



THE LAW OF  
SHERIFFS

**VOLUME 1**



A TREATISE ON THE LAW OF  
SHERIFFS

CORONERS AND CONSTABLES  
WITH FORMS

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## PREFACE TO THE FIRST EDITION

This book is intended to be used by sheriffs, coroners, and constables and members of the bench and bar. It is written by an active practitioner of more than thirty years' experience.

There is no office so important in the administration of justice as that of a sheriff. In every action filed in the courts of record, a sheriff is called upon to perform some service in most of the jurisdictions. The office next in importance is that of constable. His services are commanded for the service of official process, followed by the requirement of his services for all intermediate process, and, finally, to make the judgment effective by execution. No attempt has been made in this book to treat purely local statutes or decisions, but it is of necessity a book of general application for use in all jurisdictions where the common law is mainly the rule of decision.

It usually is not a question of local law that is difficult of decision in connection with the law pertaining to the officers' duties, with which this book deals, but it is generally a question of common law that presents the difficulties in the proper discharge of their duties.

The forms that are contained in the Appendix are not drawn with respect to the law of any particular jurisdiction, but these forms are general in character and can be used in any jurisdiction with slight changes and modifications with respect to the local statutes or decisions. It is suggested that before making use of these forms, they be checked by the officer or other user of the book with respect to the local law.

There has not been produced a book dealing with the law pertaining to administration of the offices of sheriffs, coroners, and constables during the last half a century. Some purely local works have been offered to the officers and the profession, but by reason of this long lapse of time since a general work has been brought out, it is felt that this book will supply a real need of sheriffs, coroners, constables, and members of the bench and bar.

If this book shall in some form lessen the labors of the officers, for whom it is intended to be a guide, and of the bench and bar, that alone in a great measure will compensate the author for his efforts.

Grateful acknowledgment is made to Mrs. Dicy Hillman, State Law Librarian of Pocatello, Idaho, for the many courtesies extended to the author during the preparation of the manuscript, to Mrs. Melba Trimming, the most efficient stenographer and secretary the author has encountered in his more than thirty years' experience, and Miss Phyllis Pfof, who performed the stenographic tasks incident to the completion of the book; and to Clyde Bowen, Gus Carr Anderson, and A. E. "Duke" Trimming, all members of the Idaho Bar, for their untiring and unstinted aid and assistance rendered in the location, verification, and arrangement of authorities.

To say that the book is without defects would be a boast that the author is not in the least inclined to make, but he now offers it to the sheriffs, coroners, constables, and members of the bench and bar, and bespeaks for it a charitable judgment, and hopes that any imperfections or defects that may be contained therein will be partially palliated when he assures the user thereof that he has devoted long and laborious hours in an endeavor to accomplish the aim of making it useful.

WALTER H. ANDERSON.

Pocatello, Idaho, November, 1940.



## PREFACE TO THE SECOND EDITION

Law and order! What a righteous sounding expression! But where in America is it to be found in this fourth quarter of the Twentieth Century? In our inner cities? Do not bet your life on it or you will probably lose just that. In the remote hinterlands of our country? Try going against the desires of some bureaucrats and see how quickly they come against you with their squads of *unlawful* enforcers no matter where you are. These enforcers are not *law* enforcement officers; they are *bureaucratic regulation* enforcement officers, and they are violating the Rights and Liberties of Sovereign American citizens all across the country. While this is happening, the *real* law enforcement officers stand back and watch it happen, or in some cases, even assist them.

It seems as if we have more so-called "law" now than we ever had, and at the same time, we have less "order" in our society than in any time in our country's history.

Whatever happened to old-fashioned "law and order"? I will tell you what happened to it. Somewhere along the line the good people of America fell asleep at the switch. And during that snooze, the concept of the function of the American government (both State and federal) changed from protecting the God-given Rights, Liberties, and Property of the Sovereign Citizens from being plundered, to that of a totalitarian state when *everything* is considered to be the property of the government and therefore, totally controlled by the government. The function of Law enforcement changed from protecting the Rights of the Sovereign Citizens to carrying out the will of the now-imagined-to-be "Sovereign" government.

There was no amendment to either the Constitution of the United States or the Constitution of any of the 50 Free and Independent States that permitted this. A group of people just silently sneaked in to positions of influence and started it happening. Now it has grown to the point where it is almost safe to say that a state of war exists between the Sovereign Citizens of the United States and their State and federal government. Even as this preface is being written, and this book is being prepared to be sent to the printer, a federal judge has upheld a 4-2 decision by the village board of Morton Grove, Illinois to make it illegal for the Sovereign Citizens of that village to own handguns, in spite of that specific Right being secured for them by the Constitution.

What can be done about it? Do we have to have a revolution to get things back on the right track again?

The answer is "No"; we do not need a revolution, but what we do need is a *Restoration Movement*. You see, the other side is already carrying out a revolution. They are revolting against our Constitution and our Republican form of government, and they want to install in its place a totalitarian dictatorship. We simply want to keep the form of government that was established by the Founding Fathers not quite 200 years ago and which worked exceedingly well for the first 150 years.

How can we do this? The answer is relatively simple — Make the government obey the law!

We do not have to devise a new method for accomplishing this. There is already an existing method and it is just waiting for us to pick it up and put it into action. That method is to utilize the only legitimate law enforcement officer, and his support force, in America. That is, the Sheriff and the Posse Comitatus.

The Sheriff is the Executive Officer of the County. He is to make sure that those who violate the Rights of others are to be arrested, given a fair trial, and if guilty, he is to see that the punishment is carried out. To assist him in this function, he may call upon the Posse Comitatus — "the power of the County." The American system of limited government was established to secure the people's freedom and to allow them to be left alone. Government was a negative force. It was supposed to appear when something wrong was done so that the wrong could be hopefully righted and then government would fade back to its very limited function. American government was never supposed to be an omnipresent influence in every aspect of our lives, such as subsidizing of welfare, food production, education, employment, food prices, gasoline prices, and in other areas such as controlling television programming, union activity, hours of employment, and on, and on, and on, until government is into *everything*.

The time has come, in fact, it is here, that knowledgeable and concerned Americans *must* use the offices that are properly made available to the Sovereign Citizens to *restore* our constitutional Republic.

To that end, this superb book on the office of the Sheriff and the function of the Posse Comitatus has been reprinted and made available so that the job may be gotten on with.

Herbert Howard  
Towson, Maryland  
January, 1982.



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# VOLUME ONE

# SHERIFFS, CORONERS, AND CONSTABLES

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§ 1. **Origin of the Office of Sheriff.**—The office of sheriff is one of the oldest offices known to the common law system of jurisprudence. It is an office of great dignity and greater antiquity. Indeed, some legal antiquarians find themselves not contented with antedating the Norman Conquest for the establishment of the genesis of the office of sheriff, but profess to find the prototype of the sheriff in the Roman Pro-consul and that of the Earl or Count in the consul. This view is founded upon (alleged and perhaps, apocryphal) Laws of Edward the Confessor and Lord Coke lent the prestige of his great name, learning and ability, in the favor of this view, but this has been pronounced a mere fancy by Mr. Hargraves.<sup>1</sup>

True it is that in England and all of the American States, the office of sheriff is in existence and is one of great utility and greater responsibility on the part of the holder of this dignified and ancient office.

§ 2. **Origin of the Name of "Sheriff."**—The word "sheriff" was evolved from the Saxon word "Seyre," signifying shire, meaning county and the word "Reve" signifying keeper. The pronunciation or enunciation of these two words combined, developed by a quasi process of evolution into the modern word "sheriff."<sup>2</sup>

§ 3. **The Origin of the Office of Constable.**—It has been asserted that the constable in his dignity of antiquity was an officer, second only to the King. It has been frequently questioned whether the office existed in England prior to the Westminster statute enacted in the thirteenth year of the reign of Edward I, however on the other hand it has been asserted, with some degree of assurance, that the office of constable in England is of Norman origin,

1. Allen on Sheriffs, 5; Backus on Sheriffs, 2; Harlow on Sheriffs (3rd Edition) § 1; Impey on Sheriffs, 6; Jaffee, the Law of Sheriffs and Constables, § 2; Murfree on Sheriffs, § 1; Coke Litt. 168 (a) and notes 4, 5, 6, 7; State v. Pratt, 68 So 255, 192 Ala 118,

Ann Cas 1917D 990; State v. Reichman, 188 SW 225, 135 Tenn 653, Ann Cas 1918B 889.

2. Bouvier's Law Dictionary, page 3058. See also 1 Backus on Sheriffs, 2; Harlow on Sheriffs (3rd Edition) § 1.



being introduced by William and that subsequently the duties of the Saxon tithing men, etc., were added to the other functions of this ancient office.<sup>3</sup>

§ 4. Derivation of the Name "Constable."—Perhaps the most satisfactory derivation of the name of the office of constable is that which deduces it from the French comestable, who was an officer of high honor, great dignity and antiquity, second only to the King, and this officer is to be found in both England and the United States and perhaps every other jurisdiction administering the common law system of jurisprudence.<sup>4</sup>

§ 5. Origin of the Office of Coroner.—The existence of the office of coroner may be taken up in our day and traced back across the shores of the sands of times until we arrive at a period in an early day of the existence of the early common law, at which point, the trace is lost in the mists of antiquity. We do know that under the common law at an early period of the history of that system of jurisprudence, the office of coroner was one analagous to that of sheriff and constable and partook of the dignity surrounding those two ancient officers. The coroner, however, was next to the sheriff in the performance and discharge of his duties and being clothed with the dignity attendant upon that office. Pollock and Maitland say that "their origin is traced to an ordinance of 1194."<sup>5</sup> On the other hand it has been contended that in England, prior and subsequent to the time of Blackstone, the office of coroner was one of great dignity, and the office was held by persons of high authority. The office is of equal antiquity with that of the sheriff.<sup>5a</sup>

3. 1 Blackstone Com. 356; Jones' Blackstone, page 495 et seq., §§ 486 et seq.; 1 Pollock and Maitland, 542; 1 Backus on Sheriffs, 38; Smith on Coroners and Constables, 47.

4. Bouviers Law Dictionary, page 625; 1 Blackstone Com. 356; Jones' Blackstone, page 495, §§ 486 et seq.; 1 Pollock and Maitland, 542.

<sup>5</sup>The office of constable is said to have been borrowed at an early period from the French, the name being derived from the Latin 'comes stabuli,' an officer who regulated all matters of chivalry, tilts, tournaments, and feats of arms which were performed on horseback. Formerly there

were two classes of constables in England: High constables, which are now abolished and petty constables, which still exist. 25 Am & Eng Encyc of Law (2nd Ed) 682.

5. Peoria Cordage Co. v. Industrial Board, 119 NE 996, 284 Ill 99, LRA 1918E 822; Cox v. Royal Tribe, 71 Pac 73, 42 Ore 305, 60 LRA 620, 95 ASR 752; 1 Pollock & Maitland, History of English Law (2d Ed) 534.

5a. 1 Blackstone's Com. 347; 1 Jones' Blackstone, page 486, § 475; In re: Sly, 78 Pac 760, 9 Ida 779. Bacon claims to trace existence of this office to the time of King Alfred, Bacon Gov. 66; 1 Blackstone Com. 346;

§ 6. Powers and Duties of Sheriff Generally Considered.—It hardly need be said that the modern office of sheriff carries with it, both in England and in America, all of the common law powers, duties and responsibilities attendant upon an office of such antiquity and high dignity, except, insofar as the same have been legally modified within the constitutional ambit of legislative enactments. It is not only the power, but the duty, of sheriffs in their various jurisdictions to preserve the peace, enforce the laws and arrest and commit to jail felons and other infractors of statutory or common law, and to execute all process to him directed and attend upon the trial courts of record and to preserve peace and quiet, to execute and carry out the mandates, orders and directions of the courts.<sup>6</sup>

He (the sheriff) may and is bound ex officio to pursue and take all traitors, murderers, felons, and other misdoers and commit them to gaol for safe custody. He is also to defend his country against any of its enemies, when they come into the land; and for this purpose, as well as for keeping the peace or pursuing felons, he may command all of the people of his county to attend him; which is called the posse comitatus, or the power of the county; and thus summoned, every person above fifteen years old, and in England under the degree of peer, is bound to attend upon warning under pain of fine and imprisonment. It is also in England a contempt against the King's prerogative to neglect to attend the posse comitatus, or power of the county, upon being thereunto required by the sheriff or justices.<sup>6a</sup> Differently stated, the powers and duties

Jervis, Coroners, page 2. It has been asserted that this officer was called coroner or coronator because he dealt principally with pleas of the crown or those concerning the King, 2 Bacon Abr. page 424.

Jones' Blackstone, page 486, § 476.

6. State v. Bus, 36 SW 636, 135 Mo 325, 33 LRA 616; South v. State of Maryland, 18 Howard 396, 15 L ed 433; State v. Wyatt, 80 Atl 217, 27 Del 473 (4 Boyce); State v. McCarty, 179 Pac 309, 104 Kan 301, 3 ALR 1283; Allor v. Wayne County, 4 NW 492, 43 Mich 76; Pearce v. Stephens, 45 NYS 422, 18 App Div 101, 48 NE 1106, 153 NY 673; Scougale v. Sweet, 82 NW 1061, 124 Mich 311; Coyle v. Hurtin, 10 Johns. (NY) 85; Commonwealth v. Vanduyke, 57 Pa 34; Com-

monwealth v. Martin, 7 Pa Dist 219, 9 Kulp. 69; Davis v. State, 275 SW 1060, 101 Tex Cr 243; Corder v. People, 287 Pac 65, 87 Colo 251; State v. Reichman, 188 SW 225, 597, 135 Tenn 653, 685, Ann Cas 1018B 889 and notes; Chase's Blackstone, 90, 899, 745, 914; State v. Hill, 60 Fed 1005, 9 CCA 326, 22 US App 1, 24 LRA 170.

When the State statute makes the sheriff liable for an escape of a prisoner, the United States may sue the sheriff in such cases for escape of a Federal prisoner. State v. Hill, supra.

Mayor of Baltimore v. State, 15 Md 400, wherein it was held that the sheriff is a constitutional officer and his duties are defined by the common law.

6a. 44 ASR 146. Substituting in place of "King" the words "the State,"

of the sheriff are analogous to those imposed by law upon peace officers of modern municipalities, exercised by the sheriff in a larger territory that the lives of the citizens, their persons, property, health, and morals shall be protected and made safe. In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State and he has no superior in his county. When a situation arises calling therefor it becomes the sheriff's right, and it is his duty, to determine what the public safety and tranquillity demand, and to act accordingly. He must, of course, act according to law; but if, holding a felony warrant, he should deem it necessary to take custody of a disturber, held by a constable, under a misdemeanor warrant, and it is his duty to do so, it is the duty of the constable to yield. In such a situation the justification of the constable lies in the rightful exercise of overruling authority by the sheriff.<sup>7</sup>

§ 7. **Authority of Constable.**—While the office of constable is not of the same grade and dignity as that attributed to the office of sheriff, still perhaps it is a more important office in the immediate vicinity that the officer serves. The duties and administrations of the constable, with reference to the justices or magistrates courts, corresponds with the duties of the sheriff regarding the trial courts of record. He is a peace officer within the limits prescribed by statutory law of his State, and it is sometimes enacted that this duty or function may be performed anywhere within his county. Differently stated, he is in effect the sheriff so far as concerns any matter within the jurisdiction of the justice of the peace. He serves original, mesne, and final process, issuing out of these courts. The constable has the same power and is under the same duty to call out the posse comitatus to execute process and, in this respect, he possesses the same powers and has the same authority within his more limited sphere that the sheriff has in a broader sense and a wider territorial jurisdiction.<sup>8</sup> In short, the constable has all of the powers that appertain to his ancient predecessor under the common law.<sup>9</sup> However, the powers of the constable or other officer are often prescribed by statutory enactments, and out

this rule of common law correctly states the powers and duties of the sheriff as we know him in modern times and is authority to command the power of the county.

7. *State v. McCarty*, supra.

8. *Murfree on Sheriffs*, § 1113; *Allor v. Wayne Co.* 4 NW 492, 43 Mich 76.

9. *Norris v. Smithville*, 1 Swan (Tenn) 164; 1 *Backus on Sheriffs* 39.

of safety these statutes in each jurisdiction should be examined by the officer called upon to act in pursuance thereof, or by virtue of their provisions. He ought to become perfectly familiar with their terms and provisions. With respect to territorial limitations circumscribing the official functions of the constable, it may be stated generally that, in the absence of a constitutional or statutory grant of authority, he cannot act outside of his own district, precinct or town in which he was elected.<sup>10</sup>

§ 8. **Powers and Duties of the Coroner.**—The coroner, as we know him in modern times, is a quasi judicial officer with the exception when the office of sheriff is vacant or the sheriff is a party litigant in an action and it is necessary or desired to serve him with process, or when the sheriff is disqualified for any other reason recognized by law, or is under suspicion of partiality, or is unable to act on account of illness; in all of these cases, then the coroner may perform the duties of the sheriff, otherwise he acts in a judicial capacity in holding inquests and the like.<sup>11</sup> It is sometimes held that the employment of the word "sheriff" in statutory

10. *Norris v. Smithville*, supra; *Riley v. James*, 18 So 930, 73 Miss 1; *Boutwell v. Grayson*, 70 So 61, 118 Miss 80; *Dolbear v. Hancock*, 0 Vt 388; *Wood v. Crosby*, 2 Hill(SC) 520.

In *Riley v. James*, 18 So 930, 73 Miss 1, the court held that a constable could not go beyond the confines of his district and serve process; that under the law he was elected by and for a district and was limited in his action to his district. *Boutwell v. Grayson*, supra.

It seems that Mr. Murfree, in his generally accurate work, fell into the error of stating that "besides being a peace officer within the statute law of his State, generally anywhere within his county, he is, in effect, the sheriff so far as concerns any matter within the jurisdiction of the justice of the peace." *Com. v. Lentz*, 106 Pa 643; In re: *Constable Plymouth Borough*, 27 Pa Co 204; *Caufman Case*, 18 Pa Dist 25, 35 Pa Co 417.

"The constable is a township or ward officer, outside of it he has no jurisdiction, and even his power to execute process beyond his immediate district arises rather from the jurisdiction of the magistrate than from

his own." *Com. v. Lentz*, supra. See also for a full discussion of the office of constable *Allor v. Wayne Co.* 4 NW 492, 43 Mich 76.

11. 1 *Blackstone*, 349.

III.—*Reed v. Reber*, 62 Ill 240.

Ky.—*Gowdy v. Sanders*, 11 SW 82, 88 Ky 346. Where statute authorizes coroner to serve process, if sheriff disqualified, and if coroner disqualified, then the jailer, but process cannot be directed to and served by jailer except in cases where both sheriff and coroner are disqualified.

Mo.—*Oracheln v. Scott*, 79 Mo App 534; *State v. Smith*, 1 SW 753, 90 Mo 37, 59 Am Rep 4; *Webster v. Smith*, 78 Mo 163; *Carr v. Youse*, 39 Mo 340, 90 Am Dec 470.

Mich.—*Bush v. Meachan*, 19 NW 192, 53 Mich 574.

Neb.—*Barlass v. May*, 21 NW 136, 16 Neb 647.

Pa.—*Com. v. Mallini*, 63 Atl 414, 214 Pa 50.

Tex.—*Goodin v. State*, 14 Tex App 443; *Kirk v. Murphy*, 16 Tex 654, 67 Am Dec 640.

*Scanlan v. Turner*, 1 *Bailey (SC)* 421.

enactments or constitutional provisions is in a generic sense and embraces constables or coroners.<sup>12</sup> Likewise, the disqualification of the sheriff, by reason of interest, thereby authorizes the coroner to function in the particular case or instance. It is sufficient to disqualify him even though the sheriff is not a party but his wife is a party.<sup>13</sup> It is hardly necessary to add that where a sheriff, or other officer, is disqualified to act by reason of partiality, interest, or otherwise, such disqualification is followed by the far reaching consequence that all of his deputies are likewise disqualified. This rule is grounded upon the fact that a deputy can only act for, or in the name of, the sheriff or other officer under whom he is a deputy.<sup>14</sup> This rule of disqualification to act in cases of interest, partiality or other substantial grounds of objection is of so far reaching effect as to render void the execution of official process by the sheriff, even though there is a statute in the particular State dealing with the matter but does not in terms prohibit the official performance of such function.<sup>15</sup> A further illustration of the jealousy with which the law guards against a disqualified sheriff, or other officer acting, is found in those adjudications determining that where the sheriff is disqualified, one of his deputies cannot serve process upon another.<sup>16</sup> At an early date, however, there was a departure from these statutory rules to be found in a few adjudications in the State of New York.<sup>17</sup> But, these holdings never gained any foothold without the particular jurisdiction and no substantial recognition within the State of New York, itself.

§ 9. **The Mode of Selecting Sheriffs.**—In England, the office of sheriff was bestowed by different processes at different periods in the history of the office. At one time sheriffs were elected but only free holders possessed the right of franchise. But later they were appointed by the Crown upon the nomination of the Lord Chancellor, the treasurer and the judges. This nomination was made on All Souls Day, or November 3, and not a little importance was

12. DeWitt v. Decker, 9 NJL 143; Hume v. Norris, 5 Or. 478.

13. Scanlin v. Turner, 1 Bailey (SC) 421.

14. Gage v. Groffan, 11 Mass 181; May v. Walters, 2 McCord (SC) 470; Murfree on Sheriffs, Sec. 100C; Cooley on Torts, 4th Edition, Sec. 133.

15. Colo.—Kelliher v. People, 205 Pac 274, 71 Colo 202; Toenniges v. Drake, 4 Pac 790, 7 Colo 471.

16. Ga.—Knight v. Morreson, 3 SE 639,

79 Ga 55, 11 ASR 405.

Me.—Dane v. Gilmore, 51 Me 544.

Tex.—Ellis v. Blanks, 25 SW (Tex) 309.

18. Dane v. Gilmore, 51 Me 544; Douglass v. Gardner, 63 Me 402; Brown v. Gordon, 8 Me 107, 1 Greenl 165, 22 Am Dec 223.

17. Tuttle v. Hunt, 2 Cow (NY) 436; Putnam v. Man, 3 Wend (NY) 202, 20 Am Dec 636; Bennett v. Fuller, 4 Johns.(NY) 486.

attached to the requirements of making the nomination on this particular day. However, in cases of emergency the Crown could appoint a sheriff thereby dispensing with the process of nominations and occasionally the King exercised this power without the excuse of the urgency or necessity. At an early day in some counties in England the office was hereditary. It seems, too, that the sheriff of Middlesex was authorized to be appointed by virtue of an authority conferred by the Charter of the city of London.<sup>18</sup> In modern times, it is generally thought that committing the selection of officers to the electorate is the surest method of obtaining faithful performance at the hands of officers, but not so in ancient England, for we are told that the great complaint by reason of extortion and abuse committed by elected sheriffs was assigned as a justification for transferring the appointment of that officer from the election of the people to a nomination by the chancellor, treasurer and judges.<sup>19</sup> It is perhaps true that in every State of the United States, the sheriff is chosen by an election in which the people of the county are entitled to vote.

§ 10. **Qualifications of the Sheriff.**—Formerly in England it was requisite that the person appointed to the position of sheriff should, within the preceding year, have partaken of the Sacrament in the National Church, but this religious requirement was later discarded and there was substituted in its place the exaction that the appointee take an oath that was regarded as of equal binding effect as the eucharistic qualification. There was also, and especially so in some counties, a property qualification. The sheriff in London was required to be worth approximately \$50,000 and at a later time this property requirement was increased to a sum practically equivalent to \$100,000, while in some other counties the property requirement was about \$1,500.<sup>20</sup> In the United States, however, either by virtue of common law rules, constitutional provisions or statutory enactments qualifications are prescribed for the citizen to hold the office of sheriff. A few of these may be mentioned: that he be a qualified elector,<sup>21</sup> a resident of the county for

18. 1 Blackstone Com. 341; Coke Litt. 326 (a) note; 12 & 13 Vict., Ch. 42; 13 & 14 Vict. Ch. 30; 4 Blackstone Com. 349.

19. 2 Reeves History of English Law, Ch. 10; 3 Reeves History of English Law, Ch. 12.

20. 8 Bacon's Abridgement, 603; 9

George 4, Ch. 17, Sec. 2; 10 George 4th, Ch. 7; 8 Bacon's Abridgement 605.

21. State v. Schmidt, 173 NW 838, 42 SD 267, 173 NW 951, 42 SD 294; State v. Nichols, 63 So 1025, 106 Miss 419. In the last cited case it was held that a legal voter meant a registered voter and that where one was

a certain period of time,<sup>22</sup> and in a few jurisdictions the possession of certain property qualifications is an essential prerequisite to being elected to the office of sheriff.<sup>23</sup> Coming to the recognized common law qualifications, it is generally held that citizenship alone is imposed.<sup>24</sup> It may be stated also that there are found statutes and constitutional provisions prescribing certain disqualifications to the fulfillment of the office of sheriff as, for instance, failure to account for public money,<sup>25</sup> conviction of a crime rendering the defendant infamous, as the bribing of a voter,<sup>26</sup> so, too, an attorney at law is sometimes barred from being elected to, or occupying, the office of sheriff.<sup>27</sup> However, it seems that misconduct in office, resulting in the consequent removal of the sheriff, does not ipso facto in the absence of statutory or constitutional inhibition, render the removed sheriff disqualified to be re-elected and hold the office.<sup>28</sup> The mere fact that a citizen has received a commission as sheriff or that he has been elected to that office, or has taken the oath of office, executed and filed an official bond, and otherwise qualified, does not create a presumption of his qualification or eligibility to hold the office.<sup>29</sup> The election of a disqualified person is attended with the consequences of rendering such election voidable, but not absolutely void. However, in some jurisdictions, by special statutory provision, such an election is absolutely void.<sup>30</sup>

§ 11. **Sheriffs in England Compelled to Serve.**—At an early day in the history of the sheriff's office in England one appointed or selected for that office was compelled to serve under the pains of a forfeiture of a designated sum of money.<sup>31</sup> This seems to have been the result of an attempt to avoid the expense and responsibility in connection with the discharge of the function of the office.<sup>32</sup> However, such is not the law in the United States. In

not legally registered at the time he was elected to the office of sheriff, he was not qualified to hold the office.

22. *Patterson v. Miller*, 2 Metc(Ky) 493; *State v. Anderson*, 1 NJL 318, 1 Am Dec 207.

23. *Hatcheson v. Tilden & Bordley*, 4 Har & McH(Md) 279; *Roberts v. Gibbon*, 6 Har & J(Md) 116; *State v. Anderson*, supra.

24. *State v. Van Beek*, 54 NW 525, 87 Ia 589, 43 Am St Rep 397, 19 LRA 622; *State v. Smith*, 14 Wis 497.

25. *Hoskins v. Brantley*, 57 Miss 314.

26. *Com. v. Shaver*, 3 Watts & S (Pa) 338.

27. *State v. Boyles*, 60 SE 233, 80 SC 352.

28. *Gordon v. State*, 43 Tex 330.

29. *State v. Anderson*, supra; *Patterson v. Miller*, supra.

30. *State v. Anderson*, supra; *Nowman v. Jefferson County Justices*, 6 Humphr(Tenn) 41.

31. 8 Bacon's Abridgement 602; *Attorney General v. Reed*, 2 Mod 299.

32. *Murfrees on Sheriffs*, Sec. 5.

this country, the citizen seeks the office rather than the office seeking him. But, at an early date in this country, there were similar penalties imposed. By way of illustration, in Tennessee there was a statute imposing a penalty against persons who being duly qualified and having been elected sheriff should refuse to serve in that capacity.<sup>33</sup> In an old Virginia case of *The King v. McClanahan*, decided in the year 1733, it was held that one who declined the office of sheriff was not responsible for an imposed penalty unless he had been commissioned, the terms of the act being, every person hereafter commissioned to be sheriff and refusing shall forfeit, etc.<sup>34</sup> It appears that some of these old statutes still remain upon the pages of the codes and compilations of some states but they no doubt have long since been abrogated by disuse.

§ 12. **The Sheriff as a Judicial Officer in England.**—The sheriff in England formerly in a very limited capacity discharged the functions of a judicial officer.<sup>35</sup> It is perhaps safe to say, however, that in the United States this part of his powers, duties, and functions has been entirely abrogated and he is now exclusively an executive and ministerial officer.<sup>36</sup> Statutes are sometimes encountered providing that where third party claims are filed as to property that has been seized by virtue of execution or on a writ of attachment the sheriff may assemble a jury to aid him in the discharge of the duty to determine such claims by third persons, and where these statutory provisions are found and a jury is thus assembled, by virtue of the provisions thereof, then in such proceedings the sheriff is a judicial officer and performs the functions of a court.<sup>37</sup> Aside from this isolated instance, the sheriff, both in the United States and England, has been shorn of his judicial power. Most of the functions of the sheriff to act in a judicial capacity were removed by the Magna Charta.<sup>38</sup>

§ 13. **Election of Sheriffs.**—We have already had occasion to advert to the mode of selecting sheriffs in England.<sup>39</sup> It may be safely stated that in practically all of the states of the United States the sheriff is elected by the vote of the people.

33. *Thompson and Steeger's Code* (Tenn) Sec. 358.

34. *King v. McClanahan*, Jeff(Va) 9.

35. 3 Blackstone Com 80; 4 Blackstone Com 273, 411, 424; 8 Bacon's Abridgement 688.

36. *Merrill v. Rham*, 6 Cal 41; *Peo. v. Squires*, 14 Cal 12; *Peo. v. Edwards*, 9 Cal 286.

37. *Murfrees on Sheriffs*, 6.

38. 2 *Reeves History of English Law*, 45; 1 *Blackstone Com* 343; *South v. Maryland*, 18 How 396, 15 L ed 433; *Dow v. Humbert*, 91 US 294, 23 L ed 368.

39. See Sec. 9 supra.



§ 14. **Eligibility to the Office of Sheriff.**—Whether a particular jurisdiction recognizes the right of women to serve as sheriff, which is unimportant for our present consideration, it may be stated as perhaps a universal rule that the sheriff must be of lawful age, a citizen of the United States and a citizen and resident of the state and county wherein he seeks to serve and in many jurisdictions it is required that he be an elector or legal voter,<sup>40</sup> and in some states property qualifications are also prescribed.<sup>41</sup> Where a property qualification is prescribed, the property must be owned by the person seeking the office of sheriff in his own right and not merely held in trust.<sup>42</sup> Even in the absence of constitutional and statutory provisions, citizenship is an indispensable prerequisite to the holding of the office of sheriff.<sup>43</sup> There usually are found statutory provisions containing disqualifications of persons to holding the office of sheriff.<sup>44</sup> In some states are found statutory requirements prohibiting the holding of the office of sheriff at the time of holding any other office of honor or profit under state government or an office of profit, trust or emolument under the Government of the United States or receives from the United States Government any emolument whatsoever.

§ 15. **Term of the Office of Sheriff.**—Formerly in England the term of office of sheriff was limited to one year and by the enactments contained in ancient statutes he and his subordinates upon expiration of the term were excluded from their respective offices and were ineligible for two more years to hold the office. Also, in that country the demise of the King or ruler operated to vacate the office of sheriff at the expiration of six months after the death of the holder of the Crown, but he continued to discharge the duties of his office until a writ of discharge should have been actually delivered to him.<sup>45</sup> The terms of the office of sheriff vary in the different states of the United States and no useful purpose could be subserved in attempting to state what the terms of office of the sheriff of the different jurisdictions of the United States are actually provided. It is important to notice, however, profiting by the experience of the English rule that the sheriff's office was vacated six months after the death of the Monarch, that in most ju-

40. *State v. Smith*, 14 Wis 497; *Patterson v. Miller*, 2 Metc(Ky) 493, 59 Ky 493; *State v. Schmidt*, 173 NW 938, 42 SD 207, 173 NW 294, 42 SD 294; *State v. Nichols*, 63 So 1025, 106 Miss 419; *State v. Anderson*, 1 NJL 318, 1 Am Dec 207.

41. *Roberts v. Gibson*, 6 Har & J (Md) 116.

42. *Hatcheson v. Tilden & Bordley*, 4 Har (Md) 279.

43. See Sec. 10 *supra*.

44. See Sec. 10 *supra*.

45. 8 Bacon's Abridgement 683.

risdictions in this country it is provided that a sheriff, on being commissioned as such, shall serve for a stated period of time and until his successor shall be elected and qualified.<sup>46</sup> The object, it has been claimed, in shortening the term of office of the sheriff in England to one year, was for the purpose of preventing the notorious and inveterate abuse and misconduct of these officers; for prior thereto, it had been the practice for sheriffs to have grants of their bailiwick from the King for a term of years.<sup>47</sup>

§ 16. **Eligibility to Re-election.**—In England and in some of the states of the United States a sheriff may not succeed himself and is limited to holding the office for a definitely designated period.<sup>48</sup> The Constitution of Wisconsin provides that the sheriff shall hold no other office and be ineligible for two years next succeeding the termination of their offices to be re-elected. However, it was held that the provision did not prevent the sheriff from being elected to another county office.<sup>49</sup>

§ 17. **Removal of Sheriff.**—Due provisions are to be found in the statutes and constitutions of the various American jurisdictions for the removal of sheriffs who have committed infractions of law.<sup>50</sup>

§ 18. **Oath of Sheriff.**—The oath of the English sheriff has been duly prescribed by an act of Parliament.<sup>51</sup> It is perhaps univer-

46. Murfree on Sheriffs, Sec. 8.

47. Murfree on Sheriffs (New ed) p. 19D, n. 17.

48. Article 7, Sec. 1, Tennessee Constitution of 1870; Art. 6, Sec. 1, Pennsylvania Constitution; *Doberstein v. Dahl*, 195 NW 416, 181 Wis 491; *State v. Linkhauer*, 41 NE 325, 142 Ind 94; *Gosman v. State*, 6 NE 349, 106 Ind 203. Wherein it was held that an appointment to fill a vacancy should not be reckoned so as to prevent the appointee from standing for election to succeed himself; *Black v. Pate*, 30 So 434, 130 Ala 514; *Bozeman v. Laird*, 45 So 722, 91 Miss 719. Wherein it was held that a constitutional provision preventing the same person from holding the office of sheriff for two successive terms applies only to two full terms; *McGinnis v. Cossar*, 18 SW (2d) 988, 230 Ky 213.

49. *State v. Southwick*, 13 Wis 365.

50. The statutes of the different jurisdictions should be consulted for

further information with respect to such removal. Removal of sheriffs, coroners and constables will receive further consideration at a later page in this work.

51. Oath required of sheriff.—In common with other officers whose due performance of their duties materially affects the welfare of the community, and involve the rights and pecuniary interests of individual citizens, sheriffs are required to take an oath and to execute a bond. The oath which in England was formerly required of sheriffs having become objectionable because certain duties therein prescribed for sheriffs were rendered impossible of performance by the repeal of several statutes directed against heresy, a new oath was prescribed by act of Parliament, which is sufficiently comprehensive to embrace every legitimate duty that could be reasonably required of a ministerial officer. The oath of the sheriff required by statute

sally required that a sheriff shall take an oath before entering upon the discharge of his duties and the form of this oath is generally found provided for in state statutes and constitutions. Generally in the United States the oath of office required of a sheriff is, that he will support the constitution of the United States and the constitution and laws of the State wherein he is elected, and will faithfully discharge all of the duties of the office of sheriff<sup>52</sup> to the best of his ability, concluding by calling upon God to help him.

§ 19. Official Bonds.—Sheriffs' bonds in the United States are required and regulated by either statutory enactments or consti-

in each of the American states, although couched in more general terms is in substance, mutatis mutandis, identical with that prescribed by the English statute. Murfrees on Sheriffs, Sec. 12.

By Act of 3 George III, Ch. 15, Sec. 18 the oath prescribed is as follows: "I, A. B., do swear that I will well and truly serve the King's majesty in the office of sheriff, in the county of ..... and promote his majesty's profit in all things that belong to my office as far as I legally can or may. I will truly preserve the King's rights and all that belongeth to the crown. I will not assent to decrease, lessen, or conceal the King's rights, or the rights of his franchise; and wheresoever I shall have knowledge that the rights of the crown are concealed or withdrawn, be it in lands, rents franchises, suits, or services, or in any other matter or thing, I will do my utmost to make them be restored to the crown again; and if I may not do it myself, I will certify and inform the King thereof, or some of his judges. I will not respite or delay to levy the King's debts, for any gifts, promises, reward, or favor, where I may raise the same without great grievance to the debtors. I will do right as well to poor as to rich, in all things belonging to my office. I will do wrong to no man for any gift, reward, or promise, nor for favor or hatred. I will disturb no man's right, and will truly and faithfully account the Exchequer all those of whom I shall receive any debts or duties belonging to the crown. I will take noth-

ing whereby the King may lose or whereby his right may be disturbed, injured, or delayed. I will truly return and truly serve all the King's writs according to the best of my skill and knowledge. I will take no bailiffs into my service, but such as I will answer for, and will cause each of them to take such oaths as I do in what belongeth to their business and occupation. I will truly set and return reasonable issues of them that be within my bailiwick, according to their estate and circumstances, and make due panels of persons able and sufficient, and not suspected or procured, as is appointed by the statutes of this realm. I have not sold or let to farm, nor contracted for, nor have I granted or promised for reward or benefit, nor will I sell or let to farm, nor contract for or grant for reward or benefit by myself or any other person for me, or for my use, directly or indirectly, my sheriffwick or any bailiwick thereof, or any office belonging thereunto, or the profits of the same, to any person or persons whatsoever. I will truly and diligently execute the good laws and statutes of this realm, and in all things well and truly behave myself in my office for the honor of the King and the good of his subjects, and discharge the same according to the best of my skill and power, so help me God."

2 Backus on Sheriffs, pp. 95 et seq., 199, 262, 325, 398; Harlow on Sheriffs (3rd Ed.) Sec. 6.

52. The statute of the particular jurisdiction should be consulted with respect to the form of the oath.

tutional provisions. The conditions of such bonds are generally prescribed by the same source. It does not appear, however, that anciently, at least in England, that the sheriffs were required to give bonds. The sheriff's bond is regarded as collateral security for the performance of the duties of the office and is for the protection and indemnification of all persons who may be injured by official neglect or default in performance of the duties legally imposed.<sup>53</sup> Where the duties of a tax collector are imposed upon the sheriff, his official bond seems to cover any defalcation or default in connection with the administration of the duties of such collateral office.<sup>54</sup> It has been held, however, but of doubtful soundness, that the failure to give a bond does not affect the capacity of the sheriff to act in respect to the execution of judicial process.<sup>55</sup> Neither will a failure to give one prevent a sheriff from acting in that capacity and taking a receipt for personal property delivered to a keeper where the same has been levied upon under an execution or attachment from bringing an action for its conversion.<sup>56</sup> In any event the induction of a sheriff into office without the compliance with such law will not prevent the curing of the irregularity by the later execution and filing of the requisite bond.<sup>57</sup> With respect to the form of the bond, the falling short of a literal compliance with that which is prescribed by statute or constitutional provision does not operate to render invalid a bond attempted to be given, but if the conditions required in the bond are substantially inserted, then the bond will be treated as legally binding and of lawful efficacy, or as a common law bond.<sup>58</sup> An illustration of the principle we have under discussion is, that, where the bond has been given and approved, the fact that the obligee is not the one designated by law does not in any way militate against the validity of such an undertaking.<sup>59</sup> It seems too that the sureties on a sheriff's

53. State v. McDonald, 40 Pac 312, 4 Ida 468, 95 Am St Rep 137; Peo. v. Wockner, 244 Ill App 30; Bay County v. Brock, 69 NW 101, 44 Mich 45.

54. Peo. v. Edwards, 9 Cal 286; New Orleans v. Gauthreaux, 36 La Ann 109; State v. Matthews, 57 Miss 1; State v. Powell, 44 Mo 436; Brunswick Co. v. Woodside, 31 NC 496; Moore Co. v. McIntosh, 31 NC 307; Marion School Dist. v. Donahue, 7 Pa Co 264; Com. v. Compton, 7 Pa Co 262; State v. Hill, 17 W Va 452; State v. McDonald, supra.

55. Mechanics etc. Bank v. Labiche, 3 La Ann 539.

56. Taylor v. Nichols, 29 Vt 104.

57. Peo. v. Smith, 81 NC 304.

58. State v. McDonald, 40 Pac 312, 4 Ida 468, 95 ASR 137 and note; McCracken v. Todd, J Kan 148; Young v. State, 7 Gill & J(Md) 253; White v. Miller, 20 NC 50; Treasury Commrs. v. Muse, 5 SCL 150; Amis v. Marks, 3 Lea(Tenn) 253; Rader v. Davis, 5 Lea (Tenn) 536. Omission of name of officer.

Note 90 ASR 191.

59. Bay County v. Brock, 6 NW 101, 44 Mich 45; Stevens v. Treasurers, 2 McCord(SC) 107.

Note 90 ASR 191.

bond may, without rendering the same invalid, attach conditions to their signatures with respect to liability.<sup>60</sup> No importance is attached to the fact that a sheriff's bond is signed on different dates by the several sureties, or whether the date of different bonds was in fact the date on which they were signed.<sup>61</sup> Of course, it goes without saying, if the statutory or constitutional provisions require the justification or acknowledgment by the sheriff or his sureties on his official bond, such compliance should be fulfilled.

§ 20. Sheriff's Subordinates.—It is familiar law that the sheriff is regarded as the head of the sheriff's office and for any defaults or failures to comply with law or fulfill legal duties the sheriff is required to answer therefor though the same were in fact committed or omitted by his deputies or subordinates. It is the duty of the sheriff to take the undertaking of sureties for the faithful fulfillment of the duties of his deputies, undersheriffs, or subordinates, but whether he exacts such bonds or not is not of the least importance insofar as his liability to the injured party or to the State or county is concerned. Of course, in order to hold a sheriff or constable for the default or misconduct of his deputies the act must have been committed in the official capacity of such deputy.<sup>62</sup>

Adams v. Taylor, 42 Hun 384, where it was held that bond of an officer failing to make the surety thereon liable in damages for default of the officer was not thereby invalidated.

Kopplekom v. Huffman, 10 NW 377, 12 Nebr 95. Bond of sheriff running to the State instead of the county as required by law.

Rigga v. Miller, 52 NW 567, 34 Nebr 666. A bond of a deputy sheriff payable to county, whereas the law required the sheriff to be named as obligee, does not vitiate it.

Charles v. Hoskins, 11 Ia 329, 77 Am Dec 148, where bond was payable "to the people of Woodbury County" it was not invalidated although there is no such person or corporation known to the law.

State v. Horn, 7 SW 116, 94 Mo 162. A constable's bond making the state obligee instead of township trustees does not invalidate it.

See also, Bryan v. Kelly, 5 So 346, 85 Ala 569.

