment."

Dated ....., 19....

A. B., Sheriff.

NO. 143

Return to Attachment against an Absconding, Concealed or Non-resident Debtor

As in No. 142, so far as proceedings conform, and add: "that having been served with the order of the court appointing A. B., C. D., and E. F., trustees of the property and effects of the defendant, and also with the certificate of the clerk of the court that they had duly filed the security required by law and taken upon themselves the duties of such trustees, I have delivered over to said trustees all of the property, money and effects of the defendant in my hands, received by me under and pursuant to such attachment."

NO. 144

Return to Warrant or Writ for Seizure of Ships

In pursuance of the within attachment, I attached and seized the vessel named within on the ..... day of ....., 19...., together with her tackle, apparel and furniture, and she is now and ever since hath been safely kept by me as I am within commanded. And that at the time of such seizure I had no other warrant against the said vessel; but that after said seizure, to-wit: on the ..... day of ....., 19....., I received a warrant of attachment against the same vessel, issued by the Hon. C. H. C., and in favor of .....

Dated ....., 19....

A. B., Sheriff.

NO. 145

Inventory Annexed

A just and true inventory made and signed by me, of all the property seized by virtue of the annexed warrant; that is to say, one sloop called the ..... with the following tackle, apparel and furniture, to-wit: .....

Dated ....., 19....

A. B., Sheriff.

NO. 146

Notice of Sale of Vessel under Order of Officer

State of .....
County of ..... } ss. Sheriff's Sale.

By virtue of a writ of attachment issued by Hon. C. H. D., a justice (or judge) of the ..... court of this state, to me directed and delivered for execution against the sloop ....., her tackle, apparel and furniture, and also of the order of the said justice (or judge) directing the sale of the said vessel, her tackle, apparel and furniture, I shall expose the same for sale, at, etc., on, etc.

Dated ....., 19....

A. B., Sheriff.

NO. 147

Report of Sale under Order

In the matter of the ship (or sloop) attached under a warrant issued on the application of .....

In pursuance of the statute in such case made and provided, I, the sheriff of ..... county, to whom the warrant of attachment in the above entitled matter was directed and delivered for execution, do certify and return to the Hon. C. H. D., justice (or judge) of the ..... court of this state, by whom the said warrant was issued, that in pursuance of the said warrant, and of the order made by the said justice (or judge) bearing date the ..... day of ....., I sold the said vessel, her tackle and apparel, at public

auction, at, etc., on, etc., after having first duly advertised the same for sale, in the manner provided by law; and that the said property was then and there sold for the sum of $....., that being the highest sum bid therefor, and that I have received the amount thereof and hold the same subject to the order of the said justice (or judge).

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 148

Return to the Attachment

I certify and return that in pursuance of the attachment hereto annexed, I seized the vessel, her tackle, furniture and apparel, and made and returned an inventory thereof, in due form of law, to the Hon. C. H. D., the justice (or judge) of the ..... court issuing such warrant, and retained the property seized in my possession; that in pursuance of the order of said justice (or judge) I sold the said vessel, her tackle, apparel and furniture, in the manner prescribed by law; and that after having retained my fees and expenses in seizing, preserving, watching and selling such vessel, allowed by law, I paid, out of the balance, to the several attaching creditors entitled thereto, according to the distribution thereof required by law, as follows:

To A. B., the sum of .....

To C. C., the sum of .....

And there remaining a surplus of $..... in my hands, after paying all of the liens aforesaid, after deducting my commissions thereon allowed by law, I paid such surplus to ....., the owner of said vessel.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 149

Indorsement on the Attachment

The execution of the within attachment will appear by schedule hereto annexed.

A. B., Sheriff.

NO. 150

Return to Attachment Where the Vessel Is Discharged

I seized the within named vessel as I am within commanded, and kept her safely, until I was served with the order of discharge made by the Hon. C. H. D., justice (or judge) of the ..... court, by whom the within warrant was issued, and that thereupon I released and discharged said vessel, her apparel and furniture.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 151

Bail Bond on Arrest on Ne Exeat

(Penal part as No. 12)

Whereas, the said ..... has been arrested under and by virtue of a writ of ne exeat issued out of and under the seal of the ..... court of this state, by which the said sheriff was required to hold the said ..... to bail in the sum of ..... dollars; Now therefore, the condition of the said obligation is such that if the said ..... shall go or depart, or attempt to depart from or beyond the said state, without the leave of said court, then the said ..... and each of them will pay or cause to be paid unto the said ....., sheriff as aforesaid, the sum of ..... dollars; but if the said ..... shall not go or depart, or attempt to go or depart from or beyond the said state without leave of such court, then and in that case this obligation to be void and of no effect; otherwise to remain in full force and virtue.

Signed, sealed and delivered
in the presence of:

(To be signed, and affidavit of justification and acknowledgment as Nos. 92, 93.)

NO. 152

Affidavit of the Sheriff to Copy of Bond

(Title of action.)

County of .....
State of ..... } ss.

A. B., sheriff of ..... county, being sworn, says that the within is a true copy of the bond taken by him on the arrest of the defendant therein named, and now in his possession, with all the indorsements thereon.

A. B.

Subscribed and sworn before me
this ..... day of ....., 19....
.....
Notary Public.

NO. 153

Return to Ne Exeat

I have arrested the within defendant, and have him now in the common jail of ..... county, for want of bail.

A. B., Sheriff of ..... County.

NO. 154

Return Where the Defendant Has Been Let to Bail

I have arrested the defendant, and have taken from him a bond with ..... as his surety in the penalty marked on the writ.

A. B., Sheriff.

NO. 155

Admission of the Receipt of the Execution

Court

A. B.
vs.
C. C.

Execution for $..... on a judgment rendered and docketed in ..... county, with directions indorsed to levy and collect $..... ..... and interest from .... besides fees,

dated ..... Received by me this ..... day of ....., 19...., at ..... o'clock, ..m.

E. T., Sheriff of ..... County,
by C. D., Deputy Sheriff.

Or, if endorsed on a copy of the execution:

Received an execution of which the within is a copy, this ..... day of ....., 19....

E. F., Sheriff,
By C. D., Deputy.

NO. 156

Indorsement of Receipt of Execution

Received ....., 19...., at ..... o'clock, ..m.

A. B., Sheriff of ..... County.

NO. 157

Sheriff's Receipt for Moneys Received from a Person Indebted to the Judgment Debtor

(Title of action.)

Received from C. D., the sum of ..... dollars, to apply on the execution, issued in the above action now in my hands.

Dated ....., 19....

E. F., Sheriff.

NO. 158

Indorsement of Levy

Levied this ..... day of ....., 19...., at ..... o'clock, ..m., on the following property, under and by virtue of the within execution on the premises of the defendant in ....., to-wit:

.....

Dated ....., 19....

A. B., Sheriff,
By D. E., Deputy.

NO. 159

When Articles Are Too Numerous to Endorse on Execution

(Title of action.)

Levied this ..... day of ....., 19...., at ..... o'clock ..m., on the following property, in the possession of the defendant, under and by virtue of the within execution, to-wit: .....

(Then generally describe same and attach schedule)

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 160

Indorsement of the Execution in Such Case

I have levied on the property mentioned in the annexed schedule, under the within execution, as therein stated.

NO. 161

Receipt to the Officer for Property Levied on

(Title of action.)

Execution for $..... and interest from ....., besides sheriff's fees; received by me, ..., 19...., for execution.

I have levied upon the following property upon the premises of the defendant and in his possession of ..... under said execution, to-wit:.....

Dated ....., 19....

C. D., Sheriff of ..... County.

I hereby acknowledge that I have received the above described property, so levied upon by the sheriff of ..... county, from said sheriff, and hereby promise and undertake to return the same and every part thereof to the said sheriff on demand, or pay the above judgment and sheriff's fees.

Dated, etc.

(signed) A. B.

NO. 162

Notice to Party of Claim to Property, and of Calling Jury to Try Such Claim .....

(Title of action.)

Take notice that A. B. makes claim to the property levied on (or attached) by me under the execution (or attached) by me under the execution (or attachment) issued out of the ..... court in favor of C. D. against E. F., and that I shall proceed to try the claim of the said A. B. before a jury to be summoned by me for that purpose at, etc., on, etc.

Dated ....., 19....

A. C., Sheriff of ..... County.

To:

A. B., Claimant,
C. A., Plaintiff's Attorney,
E. F., Defendant.

NO. 163

Oath of Jurors on Claim of Property

You and each of you do swear that you will well and truly try the claim of A. B. to the property levied (or attached) by the sheriff of ..... county, under the execution (or attachment) in favor of C. D. at the suit of E. F., and true inquisition make according to the evidence. So help you God.

NO. 164

Oath to Witness

You do swear that the evidence you shall give to the jury, touching the claim of A. B. to the property levied on (or attached) by the sheriff of ..... county, under the execution (or attachment) in favor of C. D. against E. F. shall be the truth, the whole truth, and nothing but the truth. So help you God.

NO. 165

Inquisition of Jury upon Claim to Property

(Title of action.)

We whose names are hereto signed, being a jury summoned and sworn by the sheriff of ..... county to try the claim of A. B. to the property levied on (or attached) by the said sheriff of ..... county under the execution (or attachment) in favor of C. D. against E. F., to-wit, one horse, etc., ... do upon our oaths say that the title to the said property is (or is not) in the said A. B.

Witness our hands and seals, at, etc.

Jurors.	Jurors.
(L. S.)	(L. S.)
(L. S.)	(L. S.)
(L. S.)	(L. S.)

C. H., Sheriff of County.

NO. 166

Bond of Indemnity against a Levy

(The penal part as No. 12)

Whereas, ..., has issued an execution on a judgment in the ..... court in his favor against ..... for ..... dollars to the said ..... as sheriff of ..... county; and whereas*

Now therefore, the condition of the above obligation is such, that if the above bounden ..... shall well and truly keep and save harmless and indemnify the said ..... sheriff

as aforesaid, and all and every person and persons aiding and assisting him in the premises, of and from all harm, loss, trouble, damages, costs, suits and actions, judgments and executions, that shall or may at any time arise, come or be brought against him, them, or any of them; as well for the levying and making sale under and by virtue of such process, or any of said goods, as for entering any shops, stores, dwelling, or other houses or buildings, for the purpose of taking said goods and chattels; and shall pay off, cancel and discharge any judgment, claim or demand that may be recovered, arise, or may be made against the said ..... as such sheriff, or of the said persons so aiding or assisting, or either of them, then this obligation to be void, otherwise to remain in full force.

Signed, sealed and delivered
in the presence of

(L. S.)
(L. S.)
(L. S.)

(To be signed, and affidavit of justification, and certificate of acknowledgment, as in Nos. 92, 93.)

NO. 167

When the Levy Is Made by Direction of the Plaintiff

The same as the last, inserting after the asterisk: "by direction of said plaintiff, said ..... as such sheriff, by his deputy, has seized and levied on personal property, consisting of."

NO. 168

Where a Jury Has Been Called to Try the Claim

The same as No. 166, inserting after the asterisk: "The said ..... as such sheriff, did levy upon certain goods and chattels, under such execution, supposed by him to belong to said defendant; but which were claimed by ..... and a jury duly called for that purpose having found that the title to such property was in the said claimant, and the said plaintiff refusing to assent that such property be released from such levy, but insisting that such sheriff should retain such levy under his execution, and that he should sell the property:"

NO. 169

Where Given before Trial of Claim

The same as No. 166, inserting after the asterisk: "the said ..... as such sheriff, did levy upon certain goods and chattels, under and by virtue of such execution, supposed by him to belong to said defendant, but which are now claimed by some other person."

NO. 170

Undertaking of Indemnity against a Levy

Whereas, an execution has been issued by the clerk of the county of ..... on the ..... day of ....., 19...., to the sheriff of said county, upon a judgment rendered before a justice of the peace of said county, on the ..... day of ..... in favor of ..... against ..... for ..... and docketed in his office, and, whereas the defendant has in his possession certain personal property, to-wit: ..... which he claims to belong to some other person;

Now, therefore, in consideration that ....., the said ..... as such sheriff, by himself or his deputy, or other officer, shall levy upon the ..... and shall sell the same under said execution; and, also, in consideration of ..... to us paid, we do hereby agree to indemnify and save harmless the said ..... as such sheriff as aforesaid, and his deputies and officers, and all persons executing or assisting in executing said execution, from any costs, expenses, judgments or damages, he or they or either of them may suffer, in consequence of levying upon or selling said ..... and also that we will pay off and discharge all judgments, damages and costs, that said .... or any of his deputies, may or shall become liable to pay by reason of such levy or sale. Dated.

(To be signed and affidavit of justification and certificate of acknowledgment annexed, as in Nos. 92, 93.)

NO. 171

Notice of Sale of Personal Property

State of .....
County of ..... } ss.

By virtue of an execution (or of several executions) issued out of the ..... court of this state and to me directed and delivered, I have levied on and taken all the right, title and interest of ...., in, and to the following property, to-wit: ....., which I shall expose to sale at public vendue, as the law directs on the ..... day of ....., 19...., at ..... o'clock in the ..... noon, at the public house (or other place) kept by ..... in the town of ..... in said county.

Dated ....., 19.....

A. B., Sheriff.

NO. 172

Bill of Sale of Personal Property on Execution

(Title of action.)

A. B. has this day bought at sheriff's sale, under an execution in the above entitled cause, the following described property, to-wit:

One bay horse, ...	$50.
One single harness, ...	10.
One single wagon, ...	30.
	$90.

Received ninety dollars in full of above purchase.

Dated ....., 19.....

A. B., Sheriff of ..... County.

NO. 173

Bill of Sale of Stocks Attached

(Title of action.)

By virtue of the attachment, issued in the above entitled cause by Hon. C. H. D., as justice (or judge) of the ..... court, dated ....., 19...., I attached and seized certain stocks, and the divi-

dends thereon, and certain deposits, moneys, and credits of the defendant, which I exposed for sale, as the law directs, on the .... at, etc., at which sale, the following stocks, funds and rights were sold to ..... for the following prices, to-wit:

Ten shares in the capital stock of the ..... insurance company for $.....

Five shares in the capital stock of the ..... bank, Dividends now due thereon, $.....

A deposit in said bank to the credit of the defendant, of $.....

Received payment in full of the amount of said purchase.

Dated ....., 19.....

A. B., Sheriff.

NO. 174

Return of Execution of Nulla Bona

The defendant has no goods or chattels, lands or tenements, within my county, whereof I can make the amount of the within execution, or any part thereof.

Dated.

A. B., Sheriff of ..... County.

NO. 175

Where Part Is Made and Nulla Bona for the Residue

I have made the sum of ....., part of the moneys directed to be made upon the within execution; and I can find no goods or chattels, lands or tenements, of the within defendant in my county, whereof I can make the balance of the said execution.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 176

Where the Whole Is Made

I have made the amount of the within execution out of the goods and chattels, lands and tenements of the within defendant, which I have ready at the day and place within mentioned, to render to the within plaintiff, as I am within commanded, (or have paid the same to the within plaintiff) (or have paid the same into court).

Dated ....., 19.....

A. B., Sheriff of ..... County.

(Or, "satisfied.")

NO. 177

Where Goods Remain Unsold for Want of Bidders

I have levied on goods and chattels of the defendant, under the within execution, which remain on hand for want of bidders; therefore I cannot have the moneys at the day and place within mentioned, as I am within commanded.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 178

Nulla Bona Where But One of Two Joint Debtors Was Served

I can find no goods or chattels, lands or tenements of the within defendant ..... in my county; and no goods or chattels of the defendant ....., owned by him jointly with the said ....., of which I can make the amount of the within execution, or any part thereof.

Dated.

A. B., Sheriff of ..... County.

NO. 179

Nulla Bona against an Executor or Administrator

The within defendant has no goods or chattels, which were of the within named deceased at the time of his death, in his hands to be administered in my county, whereof I can cause to be made the damages within mentioned, or any part thereof.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 180.

Return to Execution Stayed by Appeal Before Levy

I certify and return, that after the delivery of the said execution to me, and before levy thereunder, the execution of the same was stayed, by appeal; wherefore I could not have the moneys within mentioned at the return day of such execution, as I am within commanded.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 181

When Stayed By Appeal or Injunction after Levy

After the receipt of the within execution by me, I levied, in due form of law, upon certain goods and chattels of the defendant; but before sale thereof, the execution was stayed by appeal (or by injunction): therefore I could not make the within moneys by the day mentioned; nevertheless I have the said goods and chattels in my custody, to answer to the within execution when the said appeal shall be determined (or said injunction is removed).