60. State v. Yates, 3 Hill(SC) 230.

61. Gay v. Jackson City Board of Education, 265 SW 772, 205 Ky 277.

62. U. S.—Clute v. Goodell, 5 Fed Cas No 2,011, 2 McLean 193; Lawrence v. Sherman, 14 Fed Cas No 8,144, 2 McLean 488.

Ala.—King v. Gray, 68 S 643, 180 Ala 686; Stephens v. Head, 35 S 565, 138 Ala 453; Rogers v. Carroll, 20 S 602, 111 Ala 610; Mathis v. Carpenter, 10 S 341, 36 Am St Rep 187, 95 Ala 156; Pond v. Vanderveer, 17 Ala 426; Clarke v. Gary, 11 Ala 98.

Sometimes statutes are found exempting sheriff from liability. Tuscaloosa Co. v. Shamblin, 160 So 234, 233 Ala 6. Such statutes are valid.

Ark.—Usrey v. Yarnell, 27 SW(2d) 988, 181 Ark 804; Whitlock v. Wood, 101 SW(2d) 950, 193 Ark 602, 667; holding liability for acts of sheriff's or constable's deputy done under color of office; Edgin v. Talley, 276 SW 591, 42 ALR 1194, 169 Ark 662, 667; Moores v. Winter, 53 SW 1057, 67 Ark 189; Frizzell v. Duffer, 25 SW 1111, 58 Ark 612; Badgett v. Martin, 12 Ark 730.

Cal.—Foley v. Martin, 71 P 165, 142 Cal 250, 75 P 842, 100 Am St Rep 123; Nixon v. Rauer, 60 P 221, 6 Cal Unrep Cas 788; Filarski v. Covey, 242 P 874,

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The liability of the sheriff embraces acts of his subalterns only to

75 Cal App 353; Towle v. Matheus, 62 P 1064, 130 Cal 574; Michel v. Smith, 205 P 113, 188 Cal 199; Clement v. Dunn, 299 P 545, 114 Cal App 00. Liability predicated on theory deputy is sheriff's representative; Van Vorce v. Thomas, 64 P(2d) 772, 18 Cal App(2d) 723. Not liable where deputy under civil service.

Conn.—Palmer v. Gallup, 16 Conn 565.

Fla.—Roberts v. Dean, 187 So 571, 133 Fla 47; Swenson v. Cahoon, 152 So 203, 111 Fla 788.

Ga.—Fate v. National Surety Co. 200 SE 314, 58 Ga App 874; Matthias v. Pollard, 3 Ga 1; In re Stephens, 1 Ga 584.

Haw.—County of Hawaii v. Martin, 33 Haw 677. Sheriff not liable for policeman appointed deputy unless sheriff is negligent in selection, or directed, or ratified act, or personally cooperated therein.

Ida.—Helgeson v. Powell, 24 P(2d) 957, 54 Ida 667; San Francisco Federal Reserve Bank v. Smith, 244 P 1102, 42 Ida 224; Haffner v. United States F. & G. Co. 207 P 716, 35 Ida 517. Both cases are overruled in Helgeson v. Powell, 34 P(2d) 957, 54 Ida 667; Price v. Pace, 296 P 189, 50 Ida 353.

Ind.—Snell v. State, 43 Ind 359; Bosley v. Farquar, 2 Blackf (Ind) 61; McGruder v. Russell, 2 Blackf (Ind) 18.

Kan.—Frankhouser v. Cannon, 32 P 379, 50 Kan 621; Hoyer v. Raymond, 25 Kan 665; Elwell v. Reynolds, 51 P 578, 6 Kan App 545.

Ky.—Hogg v. Lorenz, 29 SW(2d) 17, 234 Ky 751; West v. Nantz, Admr. 101 SW(2d) 673, 267 Ky 113; Schork v. Calloway, 265 SW 807, 205 Ky 346; Jones v. Van Bever, 174 SW 795, 164 Ky 80, LRA1915E 172; Stephens v. Wilson, 72 SW 336, 24 Ky L Rep 1832, 115 Ky 27; Mann v. Martin, 82 Ky 242; Shields v. Pfanz, 41 SW 267, 19 Ky L Rep 648, 101 Ky 407; Winterbown v. Haycraft, 7 Bush(Ky) 57; Bottom v. Williamson, 3 Bush(Ky) 521; Harlan v. Lumsden, 1 Duv(Ky) 86; Murrell v. Smith, 3 Dana(Ky) 462; Forsythe v. Ellis, 4 JJ Marsh(Ky) 16

298, 20 Am Dec 218; Com. v. Stockton, 5 TB Mon(Ky) 192; Owens v. Gatewood, 4 Bibb(Ky) 494.

La.—Grabenheimer v. Budd, 3 So 724, 40 La Ann 107; Gray v. De Bretton, 188 So 722, 192 La 628, see also 184 So 390; Davis v. McDowell, 165 So 634, — La App —; State v. Budd, 1 So 453, 39 La Ann 232; Frazier v. Parsons, 24 La Ann 339; Pascal v. Ducros, 8 Rob 112, 41 Am Dec 294.

Me.—Frothingham v. Maxim, 141 A 99, 127 Me 56; Kittredge v. Frothingham, 96 A 1063, 114 Me 537; Kelley v. Tarbox, 66 A 9, 102 Me 119; Norton v. Nye, 58 Me 211; Hamilton v. Godding, 55 Me 419; Kendrick v. Smith, 31 Me 162; Dyer v. Woodbury, 24 Me 546; Harrington v. Fuller, 18 Me 277, 36 Am Dec 719; Bailey v. Hull, 16 Me 408; Norton v. White, 16 Me 53; Adams v. Jewett, 10 Me 426; Williams College v. Balch, 9 Me 74; Kidder v. Parlin, 7 Me 80; Green v. Lowell, 3 Me 373; Walker v. Foxcroft, 2 Me 270.

Mass.—Parker v. Young, 75 NE 98, 188 Mass 600; Clapp v. Thomas, 7 Allen(Mass) 188; Robinson v. Ensign, 6 Gray(Mass) 300; King v. Rice, 12 Cush(Mass) 161; Codman v. Freeman, 3 Cush(Mass) 306; Goodnow v. Willard, 5 Mete(Mass) 517; Sexton v. Neviers, 20 Pick(Mass) 451, 32 Am Dec 225; Knowlton v. Bartlett, 1 Pick (Mass) 271; Campbell v. Phelps, 1 Pick 62, 17 Mass 244, 11 Am Dec 139; Larned v. Allen, 13 Mass 295; Draper v. Arnold, 12 Mass 449; Rice v. Hosmer, 12 Mass 127; Barnard v. Ward, 9 Mass 269; Esty v. Chandler, 7 Mass 464; Marshall v. Hosmer, 4 Mass 60; Grinnell v. Phillips, 1 Mass 530.

Mich.—Bostatter v. Hinchman, 229 NW 775, 243 Mich 589; Handy v. Clippert, 15 NW 607, 60 Mich 355; Prosser v. Coots, 15 NW 448, 60 Mich 262; Ackworth v. Kemp, Dougl. 50.

Minn.—Kroll v. Moritz, 127 NW 1120, 112 Minn 270; Albrecht v. Long, 25 Minn 163.

Miss.—Brown v. Weaver, 23 So 388, 76 Miss 7, 71 ASR 512, 42 LRA 423; State v. Dalton, 10 So 578, 69 Miss 611.

Mo.—State v. Moore, 72 Mo 285;

State v. Moore, 19 Mo 369, 61 Am Rep 563; Blunt v. Sheppard, 1 Mo 219; State v. Claudius, 1 Mo App 551.

N. H.—Haley v. Thurston, 60 NH 204; Rider v. Chick, 59 NH 50; Clough v. Monroe, 34 NH 381; Moody v. Mahurin, 4 NH 206; Morse v. Betton, 2 NH 184.

N. Y.—James v. Gurley, 48 NY 163; Sheldon v. Paine, 10 NY 308; Peo. v. Schuyler, 4 NY 173; Colvin v. Holbrook, 2 NY 126 (aff 3 Barb 475); Shea v. Conant, 134 NYS 315, 149 App Div 583, 3 NY Civ Proc (NS) 220; Beyer v. Sigel, 69 NE 1120, 177 NY 575, 75 App Div 83; McKinley v. Tucker, 59 Barb(NY) 93; Pond v. Leman, 45 Barb(NY) 152; Stewart v. Wells, 6 Barb(NY) 79; King v. Orser, 11 NY Super 431; Paddock v. Cameron, 8 Cow(NY) 212; Gorham v. Gale, 7 Cow (NY) 739, 17 Am Dec 549; Peo. v. Brown, 6 Cow(NY) 41; McIntyre v. Trumbull, 7 Johns.(NY) 35.

N. C.—Sutton v. Williams, 155 SE 100, 199 NC 546; Davis v. Moore, 2 SE(2d) 366, 215 NC 449, holding sheriff responsible for deputy's acts under doctrine of principal and agent; Styers v. Forsyth Co. 194 SE 305, 212 NC 558, distinguishing between a deputy appointed and one employed, and holding one employed is regarded as one with the sheriff or constable; Hannie v. Rice, 130 SE 380, 194 NC 234, 193 NC 900; McLean v. Buchanan, 53 NC 444; Martin v. Martin, 47 NC 285; Tarkinton v. Hassell, 27 NC 359; Lyle v. Wilson, 26 NC 226; Satterwhite v. Carson, 25 NC 549.

Okl.—McLain v. Arnold, 174 P 563, 73 Okl 52.

Or.—Bowles v. Creason, 66 P(2d) 1183, 156 Or 278; see also, 78 P(2d) 324, holding liability for act done in official capacity, under color of office and by virtue of office.

Pa.—Wilbur v. Strickland, 1 Rawle (Pa) 458; Wheeler v. Hambright, 9 Serg & R(Pa) 300.

S. C.—Hazard v. Israel, 1 Binn(SC) 240, 2 Am Dec 438; Jentry v. Hunt, 13 SCL 410; Teasdale v. Hart, 2 SCL 173.

Tenn.—Ivy v. Osborne, 279 SW 384, 162 Tenn 470; Love v. Bass, 238 SW 94, 145 Tenn 522; Wiseman v. Bean,

[1 Anderson on Sheriffs]—2

2 Heisk (Tenn) 300; Draper v. State, 1 Head (Tenn) 262; Atkins v. Scarborough, 9 Humph. (Tenn) 517; Estes v. Williams, Cooke (Tenn) 413.

Tex.—Fox v. Cone, 13 SW(2d) 65, 118 Tex 212; Rich v. Graybar Electric Co. 84 SW(2d) (Tex Com App) 708.

See also, Hohn v. Graybar Electric Co. 60 SW(2d) 1065. Holding difference in liability as between sheriff and constable for acts of deputy.

Singer Sewing Machine Co. v. Mendoza, 62 SW(2d) (Tex Civ App) 656. The fact appointment of deputy must be confirmed by commissioners, court, or county commissioners is no defense. King v. Brown, 94 SW 328, 100 Tex 109 (rev 41 Tex Civ App 598, 93 SW 1017); Herring v. Patten, 44 SW 50, 18 Tex Civ App 147; Tarver v. Carter, 42 SW (Tex Civ App) 229; Luck v. Zapp, 21 SW 418, 1 Tex Civ App 528.

Vt.—Stimpson v. Pierce, 42 Vt 334; Seaver v. Pierce, 42 Vt 325; Bradley v. Chamberlain, 31 Vt 468; Newbury Bank v. Baldwin, 31 Vt 311; Mason v. Ide, 30 Vt 697; Abbott v. Kimball, 19 Vt 551, 47 Am Dec 708; Wetherby v. Foster, 5 Vt 136; Johnson v. Edson, 2 Aik(Vt) 298; Smith v. Joiner, 1 D Chipm(Vt) 62.

Va.—Allenbaugh v. Coakley, 75 Va 628; Sage v. Dickinson, 33 Gratt (74 Va, 361; Mosby v. Mosby, 9 Gratt (50 Va) 584; Scott v. Tankersley, 10 Leigh (37 Va) 581; Douglass v. Stumps, 5 Leigh (32 Va) 392; Moore v. Dawney, 3 Hen & M (13 Va) 127; James v. McCubbins, 2 Call (6 Va) 273; Armistead v. Marks, 1 Wash (1 Va) 325; White v. Johnson, 1 Wash (Va) 159.

See also, Stowers v. Smith, 5 Munf (19 Va) 401.

Wash.—Coles v. McNamara, 230 P 430, 131 Wash 377; Young v. Long, 214 P 821, 124 Wash 400; Kusak v. McCorkle, 170 P 1023, 100 Wash 318.

W. Va.—Lucas v. Locke, 11 W Va 81.

Wis.—Gebhardt v. Holmes, 136 NW 860, 149 Wis 428; Sprague v. Brown, 40 Wis 612; Cotton v. Marsh, 3 Wis 221.

Eng.—Wright v. Child, LR 1 Exch 358; Smart v. Hutton, 8 A & E 568, 35 ECL 734, 112 Eng Reprint 954 note; Gregory v. Cotterell, 5 E & B

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the extent that the misconduct is stamped with official approval.<sup>63</sup> It is no defense to the sheriff that his subordinate in the commission or omission of the act for which the sheriff is called to account labored under a misapprehension of the lawfulness of his conduct.<sup>64</sup> Since the bond of the deputy is, as a rule, for the protection of the sheriff, it should name him as the obligee,<sup>65</sup> however, the rule is different in some states by virtue of statutory enactments. While deputy sheriffs are more than mere agents, such deputy cannot be held liable for the acts of other deputies over whom he has no authority, or, generally speaking, for matters beyond his own sphere of activity.<sup>65a</sup>

§ 21. Distinction between Sheriff and Undersheriff and Bailiff.—There is a marked distinction recognized in English law as to the subordinates of the sheriff. The undersheriff had powers and duties measured by the limits of that of the sheriff and in the event of the death of the sheriff he succeeded to the office and discharged the duties and performed the functions thereof until a successor was lawfully provided. A bailiff in England was a sort of a deputy sheriff but appointed to a fairly limited territorial jurisdiction or subdivision of the county.<sup>66</sup> The distinction, however, with respect to the rank, dignity and authority of the sheriff's subordinates and assistants, is not generally recognized in the American jurisdictions.<sup>67</sup> The legal provisions providing for and creat-

571, 65 ECL 571, 119 Eng Reprint 593; Anonymous, Lofft. 81, 98 Eng Reprint 543.

Man.—Massey-Harris v. Mollond, 15 Man 364, 1 West LR 424.

Ont.—Holt v. Jarvis, Draper (Ont) 190; Ross v. McMartin, 7 UCQB (Ont) 179.

Newfoundl.—Bennett v. Stephenson, 4 Newfoundl 444.

63. Ky.—Murrell v. Smith, 3 Dana (Ky) 462, 33 Ky 462.

Me.—Kelley v. Tarbox, 66 Atl 9, 102 Me 119; Whitney v. Farrar, 51 Me 418.

N. H.—Morse v. Betton, 2 NH 184.

Vt.—Hutchison v. Parkhurst, 1 Aikens (Vt) 258; Wetherby v. Foster, 5 Vt 136.

See also footnote 62 supra.

64. Ala.—Rogers v. Carroll, 20 So 602, 111 Ala 610.

Reichman v. Harris, 252 Fed 371, 164 OCA 295.

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65. Murfree on Sheriffs, Sec. 14. But the omission in this regard is a mere irregularity and is not fatal. See Sec. 19, notes 58 and 59, supra.

65a. Maciejczak v. Bartell, 60 P(2d) 31, 187 Wash 113.

66. 8 Bacon's Abridgement 671; Chamberlain v. Goldsmith, 2 Brownl 281; Norton v. Semmes, Hob 13 (c).

67. Murfree on Sheriffs, Sec. 15. See, however, Secs. 1043, 1044, New Ed. It seems in some states a deputy or undersheriff may succeed to the duties of the sheriff to a limited extent where the sheriff absconds; and it seems the sheriff's bond secures the faithful performance of the duties of such deputy or undersheriff.

See also, McCluskey v. McNeely, 8 Ill 578; Greeup v. Stoker, 12 Ill 24; Ballance v. Loomias, 22 Ill 62; Newman v. Beckwith, 61 NY 605; Newman v. Beckwith, 5 Lans 80; Paddock v. Cameron, 8 Cow (NY) 212.

[1 Anderson on Sheriffs]



ing these officers are generally found to be expressed in the broadest terms. The reason of this is that they are regarded as assistants, or aides, of the sheriff and the control of their actions and regulation of their conduct are largely committed to the sheriff since he is, and of necessity must be, answerable for their defaults and misdeeds. The law is not so much concerned with the appointment of these assistants, or their qualifications before assuming to act as such. An apt illustration of this rule of law is found in the fact that, if the sheriff permits a person who has neither given bond nor taken upon himself an oath, nor otherwise attempted to comply with the law, to act as a de facto deputy, even though he has never been appointed by express authority of the sheriff, and there exists no written proof of his authority to act, the sheriff will be responsible for the misdeeds and defaults of such de facto deputy.<sup>68</sup>

§ 22. Removal of Undersheriffs, Bailiffs, and Deputies.—In the absence of statutory or constitutional provision from the very nature of the character or relation between a sheriff and his deputies or other subordinates appointed by him, it is reasonable that the sheriff, as principal of, and responsible for, such subordinates should freely be permitted to remove the same. This is true with respect to so called undersheriffs, bailiffs and the like, appointed in the capacity of deputies, or quasi or analogous position.<sup>69</sup> Indeed it follows as an illative consequence of the power of appointment that the sheriff may remove a deputy where not prohibited by statutory terms or a constitutional provision with or without cause and the fact that the deputy has given bond which will indemnify the sheriff in case of official neglect or other misconduct for which the sheriff would be responsible does prevent a removal of the deputy notwithstanding an agreement between them that the deputy should hold his office as long as the sheriff continued in office, the sheriff may still remove such deputy.<sup>70</sup> It must not be understood, however, that the deputy is without his civil remedy against the sheriff for wrongful removal, in violation of an enforceable contract, but if the deputy has been guilty of

68. *Bosley v. Farquer*, 2 Blackf. (Ind) 61; *McCoy v. Key*, 123 So 873, 155 Miss 64; *Pickens v. McNutt*, 20 Miss 651, 12 Smedes & M 651; *Mann v. Martin*, 82 Ky 242, 6 Ky L Rep 340; *Dean v. Brannon*, 104 So 173, 130 Miss 312; *Wiseman v. Bean*, 2 Heisk (Tenn) 300; *State v. Allen*, 27 NC 36; *Buchanan v. McIntosh*, 24 NC 53.

69. *Norton v. Semmes*, Hobert 13 (a); *Edmunds v. Barton*, 31 NY 495; *Crooms v. Reichman*, 8 Tenn Civ App 86; *Sheriff Salt Lake County v. Salt Lake County*, 268 P 783, 71 Utah 593; *Hoge v. Trigg*, 4 Munf (Va) 150.

70. *Sheriff v. Salt Lake County*, supra; *Hoge v. Trigg*, supra.

misconduct, warranting the removal, then he is without any right of action against the sheriff.<sup>71</sup> A sheriff's office and that of a board of county commissioners are coordinate branches of the county government and it may be stated, as a general proposition that a sheriff, in performing his powers and duties prescribed by statute, acts independently of the board of county commissioners except as otherwise restricted or specified by statutory provision. The sheriff and not the county commissioners is the one to exercise the right of removal of deputy sheriffs.<sup>72</sup> The view that the sheriff has the right of removal, or suspension of, his deputy is in harmony with a statutory enactment that "any officer appointing any deputy shall be liable for all official acts of such deputy" which is in recognition of the principle that those in charge of and responsible for administering functions of government, who select their executive subordinates, needed in meeting their responsibilities, have the power to remove or suspend those they appoint. It would be an anomaly to allow a board of county commissioners to remove a sheriff's deputy, for certain it is that such board is not, nor any of its members, officially or individually, in any sense, civilly or otherwise liable for the official acts of a deputy sheriff, but the sheriff is so civilly liable.<sup>73</sup> A sheriff has the right to remove in a summary manner a deputy, notwithstanding the fact that there exists a statutory provision to the effect that a deputy sheriff shall be removed on complaint of certain officers charging that such deputy is failing in the discharge of his duties in a satisfactory manner.<sup>74</sup> It seems that such removal may be effected by any sort or kind of written notification to the deputy affected thereby, but no particular formality is requisite to make such removal operative unless required by statutory provision.<sup>75</sup>

§ 23. Sheriff Cannot Abridge Powers of Deputy.—While it is

71. *Hoge v. Trigg*, supra.

72. *Sheriff Salt Lake County v. Salt Lake County*, supra.

In the last cited case it is said "whatever summary power of suspension of, or removal of a deputy may be exercised is, to be exercised by the sheriff and not by the board of county commissioners, except as may directly or indirectly result from a determination by the board that the services of the deputy or deputies theretofore appointed are no longer necessary, and even then we think it would be with-

in the province of the sheriff to indicate which of his deputies were to be retained and which dismissed or let out, unless the commission had determined that the service of no deputy longer was necessary."

73. *Sheriff of Salt Lake County v. Salt Lake County*, supra; *Myers v. U. S.* 47 S Ct 21, 272 US 62, 71 L ed 160. See also *State v. McIntyre*, 25 Minn 383.

74. *State v. Goldsmith*, 81 SE 147, 96 SC 484.

75. *Edmunds v. Barton*, 31 NY 495.

necessary, as we have seen, both for the public welfare and the safety of the sheriff that his deputies be removable by him, yet the sheriff cannot limit or abridge the powers of his deputy while he permits him to act, and an agreement or undertaking on the part of a deputy sheriff, or other subordinate, to refrain from the execution of certain process or a limit placed upon the amount involved as warranting the deputy to handle process, such an agreement is void as being against law and justice, for, since being made a deputy or undersheriff, he has the power to execute all process, and he could, no more than the sheriff, himself, agree not to execute process without another's special consent, for such an agreement would operate to deny or delay justice. Another reason assigned to deny the power of the sheriff to abridge the authority of his deputy is that the office of a deputy, or undersheriff, is an entirely indivisible thing and can neither be granted, nor taken away, nor removed in parts or parcels, and public policy requires that citizens and suitors have a right to expect of an officer the full exercise of his official powers and they are not to be hampered by a secret understanding or a restricted grant of powers between the subordinate officer and the superior, for, to do so, would impose restrictions and limitations upon the authority of the deputy, which are coextensive with those granted to the sheriff and of such secret instructions the citizenry and persons dealing with the sheriff's office would be unadvised.<sup>76</sup>

§ 24. **Contract Not to Remove a Deputy Illegal.**—We have had occasion to touch upon the effect of a contract against removal of a deputy sheriff<sup>77</sup> but it seems helpful at this time to consider the validity of such a contract. It may be stated as a general rule and sustained on principles of honesty, right and reason that a contract entered into between a sheriff and his deputy, whereby the deputy is to hold such office during the tenure of the sheriff, is void as offending against public policy.<sup>78</sup> A great law writer, whose greatness has been enhanced by the passage of time, has said "surely nothing can be more prejudicial to the good of the public than to have places of the highest concernment, on the due execution whereof the happiness of both the King and people depend, disposed of, not to those who are the most able to execute

76. *Norton v. Semmes*, Hobert 13 (c-d); *Chamberlain v. Goldsmith*, 2 Brownl 281.

77. See Sec. 22, *supra*.

78. *Outon v. Rodes*, 3 AK Marsh 432, 13 Am Dec 193.

See also Sec. 22, *supra*.

them, but to those who are the most able to pay for them."<sup>79</sup> A very fine distinction, however, has been drawn in connection with the topic we have under discussion and that is that if the deputy is to pay out of his fees for an agreement to hold the office, if such fees should amount to a specified sum, it was held to give to the contract validity, but, if the agreement is to pay it out of the profits and a definite fixed certain sum, at all events, then the agreement would be stamped with the law's disapproval and no validity could be asserted for it.<sup>80</sup> But after all the fact stands out in bold relief that an irrevocable contractual deputation made by a sheriff and bestowed upon a subordinate for a time certain in the appointee, surely cries aloud its breach of the rule forbidding the sale of offices and is in every sense of the phrase "letting of the office to farm."<sup>81</sup>

§ 25. **Sheriff's Commission.**—It is generally provided by law that upon being elected or appointed to the office of sheriff, he is entitled to have issued to him by the governor, or by other appropriate or designated authority, a commission which is a muniment of title to the office. But, it seems that the failure of the governor, or other authorized authority, to issue a commission to a duly elected sheriff does not militate against his power to act in his official capacity, unless the holding of such commission is prescribed by constitutional or statutory law as a condition precedent to the assumption of, on the part of such sheriff, the duties and functions of the office.<sup>82</sup> If the constitution or statutes of the particular jurisdiction inhibit one elected to the office of sheriff from acting in that capacity until the bond prescribed by law has been duly executed, approved and filed and until such time as a commission can be issued, before such an officer can act, he must be in possession of the muniment of title to the office.<sup>83</sup> Although a commission may have been issued by the proper and lawful authorities, still if it contains the name of and is delivered to a person who was not elected to the office of sheriff, the error may be corrected by the issuance of a commission to the person lawfully

79. 1 *Hawkins Pleas of the Crown*, 415.

See however, Sec. 22, *supra*.

80. *Godolphin v. Tudor*, 1 Bro Ch Cas 101, 2 Salk 467, 6 Mod 234.

See also, *Hoge v. Trigg*, 4 Munf (Va) 150.

81. *Murfree on Sheriffs*, Sec. 19.

82. *State v. Pool*, 41 Mo 32; *Richardson v. Croft*, 17 SCL 264, 1 *Bailey's Law* 264; *State v. Morrison*, 41 Mo 238; *Graves v. Hayden*, 2 *Litt(Ky)* 61.

83. *State v. Howell*, 131 So 320, 100 Fla 1391.

entitled thereto.<sup>84</sup> It is immaterial that a sheriff's commission, otherwise lawfully issued, is dated prior to the expiration of the term of the predecessor in office, provided, of course, that such commission cannot become effective until the expiration of such preceding term.<sup>85</sup> Where two persons were successively granted commissions for the office of sheriff, and they each had failed to qualify as was required by law, by failing to give the bond within the time prescribed, a second commission could not thereupon be issued to the person first commissioned.<sup>86</sup>

§ 26. *Mode of Selecting the Coroner.*—Under the common law of England and in that country the Chief Justice of the King's Bench was coroner *virtute officii* and he was designated the chief coroner of the realm.<sup>87</sup> There were also recognized at that period in the history of the common law certain other coroners aside from those found in each county.<sup>88</sup> However, the general coroners of the different counties in England were elected by certain classes of voters at different periods of time and the office of coroner did not terminate upon the demise of the monarch of England.<sup>89</sup> At that period of time, in order to vote for a coroner, it was necessary to be the possessor of legal freehold and neither an equitable freehold nor a right of common in gross would confer the right to vote.<sup>90</sup> It may be stated, without the necessity of citation of authority, that in the American jurisdictions a coroner is generally elected for each county in every state and he is elected as other county officers, by a popular vote of the people. In at least two states the ancient office of coroner has been supplanted by what is designated as medical examiner.<sup>91</sup>

In some jurisdictions justices of the peace are empowered to act as coroners,<sup>91a</sup> and in others they may only act as coroners when the office is vacant or the coroner is ill, or cannot act for any legitimate reason, such as in cases where he is located a great dis-

84. *Gulick v. New*, 14 Ind 93, 70 Am Dec 49.

85. *Treasury, Commissioners v. Muse*, 5 SCL 150, 3 Brev 150.

86. *Bowers v. Millar*, 3 Munt 17 (Va) 492.

87. 2 *Hale Pleas of the Crown*, 53.

88. In re: *Local Government Act*, 1 QB 22, 85 JP 279, 01 LJQB 27, 65 LTR(NS) 614; *Jewison v. Dyson*, 11 LJEx 401, 9 M & W 540, 2 *Hale's Pleas of the Crown* 53.

89. In re: *Salop* 3 Swanst 181, 2

*Hale's Pleas of the Crown* 55, 22 *Hawkins Pleas of the Crown*, Ch. 9, Sec. 5.

90. *Reg. v. Day*, 2 CLR 1695, 3 E & B 859, 1 Jur(NS) 107, 23 LJQB 317, 2 *Week Rep* 515, 77 ECL 859; 1 *Bouvier's Law Dict.* p. 682.

91. In re *Senior*, 117 NE 618, 221 NY 414, 167 NYS 140, 179 App Div 746, 107 NYS 96.

91a. *State v. Mackles*, 109 So 410, 161 La 187; *Faucett v. State*, 134 P 839, 10 Okla Cr 111; *Stewart v. State*, 6 Tex App 184.

tance from the place of holding an inquest.<sup>91b</sup> But in the absence of statute, the powers of coroner may be lawfully exercised by none other than that officer.<sup>91c</sup> In some jurisdictions, the sheriff is *ex officio* coroner, as is also the county attorney.<sup>91d</sup> When an officer is authorized by law to perform the functions and discharge the duties of coroner, he has all the power, jurisdiction and authority of the coroner.<sup>91e</sup> So, where an officer is *ex officio* justice of the peace, such officer may perform the duties of coroner if any other justice of the peace could do so.<sup>91f</sup>

§ 27. *Qualifications and Eligibility of a Coroner.*—In the event that statutes or constitutional provisions prescribe certain qualifications rendering one eligible to hold the office of coroner, such laws are controlling and where a statute provides that in order to be eligible to hold the office of coroner one must be a practicing physician in good standing, such enactment is valid.<sup>92</sup> However, where it is provided by statute that in order to hold the office of coroner an official oath must be filed and a bond executed; filed and approved such statutes are directory in character and are not raised to the dignity of being mandatory.<sup>93</sup> The consequences attaching to a failure to comply with these requirements do not operate to avoid the acts of such coroner, who is classified as a *de facto* coroner, insofar as the rights of the public and third parties are concerned. However, such default may work a forfeiture of the right to hold the office, together with all of the benefits flowing therefrom. Where, however, a bond has been duly filed and it appears that the coroner has assumed to discharge the official duties of his office, a presumption will be indulged of the approval

91b. *Rio Grande Co. v. Wilson*, 55 P 1082, 26 Colo 29; *Earley County v. Jones*, 21 SE 828, 94 Ga 679; *Iroquois Co. v. Viets*, 59 Ill App 175; *Dubois Co. v. Wertz*, 13 NE 874, 112 Ind 268; *Stevens v. Harrison Co.* 46 Ind 541; *State v. Errickson*, 40 NJL 159; In re *Coroner's Inquest*, 28 Pa Co 428; In re *Coroner's Inquest*, 1 Pa Co 14, 3 Kulp 451; In re *Kribbs*, 2 Blair Co (Pa) 302; In re *Reitnauer*, 14 Pa Co 46.

91c. *Ex p. Schultz*, 6 Whart(Pa) 269. Sufficiency of the reason for another acting in the place of the coroner presents a question of law. Sec. 32, note 13, *infra*.

In re *Missimer*, 15 Pa Dist 176.

91d. *More v. San Bernardino Co.* 160 P 702, 31 Cal App 388; *State v. Moorhead*, 159 NW 412, 100 Neb 298.

91e. In re *Coroner's Inquest*, 1 Pa Co 14, 3 Kulp 451; *State v. Moorhead* supra; *More v. San Bernardino Co.* supra.

91f. *Pickett v. Erie Co.* 19 Wkly N C(Pa) 60.

92. *Board of Revenue of Jefferson County v. State*, 74 So 364, 199 Ala 260.

93. *McBee v. Hoke*, 2 Speers(SC) 138; *State v. Texas County Court*, 44 M. 230; *State v. Falconer*, 44 Ala 696; *State v. Feucht*, 161 So 179, 182 La 134, 157 So 557.

of the sureties on the bond.<sup>94</sup> A continuous acting as coroner over a long period of time may operate to raise a presumption in favor of the purported incumbent having qualified as required by law.<sup>95</sup> So too, levy of an execution by one acting as coroner, although he had failed to give bond, is valid where a commission has been duly issued to him and he has taken the oath of such office prescribed by law since he will be regarded in law as a *de facto* officer.<sup>96</sup>

§ 28. **Nature of the Office of Coroner.**—There exists in the reported cases a great diversity of opinion as to the nature and character of and the functions attaching to the office of coroner. Some opinions hold that the coroner does not act in a judicial capacity in holding an inquest, since the result of such a holding does not fix or adjudicate the rights of anyone, which these courts insist is an essential element of the exercise of judicial power.<sup>97</sup> In consonance with this line of holdings, where the coroner has the power to direct an autopsy it is asserted that this is the exercise of ministerial jurisdiction and subject to review by the courts.<sup>98</sup> On the other hand, there are adjudications sustaining the view that the functions of the coroner are variously classified as partly judicial, quasi judicial and judicial.<sup>99</sup> It is thought, however, that the line of decisions sustained by the better reason are those cases holding that a coroner is a quasi judicial officer. In addition to any quasi judicial, or other functions of a coroner partaking of the exercise of judicial power, he, of course, acts in a ministerial capacity when he is discharging the duties of a sheriff.

§ 29. **Term of Office of the Coroner.**—The term of office of a

94. *Mabry v. Turrentine*, 30 NC 201; *State v. Feucht*, supra; *Young v. Com.* 6 Binn(Pa) 38.

95. *Apthorp v. North*, 14 Mass 167.

96. *Nason v. Dillingham*, 15 Mass 170.

97. *Stults v. Allen County*, 81 NE 471, 108 Ind 539, 11 Ann Cas 1021; *Cox v. Royal Tribe of Joseph*, 71 P 73, 42 Ore 305, 60 LRA 620, 95 ASR 752; *Hendrickson v. Peo.* 10 NY 13, 16 Am Dec 721, 9 How Pr 155, 1 Park Cr R 416.

98. *Sandy v. Morgan*, 97 NE 131, 171 Ind 674, 131 ASR 273.

99. *Rex v. Ferrand*, 3 Barn & Ald 260, 106 Eng Rep 659, 7 Eng Rul Cas Law 144; *Devine v. Brunawick-Bulke-*

*Collender*, 110 NE 780, 270 Ill 504, Ann Cas 1917B 887; *Peo. v. Jackson*, 84 NE 65, 191 NY 203, 15 LRA(NS) 1173, 14 Ann Cas 243. In the last cited case the question involved was the bribery of a coroner and he was prosecuted under a statute providing for the punishment of a judicial officer who received a bribe. By reason of the powers granted to the coroner in certain cases partaking of the character of a committing magistrate, it was determined by the New York court that the coroner was amenable to such statute. 1 Blackstone, pp. 348 et seq. 2 Hawkins Pleas of the Crown, Ch. 9; *State v. Perry*, 150 NE 78, 113 Ohio St 641; *Giles v. Brown*, 1 Mill(SC) 230.

coroner is usually prescribed by statute in the United States and with respect thereto the statutory law of the particular jurisdiction should be consulted. However, at one time in England they were chosen for life but were subject to removal under certain conditions.<sup>1</sup>

§ 30. **Coroner's Bond.**—At common law a coroner was required to possess certain property qualifications and being thus required to be a man of dignity and means at that period in the history of this office the coroner served without compensation.<sup>2</sup> Instead of exacting the property qualification, as at common law, coroners now generally, and particularly in the United States, are required to file a bond provided for by statute with sufficient sureties, containing the conditions set forth in such statute, which, in general, are conditioned upon the faithful discharge of the duties appertaining to the office.<sup>3</sup> Anyone suffering damages or injury by reason of misfeasance or nonfeasance of the coroner, in his official capacity, may make assignment of his cause of action for suit or otherwise bring an action thereon. The bond required to be given by a coroner covers the faithful performance and discharge of his duties when he is acting in the capacity of sheriff.<sup>4</sup> However, it seems that where a bond is required of the coroner by virtue of statute he is a *de facto* coroner though no such bond has been given. Informalities of the bond falling short of a strict compliance with the statutory exactions do not appear to relieve the sureties from liability thereon, and where bonds have been executed and filed and the coroner has assumed to act in an official capacity, a presumption will be indulged that the sureties on such bond have been duly approved.<sup>5</sup> Where a bond was delivered to the court designated by law for its approval, and was afterwards found in the records and files of the court, the presumption entertained was that it was approved as required by law and particularly this is true where the statute did not require a record of such approval to be made, only requiring such record where the court refused to approve it as insufficient.<sup>6</sup>

1. 1 Jones' Blackstone, p. 487; 1 Blackstone, p. 348; 2 Hawkins Pleas of the Crown, Ch. 9, Sec. 12; Hale's Pleas of the Crown, 56.

2. 1 Blackstone Com. 347, 348; 2 Hale's Pleas of the Crown, 55; Fitzherbert Nat. Brev 163; 2 Hawkins's Pleas of the Crown, Ch. 9, Sec. 3.

3. *Harris v. Hansen*, 11 Me 241; *Apthorp v. North*, 14 Mass 167; *Pickering*

*v. Pearson*, 6 NH 559.

4. *McBee v. Hoke*, 2 Speers(SC) 138; *Allbee v. Peo.* 22 Ill 633; *Tieman v. Haw.* 49 Ia 312; *McRae v. Evans*, 13 NC 383; *Mabry v. Turrentine*, 30 NC 201.

5. *Harris v. Hansen*, supra; *Apthorp v. North*, supra; *Young v. Com* 6 Binn(Pa) 88.

6. *Apthorp v. North*, 14 Mass 167.

Where, however, the statute required a recognizance in addition to the bond, no recovery could be had on the bond if the recognizance had not been given, as required by law, since it was declared that in such case the coroner's commission, and all his acts *colore officii* were void.<sup>7</sup> But the fact that the bond had not been recorded as required by statute did not prevent its being admissible in evidence against both the coroner and his sureties.<sup>8</sup>

§ 31. **Oath of Coroner.**—The statutory provisions and codes of the different states of the United States prescribed that the coroner shall take an oath of office substantially the same as the oath taken by other State, district, county or precinct officers.

§ 32. **Deputy Coroners.**—There exists no common law authority in a coroner to appoint a deputy. The reason assigned for this is that the nature of the functions of his office border on the judicial as well as ministerial in character.<sup>9</sup> In some states, however, by virtue of special provisions in the statutes or constitutions deputies or assistant coroners are provided for either to act as subordinates to the coroner or to perform the functions of that office when the coroner himself is unable to act by reason of illness or absence.<sup>10</sup> When a deputy once assumes to discharge the functions of the office of coroner and is actually engaged therein, he should complete the particular function undertaken, as holding an inquest, even though the coroner should thereafter appear.<sup>11</sup> It seems, however, that a deputy coroner, like other assistants and deputies, of state, district, county or precinct officers, should act in the name of the coroner, by him, as such deputy.<sup>12</sup> When it is made to appear that the coroner is absent holding another inquest, that is sufficient to warrant a deputy to proceed with the holding of an inquest, however, it is generally held that the lawfulness or reasonableness of the cause or excuse for the absence of the coroner is a question of law for the court to determine.<sup>13</sup> Instead of providing for deputy coroners, in many jurisdictions, it is enacted by statutory law that, if the coroner is absent, disqualified or unable

7. *Young v. Com.* supra.

8. *Young v. Com.* supra.

9. *Rex v. Ferrand*, 3 B & Ald 260, 5 ECL 156, 1 Chit 754, 18 ECL 407, 22 Rev Rep 375; *Matter of Dawes*, 8 A & E 936, 35 ECL 917, 112 Eng Rep 1095; *Ex parte Carruthers*, 2 M & R 397.

10. *State v. Duffy*, 2 So 184, 39 La

Ann 419; *Buttz v. Charleston Cty.* 17 SC 585; *Reg. v. Perkin*, 7 QB 165, 9 Jur 686, 14 LJMC 97, 53 ECL 165; *Reg. v. Johnson*, LR 2 CC 15, 12 Cox CC 204, 42 LJMC 41, 27 LRNS 801.

11. *Reg. v. Perkin*, supra.

12. *Reg. v. Perkin*, supra.

13. *Reg. v. Perkin*, supra; *Reg. v. Johnson*, supra.

to act, in holding an inquest, that one of the justices of the peace of the county may do so. A justice has a right to so act in pursuance of the statute when the office of coroner is vacant, or even when it is a great distance from the coroner's office to the place where it is necessary to hold such inquest.<sup>14</sup> It has been held that the meaning of a statutory provision authorizing a justice of the peace to hold an inquest in the absence of the coroner will be interpreted to the effect that, when there is an emergency for the holding of such inquest, and the coroner for any cause is so far out of the way as to be unable to reach the body and hold the inquest within a reasonable length of time, under all the circumstances, the properly designated justice of the peace, under the statute, may do so and perform all of the duties of the coroner in connection therewith.<sup>15</sup> Likewise, where the statute provides that a justice of the peace is empowered to hold an inquest over a dead body, when the office of the coroner is more than ten miles distant, such justice may hold an inquest over a body found more than ten miles from the coroner's office, in spite of the fact that the coroner has a deputy residing within ten miles of the place.<sup>16</sup> In the absence of a statutory enactment or a constitutional provision enabling a justice of the peace to perform the functions of the coroner, no such right exists at common law, since the common law vests the performance of such functions in the coroner alone.<sup>17</sup>

§ 33. **Removal of Coroner's Deputies from Office.**—It seems that the rules of law that may be amalgamated from analogous principles that the power of appointment generally carries with it, as an incident thereto, the authority to remove, in the absence of a restriction placed thereon by constitutional provisions or legislative act, is applicable to the office of deputy coroner, where such deputy is appointed by the coroner and there is no definite term of office prescribed for such deputy.<sup>18</sup> And by resort to like analogous principles it would seem that a coroner could not contract to retain a deputy in office for a definite or fixed period of time.<sup>19</sup>

14. *Stewart v. Texas*, 6 Tex App 184. See Sec. 26, note 91a et seq. *Dubois County v. Wertz*, 13 NE 874, 112 Ind 268; *Stevens v. Harrison County*, 40 Ind 541; *Early v. Jones*, 21 SE 828, 94 Ga 670; *Iroquois County v. Viets*, 59 Ill App 175; *State v. Errickson*, 40 NJL 159; *In re: Reitnauer's Inquest*, 14 Pa Co 46.

15. *Dubois County v. Wertz*, 13 NE 874, 112 Ind 268.

16. *In re Reitnauer's Inquest*, supra. See Sec. 26, note 91a et seq.

17. *Ex parte Schultz*, 6 Whart(Pa) 269.

18. 46 CJ p. 985.