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 182

Return Where Judgment or Execution Is Vacated

After receipt of the within execution by me, I levied, in due form, upon certain goods and chattels of the defendant; but before sale, was served with an order of this court, duly certified by the clerk of ..... county, vacating the said judgment (or setting aside the said execution). Therefore I have released the said goods and chattels from the said levy, and cannot have the within moneys at the day and place within mentioned, as I am within commanded.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 183

Return of Levy and Sale, When a Surplus of Property has been Seized

On the receipt of the within execution, I levied, in due form of law upon the following property, then in the possession of the defendant, in my county, to-wit: one bay horse, etc.; and that on the ..... day of ....., 19....., at ..... in said county, I sold the following part of such property, to-wit: ....., whereby I realized sufficient to pay the within execution, with interest and fees of levy and sale; and thereupon I returned to the defendant the balance of said property, to-wit: .....

Dated ....., 19.....

A. B., Sheriff of ..... County.

NO. 184

Where Goods Levied On Are Replevied

After the coming to me of the within execution, I levied, in due form of law, upon certain goods and chattels of the within defendant; but before the sale thereof, the same were replevied and taken out of my custody by ..... one of the coroners of the within county, at the suit of ..... and I can find no other goods or chattels, lands or tenements of the within defendant in my county, whereof to make the amount of the within execution, or any part thereof.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 185

Return of Rescue

After the delivery of the within execution to me for service, I proceeded to execute the same by levying upon certain goods and chattels of the defendant, at his dwelling in ..... and while taking the same into my possession, under and by virtue of the within execution, I was violently resisted by the said defendant and one ..... then and there aiding and abetting the said defendant; who then and there violently rescued the said goods from me, and I have not been able to find the same in my county; and I can find no other goods or chattels, lands or tenements of the within defendant in my county, whereof I can make the amount of the within execution, or any part thereof.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 186

Return of Loss of Goods by Fire, Etc.

By virtue of the within execution, I levied upon certain goods and chattels, to wit: ..... of the within defendant, and took the same into my custody; but that before the same could be sold, they were casually destroyed by fire (or stolen) without fault or neglect on my part; therefore I cannot have the moneys within mentioned, as I am within commanded.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 187

Return Where the Moneys Realized Have Been Applied to the Payment of Other Liens.

I levied on certain goods and chattels of the defendant, to wit: ..... under and by virtue of the within execution, and duly sold the same; on (or after) such sale, I was duly notified and it was established that ..... had a lien and claim upon the said goods and chattels to the amount of $..... for work and labor bestowed upon the same; and that I paid and discharged said lien, and have applied the balance of the proceeds of said sale, to-wit: $..... on this execution; and I can find no

other goods or chattels, lands or tenements of the defendant, whereof I can make the balance of the within execution, or any part thereof.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 188

Notice of Sale of Real Estate

State of .....
County of ..... } ss.

By virtue of an execution, issued out of the ..... court of this state, against the goods and chattels, lands and tenements of ....., I have seized all the right and title which the said ..... had on the ..... day of ....., 19...., of, in, and to the following described premises, which I shall expose for sale, as the law directs, at, etc., to-wit: all that certain, etc.

Dated ....., 19.....

A. B., Sheriff of ..... County.

NO. 189

Postponement of Sale

The sale, pursuant to the above notice, is postponed until the ..... day of ..... next, at the same hour and place.

Dated ....., 19.....

A. B., Sheriff of ..... County.

NO. 190

Oaths of Jurors to Appraise Homestead

You, and each of you, do swear that you will well and truly appraise the homestead of ..... situate in the town of ..... in the county of ..... and that if in your opinion the same is worth more than $....., then that you will say whether the same can be conveniently divided or not; and if yea, that you will fairly and honestly set off to the said ..... so much thereof, with the dwelling, as shall in your opinion be worth $..... and no more; so help you God.

NO. 191

Appraisal of Homestead

(Title of action.)

We, whose names are hereto subscribed, having been summoned and sworn by the sheriff of the county of ..... to appraise the homestead of ..... situate in the town of ..... in said county; and if in our opinion the same are worth more than $....., then that we say whether the same can be conveniently divided or no; and if yea, that we set off to the said ..... so much thereof as shall be worth $....., and no more; do upon our oaths say that the said premises are worth not to exceed the sum of $..... (or exceed the sum of $....., to-wit: the sum of $....., and that in our opinion the same cannot be conveniently divided; (or that in our opinion the same can be conveniently divided, and that we have set off to the said ..... the following described part thereof, including the dwelling, which, in our opinion, is worth the sum of $.....)

In witness whereof, we have hereto set our hands and seals this ..... day of ....., 19.....

Jurors.
(L.S.)
(L.S.) etc.
A. B., Sheriff.

NO. 192

Notice to Defendant When Premises Cannot Be Divided

(Title of action.)

I certify that the within is a copy of the appraisal of the jurors, summoned and sworn by me to appraise the value of the homestead owned and occupied by you; and you will take notice, that unless you pay to me the surplus over the said sum of $....., to-wit: the sum of $....., within sixty days from the receipt here, that the premises will be sold by me, under the execution in this cause.

Dated.

Yours, etc.

A. B., Sheriff of ..... County.

NO. 193

Certificate of Sale of Lands

I, ..., sheriff of the county of ....., do certify that by virtue of an execution issued out of the ..... court of this state, tested on the ..... day of ....., 19....., I was commanded to make of the goods and chattels, lands and tenements of ..... the sum of ..... which ..... lately recovered against ..... for damages and costs, (or by virtue of several executions, describing each separately) and for want of sufficient goods and chattels of the said ..... to make the moneys aforesaid, then that I should cause the same to be made of the lands and tenements of the ..... said ..... whereof he was seized on ..... and for want of sufficient goods and chattels whereof to make the moneys aforesaid, I did seize the following lands, to-wit: ..... and having duly advertised the same in the manner prescribed by statute, to be sold on the ..... day of ....., 19....., at ..... in said county, I did expose the same for sale at public auction at the said time and place, (in separate parcels) and that the first parcel, as above described, was then and there struck off to ..... for the sum of ..... and that the second parcel, as herein described, was also then and there struck off to the said ..... for the sum of ....., being together the sum of ....., these being the highest sums bid therefor, respectively.

And I, the said ....., sheriff as aforesaid, do hereby certify that the said sale will become absolute, and the said purchaser will be entitled to a deed of said lands from me, as sheriff aforesaid, at the expiration of ..... from the day of said sale, viz.: the ..... day of ....., 19....., unless the same shall be, before that time, redeemed agreeably to the provisions of the statute in such case made and provided.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 194

Deed on Sale of Leasehold Estate

This indenture, made this ..... day of ....., 19....., between ..... sheriff (or late sheriff) of the county of ..... of the first part, and ..... of the second part:

Whereas, by virtue of a certain execution issued out of the ..... court of this state, upon a judgment therein, wherein ..... was plaintiff, and ..... was defendant, tested on the ..... day of ....., 19....., and directed and delivered to the said party of the first part, as such sheriff, for execution, by which he was commanded, that of the goods and chattels of the said defendant, he should make the amount of the said execution, and for want of sufficient goods and chattels whereof to make the same, then that he should make the deficiency thereof of the lands and tenements and chattels real, whereof the defendant was seized on the ..... day of ....., 19....., in whose hands soever the same might be; and, whereas, for want of goods and chattels sufficient to make the amount of the said execution, the said sheriff seized all the right, title, and interest, which said defendant had of, in, and to the premises hereinafter described, and did, thereupon, advertise the same to be sold under and pursuant to such judgment and the said execution thereon, at the court house door ..... in the town of ..... in said county, on the ..... day of ....., 19....., at ..... o'clock in the ..... noon, by causing a notice thereof to be published in a public newspaper published in said county, once in each week for ..... weeks successively next preceding said day, and by affixing up in ..... public places in the said town, where the said premises are situated, and where the same were advertised to be sold on the ..... day of ..... 19.... printed copies of said notice; and that at the time and place aforesaid, the said premises were exposed for sale at public vendue, and were then and there struck off to ..... the party of the second part, for the sum of ..... dollars, he being the highest bidder therefor; and, whereas the right, title and interest of the defendant of, in, and to the said premises, consists of a leasehold estate, or interest therein, of which there was not, at the time of the said sale, ... years unexpired term of said lease:

Now, this indenture witnesseth, that the said party of the first part, by virtue of the said judgment and execution, and in consideration of the sum of money so bid, as aforesaid, to him duly

paid, hath sold, and by these presents doth grant and convey unto the said party of the second part, all the estate, right, title and interest, which the said defendant had on the ..... day of ....., or at any time afterwards, of, in, and to all .....

To have and to hold the said above mentioned and described premises unto the said party of the second part, his heirs and assigns, for and during the remainder of the unexpired term, as fully and as absolutely as the said party of the first part, as sheriff of the said county can convey the same by virtue of the said judgment and execution, and the laws relating thereto.

In witness whereof the said party of the first part has set his hand and seal the day and year first above written.

Signed, sealed and delivered in the presence of

C. D., Sheriff,
by A. H., Deputy.

NO. 195

Certificate of Acknowledgment

State of .....
County of ..... } ss.

Personally appeared before me this ..... day of ....., 19....., the above named A. H., to me known to be the person who executed the foregoing deed, as deputy of the sheriff of said county, and who acknowledged that he executed the same for the uses and purposes therein mentioned.

R. B. M.,
Recorder of .....

(Local statutes should be consulted as to the proper form of acknowledgment.)

NO. 196

Certificate on Redemption By the Judgment Debtor, Grantees, Etc.

State of .....
County of ..... } ss.

I, the sheriff of said county, hereby certify that on the ..... day of ....., 19 ....., A. B., in due form of law, tendered to me the sum of ..... being the amount stated by him to have been bid by the purchaser, on the sale by me of the premises hereinafter mentioned, under and by virtue of an execution issued out of the ..... court of this state, against the said A. B., (or against one C. D.) in favor of E. F., on the ..... day of ..... with interest thereon; and the said A. B., then and there claimed the right to redeem said premises, as the judgment debtor (the grantee of the judgment debtor, heir or devisee) and thereupon I received the moneys so tendered as aforesaid, and have granted to said A. B. this my certificate, in conformity to the statute in such case made and provided. The premises so redeemed, or intended to be redeemed, are described in the certificate of the sale thereof as follows: .....

In witness whereof, I have hereto set my hand this ..... day of ....., 19.....

A. B., Sheriff of ..... County.

(To be acknowledged in accordance with the local statute.)

NO. 197

Certificate of Redemption by a Junior Judgment Creditor

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., 19....., A. B. tendered to me the sum of $..... and also presented to me a copy of the docket of a judgment in his favor (or in favor of ....) against C. D., rendered in the ..... court of this state on the ..... day of ....., certified by the clerk of said county, under his seal, (or if the judgment was not in favor of said A. B., then add) also an assignment of said judgment to said A. B., verified by his affidavit, (or the affidavit of .....); also, an affidavit of the said A. B., showing the amount due to him on said judgment; and thereupon, said A. B. claimed to redeem, as a judg-

ment creditor, certain premises sold by me, under and by virtue of an execution issued upon a judgment in the ..... court of this state, in favor of ..... against ..... on the ..... day of ....., and which premises are described in the certificate of sale, as follows:

Whereupon I received the moneys so tendered, and the papers so presented by the said A. B., and have granted to him this my certificate in conformity to the statute in such case made and provided.

In witness whereof, I have hereto set my hand this ..... day of ....., 19.....

A. B., Sheriff of ..... County.

(To be acknowledged in accordance with the local statute.)

NO. 198

Certificate of Redemption by a Senior Judgment Creditor

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., A. B. presented to me a copy of the docket of a judgment, in his favor, (or in favor of .....) against C. D., rendered in the ..... court of this state on the ..... day of ....., certified by the clerk of said county under his seal (if the judgment was not in favor of A. B., add) and also an assignment of said judgment to A. B., verified by his affidavit, (or by the affidavit of .....); also an affidavit of ..... purporting to be the agent of said A. B., showing the amount due to said A. B. on said judgment; and thereupon, said A. B. claimed to redeem, as a senior judgment creditor, certain premises sold by me under and by virtue of an execution issued upon certain judgments in the ..... court of this state, in favor of ..... against ..... on the ..... day of ....., and which premises are described in the certificate of sale, as follows: .....

Whereupon I received the papers so presented, and have granted to him this my certificate (the same as the last).

NO. 199

Certificate of Redemption by a Mortgagee

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., A. B. tendered to me the sum of ..... and also presented to me a copy of a mortgage, certified by the clerk of the said county, where the same is recorded, together with a copy of an assignment thereof verified by his affidavit, (or the affidavit of ..... a witness to such assignment) and a copy of the letters of administration (or letters testamentary) and an affidavit of said A. B. (or E. D., his attorney,) stating the amount due (or to become) due thereon, and thereupon, etc.

(Conclusion same Form 197, supra.)

NO. 200

Verification of Assignment of Judgment

(Title of action.)

State of .....
County of ..... } ss.

A. B. being duly sworn, says that the foregoing is a true copy of the assignment of the above entitled judgment, executed by the above named plaintiff to this deponent, and of the whole of such assignment; and further saith not.

A. B.

Subscribed and sworn before me
this ..... day of ....., 19.....

C. D. Notary Public.

NO. 201

Verification by a Witness of Assignment of Mortgage

State of .....
County of ..... } ss.

E. F. being sworn, says that he was present when an assignment of the mortgage executed by ..... to ..... and record-

ed in the office of the clerk of ..... county, was executed by the mortgagee therein to A. B.; and that there was no subscribing witness to such assignment; and he further saith that he has compared the foregoing copy of said assignment with the said original assignment so executed in his presence, and that the above copy is a true copy thereof, and of the whole thereof.

E. F.

Subscribed and sworn before
me this ..... day of ....., 19 .....

G. H. Notary Public.

NO. 202

Affidavit of Amount Due on Judgment

State of .....
County of ..... } ss.

A. B., being duly sworn, deposeth and saith, that he is the owner and holder of the judgment mentioned in the foregoing copy of docket of judgment, and that there is justly due to this deponent this day, on said judgment, the sum of .....

A. B.

Subscribed and sworn before me
this ..... day of .....

C. D. Notary Public.

NO. 203

Affidavit of Agent of Amount Due on Mortgage

State of .....
County of ..... } ss.

E. F., being sworn, deposeth and saith, that he is the agent for A. B., who is seeking to redeem certain premises from a sale under execution; that there is due to said A. B., on the mortgage held by him, of which a copy is hereto annexed, this day, the sum of ..... over and above all payments, and that there is secured to be paid by said mortgage the further sum of ..... payable with interest from this date, on the ..... day of ..... next.

E. F.

Subscribed and sworn before me
this ..... day of .....

G. H. Notary Public.

NO. 204

Affidavit of Overseer of Poor on Seeking to Redeem

State of .....
County of ..... } ss.

A. B., being duly sworn, says that he is one of the overseers of the poor of ..... under whose direction the warrant and proceedings were issued and taken as mentioned in the annexed certified copy of order of the court of ..... of the said county of ..... and that the real estate sought to be redeemed is held by such overseers under such warrant and seizure, and that the same have not been discharged, annulled, or reversed, but are now in force.

A. B.

Subscribed and sworn before me this
..... day of ....., 19.....

C. D. Notary Public.

NO. 205

Statement of Redemption to File in County Clerk's Office

State of .....
County of ..... } ss.

I certify that A. B. has this day redeemed the following described premises from the sale made by me on the ..... day of .... 19...., under and by virtue of an execution issued on a judgment in favor of said A. B., against C. D., to-wit:

That such redemption was made by virtue of a judgment in favor of E. F., against C. D., (or a mortgage executed by C. D. to E. F.) and by him assigned to said A. B.; that he paid the sum of ..... to redeem; and that there was claimed to be due on said judgment (or mortgage) at the time of the redemption, the sum of .....

Dated.