19. *Barbor v. County Court of Mercer County*, 101 SE 721, 85 W Va 359;

However, there are authorities holding that if the deputy is to pay out of fees a portion thereof to the coroner, that such arrangement is not within the rule above enunciated and is not regarded as "selling the office" but is merely a dividing of the fees with the deputy.<sup>20</sup>

§ 34. **Liability of Coroner for Acts and for Deputy's Conduct.**—It would seem to be a rule of law deducible from similar principles applicable to other officers that a coroner would be liable for the misfeasance or nonfeasance or other misconduct of his deputy in the discharge of the duties of the office for, and on behalf of, the coroner, but since the functions of the office of coroner partake of the nature of judicial acts, the coroner himself is not liable for an error or mistake, or even misconduct, while acting in his judicial capacity.<sup>21</sup> It has even been held that a coroner is not liable for defamation of another's character while holding an inquest.<sup>22</sup> The judicial cloak so far protects a coroner against liability that it has been held he is not liable for ejecting another from a room where he is about to hold an inquest,<sup>23</sup> a fortiori a coroner would not be liable for the acts of his deputy in doing the things such as suggested above, or similar acts. Another application of the protection surrounding a judicial officer is found in the privilege from arrest extending to a coroner on civil process while on his way to holding an inquest and such privilege would embrace a deputy coroner also under the same circumstances, and if either a coroner or a deputy were arrested when on his way to, or while holding, or perhaps returning from the holding of an inquest, he would be discharged on a proper application by habeas corpus, or otherwise, to the court.<sup>24</sup> However, when a coroner, or his deputy, are

46 CJ 985; *Outan v. Rhodes*, 3 AK Marsh 432, 13 Am Dec 193; 1 *Hawkin's Pleas of the Crown*, 415. But, however, see *Godolphin v. Tudor*, 1 *Bio Parl Cas* 101, 2 Salk 467, 6 Mod 234; *Schloss v. Hewlett*, 1 SW 263, 81 Ala 266; *Groton v. Waldoborough*, 11 Me 306, 26 Am Dec 530; *Martin v. Royster*, 8 Ark 74; *Love v. Buckner*, 4 Bibb(Ky) 506; *Baldwin v. Bridges*, 2 JJ Marsh(Ky) 7; *Stockwell v. North*, Noy 101; *Davis v. Hull*, 1 Litt (Ky) 9.

20. *Godolphin v. Tudor*, supra; *Mott v. Robins*, 1 Hill(NY) 21, 37 Am Dec 286; *Culliford v. Cardinal*, Comb 356; *Greenhoods Public Policy*, pp. 338 et seq; *Hall v. Gavitt*, 18 Ind 390; *Carle-*

*ton v. Whitcher*, 5 NH 196; *Meredith v. Ladd*, 2 NH 517; *Cardigan v. Paige*, 6 NH 182.

21. *Smiley v. Allen*, 13 Allen (Mass) 465.

22. *Thomas v. Chirton*, 2 B & S 475, 8 Jur NS 705, 31 LJQB 139, 6 LT Rpt NS 320, 110 ECL 475. See also, 9 ERC 46.

23. *Garnett v. Ferrand*, 6 B & C 611, 9 D & R 667, 30 Rev Rep 467, 13 ECL 277, 108 Eng Rep 576; *Garner v. Coleman*, 19 UCCP 106.

24. *Ex parte Middlesex*, 6 H & N 501, 7 Jur NS 103, 30 LJ Exch 77, 3 Lt Rpt NS 754.

authorized to execute ministerial and executive duties and functions, and he is acting in such capacity, he is answerable for his misconduct in the same manner as any other ministerial or executive officer.<sup>25</sup> So where a coroner finds personal property on a dead body and rightfully takes possession of the same to the end that he may deliver it to the true owner, upon reasonable demand and satisfactory proof of ownership, but if he refuses to do so, an action of replevin or for trover as in conversion can be maintained.<sup>26</sup>

§ 35. **Mode of Selecting a Constable.**—The office of constable in the popular acceptance of that term is usually filled in the United States by an election, however, by an appointment in some states. The election or appointment is generally prescribed by statutory enactments or provisions of the organic law.<sup>27</sup> Of course, where the manner of filling the office of constable is the subject of a constitutional provision, it is controlling and any attempts on the part of the law making power of the jurisdiction to otherwise provide therefor are futile.<sup>28</sup> By way of illustration, if the constitution calls for the election of a constable, statutory provisions attempting to provide for filling the office by appointment are nugatory.<sup>29</sup> Likewise, where it is enacted by statute that constables shall be appointed, but such provision is thereafter modified by requiring an election, an appointment under the former statute is unavailing and so, too, any attempt on the part of a municipality or county to alter the manner of filling the office of constable contrary to that provided by statutory law is invalid.<sup>30</sup> It seems that where the statute provides for the appointment of a constable by the mayor and common council without any direction as to the mode or manner of the exercise of the conferred power, the mayor should nominate the constable, but such nomination is subject to confirmation by the council and an appointment, attempted to be made by the council of one not so nominated by the mayor, is illegal.<sup>31</sup> Where the appointment of a constable for a municipality is lodged in the mayor and city council, the proper manner of

25. *Smiley v. Allen*, 13 Allen (Mass) 465.

26. *Smiley v. Allen*, supra.

27. *White v. Manistee City*, 63 NW 653, 105 Mich 608; *Helena v. Biscoe*, 19 Ark 417; *State v. Sayer*, 31 Ohio Cir Ct 331; *Smith v. Thursby*, 28 Md 244.

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28. *Levin v. Hewes*, 86 Atl 233, 118 Md 624.

29. *Peo. v. Bollam*, 54 NE 1032, 182 Ill 528.

30. *State v. McKee*, 69 Mo 504; *Comfort v. Cumberland*, 23 Pa Co 414.

31. *Loper v. Millville (State v. Millville)* 21 Atl 668, 53 NJL 362.



exercising such power seems to be by ordinance.<sup>32</sup> Where it is the duty of a court or board to subdivide the county into districts and to designate the districts for which constables are to be appointed, an appointment of a constable for the whole county, it seems, is not void.<sup>33</sup> However, an effort to appoint a constable where it does not appear that the power may be lawfully exercised by the court or board attempting to do so is void.<sup>34</sup>

§ 36. **Eligibility of One for the Office of Constable.**—The common law required, and the same exaction is found in both statutes and constitutions, that the person filling the office of constable must reside in the district or territory which he is to serve.<sup>35</sup> The qualification that the candidate or applicant for the office of constable shall be a voter of the district may be and generally is required.<sup>36</sup> It seems that a resident who is subject to taxation in a town is a voter and therefore eligible to the office of constable, although at the time of the annual assessment next preceding the election he was a resident of another town, he being the owner of real estate in both towns and assessed in both.<sup>37</sup> A charge laid against one of having committed a criminal offense of which no conviction has been had is inoperative to render such person ineligible to fill the office of constable in the discretion of a court or board authorized to select such officer.<sup>38</sup> Where the statute prohibits the re-election of a constable who fails on or before a designated date of each year to pay over moneys collected by him to the treasurer, to which they are properly payable, the mere fact that certain taxes have not been collected, it being the duty of the constable to collect them, does not preclude the re-election of such person to the office of constable.<sup>39</sup>

§ 37. **Qualification and Bond of a Constable.**—It is sometimes provided by statute that a constable shall qualify for the office within a specified time and on failure to do so, the office becomes vacant. These statutes have been held both directory and mandatory.<sup>40</sup> It has been held, however, that before the office can be

32. Levin v. Hewes, supra.

33. Chambers v. Thomas, 1 Litt(Ky) 268, 3 AK Marsh(Ky) 536.

34. State v. Briggs, 25 NC 357.

35. In re Plymouth Borough Constable, 27 Pa Co 204; Barre v. Greenwich, 1 Pick (Mass) 129.

36. Wilson v. Wheeler, 55 Vt 446; Hutcheon v. Pitts, 278 SW 639, 170 Ark 248.

37. Wilson v. Wheeler, supra.

38. In re: Miller, 1 Browne(Pa) 349.

39. Town of Pawlett v. Kelley, 38 Atl 92, 60 Vt 398.

40. Franklin v. Kaufman, 65 Ga 260; Smith's Application, 28 Pa Dist 978; State v. Buchanan, 27 Atl 166, 65 Vt 445; Dutton v. Kelsey, 2 Wend (NY) 615; Bachmeier & Co. v. Semel, 163 Atl 126, 10 NJM 1172. Failure to

declared vacant, by reason of the failure to qualify, there must be a demand that the law respecting such qualification be complied with.<sup>41</sup> Where the constitution or statute provides that the neglect to qualify as required by law may be termed a refusal to accept the office, a failure to take the oath and give the bond within the prescribed time is usually treated as such refusal.<sup>42</sup> In all jurisdictions it is probably a requirement of statute, or constitution, that a constable shall give bond.<sup>43</sup> The purpose of the bond of course is to protect the town or district, or the public, from misconduct or failure to account in the discharging of official duties.<sup>44</sup> It seems, however, that the performance of the duties of constable, by one elected to that office without having given the qualifying bond, does not affect his official conduct and especially so where the delay in compliance with law with respect to such bond is with the consent of an official having the power to consent,<sup>45</sup> and the mere circumstance that a constable has not given the bond required by law until after he has entered upon the discharge of his official duties, or until after the expiration of the time allowed by law for the giving of such bond in order to qualify, does not invalidate the bond or thereafter render the office vacant.<sup>46</sup> Where the law provides for certain forfeitures by constable for every process executed by him before the giving of such bond is not construed to mean that the bond must be approved before the service of process without incurring the prescribed liability.<sup>47</sup> A bond of a constable exacted wrongfully and without lawful authority is void.<sup>48</sup> So, too, where the appointment or election of a constable is void for failure to comply with the law or upon the grounds of fatal irregularity a bond given by him is likewise void.<sup>49</sup> A lawful bond given by a constable is not rendered void by his temporary suspension from office but will be held to cover official conduct after being reinstated.<sup>50</sup>

qualify does not ipso facto work vacancy in or forfeiture of office.

41. Bank of Middlebury v. Rutland etc., R. Co. 30 Vt 159. See also, Leslie Co. v. Eversole, 2 SW(2d) 644, 222 Ky 793, involving renewal bond of sheriff; Bachmeier & Co. v. Semel, supra.

42. Little v. Schul, 84 Atl 640, 118 Md 454.

43. Franklin v. Kaufman, 65 Ga 260.

44. State v. Buchanan, 27 Atl 166, 65 Vt 445.

45. Langdon v. Rutland & W. R. Co. 29 Vt 212.

46. Dickens v. State, 7 Blackf (Ind) 358; Dutton v. Kelsey, 2 Wend(NY) 615; Westerhaven v. Clive, 5 Ohio 136.

47. Stacey v. Graves, 74 Me 368.

48. Woollick Township v. Forest, 2 NJL 115.

49. Little v. Powell, 24 NC 276; Little v. Wall, 24 NC 272.

50. U. S. v. Bill, 24 Fed Cas 14594, 2 Cranch CC 518.

§ 38. **Term of Office.**—The term of office of a constable in most of the American jurisdictions is fixed by statutes or by provisions of the constitutions and the provisions of such statutory enactments, or the terms of the constitutions will control as to the beginning and termination of the term of office. However, it is occasionally provided that the term commences and dates from the qualification instead of the date of election, or some other time.<sup>51</sup> Where, however, the term of office is not found to be specified in a constitutional provision the legislature may change such term. It may be shortened, lengthened or abolished although there is an incumbent in office, in the absence of an inhibition found in the organic law.<sup>52</sup> Of course, the constitution or statutes generally provide for the filling of the office of constable where a vacancy occurs. The vacancy it has been held exists where there is a failure to elect, or one is elected but fails to qualify, or by resignation, or by removal from office or by reason of the abandonment of the office.<sup>53</sup>

§ 39. **Evidence of Title to Office.**—It seems that where the records of a county show that a constable has given bond biennially, the last of which is not two years old, together with evidence that he was recognized as such, is sufficient proof of his incumbency without additional evidence of the taking of oath and the like, and indeed evidence that a certain person acted as constable and was reputed to be such, generally is admissible in proof that he was such officer.<sup>54</sup>

§ 40. **Deputy Constable.**—In some jurisdictions there are to be encountered provisions in constitutions or statutes providing for the constable to have, or appoint, deputies, and the statutes and constitution of the particular jurisdiction should be consulted with respect to the creation of such an office. But aside from this, since the functions of a constable are purely ministerial in character, he may, in the absence of statutory or constitutional provisions to the contrary act through and by a deputy, at least in the execution of a particular duty.<sup>55</sup> It seems, however, that while the

51. *State v. Parchmen*, 3 Head (Tenn) 609.

52. *Matter of Constable Election*, 13 Phila(Pa) 583; *In re Allegheny County Constable*, 17 Pa Co 622; *Hutcheson v. Pitts*, 278 SW 630, 170 Ark 248; *Little v. Schull*, 84 Atl 649, 118 Md 454; *Com. v. Benfield*, 5 Pa Dist 382; *Hillman v. Police Jury of Webster*, 133 So 839, 16 La App 237.

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53. *Franklin v. Kaufman*, 65 Ga 260; *King v. McLure*, 84 NC 153; *Peo. v. Davidson*, 83 P 159, 2 Cal App 96, see also, 83 P 161, 2 Cal App 100.

54. *Linville v. Black*, 5 Dana(Ky) 170; *State v. Row*, 46 NW 872, 81 Iowa 138; *Hart v. Robinett*, 5 Mo 11; *Johnson v. Stedman*, 3 Ohio 94.

55. *Kaysen v. Steele*, 44 P 1042, 13 Utah 200; *Jobson v. Fennell*, 35 Cal

common law authorizes a constable to appoint a deputy for a particular act, or in the performance of a certain duty, or to act as special constable, such as to serve a summons, or writ of replevin, or even a writ of execution, that he may not assume to appoint a deputy constable to act continuously or permanently.<sup>56</sup> Of course, if a statute provides for the appointment of a deputy constable then the directions of such provision should be followed. If it is required that the appointment of a deputy constable be endorsed upon the process he is to serve, a compliance therewith should be had.

§ 41. **Removal of Constable's Deputy.**—The power and authority of a constable to remove his deputy is in all respects analogous to that lodged in a sheriff and the rules with respect to the removal of deputies by the sheriff may be safely followed as a guide by a constable or his attorney.<sup>57</sup>

711; *Taylor v. Brown*, 4 Cal 188, 60 Am Dec 604; *Midhurst v. Waite*, 3 Burr 1259, 97 Eng Rep 621; *Rex v. Clark*, 1 TR 679, 99 Eng Rep 1317.

56. *Kaysen v. Steele*, 44 P 1042, 13 Utah 200, where the court said: "The case of *Jobson v. Fennell*, 35 Cal 711, cited by appellant, holds that the common law rule applies, and that a constable may act by deputy in the exercise of their ministerial functions. If the court meant by this that a constable may appoint a permanent deputy to discharge generally the duties of his office, then we are not inclined to adopt its views." *Lawson v. Buzi*

nes, 3 Del (3 Har 416) 416; *New Albany, etc., R. Co. v. Grooms*, 9 Ind 243; *Prickett v. Cleek*, 11 P 49, 13 Ore 415; *Standard Dev. Co. v. Broz*, 168 NE 615, 90 Ind App 265, where it was said: "Under the common law the bailiff had the right and power to appoint another to do a particular act if the act to be performed was within the power of the regularly appointed or elected bailiff." But however, see, *Stacy v. Bernard*, 78 P 616, 20 Cal App 293; *Gordon v. Knapp*, 1 Scamm (2 Ill) 488.

57. See Sec. 22.

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## CHAPTER II

## SHERIFFS, BONDS, AND DEPUTIES

## SECS.

42. Powers and Duties of Sheriff Implied from Name and Nature of His Office.
43. Rights of the Sheriff as Constitutional Officer.
44. The Sheriff Essentially a Common Law Officer.
45. The Qualifications of a Sheriff, His Oath and Bond.
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## SECS.

83. Resistance to Deputies.
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§ 42. Powers and Duties of Sheriff Implied from Name and Nature of His Office.—A sheriff is an officer of great antiquity, dignity, trust and authority. He was chief officer to the King within his county; no suit began, no process was served, but by the sheriff. He was to return indifferent juries for the trial of men's lives, liberties, lands, goods, etc. At the end of suits he was and still is required to make execution which is the life and fruit of the law. So it is seen that original process moved and was directed to the sheriff, subsequent proceedings were circulated in him and were at last finished and completed by him. And if execution be the life of the law, as it is alleged to be, it seems (as one says) to be seated in the sheriff as in the heart which is *primum vivens* and *ultimum moriens*. The sheriff is also the principal conservator of the peace within the county which is the life of the commonwealth.<sup>1</sup> The powers and duties of a sheriff as implied from the name and nature of his office are still the same today as they were at common law, except, insofar as it has been modified by constitutional and statutory provision.<sup>2</sup> He is still an officer of the court and subject to its orders and directions.<sup>3</sup> The sheriff is still made re-

1. Coke Litt 168. Dutton on Sheriffs III et seq.

2. Merrill v. Phelps, 84 P(2d) 74, 52 Ariz 626, wherein it is said: "Under the common law of England, the judges did not sit solely in certain particular territorial areas. Their jurisdiction extended to all parts of the country, and they held court part of the time at Westminster, and part of the time in such places as the business of the nation required. When they exercised the latter function, it was the custom from time immemorial that the sheriff of the county in which the court was to be held, who was the chief administrative officer of that county, met the judge as he entered the county and from that time on furnished him all attendants and other conveniences necessary to carry on the business of the court, obeying its orders in all respects as to what was done. As time went on, however, the

office of sheriff, which originally was a very important one in connection with the administration of justice, became more or less of an honorary and ornamental position, and the courts gradually took over many of the functions theretofore exercised by the sheriff. Murfree on Sheriffs, Sec. 427. The common law of England, so far as applicable to our circumstances and conditions, is the law of Arizona."

3. Levine v. Levine, 115 Atl 243, 44 RI 61; Merrill v. Phelps, supra; In re Garner, 10 Fed Supp 380; State ex rel. Andrews v. Superior Court of Maricopa County, 5 P(2d) 192, 39 Ariz 242; Chapman v. Thornburgh, 17 Cal 87, 78 Am Dec 571; Goodrich Rubber Co. v. Valley Plumbing Co. 267 SW (Tex Civ App) 1036; Harston v. Langston, 292 SW (Tex) 648, wherein it is said: "A sheriff is an officer of the court, under duty to execute process, but is not a tribunal to determine

sponsible as conservator of the peace and protector of society against vice and crime.<sup>4</sup>

§ 43. **Rights of the Sheriff as Constitutional Officer.**—Where the sheriff is named in the Constitution his duties are the same as they were at the time the Constitution was adopted.<sup>5</sup> Where the office of sheriff is named as a constitutional officer the people intended that those officers should exercise the powers and perform the duties then recognized as appertaining to the respective offices which they were to hold. This thought is well expressed in an early Wisconsin case.<sup>6</sup> "Now it is quite true that the constitution nowhere defines what powers, rights and duties shall attach or belong to the office of sheriff. But there can be no doubt that the framers of the Constitution had reference to the office with those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the Constitution was adopted."<sup>7</sup> While the legislature may impose additional duties upon the sheriff, where he is recognized as a constitutional officer, it cannot restrict or reduce his powers as allowed by the Constitution, or as they were recognized when the Constitution was adopted.<sup>8</sup>

§ 44. **The Sheriff Essentially a Common Law Officer.**—From the very title and by virtue of occupying the office of sheriff it carries with it all the common law powers and duties, except as modified by the State Constitutions and by statutes.<sup>9</sup> The sheriff is the chief law enforcement officer in the county today even as he was at common law. His jurisdiction is co-extensive within the county including all municipalities and townships.<sup>10</sup> Where the State constitution provides for the election of that officer without prescrib-

doubtful questions of fact, which the sheriff undertook to do in this case."

4. *Sawyer v. Commissioners of Androscoggin County*, 102 Atl 220, 116 Me 408.

5. *State ex rel. Johnson v. Melton*, 73 P(2d) 1334, 192 Wash 379.

6. *State ex rel. Kennedy v. Brunst*, 20 Wis 412, 7 Am Rep 84.

7. *State ex rel. Kennedy v. Brunst*, 20 Wis 412, 7 Am Dec 84; *Ex parte Corliss*, 114 NW 962, 10 ND 470; *State v. Melton*, 73 P(2d) 1334, 192 Wash 379.

In the cited case, the court in referring to *Kennedy v. Brunst*, 20 Wis 412, 7 Am Dec 84, said: "Lest it should be thought that the Wisconsin case just

referred to is too old (1870) to be considered persuasive authority in these modern days, we also refer to *Ex parte Corliss*, 10 ND 470, 114 NW 962, 964; *Merrill v. Phelps*, 84 P(2d) 74, 52 Ariz 526; *State ex rel. Llewellyn v. Knox County*, 54 SW(2d) 973, 105 Tenn 319; *Sawyer v. Commissioners of Androscoggin County*, 102 Atl 220, 116 Me 408.

8. *Merrill v. Phelps*, 84 P(2d) 74, 52 Ariz 526; *State v. Melton*, 73 P(2d) 1334, 192 Wash 379.

9. *State v. Reichman*, 188 SW 225. Rehearing denied, 188 SW 597, 135 Tenn 685.

10. *In re Sulzmann*, 183 NE 531, 125 Ohio St 594.

ing in express conditions the duties which shall attach to the office, it is presumed that the duties are those attaching to the office of common law.<sup>11</sup>

§ 45. **The Qualifications of a Sheriff, His Oath and Bond.**—As to the oath of a sheriff, no litigation has been known to have grown out of that and there are no decisions in the United States or in England regarding that subject. The qualifications for a sheriff vary from State to State. In Ohio, a sheriff who has served more than two years is not eligible for re-election.<sup>12</sup> It has likewise been held in Ohio that where a sheriff was elected to fill an unexpired term he was eligible to succeed himself.<sup>13</sup> It was held in Wisconsin<sup>14</sup> that he was not eligible to succeed himself. Where a person has been elected to fill an unexpired term as sheriff, he cannot receive a commission to act as such until his bond is approved and he has otherwise qualified.<sup>15</sup> An alien, not a qualified elector, is not qualified for the office of sheriff.<sup>16</sup> The statutory provisions for the approval and filing of sheriff's bond are for the security and protection of the public.<sup>17</sup> Where the approval of the bond of the sheriff rested with the county judge, failure to sign the order of approval did not make the bond void, but it may be signed afterward by his successor.<sup>18</sup> In many states the board of county commissioners are empowered to approve the sheriffs' bonds of their counties.<sup>19</sup> An incumbent sheriff has been held disqualified where he fails to account for taxes collected during his prior term and the board of county commissioners may appoint another to act as sheriff.<sup>20</sup>

§ 46. **Delivery and Approval of Sheriff's Bond.**—Where there is no precise form in which delivery of a sheriff's bond must be made, it is sufficient if it is made by any acts or words which show an intention on the part of the obligors to perfect the instrument.<sup>21</sup> Where a bond was filed and recorded, though not approved, it has

11. *Virtue v. Essex County*, 50 Atl 360, 67 NJL 139. See also, Sec. 43, supra.

12. *State v. Pask*, 180 NE 809, 126 Ohio 633.

13. *McGinnis v. Coesar*, 18 SW(2d) 988, 230 Ky 213.

14. *State v. Johnson*, 177 NW 899, 171 Wisc 521.

15. *State v. Howell*, 131 So 320, 100 Fla 1391.

16. *State v. Schmidt*, 173 NW 838, 42 SD 267. Rehearing denied, 173 NW 951, 42 SD 294.

17. *Gray v. Sanderson*, 238 NW 137, 59 SD 41.

18. *Leslie Co. v. Eversole*, 2 SW(2d) 644, 222 Ky 793.

19. *Spivey v. Fidelity & Deposit Co.* 160 SE 275, 102 SC 143.

20. *Lenoir County v. Taylor*, 130 SE 25, 190 NC 336.

21. *McLure v. Colclough*, 17 Ala 89.

been held to constitute delivery and acceptance and that the sureties were liable thereon.<sup>22</sup> Where the board of county commissioners, whose duty it was to pass on the bond, delivered it to be recorded, such action shows it was approved and it is obligatory upon the signers.<sup>23</sup> Where it is required that the sheriff's bond be delivered to a certain officer, such bond becomes operative only upon delivery to the person authorized to receive it.<sup>24</sup> In the absence of a showing to the contrary, it will be presumed that a bond in the possession of the proper authorities has been accepted.<sup>25</sup> Where a sheriff's bond is not approved until after the expiration of his term, it has been held, nevertheless, that it was effective for all purposes and the sureties were liable for the acts of the sheriff during his term.<sup>26</sup> Where the county judge failed to sign the order approving the sheriff's bond, such act does not make the bond void but the bond may be signed afterward by such judge's successor.<sup>27</sup>

§ 47. Construction of Sheriff's Bond.—In the construction of the bonds of a sheriff, the usual rules of construction of such instruments are followed and adhered to with some exceptions as hereinafter noted.<sup>28</sup> The sheriff owes a duty to the public in all matters of his office where the public is directly concerned and also a duty to the individual in any matter in which the individual is directly interested, and for a violation of either duty, resulting in damage, the sheriff and his sureties are liable on his official bond.<sup>29</sup> However, where a sheriff acts in different capacities, his bond as sheriff is not liable where he is acting in the other capacity. Where a sheriff of a county was also sheriff of a city court in which capacity a separate bond was given and a deputy levied a city court fi. fa. and turned it over to the sheriff of the county who sold realty and illegally converted the proceeds, suit would not lie against the sureties on the bond of the sheriff of the city court, but sureties on the bond of the sheriff of the county would be liable.<sup>30</sup> Where the sheriff's bond recited the specific duties for which the sureties would be liable, the bond afforded no basis for recovery by an act of the sheriff outside of the specific duties mentioned in the bond.

22. *Stabler v. Adamson*, 237 P 483, 73 Mont 490.

23. *Young v. State*, 7 Gill & J (Md) 263.

24. *McLure v. Colclough*, 17 Ala 89.

25. *Wright v. Leath*, 24 Tex 24.

26. *Leslie County v. Eversole*, 2 SW

(2d) 644, 222 Ky 793.

27. *Leslie County v. Eversole*, *supra*.

28. See 57 CJ 1010.

29. *Hodgson v. Hatfield*, 240 P 69, 112 Okla 134.

30. *Williams v. Ellis*, 97 SE 100, 22 Ga App 673.

The court in construing the bond said "the appellant relies on the concluding words of the condition of the bond to show that it was given to insure the faithful execution of all the official duties of the sheriff and therefore makes the contention that the allegations of the complaint are sufficient in law since they contain the statement that the sheriff, while acting in his official capacity, committed an unlawful and unprovoked assault.

"On the other hand, it is said that the official acts contemplated by the bond are only those which relate to the specific duties to execute process and pay and satisfy all fees received or levied by virtue thereof.

"So far as this court is concerned, the controversy is concluded by the interpretation of the statute by the supreme court of North Carolina, *Sutton v. Williams*, 199 NC 546, 155 SE 160, 163. A similar sheriff's bond was under consideration and it was held in conformity with the earlier case of *Eaton v. Kelly*, 72 NC 110 that the general provisions of the bond as to the sheriff's performance of the duties of his office related to the specific obligations therein set out as to process, and that neither the sheriff nor the sureties on his bond were liable in the civil action for damages for negligent injury inflicted by a prisoner in the custody of the sheriff while such prisoner was unlawfully permitted by the sheriff to be at large as a trusty."<sup>31</sup>

Where a constable assumed office his sureties were estopped to deny liability on his bond by such assumption of office.<sup>32</sup> As to whether sureties signed on same date, or different date than bond showed, has been held immaterial where the sureties sought to avoid liability on such grounds.<sup>33</sup> Where a sheriff's bond was prematurely accepted with reservations, that it would not be operative until acceptance, unless other persons as sureties executed same and such other persons failed to execute the bond, there can be no recovery on the bond.<sup>34</sup> In Kentucky where an annual renewal bond is required, bonds given by the sheriff at the beginning of the term cover the whole term, and the annual renewal bonds are merely additional security.<sup>35</sup> The surety was held liable on the bond of the sheriff for money received by the sheriff and not accounted for by

31. *State of North Carolina v. Leonard*, 68 F(2d) 228.

32. *Whitlock v. Wood*, 101 SW(2d) 695, 193 Ark 695.

33. *Gay v. Jackson County*, 205 SW 772, 205 Ky 277.

34. *Raleigh County Court v. Cottle*, 92 SE 110, 70 W Va 661, Ann Cas 1918D 510 and note.

35. *Leslie County v. Maggard*, 270 SW 335, 212 Ky 354.

the sheriff as such after the expiration of his term of office.<sup>36</sup> Where a sheriff holds two succeeding terms of office, his bonds for the last term are not responsible for a defalcation committed before the execution of his last bond or during the first term.<sup>37</sup>

According to the great weight of authority a sheriff and his bondsmen are liable for negligent operation of an automobile by sheriff's deputy while acting officially. These holdings are well sustained in reason and no doubt represent the sounder and juster rule.<sup>38</sup>

The adjudicated cases are in accord with respect to the liability of the sheriff and his bond sureties for an injury to a prisoner while under arrest and is being transported in an automobile.<sup>39</sup> A single case, however, of doubtful soundness, holds a sheriff and his bondsmen are not liable for the negligence of a convict or prisoner that the sheriff has put to driving a motor vehicle.<sup>39a</sup> The sheriff

36. *King County v. Stringer*, 227 P 17, 130 Wash 287.

37. *State v. Lowen*, 98 SE 864, 112 SC 165.

38. *Engstrom v. City of New York*, 17 NYS(2d) 904. This case, however, did not involve the bondsmen, but the sheriff was held liable for chauffeur's conduct even though automobile was owned and chauffeur paid by a municipality; *Stevens v. Short*, 285 P 797, 41 Wyo 324. However, see also, *Tuttle v. Short*, 298 P 524, 42 Wyo 1, 70 ALR 106; *Rhodes v. Jordan*, 157 So 811, — La App —; *U. S. Fidelity & Guaranty Co. v. Samuels*, 157 NE 325, 116 Ohio St 586, 53 ALR 36 and note, holding a bond was breached by negligent operation of an automobile, the bond providing that officer "shall faithfully perform the duties of the office of policeman of said city;" *U. S. Fidelity & Guaranty Co. v. Samuels*, 157 NE 325, 116 Ohio St 586, 53 ALR 36 and note, holding that where in the discharge of official duty of a police officer he fails to take that precaution or exercise that care which due regard for others requires, his conduct constitutes a misfeasance; *Fidelity & Casualty Company v. Boehnlein*, 260 SW 353, 292 Ky 601; *Hanratty v. Godfrey*, 184 NE 842, 44 Ohio App 360, holding if deputy sheriff were negligent in driving automobile hauling prisoners,

it was official misconduct for which sheriff and his bondsmen were liable; *Clark v. West* (Tex Civ) 126 SW(2d) 569. See also, *Geros v. Harries*, 236 P 220, 65 Utah 227, 39 ALR 1297 and note; *Filarski v. Covey*, 242 P 674, 75 Cal App 353, recognizing liability, but held deputy not engaged in duties of office and for that reason sheriff not liable. But see, *Gray v. DeBretton*, 183 So 722, 102 La 628 affirming 184 So 300. See also, note 1 ALR 222.

*Clement v. Dunn* 299 P 545, 114 Cal App 60. Complaint held not to allege official capacity of deputy; *Usrey v. Yarnell*, 27 SW(2d) 988. Held complaint failed to allege the deputy sheriff was acting in his official capacity; *McVey v. Gross*, 11 F(2d) 379; *Humphrey v. Ownby*, 104 SW(2d) (Mo App) 398; *Ruiz v. Clancy*, 102 So 734, 182 La 734; see also, 157 So 737.

39. *Asher v. Cabell*, 50 Fed 818, 1 CCA 693, 2 US App 159; *State of Indiana v. Gobin*, 91 F 48; *Reid v. Woods*, 95 SW(2d) 637, 192 Ark 884; *Ex parte Jenkins*, 58 NE 560, 25 Ind App 532, 81 ASR 114; *Rhodes v. Jordan*, 157 So 811, — La App —; *Hixon v. Cupp*, 49 P 927, 5 Okla 545; *Kusah v. McCorkle*, 170 P 1023, 100 Wash 318, LRA1018C 1158 and note; *Stevens v. Short*, 285 P 797, 41 Wyo 324.

39a. *Lauzls v. Byrne*, 131 So 444, 222 Ala. 183.

is likewise not liable on his bond where the legislature requires the doing of an act by a sheriff and prescribes his punishment for a violation. The punishment of the sheriff furnishes an exclusive remedy for the wrong and the act cannot be made the basis for damages unless the aggrieved party has been specially injured thereby.<sup>40</sup> Where the sheriff's official bond was joint and several, the sureties were not released by striking the sheriff as defendant in the suit against him and the sureties.<sup>41</sup> When a sheriff's official bond has been accepted, it is not void and the sureties are not relieved of liability because the penalty is less than is required by statute.<sup>42</sup>

Sureties are not liable for even official misconduct when the same occurs beyond the territorial limits of the state wherein the sheriff was elected.<sup>42a</sup>

§ 48. Acts by Virtue of the Office and Color of Office.—There is a definite split of authority as to the liability of bondsmen of a sheriff for acts which are done under color of office but not by virtue of office. It may be stated without question that for all of the acts done by virtue of office by the sheriff himself or through a subaltern, the sheriff and his sureties are liable on his bond. However, the trend seems to be to discard this distinction<sup>43</sup> that the sheriff is

40. *Nemec v. Brown*, 184 NW 956, 150 Minn 252.

41. *Cone v. American Surety Company*, 116 SE 648, 29 Ga App 676, conforming to 115 SE 481, 154 Ga 841; see also 116 SE 30, 29 Ga App 413, 116 SE 48, 29 Ga App 493, 116 SE 651, 29 Ga App 690.

42. *Grimes v. Butler*, 1 Bibb(Ky) 192.

42a. *Kendall v. Aleshire*, 45 NW 167, 28 Neb 707, 26 ASR 367.

43. *Adkins v. Camp*, 105 So 877, 213 Ala 642; *Union Indemnity Co. v. Webster*, 118 So 794, 218 Ala 468; *Richards v. American Surety*, 171 SE 924, 48 Ga App 102; *Helgeson v. Powell*, 34 P(2d) 957, 64 Ida 667, overruling *Haffner v. United States F. & G. Co.* 207 P 716, 35 Ida 517; *Federal Reserve Bank v. Smith*, 244 P 1102, 42 Ida 224, and in connection therewith said: "Appellants have put forth considerable effort to distinguish *Haffner v. United States F. & G. Co.* supra, and *Federal Reserve Bank v. Smith*, supra, from the case at bar. We do not believe

that a real distinction exists, but we feel that those cases are contrary to the more modern and just rule and great weight of authority; that the rule therein stated prevents justice. Therefore, in so far as they are contrary to the rule herein announced, they are hereby expressly overruled." *Bostatter v. Hinchman*, 220 NW 775, 243 Mich 589; *Hitman v. Kennedy*, 27 P(2d) 218, 138 Kan 564; *State v. Roth*, 49 SW(2d) 109, 330 Mo 105; *American Guaranty Co. v. McNiece*, 144 NE 77, 111 Ohio St 532, 39 ALR 1289 and note. In the opinion of the court in the cited case, the court said: "The sureties on a bond of an official, conditioned upon the faithful performance of his duties, are liable to all persons unlawfully injured by the nonfeasance, misfeasance, or malfeasance, perpetrated by such officer, whether by virtue of his office or under color of his office."

See also, *United States F. & G. Co. v. Samuels*, 157 NE 325, 116 Ohio St 586, 53 ALR 36; *Jahns v. Clark*, 244



liable only for acts done by virtue of office.<sup>44</sup> On the other hand many modern cases still sustain the old common law view of liability that the sheriff's bondsmen are answerable only for conduct that falls into the classification of acts by virtue of office.<sup>45</sup> What is meant by color of office and by virtue of office is well stated by the supreme court of Idaho, that:

"Acts done 'virtute officii' are those within the authority of the officer, when properly performed, but which are performed improperly; acts done 'colore officii' are those which are entirely outside or beyond the authority conferred by the office."<sup>46</sup>

The abolition of this arbitrary rule doubtless promotes justice, and bottoms the rule on a surer, and sounder, basis.<sup>46</sup>

§ 49. **Liability of Sureties and Sheriff; Limitation of That Liability.**—The official bond of the sheriff binds no further than he would be obligated without it, and no official act can be considered a breach of the bond to execute the duties of his office faithfully, unless such act would amount to a breach of his official duty without the bond.<sup>47</sup> In fixing the liability of sureties on a sheriff's bond, such liability is a matter of strict law and it cannot be extended by implication or intendment.<sup>48</sup> In other words, the liability of a surety on the sheriff's bond is limited by the terms of such bond.<sup>49</sup> By way of illustration it may be stated that when the bond sets forth specific duties, for the breach of which the sureties would be liable, but the liability cannot be extended to a case where a prisoner escaped and did damage to a motorist, such

P 729, 138 Wash 288; *Croase v. John*, 164 P 941, 96 Wash 216; State for use of Vandevender v. Cunningham, 167 SE 595, 113 W Va 244; *Lynch v. Burgess*, 273 P 691, 40 Wyo 30, 62 ALR 849; see also, 10 P(2d) 611.

44. *Murfree on Sheriffs*, Sec. 46.

45. *Bassinger v. U. S. F. & G. Co.* 58 F(2d) 573, cert denied 53 S Ct 21, 237 US 422, 77 L ed 510. In this case the court observed: "Whatever may be the rule elsewhere, in Nebraska it is firmly established that an official bond covers only such acts or failure to act as come within the legal duties of the officer; in other words, such as some of the decisions term *virtute officii*, as distinguished from acts done *colore officii* merely;" *State v. Fidelity & Dep. Co.* 127 Atl 758, 147 Md 194; *Citizens State Bank of Wheeler v. Ameri-*

*can Surety Co.* 65 SW(2d) 778; *State v. National Surety Company*, 39 SW(2d) 581, 162 Tenn 547; *Sheppard v. Gill*, 58 SW(2d) 103, affirmed 190 SW(2d) 563, 126 Tex 603; *Howard et al. v. Caudill*, 15 SW(2d) 245, 228 Ky 403, 290 SW 347.

45a. *Helgeson v. Powell*, supra; *Haffner v. United States F. & G. Co.* 207 P 716, 35 Ida 517.

46. *Citizen's State Bank of Wheeler v. American Surety Co.* 65 SW(2d) (Tex Civ A) 778.

47. *Roberts v. Dean*, 187 So 571, 133 Fla 47.

48. *Jeff Davis County v. Davis*, 192 SW (Tex Civ App) 291.

49. *Davis v. Moore*, 2 SE(2d) 366, 215 NC 449. See also, *State of N. C. v. Leonard*, 68 F(2d) 228.

damage not being one of the acts enumerated in the bond, and therefore the sureties were not liable therefor.<sup>50</sup> Some courts go a long way to relieve a sheriff's sureties on his official bond, as, for example, unless a specific act is enumerated in a bond the doing thereof will not be considered as a breach of the official undertaking. In other words, unless the act it is claimed breached the bond is specifically provided for therein, then there is no liability visited upon the sureties. By this view general conditions set forth in a bond are deleted therefrom by judicial construction. But the great weight of authority and reason contravene this view.<sup>51</sup> Generally, however, the liability of the surety on an official bond is the same as the liability of the officer.<sup>52</sup> The purpose of an official bond of the sheriff is to provide indemnity against malfeasance, nonfeasance, and misfeasance in office, whether by virtue or under color of office.<sup>53</sup> Generally the liability of a surety on a sheriff's official bond is limited to actual losses.<sup>54</sup> This is particularly so where the sheriff acts in good faith.<sup>55</sup> Such good faith, however, must be without negligence or willful misconduct in respect to the matter in which the damages arise.<sup>56</sup> The rule seems to be that in the absence of statute the surety is liable only for compensatory damages and not punitive damages.<sup>57</sup> Where a sheriff re-delivered attached property, taking a statutory forthcoming bond, which was fatally defective, the sheriff and sureties were held not liable for the expense of the plaintiff on the attachment consisting of attorney's fees and costs in the unsuccessful suit on the defective forthcoming bond taken by the sheriff.<sup>58</sup> The sureties on a sheriff's bond, conditioned that he would faithfully perform all duties required of him by law, were held not liable to the county for moneys paid to the sheriff by the county under orders of the county com-

50. *Sutton v. Williams*, 155 SE 160, 109 NC 546.

51. *United States Fidelity & Guaranty Co. v. Samuels*, 157 NE 325, 116 Ohio St 586, 36 ALR 36; *State of N. C. v. Leonard*, 68 F(2d) 228.

52. *Kukowski v. Emerson Brantingham Implement Co.* 175 NW 706, 42 ND 33.

53. *American Guaranty Co. v. McNiece*, 140 NE 77, 111 Ohio St 532, 39 ALR 1289 and note; *U. S. Fidelity & G. Co. v. Samuels*, supra; *Gray v. De Bretton*, 188 So 722, 192 La 628, affirmed 184 So 390.

54. *Dallas, etc. Bank v. Randerson*, 127 SW(2d) 593.

55. *State v. Reynolds*, 223 SW 408, 283 Mo 253.

56. *State ex rel. Missouri Poultry and Game Co. v. Nolte et al.* 203 SW (Mo) 956.

57. *Farmer v. Rutherford*, 15 P(2d) 474, 136 Kan 298.

58. *Campbell v. Tucker*, 154 So 821, 23 Ala App 100, cert. denied 154 So 825, 228 Ala 658; see also, 148 So 168, 25 Ala App 420.

The defects in the above mentioned bond were stated and no time was fixed for return of property delivered.

missioners, based upon claims which under no circumstances could have been lawfully collected from the county by the sheriff. This was on the basis that such payments of money by the county to the sheriff were outside the liability of the sheriff's bond and not an official act.<sup>59</sup> Where a sheriff had been overpaid, out of the fines and forfeitures, the sheriff's sureties were held not liable for the sheriff's refusal to restore to the county such overpayments.<sup>60</sup> However, where the sheriff deposits the county's money in a bank, which is not a lawful depository, such deposit amounts to a conversion of the funds and renders him and his sureties liable.<sup>61</sup> In accordance with the general rule, the liability of sureties on the bond extends not only to direct and immediate losses, but to such consequential damages as according to the common experiences of men are liable to result from such acts.<sup>62</sup> Where a sheriff's bond is prematurely accepted with reservations by the surety signing that it would not be operative until executed by other persons as sureties, and the bond was never executed by the other persons, there can be no recovery on the bond against the surety executing the bond.<sup>63</sup> This appears to be in consonance with the usual rule where a surety conditionally executes the instrument.<sup>64</sup> Where a plaintiff made a valid tender to redeem land sold under execution but the sheriff refused to accept, he cannot recover on the sheriff's bond unless title to the land, or a portion thereof, has been lost, because the tender constitutes a redemption which rendered the sale void and the action to obtain lawful redress should be one to quiet title with damages as an incident.<sup>65</sup> As a general proposition, the sureties on a sheriff's official bond are not liable for revenue collections of the sheriff when the sheriff has also executed revenue bonds required by law.<sup>66</sup> Sureties, likewise, are not responsible for defalcations committed during the first term where a sheriff holds two successive terms of office and where such defalcations were committed before the

59. *Jeff Davis County v. Davis*, 192 SW (Tex Civ A) 291.

60. *Maryland Casualty Co. v. Salmon*, 163 SE 285, 45 Ga App 28; see also, 164 SE 80, 45 Ga App 173; *United States F. & G. Co. v. Rice*, 185 So 563, 184 Miss 443; see also, 186 So 620.

61. *Jefferson County v. Downs*, 147 So 226, 226 Ala 427.

62. *Dallas Joint etc. Bank v. Rander-son*, 127 SW(2d) 593, error granted.

63. *Raleigh County v. Cottle*, 92 SE 110, 79 W Va 661, Ann Cas 1918D 510; see also, 94 SE 948, 81 W Va 469, 97 SE 292, 82 W Va 743.

64. *White Sewing Mach. Co. v. Saxon*, 25 So 784, 121 Ala 399.

65. *Williams v. Thrall*, 167 NW 825, 167 Wis 410.

66. *Fidelity and Casualty Co. of New York v. Breathitt County*, 123 SW(2d) 250, 278 Ky 173.

execution of the last bond.<sup>67</sup> A surety is not liable where the legislature requires the doing of an act by the sheriff and prescribes punishment for a violation; the prescribed penalty furnishes the exclusive remedy for the breach of the statute and the act cannot be made the basis for damages unless the aggrieved party has been specially injured thereby.<sup>68</sup> In some States the surety's liability is the subject of statutory limitations.<sup>69</sup> The bond of the sheriff operates practically as a policy of insurance against damages in automobile accidents.<sup>70</sup> However, the opposite view has been maintained.<sup>71</sup> Also, in regard to the limitation of the liability of sureties, the restrictions or extension of such liability will depend to some extent upon whether such surety is a gratuitous or compensated surety.<sup>72</sup> In the case of *Lorah v. Bescailus*, 54 P(2d) 1125, 12 Cal App 100, it was held that where the requirements of the bond went beyond statutory exactions that such bond was executed without consideration. However, this holding was expressly overruled in *Union Bank & Trust Company of Los Angeles v. Los Angeles County*, 74 P(2d) 240:

"A surety, expressly assuming liability on county clerk's bond in consideration of premium demanded, cannot claim that any condition thereof, such as condition that all of principal's deputies shall faithfully perform all their duties, is without consideration (Pol. Code, Secs. 959, 4022)."<sup>72a</sup>

In construction of a bond in Alabama with reference to the death statute or Lord Campbell's Act, it has been held that damages provided for by the wrongful death statute are not recoverable under the sheriff's official bond on the theory that the death statute authorizing suit to recover damages for wrongful death is penal in its nature and provides only for punitive as distinguished from compensatory damages, while official statutory bonds are intended to cover compensatory damages only.<sup>73</sup> But the Alabama court is

67. *State v. Bowen*, 98 SE 864, 112 SC 165.

68. *Nemec v. Brown*, 184 NW 956, 150 Minn 252.

69. *Langis v. Byrne*, 131 So 444, 222 Ala 183; *Burge v. Scarbrough*, 100 So 653, 211 Ala 377.

70. *Stephens v. Short*, 285 P 797, 41 Wyo 324. See also, *Tuttle v. Short*, 288 P 524, 42 Wyo 1, 70 ALR 106.

See Sec. 47, note 38, supra.

71. *Gray v. DeBretton*, 188 So 722, 192 La 628, affirming 184 So 390.

See Sec. 47, note 38, supra.

72. *Holmes v. Elder*, 94 SW(2d) 390, 170 Tenn 257, 104 ALR 1282; *Maryland Cas. Co. v. Fowler*, 31 F(2d) 881, 63 ALR 1375, 21 RCL 1162, Sec. 201; 50 CJ 78, Sec. 132; note 12 ALR 387.

72a. See also 64 P(2d) 1135 and 81 P(2d) 919, 11 Cal(2d) 675.

73. *Giles v. Parker*, 159 So 826, 230 Ala 119; *Hain v. Gaddy*, 122 So 329, 219 Ala 363.

In Colorado it was held that where the deceased husband was killed by the sheriff and the sheriff died before suit was filed, that the right to sup-

so out of line with the great weight of authority in other jurisdictions and so at war with reason and the plainest principles of justice, its holdings will command attention only by reason of its unusualness and solitude.<sup>73a</sup>

§ 50. **Additional Duties Required of the Sheriff by Statute.**—As has already been seen, where the office of sheriff is a constitutional one, the legislature has no power without a constitutional amendment to diminish his official powers, or to transfer to other officers the duties which properly pertain to his office. However, additional duties may be added, and often are, to the office of sheriff, and frequently when such is done, additional bonds are required as hereafter seen. Where a sheriff holds two offices his bondsmen are liable only for the default in the office for which such bond is given.<sup>74</sup> As where a sheriff of a county is also sheriff of a city court and his deputy levied a city court fi. fa. and turned it over to the sheriff of the county who sold realty and illegally converted the proceeds, suit would not lie against the sureties of the bond of the sheriff of the city court, but sureties on the bond of sheriff of the county would be liable.<sup>75</sup> In Arkansas where the sheriff is required to act as public administrator and while so acting the sureties on the bond as public administrator are liable, but not the sureties on the sheriff's general bond.<sup>76</sup> When the sheriff is acting in another capacity, other than sheriff, and bond is required by law for such other capacity, the sureties on the sheriff's official bond are not liable for acts done in the other capacity, such as revenue collector when the sheriff has also executed a bond as collect-

port was not a property right so as to give rise to a common law action and such case was not within the death statute and hence the wife could not recover on the sheriff's official bond. *Peo. ex rel. Putman v. U. S. F. & G. Co.* 59 P(2d) 796, 99 Colo. 64.

But this decision is so shocking to an enlightened sense of justice that it is safe to say it will never be accorded recognition in any other jurisdiction; that the loss of support for a wife and children has been so long recognized that anyone would question it or that a court would hold against it makes this sporadic case all the more astounding. 17 CJ 1328, Sec. 199; 16 Am Jur 118, Sec. 177 et seq and notes; Tiffany, *Death by Wrongful Act* (2d Ed.) Sec. 160.

73a. *Bolton v. Ayers*, 110 SW 385, 33 Ky L Rep 591; *Tuttle v. Short*, 288 P 524, 42 Wyo 1, 70 ALR 106. (Contra) *Asher v. Cabell*, 50 Fed 818, 1 CCA 693, 2 US App 159. See however *State of Ind. v. Gobin*, 94 Fed 48

74. *Martin v. Decatur County*, 131 SE 302, 34 Ga App 816; *Cain v. Woodruff County*, 89 Ark 450, 117 SW 768; *Pearce v. Stephens*, 19 App Div 101, 45 NYS 422, affirmed 153 NY 873, Memo. 48 NE 1100; *Board of Commissioners Boone County v. Lewis*, 144 NE 623, 81 Ind App 601.

75. *Williams v. Ellis*, 97 SE 100, 22 Ga App 673.

76. *Briggs v. Manning*, 80 Ark 304, 97 SW 289.

or required by law.<sup>77</sup> And it has even been held that liability for money received by the sheriff as such is not covered by a bond as an ex officio tax collector.<sup>78</sup> On the other hand, where a sheriff is selected to collect the school taxes and although required by law to give bond, fails to do so, it was held that his existing official bond was liable for shortages in the sheriff's school tax collections.<sup>79</sup>

When, by law, additional duties are imposed after giving bond upon the sheriff, his bond embraces his faithful performance of them if the new duties bear some relation to the duties existing at the time of giving the bond.<sup>79a</sup> But if his term is extended during his incumbency, then the original bond, given at the inception of his term of office, does not cover misconduct transpiring after expiration of his original term.<sup>79b</sup> Although the legislature may increase the duties of a sheriff, such, however, cannot be enlarged by private agreement between litigants.<sup>80</sup>

§ 51. **The Sheriff as Tax Collector; His Sureties.**—In many States, the sheriff also holds the office of collector of taxes and his liability to perform that duty depends upon a variety of circumstances as hereinafter noted. Where a special bond is given for his performance of duty as tax collector, the general bond is not liable.<sup>81</sup> However, where there is a failure to give the special bond as required by statute, the general bond is liable for default as tax

77. *Fidelity & Casualty Co. of New York v. Breathitt County*, 123 SW(2d) 250, 276 Ky 173; *Board of Education of Glade v. Rader*, 42 W Va 178, 24 SE 680. See also, *Board of Ed. of Fort Rick Dist. v. Rader et al.* 24 SE 682, 42 W Va 182; *State v. Harman*, 80 SW(2d) 619, 190 Ark 621.

78. *American Bond etc. Co. v. Garrett*, 61 Tex Civ App 454, 129 SW 398.

79. *Fidelity and Deposit Co. v. Board etc. District*, 57 SW(2d) 457, 247 Ky 535. "The fact that Murray had not been selected by the board of trustees to collect the school taxes prior to the execution of his official bond as sheriff is immaterial. The collection of these school taxes was a function of his office as sheriff, contingent, however upon the school board's failure to elect a collector and under such circumstances their necessary selection of him to collect the taxes. This being true, his surety was liable on his sheriff's bond for the shortage involved in this case."

79a. *Fidelity and Deposit Co. v. Board etc. District*, 57 SW(2d) 457, 247 Ky 535; *City of Rice Lake v. Jensen*, 255 NW 130, 210 Wis 1, 94 ALR 609 and note.

79b. *King County v. Ferry*, 32 P 538, 5 Wash 536, 34 ASR 880 and note, 19 LRA 500.

80. *H. R. Hayes Lumber Co. v. H. M. Jones Drilling Co.* 148 So 899, 177 La 626.

81. *State v. Harman*, 80 SW(2d) 619, 190 Ark 621; *Board of Education of Glade v. Rader*, 42 W Va 178, 24 SE 680; *Cooper v. Peo.* 85 Ill 417; *Fidelity and Casualty Co. of New York v. Breathitt County*, 123 SW(2d) 250, 276 Ky 173; *Columbia County v. Massie*, 31 Ore 292, 48 P 694; *American Bond etc. Co. v. Garrett*, 61 Tex Civ App 454, 129 SW 398.

collector.<sup>82</sup> Where a special bond is given, which is not required by statute, it acts only as cumulative security and the official bond is still liable.<sup>83</sup> Where a part of the official duty of the sheriff is to collect taxes, his official bond is subjected to liability for default in that duty.<sup>84</sup> Where the sheriff collects taxes without authority, his bondsmen are not liable.<sup>85</sup>

§ 52. What Will Not Release the Sureties of the Sheriff.—Although there may be certain circumstances which may affect the liability of a surety, yet such circumstances will not act to release the surety. Where there is a change in the existing law which changes the obligations of the sureties on the bond, it does not discharge or operate to release the sureties where such change doesn't prejudice their rights.<sup>86</sup> However, where the law is changed to such an extent as to constitute a new office or a new appointment, the sureties on the sheriff's bond would be released.<sup>87</sup> Where a bond contains an illegal condition prohibited by law, the surety may not avoid the bond on such grounds but such condition will be disregarded as being surplusage.<sup>88</sup> Where it is required by statute that the sheriff's bond shall be recorded in a certain office and there is a failure to so record, the sureties on such bond are not released, such requirement being for the benefit of the public and not a condition of the bond.<sup>89</sup> Likewise, the giving of an additional bond, not required by statute, does not release the sureties on an official bond.<sup>90</sup> The fact that the bond contains a penalty in excess of the statutory requirements does not release the surety.<sup>91</sup> The failure of the sheriff to take his oath of office does not avoid the bond or release the sureties for his default while acting in such office.<sup>92</sup> Where the sheriff's official bond was joint and

82. *Kenton County v. Lowe*, 91 Ky 367, 16 SW 92, 13 Ky L Rep 97; *State v. Hill*, 17 W Va 452, see however, *Governor v. Matlock*, 12 NC 214.

83. *State v. Matthews*, 57 Miss 1.

84. *Peo. v. Edwards*, 9 Cal 286; *State v. McDonald*, 4 Idaho 469, 40 P 312, 95 Am St Rep 137; *Fidelity and Deposit Co. v. Board etc. District*, 57 SW(2d) 457, 247 Ky 535; *State v. Matthews*, 57 Miss 1; *State v. Powell*, 14 Mo 436; *Moore County v. McIntosh*, 31 NC 307; *Brunswick County v. Woodside*, 31 NC 496; *Commonwealth v. Compton*, 7 Pa Co 262; *Marion School District v. Donahue*, 7 Pa Co 264; *State v. Hill*, 17 W Va 452.

85. *State v. Harris*, 52 Miss 686; *Greenwell v. Com.* 78 Ky 320.

[1 Anderson on Sheriffs]—4

86. *Peo. v. Leet*, 13 Ill 261; *Peo. v. Vilas*, 36 NY 459, 93 Am Dec 520, 3 Abb Pr (NS) 252; *Chadwick v. U. S.* 3 Fed 750; *Freeland v. Akers*, 25 NYS 986, 5 Misc 528; *Board of Education v. Quick*, 1 NE 533, 99 NY 138.

87. *Miller v. Stewart*, 9 Wheat(US) 680, 6 L ed 189, 4 Wash CC 26.

88. *State v. McGuire*, 46 W Va 328, 33 SE 313.

89. *Hill v. New Amsterdam Casualty Co.* 105 Cal App 156, 236 P 1103.

90. *State v. Matthews*, 57 Miss 1; *Sheeley v. Wiggs*, 32 Mo 398.

91. *Henderson v. Matlock*, 9 NC 366; *Johnson v. Gwathney*, 2 Bibb(Ky) 186.

92. *Burtles v. State*, 4 Md. 273; *Musselman v. Com.* 7 Pa 240.

several, the sureties were not released where the sheriff was stricken out as one of the defendants in a suit against him and his sureties.<sup>93</sup> The sheriff's bond is held effective and the sureties were not released though the order approving it was not signed until after the expiration of the sheriff's term, notwithstanding such approval was required by statute.<sup>94</sup> The fact that a county judge fails to sign an order approving the sheriff's bond, which was presented to him for approval, does not make the bond void and release the sureties but such bond may be signed afterward by the judge's successor.<sup>95</sup> Delivery of the sheriff's bond by an approving board who is authorized to pass on such bond to be recorded, shows the bond was so approved, and is obligatory upon the signers, even though there is no other evidence of approval.<sup>96</sup> When a sheriff's official bond has been accepted, the sureties may not avoid the bond by reason of the fact that the penalty provided therein is less than is required by statute.<sup>97</sup> Where a sheriff forfeits his office, the sureties on his official bond are not released thereby.<sup>98</sup> Where it is required that a new bond be given ever so often, sureties on the old bond are not discharged by such giving of a new bond.<sup>99</sup> The surety may be estopped from raising objections in accordance with the general principles of estoppel.<sup>1</sup> Estoppel will be applied to prevent a surety from denying that his principal is such an officer as the bond recites him to be.<sup>2</sup>

§ 53. Special Bonds.—Where special bond is given by an officer in a particular capacity, to cover certain duties, it does not cover his accounts or defaults in his general capacity as such officer.<sup>3</sup> Where a special bond is required by statute in regard to

93. *Cone v. American Surety Co.* 116 SE 648, 29 Ga App 76, conforming to 115 SE 481, 154 Ga 841, 116 SE 30, 29 Ga App 413, 116 SE 49, 29 Ga App 493, 116 SE 651, 29 Ga App 690; *Carmack v. Com.* 5 Binn(Pa) 184; *Com. v. Lelar*, 1 Phila(Pa) 336; *State v. Cason*, 11 SC 392.

94. *Disheroon v. Brock*, 213 Ala 637, 105 So 899; *Hill v. New Amsterdam Casualty Company*, 286 P 1103, 105 Cal App 156; *Leslie Co. v. Eversole*, 2 SW(2d) 644, 222 Ky 793; *Stabler v. Adamson*, 73 Mont 490, 237 P 483; *State v. Proudfoot*, 38 W Va 736, 18 SE 949.

95. *Leslie County v. Eversole*, 2 SW(2d) 644, 222 Ky 793.

96. *Young v. State*, 7 Gill & J(Md) 253.

97. *Grimes v. Butler*, 1 Bibb(Ky) 192.

98. *State v. Muir*, 20 Mo 303.

99. *Fidelity etc. Co. v. Brown*, 230 Ky 634, 20 SW(2d) 284; *Leslie County v. Maggard*, 212 Ky 354, 279 SW 335. 1. *Burge v. Duden*, 105 Mo App 8, 78 SW 653; *Manchester Building etc. Assoc. v. Graham*, 78 NJL 114, 72 Atl 959.

2. *U. S. Fidelity etc. Co. v. McLaughan*, 76 Neb 307, 107 NW 577, 109 NW 390; *Gray v. State*, 78 Ind 68, 41 Am Rep 545; *Cox v. Thomas*, 9 Gratt(Va) 312.

3. *American Bonding etc. Co. v.* [1 Anderson on Sheriffs]

the collection of taxes, such special bond is not liable for a default in regard to his general duties.<sup>4</sup> Where a sheriff holds two offices and is required to give a bond to cover the duties of each office, the sureties are liable only for the default in the office for which the bond was given and out of which the default arose.<sup>5</sup> As a general proposition it may be stated that a general bond is not liable where a special bond required by statute is given and the default occurs which is covered by the special bond.<sup>6</sup> Where the sheriff was required to act as public administrator and was required by law to give a bond to cover such duties, the sureties on such special bond are alone liable and not the sureties on the sheriff's general bond.<sup>7</sup> However, where a special bond is required by statute and the sheriff fails to give such bond the general bond becomes subject to such liability as would have been covered by the special bond.<sup>8</sup>

§ 54. **Cumulative Bonds.**—Additional bonds given by an officer during any term of his office are cumulative. The first bond is liable for defaults occurring through the entire term and any new bond given at a later period during the same term is additional security for the discharge of such duties as have not yet been performed when such bond was executed.<sup>9</sup> Where a sheriff holds two succeeding terms of office, his bonds for the last term will not be responsible for the defalcations committed before the execution of his bond or during the first term.<sup>10</sup> Where such cumulative bonds are given, sureties are liable only for acts done after the execution of the bond.<sup>11</sup> However, where the bond given is retro-

Garrett, 120 SW 398, 61 Tex Civ App 454.

4. Fidelity & Casualty Co. of N. Y. v. Breathitt County, 123 SW(2d) 250, 276 Ky 173; Hughes v. Peo. 82 Ill 78; Briggs v. Manning, 80 Ark 304, 97 SW 287; Board of Education of Glade Dist. v. Rader, 42 W Va 178, 24 SE 680.

5. Martin v. Decatur County, 131 SE 302, 34 Ga App 810.

6. Columbia County v. Massie, 31 Ore 292, 48 P 604; Cooper v. Peo. 85 Ill 417; State v. Matthews, 57 Miss 1.

7. Briggs v. Manning, 80 Ark 304, 97 SW 289.

8. Kenton County v. Lowell, 91 Ky

367, 16 SW 82; State v. Hill, 17 W Va 452.

9. Leslie County v. Maggard, 279 SW 335, 212 Ky 354; Fidelity & Deposit Co. of Maryland v. Brown, 20 SW(2d) 284, 230 Ky 534; State v. Martin, 188 NC 119, 123 SE 631, 186 NC 127, 118 SE 014; Maddox v. Shacklett, 36 SW (Tenn Ch A) 731.

10. State v. Bowen, 98 SE 864, 112 SC 165.

11. Rochester v. Randall, 105 Mass 295, 7 Am Rep 519; State v. Causey, 93 SC 300, 76 SE 707; Missoula County v. McCormick, 5 P 287, 4 Mont 115; United States v. Linn, 1 How(US) 104, 11 L ed 64.

spective in its provisions, liability will attach for acts done prior to the execution of the bond.<sup>12</sup>

§ 55. **Liens on Real Estate or Further Security.**—In Kentucky, Louisiana, and Pennsylvania the execution of a sheriff's bond subjects the real estate of the sheriff and his sureties to a lien.<sup>13</sup> However, this lien attaches only upon the execution of a strictly statutory bond.<sup>14</sup> Where such statute subjecting real estate of the officer and the sureties is enacted during the term of the officer and after the giving of the bond, the statute is not applicable to the bond already executed when the statute was enacted.<sup>15</sup> The lien upon real estate thus imposed endures as long as the sheriff is subject to any liability for default during his term of office.<sup>16</sup> Such a lien is effective from the date of the bond,<sup>17</sup> unless the law otherwise provides.<sup>18</sup> There is a conflict of authority as to the limitations of this lien, it being held that unless the bond is re-executed within the period of limitation applicable to other liens on land, the lien is lost,<sup>19</sup> but it has been held otherwise.<sup>20</sup>

§ 56. **Recording and Approval of Official Bonds.**—Under certain statutes the sheriff is required, in order that his bond may become effective, to have such bond approved by and delivered to certain designated officers or tribunal and the sureties' liability attaches upon delivery as by law directed and not before.<sup>21</sup> A sher-

12. Wenatches Orchard Syndicate v. Maryland Fidelity etc. Co. 143 Wash 632, 255 P 943; Chicago v. Siebert, 244 Ill App 83; Missoula County v. McCormick, supra; Raleigh County v. Cottle, 92 SE 110, 79 W Va 661.

13. Where bond is invalid as statutory bond, because executed in the month of June, when the law requires it to be executed in the preceding January or February, its execution creates no lien on the estate of the sheriff. Hall v. Com. 8 Bush(Ky) 378; Gale's Succ. 30 La Ann 351; David's Succ. 14 La Ann 730; Fluker v. Bobo, 11 La Ann 609; Miller v. Com. 5 Watts & S(Pa) 488; Snyder v. Com. 3 Pen & W(Pa) 286.

See In re Morris, 4 Pa 162 (recognizance of a sheriff binds all his real estate and that of his sureties in the same county as effectually as a judgment of a court of record). Compare In re McKenzie's Appropriation, 3 Pa 52

156 (holding that the recognizance of a sheriff and his sureties, taken pursuant to the provisions of the act of April 13, 1834, is a lien on their lands as well as on their goods and chattels).

Bond executed before enactment of statute.—Such a statute making an official bond a lien on the officer's property is not applicable to a bond executed before its passage. Miller v. Com. 5 Watts & S(Pa) 488.

14. Hall v. Com. 8 Bush(Ky) 378.

15. Miller v. Com. 5 Watts & S(Pa) 488.

16. Hall v. Com. supra; Fluker v. Bobo, 11 La Ann 609.

17. Hall v. Com. supra.

18. Fluker v. Bobo, supra; David's Successor, 14 La Ann 730; Gale's Successor, 30 La Ann 351.

19. Gale's Successor, supra.

20. Snyder v. Com. 3 Pen & W(Pa) 286.

21. McLure v. Colclough, 17 Ala 89.

iff's bond was held effective though the order approving it was not signed until after expiration of the sheriff's term.<sup>22</sup> However, in this instance the bond had been offered for approval and had been filed as if approved. Where the bond is found in the archives of the proper authorities, it will be presumed that the bond has been approved and accepted.<sup>23</sup> Generally, there is no precise form in which delivery of the bond must be made, but it is sufficient if there is any act manifesting an intent on the part of the obligors to consummate the instrument.<sup>24</sup> Where it is required that the bond be filed with the clerk of the court, he may be compelled to file such bond, which has been properly executed and offered within the prescribed time and approved by the proper official.<sup>25</sup> Where the approving officials for some insufficient reason refuse so to do, and the bond is proffered, approval may be enforced by mandamus.<sup>26</sup>

#### § 57. Liability of Sureties of Sheriff in the Event of His Death.—

The sureties on the sheriff's or constable's bond are not released from liability by his death for official defaults committed while in office.<sup>27</sup> Also, where at the time of the officer's death an action is pending against him and his sureties, the action survives against the sureties.<sup>28</sup> However, in some instances, the death of the sheriff does relieve the sureties from liability for a default which they might otherwise be subjected to, as where the sheriff kills or injures some one and before suit can be brought against him the sheriff dies the action abates.<sup>29</sup> An officer's sureties are relieved from liability for his failure to return an execution where he dies before the time for making the return has expired.<sup>30</sup> Where a sheriff's deputy makes some default after the sheriff's death, the liability attaches to the deputy's bond but not to that of the sheriff.<sup>31</sup> And likewise, where a sheriff is collecting money under an execution, regular on its face, issued by a court of competent jurisdiction on a judgment which after his death is reversed, the sureties

22. *Leslie County v. Eversole*, 2 SW (2d) 614, 222 Ky 793.

23. *Wright v. Leath*, 24 Tex 24.

24. *McLure v. Colclough*, 17 Ala 89; *Goodrum v. Carroll*, 2 Humph(Tenn) 490, 37 Am Dec 564.

25. *Peo. v. Fletcher*, 2 Scam 432.

26. *Gulick v. New*, 14 Ind 93, 77 Am Dec 49; *State v. Lewis*, 10 Ohio St 128.

27. *Morris v. Graham*, 1 UCQB(Ont) 521.

28. *Camp v. Watt*, 14 Ala 610.

29. *Peo. ex rel. Putnum v. U. S. F. & G. Co.* 59 P(2d) 796, 99 Colo 64.

30. *Moore v. Rooks*, 76 SW 548, 71 Ark 562.

31. *McLeod v. Boulton*, 2 UCQB(Ont) 44.

on his bond are not liable to the execution defendant for the amount of the sheriff's commission collected and retained by him.<sup>32</sup>

Where a statute authorized the judgment to be rendered only against the sheriff or constable, and his sureties and the officer is dead, then no judgment can be rendered against his sureties.<sup>32a</sup>

§ 58. Liability of Sureties for Overpayment.—Under a sheriff's bond conditioned that he would "faithfully perform all duties required of him by law" the sureties were held not liable to the county for monies paid the sheriff under orders of the commissioners' court upon claims presented by him which under no circumstances could be lawfully collected from the county.<sup>33</sup> Where a statute renders an officer liable on his bond for monies coming into his hands by virtue of his official position, it was held that there was no liability on the sheriff's bond for excessive payments made to the sheriff by the county for services.<sup>34</sup> The sheriff's surety is held not liable for the sheriff's refusal to repay overpayments made to him out of fines and forfeitures. The sheriff's refusal to repay does not constitute a breach by the sheriff of any official duty, but constitutes only a mere refusal to pay a private and individual debt.<sup>35</sup> Likewise, the sheriff's bondsmen are not liable for taxes collected by the sheriff without authority.<sup>36</sup> Where there has been a voluntary overpayment made to the sheriff and he refuses to refund it, such an act does not constitute a breach of his official bond and does not render the sureties thereon liable.<sup>36a</sup> However, where such overpayment is made by an execution debtor under coercion by way of threat to levy unless the

32. *Clark v. Lamb*, 76 Ala 406. See also *State v. Vananda*, 7 Blackf(Ind) 214.

32a. *James v. Auld*, 9 Ala 462.

33. *Jeff Davis County v. Davis*, (Tex Civ A) 192 SW 291. (Where the monies paid to the sheriff were on claims presented by him for postage stamps used in official business; for expenses incurred by him for telephone service in transacting official business; for the hire of automobiles used in his duties as sheriff, it was held that the bond did not cover the sheriff's liability to refund to the county monies paid to him under orders of the commissioners' court upon such claims, which under no circumstances could be lawfully collected from the county.)

34. *United States Fidelity & G. Co. v. Rice*, 185 So 563, 184 Miss 443, 186 So 566. The basis of the opinion was that the act in collecting money from the county for his services was an individual and not an official act; the exercise of a right in the performance of a duty imposed by statute, and therefore not within the coverage of his official bond.

35. *Maryland Casualty Company v. Salmon*, 163 SE 285, 45 Ga App 28.

36. *Greenwell v. Com.* 78 Ky 320; *State v. Harris*, 52 Miss 686; *Peo. v. Foster*, 133 Ill 496, 23 NE 615; *Cooper v. Johnson County*, 212 SW (Tex) 528.

36a. *Treasurers v. Buckner*, 27 SCL 327.



excessive demand is satisfied, then the officer is acting "by virtue of his office" and his bond sureties are answerable therefor.<sup>37</sup>

§ 59. **The Right to Office.**—The right of an individual to fill the office of sheriff is generally dependent upon election<sup>38</sup> or by appointment.<sup>39</sup> The holder of a formal certificate of election as sheriff is entitled to be inducted into that office.<sup>40</sup> Even where the term of office has expired but an action of contest has been brought, and is pending and the question of compensation is in issue therein, this is sufficient to withstand a motion to dismiss on the ground that the contest had become moot.<sup>41</sup> However, even though one is properly elected to an office, still he is not entitled to be inducted into that office until he has met the statutory requirements as to the giving of bonds.<sup>42</sup> Where a sheriff has failed to qualify by giving the proper bonds, the person appointed to fill the vacancy in such office, and qualifying according to law, is a de jure sheriff and may be inducted into office by mandamus. Mandamus is the proper action to be invoked to assert a right to office by a person having the prima facie right thereto.<sup>43</sup> A court's order appointing a person to fill the office of sheriff is admissible to prove that he is the duly appointed sheriff.<sup>44</sup> Generally, the jurisdiction of proceedings to inquire into a right of one claiming an office are governed by statutory or constitutional provisions.<sup>45</sup>

§ 60. **The Sheriff and His Deputies.**—At common law the sheriff had the exclusive right to appoint his deputies and any statute limiting the power of the sheriff to appoint deputies being in derogation of the common law will be strictly construed.<sup>46</sup> Generally, the power of appointment of deputy sheriffs is in the sheriff.<sup>47</sup> District court judges have no inherent right to appoint deputy

37. *Snell v. State*, 43 Ind 359.

38. *Israel v. Wood*, 56 P(2d) 1324, 98 Colo 495; *State ex rel. Johnson v. Melton*, 73 P(2d) 1334, 192 Wash 379.

39. *Dobkins v. Reece*, 17 SW(2d) (Tex Civ A) 81.

See also 19 SW(2d) 574.

40. *Doberstein v. Dahl*, 105 NW 416, 181 Wis 491.

41. *Israel v. Wood*, supra.

42. *Thomson v. Justices*, 3 Humph (Tenn) 233.

43. *State ex rel. Looney v. Carpenter*, 145 SE 184, 106 W Va 170.

However, a better, more expeditious, and flexible remedy is by an action for

declaratory judgment. See *Anderson, on Declaratory Judgments*, Secs 386 et seq.

44. *State v. Crowe*, 20 Ark 209.

45. *State on relation of Perine v. Van Beek*, 54 NW 525, 87 Ia 509.

46. *Connerly v. Sewell*, 213 NYS 602, 126 Misc 418.

47. *People ex rel. Meyering v. Whealan*, 190 NE 693, 356 Ill 402; *Board of Commissioners of Sedgwick v. Toland*, 245 P 1019, 121 Kan 109; *William v. Guerre*, 162 So 609, 182 La 745; *Connerly v. Sewell*, supra; *Sheriff of Salt Lake County v. Board of Commissioners of Salt Lake County*, 268 P 793, 71 Utah 593.

sheriffs and cannot usurp the right of the sheriff to do so.<sup>48</sup> Such appointment by the sheriff is usually subject to the approval of certain boards as provided by statute.<sup>49</sup> Generally in order for a deputy to qualify to fill such an office, it is a statutory requirement that he must furnish a bond.<sup>50</sup> Ordinarily the term of appointment of a deputy sheriff concludes when the term of the sheriff who appointed him expires,<sup>51</sup> or such deputy sheriff's authority may determine on the sheriff's death.<sup>52</sup> In California the sheriff has the absolute right to terminate such deputy sheriff's authority by discharging such deputy.<sup>53</sup>

§ 61. **Sheriff's Liability for His Deputies.**—Generally the sheriff is liable for any wrongful act committed by a deputy sheriff within the course of the deputy sheriff's official duty.<sup>54</sup> In some jurisdictions the sheriff is not liable for the defaults of misfeasance of his deputy unless he is negligent in making the appointment and in his supervision of such deputy.<sup>55</sup> Where the sheriff's bond contains a provision "well and faithfully perform the duties of his office" it was held such provision did not make the sureties on such bond responsible for the wrongful arrest by the deputy sheriff.<sup>56</sup> Where a deputy sheriff is ordered to arrest a certain criminal and to kill him, if necessary, and he negligently shot the plaintiff, thinking she was the criminal, the sheriff and his bondsmen are liable.<sup>57</sup> Where a deputy breaches the peace resulting in damages or injury to another, the sheriff or his official bond is not liable for such default unless it was committed by virtue or under color of his office.<sup>58</sup> In addition to the liability of the sheriff as principal on

48. *State ex rel. Porterie v. Jones*, 159 So 594, 181 La 390.

49. *State v. Harris*, 161 NW 253, 100 Neb 745; *State v. Board of Commissioners*, 157 P 656, 21 NM 632; *Connerly v. Sewell*, supra; *Sheriff of Salt Lake County v. Board of Commissioners of Salt Lake County*, supra; *Jackson v. Thurston County*, 219 P 840, 127 Wash 41.

50. *Hill v. New Amsterdam Casualty Co.* 286 P 1103, 105 Cal App 156; *Stinson v. State*, 80 So 606, 76 Fla 421.

51. *Abt v. Wilcox*, 249 NW 483, 264 Mich 183.

52. *McMullen v. Daniel*, 155 So 687, 229 Ala 184.

53. *Cronin v. Civil Service Commission*, 236 P 339, 71 Cal App 633.

54. *Chambers v. Anderson*, 58 F(2d) 151; *Bracken v. Cato*, 54 F(2d) 457; *Abbott v. Cooper*, 23 P(2d) 1027, 218 Cal 425; see also, 14 P(2d) 554; *Corder v. Peo.* 287 P 85, 87 Colo 251; *Powell v. Fidelity and Deposit Co. of Maryland*, 173 SE 196, 48 Ga App 529; *Helgeson v. Powell*, 34 P(2d) 957, 54 Ida 667.

55. *Langis v. Byrne*, 131 So 444, 222 Ala 183.

56. *Murray v. Low*, 8 F(2d) 352. It is submitted this case is out of harmony with the better reasoned and more modern authorities.

57. *Crose v. John*, 164 P 941, '90 Wash 216.

58. *State v. Lightcap*, 179 So 880, — Miss —. It will be noted that this case recognized the distinction be-

his official bond, he is also liable personally for acts of his deputy for exceeding his authority as an arresting officer and in the discharge of his duties.<sup>59</sup>

**62. Liability of Sheriff for Acts of His Deputy Done Colore Officii and Virtute Officii.**—At common law the sheriff is not responsible for an act done by his deputy colore officii.<sup>60</sup> The weight of authority seems to be now that the sheriff is liable not only for acts virtute officii but also for acts colore officii.<sup>61</sup> However, there is substantial authority for position restricting liability of the sheriff for acts of his deputies only when done by virtue of his office<sup>62</sup> and not by color of his office.<sup>63</sup> What constitutes acting by virtue of office and under color of office is divisible by a line of fine distinction.<sup>64</sup> In many instances, the liability of the sheriff's sureties for acts of the sheriff's deputies is limited by the terms of the bonds as where the sheriff's bond provides that he would "well and faithfully perform the duties of the office." It was held not to make the sheriff's sureties responsible for a wrongful arrest by a sheriff's deputy.<sup>65</sup> However, it is held in Alabama that the sheriff and his sureties are not liable to the father for damages for the wrongful act or omission on the sheriff's deputy in causing the child's death. Notwithstanding the statutory provision for recovery for wrongful death resulting from omission of agent or servant. The court held that the doctrine of respondeat superior did not exist between the sheriff and his deputy,<sup>66</sup> but this is unsound.<sup>66a</sup> In Kentucky,

tween acts done under color of office and by virtue of office.

59. *West v. Nantz Administrators*, 101 SW(2d) 673, 267 Ky 113.

60. *Murfrees on Sheriffs*, Sec. 60.

61. *Adkins v. Camp*, 105 So 877, 213 Ala 042; *Union Indemnity Company v. Webster*, 118 So 794, 218 Ala 463; *Abbott v. Cooper*, 23 P(2d) 1027, 218 Cal 425; *Corder v. Peo.* 287 P 85, 87 Colo 25; *Kendrick v. Adamson*, 180 SE 647, 51 Ga App 402; *Richards v. American Surety Company*, 171 SE 024, 48 Ga App 102; *Helgeson v. Powell*, 34 P(2d) 957, 54 Ida 007; *Hiitsman v. Kennedy*, 27 P(2d) 218, 138 Kan 504; *Bostatter v. Hinchman*, 220 NW 775, 243 Mich 589; *State v. Roth*, 49 SW(2d) 109, 330 Mo 105; *United States F. & G. Co. v. Samuels*, 147 NE 325, 116 Ohio St 536, 53 ALR 36.

See Sec. 48, supra.

*American Guaranty Co. v. McNiece*, 146 NE 77, 111 Ohio St 532, 39 ALR 1289; *Cross v. John*, 104 P 941, 90 Wash 216.

Notes: 116 ALR 1070; 102 ALR 182.

62. *State v. National Surety Company*, 39 SW(2d) 581, 162 Tenn 547.

63. *Fidelity and Deposit Company v. Hall*, 284 SW 426, 215 Ky 30.

64. *Roberts v. Dean*, 187 So 571, 133 Fla 47; *Bassinger v. U. S. F. & G. Co.* 58 F(2d) 573, cert. denied, 53 S Ct 21, 287 US 622, 77 L ed 540.

65. *Murray v. Low*, 8 F(2d) 352. But this case is unsound and out of harmony with the modern trend of authority. See note 61, supra; Sec. 48, supra.

66. *Giles v. Parker*, 159 So 829, 230 Ala 119.

66a. See Sec. 49, supra.

the liability of the sheriff was sustained for the act of his deputy in wrongfully causing the death of a person.<sup>67</sup> This holding is in consonance with sound principles of law and justice, and the great weight of authority. In Washington the distinction between acts colore officii and virtute officii has been discarded in accordance with the modern trend of decisions, the court saying "in behalf of this argument discussion is had of the defense between acts done under color of office and by virtue of the office, and the ancient distinction between colore officii and virtute officii is refurbished and attractively presented. Courts long ago, however, have ceased to view with much tolerance this distinction. When liability for unwarranted acts on the part of peace officers is attempted to be evaded by their superior and his sureties, for, as has often been pointed out, if this distinction is carried to its legitimate conclusion, there would never be any liability but his own for the wrongful act of a subordinate peace officer."<sup>68</sup>

**§ 63. When the Sheriff Is Not Liable for the Acts of His Deputy.**—The sheriff is not liable criminally for his deputies,<sup>69</sup> except where it was done by the deputy in the sheriff's name and as his act and with the sheriff's consent.<sup>70</sup> Where a deputy acting in his official capacity and while waiting on a grand jury discloses information that he received while serving the grand jury, he alone is criminally liable and the sheriff is not responsible for such act of disclosure.<sup>71</sup> In Alabama, the sheriff would be liable, neither criminally nor civilly for the wrongful act or omission of a deputy in causing a child's death, notwithstanding the statutory provision for recovery for wrongful death resulting from an act or omission of agent or servant, the court holding that the doctrine of respondeat superior does not exist as between sheriff and deputy. But this is wholly untenable.<sup>72</sup> The sheriff's liability is limited in some states where he is only liable for an act of a deputy sheriff where committed by virtue of his office and not under color of the office.<sup>73</sup> In order to hold the sheriff civilly liable for a homicide committed by his deputy, there must exist the necessary legislative enactment since

67. *Johnson v. William's Administrators*, 63 SW 759, 111 Ky 289, 23 Ky L Rep 658, 54 LRA 220, 98 Am St Rep 416. The William's case seems to be a more well-considered case than the recent Alabama case above cited.

68. *Jahns v. Clark*, 244 P 729, 138 Wash 288; *Greenius v. American Surety Company*, 159 P 384, 92 Wash 401.

58

69. *State v. Johnson*, 2 NC 293; *Com. v. Lewis*, 4 Leigh(Va) 664.

Note 102 ALR 182; 116 ALR 1070.

70. *State v. Johnson*, 2 NC 293. Note 102 ALR 182; 116 ALR 1070.

71. *White v. State*, 44 Ala 409.

72. *Giles v. Parker*, 159 So 826, 230 Ala 119. But see Sec. 49, supra.

73. See Sec. 62, supra.

the right of recovery for wrongful death of another is wholly statutory and the plaintiff must bring his right of recovery within such statute in order to hold the sheriff for the act of his deputy.<sup>74</sup> The sheriff is likewise not responsible for damages caused by deputy's malicious prosecution not authorized by the sheriff.<sup>75</sup>

§ 64. **Liability of Ex-sheriff for His Deputy.**—An ex-sheriff is liable for the acts of his deputy as to executions placed in the hands of his deputy but not consummated at the time the sheriff's term of office has expired.<sup>76</sup> The sheriff is likewise liable for the act of his deputy, though his term of office has expired and he has made final settlement with his subordinate deputed by him to collect and disburse the public taxes on lawful orders drawn on him, where such deputy withdrew such money from the bank where deposited and misappropriated the same. Where a sheriff during part of his term seized property which was to be sold under execution and after he left office the same was sold, the sheriff is responsible for such surplus remaining over after the sale, as the responsibility of the sheriff begins and continues until the termination of the sale and all monies have been disposed of.<sup>77</sup>

§ 65. **Supervisory Power of Courts over Sheriffs and Deputies.**—In the early history of English jurisprudence when the sheriff himself held court, he appointed the clerks, criers, tipstiffs, constables and other officers, thereafter, however, his authority was diminished until he became a ministerial and executive officer, but still as a matter of form he appoints court officers although subject to the approval of the court.<sup>78</sup> The court cannot interfere with the sheriff's discretion in appointing bailiffs or reduce the number provided by statute, but the sheriff is liable for contempt in appointing persons offensive to the court's order and decorum under pretense of exercising his statutory discretion and the court may enforce the exclusion of such appointees from its presence.<sup>79</sup> A sheriff may not be removed for defaults of his deputy where he did not aid or abet such acts and remained in ignorance of the conduct of such deputy.<sup>80</sup> Sheriffs, likewise, cannot be removed where

one of his deputies commits a crime and he has been diligent thereafter to bring such deputy to justice.<sup>81</sup> The right of the court to remove a sheriff for defaults in office is purely statutory.<sup>82</sup> Although the trial court may not have the power to make appointments of deputies, nevertheless it is the duty of the sheriff, or his deputies, to perform services which are reasonably necessary for the proper functioning of a court of record and so ordered by the court, this is generally provided by statute.<sup>83</sup> In some States, commissioners' courts are established and boards of county commissioners which have the power to limit the number and salary of the deputy sheriffs but have no power over the naming of such deputies which remains in the sheriff.<sup>84</sup>

§ 66. **Deputy Sheriff's Bond.**—In many States it is provided that a deputy sheriff shall give bond to the sheriff, or to the State or county, for any default while in office, or even without statute the sheriff is entitled to demand of his deputies a bond for their acts while holding such office.<sup>85</sup> The contract between the sheriff and his deputy is purely a personal matter unless otherwise provided by statute and is no concern of the public.<sup>86</sup> In many States, before a deputy sheriff can qualify for such office, it is provided by statute that he must give a bond.<sup>87</sup>

§ 67. **Liability of Sheriff to His Deputy.**—Although a sheriff may be liable personally to his deputy for monies advanced for or loaned by such deputy to the sheriff or for salaries or expenses due to such deputy from the sheriff, the ordinary sheriff's bond would not be liable for such monies.<sup>88</sup> However, the sheriff is liable where

La 158; *State v. Budd*, 1 So 453, 39 La Ann 232.