A. B., Sheriff of ..... County.

NO. 206

Sheriff's Deed

This Indenture, made this ..... day of ....., between A. B., sheriff (or late sheriff) of the county of ..... of the first part, and C. D. of the second part:

Whereas, by virtue of a certain execution (describe it as in the certificate of sale) directed and delivered to the said sheriff, commanding him that of the goods and chattels of the said defendant he should cause to be made certain moneys in the said writ specified, and if sufficient goods and chattels could not be found, then that he should cause the amount so specified to be made of the real estate which said defendant had on the day in the said writ mentioned, or at any time afterwards, in whose hands soever the same might be, the said (late) sheriff did levy on and seize all the estate, right, title, and interest, which the said defendant so had of, in, and to the premises hereinafter described; and on the ..... day of ..... sold the said premises at public vendue, at the court house door of ..... in the town of ..... in the said county, having first given public notice of the time and place of such sale by causing a notice thereof to be published in a public newspaper published in said county, once in each week for ..... weeks successively next preceding said day, and by affixing up in ..... public places in the said town where the said premises are situated, and where the same were advertised to be sold, on the ..... day of ....., 19..... printed copies of said notice; and that at such sale the said premises were struck off to C. D. for the sum of ....., he being the highest bidder therefor, and that being the highest sum bid for the same; (and, whereas, the said premises, after the expiration of ..... months from the time of said sale, remained unredeemed, and no creditor of the said ..... hath acquired the right and title of the purchaser, according to the statute) (or; and, whereas the said premises, after the expiration of ..... from the time of said sale, remained unredeemed by any person entitled to make such redemption within that time; and, whereas, the said C. D., a creditor of the said E. F., having in his own name, (or as assignee, or representative or trustee) a judgment against the said E. F., rendered before the expiration of ..... months from the time of such sale, and which was a lien and charge upon the premises sold, hath acquired all the right of the said purchaser to said premises, within the time and in the manner and form prescribed by the statute in such case made and provided; and more

than ..... having elapsed since the time of the said redemption, and no other creditor of the said E. F. hath acquired the said right from the said C. D.)

Now, this indenture witnesseth, that the said party of the first part, by virtue of the said writ, and in pursuance of the statute in such case made and provided, and in consideration of the sum of money so bid, as aforesaid, to him duly paid, hath sold, and by these presents doth grant and convey unto the said party of the second part, all the estate, right, title and interest, which the said defendant had on the ..... day of ....., 19....., or at any time afterwards, of, in and to all .....

To have and to hold the said above mentioned and described premises unto the said party of the second part, his heirs and assigns, forever, as fully, and as absolutely as the said party of the first part as (late) sheriff, as aforesaid, can convey by virtue of the said writ and the laws relating thereto.

In witness whereof, the said (late) sheriff has set his hand and seal hereto the day and year first above written.

Signed, sealed and delivered
in the presence of

A. B., Sheriff, (L.S.)
By A. H., Deputy.

.....
Witness

.....
Witness

(Acknowledgment in accordance with local statute)

NO. 207

Notice of Sale Under Decree of Foreclosure on Partition

(Title of action.)

In pursuance of a decree in this cause, dated ....., I shall expose for sale, as the law directs, at the ..... in the ..... on, etc., the premises described in said decree, as follows (describe the premises as in the decree). (Also state terms of sale in accordance with the judgment or decree).

Dated ....., 19.....

A. B., Sheriff of ..... County.

C. D., Attorney for Plaintiff.

NO. 208

Sheriff's Deed on Sale under Decree of Foreclosure

This Indenture, made this ..... day of ..... between ..... sheriff of the county of ..... of the first part, and ..... of ..... of the second part:

Whereas, in and by a certain decree made at a ..... term of the ..... court held at ..... in the town of ..... before ..... on the ..... in a certain cause pending in said court, wherein ..... were plaintiffs, and ..... were defendants, it was, among other things, ordered, adjudged and decreed, that the said sheriff should sell, according to the rules and practice of said court, all and singular, the premises described in the decree in said cause, at public auction in the said county, according to the course and practice of said court.*

And, whereas, the said sheriff having given due notice of the time and place of sale, did, on the ..... day of ..... sell at public auction at the ..... in ..... aforesaid, the premises described in the said decree; and that the same were then and there struck off to the said party of the second part for the sum of ....., that being the highest sum bid therefor, and the judgment herein being duly perfected.

Now, this indenture witnesseth, that the said sheriff, in order to carry into effect the sale so made by him, as aforesaid, in pursuance of the said decree, and in conformity to the statute in such case; and, also, in consideration of the premises and of the sum of money so bid, as aforesaid, the receipt whereof is hereby acknowledged, hath bargained, sold and conveyed, and by these presents doth hereby grant, assign, sell and convey unto the said* party of the second part, his heirs and assigns, forever, all (describe the premises as in the decree).

To have and to hold, all and singular the premises above mentioned and described, and hereby conveyed, or intended to be unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof, forever.

In witness whereof, the said sheriff, party of the first part, has set his hand and seal the day and year first above written.

Sealed and delivered in the presence of

A.B., (L.S.)
Sheriff of ..... County.

..... Witness
..... Witness

(Acknowledged in accordance with local statute.)

NO. 209

Sheriff's Report of Sale on Foreclosure

(Title of cause.)

To the ..... Court of the State of .....:

In pursuance of the decree of sale in this cause, made on the ..... day of ....., 19....., by which it was, among other things ordered and decreed that the mortgaged premises hereinafter described, be sold at public auction by, or under the direction of the sheriff of ..... county, in said county, and that he give public notice of the time and place of such sale, according to the course and practice of this court; and that he execute to the purchaser on such sale a good and sufficient deed of the premises, and that he pay to the plaintiff, or his attorney, out of the proceeds of such sale, the sum of ..... for his costs, and also ..... the amount reported due, with interest thereon, or so much thereof as the purchase money will pay; and that the sheriff take the receipts of the plaintiff, or his attorney, for the amounts so paid, and file the same with his report of sale; and that he bring the surplus moneys arising from the sale, if any, into court. And that if the amount of moneys arising from said sale are insufficient to pay the amount so reported due, that the sheriff specify the amount of such deficiency in his report of sale: I, ..., sheriff of said county, do report, that I advertised said premises to be sold by me, at the court house door in the town of ..... in said county, on the ..... day of ....., 19....., at ..... o'clock in the ..... noon, as follows: by causing a printed notice thereof to be fastened up in ..... public places in said town, on the ..... day of ....., 19....., and by causing a copy of such notice to be printed once in each week during the ..... weeks immediately preceding said sale, in a public newspaper printed in said county; which notice contained a description of the mortgaged premises.

And I further report that, on the said ..... day of ....., I exposed said premises for sale at public auction, and that they were then and there fairly struck off to ..... for the sum of ....., that being the highest sum bid therefor.

And I further report, that I have executed and delivered to the purchaser a deed of the premises, that I have retained for my fees and disbursements, the sum of ..... and have paid to the plaintiff's attorney the sum of ..... for his costs in this cause, and have taken his receipt therefor, which is hereto annexed;

and that I have paid to the plaintiff the sum of ..... being the amount reported due him, with interest thereon, and have taken his receipt therefor, which is also hereto annexed. (And that the amount so bid and paid was insufficient to pay the amount reported due, with interest and costs, and that the deficiency is the sum of .....) (or that I have paid the surplus moneys into court, and have taken the receipt of the clerk thereof, which is also hereto annexed). The premises are described as follows in such decree, notice and deed: .....

All of which is respectfully submitted.

Dated ....., 19.....

A. B., Sheriff of ..... County.

Receipts Annexed to Report

(Title of action.)

Received ..... 19....., of ..... sheriff of ..... county, the sum of ..... in full of my costs in this action.

C. D., Attorney for Plaintiff.

(Title of action.)

Received ..... 19....., of ..... sheriff of ..... county, the sum of ..... being the amount reported due, with interest .....

C. D., Attorney for Plaintiff.

(Title of action.)

A. B., the sheriff of ..... county, has this day paid into court the sum of ..... for surplus moneys in this action.

Dated .....

J. B., Clerk of ..... County.

NO. 210

Report of Sale in Partition

(Title of action.)

To the ..... Court of the State of .....:

In pursuance of the decree of sale made in this cause on the ....at ..... by which it was, among other things, ordered and decreed, that the premises described in said decree be sold by the sheriff of ..... county, according to the rules and practice of this court; and that on making the said sale, said sheriff forthwith make report thereof to this court; I, the said

sheriff, do certify and report, that in pursuance of said decree of the statutes and the rules and practice of the said court, I gave due notice of the time and place of said sale, by causing a notice thereof to be published once in each week for ..... weeks successively, next preceding the day of sale therein mentioned, in a public newspaper printed in said county; which notice contained a brief description of the premises; and also by fastening up in ..... public places in the town where the said premises are situated and were advertised to be sold, ... weeks next preceding the day of said sale, copies of the said printed notice, and that at the time and place mentioned in the said notice, I exposed the said premises for sale at public vendue, and the same were then and there struck off to ..... for the sum of ....., that being the highest sum bid therefor.

All of which is respectfully submitted.

Dated ....., 19.....

A. B., Sheriff of ..... County.

NO. 211

Sheriff's Deed on Sale under Decree in Partition

The same as No. 208 to the first asterisk, and then insert: "that after making said sale, said sheriff make report thereof to the said court, and after said judgment shall have been perfected, and the said report confirmed, that said sheriff execute and deliver to the purchaser or purchasers, a deed or deeds of the premises:" and after the second asterisk, add: "and the said sheriff having made report of his doings in the premises to the court, and the same having been duly confirmed by the order thereof." (conclude as No. 208)

NO. 212

Final Report of Sale under Decree in Partition

(Title of action.)

To the ..... Court of the State of .....:

In pursuance of the decree of sale in this cause, and of the order confirming the sale, made by this court on the ..... day of ....., 19....., I, the sheriff of ..... county, have executed to the purchaser a deed of the said premises so sold by me, upon receiving from said purchaser the purchase money;

that I have retained the sum of ..... out of said purchase money for my fees and disbursements; and have paid to the attorney of the plaintiff for his costs and charges, the sum of ..... and to ....., the attorney for the defendant ..... the sum of ..... for his costs and charges; and that I have divided the balance thereof amongst the several parties hereto, according to their respective interests therein, and have paid to each their proportionate share thereof, to-wit: to ..... the sum of ..... to ..... the sum of ..... and to ..... the sum of ..... under and pursuant to the decree in this cause, and that I have taken receipts for the said several sums so paid, as aforesaid, and have annexed the same to this my report.

All of which is respectfully submitted.

Dated ..... 19.....

A. B., Sheriff of ..... County.

(Title of action.)

Received of ....., sheriff of ..... county, the sum of ..... in full of my costs and charges in this action, as attorney for plaintiff. Dated ....., 19.....

C. D., Attorney for Plaintiff.

(Title of action.)

Received of ....., sheriff of ..... county, the sum of ..... in full of my share or portion of the moneys realized on the sale of the premises in this action.

Dated ....., 19 .....

E. F.

NO. 213

Return of Arrest on Execution against the Body

I have arrested the within defendant, and have him in my custody in the common jail of the county.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 214

Return of Arrest Where the Defendant Is Let to Bail

I have arrested the within defendant, and have let him to bail to the liberties of the jail of said county.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 215

Where the Defendant Released on Habeas Corpus

I return that I arrested the within defendant, and held and detained him in my custody, under the within writ of execution, in the common jail of my county, until the ..... day of ....., when he was, in due form of law, removed from my custody by writ of habeas corpus, granted by Hon. C. H. D., and was then and there discharged from said arrest.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 216

Return Where One is Taken and the Other Cannot be Found

I have arrested the within defendant ..... and have him in my custody in the common jail of the county; and the defendant ..... cannot be found in my county after diligent search.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 217

Return Where the Defendant is Discharged from Custody under the Insolvent Laws

I return, that I arrested the within defendant, and held him in my custody until the ..... day of ..... when said defendant was duly discharged from imprisonment by the ..... court of ..... county, as an insolvent debtor.

A. B., Sheriff of ..... County.

NO. 218

Arrest and Escape in Consequence of a Fire in the Jail

I arrested the within defendant, under the within writ of execution, and detained him in my custody in the common jail of the county until the ..... day of ....., when there casually occurred a fire in the said jail, whereby and by reason whereof the said ..... escaped therefrom without my knowledge or assent; and that I could not prevent such escape, but the same was without default on my part; and that I have not been able, after diligent search, to retake the said defendant.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 219

Affidavit of Imprisoned Debtor on a Justice's Judgment to Obtain His Discharge

(Title of action.)

State of .....
County of ..... } ss.

A. B., the defendant in this action, being duly sworn, deposeth and saith, that he was committed to the jail of the said county of the ..... day of ..... under and by virtue of an execution issued by* ..... a justice of the peace of said county, upon a judgment rendered before him in favor of ....., the above named plaintiff, against his deponent, for the sum of ..... damages and costs, on the ..... day of ....., 19....., and that he, this deponent, has remained a prisoner on said execution from the time of such commitment, until the time of making this affidavit, to-wit: the ..... day of ....., 19....., and this deponent further saith, that at the time of such commitment, he had and still has a family in the town of ..... in said county and state of ....., for which he provides; and that at the time of such commitment he was not, nor has he been since, nor is he now, a freeholder; (or any other statutory ground for discharge) and further saith not.

A. B.

Subscribed and sworn before me
the ..... day of ....., 19.....

C. D. Justice of Peace.

NO. 220

Where the Execution Is Issued by the County Clerk

Instead of the above description of the judgment and execution, insert after the asterisk: "the clerk of the said county, upon a judgment rendered before ..... a justice of the ..... of said county, in favor of ....., the said plaintiff, and against this deponent, on the ..... day of ....., 19....., for ..... damages and costs, and docketed in the office of the said clerk."

(Conclude as last.)

NO. 221

Where the Prisoner Has Not a Family for Which he Provides

The same as the foregoing in all respects, omitting the statement that he has such family.

NO. 222

Bond for Liberties of the Jail

(Penal Part as No. 12.)

Whereas, the above bounden ..... is now in the custody of the above named ....., sheriff of the county of ....., by virtue of an order of arrest, made by the Hon. C. H. D., a justice (or judge) of the ..... court of this state, requiring the said ..... to be held to bail in the sum of ..... at the suit of ..... (or, "by virtue of an execution issued out of the ..... court of this state, at the suit of ..... against the said ..... for damages and costs, tested on the ..... day of ..... and returnable ..... after the receipt thereof.")

Now, therefore, the condition of the said bond is such that if the above bounden ..... so in custody of the above named sheriff, as aforesaid, shall remain a true and faithful prisoner, and shall not at any time, or in any manner escape or go without the liberties established for the jail of the county of ..... until

discharged by due course of law, then this obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the
presence of

A. B. (L.S.)
C. D. (L.S.)
E. F. (L.S.)

.....
Witness
.....
Witness

(Sureties to justify and all parties to acknowledge as Nos. 92, 93.)

NO. 223

Assignment of Bond

Know all men by these presents, that I, sheriff of ..... county, within named, do assign and set over to the plaintiff therein named at his request, the within bond or obligation, pursuant to the statute in such case made and provided.

A. B., Sheriff.

Dated ....., 19.....
Signed, sealed and delivered
in the presence of

.....
Witness
.....
Witness

NO. 224

Deputation of Bail to Arrest Principal

Know all men by these presents, that I. A. B., (or we, A. B. and C. D.,) of, etc., being the same A. B. mentioned in the within copy of undertaking, (or bail bond, or bond for jail limits, or recognizance,) have deputized, authorized and empowered in my place and stead and in my behalf, E. F., of, etc., to take, arrest, secure and surrender to the sheriff of the county of ..... in the state of ....., G. H., in said copy of undertaking named in exoneration and discharge of my undertaking as bail of said G. H., in the cause therein mentioned, and to employ such persons and assistants as may be necessary to effect said purpose.

In witness whereof, I have set my hand hereto this ..... day of ....., 19.....

A. B.(L.S.)

NO. 225

Certificate of Surrender of Defendant by His Bail

(Title of cause.)

I certify that ....., the surety in the undertaking given on the arrest of the defendant this day surrendered the said defendant in exoneration of them as bail, by delivering him into my custody, together with a certified copy of the undertaking given by the said surety.

Dated ....., 19 ...

A. B., Sheriff.

NO. 226

Return to Writ of Possession

I have caused the within plaintiff to have possession of the premises within described, with the appurtenances, as by the said writ I am within commanded.

Dated ....., 19....

A. B., Sheriff.

NO. 227

Where the Plaintiff Neglects to Point Out the Premises

I certify and return, that I have been at all times ready to execute the within writ, from the day of its receipt by me, to the last day of its return, to-wit: etc., but that no one, on behalf of the within plaintiff came to show me the premises within described; wherefore I could not make the said ..... to have possession of the said premises as by the said writ is required.

Dated ....., 19 ....

A. B., Sheriff.

NO. 228

Return of Service of Habeas Corpus

(Title of matter or proceeding.)

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., at ....., I served the writ of habeas corpus issued by ..... in the above entitled matter, a copy of which is hereto annexed, upon the said ..... by delivering the same to him personally, at ..... in said county.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 229

Return Where the Party Cannot be Found

(Title of matter or proceeding.)

State of .....
County of ..... } ss.

I certify that on the ..... at ..... in said county, I served the writ of habeas corpus issued by ..... in the above entitled matter, a copy of which is hereto annexed, upon the said ..... by leaving at the residence of the said ..... the said writ with the wife of the said ..... who then had the above named infant in charge, in the absence of ....., who could not be found.