81. *State v. Reid*, supra.

82. *State v. Latham*, 61 So 351, 174 Ala 281; *Archbold v. Huntington*, 201 P 1041, 34 Ida 558; *Robinson v. State*, 28 SW(Tex) 566.

83. *Merrill v. Phelps*, 84 P(2d) 71, 52 Ariz 526.

84. *Tarrant v. Smith*, 81 SW(2d) (Tex) 537.

See also, *McWilliams v. Richland Co.* 17 Ill App 333; *Sheriff of Salt Lake Co. v. Salt Lake County*, 208 P 783, 71 Utah 593.

85. *Rich v. Graybar Electric Co.* 84 SW(2d) 708, 125 Tex 470, 102 ALR 60

171; *City & County of San Francisco v. McAllister*, 18 P 315, 76 Cal 246; *Lewis v. Knox*, 2 Bibb(Ky) 453.

86. *City & County of San Francisco v. McAllister*, 18 P 315, 76 Cal 246, the court holding the contract on which the sheriff recovered from his deputy is distinct and different from that which he made with the city and county as evidenced by his official bonds.

87. *Hill v. New Amsterdam Casualty Co.* 286 P 1103, 105 Cal App 156; *Stinson v. State*, 80 So 606, 76 Fla 421; *State v. Buech*, 177 NW 781, 171 Wis 474.

88. *Com. v. Keller*, 162 Atl 474, 106 Pa Super 458.

74. *Howard v. Caudill*, 15 SW(2d) 246, 228 Ky 403.

75. *Biehn v. Bannick*, 7 P(2d) 567, 166 Wash 405.

76. *Hill v. Fitzpatrick*, 6 Ala 314; *Larned v. Allen*, 13 Mass 295; *Morse v. Betton*, 2 NH 184; *Stimpson v. Pierce*, 42 Vt 334. The fact, this case

holds, that the deputy has become a deputy under the sheriff's successor does not change the rule.

77. *Stimpson v. Pierce*, supra.

78. *Day v. New York*, 66 NY 592; *In re Court Officers*, 3 Pa Dist 196.

79. *Ex parte Strobach*, 49 Ala 443.

80. *State v. Reid*, 55 So 748, 129

there has been a judgment obtained against the sheriff for an act of one of his deputies where the sheriff failed to set up a defense to the action of which he had been notified by his deputy, or where he had failed or neglected to give the deputy an opportunity of defending the action and the deputy might set this up as a defense in an action by the sheriff against the deputy's bond.<sup>89</sup> In order for the deputy to avail himself of this defense against the sheriff's action on the deputy's bond, not only must he prove such fact but there must be a basis for such by an appropriate pleading.<sup>90</sup>

§ 68. **Liability of Deputy in Summary Actions.**—Since it seems that summary proceedings against officers are confined in their application to officers to whom process may be directed, the postulate seems clear that such proceedings are unavailable as a remedy against a deputy sheriff or constable for the reason that process cannot be directed to a deputy, whether a sheriff's or constable's deputy.<sup>91</sup> In a summary action, being purely statutory, the jurisdiction must be found within the statute alone.<sup>92</sup> It is sometimes provided by statute that on a deputy's default the sheriff has the right to a summary action against such deputy for such default.<sup>92a</sup>

§ 69. **Relation of de Facto Officer and His Deputy.**—A de facto sheriff or constable is one whose claim to the office is defective but who exercises the duties of the office.<sup>93</sup> The defect in an officer's claim of title to the office may exist in the fact that he has not executed his bond within the time prescribed by law,<sup>94</sup> or on some other ground not rendering the claim void.<sup>95</sup> The acts of a de facto deputy sheriff and his relationship with the public are like that of the de facto sheriff and are of the same dignity as though he were a de jure officer.<sup>96</sup> No officer—principal or deputy—can

89. *Shaw v. Patterson*, 2 Tenn Ch 171.

90. *Tripp v. Vincent*, 3 Barb Ch(N Y) 613; *Van Seiver v. Bryan*, 13 NJE 134.

91. *Abbott v. Norman*, 204 SW 303, 134 Ark 535; *Rich v. Graybar Electric Company*, 84 SW(2d) 708, 125 Tex 470, 102 ALR 171 and note; *Caldwell v. Holly*, 1 AK Marsh(Ky) 429.

92. *Baldwin v. Gully*, 11 Ala 716; *Helm v. Haycraft*, 2 Litt(Ky) 171; *Vance v. Campbell*, 8 Humph(Tenn) 524; *Stowers v. Smith*, 5 Munf(Va) 401; *Heymann v. Cunningham*, 8 NW 401, 51 Wis 506.

92a. *Baldwin v. Gully*, supra; *Stowers v. Smith*, supra.

93. *Abbott v. Norman*, 204 SW 303, 134 Ark 535; *Gunn v. Fackett*, 67 Ga 725; *Harrison v. Richardson*, 27 SE 173, 99 Ga 763; *Cooper v. Ricketson*, 80 SE 217, 14 Ga App 63; *State v. Bates*, 23 Ia 96.

94. *Crawford v. Howard*, 9 Ga 314; *Monteith v. Com.* 56 Va 172, 15 Grat 172.

95. *People v. Colerick*, 34 NW 683, 67 Mich 362.

96. *U. S.—Commercial Bank of Augusta v. Sandford*, 103 F 98.

Ala.—*Thrower v. State*, 52 Ala 22; *Garner v. Clay*, 1 Stow(Ala) 182.

defend himself by reason of defaults in such office upon the ground that he is only a usurper of that office.<sup>97</sup> As to the questioning of his authority, it can only be raised by those directly involved in the exercise of that authority or affected by his acts.<sup>98</sup>

§ 70. **Special Deputy; How Constituted.**—In general the appointment of a special deputy must be in writing.<sup>99</sup> It has been held to be a sufficient compliance with a statute requiring that the appointment of a special deputy to be in writing where the sheriff gave the deputy a metal badge with the words "deputy sheriff" thereon.<sup>1</sup> The requirement that such appointment be in writing is necessary even where there is no statute demanding such.<sup>2</sup> However, a sheriff, even in the face of the statute requiring that all appointments of special deputies be in writing, has also the implied authority to call to his assistance such aid as is necessary to efficiently execute the express authority given him to make an arrest and the expense so incurred becomes a public charge.<sup>3</sup> Likewise, a regularly appointed deputy or undersheriff may appoint a special deputy to do a particular act.<sup>4</sup> A special deputy appointed by a

Cal.—*Shores v. Scott River Water Co.* 17 Cal 626; *Peo. v. Roberts*, 6 Cal 214.

Conn.—*Soudant v. Wadhams*, 46 Conn 218.

Ga.—*Harrison v. Richardson*, 27 SE 173, 99 Ga 763; *Brooks v. Rooney*, 11 Ga 423, 56 Am Dec 430; *Crawford v. Howard*, 9 Ga 314; *Stephens v. State*, 32 SE 13, 106 Ga 116.

Ill.—*Ballance v. Loomiss*, 22 Ill 82; *McCluskey v. McNeely*, 8 Ill 578, 3 Gilman 578.

Ind.—*Case v. State*, 69 Ind 46.

Ia.—*Stickney v. Stickney*, 42 NW 518, 77 Ia 699.

Ky.—*Wilson v. King*, 3 Litt(Ky) 457, 14 Am Dec 84.

La.—*Dorsey v. Vaughan*, 5 La Ann 155.

Me.—*Bliss v. Day*, 68 Me 201.

Mass.—*Bucknam v. Ruggles*, 15 Mass 180, 8 Am Dec 98; *Fowler v. Bebee*, 9 Mass 231, 6 Am Dec 62.

Miss.—*Alabama, etc., R. Co. v. Bolding*, 13 So 844, 69 Miss 255, 30 ASR 541.

Mo.—*Abington v. Steinberg*, 86 Mo App 639; *Powers v. Braley*, 41 Mo App 566.

N. H.—*Lisbon v. Bow*, 10 NH 167; *Moore v. Graves*, 3 NH 408.

N. J.—*Clark v. Ennis*, 45 NJL 69; *State v. Anderson*, 1 NJL 318, 1 Am Dec 207.

N. Y.—*Hammondsport Law, etc., Assoc. v. Kinzell*, 89 NYS 534, 43 Misc 505; *Synder v. Schram*, 59 How Pr (NY) 404.

N. C.—*Mabry v. Turrentine*, 30 NC 201 (de facto coroner acting as sheriff); *Welch v. Scott*, 27 NC 72.

S. D.—*Williamson v. Lake County*, 96 NW 702, 17 SD 353.

Tenn.—*Bates v. Dyer*, 9 Humph (Tenn) 162.

Tex.—*Broach v. Barth*, 50 SW(Tex) 594; *Trammell v. Shelton*, 45 SW 319, 18 Tex Civ App 366.

97. *Sprague v. Brown*, 40 Wis 612.

98. *Moore v. Graves*, 3 NH 408.

99. *Greisner v. Greisner*, 97 Atl 287, 80 NJ Eq 76; *Croze v. John*, 164 P 941, 96 Wash 216.

1. *Croze v. John*, supra.

2. *Greisner v. Greisner*, supra.

3. *Christian Co. v. Merrigan*, 61 NE 479, 101 Ill 484; *Lansdon v. Washington County*, 102 Pac 344, 16 Ida 618.

4. *McGuffie v. State*, 17 Ga 497; *New Albany, etc., Railroad Co. v.*

sheriff is merely an agent of the sheriff but neither his appointment nor his relation to the sheriff can be presumed from his acts.<sup>5</sup> Such being the case, the sheriff may appoint as his special deputy a minor to perform a particular act required,<sup>6</sup> the court saying: "these grounds, in different forms, raise the question whether a minor could legally act as special deputy of the sheriff, and as such legally summon jurors under a writ venire. A special deputy, not being an 'officer' in the proper sense of the word, and not being required to give any bond, and the sheriff, by the express terms of the statute, being made responsible for his conduct, we see no reason why a sheriff may not appoint a minor as his special deputy to serve and execute any particular paper. In such a case the deputy acts merely as the agent of the sheriff, who is responsible for the acts of his agent, within the scope of his agency; and, as there can be no question that a minor may act as the agent of another, we do not see why, upon the same principle, the sheriff may not appoint a minor his special deputy or agent."<sup>7</sup> A special deputy has no official standing and acts only for the sheriff as has been already seen.<sup>8</sup>

§ 71. **Appointments of Deputies by Parol and by Ratification of Acts.**—Where a private citizen was appointed as special constable to serve a writ of attachment or a garnishment, the appointment was not invalid because not in writing; the statute in that instance authorizing such appointment and not requiring it to be in writing.<sup>9</sup> It has been held, however, that although it was unlawful for the sheriff to appoint a special deputy by parol, and that all such deputations should be in writing, nevertheless, where a person holds himself out as the sheriff's deputy and being apparently clothed with the right to execute the duties of the office that in the circumstances he acted, not as a private citizen but as a public officer, especially when it clearly appears that the sheriff recognized such assumption of authority by a ratification of the act done or otherwise, then the public and all persons having business with such purported officer have a right to accept such person for what he claims and is admitted to be without examining into the

Grooms, 9 Ind 243; Welch v. Jamison, 1 How (Miss) 180; Hunt v. Burrell, 5 Johns. (NY) 137; Com. v. Armstrong, 4 Pa Co 5.

5. Meyer v. Bishop, 27 NJ Eq 141.

6. State v. Toland, 15 SE 509, 38

SC 515; McConnell v. Kennedy, 7 SE 70, 27 SC 180.

7. State v. Toland, supra.

8. State v. Toland, supra; Meyer v. Bishop, 27 NJ Eq 141.

9. Brown v. Williams-Brooke Co. 63 So 351, 106 Miss 182.

regularity of his credentials.<sup>10</sup> And where an arrest was made by a constable without any written authority from the sheriff, yet where the sheriff recognized the act and ratified it by taking the defendant into his own custody from the constable and keeping him, or pretending to keep him in custody by virtue of the requirements of a writ of ne exeat, that such prisoner was properly taken into custody by the sheriff and he was a lawful prisoner under such writ will be assumed.<sup>11</sup> It has also been held in other states that a parol appointment is sufficient, there being no statute which requires the sheriff to make his deputation in writing.<sup>12</sup> Where the statute requires that when the sheriff appoints a jailer he shall make him a deputy, and that as such deputy he shall take an oath of office, it is, of course, true that in designating an individual for such important duties that the sheriff should have legally appointed him as a deputy and such deputy should have taken the oath of office; but in assuming and performing the duties of jailer under the authority of the sheriff, he becomes a de facto jailer and is entitled to remuneration for services thus performed from the county.<sup>13</sup> At common law,<sup>14</sup> and by statute the sheriff has a right to appoint deputies, and a statute limiting the right will be strictly construed as being in derogation of the common law.<sup>15</sup> Appointments of deputy sheriffs are generally regulated by statute.<sup>16</sup> In many instances the approval of the deputies named by the sheriff must be passed upon by a board of county commissions<sup>17</sup> or by some local court.<sup>18</sup> Where a state requires that the appointment of a special deputy shall be in writing, such provision must be com-

10. Meyer v. Patterson, 28 NJ F-239.

11. Greisner v. Greisner, 97 Atl 287, 86 NJ Eq 70.

12. Harris v. Bradford, 4 Ala 214; McGee v. Eastis, 3 Stew (Ala) 307; Pentecost v. State, 18 So 140, 107 Ala 81; Morris v. Jones, 7 Del 123; Matt-his v. Pollard, 3 Ga 1; Broadman v. Halliday, 10 Paige (NY) 223; Edmunds v. Barton, 31 NY 495; State v. Allen, 27 NC 36; Guernsey v. Tuthill, 82 NW 190, 12 SD 584; Crose v. John, 164 P 941, 96 Wash 210; 1 Backus on Sher-iffs, 13.

13. McFadden v. Cedar County, 145 NW 639, 95 Neb 318.

14. Connery v. Sewell, 213 NYS 602, 126 Misc 418; Cronin v. Civil 64

Service Commission of Los Angeles County, 236 P 339, 71 Cal App 633.

15. Connery v. Sewell, supra.

16. People ex rel. Meyer v. Whealan, 190 NE 603, 356 Ill 402; Protest of Chicago R. I. & P. R. R. 25 P(2d) 690, 164 Okla 239; State v. Johnson, 52 SW(2d) (Tex) 110; Sheriff of Salt Lake County v. Board of Commissioners of Salt Lake County, 268 P 783, 71 Utah 593.

17. Campbell v. Canyon County, 5 Ida 53, 46 P 1022.

18. Dassey v. Sanders, 33 SW 103, 17 Ky L Rep 972; Day v. Justices Fleming County Court, 3 B Mon (Ky) 108; State v. McIntyre, 25 Minn 333; Sheriff of Salt Lake County v. Board of Commissioners of Salt Lake County, 268 P 783, 71 Utah 593.

plied with.<sup>19</sup> Ordinarily a deputy sheriff's appointment terminates with the sheriff's death,<sup>20</sup> or when the term of the sheriff, who appointed him, expires.<sup>21</sup> Where it is required by statute that the appointment of a deputy sheriff be entered on the records of the county clerk, a minute entry therein showing the approval of the appointment is some evidence thereof and sufficient to make the question an issue of fact for the court or jury.<sup>22</sup>

§ 72. **Appointment of Deputy Sheriffs.**—The general appointment of a deputy sheriff need not be in writing,<sup>23</sup> unless required by statute or constitutional provision.<sup>24</sup> Where, however, there is delivered to a deputy a badge representing the power of the office such act constitutes a general appointment.<sup>25</sup> The power of appointment rests generally with the sheriff.<sup>26</sup> While the sheriff may have the power of appointment, and had such power at common law, generally it is exercised under the supervision of county commissioners,<sup>27</sup> or of a local judge.<sup>28</sup> However, where a deputy sheriff is paid solely on a fee basis, such deputy has no connection with the county commissioners except through the sheriff, notwithstanding a statute which authorizes the county commissioners to place deputies on a salary basis and to discharge them, the status of such deputy sheriff being that of a ministerial officer who acts for the sheriff in ministerial matters and in his name and stead.<sup>29</sup>

19. Greisner v. Greisner, 97 Atl 237, 86 NJ Eq 76; Meyer v. Bishop, 27 NJ Eq 141, affirmed 28 NJ Eq 239; Alford v. State, 8 Tex App 545.

20. McMullan v. Daniel, 155 So 687, 229 Ala 194.

21. Abt v. Wilcox, 249 NW 483, 264 Mich 183.

22. Correll v. Morgan, 174 P 509, 70 Okla 205; Buck v. Hawley, 105 NW 688, 129 Ia 406.

23. McGee v. Eastes, 3 Stew (Ala) 307; Morris v. Jones, 2 Houst (7 Del) 123; Matthis v. Pollard, 3 Ga 1.

24. Crose v. John, 164 P 941, 96 Wash 216. Under a statute providing: "Each sheriff may appoint as many deputies as he may think proper, for whose official acts he shall be responsible to the amount of (his) their bond and may revoke such appointments at his pleasure; and persons may also be deputed by any sheriff in writing to do particular acts; and the sheriff shall be responsible on [1 Anderson on Sheriffs]—5

his official bond for the default or misconduct in office of his deputies," a parol appointment of a general deputy is valid, but a special deputy must be appointed in writing. Crose v. John, supra.

24. Meyer v. Bishop, 27 NJ Eq 141, affirmed in 28 NJ Eq 239; Alford v. State, 8 Tex App 545.

25. Crose v. John, supra.

26. Jackson v. Thurston County, 219 P 840, 127 Wash 41; Cronin v. Civil Service Commission of Los Angeles County, 236 P 330, 71 Cal App 633; State v. Harris, 161 NW 253, 100 Neb 745.

27. State v. Johnson, 52 SW(2d) 110; Sheriff of Salt Lake County v. Board of Commissioners Salt Lake County, 268 P 783, 71 Utah 593.

28. Hansmann v. Thomas, 234 NYS 581, 134 Misc 76.

29. Styers v. Forsyth County, 194 SE 305, 212 NC 558.

Where a statute required traffic officers to be duly appointed and qualified deputies acting under respective sheriffs of the several counties, constitutionally interpreted contemplates the traffic officers provided for shall be duly appointed and qualified deputy sheriffs who may, with consent of the sheriff, be employed as traffic officers by the county commissioners, and who may not be appointed by any authority other than the sheriff.<sup>30</sup>

§ 73. **Appointment of Special Officer by Court or Justice.**—The right of a justice of the peace to appoint a special constable is purely statutory and must be strictly complied with.<sup>31</sup> An attempted appointment of a special constable to execute a writ of possession of realty and writ of execution for money damages without statutory authorization is invalid.<sup>32</sup> In general, the attendants and assistants legally appointed by the judge of a court have the same powers and authority as the sheriff.<sup>33</sup> Where the appointment of a special officer is by the court, no compensation is recoverable by the appointee unless a record of his appointment is made properly in the court records.<sup>34</sup>

§ 74. **General Deputy May Appoint a Special Deputy.**—While the sheriff may not delegate the power of appointment to a general deputy, it has been held that a general deputy may deputize another for a special duty.<sup>35</sup> Any officer in making an arrest or executing civil process has the right, and it is his duty, to summon sufficient help to enable him to effect his purpose.<sup>36</sup> Where a sheriff or constable summons assistance for the purpose of making a lawful arrest, it may be made by the person called to assist and it is not necessary that the sheriff should be actually in sight, it being sufficient if he is near at hand and acting in making the arrest.<sup>37</sup>

30. State ex rel. Rauscher v. Gandy, 178 So (Fla) 166.

31. Davis v. C. E. Blackwell & Co. 298 P 730, 162 Wash 415.

32. State v. Morris, 161 SE 576, 111 W Va 347.

33. Stevenson v. Milwaukee County, 121 NW 654, 140 Wis 14, 17 Ann Cas 911.

34. Huff v. Knapp, 5 NY Sup Ct 299.

35. McGuffie v. State, 17 Ga 407; New Albany, etc. RR v. Grooms, 9 Ind 243; Welch v. Jamison, 1 How (Miss) 100; Com. v. Armstrong, 4 Pa 66

Co 5; Hunt v. Burrell, 5 Johns(NY) 137.

36. Randolph v. Com. 134 SE 544, 145 Va 883, 47 ALR 1084, where one was deputized by a justice to execute a warrant of arrest, and in executing such process he may call on others to assist him in doing so. Comfort v. Com. 5 Whart(Pa) 437; Slater v. Wood, 22 NY Sup Ct 15.

37. Robinson v. State, 16 SE 1016, 63 Ga 77, 86, 44 Am St Rep 127; Com. v. Field, 13 Mass 321; Coyles v. Hurtin, 10 Johns.(NY) 85; Byrd v. Com. 164 SE 400, 168 Va 897.

Where one was called to assist an [1 Anderson on Sheriffs]



Such an arrest is valid even though the appointment is by parol, unless there exists in the particular jurisdiction a mandatory statute to the contrary.<sup>38</sup> Likewise, in regard to the service of summons, a deputy sheriff has the same power to appoint a special deputy as is delegated by law to the sheriff.<sup>39</sup>

§ 75. Summary Proceedings.—In many states there are special statutes providing for summary proceedings against an official to enforce his liability for his official omissions.<sup>40</sup> Likewise, there are statutory summary remedies to compel the performance by the sheriff of the duties of his office.<sup>41</sup> These remedies are purely crea-

officer making an arrest, the one so called may do everything that the officer himself might do. *Byrd v. Com.* 164 SE 400, 158 Va 897.

38. *Com. v. Field*, 13 Mass 321.

39. *Gehrke v. Forman*, 52 NE 852, 177 Ill 618.

40. U. S.—*Turner v. Fendall*, 1 Cranch 117, 2 L ed 53.

Ala.—*Birmingham Dry-Goods Co. v. Bledsoe*, 23 So 153, 117 Ala 495, 21 So 403, 113 Ala 418; *Chandler v. Francis Vandegrift Shoe Co.* 10 So 353, 94 Ala 233.

Ark.—*Williams v. State*, 46 SW 186, 65 Ark 159; *Scarborough v. Arnold*, 21 Ark 231.

Del.—*Stidham v. Chase*, 3 Del 418, 3 Har 418; *Hukill v. Staats*, 2 Del 385, 2 Har 385.

Ga.—*Hand v. Grenville*, 22 Ga 476; *U. S. F. & G. Co. v. Toombs County*, 1 SE(2d) 411, 187 Ga 544.

Ill.—*Day v. Hackney*, 20 Ill 133; *Beard v. Foreman*, 2 Ill 40.

Ky.—*Johnson v. Bradley*, 11 Bush (Ky) 666; *Todd v. Caines*, 18 B Mon (Ky) 620.

La.—*Waldo v. Bell*, 13 La Ann 329; *Lay v. Boyce*, 3 La Ann 622.

Minn.—*Roche v. Dunn*, 106 NW 665, 97 Minn 529; *Kumler v. Brandenburg*, 38 NW 704, 39 Minn 59.

Miss.—*Steen v. Briggs*, 11 Miss 326; *Everett v. Duckworth*, 176 So (Miss) 387; *Rowand v. Gridley*, 2 Miss 210.

Mo.—*Roach v. Settles*, 10 Mo 397.

N. J.—*Diaston v. Strauck*, 42 NJL 546.

N. Y.—*Frankel v. Elias*, 60 How Pr (NY) 74; *Burk v. Campbell*, 15 Johns. (NY) 456.

N. C.—*Oats v. Darden*, 5 NC 500.

Pa.—*Ebersole v. Boeshore*, 1 Pa Co 92.

S. C.—*Kirkpatrick v. Ford*, 29 SCL 110; *Pennsylvania Bank v. Condy*, 10 SCL 209.

Tenn.—*Erkman v. Carnes*, 45 SW 1067, 101 Tenn 136; *Young v. Donaldson*, 2 Heisk (Tenn) 52.

Tex.—*Robinson v. Schmidt*, 48 Tex 13; *Spinks v. Caldwell*, 23 Tex 623; *Vaughan v. Warnell*, 28 Tex 119; *Burkett v. Simmons Hardware Co.* 52 SW(2d) (Tex) 675; *Rich v. Graybar Electric Co.* 84 SW(2d) 709, 125 Tex 470, 102 ALR 171.

Va.—*Stone v. Wilson*, 10 Gratt (51 Va) 529; *Bacchus v. Gee*, 2 Leigh (29 Va) 68.

Cal.—*Leese v. Clark*, 29 Cal 664; *McMann v. Superior Ct.* 15 P 448, 74 Cal 108.

Ga.—*Brannon v. Central Bank*, 18 Ga 381.

Ill.—*Buckmaster v. Drake*, 10 Ill 321.

N. J.—*Brown v. Dunn*, 11 Atl 149, 50 NJL 111.

N. Y.—*Holmes v. Rogers*, 2 NYS 501; *In re Dawson*, 13 NY Civ Proc 142, 20 Abb NC 188, 47 Hun 634.

Pa.—*Littleboy v. Blankman*, 1 Miles (Pa) 279.

S. C.—*Murray v. Peay*, 28 SCL 10.

Tex.—*Russell v. State*, 40 SW (Tex CA) 69.

tures of statute<sup>42</sup> and must be in strict accord with the statute.<sup>43</sup> A summary proceeding brought against the sheriff and his sureties for failure to proceed under an execution, is properly dismissible where it appears that prior to commencement of the summary proceeding the execution had been quashed because the judgment had been satisfied and since the function of the execution is for the purpose of realizing on the judgment and as the judgment had been satisfied, there was no further need for execution or action thereon.<sup>44</sup> In the application of summary remedies against the sheriff, the only defaults for which he is liable are those that are set out in a statute; this is in consonance with strict construction required at common law.<sup>45</sup>

§ 76. Statutory Regulations as to Deputy Sheriff.—As seen heretofore<sup>46</sup> the power of appointment of a deputy sheriff rests with the sheriff, subject to the approval of various other authorities.<sup>47</sup> Ordinarily, the deputy, after being appointed must qualify by giving the necessary bond and filing it with the proper authorities.<sup>48</sup> The sheriff is usually limited by statute as to the number of deputies that he may appoint.<sup>49</sup> Where the number of deputies that a sheriff may appoint is not limited by statute, he is required to provide himself with a sufficient number to execute the duties of his office.<sup>50</sup> The term of office of the deputy sheriff is usually fixed by statute.<sup>51</sup> Occasional statutory enactments are found where the deputy is empowered to exercise the duties of the office of sheriff in case of a vacancy.<sup>52</sup> Generally the relationship

42. *Braswell v. Watkins*, 112 So 343, 216 Ala 62; *Moutier v. Sherman*, 25 SW(2d) (Mo App) 490.

43. *Chandler v. Francis Vandegrift Shoe Co.* (also, *Chandler v. Vandegrift Shoe Co.*) 10 So 353, 94 Ala 233; *Robinson v. Schmidt*, 48 Tex 13; *Peck v. Murphy & Bolanz*, 184 SW (Tex Civ App) 542; *Union Motor Car Co. v. Farmer*, 138 So 579, 161 Miss 847.

44. *Matthews v. Fork Ridge Bus Line*, 79 SW(2d) 196, 257 Ky 757.

45. *Chandler v. Francis Vandegrift Shoe Co.* (also, *Chandler v. Vandegrift Shoe Co.*) 10 So 353, 94 Ala 233; *Smith v. Leavitts*, 10 Ala 92; *Union Motor Car Co. v. Farmer*, 138 So 579, 161 Miss 847.

46. See Sec. 72, supra.

47. See Sec. 72, supra.

48. *Stinson v. State*, 80 So 506, 76 Fla 421; *State v. Buech*, 177 NW 761, 171 Wis 474; *Hill v. New Amsterdam Casualty Co.* 286 P 1103, 105 Cal App 156.

49. *Hogan v. Cascade County*, 92 P 529, 38 Mont 183; *Urban v. Harris County*, 251 SW (Tex Civ App) 594; *Peo. v. Whealan*, 190 NE 693, 356 Ill 402.

50. *Hallet v. Lee*, 3 Ala 28; *Fruedenstein v. McNeil*, 81 Ill 208.

51. *Abt v. Wilcox*, 249 NW 483, 264 Mich 183; *Morris v. Civil Service Commission*, 163 Atl 635, 9 NJ Misc 309.

52. *Opinion of Justices*, 126 Mass 603; *Dickinson v. Oliver*, 88 NE 44, 195 NY 238, 111 NYS 1116, 127 App Div 932; *Lamoreaux v. Attorney General*, 50 NW 812, 89 Mich 146.

existing between the sheriff and his deputy is regulated by law.<sup>53</sup> The delivery and approval of a deputy sheriff's bond is likewise regulated by statute.<sup>54</sup>

§ 77. Deputy as a General Agent.—In many states the courts look upon the relationship between a sheriff or constable and his deputy, not as one of master and servant or principal and agent, but merely as a representative one of the sheriff or constable by his deputy, and regulated by law.<sup>55</sup> As to the public, the deputy is the servant or agent of the sheriff and for his acts and omissions the sheriff is liable as we have heretofore seen.<sup>56</sup> "The deputy is an officer coeval in point of antiquity with the sheriff. . . . The creation of deputies arose from an impossibility of the sheriff's performing all the duties of his office in person. The powers of the deputy have, consequently, been ascertained at an early date. The general criterion by which to test his authority, is declared in the case of *Levett v. Farrar*, (Cro. Eliz. 294), (78 Eng Reprint 547) in which the court said, that if a writ be directed to the sheriff, by the name of his office, and not by a particular name, and doth not expressly command him to execute it in person, the under sheriff may execute it."<sup>57</sup> The deputy sheriff or constable, being a representative of the sheriff or constable, has the authority to exercise any of the powers or perform any of the duties which the sheriff or constable might perform himself.<sup>58</sup> In the execution of writs the deputy may bind the sheriff or constable in incurring expenses in the service thereof.<sup>59</sup> The power of the deputy, however, to bind the sheriff by contract is very limited.<sup>60</sup> In an

53. *Gray v. De Bretton*, 188 So 722, 192 La 628, see also 184 So 390.

54. *Stinson v. State*, 50 So 506, 76 Fla 421; *Hill v. New Amsterdam Casualty Co.* 286 P 1103, 105 Cal App 156.

55. *Gray v. De Bretton*, 188 So 722, 102 La 628; see also, 184 So 390; *Rich v. Graybar Electric Company*, 84 SW (2d) 708, 125 Tex 470, 102 ALR 171.

56. Secs. 61 et seq., supra.

57. *Tillotson v. Cheetham*, 2 Johns. (NY) 63.

58. *Buchanan v. Chapman*, 140 So 585, 108 Fla 280; *Jeffcoat v. Chapman*, 146 So 588, 108 Fla 288; *Collins v. Com.* 291 SW 1, 218 Ky 189; *Scottish American Mortgage Co. v. Nye*, 79 NW 553, 58 Neb 601; *Lanier v. Town of Greenville*, 93 SE 850, 174 NC 311;

*National Cash Register Co. v. Kline*, 99 Pa Super 299; *National Cash Register Co. v. Berg*, 99 Pa Super 299; *Shely v. State*, 32 SW 901, 35 Tex Cr 190.

59. *American Wrecking Co. v. McManus*, 181 NW 235, 174 Wis 300; see also, 183 NW 250, holding, also, the plaintiff liable in an execution or other process for expenses in excess of statutory fees in executing the mandates of the process; *Foster v. Rhinehart*, 11 NYS 629. See, however, *Dooley v. Root*, 13 Gray (Mass) 303; *Dow v. Rowe*, 58 NH 125; *Lucier v. Pierce*, 60 NH 13; *Krum v. King*, 12 Cal 412, involving wages of a keeper employed by the deputy with sheriff's approval.

60. *Miller v. Bruff*, 64 Pa Super 69

action against the sheriff for alleged official misfeasance, or neglect of a deputy, based upon the deputy sheriff's contract with the plaintiff to take a note maker's automobile on a note owed to the plaintiff and placed in the hands of the deputy sheriff, it appearing that if the deputy had faithfully done as plaintiff instructed he would have done nothing which the law required him to do officially, the fact that subsequently the note was lost along with the amount due thereon, imposed no liability on the sheriff.<sup>61</sup> It was held, however, that a deputy could not serve the ancient writ de homine replegiando.<sup>62</sup> Likewise, it has been held, that the giving of advice is not within the province of a deputy sheriff for which the sheriff is liable.<sup>63</sup> A deputy sheriff can only act in the name of the sheriff.<sup>64</sup> Where the deputy sheriff or constable has notice of certain facts which are material in the execution of the duties of his office, such notice is also imputed to the sheriff or constable.<sup>65</sup> The allegedly official acts of one whom the sheriff holds out as a deputy and the purported deputy acts as such with the sheriff's approval possess the same legality as the official conduct of a de jure officer, notwithstanding the deputy's failure to legally qualify.<sup>66</sup> Although the sheriff is

177; *Walter v. Jenkins*, 92 Pa Super 526.

61. *Hunt v. Hill*, 143 Atl 307, 101 Vt 311.

62. *Wood v. Ross*, 11 Mass 271.

This antiquated writ was a sort of replevin for a human being, and long ago was supplanted by the writ of habeas corpus, but it seems that a quasi palingenesis was effectuated at a comparatively neoteric period in our law. *Fitz. N.B.* 66; 3 Black Com 129; 1 Kent Com 404 note; *Hutchings v. Van Bokelen*, 34 Me 126.

63. *Smith v. Michle*, 29 Pa Dist 899.

64. *Thompson Bros. v. Philips*, 200 NW 727, 198 Iowa 1064; *Ditch v. Edwards*, 1 Scam 127, 2 Ill 127, 26 AD 414 and note; *Reinhart v. Lugo*, 25 P 1069, 26 Cal 395, 21 ASR 52, wherein it is said: "The act and return of a deputy is a nullity unless done in the name and by the authority of the sheriff." *Gray v. Wolf*, 42 NW 504, 77 Ia 630.

65. *Snouffer v. Heiseg*, 130 SW 912, 62 Tex Civ 81. The rule with respect to the deputy's knowledge being im-

puted to the sheriff or constable seems to be the same as that obtaining generally with respect to principal and agent, master and servant, and the like. So, it would seem to follow that notice or knowledge possessed by a deputy would be binding on the sheriff or other chief officer without regard to when the subaltern acquired the same. The principal would be bound by such notice or knowledge if it were acquired by the deputy before being appointed as such, if he acted with such notice or knowledge in mind thereafter. *Clariss v. Oregon Short Line R. R. Co.* 51 P(2d) 217, 56 Ida 169; *Henry v. Omaha Packing Co.* 115 NW 777, 81 Neb 237; *Harrington v. U. S.* 11 Wall.(US) 356, 20 L. ed 167; 1 Restatement of the Law of Agency, Sec. 276. In other words, it is unnecessary that an agent or deputy should be acting as such when the knowledge or notice affecting his principal is acquired in order to impute same to the chief officer. However, see note 66, infra.

66. *Powell v. Fidelity & Deposit Company*, 163 SE 239, 45 Ga App 88.

charged with the knowledge of his deputy, acquired in the exercise of his duties,<sup>67</sup> it has been held that such knowledge would not be imputed to the sheriff where the deputy acquired the information before his appointment,<sup>68</sup> although, it seems there would be a limitation in regard to the last mentioned principle, imposed by the general rule with respect to imputing knowledge of the subordinate to the principal.<sup>69</sup>

§ 78. **The Sheriff Is the One Officer.**—In the eyes of the law the sheriff or constable and his deputy are one officer.<sup>70</sup> While the sheriff or constable and his deputy are regarded as one officer, this rule does not extend so far as to make the sheriff chargeable with notice of all that has come to the knowledge of any of his deputies, nor can it be stretched so far as to require impossibilities of the sheriff, or to impose unconscionable exactions.<sup>71</sup> A deputy is usually defined as one who, by appointment, exercises an office in another's right.<sup>72</sup> As the sheriff or constable is the "officer" so upon the insanity of the sheriff or constable, his deputy can no longer act.<sup>73</sup> Just what the status of the relationship between the officer and his deputy is, is one of conflict. In *Styers v. Forsyth County*, 212 NC 558, 194 SE 305, the court had occasion to go into the matter, saying, "As between the injured party and the sheriff, there is a choice of theories, equally efficacious, and all leading to liability. But when we come to consider the responsibility of the sheriff to his deputy a different question is presented. This calls for a reconsideration of the former decisions before they can be regarded as precedents in a case like the present where the correctness of the theory upon which they are predicated is to be determined. Instead of controlling precedents forsooth some are found to be only inns for the night, good enough for the time and purpose, but the law, like the traveler, was up and moving on the morrow."<sup>74</sup> There are three different views as to the relationship of the sheriff or constable and his deputy, one is, they are master and servant; the second, they are principal and agent; and the third, that the deputy is the officer's representative and the sheriff

67. *Shea v. Conant*, 134 NYS 315, 149 App Div 583, 3 Civ Pr (NS) 220.

68. *Schraeder v. Mitchell*, 215 P 147, 73 Colo 320.

69. Note 65, supra.

70. *Styers v. Forsyth County*, 194 SE 305, 212 NC 558; *Broschart v. City of New York*, 3 NYS(2d) 13, 166 Misc 515; *Roberts v. Dean*, 187 So 571, —

Fla —; *State ex rel. Rauscher et al. v. Gandy*, 178 So 166, — Fla —.

71. *Roberts v. Dean*, supra.

See also, Sec. 77, notes 65, 69, supra.

72. *Styers v. Forsyth County*, supra.

73. *State v. Commissioners*, 31 SE 873, 123 NC 582, 68 Am St Rep 834.

74. *Styers v. Forsyth County*, supra.

or constable is liable for his acts as if they had been done by himself. In the latter sense, the deputy is not to be regarded as acting as an agent of the officer, but rather in a sense of official responsibility cast by law upon the sheriff or constable for the acts of his deputy.<sup>75</sup> The sheriff or constable being the officer, the deputy can only act in his name.<sup>76</sup> Generally the deputy can only act for the sheriff or constable in ministerial matters<sup>77</sup> but not so where the exercise of judicial authority is involved.<sup>78</sup>

§ 79. **Personal Acts of the Deputy.**—Where a deputy acts personally and outside the scope of his duty as an officer, as where a deputy sheriff and others conspired to get an estranged wife to return to her husband by having a deputy from another county serve a fictitious warrant of arrest upon her and while carrying out the conspiracy, one of the conspirators shot and killed a third party, neither the sheriff, nor the surety on the sheriff's bond was held liable to the decedent's widow for the death, since the deputy was not acting within the scope of his official authority, but in a purely personal matter.<sup>79</sup> Likewise, it has been held to be the personal as contradistinguished from an official act of the deputy where one was arrested by such deputy without a warrant and imprisoned without any legal authority.<sup>80</sup> Where a deputy sheriff entered into a contract with a party to a law suit to take a note to make collection thereof, the sheriff was not liable where the note was lost along with the amount due, as the deputy sheriff had no authority whatsoever in making such a contract.<sup>81</sup> Likewise, it was considered a non-official act of a special deputy where such deputy procured a John Doe warrant without any directions from the sheriff and in attempting an arrest shot a bystander, the sheriff was held not civilly liable.<sup>82</sup> In this instance, the court

75. *Styers v. Forsyth County*, supra; *Gray v. De Bretton*, 188 So 722, 192 La 628.

76. *Arnold v. Hawkins*, 90 SE 678, 79 W Va 205; *Wilson v. Russell*, 31 NW 645, 4 Dak 376.

77. Sec. 60, supra.

78. *Wood v. Ross*, 11 Mass 271; *Nebraska Loan, etc. Association v. Marshall*, 71 NW 63, 51 Neb 534; *Smith v. Michie*, 29 Pa Dist 899.

79. *Davis v. McDowell*, 185 So (La App) 634.

80. *Graves v. Buzbee*, 45 SW(2d) (Tex Civ App) 392. But this adjudication is not easy to sustain on any

reasonable hypothesis, for it is quite apparent that the deputy acted, or attempted to act as such in making the arrest and detaining the plaintiff. It must be manifest that whatever the deputy did was in an attempt to discharge some supposed duty as a deputy. If the sheriff or constable may be exonerated in these circumstances upon a finely spun theory of nonofficial conduct of his deputy, then abuse of official authority may be indulged with impunity.

81. *Hunt v. Hill*, 143 Atl 307, 101 Vt. 311.

82. *Hanic v. Rice*, 129 SE 280, 194

held that the special deputy was not acting in the line of duty, nor in the scope of his official authority as such, nor was he acting by virtue of his office or under color thereof, but entirely and exclusively as a volunteer and therefore the sheriff was not liable for the injury complained of. Also where a deputy sheriff secured a search warrant and knowing of certain circumstances which rendered its issuance invalid, he was held charged with the knowledge that the warrant was invalid so that the sheriff would not be liable for the unauthorized service.<sup>83</sup> These authorities are unsound; the illative conclusion from them is that a sheriff or constable is not liable when the deputy acts wrongfully, if he knows he is so acting. It would be just a step to conclude if the deputy did not know he was acting illegally, the sheriff would be protected because of the deputy's good faith, and thereby panoply the officer on the one hand because the deputy knew he was acting wrongfully and on the other because the deputy did not know of his illegal conduct.

§ 80. **Special Legislation as to Deputy Sheriffs.**—In Alabama it is provided by statute that the sheriff is exempt from liability for wrongful acts of his deputies in which he did not participate.<sup>84</sup> In Indiana the sheriff is not liable for misconducts of sheriffs of other counties in the execution of process directed to him and which he sends to them with his mandate to execute the same, they being independent officers of their own counties, elected by the people.<sup>85</sup> In Connecticut a deputy sheriff is regarded as an independent officer and the liability of the sheriff for the deputy's acts is restricted to very narrow limits which practically amounts to total nonliability.<sup>86</sup> Also in Alabama the sheriff is not liable for the defaults and misfeasance of his subordinates in absence of his negligence in making appointments and supervision thereof.<sup>87</sup>

§ 81. **Cumulative Remedy.**—Where one has been injured by the default of a deputy sheriff such party has a right to bring a

NC 234. This case is unsound; what we have said with respect to Graves v. Buzbee, supra, is equally applicable here.