Dated ....., 19....

A. B., Sheriff of ..... County.

(This manner of service would be available only if authorized by statute)

NO. 230

Where the Party Conceals Himself

(Title of matter or proceeding.)

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., 19....., at ..... in said county, I served the writ of habeas corpus issued by ..... in the above entitled matter, a copy of which is hereto annexed, upon the said ..... by affixing the said writ in a conspicuous place, on the outside of the front door of the dwelling house of the said ..... the said ..... concealing himself within (or refusing admittance to me to make personal service).

Dated ....., 19....

A. B., Sheriff of County.

(See note to form 229)

NO. 231

When the Party Served Is a Sheriff, Coroner, Constable or Marshal

Add, after describing the manner of service: "and also at the same time paying (or tendering) to said ..... the sum of ..... for his fees in bringing up the said prisoner; and delivering (or tendering) to said ..... a bond in the penal sum of ..... conditioned to pay to said ..... the charges for carrying back said prisoner if he should be remanded, and that such prisoner will not escape by the way, either in going to or returning from the place to which he is to be taken."

(In some states no fees are collectible in habeas corpus proceedings.)

NO. 232

Return to Habeas Corpus

I do hereby return to the justices of the ..... court (or, to the Hon. ....., a justice (or judge) of the ..... court, or county judge of ..... County) that before the coming to me of the within writ, the said ..... was committed to my custody, and is detained by virtue of another writ, a copy of which is hereto annexed; the original of which I also herewith produce; nevertheless I have the body of the said ..... before you at the ..... day and place within mentioned, as I am within commanded.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 233

Return Where the Prisoner Is Sick

I do hereby return to the justices of the ..... court (or, to the Hon., etc.,) that before the coming to me of the within writ, the said ..... was committed to my custody, and is detained by virtue of another writ, a copy of which is hereto annexed; the original of which I also herewith produce; and that the said ..... now lies in the jail of said county, sick and infirm, and so remains, so that he cannot, without danger, be brought before the court now here as I am within commanded.

A. B., Sheriff.

State of .....
County of ..... } ss.

The sheriff of said county, who makes the above return, being duly sworn, says, that the said return is in all respects true, according to his information and belief.

A. B.

Sworn before me this .....
day of ....., 19....

C. D. Notary Public.

NO. 234

Where the Party Is Not in the Sheriff's Custody

I hereby return to the justices of the ..... court (or, to the Hon., etc.) that before the coming to me of the within writ, the said ..... was committed to my custody, and was detained by virtue of another writ, a copy of which is hereto annexed; the original of which I also herewith produce; but that said ..... is not now, and was not at the delivery of the within writ to me in my custody or under my power of restraint, the said ..... having on the night of the ..... broke the jail and escaped therefrom, and has not been retaken; (or, the term of his sentence having expired, I did on ..... discharge said ..... from confinement in said jail; or, that on the ..... the said ..... was in due form of law let to bail by ....., county judge; or, that by virtue of a bench warrant issued by the district attorney of ..... county, I did on the ..... day of ..... deliver the said ..... into the custody of the sheriff of .... county;) wherefore I cannot have the body of the said ..... at the day and place within named, as I am within commanded.

Dated ....., 19....

A. B., Sheriff.

NO. 235

Proof of Service of a Writ of Certiorari

(Title of matter of proceeding.)

State of .....
County of ..... } ss.

I certify that on the ..... day of ..... I served the writ of certiorari issued by the Hon. ..... in the above matter or proceeding, upon the person named therein, by delivering such writ to him, personally, in ..... in said county.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 236

Return to Certiorari

State of .....
County of ..... } ss.

I certify and return to the ..... court of the state of ..... (or, to Hon. C. H. D., justice (or judge) of the ..... court, etc.) as I am within commanded, that before the coming to me of the within writ of certiorari, to-wit: on the ..... day of ....., the within named ..... was committed to my custody, as sheriff of the county of ....., by virtue of an execution issued upon a judgment, etc., (or, by virtue of a warrant of commitment of ..... justice of the peace of ..... County) a true copy of which is hereto annexed, and that he is detained by me for no other cause.

Dated.

A. B., Sheriff of ..... County.

NO. 237

Habeas Corpus ad Testificandum

The People of the State of ....., to the Sheriff of the County of ....., greeting:

We command you that you have the body of ..... defendant in your prison under your custody, under safe and secure conduct, before* our ..... court, to be held at the court house in the town of ..... on the ..... to testify and give evidence in a certain action now pending in the said ..... court, then and there to be tried between ..... plaintiff and ..... defendant, on the part of the plaintiff (or defendant,) and that immediately after the said ..... shall have given his testimony in said action, that you return him to your prison under safe and secure conduct; and have you then there this writ.

Witness, C. H. D., justice (or judge) of the ..... court, at the court house in, etc., the ..... day of ....., 19....

J. B., Clerk.

A. B., Attorney.

(Endorsed)

Allowed this ..... day of ....., 19....,
C. H. D., Justice (or Judge) of the ..... Court.

NO. 238

The Same to Bring a Witness before a Referee or Justice

The same as the last to the asterisk, and add: "A. B., referee in a cause pending before him as such referee, (or before C. C., a justice of the peace, in a cause pending before him,) wherein ..... is plaintiff and ..... is defendant, on the part of the plaintiff (or defendant,)" and then the name as the last.

NO. 239

Bond to Be Given on Issuing Habeas Corpus

(The penal part as No. 12; and the penalty to be in the amount required by local law or fixed by the court.)

The condition of the bond is as follows:

Whereas a writ of habeas corpus (ad testificandum) has been issued by the Hon. C. H. D., a justice (or judge) of the ..... court; (or, by the supreme court or county court of ..... now in session at, etc.) by which the said sheriff is commanded that he bring ....., now in the custody of him the said sheriff under and by virtue of ..... before the said justice of the supreme court, (or before the said court, or before A. B., a referee, or C. D., a justice of the peace) on the application of the said .....

Now, therefore, the condition of the above obligation is such, that if the said ..... shall pay to said sheriff all charges for carrying back such prisoner if he shall be remanded (or after he has testified; and that such prisoner shall not escape by the way, either in going to or returning from the place to which he is to be taken, then this obligation shall be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered
in the presence of

A. B. (L. S.)
C. D. (L. S.)

.....
Witness
.....
Witness

(In some states no fees or costs are allowed in habeas corpus proceedings.)

NO. 240

Justification of Surety to Bond

State of .....
County of ..... } ss.

C. D., the surety in the foregoing bond, being by me duly sworn, deposeth and saith that he is a resident of said county and a householder (or freeholder) (or other qualification required by local law) therein, and that he is worth, over and above all debts and liabilities, in addition to the property exempt from levy and sale on execution, the sum of ..... dollars; and further saith not.

C. D.

Subscribed and sworn before
me this ..... day of ....., 19....
(To be acknowledged as No. 13.)

NO. 241

Oath of Jurors on Writ of Inquiry

You and each of you, do swear that you will well and truly hear and determine the matter in difference between ..... plaintiff and ..... defendant, and true inquisition make, according to the evidence; so help you God.

NO. 242

Oath to Witness

You do swear that the evidence you shall give in the matter in difference between ..... plaintiff and ....., defendant shall be the truth, the whole truth, and nothing but the truth; so help you God.

NO. 243

Inquisition

State of .....
County of ..... } ss.

Inquisition taken this ..... day of ..... before me, A. B., sheriff of ..... county, at ..... by virtue of a writ of inquiry to me directed and to this inquisition annexed, to inquire of and concerning certain matters in said writ contained and specified, by the oaths of ..... twelve good and lawful men of said county, who being summoned and sworn, say upon their oaths, that the plaintiff in the said writ named hath sustained damages by reason of the premises in the writ mentioned, over and above his costs and charges, to ..... dollars.

In witness whereof, we, as well as the said sheriff, as the said jurors, have set our hands and seals in this inquisition, the day and year above written.

A. B., Sheriff (L. S.)

Jurors.
(L. S.)
(L. S.)

Jurors.
(L. S.)
(L. S.)

NO. 244

Notice of Execution of a Writ of Ad Quod Damnum

State of .....
County of ..... } ss

By virtue of a writ of ad quod damnum, issuing out of the .... court of this state, and tested on the ..... day of ..... and to me directed and delivered, by which I am commanded, by the oaths of twelve good and lawful men of my county, to inquire if the persons, or any of them owing the premises hereinafter described, will sustain any and what injury by reason of the taking of such premises for the use of the people of this state, (or of the United States).

The said premises are described as follows: .....

Notice is therefore hereby given, that I will proceed to execute the said writ on the ..... day of ..... at ..... in said county.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 245

Oath to Jurors on Writ of Ad Quod Damnum

You do swear, that you will diligently inquire whether the person (or persons) owning the lands or tenements to be viewed by you, and which are mentioned and described in the writ of ad quod damnum, issued by the ..... court of this state, to the sheriff of ..... county, will sustain any and what injury by reason of the taking of such premises, for the use of the people of this state (or the United States) and will give a true verdict, according to the best of your judgment, without favor or partiality; so help you God.

NO. 246

Inquisition upon a Writ of Ad Quod Damnum

State of .....
County of ..... } ss

Inquisition taken this ..... day of ....., 19...., at, etc., before ..... sheriff of ..... county, under and by virtue of the writ of ad quod damnum, to said sheriff directed and delivered and to this inquisition annexed by the oaths of ..... qualified jurors of said county, who being duly summoned and sworn by the said sheriff, say, upon their oaths, that A. B. is the owner in fee of the lands and tenements firstly described in said writ, as follows:

C. D. is the owner in fee of the premises secondly described in said writ, as follows:

And E. F. holds the last mentioned premises by lease granted by ..... on, etc., for the term of ..... years, at an annual rent of ..... dollars;

That said A. B. will sustain injury and damages, to the amount of ..... dollars, by being deprived of the said premises so owned by him.

That said C. D. will sustain damages in the amount of ..... dollars, by being deprived of the said premises so owned by him.

And that E. F. will sustain injury and damages to the amount of ..... dollars, by being deprived of the said premises so held by him, as aforesaid.

And the said jurors, upon their oaths aforesaid, do further say that the people of the state of ..... should pay for the said several parcels of lands and tenements, the said several sums so assessed as aforesaid to the said persons, to whom the same are assessed as aforesaid, respectively.

In witness whereof we, the said sheriff, as well as the said jurors, have hereto set our hands and seals, the day and year first above written.

Jurors.

(L. S.)

A. B., Sheriff (L. S.)

NO. 247

Return of Execution of Writ of Ad Quod Damnum

State of .....
County of ..... } ss.

I certify and return, that on the coming to me of the within writ of ad quod damnum, I caused due notice of the time and place of executing the same to be given, by publishing a notice thereof once in each week for ..... weeks successively, immediately preceding such time, in a public newspaper printed in said county; that I summoned ..... qualified jurors of my county, as I am within commanded, to attend at the time and place designated in such notice for executing said writ, and then and there administered to each of said jurors, the oath prescribed by statute; that thereupon the said jurors viewed together all the lands and tenements specified in said writ, and after so viewing the same, made inquisition of the matters required in and by the within writ by them to be made; which inquisition, under the hands and seals of the said jurors, as well as under my hand and seal, is hereto annexed.

Dated ....., 19....

A. B., Sheriff of ..... County.

(Before damages could be so assessed the proceedings therefor must find warrant in a statutory enactment in the particular jurisdiction)

NO. 248

Certificate of Service of a Judge's Order under Proceedings Supplementary to the Execution

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., 19....., I served the within order upon the within named defendant in ..... in said county, by delivering to him personally a copy thereof, and at the same time showing him the within original order.

Dated ....., 19....

A. B., Sheriff.

NO. 249

Return to Precept for Summoning a Jury in a Case of Lunacy

The execution of the within precept will appear by the panel of jurors hereto annexed.

Dated ....., 19....

A. B., Sheriff.

NO. 250

Panel of Jurors to Be Annexed to Precept

Panel of jurors summoned by me, under and pursuant to the annexed precept.

A. B., Sheriff.

A. K., Farmer, of D.
C. D., Mechanic, of E., etc.

NO. 251

Affidavit of Summoning Jury in Plank Road Case

State of .....
County of ..... } ss.

A. B., the sheriff of ..... county, to whom the within precept was delivered for service, deposeth and saith, that the following jurors therein named, to-wit: ..... were each duly personally served by him to appear as such jurors at the time and place, and for the purposes in the said precept named, at least ..... days before the day therein specified for hearing; and that the following jurors, to-wit: ..... were in like manner duly served by him, by leaving at their respective places of residence, a written notice containing the substance of the within precept; and that the distance actually and necessarily traveled by me in making the said service, was ..... miles.

A. B.

Subscribed and sworn before me
this ..... day of ....., 19....

C. D. Notary Public.

(There must be a local statute authorizing this proceeding in the particular jurisdiction)

NO. 252

Return to Precept for Summoning a Jury in a Case of Forcible Entry

(The same as Nos. 249 and 250.)

NO. 253

Certificate of Service of Notice of Issuing the Precept

I certify that on the ..... day of ....., 19...., I served a notice of which the within is a copy, upon ....., by delivering the same to (him personally;) (or, if he cannot be found, "by delivering the same to ....., his wife, upon the premises therein mentioned, the said ..... not being found;") or, if there is no person on the premises on whom the same can be served, "by affixing the same on the outer door of the house, the said ..... not being found, and there being no person on the within premises upon whom such service could be

made;") (or, if there be none, "by affixing the same upon the fence on said premises, on the public highway, being the most public and suitable place on the premises, the said ..... not being found, and there being no person on the premises on whom service could be made, and there being no house thereon").

Dated ....., 19....

A. B., Sheriff.

NO. 254

Certificate of Service of a Summons in Summary Proceedings to Obtain Possession of Lands

I certify that on the ..... day of ....., 19...., I served the within summons upon the within ..... by delivering to him a true copy thereof, and at the same time showing him the original summons.

Dated ....., 19....

A. B., Sheriff.

NO. 255

Where the Tenant Is Absent

I certify that on the ..... day of ....., 19...., I served the within summons by delivering and leaving a copy thereof with the wife of said ..... at his last place of residence, he being absent therefrom, and such residence being in the same town with the demised premises.

Dated ....., 19....

A. B., Sheriff.

NO. 256

Where No Person Found at Tenant's Residence

I certify that on the ..... day of ....., 19...., I served the within summons by delivering and leaving a copy thereof with C. D., a person of mature age residing on the demised premises, the said ..... being absent from his place of residence, and no person of mature age being found thereat on whom to make service.

Dated ....., 19....

A. B., Sheriff.

NO. 257

Where the Premises Are Not in Same Town with Tenant

I certify that on the ..... day of ....., 19...., I served the within summons by delivering to and leaving with C. D., a person of mature age residing on the demised premises, the tenant being absent from his place of residence and the demised premises not being in the same town (or city).

Dated ....., 19....

A. B., Sheriff.

NO. 258

Where No Person Resides on the Premises

I certify that on the ..... day of ....., 19...., I served the within summons by delivering to and leaving a copy thereof with C. D., a person of mature age, a clerk in the store on the demised premises, the tenant being absent from his place of residence, and said premises not being in the same town with the said residence and no person residing on the premises.

Dated ....., 19....

A. B., Sheriff.

NO. 259

Where No Person Found on the Premises

I certify that on the ..... day of ....., 19...., I served the within summons by affixing a copy thereof on the front door or conspicuous part of the demised premises, the tenant having no place of residence in the county and no person residing on the premises or employed in any business upon the premises.

Dated ....., 19....

A. B., Sheriff.

NO. 260

Return to a Precept for a Jury in Such Case

I have summoned the several jurors named in the within precept, to appear at the time and place within mentioned; the said .... were summoned personally, and the said ....., who could not be found, were summoned by leaving at their respective residences, with persons thereat of proper age, a notice that they had been nominated as such jurors, and the time and place at which they were required to attend.

Dated ....., 19....

A. B., Sheriff.

NO. 261

Return of Service of Order upon a Defaulting Juror to Show Cause

I certify that on the ..... day of ....., 19...., I served the within order upon the within named ..... by delivering to him personally a copy thereof, and at the same time showing him the within original order.

Dated ....., 19....

A. B., Sheriff.

NO. 262

Return to Process for Collection of Fines

I have made the sum of ..... directed to be collected of the within named ..... besides my fees, and have paid the same to the county treasurer. The within ..... having no goods or chattels in my county, whereof I could make the amount of the within fine imposed upon him, I have committed him to the jail of the county, where he now remains. I cannot find any goods or chattels of the said ..... in my county, whereof I can make the amount of the fine imposed upon him, or any part thereof, nor can I find the said ..... in my county.

Dated ....., 19....