83. Sheppard v. Gill, 58 SW(2d) (Tex Civ App) 168; see also, 90 SW (2d) 563, 128 Tex 603.

84. Local Acts 1936, p. 55, Sec. 5. Constitution 1901, Sec. 22. It was held that such legislation was not invalid as granting the sheriff special

privileges or immunities under the constitution. *Tuscaloosa County v. Shamblin*, 169 So 234, 233 Ala 6.

85. *McGruder v. Russell*, 2 Blackf (Ind) 18.

86. *Coite v. Lynes*, 33 Conn 109.

87. *Tuscaloosa v. Shamblin*, 169 So 234, 233 Ala 6; *Langis v. Byrne*, 131 So 444, 222 Ala 183; *Edmonds v. Shirlley*, 116 So 303, 22 Ala App 398.

direct action against the deputy for such breach of his duty and to recover for any damage that such breach might have caused.<sup>88</sup> In some instances, it is provided by statute that a party has the right to prosecute an action against the bond of the sheriff in the name of the people of the State for his acts. Such statute does not take away the right to sue the sheriff, or the wrongdoer alone.<sup>89</sup> Likewise, where a statute gives a particular remedy against a constable for breach of his duty, it is held that it does not take away the common law right of action as where a particular default of the constable was a failure to levy the attachment, but, both remedies are not available at one and the same time.<sup>90</sup> It is no defense in an action against the sheriff to show that others who might be liable were not joined as defendants.<sup>91</sup>

§ 82. **Suretyship Strictissimi Juris.**—The contract of the surety on the official bond of a sheriff or a constable is construed strictissimi juris.<sup>92</sup> Official bonds are not retrospective and cover liability for defaults prior to the execution of the bond in the absence of stipulation therein making it retroactive by reason of estoppel. So it may be said generally there can be no liability on the bond for default of the principal which occurred prior to the execution of the bond.<sup>93</sup> However, where the bond refers to the entire term of office, although it was executed after the expiration of the term of office, or during the middle of the term for which the bond was given, liability extends to the entire term.<sup>94</sup> An official bond conditioned for specific acts and for the faithful execution of his office by the principal obligor under a statute requiring a bond to be so conditioned, covers only the duties imposed upon the sheriff by law and does not extend the liability beyond that for nonperformance of the act so specified,<sup>95</sup> in the absence

88. *Fox v. Cone*, 13 SW(2d) 65, 118 Tex 212; *Frothingham v. Maxim*, 141 Atl 99, 127 Me 58.

89. *King v. Snow*, 266 Ill App 462.

90. *Abbott v. Norman*, 204 SW 303, 134 Ark 535.

91. *Dyett v. Hyman*, 29 NE 261, 129 NY 351, 26 Lam St Rep 533.

92. *Hain v. Gaddy*, 122 So 320, 219 Ala 363; *Gray v. Noonan*, 50 P 116, 5 Ariz 167; *People v. Foster*, 23 NE 615, 133 Ill 406; *Sutton v. Williams*, 156 SE 160, 199 NC 546. Rule of strict construction as inapplicable to compensated surety. See 94 ALR 864, 883; *Davis v. Moore*, 2 SE(2d) 360, 74

215 NC 449; *Davis v. Hall*, 143 P 803, 72 Ore 220; *Winters v. May*, 50 SE 647, 71 SC 9; *Jeff Davis County v. Davis*, 192 SW (Tex Civ App) 291.

93. *Disheroon v. Brock*, 105 So 899, 213 Ala 637; *Cowden v. Trustees*, 85 NE 924, 235 Ill 604, 23 LRA(NS) 131 and note, 126 Am St Rep 244.

94. *McMullen v. Winfield Building etc. Association*, 67 P 892, 64 Kan 298, 56 LRA 924 and note; 91 ASR 236 and note; *Town of Hudson v. Kiles*, 71 NE 63, 135 Mass 682; *Disheroon v. Brock*, supra.

95. *Sutton v. Williams*, 155 SE 160, 199 NC 54.

of any other contrary statutory conditions which are read into a sheriff's official bond.<sup>96</sup>

Bonds of sheriffs and constables are liable for defaults, although partly performed when the bond is executed, as for instance, where process has been delivered to a sheriff before a bond has been given, it is no defense for breach of duty committed in connection with such process after the bond is given.<sup>96a</sup> But the bond cannot be made to cover breaches of duty in other official capacities, as where the sheriff received an execution while acting as a deputy of a former sheriff and the money came into his hands after he became sheriff, his bondsmen are not liable for a loss arising therefrom by reason of the sheriff's misconduct.<sup>96b</sup>

**§ 83. Resistance to Deputies.**—A deputy who is making a lawful arrest has the right to use such force as is reasonably necessary to prevent the offender from regaining his freedom and to overcome his resistance, to prevent his escape, and to retake him if he does escape.<sup>97</sup> In the use of force to overcome the resistance of a prisoner, the force must be reasonable and not excessive and only used when it cannot be overcome otherwise.<sup>98</sup> The amount of force necessary to be used in making an arrest is determined in accordance with the old rule of that which an ordinarily prudent and intelligent person, with the knowledge and one who could appreciate the situation would have used, or determined necessary to use.<sup>99</sup> Every private person who is called on by the officer to aid the officer in making the arrest, or enforcing the law, may resort to the same force as the officer himself.<sup>1</sup>

**§ 84. The Office of Deputy Sheriff Is Not the Subject of Sale.**—The English rule that the sheriff should not "let his office to farm or contract the right of deputyship" has generally been enforced in the United States.<sup>2</sup> Where a candidate for sheriff agreed to let another appoint deputies in return for political support in securing

the office of sheriff, it was held that it was not a sale of the office of deputy sheriff within the meaning of statutes prohibiting same.<sup>3</sup> However, such action is generally held to be void as against public policy.<sup>4</sup> In the case of *Fox v. Petty* where an action of mandamus was brought to compel approval of appointment of a deputy by the county court, which was required to approve all deputies of the sheriff, and it was shown that the deputy in question was appointed pursuant to an agreement whereby the sheriff agreed to allow another to select his deputies in exchange for political assistance, the court still held that such facts did not warrant the county court in withholding its approval of such deputy, it appearing that the deputy was of good moral character and qualified to perform the duties of the office. However, the court pointed out that such contract was contrary to public policy and void, and observed if the action were one by which the deputy sought to require the sheriff to make the appointment pursuant to such agreement, or an action by the sheriff seeking redress for failure to deliver the political assistance contracted for, no relief could be afforded either party to the contract.<sup>5</sup>

**§ 85. Removal of the Deputy Sheriff.**—As a general proposition, the power of appointment carries with it the power of removal<sup>6</sup> so that it follows a deputy sheriff holds office only during the pleasure of the sheriff.<sup>7</sup> Where a statute conferred upon a sheriff the power to appoint deputies, and fixed no definite term of office for them but provided that the tenure of the deputy should be at the pleasure of the sheriff, it is tantamount to a provision that both the appointment and the tenure are discretionary with the sheriff.<sup>8</sup> Where such authority is given to the sheriff to appoint and where the tenure in office is not fixed by law, the sheriff may suspend or remove a deputy<sup>9a</sup> without notice to, charges against, or hearing. Where the power of approval of an appointment of a deputy rests in a board of county commissioners and also the right to determine the number of deputies necessary, such board may reduce the number of deputies, but the sheriff has the

96. *Farmer v. Rutherford*, 15 P(2d) 474, 136 Kan 298.

96a. *Faulkner v. State*, 9 Ark 14.

96b. *Peo. v. Mellenry*, 19 Wend(NY) 482.

97. *People v. Adams*, 24 P 629, 85 Cal 231; *U. S. v. Fullhart*, 47 F 902. See Sec. 138 *infra*; *Peo. v. Hutchinson*, 9 F(2d) 275; *People v. Denker*, 234 NYS 32, 225 App Div 517; *Harper v. State*, 207 SW 96, 84 Tex Cr 345.

98. *Ex parte Finney*, 205 P 197, 21

Okl Cr 103; *People v. Hutchinson*, *supra*. See Sec. 138 *infra*.

99. *Barrett v. United States*, 64 F (2d) 148, 62 App DC 25; *Dixon v. State*, 132 So 684, 101 Fla 840.

1. *Com. v. Fields*, 183 Atl 78, 120 Pa Super 397; *Logan v. State*, 296 SW 670, 107 Tex Crim 297.

2. *Murray v. Harris*, 112 SW(2d) (Tex Civ App) 1091; *Landrom v. Cockrell*, 102 SW(2d) 337, 267 Ky 397.

3. *Fox v. Petty*, 30 SW(2d) 945, 235 Ky 240.

4. *Glass v. Harwell*, 149 SE 722, 40 Ga App 400.

5. *Fox v. Petty*, *supra*.

6. *Morris v. Parks*, 28 P(2d) 215, 145 Ore 481. See Secs. 22, 33 and 41, *supra*.

7. *Cronin v. Los Angeles County*

*Civil Service Commission*, 236 P 330, 71 Cal App 633; *Edmunds v. Barton*, 31 NY 495; *Murray v. Harris*, 112 SW (2d) (Tex Civ App) 1091.

8. *Murray v. Harris*, 112 SW(2d) (Tex Civ App) 1091.

9a. *State v. Goldsmith*, 81 SE 147, 96 SC 484; *Edmunds v. Barton*, 31 NY 495.

exclusive right to select the deputies which are to be retained.<sup>9</sup> Of course, it goes without saying, unless otherwise provided by statute, that on the death of the sheriff the deputy sheriff's term ordinarily ceases.<sup>10</sup> Or when the term of sheriff who appointed the deputy sheriff expires the deputy's tenure ends.<sup>11</sup>

§ 86. **Additional Duties of Sheriff.**—In many States besides the common law duties imposed upon the sheriff there are additional statutory duties which the sheriff is obliged to perform, as the collection of taxes.<sup>12</sup> It is also provided by statute that the sheriff shall act as public administrator in some jurisdictions.<sup>13</sup> Where such matters are part of the sheriff's official duties, the bond which he gives in his official capacity covers what is done or omitted when acting in connection with these special functions.<sup>14</sup> As has been seen, where a special bond is required for such acts of the sheriff in a special capacity, the special bond must respond instead of the general official bond.<sup>15</sup> However, where the sheriff fails to give such special bond, it has been held that the general official bond is liable for default, in connection with the discharge of his special duties.<sup>16</sup> The sheriff sometimes is required to act as trustee where the court is seeking to prevent the failure of a trust for want of a trustee.<sup>17</sup> Where the sheriff is required by statute to be the official custodian of private funds or property, his liability is merely that of a bailee and he is required to use the degree of diligence in keeping such property required of bailees.<sup>18</sup>

9. *Sheriff of Salt Lake County v. Board of Commissioners of Salt Lake County*, 269 P 793, 71 Utah 593.

10. *McMullan v. Daniel*, 155 So 637, 229 Ala 194.

11. *Abt v. Wilcox*, 249 NW 483, 204 Mich 183.

12. Cal.—*Peo. v. Edwards*, 9 Cal 236.

Ida.—*State v. McDonald*, 40 P 312, 4 Ida 463, 95 Am St Rep 137.

La.—*City of New Orleans v. Gauthreaux*, 36 La Ann 109.

Miss.—*State v. Matthews*, 57 Miss 1.

Mo.—*State v. Powell*, 44 Mo 430.

N. C.—*Moore County v. McIntosh*, 31 NC 307.

**Liability where tax list defective.**—Although the tax list made out by the clerk and delivered to the sheriff is defective he is liable on his official bond for failing to collect and pay

over the taxes. *Brunswick County Trustee v. Woodside*, 31 NC 496.

Pa.—*Marion School Dist. v. Donahue*, 7 Pa Co 264; *Com. v. Compton*, 7 Pa Co 262.

Va.—*Munford v. Nottoway*, 2 Rand (23 Va) 313.

W. Va.—*State v. Hill*, 17 W Va 452.

13. *Cocke v. Harrison*, 3 Rand 494 (Va); *Bridgeman v. Bridgeman*, 3 SE 580, 30 W Va 212.

14. See footnote 12 supra.

15. See Sec. 53 supra.

16. *Kenton County v. Lowe*, 16 SW 82, 91 Ky 367, 13 Ky L Rep 97; *State v. Hill*, 17 W Va 452, see however *Governor v. Matlock*, 12 NC 214 which holds to the contrary.

17. *Tatum v. Holliday*, 59 Mo 422; *State v. Griffin*, 63 Mo 545.

18. *Cartley v. Peo.* 64 P 208, 28 Colo 227. See also 40 P 272; *People v. Falkner*, 14 NE 415, 107 NY 477.

## CHAPTER III

## PROCESS

## SECS.

67. Sheriff's Duty to Execute Process.
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113. Service of Process on Nonresidents.
114. When Process May Be Served.
115. Nonresidents May Be Served When within the Jurisdiction.

§ 87. **Sheriff's Duty to Execute Process.**—One of the first and most important duties of a sheriff is the execution of process, the indispensable preliminary, the necessary mesne, and final fruition of all litigation. When we have progressed thus far, there looms on the horizon of our view the distinguishing characteristic of executive and ministerial functions. Undoubtedly the general rule deducible from the adjudications and formulated by analogy from salutary principles of law is that when a writ is delivered to the

sheriff he is bound to execute it according to its directions and exigency thereof without inquiring into the regularity of any proceedings upon which such writ is founded, although an investigation in truth and fact would disclose that such process was voidable or erroneous. Differently stated, a writ or process, regular on its face, is sufficient justification for the sheriff to act and he need not inquire further, or extend his investigation beyond the face of the writ or process placed in his hands.<sup>1</sup> In England, if a *capias* be issued against a Duke or an Earl, or other person protected by the privilege against arrest in civil action, the sheriff will be excused for acting under it, provided the court out of which the writ was issued had jurisdiction of the cause, that is, the sheriff is so far protected by a *capias*, regular on its face, that it is not within his province to inquire into the privileges extended to the person named therein under the law. When process is delivered to a sheriff, regular on its face, he is not to make inquiry, he has but one duty, and that is obedience.<sup>2</sup> The fact that there may be gross irregularities in the writ itself, or its issuance, does not change the situation so long as it is regular on its face.<sup>3</sup> No error or irregularity in the proceedings upon which the writ or process

1. Crocker on Sheriffs (3d Ed) Sec. 282; Macalley's Cases, Cro Jac 280, 289; Jacques v. Cesar, 2 Saund 100; Richbell v. Goddard, Cro Eliz 271; Case of the Marshalsea, 10 Coke Rep 76; Smith v. Bouchier, Stra 993; Odes v. Clark, 1 Ld Raym 397, 5 Mod 413; Brown v. Compton, 8 Term 424; Bridges v. Layman, 31 Ind 384; Allen v. Corlew, 10 Kans 70; Went v. Morgan, 3 La 311; Bergin v. Haywood, 102 Mass 414; Smith v. Grant, 58 Me 253; Bean v. Ayres, 70 Me 421; Mangold v. Thorpe, 33 NJL 134; Woodroff v. Barrett, 15 NJL 40; Dennis v. Snell, 54 Barb(NY) 411, 50 Barb(NY) 95; Werner v. Waters, 55 Barb(NY) 591; Fall Creek, etc., Co. v. Smith, 71 Pa St 230; Ford v. Treasurer, 1 Nott & McC 284 (SC); Stevenson v. McLean, 5 Humph (Tenn) 332, 42 Am Dec 434; Stoddard v. Tarbell, 20 Vt 321; Johnson v. Gibson, 263 P 949, 146 Wash 500, 58 ALR 1035; Grace v. Mitchell, 31 Wis 533, 11 Am Rep 613.

2. Bennett v. Ahrens, 57 F(2d) 948. Wherein it was said: "The appellant's only remedy is to apply to court for his discharge from the arrest. The

privilege is one which he may exercise or waive; hence, the arrest under such circumstances is voidable rather than void." Carle v. Delesdernier, 13 Me 363, 29 Am Dec 508; Chase v. Fish, 16 Me 132. Holding officer arresting one privileged therefrom is not a trespasser; Smith v. Jones, 76 Me 139, 40 Am Rep 598; Winchester v. Everett, 15 A 596, 80 Me 535, 1 LRA 425, 8 ASR 228; Willard v. Sperry, 1 Wend (NY) 52; State v. Polacheck, 77 NW 708, 101 Wis 427; Tarlton v. Fisher, 2 Douglass (KB) 672; Cameron v. Lightfoot, 2 W Blk (KB) 1190; Cameron v. Bowles, 2 W Blk (KB) 1195; Belk v. Broadbent, 3 Term (KB) 183; Yearsley v. Heane, 14 M & W 322; Countess of Rutland Case, 8 Coke Rep 54.

3. Plucknet v. Greves, 2 Keb 705; Sherley v. Wright, Ld Raym 775, 2 Salk 700; Parsons v. Lloyd, W Blk 845, 93 Eng Reprint 498; Nectar v. Gennett, Cro Eliz 400; Wooden v. Moxon, 6 Taunt 490, 2 Marsh 186; Bushe's Case, Cro Eliz 188; Ognell v. Paston, Cro Eliz 165; Keiser v. Tyrrell, 1 Salk 273.

issued will excuse the sheriff from its execution. For the justification of the refusal of the sheriff to execute a writ or process delivered to him, it must be absolutely void and this must appear in some manner upon the face of the process itself. Differently stated, it is the duty of the sheriff to execute all process emanating from a court having jurisdiction of the subject matter, irrespective of any defects, actual or alleged, in the antecedent proceedings.<sup>4</sup>

§ 88. Protection by Reason of Process.—The rule is well established as a general proposition of law that, if the court has apparent jurisdiction over the subject matter and the process appears to be valid on its face, the officer executing such is absolutely protected and shielded from all liability.<sup>5</sup> Sometimes the protection

4. See footnote 1, supra; Belk v. Broadbent, 3 TR 183, wherein Lord Kenyon said: "It is incomprehensible to say that a person shall be considered a trespasser who acts under the process of the court."

Watson v. Watson, 9 Conn 140, 23 Am Dec 324. Wherein the court said: "Obedience to all precepts committed to him to be served is the first, second, and third part of his duty; and hence if they issue from competent authority and with legal regularity, and so appear on their face, he is justified for every action of his, within the scope of their command." Johnson v. Price, 36 So 1031, 47 Fla 265; Rogers v. Silas, 42 Ga 541; Roth v. Duval, 1 Ida 167; Kliessendorf v. Fore, 3 B Mon (Ky) 471; Johnson v. Randall, 76 NW 791, 74 Minn 44; Brown v. Henderson, 1 Mo 134; King v. Nichols, 16 Ohio St 80, rev. 2 Ohio Dec 564, 4 West Law Month 25; Clearwater v. Brill, 4 Hun 728, see however 63 NY 627; Parmelee v. Hitchcock, 12 Wend (NY) 96; Cody v. Quinn, 6 Ired (NC) 191, 44 Am Dec 75; Mason v. Vance, 1 Sneed (Tenn) 178, 60 Am Dec 144, and note 21 Am Dec 190; Dix v. Batchelder, 55 Vt 582; Stoddard v. Tarbell, 20 Vt 321.

5. Conner v. Long, 104 US 228, 26 L ed 723; Matthews v. Densmore, 3 S Ct 120, 109 US 216, 27 L ed 912; Marks v. Schoup, 21 Sup Ct 724, 181 80

US 502, 45 L ed 1002; O'Brien v. Weld, 92 US 81, 23 L ed 675.

Ala.—Baker v. Sparks, 81 So 609, 202 Ala 653; Bender v. Graham, Minor (Ala) 289; Wright v. Spencer, 1 Stew (Ala) 576, 18 Am Dec 76; Fortner v. Flannagan, 3 Port (Ala) 257; Smith v. Leavitts, 10 Ala 92; Governor v. Gibson, 14 Ala 326; Cogburn v. Spence, 15 Ala 549, 50 Am Dec 140 and note. Notes 30 Am Dec 129; 42 Am Dec 436. Averett v. Thompson, 15 Ala 678; Payne v. Governor, 18 Ala 320; Kirksey v. Dubose, 19 Ala 43; Murphy v. State, 55 Ala 252; Adamson v. Noble, 35 So 139, 137 Ala 668; Pickett v. Richardson, 138 So 274, 223 Ala 683; Walker v. Graham, 172 So 655, 233 Ala 539.

Ark.—Huddleston v. Spear, 8 Ark 406.

Cal.—Old Settlers' Inv. Co. v. White, 110 Pac 922, 158 Cal 236; Laughlin v. Thompson, 18 P 330, 76 Cal 287; Brichman v. Ross, 8 P 316, 67 Cal 801; Norcross v. Nunan, 61 Cal 640; Sparks v. Buckner, 57 P(2d) 1395, 14 Cal App (2d) 213; McCullough v. Clark, 41 Cal 298; Buffandeau v. Edmondson, 17 Cal 438, 79 Am Dec 139; McRae v. Lackmann, 96 P 505, 8 Cal App 241; Taylor v. Brown, 4 Cal 188, 60 Am Dec 604; Lazarus v. Byrnes, 163 P 227, 32 Cal App 431.

Colo.—Archibald v. Thompson, 2 Colo 388.

Conn.—Osgood v. Carver, 43 Conn



of a sheriff or constable in the execution of process is the subject

24; *Toby v. Reed*, 9 Conn 216; *Watson v. Watson*, 9 Conn 140, 23 Am Dec 324 and note.

Del.—*Prettyman v. Dean*, 2 Del 494.

Fla.—*Camp v. Moseley*, 2 Fla 171.

Ga.—*Wilbur v. Stokes*, 43 SE 556, 117 Ga 545; *Haslett v. Rodgers*, 33 SE 44, 107 Ga 230; *Rounsaville v. McGinnis*, 21 SE 123, 93 Ga 579; *Johnson v. Fox*, 51 Ga 270; *Wallace v. Holly*, 13 Ga 389, 58 Am Dec 518 and note; *Jones v. McCowen*, 131 SE 200, 34 Ga App 801.

Hawaii.—*Gomez v. Whitney*, 21 Hawaii 539.

Ida.—*Coombs v. Collins*, 57 P 310, 6 Idaho 536; *Blumaur-Frank Drug Co. v. Branstetter*, 43 P 575, 4 Ida 557, 95 Am St Rep 151 and note.

Ill.—*Johnson v. Holloway*, 82 Ill 334; *Housh v. Peo.* 75 Ill 487; *Outhouse v. Allen*, 72 Ill 529; *Booth v. Rees*, 26 Ill 45; *Tuttle v. Wilson*, 24 Ill 553; *McDonald v. Wilkie*, 13 Ill 22, 54 Am Dec 423 and note; *Magerstadt v. Peo.* 105 Ill App 316; *Gilbert v. Buffalo Bill's Wild West Co.* 70 Ill App 326; *McGillis v. Bishop*, 27 Ill App 53.

Ind.—*Hartlep v. Cole*, 101 Ind 458; *State v. King*, 68 NE 85, 30 Ind App 38; *Thompson v. State*, 28 NE 998, 3 In App 371.

Iowa.—*Thompson v. Jackson*, 61 NW 1004, 93 Iowa 376, 27 LRA 92. Where in the court said: "If, as we have found, the justice of the peace was not liable for rendering the judgment, the constable was also protected by the judgment for all his acts, unless for a willingly excessive levy and sale of property with intent to oppress the defendant in execution." *Carpenter v. Scott*, 53 NW 323, 86 Iowa 563; *Henke v. McCord*, 7 NW 623, 55 In 378.

Kan.—*Allen v. Corlew*, 10 Kan 70; *Holdredge v. McCombs*, 50 P 536, 8 Kan App 663.

Ky.—*Torian v. Caldwell*, 181 SW 373, 167 Ky 670; *Ackerson v. Semple*, 173 SW 1153, 163 Ky 395; *Pepper v. Mayes*, 81 Ky 673; *Clay v. Sandefer*, 12 B Mon 334; *Hunt v. Ballew*, 9 B Mon 390; *Kleissendorff v. Fore*, 3 B Mon 471; *Perceful v. Com.* 3 B Mon

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347; *Ringo v. Ward*, 2 B Mon 127; *Ashcraft v. Elliott*, 39 SW 1062, 18 Ky L Rep 934.

La.—*Stevenson v. Exchange Nat. Bank*, 120 So 96, 10 La App 179; *Pascal v. Ducros*, 8 Rob (La) 112, 41 Am Dec 294; *Ellmore v. Hufty*, 13 La Ann 227; *Ffournoy v. Milling*, 15 La Ann 473; *Crusel v. Brooks*, 46 So 224, 121 La 243; *Crow v. Manning*, 14 So 122, 45 La Ann 1221; *Rau v. Katz*, 26 La Ann 463; *Brainard v. Head*, 15 La Ann 489; *Pembroke v. Goldman* (La App) 176 So 898.

Me.—*Jacques v. Parks*, 52 Atl 763, 96 Me 268; *Lashus v. Matthews*, 75 Me 446; *Gray v. Kimball*, 42 Me 299; *Clark v. Foscroft*, 6 Me (Greene) 296, 20 Am Dec 309.

Md.—*State v. Timmons*, 90 Md 10; *Thomson v. Baltimore, etc.*, Co. 33 Md 312.

Mass.—*Goldis v. Gately*, 47 NE 96, 168 Mass 300; *O'Shaughnessy v. Baxter*, 121 Mass 515; *Bergin v. Hayward*, 102 Mass 414; *Whipple v. Kent*, 2 Gray (Mass) 410, 61 Am Dec 470; *Twitchell v. Shaw*, 10 Cush (Mass) 46, 57 Am Dec 80; *David v. Larochelle* (Mass) 5 NE(2d) 671.

Mich.—*O'Meara v. Merritt*, 87 NW 197, 128 Mich 249; *Miller v. Hahn*, 74 NW 1051, 118 Mich 607; *Dunn v. Gilman*, 34 Mich 256; *Foster v. Wiley*, 27 Mich 244, 15 Am Rep 185; *Andrews v. Wilcox*, 270 NW 191, 277 Mich 697.

Minn.—*Whitney v. Welnetz*, 190 NW 57, 153 Minn 162, 28 ALR 93; *Johnson v. Randall*, 76 NW 791, 74 Minn 44; *Hill v. Ralscot*, 25 NW 604, 34 Minn 270; *Baker v. Sheehan*, 12 NW 704, 29 Minn 235.

Mo.—*State v. O'Neill*, 52 SW 240, 151 Mo 67; *State v. Devitt*, 17 SW 900, 107 Mo 573, 28 ANR 440 and note; *Howard v. Clark*, 43 Mo 344; *White v. Henderson*, 265 SW 991, 213 Mo App 611; *State v. Smith*, 81 Mo App 671.

Mont.—*Bingham v. National Bank of Montana*, 105 Mont 159, 72 P(2d) 90.

Nebr.—*Phillips v. Spotts*, 15 NW 332, 14 Nebr 139.

of statutory enactments and where such is the case, these statutes

Nev.—*Keys v. Grannis*, 3 Nev 548.

N. H.—*York v. Sanborn*, 47 NH 403; *Keniston v. Little*, 30 NH 318, 64 Am Dec 297 and note.

N. J.—*Mangold v. Thorpe*, 33 NJL 134.

N. M.—*Gallegos v. Sandoval*, 100 P 373, 15 NM 216; *Archibeque v. Micra*, 1 NM 419.

N. Y.—*Hess v. Hess*, 22 NE 956, 117 NY 306; *Oswego First National Bank v. Dunn*, 97 NY 149, 49 Am Rep 617, rev. 29 Hun 529; *Day v. Bach*, 87 NY 56, aff. 46 NY Super 460; *Koland v. Van Aken*, 290 NYS 768.

Holding that in order for the officer to justify under process he must show a judgment; citing *Jansen v. Acker*, 23 Wend 480; *High v. Wilson*, 2 Johns. 46; *McCune v. Peters*, 105 NYS 896, 54 Misc 165.

*Clearwater v. Brill*, 63 NY 627, rev. 4 Hun 728; *Hill v. Haynes*, 54 NY 153; *Bullis v. Montgomery*, 50 NY 352; *Smith v. Orser*, 42 NY 132, aff. 43 Barb 187; *Paige v. Willet*, 38 NY 28, 5 Transcr. 27; *Acker v. Ledyard*, 8 NY 62, rev. 8 Barb 514; *Bacon v. Cropsey*, 7 NY 195; *Sheldon v. Van Buskirk*, 2 NY 473; *Ide v. Finn*, 187 NYS 202, 196 App Div 304; *McCarthy v. McCabe*, 115 NYS 829, 131 App Div 300; *Strong v. Walton*, 62 NYS 353, 47 App Div 114; *Seward v. Wales*, 58 NYS 72, 40 App Div 539, 60 NE 1120, 167 NY 538; *Van Camp v. Searle*, 29 NYS 757, 70 Hun 134, 24 NY Civ Proc 16, mod. on other grounds, 41 NE 427, 147 NY 150; *Livingston v. Miller*, 48 Hun 232, 16 NY St 71; *Bodine v. Thurwachter*, 34 Hun 6; *Dorrance v. Henderson*, 27 Hun 206, aff. 92 NY 406; *Bovee v. King*, 11 Hun 250, aff. 75 NY 609; *Pinekney v. Hagerman*, 4 Lans(NY) 374; *Shaw v. Davis*, 55 Barb(NY) 389; *Welles v. Thornton*, 45 Barb(NY) 393; *Foster v. Pettibone*, 20 Barb(NY) 350; *Dominick v. Eacker*, 3 Barb(NY) 17; *Fulton v. Heaton*, 1 Barb(NY) 552; *Peo. v. Brennan*, 6 Thomps. & C(NY) 120; *Barron v.*

*Boyd*, 1 Thomps. & C(NY) 457; *Heath v. Westervelt*, 4 NY Super 110; *Farrington v. Root*, 10 Misc 347, 21 NYS 126, 24 NY Civ Proc 196, 31 NYS 126; *Peipgras v. Edmunds*, 25 NYS 961, 5 Misc 314, aff. 26 NYS 1134; *American Hosiery Co. v. Riley*, 12 Abb N Cas (NY) 329; *Imbert v. Hallock*, 23 How Pr (NY) 456; *Sheldon v. Stryker*, 21 How Pr (NY) 329; *Peo. v. Warren*, 5 Hill (NY) 440; *Noble v. Holmes*, 6 Hill (NY) 194; *Webber v. Gay*, 24 Wend(NY) 485; *Earl v. Camp*, 16 Wend(NY) 562; *Savacool v. Boughton*, 5 Wend(NY) 170, 21 Am Dec 181; *Suydam v. Keys*, 13 Johns.(NY) 444; *Warner v. Shed*, 10 Johns.(NY) 138; *Jenner v. Joliffe*, 9 Johns.(NY) 381; *Beuch v. Furman*, 9 Johns.(NY) 229; *Cantillon v. Graves*, 8 Johns.(NY) 472; *Bealls v. Guernsey*, 8 Johns.(NY) 52.

N. C.—*O'Briant v. Wilkerson*, 30 SE 126, 122 NC 304; *State v. Ferguson*, 67 NC 219; *Cody v. Quinn*, 28 NC 191, 44 Am Dec 75; *Stewart v. Ray*, 26 NC 269; *Farley v. Lea*, 20 NC 307, 32 Am Dec 680.

Ohio.—*Henline v. Reese*, 44 NE 269, 54 Ohio St 599, 56 Am St Rep 736 and note; *Champaign County Bank v. Smith*, 7 Ohio St 42.

Okl.—*Knisley v. Ham*, 136 P 427, 30 Okl 623, 49 LRA(NS) 770 and note.

Or.—*Barr v. Combs*, 45 P 776, 29 Or 399; *White v. Thompson*, 3 Or 115.

Pa.—*Central Nat. Bank v. Gallagher*, 30 Atl 212, 163 Pa 456; *Breckwoldt v. Morris*, 24 Atl 300, 149 Pa 291; *Barr v. Boyles*, 96 Pa 31; *Zacharias v. Totton*, 90 Pa 286; *Leonard v. Dillon*, 76 Pa 44; *Barnett v. Reed*, 51 Pa 190, 88 Am Dec 574; *Billings v. Russell*, 23 Pa 189, 62 Am Dec 330 and note; *Daum v. Richards*, 43 Pa Co 630; *Com. v. Rogers*, 4 Pa LJ 252.

Porto Rico.—*Fernandez v. Marshal San Juan Dist.* 20 Porto Rico 61.

R. I.—*Curry v. Johnson*, 13 RI 121; *McDonald v. Brown* (RI) 189 A 750.

S. C.—*Treasurer v. Ford*, 10 SCL 234; *Thrower v. Vaughan*, 30 SCL 18; *Foot-*

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are liberally construed in favor of the officer.<sup>6</sup> The protection of the officer by virtue of process, apparently regular on its face, and issuing out of a court having apparent jurisdiction of the subject matter is personal to the officer executing it, and does not extend to a wrongdoer who procures the issuance and execution of such process.<sup>7</sup> Where it appeared that John O'Shaughnessy was sued, as John Shaughnessy, on a note executed by another person of the latter name, and judgment by default was rendered and O'Shaughnessy, who was also known as Shaughnessy, was arrested and imprisoned, and thereafter he brought an action against the officer for wrongful arrest and false imprisonment, the officer was justified under the above mentioned process and took the position that he was not required to go behind the process and assume the risk of determining extrinsic facts tending to exempt O'Shaughnessy from arrest. The position of the officer was adjudicated to be sound.<sup>8</sup> So, too, where an attachment is issued against five

er v. Gault, 27 SCL 335; Brown v. Wood, 17 SCL 457; Swanzy v. Hunt, 11 SCL 211.

S. D.—Smith v. Jones, 92 NW 1084, 16 SD 337.

Tenn.—Mason v. Vance, 1 Sneed (Tenn) 178, 60 Am Dec 144 and note; Crockett v. Latimer, 1 Humphr (Tenn) 272.

Tex.—Mayer v. Duke, 10 SW 565, 72 Tex 445; Blum v. Strong, 6 SW 187, 71 Tex 321; Rice v. Miller, 8 SW 317, 70 Tex 613, 8 ASR 630 and note; Tierney v. Frazier, 57 Tex 437; Sanders v. Waghalter, 192 SW (Civ App) 1083; Morgan v. Oliver, 129 SW 156, 60 Tex Civ App 210; Wettermark v. Campbell, 57 SW (Tex Civ App) 904.

Utah—Munns v. Loveland, 49 P 743, 15 Utah 250; Hammer v. Ballantyne, 44 P 704, 13 Utah 324, 57 ASR 736 and note.

Vt.—Casselini v. Booth, 59 A 833, 77 Vt 255; Luce v. Hoisington, 54 Vt 428; Brown v. Mason, 40 Vt 157; Eaton v. Cooper, 29 Vt 444; Peck v. Crane, 25 Vt 146; Burton v. Wilkinson, 18 Vt 180, 40 Am Dec 145; Churchill v. Churchill, 12 Vt 661; Pierson v. Gale, 8 Vt 509, 30 Am Dec 487.

Va.—Price v. Holland, 1 Patt. & H 289.

Wash.—Mack v. Doak, 96 P 825, 50 Wash 119; Cavitt v. McCrite (Wash) 79 P(2d) 637.

Wis.—Holz v. Rediske, 92 NW 1105, 116 Wis 353; Gaertner v. Bues, 85 NW 388, 109 Wis 165; Lueck v. Heisler, 58 NW 1101, 87 Wis 644; McLean v. Cook, 23 Wis 364; Bogert v. Phelps, 4 NW 334, 14 Wis 88; Young v. Wise, 7 Wis 129; Sprague v. Birchard, 1 Wis 457, 60 Am Dec 393 and note.

Eng.—Cheasley v. Barnes, 10 East 73, 103 Eng Reprint 703; Philips v. Biron, Str. 509, 93 Eng Rep 667; Parsons v. Lloyd, W Bl 945, 96 Eng Reprint 498.

Can.—Sleeth v. Hurlbert, 25 Can SC 620; Crowl v. Adams, 21 Can SC 342; McLean v. Bradley, 2 Can SC 535.

Man.—Beemer v. Inkster, 3 Man 534.

N. B.—Reg. v. O'Leary, 16 NB 264; G. J. B. Van Sciver Co. v. New Irving Hotel, 148 Atl 513, 298 Pa 463; Jones v. Hughes, 5 Serg. & R(Pa) 209, 9 Am Dec 364.

7. Tuttle v. Wilson, 24 Ill 553; Housh v. Peo. 75 Ill 487.

8. O'Shaughnessy v. Baxter, 121 Mass 515, see also LaRoche v. Washorough, 2 TR 737.

"The officer, acting in good faith,

boats described in the writ or other process, when in fact only one of them was legally liable to the process, a sheriff or constable executing same against the five is justified in acting under the letter of the direction in the writ or other process.<sup>5a</sup>

The protection afforded by regular process issued out of a competent court is so far reaching in its application that payment of the execution to the Judgment Creditor or the judgment into court, the fact that the judgment had been paid before issuance of the execution does not militate against the right of the officer to assert the protection the process affords him. This is especially true when the officer has not been informed of such matters. And even an exhibition, of a receipt to the officer purporting to be signed by the judgment creditor and evidencing the payment, is not enough to destroy the right and protection of the officer in thereafter enforcing the process.<sup>5b</sup>

§ 89. Sheriff or Constable Cannot Question Validity of Judgment.—It seems to be well settled that it is not within the province or duty of a sheriff or constable to question the validity of a judgment where the court apparently has jurisdiction of the subject matter. If process is issued out of a court, thus having jurisdiction, and such process is regular on its face, there the authority or duty of the sheriff or constable to make inquiry ceases.<sup>9</sup> Another

had the right to rely for his protection upon the process put into his hands, and was not bound to go behind that process, and assume the risk of determining the question whether the plaintiff really signed the note upon which the action was brought, or the truth of any extrinsic fact which would exempt him from being arrested or imprisoned upon the execution." O'Shaughnessy v. Baxter, supra.

Magnay v. Burt, 5 QB 381; Dav. and Merer. 652; Wilmarth v. Burt, 7 Metc(Mass) 257; Twitchell v. Shaw, 10 Cush(Mass) 46, 57 Am Dec 80; Underwood v. Robinson, 100 Mass 298.

8a. Fall Creek etc. Co. v. Smith, 71 Pa St 230.

8b. Livingston v. Smith, 5 Pet(US) 90, 8 L ed 57; Davis v. Gate, 113 SW 826, 129 Ky 486; Twitchell v. Shaw, 10 Cush(Mass) 46, 57 Am Dec 80. An officer is not bound to investigate the genuineness of a purported receipt which it is claimed evidences the pay-

ment. Brick v. Blanchard, 20 NH 323, 51 Am Dec 222; Deyo v. Van Valkenburgh, 5 Hill(NY) 242; Barr v. Combs, 45 P 776, 29 Or 39; Throewen v. Vaughn, 30 SCL 18; Tierney v. Frazier, 57 Tex 437; Branscum v. Reese, 219 SW (Tex Civ) 871. But see Breck v. Blanchard, 20 NH 323, 51 Am Dec 22.

9. Martin v. Hall, 70 Ala 421; Horigan v. Savannah Grocery, 54 SE 961, 126 Ga 127; Gladden v. Cobb, 6 SE 161, 73 Ga 235; Brother v. Cannon, 1 Scamm(III) 200; Green v. Taylor, 71 So 375, 111 Miss 232; State v. Rainey, 73 SW 250, 99 Mo App 218; Vicksburg Groc. Co. v. Brennan, 20 So 845 (Miss); McIntosh v. Munson Road Machinery Co. 145 So 731, 167, Miss 546; Billings v. Russell, 23 Pa 189, 62 Am Dec 330; Graham v. Allen, 2 Nott & McC 492 (SC); Stevenson v. McLean, 5 Humph (Tenn) 332, 42 Am Dec 434; Reams v. McNall, 9 Humph (Tenn) 542; Murfree on Sheriffs, 102.

reason assigned why the sheriff may not question the proceedings resulting in the issuance of process placed in his hands, is that such an attack constitutes a collateral one on the judgment.<sup>10</sup> Where a sheriff received from a defendant a sum of money to be applied in the liquidation of an execution, but upon the proviso that the execution was just and legal, otherwise the money was to be returned to the judgment defendant, it was the duty of the sheriff, in these circumstances, to hold the money no longer than the return day of the execution and he was then duty bound to pay it to the plaintiff in the execution. The defendant was entitled to show that the execution was not just and legal and he had until the return day of the writ to do so, but if he did not, then the payment became absolute.<sup>11</sup> The principle we have under discussion, of the protection of the sheriff for the execution of process issued out of a court, apparently having jurisdiction of the subject matter and fair on its face, ought not to be confused with the rule of law that a sheriff or constable is not liable for failure to serve a writ, which, although it is regular, in so far as its face is concerned, but is based upon a void judgment and is not merely irregular or erroneous or that the consideration for the judgment has failed or is defective in form.<sup>12</sup> Where an execution is defective in a formal manner, which may be readily cured by amendment, the sheriff cannot later raise such formal defect when he made no question thereon at the time the process was placed in his hands for execution, and in these circumstances it is his duty to execute it and return it as directed by law and the mandates of such process.<sup>13</sup> If the process is valid and regular on its face, then it is certainly a

10. See footnote 9 supra.

11. *Richards v. Nye*, 5 Ore 332. In the course of the opinion the court said "A sheriff has no right to be wiser than his process; what he is in due form commanded to do, he is to do, and will be protected in doing."

12. *Smith v. Ala. Great Southern Railway Co.* 102 So 118, 212 Ala 166; *Spence v. Tuggle*, 10 Ala 538; *State v. Fowler*, 4 Del (4 Har) 358; *Johnson v. Price*, 30 So 1031, 47 Fla 265; *Blue v. Collins*, 34 SE 598, 109 Ga 341, where it appeared the execution was issued on dormant judgment; *Langley v. Wynn*, 70 Ga 430; *Singer Sewing Machine Co. v. Barnett*, 76 Ga 377; *Peo. v. Whitehead*, 99 Ill App 614; *Allen v. Johnson*, 4 JJ Marsh (Ky)

235; *Com. v. O'Cull*, 7 JJ Marsh (Ky) 140, 23 Am Dec 393; *Adams v. Bahch*, 5 Greenl (Me) 188; *Clark v. Foxcroft*, 6 Greenl (Me) 296, 20 Am Dec 309; *Belcher v. Sheehan*, 51 NE 19, 171 Mass 513, 68 Am St Rep 145; *State v. Rainey*, 73 SV 250, 99 Mo App 218; *French v. Willet*, 17 NY Sup 649, 10 Abb Pr 99; *Mollinoux v. Mott*, 79 NYS 661, 78 App Div 493; *Forsyth v. Campbell*, 15 Hun (NY) 235; *Newburg & Goldsmith v. Munshower*, 29 Ohio St 617, 23 Am Rep 769; *Lyles v. Bolles*, 8 SC 258; *Shaw v. Holmes*, 4 Heisk (Tenn) 692; *Stoddard v. Tarbell*, 20 Vt 324; *Hill v. Wait*, 5 Vt 124; *Chase v. Plymouth*, 20 Vt 469, 50 Am Dec 52; *Bank of Whitehall v. Pettes*, 13 Vt 395, 37 Am Dec 600.