A. B., Sheriff.

NO. 263

Return to Warrant of County Treasurer against a Delinquent Collector

I have made the sum of ..... upon the within warrant, exclusive of my fees; and the within collector has no goods or chattels, lands or tenements within my county, whereof I can make the remainder of the moneys mentioned in the within warrant.

Dated ....., 19....

A. B., Sheriff.

NO. 264

Return to Warrant for Collection of Unpaid Taxes

I have collected the amount directed to be collected of the within named C. D., E. F., and G. H., and I can find no property whereof to make the amount directed to be collected of the within J. K.

Dated.

A. B., Sheriff.

NO. 265

Certificate of Service of Notification of the Comptroller

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., 19...., I served the within notification upon the within named ..... by delivering to him personally a copy thereof.

Dated ....., 19....

A. B., Sheriff.

NO. 266

The Same Where the Party Is Absent

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., 19...., I served the within notification upon the within named ..... by leaving a copy thereof with his wife, at his usual place of abode, he being absent therefrom.

Dated ....., 19....

A. B., Sheriff.

NO. 267

Return to Warrant of Comptroller against Defaulting Canal Collector

I have made the amount of the within warrant of the goods and chattels of C. D. and E. F., the surety of the within G. H., he having no goods or chattels, lands or tenements whereof I could make the amount or any part thereof.

Dated ....., 19..

A. B., Sheriff.

(The proceedings in the last five forms must be authorized by a local statute)

NO. 268

Notice of Sale of Distress

Sheriff's Sale

By virtue of a distress, I shall expose for sale, as the law directs, at ..... in, etc., the following described property, to-wit:

Said distress was issued to me by ..... pursuant to statute for the purpose of collection .....

Dated.

A. B., Sheriff.

(The local statutes should be consulted and followed in the issuance of a distress warrant also it would be advisable to recite the steps taken under the distress warrant in the notice of sale thereunder.)

NO. 269

Inventory and Appraisal of Distressed Property

Inventory and appraisal of goods and chattels seized by the sheriff of ..... county, under and by virtue of, in, etc., made by the undersigned, three disinterested freeholders of the town of ..... upon oath, to-wit:

One bay horse, value, etc.

Dated.

A. B.
C. D.
E. F.
Appraisers.

We certify that the foregoing is a just appraisal of the property within described, appraised by us at the instance of ....., sheriff of ..... county, this ..... day of ....., 19....

A. B.
C. D.
E. F.
Appraisers.

NO. 270

Proof of Posting Notice of Sale

State of .....
County of ..... } ss.

A. B., being duly sworn, deposeth and saith, that on the ..... day of ....., 19...., he posted in three public places in the town of ..... in said county, a notice of sale, of which the foregoing (or annexed) notice is a true copy.

A. B.

Subscribed and sworn before
me this ..... day of ....., 19....

C. D. Notary Public.

NO. 271

Affidavit of Officer Making the Distress

State of .....
County of ..... } ss.

A. B., being sworn, saith, that he is the sheriff of said county; that the property mentioned in the annexed inventory and affidavit was distrained by this deponent under and by virtue of ..... that the amount of the penalty was ..... that the property sold for the sum of ..... that I have paid the said penalty out of the proceeds; that I have retained the expenses of the appraisal, certificate, notice, proof and affidavits, and of the filing of the same, amounting to ..... and that the surplus, being the sum of ...., I have this day paid to the county treasurer.

A. B.

Subscribed and sworn before me
this ..... day of ....., 19....

C. D. Notary Public.

(In most jurisdictions a return certified by the officer is sufficient, without making an affidavit; his official oath being sufficient to give such return the verity of an affidavit; the return can be made by stating the substance of the above affidavit.)

NO. 272

Appraisal of Wrecked Property

State of .....
County of ..... } ss

We, the undersigned, at the instance of the sheriff of ..... county, do appraise the wrecked property hereafter mentioned, as follows, to-wit:

One sloop named ....., lying at ..... in said county, at $.....

Her anchor,
Sails,
Load of damaged wheat.
Dated ....., 19....

A. B.
C. D.
Appraisers.
A. B., Sheriff.

NO. 273

Notice of Wrecked Property

To all whom it may concern:

Notice is hereby given, that the undersigned has this day taken into his possession at ..... in said county, a sloop named ....., of ..... one iron anchor and two sails. Said sloop is loaded with wheat now in a damaged condition; that said vessel and other property are now at the said ..... and that the wheat is in a damaged condition, being wet and beginning to heat, etc.

Dated.

A. B., Sheriff of ..... County.

NO. 274

Petition for Sale of Damaged Property

To the Hon. ....., County (or other) Judge of .... County:

The undersigned, sheriff of said county, has this day taken possession of a sloop, named ....., iron anchor, two sails, and wheat in the hold, in a damaged condition; that he has caused the same to be appraised by ....., two disinterested persons, a copy of which appraisal is hereto annexed, and that he has given the notice of such wrecked property, required by law in such cases; that said wheat is in a damaged state, and unless it is worked up soon will spoil; he therefore prays that the same may be sold as in such case is provided.

A. B., Sheriff of said County.

State of .....
County of ..... } ss.

A. B., Sheriff of said County, being sworn says: that the foregoing petition is true to the best of his knowledge and belief.

A. B.

Subscribed and sworn before
me this ..... day of ....., 19....

C. D., County Judge of ..... County.

NO. 275

Notice of Election to Be Published and Served

Election Notice

Sheriff's Office

State of .....
County of ..... } ss.

Notice is hereby given, pursuant to the statutes of this state, and of the annexed notice from the secretary of state (or, order of the board of county canvassers, or proclamation of the governor) that the general election in this state (or, a special election for said county) will be held in this county on the Tuesday succeeding the first Monday of November next; at which election, the officers named in the annexed notice (or, order, or proclamation) will be elected.

A. B., Sheriff.

Dated ....., 19....

(Annex copy notice, order, or proclamation.)

NO. 276

Proof of Service of a Citation to Attend the Probate of a Will

State of .....
County of ..... } ss.

C. D., being sworn, says, that on the ..... day of ....., 19...., he served the within citation upon the within named .... by delivering to him a copy thereof, and at the same time showing him the within original citation, at ..... in said county; (or, if he cannot be found, say, "by leaving a copy thereof on the ..... day of ....., 19...., at the place of residence of the said ..... in the town of ..... with ....., the mother of said ....., with the request to deliver the same to said ..... as soon as might be; and that this deponent has since learned that said ..... did on or about ....., return to his residence, where the copy was left for him, as aforesaid."

Subscribed and sworn before me this ..... day of ....., 19....

C. D.

A. B., Surrogate.

NO. 277

Proof of Service of Citation on Executor or Administrator to Answer Charges

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., 19...., I served the within citation on the within named ..... by delivering to him personally a copy thereof, and at the same time showing him the within original citation (or if he shall have absconded, say, "by leaving a copy thereof at his place of residence, with ....., his wife, he having absconded from the county").

Dated ....., 19....

A. B., Sheriff.

NO. 278

Proof of Service of a Citation upon a Guardian to Answer Charges

If he can be found, the proof of service is the same as the last.

If he has absconded or concealed himself so that he cannot be personally served, say, "by leaving a copy thereof with .... at his last place of residence, he having absconded from the county (or concealed himself) so that personal service could not be made upon him."

NO. 279

Notice to Sheriff to Return Process

(Title of action.)

To ....., Sheriff of ..... County:

Sir: You are hereby notified to return the summons and complaint (judge's order, etc., or execution,) delivered to you for service in this cause, within ten days after the service of this notice, or show cause at ..... term of this court to be held at the court house in the ..... on the ..... day of ....., 19...., at the opening of the court will be applied for, why an attachment should not issue against you for neglect thereof, with costs of such motion.

Dated.

Yours, etc.

A. B., Attorney for Plaintiff.

NO. 280

Proof of Service of Notice to Return Process

(Title of action.)

State of .....
County of ..... } ss.

A. B., being sworn, deposeth and saith, that on the ..... day of ....., 19...., he served a notice, of which the annexed is a copy, on the within named ..... sheriff of ..... county, by delivering the same to him personally (or if he cannot be found, "by leaving the same in his office during the hours the same is by law required to be kept open, no person being present therein"). (Conclude with signature of affiant and jurat.)

Or, if service is accepted by the officer it may be as follows: "I admit service of a notice of which the within is a copy, this ..... day of ....., 19....

C. D., Sheriff."

NO. 281

Affidavit of Delivery of Execution to the Sheriff

(Title of action.)

State of .....
County of ..... } ss.

A. B., being sworn, says, that he is the attorney for the plaintiff in this action; that judgment was perfected and the roll thereof filed in the clerk's office of ..... county, on the ..... day of ....., 19...., for ..... dollars and ..... cents, damages and costs, and a transcript thereof was filed and the judgment docketed, in the clerk's office of ..... county, on the ..... day of ....., as this deponent is informed and believes; that execution in due form of law was duly issued thereon to the sheriff of said last mentioned county, by which said sheriff was commanded to make the said sum of ..... with interest and his fees, and to return such execution to the office of the clerk of ..... county, within sixty days after the receipt thereof by him, the said sheriff; and that the same was received by said sheriff for execution on the ..... day of ....., as this deponent is informed and believes. That

this deponent has made inquiries at the office of the clerk of ..... county for said execution, and that he has learned that although the time for returning said execution has expired, said execution has not been returned; and that the said judgment, nor any part thereof, has not been paid to the plaintiff; but that the whole remains due and unpaid; and that the said sheriff is in default in not returning the said execution, and in not paying over the said moneys.

A. B.

Sworn before me this
..... day of ....., 19....

C. D., Notary Public.

NO. 282

Proof of Service of Notice to Return an Execution and of Service of Affidavit of Delivery Thereof, on the Sheriff

(Title of action.)

State of .....
County of ..... } ss.

A. B., being sworn, says, that on the ..... day of ....., 19...., he served the foregoing notice and affidavit on the above named ....., sheriff of ..... county, by delivering copies thereof to him personally (or if he cannot be found, "by leaving copies thereof with C. D., a clerk in the office of said sheriff), during the hours in which said office is required by law to be kept open, the said ..... being then absent therefrom." (Conclude with signature of affiant, and jurat.)

NO. 283

Proof That the Execution Has Not Been Returned

(Title of action.)

State of .....
County of ..... } ss.

A. B., being sworn, says, that on the ..... day of ....., 19...., he made diligent search of the files of the office of the clerk

of the county of ..... in the place where executions are kept therein, and that the execution in this action, directed and delivered to the sheriff ..... of ..... county, on the ..... day of ....., 19...., cannot be found on said files on such search; and this deponent verily believes that such execution has not been returned to said office.

Subscribed and sworn before me A. B.
this ..... day of ....., 19....

C. D., Notary Public.

NO. 284

The Same in Another Form

(Title of action.)

State of .....
County of ..... } ss.

A. B., being duly sworn, deposeth and saith, that on the ..... day of ....., 19...., he, this deponent, made inquiry at the office of the clerk of ..... county, for the execution issued in said action to the sheriff of ..... county, on the ..... day of ....., 19...., and returnable to said office; and that this deponent was informed by said clerk (or by a clerk therein) after search, that such execution had not been returned to said office; and this deponent verily believes that such execution has not been returned to said office.

Subscribed, etc.

NO. 285

Order for an Attachment

At a ..... term of the ..... court, held for the state of ....., at the ..... in the ..... on the ..... day of ....., 19....

Present,

Hon. ....., Justice (or Judge).

(Title of action.)

On reading and filing the affidavit of ....., showing the delivery of an execution in this cause to ....., the

sheriff of ..... county, notice to return the same, and of this motion, and due process of service of the same on such sheriff, together with an affidavit showing that such execution had not been returned according to the command thereof; and on motion of Mr. ....., of counsel for the plaintiff, no one appearing to oppose, it is ordered that an (or order to show cause why) attachment (or should not) issue against the said ..... sheriff of ..... county, returnable before this court on the ..... day of ....., 19...., at the ..... in the ..... at the opening of the court.

If the attachment is against the present sheriff, it should be directed to the coroners of the county; or to one of them by name. If the attachment is against the late sheriff, it is to be directed to the present sheriff, and not to the coroner. If the attachment is against the coroner for not returning the attachment, it is directed to elisors, to be appointed by the court. If against either the sheriff or coroner, for not returning the first attachment, the indorsement and allowance is as follows:

(Title of action.)

Issued against the said ..... for not returning a certain attachment directed and delivered to him against .... for contempt; and the said ..... is not to be discharged on bail or in any other manner, but by order of the court.

Dated ....., 19....

C. H. D., Justice (or Judge) of ..... Court.

NO. 286

Attachment for Not Returning an Execution

The People of the State of ....., to the coroners (or coroner) of the County of .....:

(L. S.) We command you that you attach ....., sheriff of our county of ....., so that you have him before our justices (or judges) of ....., our ..... court of ....., at ..... the ..... on the, etc., to answer for certain trespasses and contempts done and committed in our court

before our justices (or judges) thereof; and have you then there this writ.

Witness Hon. ....., one of the justices (or judges) of the ..... court, the ..... day of ....., 19...., at, etc.

A. B., Attorney. J. B., Clerk.

(Endorsed on the writ.)

..... Court

The People of the State of .....,
ex rel. C. D.

vs.

C. D., Sheriff of ..... County.

A. B., Attorney.

Attachment returnable the ..... day of ....., 19...., at, etc.

Issued by special order of the court, for not returning an execution in favor of E. F. against G. H., for ..... dollars and costs, issued and directed and delivered to the said ..... as the sheriff of ..... county.

Let the said ..... be held to bail in the sum of ..... dollars.

Dated ....., 19....

C. H. D., Justice (or Judge) of the ..... Court.

NO. 287

Bond Taken on Arrest on Attachment

(Penal part as No. 12. The penalty, the amount mentioned in the order or allowance indorsed on the writ.)

The condition of the above obligation is such, that if the above bounden..... (late) sheriff of the county of ..... shall appear before the justice (or judge) of the ..... court of this state, at a special term thereof to be held at the court house in ..... in the county of ..... on the ..... day of ..... and abide the order and judgment of the court on the attachment issued against the said ..... for not returning

an execution in favor of ..... against ....., then this obligation to be void, otherwise to remain in full force.

Sealed and delivered in
the presence of

(L. S.)
(L. S.)
(L. S.)

(To be signed and affidavit of justification and certificate of acknowledgment as Nos. 92, 93.)

NO. 288

Return to the Attachment

I have arrested the within defendant, and have taken from him a bond in the penalty marked on the writ, with ..... as his surety, and return the same herewith.

Dated ....., 19....

A. B., Sheriff.
(or Coroner.)

NO. 289

Interrogatories to the Sheriff

(Title of action.)

Interrogatories to be administered to the sheriff of the county of ....., touching a complaint against him in not returning a certain execution against property, issued out of the said court in favor of ....., plaintiff, and against ....., defendant, (or a certain summons and complaint, judge's order, etc.).

First interrogatory: Did you or not, in person or by deputy, or otherwise, at any and at what time, receive for service a certain execution to you directed as sheriff of the county of ..... wherein ..... was plaintiff, and ..... defendant, tested on the ..... day of ....., 19...., and returnable within ..... days from its receipt by you?

Second interrogatory: Did you at any and what time, receive any and what notice to return such execution? and state the purport of that notice?

Third interrogatory: Did you execute or serve the said writ: if yea, when and where, particularly?

Fourth interrogatory: Have you or have you not returned that execution, and if yea, when and where, in particular; and if nay, why have you not returned the same?

A. B., Attorney for Plaintiff.

NO. 290

Answer of the Sheriff to Interrogatories

(Title of action.)

The answer of ..... sheriff of ..... to the interrogatories hereto annexed filed in this action, upon the return of the attachment herein:

To the first interrogatory, he answereth and saith, that he received, by his deputy, as he is informed and believes, the execution mentioned in the first interrogatory hereto annexed, on or about the, etc.

To the second interrogatory, he answereth and saith, that on or about the ..... day of ....., 19...., he was served with a notice to return the said execution, within ten days thereafter, or show cause why an attachment should not issue against him; and pay the costs of the motion.

To the third interrogatory, he answereth that he has not.

To the fourth interrogatory, he says that the said execution was delivered to one C. D., a deputy of this deponent, as he is informed and believes, and not to this deponent; that he never had information of said execution until on or about the ..... day of ....., 19....; that said deputy, at the time he received said execution, was instructed and directed by A. B., the attorney for the plaintiff in this action, as this deponent is informed and believes true, of the time and place and manner of executing said writ; that said deputy was authorized and instructed to depart from the regular course of proceeding upon the execution of such process, and that he did so depart from the regular course of proceeding on such execution, and thereby this deponent became and was released from all responsibility of and concerning the execution of the said process; and the deputy thereby became and was the agent of said plaintiff in the execution of such process; that before this deponent was notified to return said execution, said deputy had absconded, and had

carried off said execution, and that the same cannot be found, so that return thereto may be made by this deponent, if it be proper that this deponent should, under the circumstances, make return to such process.

A. B., Sheriff.

Subscribed and sworn before me
this ..... day of ....., 19....

C. D., Notary Public.

NO. 291

Certificate That Defendant Is Imprisoned

(Title of action.)

I do certify that the above named defendant is a prisoner confined within the jail of the county of ..... in execution, at the suit of the above named plaintiff, by virtue of an execution against the body, issuing out of this court, (or if out of any other court, specify such court,) and lodged in my office against him, whereby I am directed to levy and receive the sum of ..... dollars and ..... cents, with interest and my fees.

Dated ....., 19....

A. B., Sheriff of ..... County.

NO. 292

Certificate That Defendant Is in Custody, and That No Execution Had Been Delivered

(Title of action.)

I certify that the above defendant is in my custody in the jail of my county, on surrender made by his bail in this action, (or on a voluntary surrender) on the ..... day of ....., 19..... and after the recovery of the judgment in said action; and that there has not been delivered to me any writ of execution in said action, within ..... months from the time of such surrender.

Dated ....., 19 ....

A. B., Sheriff of ..... County.

NO. 293

Affidavit of Sheriff When Liable as Bail, to Be Exonerated

(Title of action.)

State of .....
County of ..... } ss.

A. B., being sworn, says, that he is the sheriff of said county; that by reason of the refusal or neglect of the bail taken on the arrest of the defendant in this cause, to justify when thereto required by the plaintiff's attorney, it was and is claimed by the plaintiff herein, that this deponent became and is liable to the said plaintiff as bail in said action; (state what has been done and present state of action) and this deponent further says, that before, etc., said defendant was indicted and tried and convicted at a court of, etc., in etc., of felony, and sentenced to the state prison, and that said defendant has been committed to and now is confined in the state prison at ..... under and pursuant to said conviction and sentence, (or, that before, etc., said defendant died, etc.). (Conclude with affiant's signature and jurat.)

NO. 294

Certificate of Service of a Subpoena

State of .....
County of ..... } ss.

I certify that on the ..... day of ....., 19...., I served the within subpoena upon the within named ..... by delivering to him a true copy thereof, (or a ticket containing the substance thereof,) and at the same time showing him the within original subpoena, and by paying (or tendering) to him the sum of ..... for his fees in going to, and returning from the place designated in said subpoena, and for one day's attendance thereat.

Dated.

A. B., Sheriff of ..... County.

(If the service is in a criminal case, omit statement relative to the payment of fees.)

NO. 295

Return of Warrant under Non-Imprisonment Act

I have arrested the within named defendant, and at the same time delivered to him certified copies of the affidavits in this matter, and have the same defendant now here as I am within commanded.

Dated ....., 19....

A. B., Sheriff.

NO. 296

Affidavit of Summoning Jurors in Plank Road Case

State of .....
County of ..... } ss.

A. B., sheriff of the above named county, being duly sworn, says that he summoned the jurors named in the annexed precept at the times and in the manner set opposite to their names respectively, to-wit:

C. D., personally, Jan. 2, 19....

E. D., personally, Jan. 2, 19....

F. E., by leaving at his residence a written notice containing the substance of a precept with a member of his family of suitable age, Jan. 3, 19...., he not being found. A. B.

G. H., personally, Jan. 3, 19...., etc.

Subscribed and sworn before me
this ..... day of ....., 19....

C. D., Notary Public.

(In most states a return, in such cases, under the official oath of an officer would suffice.)

NO. 297

Annual Report of Moneys Received by Sheriff

To the board of supervisors (or county commissioners) of the county of .....:

The undersigned, the sheriff of the said county, under and pursuant to the provisions of chapter ..... of the Laws of ....., respectfully reports that the following statement contains a true

account of all the moneys received by him on account of any fine or penalty or other matter in which the county has an interest; and which states particularly the time when and the names of the persons from whom such moneys have been received, and on what account the same has been received, from and including the first day of ....., 19...., to date; all which moneys were duly paid over without any deduction for costs or charges in collecting the same to the county treasurer (or other officer) as will appear by the receipts hereto annexed.

19...., Jan. 6, Received of C. D., on account of a fine for $10.00
" Jan. 10, Paid to county treasurer

Dated ....., 19....

A. B., Sheriff.

State of .....
County of ..... } ss.

A. B., being duly sworn, deposes and says: that the foregoing report by him subscribed contains, according to his best information and belief, a full and correct statement of all the moneys received by him on account of any fine or penalty or other matter in which the county is interested from and including the 1st day of ....., 19...., to date, and how the same has been disposed of. A. B.

Subscribed and sworn before me this ..... day of ....., 19....

C. D., Notary Public.

NO. 298

Oath to Accounts Rendered by Sheriffs, Coroners, or Constables, to Board of Supervisors

State of .....
County of ..... } ss.

A. B., being duly sworn, says, that the items of the annexed account are correct, and that the disbursements and services charged therein, have been in fact made and rendered, and that no part thereof has been paid or satisfied.

Subscribed and sworn before me this ..... day of ....., 19.... A. B.

C. D., Notary Public.

FORMS FOR CORONERS

NO. 299

Assignment of Districts in Which Coroners to Act in New York

State of .....
City of .....
County of ..... } ss.

I, the mayor of the said city, in pursuance of the statutes of this state, relative to the assignment of the districts in which the coroners of the said city shall exercise the duties of their office, do hereby assign the several senate districts of the said city to the following persons, who were elected such coroners at the last general election, as follows: The ..... senate district to A. B.; the ..... senate district to C. D.; the ..... senate district to E. F.; and the ..... senate district to G. H.

Dated, etc.

A. O. H., Mayor of .....

(This form, with slight changes, may be adapted for use in other states having similar statutes.)

NO. 300

Subpoena for Witness

The People of the State of ..... to .....:

We command you and each of you, that all business and excuses being laid aside, you be and appear before the undersigned coroner of the county of ..... at ..... on the ..... at ..... in the .....noon, (or forthwith) to testify upon an inquest then and there to be had upon the body of ....., deceased (or upon the body of a person whose name is unknown) and hereof fail not at your peril.

Witness the hand of said coroner this ..... day of ....., 19....

A. B., Coroner.

NO. 301

Attachment against a Witness

The People of the State of ....., to the Sheriff, or to any Marshal or Constable of the County of .....:

We command you that you attach ..... and bring him before the undersigned, one of the coroners of said county, at .... in said county, forthwith, to testify upon a certain inquest (as in the subpoena) and also to answer all such matters as shall be objected against him, for that he having been duly subpoenaed to attend upon such inquest, has refused, or neglected to attend in conformity with such subpoena, and have you then there this writ.

Witness the hand of the said coroner this ..... day of ....., 19....

A. B., Coroner.

It seems that a coroner has common law authority to punish, as for contempt, one who fails to obey a subpoena issued by the coroner, requiring the witness to attend an inquest over a dead body. Com. v. Warden of Jail, 9 Pa Dist & Co 395, 41 York 82, 75 Pittsb Leg J 763, 6 Wash 120; In Re Cooper, 11 Phila (Pa) 387.

NO. 302

Return to the Attachment

I have arrested the within named ..... and have him in my custody now here, as I am within commanded.

Dated ....., 19....

C. D., Sheriff.

NO. 303

Oath to the Foreman of Jury

You do swear that you will well and truly inquire how and in what manner and when and where, the person lying here (or whose body you have just viewed, as the case may be,) came to his death (or was wounded) and who such person was, and into all the circumstances attending such death (or wounding) and by whom the same was produced; and that you will make a true inquisition thereof, according to the evidence offered to you, or arising from the investigation of the body: so help you God.

NO. 304

Oath to the Jurors

The same oath which A. B., the foreman of this inquest hath on his part taken, you and each of you do now take, and shall well and truly observe and keep on your part: so help you God.

NO. 305

Oath to Witness

The evidence you shall give upon the inquest touching the death (or wounding) of ..... (or of the person whose body has been viewed) shall be the truth, the whole truth, and nothing but the truth; so help you God.

NO. 306

Oath to Interpreter

You shall truly interpret to the witness the oath that shall be administered to him, upon this inquest; and shall also truly interpret between the coroner, the jury (and the counsel) and the witness: so help you God.

NO. 307

Inquisition

State of .....
County of ..... } ss

Inquisition taken at, etc., on, etc., before ..... coroner of said county, upon view of the body of ..... (or person unknown) then and there lying dead (or wounded) upon the oath of E. F., G. H., J. K., etc., good and lawful men of the said county, who being duly summoned and sworn to inquire into all the circumstances attending the death (or wounding) of the said ..... (or person unknown) and by whom the same was produced, and in what manner, and when and where the said

..... came to his death (or was wounded) do say upon their oaths aforesaid, that [1] the deceased came to his death,[2] ..... and so the said jurors say that the said killing of the deceased by the said ..... was murder (or manslaughter) in the ..... degree.[3]

In witness whereof, as well the coroner as the jurors aforesaid, have to this inquisition set their hands and seals, on the day of the date hereto.

Dated ....., 19....

C. D., Coroner. (L.S.)
E. F., Foreman. (L.S.)
Jurors.
G. H., etc. (L.S.)

NO. 308

Inquisition Where the Killing Is Murder in the First Degree

After [2] insert:

From a wound in the left lung inflicted by one ..... with a knife (pistol shot, blow of a club, slung shot, etc.,) at, etc., on, etc.; which wound was given by the said ..... with the premeditated design of effecting the death of the deceased.

Or, from taking arsenic given to the deceased by one ..... in a cup of coffee, with the premeditated design of poisoning or effecting the death of the deceased.

Or, from a pistol shot recklessly fired without cause or provocation by one ..... into a crowd in which the deceased was quietly standing, at, etc., on, etc.; the ball from which entered the brain of deceased, from which wound he instantly (or on the ..... day of ....., 19.....) died.

Or, from a blow on the head from a club, (slung shot, etc.) inflicted by one ..... while attempting to escape from the deceased who had seized him while he, the said ..... was firing the dwelling of the deceased.

NO. 309

Inquisition Where the Killing Is Murder in the Second Degree

After [2] insert:

From a blow on the head inflicted by one ....., (or some persons unknown to the jury) while endeavoring to escape from the deceased who had seized him in the act of robbing his dwelling.

NO. 310

Inquisition Where the Killing Is Manslaughter in the First Degree

Insert in place of part between [1] and [3]:

The said ..... came to his death from a stone thrown by E. F. at the house of said ..... with the design of frightening the occupants, but without design to kill anyone.

On insert in place of part between [1] and [3]:

The said ..... came to his death from being struck by a motor vehicle driven by ..... while the said ..... was in an intoxicated condition, and was negligently and carelessly driven; but that said killing was without design on the part of ....

NO. 311

Inquisition Where the Killing Is Manslaughter in the Second Degree

Insert in place of part between [1] and [3]:

The said ..... came to her death by means of medicines administered to her by . . . E. F., while she was pregnant, with the intention of procuring the miscarriage of the said .....

NO. 312

Inquisition Where the Killing Is Manslaughter in the Third Degree

Insert in place of part between [1] and [3]:

The said ..... came to his death from a blow given by E. F. with a club in the heat of passion, without any design to effect death.

NO. 313

Inquisition upon the Body of an Infant

Insert in place of the part between [1] and [2]:

That the body is the child of ....., an unmarried woman, of which she was secretly delivered and was born alive; and the said ..... with the intent to destroy the same, wrapped and folded it in a cloth by means of which it was suffocated and died.

Or, threw the same into the river by means of which it was drowned.

Or, threw the same into a privy, by means of which the same was suffocated and died.

Or, the said C. D. in a fit of temporary insanity caused by the pains of child-birth choked and suffocated the said newborn child so that it instantly died; and the jury say that the same was not done feloniously or with malice aforethought, but in the agonies of pain and not otherwise.

NO. 314

Inquisition Where a Person Is Found Dead with Marks of Violence

Insert in place of the part between [1] and [2]:

That the body of the said ..... was found lying in the highway near ..... on the, etc., and that the said ..... came to his death from a wound in the left side, which appeared to have been made with a knife, dirk or other sharp instrument (or by a gun or pistol bullet; or from a bruise upon the head, given with a club, stone or slung shot) by some person to the jury unknown.

NO. 315

Inquisition Where the Killing Is Justifiable Homicide

Insert in place of part between [1] and [2]:

A. B., being sheriff of ..... county, (or constable, marshal or police officer, etc.) and having lawful process for the arrest of C. D. upon a charge of felony (or an execution against the person or property of the said C. D., or a writ of ejectment against the said C. D. or a warrant for the removal of the said C. D., from

demised premises, etc.) did on the, etc., at, etc., attempt in a legal way to execute the said process as he was commanded; but the said C. D., and E. D. and G. D., the sons of the said C. D., violently resisted and opposed the execution of the same and assaulted and attempted to drive off the said A. B., who thereupon fired a pistol at the said C. D., by which he inflicted a mortal wound upon the neck of the said C. D., of which he instantly died; and the jurors, upon their oaths aforesaid, say that the said C. D. came to his death in the manner aforesaid, by the hand of the said A. B., in the legal and necessary attempt of the said A. B. to prevent resistance to the execution of the said process; and that the said wound was not given feloniously or with malice aforethought, but for the cause aforesaid.

Or, A. B., being sheriff of ..... county (or constable, marshal or police officer, etc.) and having lawful process for the arrest of the said C. D. upon a charge of felony (or the said C. D. having murdered one E. F.) and the said A. B. having arrested him upon said warrant (or for the said offense, or having him in jail) the said C. D. broke away and escaped from the custody of the said A. B. and the said A. B. in order to prevent the escape of the said felon, fired, etc., (conclude as the last).

Or, the said C. D., with E. F. and G. H. and divers other persons to the jury unknown, on ..... at ..... being riotously and unlawfully assembled, for the purpose of preventing the laborers and workmen on the ..... canal (or ..... railroad, or the operatives in the factory) from working, and with stones, clubs, guns and other weapons, did threaten the destruction of the property of the contractors on said work (or of the said ..... factory) and the lives of such laborers and operatives; and ..... sheriff of said county, (or ..... mayor of the said city) in the exercise of the duties and powers conferred upon him, did call out the military to aid in suppressing such riot, and prevent the destruction of property and loss of life; and having warned and admonished said rioters then and there so unlawfully assembled to desist from the acts; but the said persons, disregarding such warning and orders of said ..... sheriff, (or mayor) and continuing their assaults as aforesaid; and also, having attacked said military, by the discharge of stones, bricks and guns at them, the said sheriff (or mayor) did thereupon, as he lawfully might, command the said military to fire upon the said rioters; and thereupon the said military did fire and discharge their guns at the said rioters under and pursuant to such command, and that the charge

of one of said guns took effect upon the head of the C. D., then and there so riotously engaged as aforesaid, inflicting a mortal wound upon the said C. D., of which wound he, the said C. D., then and there died; and the jurors aforesaid, upon their oaths aforesaid, say, that the said death was not committed feloniously or with malice aforethought; but necessarily and in the discharge of a lawful duty in manner aforesaid.

Or, the said C. D. at, etc., on, etc., being then and there engaged in an attempt to commit a burglary by feloniously entering the dwelling of, etc., on, etc., in the nighttime, one A. B., being then a police officer, (constable, marshal or watchman) and then and there present, did attempt to prevent such burglary and felony by seizing and arresting the said C. D., but he, the said C. D., being about to escape, and the said A. B. being unable to hold and detain him, did strike the said C. D. a blow upon the head with his club for the purpose of disabling the said C. D. and preventing such escape; and thereby inflicted a wound upon the head of said C. D., of which he instantly (or thereafter, to-wit, on, etc.) died (conclude as last).

Or, the said C. D., on, etc., at, etc., violently and feloniously made an assault upon one A. B., with the intent to rob the said A. B. of a sum of money, in the possession of the said A. B. and did then and there put said A. B. in great bodily fear, and the said A. B. was in danger of losing said money, in the manner aforesaid; and being so in danger, he, the said A. B., for the purpose of protecting his property did draw a pocket knife and strike or stab the said C. D. in the abdomen, and thereby inflicted a wound upon the said C. D. of which he, the said C. D., instantly (or on, etc.) did die; and the jurors aforesaid, do, on their oaths aforesaid, say that the said A. B. did kill the said C. D., in manner aforesaid, not feloniously, or with malice aforethought, but in defense of his property as aforesaid.