13. *Johnson v. Price*, supra.

protection to the sheriff, even if the judgment is invalid, erroneous, voidable or void, if it is issued out of a court having jurisdiction of the subject matter.<sup>14</sup> It seems that where an execution has

14. *Ala.*—*Bender v. Graham*, Minor (Ala) 269; *Fortner v. Flanagan*, 3 Port (Ala) 257; *Kirkacy v. Dubose*, 19 Ala 43; *Murphy v. State*, 55 Ala 252; *Noles v. State*, 24 Ala 672; *Smith v. Leavitts*, 10 Ala 92.

*Ark.*—*Byrd v. Clendenin*, 11 Ark 572; *Howell v. Milligan*, 13 Ark 40; *Huddleston v. Spear*, 8 Ark 406; *McClure v. Hill*, 36 Ark 268.

*Cal.*—*Brichman v. Ross*, 8 P 316, 67 Cal 601; *Buffandeau v. Edmondson*, 17 Cal 436, 79 Am Dec 139 and note; *Laughlin v. Thompson*, 18 P 330, 76 Cal 267; *Magnauid v. Traeger*, 226 P 900, 86 Cal App 526; *Weaver v. Wood*, 49 Cal 297.

*Colo.*—*Squires v. Detwiler*, 101 P 342, 45 Colo 366.

*Conn.*—*Osgood v. Carver*, 43 Conn 24; *Watson v. Watson*, 9 Conn 140, 23 Am Dec 324.

*Fla.*—*Camp v. Moseley*, 2 Fla 171.

*Ga.*—*Hamer v. White*, 34 SE 1001, 110 Ga 300; *Johnson v. Fox*, 51 Ga 270; *Rounsaville v. McGinnis*, 21 SE 123, 93 Ga 579; *Wallace v. Holly*, 13 Ga 389, 58 Am Dec 518; *Wilbur v. Stokes*, 43 SE 856, 117 Ga 545.

*Ida.*—*Blumaur-Frank Drug Co. v. Branstetter* 43 P 575, 4 Ida 557, 95 Am St Rep 151 and note. Wherein it was said: "Where these papers (process) are placed in the hands of the sheriff, and they are fair upon their face, he must proceed to execute them in the manner pointed out by the statute. The law requires it and the sheriff has no alternative." *Coombs v. Collins*, 57 P 310, 6 Ida 530.

*Ill.*—*Barnea v. Barber*, 6 Ill (1 Gilman) 401; *Booth v. Rees*, 20 Ill 45; *Boyd v. Frank*, 20 Ill App 169; *Housh v. Peo.* 75 Ill 487; *Jacobson v. Auston*, 222 Ill App 491; *Lattin v. Smith*, 1 Ill (Beecher's Breese) 361; *McDonald v. Wilkie*, 13 Ill 22, 54 Am Dec 423 and note; *McGillis v. Bishop*, 27 Ill App 53; *Parker v. Smith*, 6 Ill (1 Gilman) 411; *Peo. v. Zimmer*, 90 NE 529, 252 Ill 9; *Sample v. Broad-*

*well*, 87 Ill 617; *Smith v. Peo.* 99 Ill 445; *Tuttle v. Wilson*, 24 Ill 553.

*Ind.*—*Hartlep v. Cole*, 101 Ind 458.

*Iowa.*—*Carpenter v. Scott*, 53 NW 328, 80 Iowa 563; *Gates v. Neimeyer*, 6 NW 150, 54 Iowa 110; *Thompson v. Jackson*, 61 NW 1004, 93 Iowa 376, 27 LRA 92.

*Kan.*—*Allen v. Corlew*, 10 Kan 70; *Holdredge v. McCombs*, 56 P 536, 8 Kan App 663.

*Ky.*—*Ackerson v. Semple*, 173 SW 1153, 163 Ky 395; *Clay v. Sandefer*, 12 B Mon (Ky) 334; *Johnson v. Scott*, 121 SW 695, 134 Ky 736; *Pepper v. Mayes*, 81 Ky 673, 5 Ky L Rep 708.

*La.*—*Clavarie v. Waggaman*, McG (La) 35; *Crow v. Manning*, 14 So 122, 45 La Ann 1221; *New Orleans v. Morgan*, 7 Mart NS (La) 1, 18 Am Dec 232.

*Me.*—*Gray v. Kimball*, 42 Me 290; *Jacques v. Parks*, 52 Atl 763, 96 Me 208; *Thurston v. Adams*, 41 Me 419.

*Mass.*—*Dwinnels v. Boynton*, 3 Allen (Mass) 310; *Fisher v. McGirr*, 1 Gray (Mass) 1, 61 Am Dec 381 (Also *Herrick v. Smith*); *Sandford v. Nichols*, 13 Mass 286, 7 Am Dec 151.

*Mich.*—*Dunn v. Gilman*, 34 Mich 256; *Miller v. Hahn*, 74 NW 1051, 116 Mich 607; *O'Meara v. Merritt*, 87 NW 197, 128 Mich 249; *Ortman v. Greenman*, 4 Mich 291.

*Minn.*—*Baker v. Sheehan*, 12 NW 704, 29 Minn 235; *Clark v. Norton*, 6 Minn (Gil 277) 412; *Johnson v. Randall*, 76 NW 791, 74 Minn 44.

*Mo.*—*Brown v. Henderson*, 1 Mo 134; *Gregory Bus Line Inc. v. Stephens*, 15 SW (2d) 910, 223 Mo App 1036; *Howard v. Clark*, 43 Mo 344; *Milburn v. Gilman*, 11 Mo 64; *State v. Cameron*, 273 SW 746, 216 Mo App 693; *State v. Devitt*, 14 SW 900, 107 Mo 573, 28 ASR 440 and note; *State v. Ferguson*, 13 Mo 166; *State v. O'Neill*, 52 SW 240, 151 Mo 67; *State v. Smith*, 81 Mo App 671; *White v. Hendersaen*, 265 SW 991, 218 Mo App 611.

*Neb.*—*Phillips v. Spotts*, 16 NW 332, 14 Neb 139.

issued upon a void judgment, but the subject matter of the action in which the judgment was rendered was one properly within the jurisdictional ambit of the court, the sheriff or constable may execute it and it will serve as a complete panoply, insofar as his liability is concerned. But on the other hand, if he refuses to execute it, he may justify such refusal on the ground of the voidness of the judgment.<sup>15</sup>

**§ 90. Officer Possessing Personal Knowledge of Defects Aliunde.**—Personal knowledge of the sheriff of the non-liability of the defendant, where the process issued to him is regular on its face, is no excuse for the failure to carry out the strict command of the process. However, if the sheriff has personal private knowledge of the lack of jurisdiction of the court and that the judgment or process is void, then he would be liable if he executed it.<sup>16</sup> A sher-

N. J.—*Mangold v. Thorpe*, 33 NJL 134.

N. Y.—*American Hosiery Co. v. Riley*, 12 Abb NC (NY) 329; *Beach v. Furman*, 9 Johns (NY) 229; *Crouse v. Johnson*, 20 NYS 177, 65 Hun 337, 47 NYS 559; *Earl v. Camp*, 16 Wend (NY) 502; *Fulton v. Heaton*, 1 Barb (NY) 552; *Jennings v. Carter*, 2 Wend (NY) 446, 20 Am Dec 635; *Lowman v. Billington*, 119 NYS 825, 65 Misc 111; *Savacool v. Boughton*, 5 Wend (NY) 170, 21 Am Dec 181; *Shaw v. Davis*, 55 Barb (NY) 339; *Sheldon v. Stryker*, 21 How Pr (NY) 329, 34 Barb 116; *Smith v. Healey*, 121 NYS 230; *Warner v. Shed*, 10 Johns (NY) 138.

N. C.—*Cohoon v. Speed*, 47 NC 133; *O'Briant v. Wilkerson*, 30 SE 126, 122 NC 304; *State v. Ferguson*, 67 NC 219; *State v. McDonald*, 14 NC 468.

Ohio.—*Henline v. Reese*, 44 NE 269, 54 Ohio St 599, 56 ASR 736 and note.

Or.—*Barr v. Combs*, 45 P 776, 29 Or 399.

Pa.—*Barnett v. Reed*, 51 Pa 190, 88 Am Dec 574; *Breckwoldt v. Morris*, 24 Atl 300, 149 Pa 291; *Hutton v. Blaine*, 2 Serg & R (Pa) 75; *Stephens v. Wilkins*, 6 Pa 260.

R. I.—*Humes v. Taber*, 1 RI 164.

S. C.—*Bragg v. Thompson*, 19 SC 572; *Goodgion v. Gilreath*, 11 SE 207, 32 SC 388; *Swanzy v. Hunt*, 2 Nott & McC (SC) 211.

Tenn.—*Martin v. England*, 5 Yerg

(Tenn) 313; *Mason v. Vance*, 1 Sneed (Tenn) 178, 60 Am Dec 144.

Tex.—*Beavers v. Goodwin*, 90 SW (Tex Civ App) 930; *Dupree v. Massey*, 192 SW (Tex Civ App) 790; *Fendrick v. Shea*, 1 White & WCC App (Tex) 912; *Spradley v. State*, 58 SW 114, 442, 23 Tex Civ App 20; *Wilson v. Moore*, 122 SW 577, 57 Tex Civ App 418.

Utah.—*Munns v. Loveland*, 49 P 743, 15 Utah 250.

Vt.—*Driscoll v. Place*, 44 Vt 252; *Pierson v. Gale*, 8 Vt 509, 30 Am Dec 487.

Va.—*Price v. Holland*, 1 Patt. & H (Va) 289.

Wash.—*Olson v. Fireaved*, 225 P 643, 129 Wash 635, 230 P 643, 131 Wash 528.

Wis.—*Bogert v. Phelps*, 14 Wis 88; *Campbell v. Sherman*, 35 Wis 103; *McLean v. Cook*, 23 Wis 364; *Weimberg v. Conover*, 4 Wis 803.

N. B.—*Reg. v. O'Leary*, 16 NB 264.

Eng.—*Kon v. Archibold*, 17 Ont L Rep 484, 12 Ont WR 592, 997.

15. *Magnaud v. Traeger*, 220 P 900, 66 Cal App 526; *Earl v. Camp & Stone*, 16 Wend (NY) 502; *Cornell v. Barnes*, 7 Hill (NY) 35; *Newburg & Goldsmith v. Munshower*, 29 Ohio St 617, 23 Am Rep 769; *Murfree on Sheriffs*, Sec. 104.

16. *Watson v. Watson*, 9 Conn 140, 23 Am Dec 324; *Leachman v. Dougherty*, 81 Ill 324; *Telefsen v. Fee*, 46

iff has no right to be wiser than his process and what he is, in due form, commanded to do, he is by law, compelled to do, and will be protected in doing, but he must put aside any opinions or misgivings as to the validity of the process, the regularity of the judgment or the justness of the cause of action resulting in its rendition.<sup>17</sup> If the sheriff has misgivings as to the validity of the process, since he is an agent of the plaintiff, it would seem that he might appropriately demand indemnification of such plaintiff.<sup>18</sup>

**§ 91. Officer Acts at His Peril in the Execution of Process.**—A sheriff in the execution of process in the very nature of things, acts upon his own responsibility and at his peril. A sheriff or a constable has no right to request, and a court will not direct him, in what manner they are to execute process. But the sheriff or constable must, under the advice of his counsel, and of his own responsibility, proceed.<sup>19</sup> The reason for this holding is that thereafter the court might be required to enter a judgment between two litigants upon a matter which it had prejudged on an ex parte application and might under such circumstances be under the necessity of holding the sheriff liable in damages for carrying out its own instructions.<sup>20</sup>

**§ 92. Endorsement of Receipt of Process.**—The first duty of the sheriff upon process being delivered into his official hands is to endorse upon it the date of the receipt of same. This is exacted in some jurisdictions by statutory provision. The endorsement made in the course of the discharge of his official duties is prima facie evidence of the date of receipt of such process and would be

NE 502, 168 Mass 168, 45 LRA 481, 60 ASR 379; *Clearwater v. Brill*, 4 Hun (NY) 728, see however 63 NY 627; *Peo. v. Warren*, 5 Hill (NY) 440. Apparently contra to rule of text see the following cases: *Richards v. Nye*, 5 Ore 382; *Bogert v. Phelps*, 14 Wis 88; *Grace v. Mitchell*, 31 Wis 533, 11 Am Rep 613; *Chruscicki v. Hinrichs* (two cases) 221 NW 394, 187 Wis 78; *McLean v. Cook*, 23 Wis 364; *Sprague v. Birchard*, 1 Wis 457, 60 Am Dec 393 and note; *Young v. Wise*, 7 Wis 128. Note 21 Am Dec 201.

17. *Roth v. Duvall*, 1 Ida 149; *Przybylski v. Remus*, 207 Ill App 106; 88

*Richards v. Nye*, 5 Ore 382; *Rogers v. Marlborough Co.* 11 SE 383, 32 SC 555; *Rainey v. State*, 20 Tex App 455, see however *Freeman on Executions*, First Edition, Sec. 102 and compare with 2 *Cooley on Torts*, 4th Edition, 339 and 340. See also *Murfree on Sheriffs*, New Edition, Sec. 103a.

18. *Webber's Executors v. Blunt*, 19 Wend (NY) 188, 32 Am Dec 445; *Winter v. Kinney*, 1 NY 365, 4 How Pr 442; *Connolly v. Walker*, 45 Pa St 449; *Grace v. Mitchell*, 31 Wis 533, 11 Am Rep 613.

19. *Bowie v. Brahe*, 11 NY Super 676, 2 Abb Pr 161, 4 Dever 676.

20. *Murfree on Sheriffs*, Sec. 105.

clothed with the presumption of law in favor of the official acts by officers done in the discharge of their duties.<sup>21</sup>

§ 93. **Diligence Required of Sheriff in Execution of Process.**—The sheriff or constable is required by common law rules, and sometimes by statutory enactments to exercise due diligence in the execution of process delivered to him or in the discharge of his official duties. The rule with respect to the diligence required of a sheriff or constable in the execution of process, and in the discharge of the duties of his office, extend to the location of parties to be served, discovery of property, to be levied upon under attachment or execution as well as the actual serving of process. He is not required, of course, in any particular case, to use all possible efforts to serve process but there must be taken into consideration in determining whether or not a sheriff or constable has used the diligence required by law, the fact that he, in general, has other process in his hands in other cases demanding the same degree of activity.<sup>22</sup> However, in some States the demands of the law are not satisfied with the exercise of due diligence

21. *Huboway v. Freeman*, 20 NC 109. Sometimes, as in North Carolina, a penalty is imposed by statute for failure to endorse the true receipt of process; *Phillips v. Ellwell*, 14 Ohio St 240, 84 Am Dec 373; *Cherry v. Kennedy*, 232 SW 661, 144 Tenn 320; *Murfree on Sheriffs*, Sec. 106.

22. *Whitset, Garner & Co. v. Slater*, 23 Ala 620; *Abbott v. Norman*, 204 SW 303, 134 Ark 535; *Lawson v. State*, 10 Ark 28, 50 Am Dec 238; *McKinney v. Blakly*, 112 SW 976, 87 Ark 405; *Whitney v. Butterfield*, 13 Cal 335, 73 Am Dec 584. Note 25 Am Dec 368; *Tucker v. Bradley*, 15 Conn 46; *Cake v. Cannon*, 2 Del (2 Houst) 427; *Dunlap v. Berry*, 4 Sean(III) 327, 39 Am Dec 413; *Hargrave v. Penrod*, *Beecher's Breeze*(III) 401, 12 Am Dec 201; *Gilbert v. Gallup*, 76 Ill App 520; *State v. Blanch*, 70 Ind 204; *Crosby v. Hungerford*, 12 NW 582, 59 Iowa 712; *Com. v. Gill*, 14 B Mon(Ky) 20; *Kidder v. Parlin*, 7 Me (Greenl) 80; *Strout v. Pennell*, 74 Me 260; *Webster v. Ballou*, 81 Atl 1009, 108 Me 522. Ann Cas 1912B 567 and note, holding mandamus will lie to compel an officer to execute process; *People ex rel. Springett v. Colerick*, 34 NW 683, 67

*Mich* 382; *Guiterman v. Sharvey*, 48 N W 780, 46 Minn 183, 24 Am St Rep 218 and note; *Cummings v. Brown*, 81 SW 158, 181 Mo 711; *Fisher v. Gordon*, 8 Mo 386; *Himmelberger-Harrison Lumber Co. v. McCabe*, 119 SW 357, 220 Mo 154; *State v. Finn*, 87 Mo 310; *State v. Ownby*, 49 Mo 71; *Taylor v. Wimer*, 30 Mo 120; *Williams v. Sands*, 158 SW 47, 251 Mo 147; *Steele v. Crabtree*, 58 NW 1022, 40 Neb 420; *Hinman v. Borden*, 10 Wend.(NY) 367, 25 Am Dec 568 and note. Holding sheriff under duty to go to residence of party to be served; *Tomlinson v. Rowe*, *Lalor's Supp* (NY) (Hill & Denio) 410; *Watson v. Brennan*, 39 NY Super 81, see however 66 NY 621; *Denson v. Sledge*, 13 NC 136; *Barnes v. Thompson*, 2 Swan (Tenn) 313; *Trigg v. McDonald*, 2 Humph (Tenn) 386; *Hill v. Pratt*, 29 Vt 119; *Gebhardt v. Holmes*, 135 NW 860, 149 Wis 428; *Winner v. Hoyt*, 32 NW 128, 68 Wis 278, 66 Wis 227, 28 NW 280; *Darling v. Corbett*, 8 UCQB 72; *O'Connor v. Hamilton*, 4 UCQB(Ont) 243; *Finnegan v. Jarvis*, 8 UCQB(Ont) 210; *Hutchings v. Button*, 6 UCCP(Ont) 452; *Hulgson v. Lynch*, 5 CL(Ir) 353; *In re Conyns*, 1 Ir Eq 72.

on the part of a sheriff or constable but the legislative mandates require more than such diligence.<sup>23</sup>

§ 94. **What Is Due Diligence?**—What is due diligence is not an easy matter to define, since what would be due diligence in one case, considering the facts and circumstances surrounding it, would be gross negligence in another case where the facts and surrounding circumstances were different. But it may be safely said, when the sheriff or constable has satisfied the rule demanding of him official conduct measuring up to the standard of due diligence, is, as a rule, a question of fact to be determined by a jury trying a case where such issue is involved. In order to execute the duties of his office with due diligence it is incumbent upon the sheriff, if the necessity of his situation requires, to surround himself with a sufficient number of competent deputies or subordinates to carry out and discharge the duties of the office. A failure to discharge such duties with due diligence, by reason of the lack of sufficient help with which to do so, may subject him to the charge of having failed in that diligence the law demands.<sup>24</sup> Courts in different jurisdictions have defined the degree of diligence, the exercise of which is necessary for the sheriff to comply with the law, in different phraseology, but when they are summed up they all mean about the same thing. A safe guide may be extracted from an opinion delivered by the learned supreme court of California at an early date, to the effect that in respect to the execution of process, the sheriff's or constable's duties are well defined by law. The law is reasonable in this as in all other things. It holds public officers to a strict performance of their respective duties. It tolerates no wanton disregard of these duties, it sanctions no negligence but it requires no impossibilities and it imposes no unconscionable exactions.<sup>25</sup> The rule as laid down by the great Chief Justice Marshall is that the process shall be served as soon as can reasonably be

23. *Trigg v. McDonald*, 2 Humph 386; *Barnes v. Thompson*, 2 Swan (Tenn) 313.

24. *Hallett v. Lee*, 3 Ala 28; *State v. Porter*, 1 Har (Del) 126; *Com. v. Gill*, 14 B Mon (Ky) 20; *Guiterman v. Sharvey*, 48 NW 780, 46 Minn 183, 24 Am St Rep 218. See also, note 95 Am Dec 423; *State v. Finn*, 87 Mo 310.

25. *Kennedy v. Brent*, 6 Cranch (U S) 187, 3 L ed 194; *Whitney v. But-*

*terfield*, 13 Cal 335, see also *Hinman v. Borden*, 10 Wend.(NY) 367, 25 Am Dec 568; *Tucker v. Bradley*, 15 Conn 46; *Brewster v. Van Ness*, 18 Johns (NY) 133; *Haggerty v. Wilber*, 16 Johns.(NY) 266, 8 Am Dec 321; *Jackson v. Law*, 5 Cow(NY) 248. See also 9 Cow 641; *McDonald v. Neilson*, 2 Cow(NY) 139, 14 Am Dec 431; *Lindsay v. Armfield*, 3 Hawks(NC) 548, 14 Am Dec 603; *Yeargen v. Wood*, 84 N C 326.

done.<sup>26</sup> Differently stated, all that is reasonably required from the sheriff or constable in such cases is that he shall, in good faith, make a reasonable effort to execute the process. If he were required to use all possible efforts to execute a summons in one case, he might thereby lose the opportunity of executing every other process in his hands. He is to act in each case honestly and diligently and with due regard to his duties to all litigants and to the public in general.<sup>27</sup> It is his duty in the execution of process to search for a defendant or other person subject to service and in the performance of this duty, he must of course go to such places as where the party to be served may be expected to be found.<sup>28</sup> As already suggested in this section what constitutes reasonable diligence depends upon the circumstances of each case.<sup>29</sup>

§ 95, Process to Be Executed in Due and Legal Order.—It is the duty of the sheriff or constable to execute the process of the same class in the order in which he receives them. That is, if he received attachments against the same defendant, he should execute them in the order they are delivered into his hands. So, too, of an execution or other process. And if he fails to do this and serves process delivered when he has other process of the same character or class against the same defendant, delivered prior thereto, he will be liable to the plaintiff in the process first received for any damages sustained, if the plaintiff thereby loses his debt or any part of it by reason thereof, or otherwise sustains damages.<sup>30</sup> Where process was placed in the hands of the sheriff on Sunday and was levied upon property of the defendant early Monday morning, but earlier than such levy, by the sheriff on Monday morning there had been levied by the sheriff's deputy process where in a different party was plaintiff. The process levied by the deputy was only received a few minutes before making such levy. In these circumstances the first levy had priority, since the sheriff could not, as such, receive process at all on Sunday and at the utmost, it could only be considered as coming into his hands officially

26. Kennedy v. Brent, supra.

27. Com. v. Gill, 14 B Mon(Ky) 20; State v. Finn, 87 Mo 310.

28. Hinman v. Borden, 10 Wend (N Y) 367, 25 Am Dec 568.

29. State v. Porter, 1 Har(Del) 126; Guiterman v. Sharvey, 48 NW 780, 46 Minn 183, 24 Am St Rep 218. See also note 95 Am Dec 423.

30. Whitney v. Butterfield, 13 Cal 335, 73 Am Dec 584, see also State v. Leland, 82 Mo 260; State v. Finn, 87

Mo 310; Rust v. Pritchett, 5 Del 200; Arberry v. Noland, 2 JJ Marsh(Ky) 421; Grabenheimer v. Budd, 3 So 724, 40 La Ann 107; Albrecht v. Long, 25 Minn 163; State v. Harrington, 28 Mo App 287; Camp v. Chamberlain, 3 Denio(NY) 108; Continental Distributing Co. v. Hays, 150 P 416, 86 Wash 300, Ann Cas 1917B 708 and note; Knox v. Webster, 18 Wis 406, 86 Am Dec 779 and note; Ohlson v. Pierce, 12 NW 429, 55 Wis 205.

at the beginning of Monday morning and that in the absence of being informed of the existence of urgency, he was not under duty to act upon it before the beginning of the business day on Monday. The court determined that it would be unjust and illegal to hold the sheriff to such a degree of diligence as to require him to arise at midnight to levy an attachment or execution.<sup>31</sup> A sheriff cannot relieve himself of liability in failing to levy a senior execution or attachment or execute other process in its proper order by the fact that at the time the junior process was levied, plaintiff well knew of the execution defendant's interest in the property so levied on, but did not inform the officer thereof, or request him to levy thereon, and that "it was supposed and believed" by the officer and by the plaintiff that a levy of plaintiff's execution previously made on other property would be amply sufficient to satisfy plaintiff's judgment.<sup>32</sup> On the other hand, however, where a sheriff received attachment plaintiff merely gave general directions to garnishee any person indebted to the defendant after filing in certain blauks with their names from books in the sheriff's possession while the latter specifically directed the sheriff to serve a garnishment upon certain designated persons, the sheriff is not liable to the earlier attachment creditor for obeying the specific directions in the junior writ first.<sup>33</sup> But it should never be lost sight of that the sheriff is a public officer of whom the law requires the strictest impartiality between those who are obliged to have his services and this impartiality cannot be enforced except upon the rule that he must, at his peril, levy and satisfy executions and levy attachments according to their seniority in his hands. Once allowed to be a race of diligence between the different creditors in finding and pointing out the property of the debtor, a door to partiality, fraud and strife would be thus opened. The sheriff might neglect inquiry, or be willingly ignorant for the sake of favoring one or oppressing another creditor, and the whole controversy would be thrown upon the uncertain testimony of those interested, and witnesses, subject to suspicion. We do not doubt, therefore, that it was the intention of legislation, as it is the course of reason, that executions and attachments should be levied according to their seniority in the hands of the sheriff.<sup>34</sup> The rule that the sheriff must levy the execution

31. Whitney v. Butterfield, 13 Cal 335.

32. Ohlson v. Pierce, 12 NW 429, 55 Wis 205. See however Reaume v. Winkelman, 255 NW 81, 102 Minn 1. 92

33. Remington v. Weber, 39 P 822, 11 Utah 181.

34. Knox v. Webster, 18 Wis 406, 86 Am Dec 779.

or attachment first received by him is not altered by the fact that a creditor placing in the hands of an officer an execution or attachment is thereafter more successful than the sheriff in discovering property of the debtor subject to levy.<sup>35</sup> Not only may the creditor in the senior execution or attachment assert liability of the officer who levies junior process prior to the senior, but likewise one who is surety for the defendant and the manner of levy of the process results in a seizure of the surety's property and such surety was only liable for the debt represented in the senior process and had the execution or attachment been levied in the order that the law requires, the surety would not have had to pay, but if by reason of such failure, he is damaged, he has a right of action against the sheriff.<sup>36</sup>

**§ 96. Sheriff to Decide Priorities at His Peril.**—Even acting under the orders of the court will not protect an officer if a judgment creditor suffers damages by violation of the creditor's right of priority by virtue of having delivered his execution or attachment to the officer first. It may be said the officer indeed decides the right of priority at his peril. So, if two attachments or executions are issued out of different courts at different times, are placed in a sheriff's or constable's hands, and both are levied on the same personal property, and the court thereafter issues orders that the property be sold, and the proceeds deposited with its clerk, and the sheriff obeys, and the money is paid to the second attaching or executing creditor, the sheriff is liable to the first attaching or executing creditor for the amount of his judgment, or for the amount of the proceeds, if less than the amount of the judgment.<sup>37</sup>

**§ 97. Directions to the Sheriff.**—When process is delivered into the hands of the sheriff it then becomes his duty, imposed by law, to make diligent search, inquiry and investigation to execute or serve such process in accordance with the directions therein contained. In the performance of this duty, the law imposes the strictest accountability and it has been said that it even goes so far as to presume that he knows, or will be able to ascertain, the residence of every person in his county, but, however, such presumption does not embrace visitors or strangers in the community.<sup>38</sup> It ought to be noted that within certain limited boundaries the directions of

35. Mahon v. Kennedy, 57 NW 1109, 87 Wis 50; Knox v. Webster, 18 Wis 406, 86 Am Dec 779.

36. Staton v. Com., 2 Dana (Ky) 397. 98.

37. Weaver v. Wood, 49 Cal 297.

38. Hamilton v. Lyle, 9 Phila (Pa)

the plaintiff, or his counsel, may control the acts of the sheriff or constable, particularly insofar as to relieve him of liability to the party giving the directions. But where such directions are given and no indemnity is demanded and loss results from failure to comply therewith, the sheriff or constable will be liable for such disobedience.<sup>39</sup> It is not necessary, that in order to fasten liability upon the sheriff or constable, for failure to carry out directions, to advise the officer of the grounds for such direction, and his failure to carry out the same based alone upon conduct dictated by good faith is no defense to his liability.<sup>40</sup> Of course, the sheriff or constable cannot be held liable for disobedience of instructions where they are conflicting, as, for instance, those given by the plaintiff in person and directions issued by his attorney.<sup>41</sup> Where the statutory right of the defendant is to designate the piece of property to be levied upon, and there exists the least known substantial doubt as to the title thereof, the sheriff or constable is not liable for failure to levy upon personal property of the debtor as directed by him. Where the officer levied on real estate, as designated by the defendant,<sup>42</sup> such directions may be verbal and will protect the sheriff or constable unless by statutory requirement they can only validly be given in writing.<sup>43</sup> As a general rule, a sheriff or constable is not liable for loss resulting from obedience to directions given him by the plaintiff or his attorney if such directions are valid.<sup>44</sup> It is sometimes said that the liability of the sheriff or constable is not affected by directions given by the plaintiff or his attorney when they act in ignorance of the fact, as for instance, where directions are given to release or discharge a defendant who

39. Barfield v. Barfield, 77 Ga 83; Kimball v. Davis, 19 Me 310; Trowbridge v. Cushman, 24 Pick (Mass) 310; Ranlett v. Blodgett, 17 NH 298, 43 Am Dec 603; Smith v. Judkins, 60 NH 127; Root v. Wagner, 30 NY 9, 86 Am Dec 348 and note; Murray v. Meade, 32 P 780, 5 Wash 693.

40. Smith v. Judkins, 60 NH 127; Peirce v. Partridge, 3 Met (Mass) 44.

41. Murray v. Meade, 32 P 780, 5 Wash 693.

42. State v. Willis, 33 Ind 118.

43. Sanford v. Boring, 12 Cal 539; Davis v. Gott, 113 SW 826, 130 Ky 486; Ridgway v. Moody's Admr. 16 SW 626, 91 Ky 581, 13 Ky L Rep 188; Chonkas v. Severyns, 99 P (2d) 942, — Wash —. When sheriff is or-  
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dered to levy on specified property, he must obey the order and is protected so long as he keeps within the order. See also, Johnson v. Nelson, 263 P 949, 148 Wash 500, 56 ALR 1035 and note; Commissioners of Treasury v. Allen, 9 SCL 88, 2 Mill. Const. 86; State v. Gemmill, 1 Houst (Del) 9.

44. O'Brien v. Weld, 92 US 81, 23 L ed 675; U. S. Glass Co. v. Chamlee, 68 SE 796, 135 Ga 152; Smith v. Smith, 60 NY 161; Ansonia Brass etc. Co. v. Babbitt, 74 NY 395, reversing 8 Hun 157; Bickham v. Kosminsky, 86 SW 292, 74 Ark 413; Douglass v. Haberstro, 88 NY 611, reversing 25 Hun 262, 62 How Pr 455; Granberry v. Crosby, 7 Heisk (Tenn) 479; Freiberg v. Johnson, 9 SW 455, 71 Tex 558.



is under civil arrest, and he has already escaped, or the property has already been released or destroyed, or otherwise passed out of the hands of the officer, then of course the consent would be no defense.<sup>45</sup> Of course, it hardly need be added that obedience to directions given by one, other than the plaintiff or his attorney, or the plaintiff's duly authorized agent, will be inefficacious to relieve the sheriff or constable from liability.<sup>46</sup> Likewise, directions with respect to some matters do not relieve the sheriff for misfeasance or nonfeasance in regard to other matters. Directions that were not authorized by law to be given, may not serve as a defense in behalf of the sheriff or constable.<sup>47</sup> The defense of having acted under directions from the plaintiff only operates as a protection for a sheriff or constable as between him and the plaintiff when the plaintiff asserts the sheriff's or constable's liability and will not, of course, be any defense for wrongful acts with respect to the defendant.<sup>48</sup> So, too, the sheriff or constable must be advised of the right of the party giving directions to him, otherwise the officer will not be liable for their disobedience. In a case of where a debt has been assigned but the judgment stands in the name of the assignor and the sheriff or constable is without knowledge of such assignment, then he is under no duty to obey directions given to him by the assignee.<sup>49</sup> A sheriff or constable seeking to escape liability on the basis that his actions were in accordance with instructions or directions issued to him by a party or his representative has the burden of proof with respect thereto.<sup>50</sup> And where he merely indorses on a writ or other process that he returned it in obedience to the directions of the plaintiff this is not sufficient evidence to excuse him from executing it.<sup>51</sup>

#### § 98. Service of Process Upon the Sheriff.—In the absence of

45. *Steele v. Putney*, 15 Me 327; *Scott v. Seiler*, 5 Watts(Pa) 235; *Powers v. Wilson*, 7 Cow(NY) 274.

46. *Stephens v. Clark*, 8 NJL 270. In the cited case the assignor of the judgment issued the directions and it was held the officer could not justify thereunder.

47. *Austin v. Burlington*, 34 Vt 506. In the cited case it appeared the officer had levied upon both realty and personality of debtor, and was directed by plaintiff's attorney to release the realty, and not only released the realty, but the chattels as well. Such direction is no defense in an action for

damages for release of the personal property; *Lewis v. Hamilton*, 15 Fed Cas No 8324a. *Hempst. 21*; *Beecher v. Anderson*, 8 NW 539, 45 Mich 543; *State v. Johnson*, 78 Mo App 569.

48. *Wilcox v. Brown*, 42 NW 937, 26 Neb 751; *Pittock v. Jordan*, 13 Pa 510, 19 Ore 7; *Scott v. Seiler*, supra; *Tomkins v. Hemphill* (*Minthorn v. Hemphill*) 34 NW 844, 73 Ia 257.

49. *Atkinson v. Cooper*, 2 Humph (Tenn) 361. See also note 46, supra.

50. *Bohon v. State*, 5 Blackf(Ind) 407; *Com. v. Hurt*, 4 Bush(Ky) 64.

51. *Bohon v. State*, supra.

special statutory provisions to the contrary, when process is required to be served upon the sheriff, it is generally the duty of the coroner to make such service. However, in some States, it is provided the constable may serve such process,<sup>52</sup> or, in certain contingencies, in some jurisdictions, the court may appoint an elisor to serve process upon the sheriff, or to perform other duties of the sheriff.<sup>53</sup> In some States it is provided by statute that any person over eighteen years of age, and not a party to the action, may serve an ordinary summons or subpoena to witnesses and it is, under these statutory enactments, immaterial whether the person to be served is the sheriff or other officer or a private citizen. In such cases proof of service is made by the affidavit of the person so serving such summons and when the process is issued out of the superior court and there is no statutory authority for the constable to serve the same, he must make affidavit and act in his private capacity when he makes such service.

§ 99. Sheriff Must Have Process in His Possession.—The issuance of process is no authority to a sheriff to act thereon unless he has it in his personal possession at the time he acts. It is no authority to take possession of property or justification to make arrest of a person unless it is in the officer's possession. It matters not if the process is in his office, or at some other place, if he is not possessed of it at the time he acts thereon.<sup>54</sup> Since, in order to complete the service of process of all classes, unless excused by statute, the officer is compelled to produce and to show to the defendant the original process if demanded, it would seem that in the absence of being possessed of the writ, he is not in a position to make a lawful service.<sup>55</sup> It has been held under an English statute that service of process meant the showing of the original to the defendant and leaving a true copy with him.<sup>56</sup> A failure to produce and show the original process on demand makes the attempted service thereof void and not merely irregular.<sup>57</sup>

52. *McClane v. Rogers*, 42 Tex 214. In that State the court is without power to appoint a special sheriff to serve process upon the sheriff.

53. Cal. Pol. Code, 1872, Sec. 4192; Kerr's Code, Sec. 4192, see also Derrington's Code 1931, Sec. 4173; 2 Idaho Code Ann., Sec. 30-1718.

54. *Wales v. Clark*, 43 Conn 183. In this case the question involved was authority to levy an attachment on telegraphic directions.

55. *Thomas v. Pearce*, 2 B & C 761, 9 ECL 330, 107 Eng Rep 566; *Phillipson v. Emanuel*, 56 LTRNS 858; *Hawthorn v. Harris*, 23 Weekly Rep 214, holding that failure to produce on demand avoids the purported service; *Woods v. Fader*, 10 Ont L Rep 643, 6 Ont W Rep 369.

56. *Ex parte Tendall*, 6 De GM & G 741, 55 Eng Ch 575, 43 Eng Rep 1421.

57. *Hawthorn v. Harris*, supra.

§ 100. **Sheriff or Constable Is Limited to His Own Territorial Jurisdiction and Restricted by Process Directed to Him.**—The sheriff is limited to the territorial boundaries of his county and in the absence of statutory authority it would seem to follow that a constable is likewise restricted to his precinct or district for which he was elected. These officers cannot, in the absence of an enabling statute, execute any kind of process outside of the above mentioned territorial limits and any attempt so to do constitutes an illegal action, and the attempted service is absolutely void. It is wholly immaterial whether the attempt to serve process beyond the territorial confines of their authority arises from a mistake or perversity. A distinction, however, is taken between the actuating motives prompting such service in the case of pure mistake or inadvertence and bad faith as to extent of his liability. The officer, in the former case, is not liable for more than nominal or at most compensatory damage. In the latter case, however, where his acts were prompted by purposes other than to fulfill or discharge the duties of his office more serious consequences would attach to the attempted service.<sup>58</sup> And, of course, the deputy possesses no more authority than the principal officer to serve process beyond the territorial limitation of the county, in the case of a sheriff, or of the district, precinct, or town, as the case may be, of a constable.<sup>59</sup> A sheriff or constable seizing property beyond the territory of his official authority is in no better position than an individual possessed of no authority whatsoever and may be required to answer in the same manner and to the same extent in damages to the owner.<sup>60</sup> The rule with respect to the sheriff being restricted in the performance of his official

58. *Matter of Tilton*, 19 Abb Pr 50. As to power to serve process on Indian reservation, see Sec. 101, note 63a, *infra*.

59. *Jones v. Baxter*, 41 So 781, 146 Ala 620, 119 Am St Rep 54 and note; *Stephenson v. Wright*, 20 So 622, 111 Ala 579; *Goetchius v. White*, 75 SE 674, 11 Ga App 456; *Dederich v. Brandt*, 44 NE 1010, 16 Ind App 264; *Parmlee v. Leonard*, 9 Iowa 131; *Washoe County v. Humboldt County*, 14 Nev 123; *Douglass v. Phoenix Ins. Co.* 33 NE 938, 138 NY 209, 20 LRA 118, 34 Am St Rep 448 and note, the principal case holding that the situs of debts and obligations is at the domicile of the creditor, but the creditor of a nonresident may in the State of

[1 *Anderson on Sheriffs*].—7

New York attach a nonnegotiable debt or credit owing or due him by a person within the jurisdiction where the attachment issues. To this extent the laws of the State, for the purposes of attachment proceedings, may fix the situs of the debt at the domicile of the debtor; *Farmer's State Bank v. Wilton*, 127 P 395, 34 Okl 755; *DuRant v. Brown Motor Company*, 144 SE 705, 147 SC 89; *Alred v. Montague*, 26 Tex 732, 84 Am Dec 603 and note; *Jones v. State*, 9 SW 53, 26 Tex App 1, 8 Am St Rep 454; *Stewart v. Martin*, 16 Vt 397; *Emerson v. Bailey*, 11 Vt 656.

60. *Stephenson v. Wright*, 20 So 622, 111 Ala 579; *Parmlee v. Leonard*, 9 Ia 131; *Stewart v. Martin*, 16 Vt 397; *Emerson v. Bailey*, 11 Vt 656.

cial duties is so rigid that where he has an execution against lands of a judgment debtor partly lying within the sheriff's county and partly beyond the boundaries thereof, a levy on the whole of such land is only effectual in so far as that part of the land is situated within the county for which the sheriff making the levy was elected.<sup>61</sup> Where the sheriff has authority, by virtue of statutory enactment or a constitutional provision, to execute criminal process anywhere within the confines of the State, he of course has no power to serve or execute such process beyond the limits thereof.<sup>62</sup>

In other words, the sheriff's jurisdiction may be extended by statutory enactment to be coextensive with boundaries of the state wherein he is elected, but cannot go beyond that with respect to his power to execute criminal process, except as an agent of the State in extradition cases.<sup>63</sup> A sheriff or constable cannot execute any process, of course, unless it is directed to him and an attempt to do so is utterly void.<sup>64</sup> Where the sheriff has a prisoner in his custody, he can travel through the boundaries of other counties, if necessary, to obey the commands of a writ to produce the prisoner before the court issuing the writ and upon fresh pursuit he may, in another county, retake an escaped prisoner that had theretofore been in his custody, but he is without authority to take the prisoner through another county to be committed to jail in the sheriff's own county.<sup>65</sup> Of course, these are common law rules, and may be altered by the law-making powers.

§ 101. **A Sheriff or Constable Cannot Serve Process unless Addressed to Him.**—A sheriff, constable, or other officer, whether a United States Marshal or municipal policeman, is without authority to serve process, either civil or criminal, unless it is directed to him, and his attempts so to do are illegal and will not protect him therein.<sup>66</sup> And, of course, if process is addressed to an offi-

61. *Alred v. Montague*, 26 Tex 732, 84 Am Dec 603, and note; *Short v. Hepburn*, 75 Fed 113, 21 CCA 252, see also, 33 LRA 92 note; *Plant v. Anderson*, 16 Fed 914. It does not cure the defect of levying on land lying in two counties to hand over the writ to the sheriff of the second county to proceed under the execution.

62. *Brannin v. Sweet Grass County*, 293 P 970, 88 Mont 412. See Sec. 148 *infra*.

63. *Brannin v. Sweet Grass County*, 293 P 970, 88 Mont 412.

64. *Wood v. Crosby*, 2 Hill(SC) 520. See Sec. 101, *infra*. *Witt v. Kaufman*, 98

25 Tex 384; *Plant v. Anderson*, 16 Fed 914.

65. *Page v. Staples*, 13 RI 306.