Or, the said C. D. made a violent assault upon one A. B., with intent to kill, maim or dangerously wound the said A. B., and thereby put him, the said A. B., in imminent danger and bodily fear of his life; and the said A. B., then and there, in self defense seized a loaded pistol (club or billet of wood, a knife or other instrument) and shot (struck or stabbed) the said C. D. in the left breast, (or inflicted a wound upon the head of said C. D.) whereof he, the said C. D., instantly (or thereafter on, etc., at, etc.) died; and the jurors, upon their oaths aforesaid, say that the said shooting, (stabbing or blow) was not done feloniously or with malice aforethought, but in self-defense..

Or, the said C. D., and other persons to the jury unknown, on,

etc., at, etc., being riotously, and unlawfully assembled, and having violently and unlawfully assaulted the dwelling house of one A. B., with stones, bricks, clubs and other instruments, with the intent to demolish and pull down said house (or to break into the said house) and thereby put the said A. B. and the other persons in said house in great peril and danger of their lives; and the said A. B., in defense of himself and for the preservation of the lives of the other persons in said house, and also of preventing the destruction of his house and loss and injuring of his goods, did discharge a rifle at the several persons so riotously and unlawfully assembled. and the bullet mortally wounded the said C. D. in the head, of which the said C. D. then and there instantly died; and so the jurors aforesaid, on their oaths aforesaid, do say, that the said A. B. did kill the said C. D. in manner aforesaid, in defense of himself and property, and not feloniously, or with malice aforethought.

Or, the said C. D., on, etc., at, etc., violently and wilfully and feloniously made an assault upon one A. B., the wife (or daughter) of C. B., with the intent to murder (ravish, rob, or commit some bodily harm to the said A. B.) and the said C. B. being unable to cause the said C. D. to desist from his assault upon the said A. B. discharged a pistol at the said C. D. (and conclude as the last).

(There does not seem to be any particular form of verdict of a coroner's jury on an inquest; it may be in the form of an opinion of the jury. Armour v. State Industrial Board, 113 NE 138, 273 Ill 590. It is the coroner's duty to receive the jury's verdict. State v. Moorhead, 159 NW 412, 100 Neb 298. There is a presumption that the verdict of a coroner's jury is supported by the evidence, in absence of anything to the contrary appearing. New York Life Ins. Co. v. McNeely, 79 P(2d) 948, 52 Ariz 181.)

NO. 316

Inquisition in Case of Suicide

Insert in place of part between [1] and [3]:

The deceased came to his death by hanging himself, at, etc., (on etc.) or by stabbing himself with a knife, or by cutting his throat with a razor; or by blowing out his brains with a gun or pistol; or by taking a dose of arsenic with the intent and for the purpose of destroying himself; or by voluntarily drowning himself in the waters of the Erie canal; or by hanging himself by the neck in his barn.

If the person is a lunatic, add:

The said C. D. being a lunatic or person of unsound mind.

Or if the suicide was committed in a fit of temporary insanity, add:

The said C. D. being in feeble health and depressed spirits was seized with a fit of delirium.

If any one was present and aided in the self murder, add:

And the said jurors further say that E. F. of ..... was feloniously present and deliberately aided the said C. D. in the commission of the self murder aforesaid.

NO. 317

Inquisition Where One Has Died a Natural Death

Insert in place of part between [1] and [3]:

The said C. D., on, etc., at, etc., was found lying dead in the highway near the house of ..... and that he had no mark of violence appearing upon his body; and so the said jurors, upon their oaths aforesaid, say, that the said C. D. died by the visitation of God.

NO. 318

Inquisition Where One Is Accidentally Drowned

Insert in place of part between [1] and [3]:

The said C. D., on, etc., at, etc., while bathing in the ..... river (or fell from a boat or bridge, or while sailing in a boat on ..... river, the same was upset, or while skating on the ..... river the ice broke) was accidentally drowned, and so the jurors aforesaid say, that the said C. D., in manner and form and by the means aforesaid, accidentally and by misfortune came to his death, and not otherwise.

NO. 319

Inquisition Where One Accidentally Takes Poison

Insert in place of part between [1] and [3]:

The said C. D., being unwell, swallowed a quantity of white arsenic through mistake, supposing the same to be .....

NO. 320

Inquisition Where One Is Accidentally Choked in Swallowing

Insert in place of part between [1] and [3]:

The said C. D. while eating his dinner on, etc., at, etc., attempted to swallow a piece of meat which became lodged in his throat and could not be removed, but suffocated him.

NO. 321

Inquisition Where the Death Was from Old Age and Want of Care and Diet

Insert in place of part between [1] and [3]:

The said C. D. died from old age and infirmity and for want of proper care.

NO. 322

Inquisition Where the Death Was from Intemperance and Want of Food

Insert in place of part between [1] and [3]:

The said C. D. came to his death through want of food and care while in a state of drunkenness.

NO. 323

Inquisition Where the Death Was from Delirium Tremens

Insert in place of part between [1] and [3]:

The said C. D. being a person of intemperate habits and addicted to intoxication was on, etc., at, etc., attacked with delirium tremens of which he then and there died.

NO. 324

Inquisition Where the Death Was from Jumping or Falling from the Cars

Insert in place of part between [1] and [3]:

The said C. D. being a passenger (or employed) upon the railroad cars upon the ..... railroad on the, etc., he leaped (or fell) from the cars (or a certain motor vehicle) while they (or it was) were in rapid motion, by means of which he was so bruised and injured that he instantly (or thereafter, to-wit, on, etc.) died.

Or, was so mutilated that it became necessary to amputate his right leg above the knee, but the said C. D. died under the operation though the same was performed in a careful and skilful manner.

NO. 325

Inquisition on a Child Who Had Died by Falling in Fire, Etc.

Insert in place of part between [1] and [3]:

The said C. D., being a child of ..... years, came to its death by falling into the fire (or into the cistern) on, etc., at, etc., when left alone by its mother (or nurse).

NO. 326

Form of Taking Examination of Witnesses Before a Coroner's Jury

State of .....
County of ..... } ss.

Examination of witnesses produced, sworn, and examined on the ..... day of ....., 19...., at ..... before .... the coroner of the said county, and ....., jurors, good and lawful men of the said county, duly summoned and sworn by the said coroner to inquire how and in what manner and when and where ..... (or person unknown) came to his death (or was wounded) and who such person was, and into all the circumstances attending such death or wounding; and to make true inquisition, according to the evidence, or arising from the investigation of the body:

G. H., being produced and duly sworn and examined, testifies and says that ..... (give his testimony in full).

G. H.

Subscribed and sworn before
me this ..... day of ....., 19.....

A. B., Coroner.

I do hereby certify that the foregoing testimony of the several witnesses appearing upon the foregoing inquest, was reduced to writing by me, and that the said testimony is the whole of the testimony taken on such inquest, and that the same is correctly stated, as given by the witnesses respectively.

A. B., Coroner.

NO. 327

Warrant of Coroner for Arrest of Party Charged by the Inquisition with the Crime

To the Sheriff, or any Constable or Marshal of the County of .....:

Whereas, by the inquisition of ..... good and lawful men of said county, taken upon their several oaths before ....., the coroner of said county, at the dwelling house of ..... at ..... C. D., is charged with having feloniously killed and murdered ..... on the ..... at .....; you are therefore hereby commanded, in the name of the people of the state of ....., forthwith to arrest the said C. D and bring him before me at ..... to be dealt with according to law.

Given under my hand this
..... day of ....., 19.....

A. B., Coroner.

NO. 328

Examination of the Accused

State of .....
County of ..... } ss.

Examination of C. D. before the undersigned, one of the coroners of said county, who is charged upon inquest taken before me with the murder of E. F. of ....., at, etc., on, etc. .....;

the said C. D. having been arrested and brought before me to answer said charge. And the said C. D., after having been first duly informed by me of the charge against him and that he was at liberty to refuse to answer any question that might be put to him, and after having been allowed a reasonable time to send for and advise with counsel, to the inquiry, What is your name? He answered, C. D.

What is your age? Ans.—Twenty-five years.

What is your occupation? Ans.—A farmer.

Where do you reside? Ans.—In .....

Did you know E. F., the deceased? Ans.—By the advice of my counsel I decline to answer any further questions.

The foregoing answers of C. D. to the several interrogatories put to him in such examination, were reduced to writing by me and were read by me to the said C. D., and were corrected by him and made conformable to what he declared to be the truth; and they contained all the answers so made by said prisoner.

A. B., Coroner.

Dated ....., 19....

NO. 329

Warrant of Commitment of Prisoner

To the Sheriff, or any Constable or Marshal of the County of ..... to the keeper of the common jail of said county:

Whereas, C. D. having been charged upon inquisition taken before me, the coroner of said county, on ..... on the oaths of ..... with having on ..... killed and murdered one ....., and the said C. D. having been brought before me as such coroner, to answer to the said charge (and having taken the examination of said C. D.).

These are therefore, to command you, the said sheriff, constable, or marshal, that you forthwith convey and deliver to the said keeper of the said jail, the body of the said C. D.: and you, the said keeper, are hereby required to receive the said C. D. into your custody in the said common jail, and him there safely keep until he shall be discharged by due course of law.

Given under my hand and seal at the ..... of the said ..... county, the ..... day of ....., 19.....

A. B., Coroner, (L.S.)

NO. 330

Recognizance by Witnesses

State of .....
County of ..... } ss.

Be it remembered, that on this ..... day of ....., 19...., A. B., C. D., and E. F., of the town of ..... in said county, personally came before me, G. H., one of the coroners of said county, and severally acknowledged themselves to be indebted to the people of the state of ....., each separately in the sum of ..... dollars, to be made and levied of their goods and chattels, lands and tenements to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such that if the above bounden A. B., C. D. and E. F., shall personally be and appear at the next court of sessions (or at the next court of oyer and terminer) to be held in and for the said county of ..... to give evidence on behalf of the said people against ..... for feloniously killing and murdering ..... as well to the grand jury, as the petit jury, and do not depart the said court, without leave, then this recognizance to be void and of no effect, otherwise to remain in full force.

Subscribed and acknowledged
the day and year first above written.

(signed) A. B.
C. D.
E. F.

NO. 331

Recognizance by Witness with Sureties

State of .....
County of ..... } ss.

Be it remembered, that on this ..... day of ....., 19...., A. B. and C. D., and all of the town of ..... in said county, personally came before me, G. H., the coroner of the said county, and severally acknowledged themselves to be indebted to the people of the state of ....., in the manner and form following, that is to say: the said A. B. in the sum of ....., and the said C. D. and

L. M., in the sum of ..... each, to be levied of their respective goods and chattels, lands and tenements to the use of the said people, if default shall be made in the condition following:

The condition of the above recognizance is such that if the above bounden A. B. shall personally be and appear, etc. (same as No. 12).

NO. 332

Statement of Coroner to Board of Supervisors

Statement and inventory of all moneys and other valuable things found with or upon all persons on whom inquests have been held by and before the undersigned, the coroner in and for the county of ..... for and during the year commencing on the ..... day of ....., 19....

Upon Whom Found	Articles Found	Disposition Thereof
A. B.	Gold watch, chain and key, two gold finger rings and $2 in specie	Delivered to county treasurer
C. D.	one coat, one hat, one pair pantaloons	Delivered to legal representatives of C. D.

A. B., Coroner.

State of .....
County of ..... } ss.

A. B., one of the coroners of the said county, being duly sworn, says, that the foregoing statement and inventory of all the moneys and other valuable things found with or upon all persons on whom inquests have been held, by and before him, within the time specified in such statement and inventory, and of the disposition thereof, is in all respects just and true to the best of his knowledge and belief; and that the moneys and other articles mentioned in such statement and inventory, have been delivered to the treasurer (or other officer) of the county of ..... and to the legal representatives of the persons therein mentioned, as therein stated.

Subscribed and sworn before me
this ..... day of ..... 19.....

A. B.

C. D., Notary Public.

FORMS FOR CONSTABLES

NO. 333

Notice of Election of Constable

To A. B.

Sir: You are hereby notified that you were duly elected to the office of constable of the town of ....., (or precinct or district) at the last town meeting held therein.

Dated.

C. D., Town Clerk.
(or other officer)

NO. 334

Appointment of a Constable to Fill a Vacancy

State of .....
Town of ..... } ss
County of .....

The said town of (or precinct or district) ..... in said county, having at its last annual town (or precinct or district) meeting failed to elect the number of constables to which the said town (or precinct or district) is by law entitled, to-wit: the number of ..... constables; and in consequence of such failure, there being one vacancy in said* office of constable of the said town (or precinct or district) we, the under signed, three of the justices of the peace in and for the said town (or precinct or district) (or other appointing authority) do by this our warrant hereby appoint ..... of the said town (or precinct or district) (or other appointing authority) to fill the said vacancy, to hold and exercise the duties of the said office until another person is chosen by election or appointed in his place.

In witness whereof we have hereunto set our hands and seals, this ..... day of ....., 19.....

A. B. (L.S.) Justices of the
C. D. (L.S.) Peace of the
E. F. (L.S.) Town of .....

NO. 335

Appointment in Case of Removal, Etc.

State of .....
Town of ..... } ss
County of .....

A vacancy in the office of constable of said town (or precinct or district) having occurred by the failure of A. B., elected thereto at the last annual town (or precinct or district) meeting in said town (or precinct or district) to qualify within the time prescribed by law (or by the death, removal from the town (or precinct or district) resignation, or removal from office of .. ..) (conclude as in last numbered form from asterisk).

NO. 336

Where a Justice of Another Town Is Associated to Appoint in Case of Vacancy

After describing the character of the vacancy, as in No. 334, add:

And we, A. B. and C. D., being the only justices of the peace of said town (or precinct or district) have associated with us E. F., a justice of the peace of the town (or precinct or district) of .... in said county, which last mentioned town adjoins town (or precinct or district) of .....; and we, being such justices as aforesaid, do, etc., (as in No. 334).

NO. 337

Certificate of Justices Removing Constables

State of .....
Town of ..... } ss
County of .....

We, the undersigned, three of the justices of the peace of the said town (or precinct or district) having upon the complaint of ..... against ....., one of the constables of the said town, for certain misconduct in such office, in not paying over moneys collected by him, duly summoned the said ..... to

appear before us, at, etc., on etc., to show cause why he should not be removed from the said office; and the said parties appearing and being fully heard (or the complainant appearing and the said ..... neglecting and refusing to appear) we do adjudge and declare, from the proofs before us, that the said complaint as charged is established to our satisfaction; and we do therefore hereby remove the said ..... from the office of constable of the said town; and the cause of the said removal is, that on the ..... day of ..... an execution was issued by ....., one of the ..... justices of the peace in said town, at the suit of ..... against ..... for ..... damages and costs, and delivered to said ..... for execution; and that afterwards, to-wit: ..... the said ..... levied and collected the said moneys and appropriated the same to his own use, and that judgment has been recovered against the said ..... and his surety for the said sum of money.

Dated.

A. B. (L.S.)
C. D. (L.S.) Justices, etc.
E. F. (L.S.)

(Of course, the right of justices of the peace to remove a constable must be conferred by statute.)

NO. 338

Certificate Indorsed by Clerk on Copy Served

I certify that the within is a true copy of the instrument in writing, filed with me this day by the justices therein named, removing you from the office of constable of said town (or precinct or district).

Dated .....

A. B., Clerk of the town of .....

To E. F., Constable of the Town (or precinct or district) of .....

NO. 339

Resignation of Constable

To ....., Justice of the Peace (or other statutory authority) of the Town (or precinct or district) of ..... in the County of .....:

I hereby resign the office of constable of the Town (or precinct or district) of .....

NO. 340

Acceptance of Resignation

State of .....
Town of ..... } ss
County of .....

A. B., constable of the Town (or precinct or district) of ....., having tendered to us, three justices of the said town (or precinct or district) his resignation of constable of said town (or precinct or district); and it appearing to us that the said constable can no longer discharge the duties of the said office by reason of ill health, we do, in pursuance of the statutes in such case, hereby accept the resignation of said ..... as such constable.

Dated. A. B.

NO. 341

Notice to Town Clerk or Other Authority of Acceptance of Resignation

To A. B., Esq., Clerk of the Town of .....:

Take notice that we, three of the justices of the said town, have accepted the resignation of ..... as constable of said town, as will appear by our certificate hereto annexed.

Dated. C. D., Clerk.

NO. 342

Constable's Bond

A. B., chosen (or appointed) constable of the Town of ..... in the county of ....., and C. D. and E. F., as his sureties, do hereby jointly and severally agree to pay to each and every person who may be entitled thereto, all such sums of money as the said constable may become liable to pay on account of any execution which shall be delivered to him for collection.

Dated the ..... day of
....., 19.....

A. B. (L.S.)
Executed in the presence of C. D. (L.S.)
G. H., Supervisor, E. F. (L.S.)
or I. J., Town Clerk.

NO. 343

Approval to Be Endorsed Thereon

I approve of the sufficiency of the within named sureties.
Dated ....., 19.....

G. H., Supervisor,
(or I. J., Town Clerk.)

NO. 344

Return to Summons Where Personally Served

Personally served ..... day of ....., 19.....
(Stating place of service.)

A. B., Constable.

Fees, ...

NO. 345

Return Where Copy of Summons Is Delivered to Defendant

Personally served ..... day of ..... 19....., and copy delivered to defendant. (Stating place of service.)

Date. A. B., Constable.

NO. 346

Return Where Defendant Not Found and Copy Summons Left at His Residence

Defendant not being found, served the ..... day of ..... 19....., by leaving a copy at his last place of abode in the presence of C. D., his wife (stating place of service) who was of ..... suitable age, and was informed by me of its contents.

Date. A. B., Constable.

NO. 347

Return Where There Are Several Defendants

Personally served on C. D. on ..... day of ....., 19....., and on E. F., on ..... day of ....., 19.... (Stating place of service of each.)

Date. A. B., Constable.

NO. 348

Return Where One of the Defendants Not Found

Personally served on C. D., the ..... day of ....., 19.....; E. F. not found in my county.

Date. A. B., Constable.

NO. 349

Return of Service on One Personally and on Another By Copy

Personally served on C. D., on ..... day of ....., 19.....; and on E. F., by leaving on same day at his last place of abode with E. F., his wife, (stating place of service) of suitable age, who was informed by me of its contents, said E. F. not being found in the county.

Date. A. B., Constable.

NO. 350

Return of Same on a Corporation

Served ..... day of ....., 19....., by delivering to C. D. personally a copy thereof, who is ..... of the within corporation. (Stating place of service.)

Date. A. B., Constable.

NO. 351

Return Where the Corporation Has Not Designated a Person on Whom Service to Be Made

Served ....., 19....., on the defendant by delivering a copy personally to C. D., a person acting within this state as the agent for said insurance company (or doing business for said company) (state place of service) no person having been designated by said corporation upon whom a summons may be served, and there being no officer of said company who resides in the county of .....

Date. A. B., Constable.

NO. 352

Return Where the Corporation Has Designated a Person on Whom Service May Be Made

Served on the defendant ....., 19....., by delivery to C. D., personally, a copy, he being the person designated by the defendant on whom process may be served. (State place of service.)

Date. A. B., Constable.

NO. 353

Return in Case of Attachment—Inventory of Goods Attached

In Justice's Court.—W. H. P., Justice.

E. F.

vs.

G. M.

Inventory of the property attached by me this ..... day of ....., 19...., under and pursuant to the within (or annexed) attachment in this action at ..... in the county of ..... 10 M. feet hemlock plank, etc.

Date. A. B., Constable.

NO. 354

Certificate to Copy of Attachments

I certify that the within (or above) is a correct copy of the attachment delivered to me for execution at the suit of E. F., against G. H.

Dated, ..., 19.....

A. B., Constable.

NO. 355

Certificate to Inventory

I certify that the within (or above) is a correct copy of inventory of the property attached by me under and the attachment in the action mentioned in said inventory and with a copy of which attachment you be herewith served.

Date. A. B., Constable.

NO. 356

Return to Attachment

By virtue of the within attachment I did on the ..... day of ..... 19....., attach and take into my custody at ..... in the county of ..... the goods and chattels mentioned in the inventory, a copy of which is hereto annexed and on the same day, immediately after, I made the said inventory and served a copy of the within attachment, etc., and said inventory duly certified by me on the said defendant at ..... in said city.

Dated.

A. B., Constable.

NO. 357

Property Taken, Defendant Absent and No Residence in the County

By virtue of the within attachment, I did on the ..... day of ....., 19..... attach and take into my custody the goods and chattels of the defendant mentioned in the inventory, a copy of which is hereto annexed at ..... in the county of ..... and on the same day, immediately thereafter, I made the said inventory, etc., and made diligent inquiry for the said defendant and for his last place of residence, but could not find him in the county of ..... nor that he had any last place of residence in the county, and I thereupon left a copy of the said attachment and said inventory with ..... at ..... in said county in whose possession I found the said property.

Dated.

A. B., Constable.

NO. 358

Where the Defendant Gives Bond and Goods Returned

After reciting as in one of the above forms, according to the fact the attaching of the property and the service of the papers, add:

And the defendant E. F., having given me the bond herewith returned, I delivered the property so attached, to him.

Dated.

A. B., Constable.

NO. 359

Where the Claimant Gives the Bond and the Goods Delivered to Him

After reciting as in one of the above forms, according to the fact, the attaching of the property and the service of the papers, add:

And J. K., having claimed the property and delivered to me the bond herewith returned, I delivered the same to him.

Dated.

A. B., Constable.

NO. 360

Defendant Not Found, Copies Left at His Residence

By virtue of the within attachment I did on the ..... day of ....., 19..... attach and take into my custody ..... at ..... in the county of ....., the goods and chattels mentioned in the inventory, a copy of which is hereto annexed, and on the same day, immediately after, I made the said inventory and made diligent inquiry for the said defendant, but could not find him in the said county, and that I then left a copy of the within attachment and of the said inventory duly certified by me, at the last place of residence of the said defendant in said county.

Dated.

A. B., Constable.

NO. 361

Bond to Prevent Removal of Goods Attached

Know all men by these presents that we ..... of, etc., are held and firmly bound unto A. B. in the sum of ..... dollars (penalty to be double the sum stated in the attachment to have been sworn to be due by the plaintiff) to be paid to the said A. B., or to his certain attorney, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the ..... day of ....., 19.....

The condition of this obligation is such that if certain goods and chattels, to-wit: ..... which have been seized by the above named A. B., constable, by virtue of an attachment issued by ..... in favor of ..... against the above bounden ..... shall be produced to satisfy any execution that may be issued upon any judgment which shall be obtained by the plaintiff upon the said attachment within six months after the date hereof, then this obligation to be void; otherwise to remain in full force.

Sealed and delivered in
the presence of .....

(L.S.) etc.

NO. 362

Oath to Surety

State of .....
County of ..... } ss.

..... being sworn, says, that he is a resident of .... county, and a householder or freeholder therein, and is worth the sum of ..... over and above all debts and liabilities, and property exempt from levy and sale on execution; and further saith not.

.....

Subscribed and sworn before me
this ..... day of ....., 19.....
Date. A. B., Constable.

NO. 363

Approval By Constable

I approve of the sufficiency of ..... surety to the within bond.

Date. A. B., Constable.

NO. 364

Bond By Claimant to Plaintiff

(Penal part as last, but to the plaintiff, by name, instead of the constable. The penalty as fixed by statute.)

Whereas, certain goods, to-wit: ..... were on the ..... day of ....., 19..... seized by A. B., constable, by virtue of an attachment issued by ....., a justice of the peace of the county of ..... in favor of the above named E. F. and against G. H.; and whereas, the above bounden J. K., claims the goods as his property:

Now therefore, the condition of this obligation is such that if in a suit to be brought on this obligation within three months (or other time) from the date hereof, the said J. K. shall establish that he was the owner of the goods, at the time of the said seizure; and in case of his failure to do so, if the said J. K. shall pay the value of the said

goods and chattels with interest, then this obligation to be void; otherwise to remain in full force.

Sealed and delivered in
the presence of:

This bond is to be approved by the constable or the justice. When the approval is by the constable it may be in the same form as the last, and the oath of the surety may be the same.

NO. 365

Return of Service Of Warrant Where Defendant Arrested and Plaintiff Notified

Arrested defendant and have him in custody before the court. Plaintiff notified.

Dated ....., 19.....

A. B., Constable.

NO. 366

Return of Arrest, Plaintiff Not Notified

Defendant arrested and have him before the court in custody. Plaintiff not notified.

Dated ....., 19....

A. B., Constable.

NO. 367

Return, Defendant Not Found

Defendant not found in the county of .....

Dated ....., 19.....

A. B., Constable.

NO. 368

Return of Arrest of One Defendant and Other Not Found

Defendant C. D. arrested and have him in custody before the court; the defendant E. F., not found in the county. Plaintiff notified.

Date. A. B., Constable.

NO. 369

Return of Arrest, and Detention of Canal Boat

Defendant arrested and have him in custody before the court, and plaintiff notified; and have seized and hold the within named canal boat ..... furniture and horses.

Dated.

A. B., Constable.

NO. 370

Notice to Plaintiff of Arrest of Defendant

In Justice's Court.—W. H. P., Justice.

C. D.

v.

E. F.

To C. D., above plaintiff:

Take notice that I have arrested the defendant under the warrant in this cause, and have him in custody before the court.

Dated ....., 19.....

A. B., Constable.

NO. 371

Return in Replevin or Claim and Delivery Action Where Property Taken and Defendant Personally Served

By virtue of the annexed affidavit and order indorsed thereon, I did on the ..... day of ....., 19..... take the property described in the said affidavit. (If all the property not found, insert in the place of above the following property, a part of the property described in said affidavit: ..... and that after diligent search, the remainder of such property could not be found.) And I further return that on the same day (or on the ..... day of .....) without delay I served upon the defendant .... summons, notice and affidavit with indorsed order, by delivering to him personally a true copy of each of them.

(State place of service.)

Dated ....., 19....

A. B., Constable.

NO. 372

Where the Defendant Cannot Be Found

After stating the fact as to the taking of property as above, add: And after diligent search I could not find the said defendant in the county of ..... and that thereupon without delay on the ..... day of ..... 19....., I served the within summons, notice and affidavit with indorsement thereon, by leaving a copy of each of them at the usual place of abode of said defendant in the town of ..... in said county, with ..... the wife of said defendant, being a person of suitable age and discretion.

Dated ....., 19.....

A. B., Constable.

NO. 373

Where the Property Is Taken, Defendant Not Found and Service on Agent

After describing the taking and search for defendant as in the last form, add:

And that thereupon without delay on the ..... day of ....., 19....., I served the within summons, notice, and affidavit with indorsement thereon by delivering a copy of each of them personally to C. D., the agent of the said defendant, and in whose possession I found the said property. (State place of service.)

Dated ....., 19.....

A. B., Constable.

NO. 374

Where the Property Is Taken and Defendant a Non-resident Having No Agent

Describe the taking as before, and inquiry for defendant, and add:

And the said defendant has no last place of abode in the said county, and no agent in the said county, on whom service of the summons, notice, affidavit and indorsement could be made.

Date. A. B., Constable.

NO. 375

Where Property Is Claimed by Third Person after Taken

Describe the taking and serving of the papers according to the first, as provided in each of the above forms, and add:

And on the ..... day of ....., 19....., E. F. of ..... made claim to said property and he at the same time served on me an affidavit required in such a case, and that thereupon and on ..... the .....day of ..... I notified the plaintiff C. D. of such claim and at the same time demanded of said plaintiff that he should indemnify me against the same; and that the plaintiff refused to execute the undertaking required by law, and I did thereupon on the day of ....., 19..... return the property so taken to the said defendant.

Date. A. B., Constable.

NO. 376

When the Plaintiff Indemnifies against the Claim of a Third Party

State the proceedings according to the fact, in the last form, down to the demand of an indemnity from the plaintiff, and add:

And the said plaintiff thereupon, on the ..... day of ....., 19....., indemnified me against said claim by executing and delivering to me the undertaking given in such case.

Dated .....

A. B., Constable.

NO. 377

Where the Property Is Not Found

By virtue of the annexed affidavit and of the order indorsed thereon, I have made diligent inquiry and search for the property described in the said affidavit within the county of ..... and I have been unable to find the same or any part thereof.

Dated .....

A. B., Constable.

NO. 378

Indemnity By Plaintiff to Constable Where Claim Is Made to Property

(Title of action.)

Whereas C. D. claims to be the owner of and to have the right of possession of the following personal property, to-wit: ..... which has been taken by A. B., constable of the town of ..... in county ..... upon the affidavit and order of ....., said justice of the peace, and has served on the said A. B. an affidavit of his title thereto and right of possession thereof, and stating the grounds of such right and title. Now therefore, we, C. D. and E. F. of ..... merchants, do undertake and agree to indemnify the said A. B. against said claim.

C. D.
E. F.

State of .....
County of ..... } ss.

C. D. and E. F. being severally duly sworn, each for himself, deposes and says that he is a householder and freeholder residing in ..... in said county, and is worth ..... dollars over and above all debts, and liabilities, and property exempt from levy and sale on execution.

C. D.
E. F.

Subscribed and sworn before me
this ..... day of ....., 19.....
(To be acknowledged as No. 93.)

NO. 379

Return to a Venire

I certify that by virtue of the within precept, I have personally summoned as jurors the several persons named in the annexed list.
Dated ....., 19.....

A. B., Constable.

NO. 380

Indorsement of Levy on Execution

Levied by virtue of the within execution this ..... day of ....., 19..... on two cows, three two-year old heifers, the property of the defendant, on his premises in .....
Date.

A. B., Constable.

NO. 381

Inventory Where Articles Are Numerous

Inventory of goods and chattels levied on this ..... day of ..... and taken into my custody by virtue of the annexed execution, viz.: one hundred saw logs, etc.
Date.

A. B., Constable.

NO. 382

Indorsement on Execution in Such Case

I have levied this ..... day of ....., 19....., by virtue of the within execution, upon the goods and chattels of the defendant, mentioned in the annexed inventory.
Date.

A. B., Constable.

NO. 383

Return of an Execution Satisfied

I have made the amount of the within execution of the goods and chattels of the defendant.
Dated .....

A. B., Constable.

(or "satisfied.")

NO. 384

Return of Satisfied in Part

I have made the sum of ..... of the goods and chattels of the within defendant, and can find no other goods and chattels of said defendant, whereof I can make the remainder of the said execution.

Dated.

A. B., Constable.

NO. 385

Return of No Property, or Nulla Bona

After due and diligent search* no goods or chattels of the within defendant can be found in my bailiwick. Or, nulla bona.

Date. A. B., Constable.

NO. 386

Neither Goods Nor Body

Same as above to * and then no goods or chattels, nor the body of the within defendant can be found in my bailiwick.

NO. 387

No Goods, and the Defendant Arrested

No goods or chattels of the within defendant can be found, and for want thereof I have arrested the defendant, and have conveyed his body to the common jail of the county.

NO. 388

Certificate of Copy of Execution Left with Jailer

I certify that the within is a true copy of the execution under and by virtue of which I deliver to the custody of the sheriff of the county of ..... at the jail of said county, this day, the body of the within named defendant; and that my fees therein are $.....

NO. 389

Return Where Goods Remain Unsold

Levied on a lumber wagon, the property of the within defendant, which remains in my possession unsold, for want of bidders.

Dated .....

NO. 390

Where an Appeal Is Brought

Proceedings stayed by appeal.

NO. 391

Of the Service of a Summons under Highway Laws

Personally served ....., 19....

A. B., Constable.

Or, served by leaving a copy at the personal abode of the within named ..... with a person thereat of suitable age and discretion, he not being found.

A. B., Constable.

NO. 392

When Served on a Corporation

Served on the within corporation, by delivering a copy of the same to ..... the president of said corporation, personally, (state place of service) this ..... day of .....

NO. 393

Return to Justice's Summons under Laws for Opening Highways

I have summoned the several jurors whose names are within mentioned personally, except C. D., one of said jurors, who could not be found; and I made service on said C. D. by leaving a notice that he was drawn to serve as such juror, and stating the time and place of attendance, at his place of residence, with a person of suitable age and discretion.

NO. 394

Return to a Precept in Case of an Encroachment

I have, by virtue of the within precept, summoned the following named persons as jurors, as I am within commanded, to-wit: .....

Dated .....

A. B., Constable.

NO. 395

Notice to Occupant and Commissioners in Such Case

Take notice, that the jury to try the question of the alleged encroachment of the fence on the land of the said ..... will meet at ..... on, etc.

Yours, etc.

To commissioners of highways of the town of .....

C. D., occupant of the land on which is alleged encroachment.

NO. 396

Return to Summons in Case of Draining Swamp

I have summoned the following named persons to serve as a jury in the matter within named, on or before the ..... day of ..... to-wit: ....., and I also gave notice to ....., the owner of the lands through which the ditch is to be cut, on the ..... day of ..... of the time and place at which such jury would appear.

NO. 397

Notice to Parties

Take notice, that a jury will appear on the ..... day of ....., 19...., at ..... o'clock, upon the lands of .... in the town of ..... and known as ..... to determine whether a ditch or drain is necessary or proper to drain any of such lands, and the damages that the owners thereof will sustain, in consequence of the cutting of such ditch.

A. B., Constable.

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