66. *Harkness v. Hyde*, 98 US 476, 25 L ed 237. See Sec. 100, note 64, *supra*. Of course, this means only in case the process is addressed to some officer, and would not apply to a summons or other process, where under the law it is addressed to a litigant. In many jurisdictions process of some classes is not directed to any officer; *Langford v. Monteith*, 102 US 145, 26 L ed 53; *Winkler v. State*, 32 Ark 539; *Porter v. Stapp*, 6 Col 32; *Bassett*

[1 *Anderson on Sheriffs*]

cer or officers of one county, it cannot be served by an officer of a different county.<sup>66a</sup> It, of course, is not necessary to direct the process to the officer by name; it is sufficient if it is addressed to officers of his class, as for instance to "any constable or other lawful officer of said county."<sup>67</sup> The sheriff has authority under this direction to execute such process. Process issued from a State court cannot be served by the sheriff upon an Indian reservation, where such reservation under an act of Congress and treaty provision is excepted from the territory of the State.<sup>68</sup>

§ 102. **Service of Process by De Facto Officer Valid.**—If the person serving process is a de facto sheriff or constable, the service is valid, since the courts decline to investigate collateral issues by delving into the official status of a person who is not before it, nor a party to an action therein, for to do so would adjudge his rights to the office without an opportunity to be heard.<sup>69</sup>

§ 103. **Kinds of Process.**—Process and writs are synonymous terms. It may be said that every writ is a process.<sup>70</sup> For convenience process may be divided into three general classes, to-wit: "original," "mesne," and "final."<sup>71</sup> The function of original process may be generally said to be the inauguration of a cause of action or legal proceeding, in contradistinction from process which prolongs an action already begun or which is appellate in its nature.<sup>72</sup> Mesne process, as its name indicates, signifies interven-

v. Howorth, 104 Mass 224; Wood v. Ross, 11 Mass 271; Foster v. Wiley, 27 Mich 244, 15 Am Rep 185; McGloughan v. Mitchell, 36 SE 164, 126 NC 681.

66a. Maranda v. Dufour, 13 Que Pr 4; Whitehead v. Van Buren, Cir. Judge, 190 NW 239, 220 Mich 504; Strauss v. Owens, 65 SE 161, 9 Ga App 415.

67. Porter v. Stapp, supra; McGloughan v. Mitchell, 36 SE 164, 126 NC 681.

68. Harkness v. Hyde, supra, note 66.

69. Flournoy v. Clements, 7 Ala 535; Gunby, Daniel & Co. v. Welcher & Carter, 20 Ga 330; Ragan-Malone Co. v. Padgett, 125 SE 605, 33 Ga App 111; Strickland v. Strickland, 100 SE 230, 24 Ga 200; Warwick G. & etc. Co. v. Continental G. etc. Co. 85 SE 700, 143 Ga 508; Greenup v. Stoker, 12 Ill 24, 52 Am Dec 474; Bucknam v. Rug-

gles, 15 Mass 180, 8 Am Dec 98; Merrill v. Palmer, 13 NH 184; Kimmell v. Edwards, 193 SW 363, 194 SW (Tex) 168; Bank of Middlebury v. Rutland etc. Co., 30 Vt 159.

70. Parks v. Bryant, 31 So 593, 132 Ala 224; Taylor v. United States, 45 Fed 531; see however, 13 S Ct 479, 147 US 695, 37 L ed 335; Aven v. Wilson, 32 SW 1074, 61 Ark 287, dissenting opinion; Anderson v. Dewey, 100 Atl 99, 91 Conn 510; Perry v. Lorillard Fire Insurance Co. 6 Lans(NY) 201, affirmed, 61 NY 214, 19 Am Rep 272; Carey v. German American Insurance Co. 54 NW 18, 84 Wis 80, 38 Am St Rep 907, 20 LRA 267.

71. White v. Guthrie, 2 Pa Co 7, 3 Blackstone Com. 279.

72. Holmes v. Jennison, 14 Pet (U S) 540, 10 L ed 579; Oglesby v. Attrill, 12 Fed 227; Birmingham Dry Goods Co. v. Bledsoe, 21 So 403, 113 Ala 418;

ing or intermediate process and embraces all writs and orders of the court necessary for the carrying on of the suit after it is instituted, by original process, but it does not embrace the final process issuing on the judgment to harvest the fruits of litigation.<sup>73</sup> Final process signifies those writs which are necessary for the successful party to satisfy the final judgment or award in his favor.<sup>74</sup> However, in the modern treatment of process, there has been manifested a disposition on the part of some courts and law writers to limit the designation of process to mesne and final.<sup>75</sup> On this general subdivision of process all writs or orders issued before the final process are regarded as mesne process.<sup>76</sup>

Process is sufficiently comprehensive to embrace papers and proceedings in foreclosure of chattel mortgage, which are authorized by statute, but are not issued out of any court.<sup>76a</sup>

§ 104. **Initial Process Summons to Answer.**—Formerly in England and in some of the American jurisdictions the initial process was called a *capias ad respondendum*. Under this writ, or process, the defendant was required to be arrested and held in jail in the default of bail until the return date of the process so that he would be in court on the return day. The rigor of this method of beginning a suit or initiating an action was relaxed, however, even before its abandonment by only requiring nominal bail and then it was entirely discarded and now in all common law jurisdictions the method of beginning suit is by summons which places no restraint upon the liberty of the defendant.<sup>77</sup> However, it was out of this procedure that there still remains in many jurisdictions the right to arrest the defendant on civil process.<sup>78</sup> There was con-

Hotchkiss App, 32 Conn 353; Reeves v. Ferguson, 31 NJL 283; White v. Guthrie, 2 Pa Co 7, 3 Blackstone Com. 279.

73. Moredock v. Kirby, 118 Fed 180; Pennington v. Lowenstein, 19 Fed Cas No 10,938; Birmingham Dry Goods Co. v. Bledsoe, supra; Reeves v. Ferguson, 31 NJL 289; White v. Guthrie, 2 Pa Co 7; Arnold v. Chapman, 13 RI 586; McLean v. Evans, 3 Ont Prac 154.

74. Birmingham Dry Goods Co. v. Bledsoe, supra.

75. Utica City Bank v. Buel, 9 Abb Pr(NY) 385, 17 How Pr 498; Murfree on Sheriffs, Sec. 117.

76. Birmingham Dry Goods Co. v. Bledsoe, supra; Place v. Washburn, 40 100

NE 853, 163 Mass 530; Arnold v. Chapman, 13 RI 586; Murfree on Sheriffs, Sec. 117.

76a. Blumaur-Frank Drug Co. v. Branatetter, 43 P 575, 4 Ida 557, 95 Am St Rep 151. Indeed, process has been held to include every description of writ, precept, warrant, or mandate issuing from a court, tribunal, or person possessing judicial powers, commanding an arrest or a seizure of, or levy upon property, personal or real. Notes 21 Am Dec 190 and 95 Am St Rep 157.

77. Murfree on Sheriffs, Sec. 118.

78. 3 Reeves History of English Law, 60, 179, 199, 311.

siderable discretion allowed the courts in the issuance of such process and it seems that it was required to be ordered by the court.<sup>79</sup>

§ 105. **What Is a Summons to Answer.**—Usually in the American jurisdictions in particular, the summons is issued by the clerk of a court and according to its wording it flows from the State, or the people or the commonwealth in accordance with the style of the sovereign State. It is in general directed to the sheriff, commanding him to summon the defendant to appear at a time therein stated, whether it is the next term of the court or within a certain number of days, or by a definite date. In some states, however, the summons is signed either by the party plaintiff litigant, or the defendant in a cross action, or by counsel of such parties. In some States the complaint is not required to be filed, or the summons entered in the records of the court, until the plaintiff, or the cross plaintiff seeks a default. In some jurisdictions the summons when issued in vacation bears what is called a teste date which is a date of the preceding term of court. This was regarded with a great deal of importance in former times.<sup>80</sup> Originally in all, and still in many, jurisdictions, upon the receipt of the summons the sheriff merely informed or now informs the defendant of the character of the process and read or now reads it to him, or delivered or now delivers it to him to read or otherwise make known to him the contents thereof and what was or is required of the defendant. But now, in many jurisdictions, and particularly in the so-called code States, a copy of the summons and complaint is delivered to the defendant and the sheriff's return, so showing, is sufficient evidence of service.

Differently stated, a summons to answer is the means whereby a court compels the appearance of a defendant before it.<sup>80a</sup>

§ 106. **Duty of a Sheriff to Return Process.**—It is the duty of the officer upon either executing process or determining the defendant cannot be found within his territorial jurisdiction, or for any other lawful reason that it cannot be executed, to return it to

79. 3 Reeves History of English Law, 311.

80. Johns v. Phoenix National Bank, 56 P 725, 6 Ariz 290; Eaton v. Fullett, 11 Ill 491.

80a. Harrington v. Superior Court in and for Placer Co. 228 P 15, 194 Cal 185; Wheatland v. Baker, 294 P 501, 110 Cal App 761; Wheatland v. Hart, 294 P 501, 110 Cal App 762; Wheat-

land v. Maloney, 294 P 499, 111 Cal App 288; Flanary v. Kusha, 173 NW 652, 143 Minn 308; Holt v. Sather, 264 P 108, 81 Mont 442, holding that a summons is the instrument; Horton v. Kansas City, etc., R. Co. 26 Mo App 349; Ackermann v. Berriman, 114 NY S 937, 61 Misc 165, holding process and summons were synonymous at common law; First National Bank v. Profit, 293 SW(Mo App) 524.

the court from which it issued and endorse thereon the fact with respect to service or inability so to do.<sup>81</sup> It is the officer's duty to execute process, if possible, and before he is justified in returning it without serving it, he should make diligent search and inquiry, and this duty is not discharged by merely making vague or indefinite inquiries on the streets or other places, but he is required to visit the supposed residence of the defendant in searching for him.<sup>82</sup> After the sheriff or constable has made diligent search, and inquiry, he may make a return "not found" as to the defendant though he is within the officer's territorial jurisdiction.<sup>82a</sup> As to what will amount to diligent search and inquiry within this rule of law depends upon the facts of the particular case and is a jury question.<sup>83</sup> If a sheriff fails to make proper inquiry of persons likely to know of the whereabouts of the defendant, he is liable for such neglect.<sup>84</sup> The sheriff's duty to execute process is not dependent upon the failure of the plaintiff or his attorney to give the sheriff information with respect thereto.<sup>85</sup> It is the duty of the sheriff and his deputies in making a return to do so in the name of the sheriff.<sup>86</sup> However, the name is not required to be written, since the sheriff may adopt a rubber stamp for an official signature.<sup>87</sup> The sheriff is under duty, however, in sending the process to the clerk's office of the court out of which it issued, to prepay the postage, since the clerk is under no duty to take from the post office letters with postage due thereon.<sup>88</sup> A mere agreement on the part of the judgment creditor for the sale of property levied upon under an execution does not exonerate the sheriff or constable from his duty to return the writ.<sup>89</sup> If for any reason, the sheriff or constable fails to return a writ, which reason is unjust or insufficient, he will be com-

81. Hinman v. Borden, 10 Wend (NY) 367, 25 Am Dec 568.

82. State ex rel. Kerney v. Finn, 87 Mo 310.

82a. Strout v. Pennell, 74 Me 260.

83. Whitney v. Butterfield, 13 Cal 335, 73 Am Dec 584; Peo. v. Palmer, 46 Ill 398, 95 Am Dec 418 and note; Franklin County National Bank v. Kimball, 152 Mass 331; Guiterman v. Sharvey, 48 NW 780, 46 Minn 183, 24 Am St Rep 218 and note; Reaume v. Winkelman, 255 NW 81, 192 Minn 1; Tubiola v. Baker, 233 NYS 373, 225 App Div 420.

84. Watson v. Brennan, 66 NY 621. 102

85. Tomlinson v. Rowe, Hill & D. (NY) (Lalor's Supp) 410.

86. Kreiling v. Treffinger, 14 Pa Dist 357; State v. Fisher, 130 SW 35, 230 Mo 325, Ann Cas 1912A 970.

Position of sheriff's or constable's name is not material. Whether above or below that of the deputy is immaterial, so long as it appears, the service is in the name of the sheriff or constable. Zepp v. Hager, 70 Ill 223.

87. Dilworth Bros. Co. v. Thomas Canning Company, 26 Pa Dist 1018.

88. Jenkins v. McGill, 4 How Pr (NY) 205.

89. Clingman v. Barrett, 6 Humph (Tenn) 20.

pelled to do so by the court by citation for contempt.<sup>90</sup> So too, if the return is evasive he may be compelled to make a more full return by the court, and upon a failure or refusal so to do, he may have visited upon him punitive measures by virtue of the power of the court to enforce its orders by contempt.<sup>91</sup> It is generally held that after the writ is returned, it then, as valid process, becomes *functus officio*, as for instance, an attachment by garnishment is served, by reason of the fact that the officer then has no further duty to perform in connection therewith.<sup>92</sup> Where the form of the return "not found" is not prescribed by the statutory law of the particular jurisdiction, then it seems that if the sheriff makes a return "the defendant is not to be found in my county," that is sufficient.<sup>93</sup>

§ 107. **The Law of Domicile.**—The domicile of the parties often becomes a matter of grave importance to ministerial officers in the discharge of their duties, especially where the statutory law of the particular jurisdiction authorizes substituted service of summons or other process by leaving it at the defendant's home, "residence," "usual residence," "abiding place," "place of abode," "last place of abode," "usual place of abode." There are three kinds of domicile, and they are "domicile of origin," "domicile of choice," and "domicile by operation of law."<sup>94</sup> Every person must have a domicile and can only have one at a particular time or differently stated, he can only have one domicile at the same time for the same purpose.<sup>95</sup> The law ascribes to every individual the domicile of origin, nothing appearing, which is the domicile of his parents at the time he was born.<sup>96</sup> A domicile of choice is, as the name implies, one by election of the party.<sup>97</sup> A domicile by operation of law is one attributed to him, independent of his intention or his place of residence, as in the case of various domestic relationships, as the domicile of

90. *Bowie v. Brabe*, 11 NY Super 676, 2 Abb Prac 161.

91. *Davis v. Weyburn*, 1 How Pr (NY) 153.

92. *Johnston v. Jones*, 248 P 296, 78 Cal App 84.

93. *Murfree on Sheriffs*, Sec. 120.

94. *Smith v. Croom*, 7 Fla 81; *Louisville etc. R. Co. v. Kimbrough*, 74 SW 229, 115 Ky 512, 24 Ky Law Rep 2409; *Lesh v. Lesh*, 13 Pa Dist 537.

95. *Helm's Trustee v. Commonwealth*, 122 SW 196, 135 Ky 392; *Lebanon v. Biggers*, 78 SW 213, 117 Ky 430, 25 Ky L Rep 1528; *Gilman v. Gil-*

*man*, 52 Me 165, 83 Am Dec 502 and note; *Abington v. North Bridgewater*, 23 Pick.(Mass) 170; *Matter of Grant*, 144 NYS 567, 83 Misc 257, 11 Mills 333.

96. *Prentiss v. Barton*, 23 Fed Cas No. 11384, 1 Brock. 389; *Van Matre v. Sankey*, 36 NE 628, 148 Ill 536, 39 Am St Rep 190, 23 LRA 665.

97. *Valentine v. Valentine*, 48 Atl 593, 61 NJ Eq 400; In the matter of *Wise*, 150 NYS 782, 165 App Div 420, 14 Mills 189; *Mather v. Cunningham*, 74 Atl 809, 105 Me 326, 29 LRA(NS) 761, 18 Ann Cas 692.

the husband controls, ordinarily, that of the wife or child.<sup>98</sup> As to whether or not a party maintains a domicile in the particular jurisdiction warranting constructive service of process thereat depends upon local statutes and rules, which should be consulted.

§ 108. **Immunity from Service.**—The matter of the immunity or exemption of a litigant from service of process is one with which the sheriff has no concern. If a litigant is privileged against being served with process at the particular time and place and makes claim thereof to the sheriff, constable or other officer, attempting to serve him, such claim should not be heeded by the officer. That is a matter for the court to determine at a later time upon a motion to quash the service.<sup>99</sup> As to when litigants are exempt or privileged from the service of process by reason of attending court of a foreign jurisdiction, is of no concern of the sheriff or constable in serving process, and since it is a matter that does not concern the sheriff, it is not necessary for our present purpose to embark upon a discussion with respect thereto. The sheriff has but one duty and that is obedience to the process placed in his hands. It is not a question that the person on whom the service is proposed to be made may raise with the sheriff. It is a question that he must raise and have passed upon by the court.<sup>1</sup>

The methods of raising the question of privilege or immunity are, in the case of arrest, to move for a discharge, or in case of service of process, to move to set aside the service, or to file a plea in abatement and in the plea insist upon the immunity or privilege.<sup>1a</sup>

§ 109. **Service of Process on Partnerships.**—In an action against a partnership it is necessary that all of the partners be served in the absence of a statutory provision allowing the service on one and binding his property and that of the firm.<sup>2</sup> However, in cases where some of the partners are without the territorial jurisdiction of the court at law, they cannot be served, but in equity the solution of the matter seems to have been satisfactorily made in its permission to serve the process upon the resident partner or partners for those who are abroad, or in other words, a sort of

98. *Flynn v. Fidelity etc. Co.* 145 Fed 265; *Louisville etc. R. Co. v. Kimbrough*, 74 SW 229, 115 Ky 512, 24 Ky L Rep 2409; 5 *American & English Encyclopedia of Law*, p. 857 et seq.

99. *Sperry v. Willard*, 1 Wend (NY) 32.

1. *Sperry v. Willard*, supra; *Gregg v. Sumner*, 21 Ill App 110. See Sec. 87, supra.

1a. 21 RCL p. 1311, Sec. 56.

2. *Romona Oolitic Stone Company v. Bolger*, 170 Fed 979; *Rice v. Doniphan*, 4 B Mon Ky 123.

constructive service is resorted to.<sup>3</sup> Statutes are found where it is permissible to initiate an action against a partnership and serve one or more partners and thereby binding the partners served and the firm property.<sup>4</sup> It is generally held, however, that service upon an agent for a partnership is not permissible.<sup>5</sup> It seems that at common law, where some of the defendant partners could not be reached, by reason of their nonresidence, as in other cases, generally there was a proceeding that could be instituted against such nonresidents known as proceedings of outlawry and after a judgment was rendered, then separate judgments against the individual partners who had been served with process within the jurisdiction could be obtained.<sup>6</sup> But, a personal judgment against the nonresident partner who was not served within the jurisdiction of the court was, and still is, in the absence of some statutory enabling act, absolutely void.<sup>7</sup> However, in the case of domestic judgments, if they are regular on their face and appearance has been entered by a responsible resident attorney for a partner or another, although no process was served and moreover such attorney is without authority to enter the appearance, the judgment may be permitted to stand, notwithstanding this situation and leave the party to his remedy against such an attorney.<sup>8</sup> As a general rule, one partner has no implied authority to accept service of process or enter an appearance in an action for and on behalf of his co-partner, and especially after a dissolution of the same.<sup>9</sup> There seems to be an exception, however, with respect to the power of a partner to accept service for, and on behalf of the

3. *Darwent v. Walton*, 2 Atk 510, 26 Eng Rep 707; *Kinder v. Forbe*, 2 Beav 503, 17 Eng Ch 503, 48 Eng Rep 1277, 9 LJ Ch 283; *Carrington v. Cantillon*, Bunb. 107, 145 Eng Rep 612; *Henderson v. Campbell*, 34 LJ Ch 660, 13 WR 704; *Snow v. Hole*, 10 LJ Ch 178; *Coles v. Gurney*, 1 Madd 187, 56 Eng Rep 70; *Birdwood v. Hart*, 3 Price 176, 146 Eng Rep 228.

4. *Liverpool etc., Navigation Co. v. Agar*, 14 Fed 615, 4 Woods 201; *U. S. v. American Bell Telephone Co.*, 20 Fed 17; *Ingraham v. Gildemeester*, 2 Cal 88; *Beebe v. McKeithen Constr. Co.*, 5 La App 170; *Cornille v. Dun*, 79 So 855, 143 La 1045; *Hedges v. Armistead*, 60 Tex 276; *Feldman v. Seay*, 291 SW (Tex) 350; *Graham Hotel Corp. v. Leader*, 241 SW (Tex) 700; *State v. Cloudt*, 84 SW (Tex) 415.

5. *Wichita County Lumber Co. v. Maer*, 235 SW (Tex) 990, but see *Cornille v. Dun*, supra.

6. *Edwards v. Carter*, 1 Strange 473, 1 Chitty Plead. 42, Tidd's Pr 423.

7. *Houston v. Ward*, 8 Tex 124; *J. C. Jacobs Banking Co. v. Security Banking Co.*, 4 Tenn Civ App 127; *Johnson v. Vaughn*, 9 B Mon (Ky) 217; *Boaz v. Heister*, 6 Serge & R (Pa) 18; *Hall v. Lanning*, 91 US 160, 23 L ed 271.

8. *Hall v. Lanning*, supra.

9. *Hall v. Lanning*, supra; *Heavrin v. Lack Malleable Iron Co.*, 155 SW 720, 153 Ky 329; *Phelps v. Brewer*, 9 Cush (Mass) 390, 57 Am Dec 56; *Weldon v. Fisher*, 186 SW 1153, 194 Mo 573; *Clark v. Slate Valley Railway Co.*, 20 Atl 562, 136 Pa 408, 10 LRA 238.

other partner or partners and the partnership, which is to the effect that if the partner so accepting service of the process is the managing agent or active partner, he may do so. The situation is not altered by the fact that those for whom he accepts service are beyond the territorial jurisdiction of the court.<sup>10</sup>

§ 110. *Service of Process upon Domestic Corporations.*—A domestic corporation in contradistinction to a foreign corporation is one organized under the laws of the State or local jurisdiction, while the foreign corporation is one organized under the laws of another State or jurisdiction, or foreign country. The service of process on a corporation is generally provided for in local statutes or constitutional provisions and it would be advisable for a sheriff, constable or other officer seeking to serve process upon a corporation to consult the local statutes. In the absence of any statutory provision, however, service of process or other papers on the corporation should ordinarily be made on an executive officer or on some agent whose ordinary duties are such that notice to him would naturally insure knowledge to the corporation.<sup>11</sup> With respect to personal service on a corporation, strictly speaking, there can be no such thing, and when spoken of, what is intended is personal service on its officers or agents.<sup>12</sup> The statutes, however, with respect to service of process upon a corporation are so far controlling that an officer attempting to make service has no power to substitute any different method or to do otherwise than to follow the directions of the statute.<sup>13</sup> At common law in the service of process on a corporation it was necessary that the president or corresponding head officer be served.<sup>14</sup> The prime purpose of the common law and statutory enactments or constitutional provisions with respect to the service of process upon a corporation is that the party served must be a representative of the corporation and likely to impart knowledge to the corporation.<sup>15</sup> It is not sufficient to serve process on one supposed to be an officer or agent of a corporation or

10. *Wheatley v. Tutt*, 4 Kan 240; *Tomlinson v. Broadsmith* (1896) 1 QB 386; *Marks v. Fordyce*, 6 Ohio D (Reprint) 81.

11. *Starke v. S. C. Beckwith*, Special Agency, 124 NE 90, 227 NY 42, rev. 162 NYS 1145, 176 App Div 910.

12. *Smetal Corp. v. West Lake Investment Co.*, 172 So 58, 126 Fla 595.

13. *Clough v. Superior Equipment Co.*, 157 Atl 306, 18 Del Ch 202.

14. *Dewolf v. Mallett's Adm.*, 53 Ky (3 Dana) 214; *Martin v. Atlas Estate Co.*, 65 Atl 881, 72 NJ Eq 416; *Wartrace v. Wartrace etc.*, Turnpike Co., 42 Tenn (2 Cold) 515.

15. *Swann v. Mutual Reserve Fire Life Association*, 100 Fed 922; *Polasek v. American Iron and Steel Manufacturing Co.*, 149 NYS 372, 164 App Div 926; see also, 109 NE 1090, 215 NY 619.

who in fact does not occupy such position.<sup>16</sup> Neither can service be made on one who is an agent of a creditors' committee rather than an agent of the corporation attempted to be served.<sup>17</sup> So too, an attempted service on a temporary trustee under an invalid appointment, as receiver of a corporation, is insufficient to have any binding effect on the corporation itself.<sup>18</sup> In ancient times, a corporation could only be compelled to appear in an action at law by service upon one of its officers and issuance of distraining process against its property and if it possessed no property, it was held to be impossible to obtain jurisdiction over the corporation itself. The necessity of a more efficacious means of obtaining jurisdiction against a defendant corporation was apparent.<sup>19</sup>

**§ 111. Service of Process on One Corporation as Binding Another, as Parent and Subsidiary Corporation.**—A corporation organized under the laws of Kansas and thereafter migrating to, and becoming qualified, under the laws of Nebraska, doing business therein, having duly appointed an agent upon whom process might be served, which said Kansas corporation subsequently merged with a Missouri corporation and the Missouri corporation absorbing the name and identity of the Kansas body politic and the Missouri corporation thereafter consolidated with a corporation organized and existing under the laws of the State of Utah, and the Missouri corporation in the consolidation thereof, with the Kansas corporation was authorized to transact business in Nebraska and likewise the Utah and consolidated company arising from its combining with the Missouri corporation, were not authorized to transact business in Nebraska, will sustain service of process obtained in Nebraska by serving the same upon the statutory agent of the original Kansas corporation.<sup>20</sup>

Where a foreign corporation is actually doing business through the instrumentality of a local corporation the foreign entity may

16. *State of N. J. v. Shirk*, 127 NE 861, 75 Ind App 275, 141 NE xxi.

17. *Burger v. St. Louis Bed & Manufacturing Co.*, 206 Ill App 256.

18. *Yource v. Home Town Mutual Insurance Co.*, 79 SW 175, 130 Mo 153.

19. *Mully v. Colt's Patent*, LR 7 QB Case 296; *Newell v. Great Western Railway Co.*, 19 Mich 336; *Illinois etc., Telephone Co. v. Kennedy*, 24 Ill 319. It has been held:

"At common law there is no way in which process can be served upon a foreign corporation, and, as a rule, it is only by statutory provision that service can be had on such corporation." *Nelson v. Deming Inv. Co.*, 96 P 742, 21 Okla 610.

20. *Anderson on Limitations of the Corporate Entity*, Sec. 523; *Lincoln Safe Deposit Co. v. Continental Life Insurance Company*, 249 SW 677, 213 Mo 561.

be drawn into court by service of process on the local corporation.<sup>20a</sup>

**§ 112. Service of Process on Foreign Corporation.**—As we have already suggested<sup>21</sup> a domestic corporation is one organized under the laws of a local State or jurisdiction, while a foreign corporation is a corporation organized under the laws of another State or another country. The attempt to obtain jurisdiction of a foreign corporation by the service of process has been one attended with great difficulty, resulting in much confusion in the adjudicated cases. In most States, there are to be found statutory enactments or constitutional provisions, directing how a service of process upon foreign corporations shall be made. These provisions of course are controlling and should be consulted and followed. It is often found that a particular State or county officer is designated as an agent upon whom process may be served with respect to foreign corporations. It is also often provided by statutory enactments or constitutional provisions that a corporation found doing business within the State may be served by serving the process on some State or county officer. Time and space will not permit the citation and analysis of these various legislative or constitutional provisions. It is generally held that, if a statutory agent is appointed by a foreign corporation upon whom process may be served, this is not the exclusive method of serving such foreign corporation and that if the foreign corporation is served in the same manner as domestic corporations could be served, that is sufficient.<sup>22</sup> Of course, if the statute provides that service on a foreign corporation can only be made on the designated statutory agent, then the service on such corporation must be made in that manner.<sup>23</sup> In no case, however, may a mere stockholder be served for a foreign or domestic cor-

20a. See Sec. 112, note 25, *infra*.

21. See Sec. 110, *supra*.

22. *Henrietta M. & M. Co. v. Johnson*, 19 S Ct 402, 173 US 221, 43 L ed 676; *Bouttree v. International Paper Co.*, 229 Fed 951, 144 CCA 233; *Mutual Reserve Fund Life Association v. Cleveland Woolen Mills*, 82 Fed 508, 27 CCA 212; *Lesser Cotton Co. v. Yates*, 63 SW 907, 69 Ark 393; *New South Brewing & Ice Company v. Price*, 50 SW 903, 21 Ky Law 11; *Howard v. Prudential Ins. Co.*, 37 NYS 832, 1 App Div 135; *Littlejohn v. Southern Ry. Company*, 22 SE 761, 45 SC 96; *Conn. Mutual Life Ins. Co. v. Spratley*, 42 SW

145, 99 Tenn 322, 44 LRA 442.

23. *Venner v. Denver Union Water Co.*, 90 P 623, 40 Colo 212, 122 Am St Rep 1036 and note.

See also, Note 85 Am St Rep 926, 112 Am St Rep 284.

*Waters Pearce Oil Co. v. Foster*, 153 P 169, 52 Okla 412; *Potts v. Prudential Ins. Co.*, 6 Pa Dist 520, 6 Del Co 535; *Brown v. American Tel. etc. Co.*, 16 Pa Dist 664; *Bea Line Construction Company v. Schmidt*, 85 P 711, 16 Okla 429; *Cunningham v. Klamath Lake Railway Co.*, 101 P 213, 1009, 54 Or 13; *Herler v. Armour*, 18 Pa Dist 60, 35 Pa Co 413.



poration.<sup>24</sup> However, where a foreign corporation is actually doing business through a domestic corporation within the State, it is subject to be served with process by serving the same upon the agents of the domestic corporation.<sup>25</sup>

§ 113. **Service of Process on Nonresidents.**—There is often provided in statutes and in constitutions for substituted service of process on nonresident individuals, the most notable example of which has grown up in the last decade whereby provision is made for service of process to obtain a personal judgment against a nonresident when he is involved in an automobile accident within the State. Such provisions now generally embrace both individuals and corporations. It is generally true that the process of a court of one State, or a Federal court sitting within the State, in the absence of special and valid legislation providing therefor cannot go into another State and summon a party domiciled therein to respond to proceedings against him in the former jurisdiction. Notice sent outside of the State to a nonresident is unavailing to give the court jurisdiction in an action against him personally for a money recovery. But, it is now generally provided that by the operation of an automobile within the State, a nonresident thereby appoints the Secretary of State or some other officer within the State as his agent on whom process may be served for him in actions involving automobile accidents within the State.<sup>26</sup> The service of process in such cases is made upon the official designated in the statute in the same manner as upon any other agent to be served and it is sufficient to serve it upon an acting officer filling such office.<sup>27</sup> Where the office of the designated officer to be served is out of the county in which the action is brought, this is one instance when venue is immaterial.<sup>28</sup> It seems that the mailing of the summons to the State officer by the sheriff, constable, or other

24. *O'Brien v. Shaw's Flat & Tuolumne Canal Co.*, 10 Cal 313; *Rand v. Proprietors of Upper Locks and Canals on Connecticut River*, 3 Day (Conn) 411; *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 292 Fed 169, 45 S Ct 250, 267 US 333, 69 L ed 334.

25. *Spokane Merchants Association v. Clere Clothing Co.*, 147 P 414, 84 Wash 616; *Anderson on Limitations of the Corporate Entity*, Sec. 521.

26. *Hess v. Pawloski*, 47 S Ct 632, 274 US 352, 71 L ed 1091; *Wuchter v.*

*Pizzutti*, 48 S Ct 259, 276 US 13, 72 L ed 446, 57 ALR 1230 and note; *Anderson on Automobile Accident Suit*, Sec. 38 et seq.

27. *Rubin v. Goldberg*, 154 Atl 535, 6 NJM 460; *Stoiber v. Marinacci*, 254 NYS 620, 142 Misc Rep 345.

28. *Bessan v. Public Service Co-ordinated Transport*, 237 NYS 680, 135 Misc 368; *Salzman v. Attrean*, 254 NYS 288, 142 Misc Rep 245; *Berkowitz v. Dunphy*, 253 NYS 327, 141 Misc 501.

officer may be sufficient when his office is without the territorial jurisdiction of such officer.<sup>29</sup> It would seem in any case, that, if the State officer accepts service of the summons that is sufficient. Where the State officer has more than one office in the State, the service of process may be made at either or any of said offices.<sup>30</sup> The fact that the plaintiff is also a nonresident or the automobile, that is claimed to be at fault, was engaged in interstate commerce, is immaterial in the service of summons in such cases.<sup>31</sup>

§ 114. **When Process May Be Served.**—At common law process can be served on any day, or any time of the day or night. Sundays and holidays were no exception.<sup>32</sup> It seems immaterial whether the process in question issued out of a court of law or equity.<sup>33</sup> However, there are a few cases and some dicta to the contrary, either holding the service "not warranted," or as "voidable" or "irregular."<sup>34</sup> In England a statute was enacted in the 29th year of the reign of Charles II limiting arrests on Sunday to criminal offenses only, and confined them to treason, felony and breach of the peace.<sup>35</sup> It has been held in a number of jurisdictions that this statute is part of the common law and that in the absence of statutory changes or constitutional provisions to the contrary, such service cannot be made on Sunday or a legal holiday.<sup>36</sup> It should be noted, however, with respect to the English statute mentioned above, that under the statutes in the American jurisdictions making the common law of England, so far as it is not repugnant to nor inconsistent with the Constitution of the United States or the constitution or laws of the State, the rule of decision of all courts of the State, is construed to adopt the common law as of the date of the enactment of such statute.<sup>37</sup> So, in all of the States adopting

29. *Bessan v. Public Service Co-ordinated Transport*, 237 NYS 680, 135 Misc 368.

30. *Salzman v. Attrean*, 254 NYS 288, 142 Misc 245.

31. *Cohen v. Plutschak*, 40 Fed(2d) 727.

32. *Heisen v. Smith*, 71 P 180, 138 Cal 216, 94 Am St Rep 39 and note; *State v. Gilbert*, 69 P 62, 8 Ida 346; *Keith v. Tuttle*, 28 Me 326; *Julius Stone's Case*, 129 Mass 156; *Hauswirth v. Sullivan*, 9 P 798, 6 Mont 203; *Glenn v. Eddy*, 17 Atl 145, 51 NJL 225, 14 Am St Rep 684; *State v. Thackam*, 1 Bay (SC) 368; *Mackally Case*, 9 Coke 65 B.

33. *In re Cunningham*, 40 F(2d) 270.

34. *Morris v. Shew*, 20 Kan 661; *Burke v. Interstate Savings and Loan Association*, 64 P 870, 25 Mont 315, 87 Am St Rep 416 and note; *Scott Shoe Machinery Co. v. Dancel*, 71 NYS 263, 63 App Div 172; *Harrison v. Wallis*, 90 NYS 44, 44 Misc 492; note 61 Am St Rep 483.

35. *Keith v. Tuttle*, supra.

36. *Valentine v. Roberts*, 1 Alaska 536; *Millner v. Millner (Alta)* (1927) 4 Dom Law Rep 644, 3 West Weekly 241; *Bryant v. State*, 21 NW 406, 16 Neb 651; *Lamb v. Lamb (Alta)* (1925) 4 Dom Law Rep 526.

37. *Martin v. Superior Court*, 168 P

the common law in the language of the California Code, the above mentioned English statute would be in force and it would follow, except in the cases mentioned, process, either criminal or civil, cannot be served on Sunday in these jurisdictions and this perhaps would also extend to holidays.<sup>38</sup>

§ 115. Nonresidents May Be Served When Within the Jurisdiction.—If a resident of another State is within the territorial jurisdiction of the court, and within the county or other district in which the officer may perform the functions of his office, he may be served with process issued out of any competent court. This has the same effect as though he were a resident.<sup>39</sup> Of course, if such nonresident is within the State, under circumstances that he is entitled to claim exemption from service of process, then such service may be quashed but as we have heretofore observed that is no concern of the officer, but is a matter for judicial determination.<sup>40</sup>

135, 176 Cal 289, LRA1918B 313; Cal Political Code, Sec. 4468.

38. Keith v. Tuttle, *supra*; Bryant v. State, 21 NW 406, 16 Neb 651; Butler v. Kelsey, 15 Johns. (NY) 177; Van Vechten v. Paddock, 12 Johns. (NY) 178, 7 Am Dec 303; Bland v. Whitfield, 1 Jones L 122, 46 NC 122.

39. Fitzhugh v. Reid, 252 F 234; Jefferson County Savings Bank v. Carland, 71 So 126, 195 Ala 279; Iams v. Tedlock, 204 P 537, 110 Kan 510; Alley v. Caspari, 14 Atl 12, 80 Me 234, 6 Am St Rep 178; Thompson v. Cowell, 20 NE 170, 148 Mass 552; In re Gahn's Will, 180 NYS 202, 110 Misc 96.

40. See Sec. 108, *supra*.

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## CHAPTER IV

### ARREST

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§ 116. Arrest for Debt in General.—In the main, arrest or imprisonment for debt has been abolished throughout the United States, but such procedure formerly prevailed at common law and in other systems of jurisprudence. However, there are a few cases in which arrest for debt or in a civil action is still permissible in most jurisdictions. The process under which the arrest was made in these cases at common law was a "capias ad respondendum."<sup>1</sup>

§ 117. Privilege from Arrest for Debt.—It becomes necessary at this time to notice briefly privileges from arrest. The bankruptcy law enacts that the bankrupt shall be exempt from arrest upon civil process except when issued out of a court of bankruptcy for contempt or for disobedience of its lawful orders, and when issued from a State court having jurisdiction and served within such State upon a debt or claim from which his discharge in bankruptcy would not release him, but in any case it seems that he is not subject to civil arrest while in attendance upon a bankruptcy court.<sup>2</sup> Likewise any accredited foreign diplomat or foreign minister is not subject to arrest on any process issuing from any of the courts in this country. Neither are his goods and chattels subject to be

seized.<sup>3</sup> This statute is sufficiently broad to embrace servants in the employ of such foreign diplomats or ministers and of course includes consuls and charge d'affaires.<sup>4</sup> An American citizen who has charge of a legation ad interim as custodian through whom it was arranged by courtesy that necessary communications might be sent, is not such a minister of a foreign power as to entitle him to claim the privilege thereof.<sup>5</sup> The constitution of the United States provides that congressmen and senators shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses and in going to and returning from the same. However, this exemption only applies to civil process.<sup>6</sup> The exemption extends to and protects an officer of the United States while he is engaged in the performance of his official duties.<sup>7</sup>

The exemption of the militia from arrest on civil process is provided for by statute in a number of jurisdictions.<sup>8</sup> An attorney while in actual attendance at court is clothed with the privilege from arrest upon civil or mesne process.<sup>9</sup> But he is not shrouded in such privilege while at home or while in attendance upon a proceeding out of court, as before a master in chancery or an examiner or judge.<sup>10</sup> Neither does the privilege shield an attorney from arrest who has ceased to practice for some time past and has engaged in another occupation or business.<sup>11</sup> But, if the attorney continues to act in the capacity of either attorney or counselor, he may claim the privilege.<sup>12</sup> However, an officer of the court as an attorney is not entitled to assert the privilege when he is sued jointly with others.<sup>13</sup> Where the privilege exists which protects the attorney against arrest on mesne or civil process while in attendance at court and likewise in going to and returning there-

3. 22 USCA Sec. 252 and note.

4. U. S. v. Jeffers, Fed Cas 15,471, 4 Cranch CC 704; U. S. v. LaFontaine, 4 Cranch 173, 26 Fed Case 15,550; U. S. v. Ravara, Fed Cas 16,122, 2 Dall 297, 1 L ed 388; Dupont v. Pichou, 4 Dall (Pa) 321, 1 L ed 851.

5. Hollander v. Baiz, 41 F 732.

6. Williamson v. United States, 28 S Ct 163, 207 US 425, 52 L ed 278; U. S. v. Wise, 28 Fed Cas 16,740a, Hayw & H 82; Ex parte Emmett, 7 P 2, 1096, 120 Cal App 349; Article 1, Sec. 6, of the United States Constitution.

7. Ex parte Murray, 35 Fed 406. 114

8. Andrews v. Gardiner, 173 NYS 1, 185 App Div 477, affirming 166 NYS 933, 100 Misc 622; People v. Campbell, 40 NY 133; Murphy v. McCombs, 33 NC 274; Land Title and Trust Co. v. Rambo, 34 Atl 207, 174 Pa 566; Gregg v. Summers, 12 SCL (1 McCord) 461.

9. Ogden v. Hughes, 5 NJL 718.

10. Cole v. McClellan, 4 Hill (NY) 59; Corey v. Russell, 4 Wend (NY) 204; Gay v. Rogers, 3 Cow. (NY) 368.

11. Brooks v. Patterson, 2 Johns. Cases (NY) 102, Colem. Cas 133.

12. Ogden v. Hughes, 5 NJL 718.

13. Gay v. Rogers, 3 Cow. (NY) 368. [1 Anderson on Sheriffs]

1. Murfree on Sheriffs, Sec. 140; 239, 220 Mich 504.

Whitehead v. Collingwood, 100 NW 2. 11 USCA Sec. 27 and annotations.

[1 Anderson on Sheriffs]—8

from,<sup>14</sup> a like exemption extends to and protects judges, jurors and parties to civil causes on trial in courts.<sup>15</sup> There is some doubt as to whether or not the exemption extending to judges applies to process issued out of a federal court against a judge of a State court and vice versa.<sup>16</sup> In some jurisdictions the privilege is held to extend to the justice of the peace.<sup>17</sup> It should be remembered however that as a general rule, in cases of privilege or exemption from arrest, it does not apply to mere service of civil process where the defendant is not detained or taken into custody. The reason for this rule is that where the statute or privilege provides that certain persons shall not be arrested on mesne process or taken or charged in execution for any debt, the term arrest connotes physical restraint and does not involve mere service of summons in a civil action.<sup>18</sup> The tendency seems to be that the privilege from service of civil process is restricted to cases where nonresidents of the State or county are in attendance at court as a party or witness not involving personal detention.<sup>19</sup> Since the sheriff or constable is not required to pass upon the matter of the privilege of the party from arrest,<sup>20</sup> or service of process,<sup>21</sup> an extended discussion with respect thereto will not be indulged.

§ 118. What Constitutes an Arrest.—The term arrest connotes physical restraint of the person and the interference with the free locomotion of the party subjected thereto.<sup>22</sup> Differently stated, an

14 *Bennett v. Ahrens*, 57 F(2d) (C CA Ill) 948.

15 *Com. v. Ronald*, 4 Call. 97, 8 Va 97; *In re Livingston*, 8 Johns. (NY) 351.

16 *Lyell v. Goodwin*, 15 Fed Cas 8616, 4 McLean 29; *Gratz v. Wilson*, 6 NJL 419.

17 *Gross v. State*, 117 NE 582, 186 Ind 581, 1 ALR 1151 and note; *Brower v. Tatro*, 73 NW 421, 115 Mich 368; *Herman v. Arndt*, 182 Atl 830, 116 NJL 150; *Wemme v. Hurlburt*, 289 P 372, 133 Or 466.

18 *Carl v. Ferrell*, 109 F(2d) 351, and annotation.

19 *Long v. Ansell*, 63 App DC 68, 69 F(2d) 386, 94 ALR 1466, cert. gr. 292 US 619, 54 S Ct 774, 78 L ed 1470, aff. 55 S Ct 21, 293 US 76, 79 L ed 208; *Lamb v. Schmitt*, 52 S Ct 317, 285 US 222, 76 L ed 720; *Merrick v. Giddings*, 1 MacArthur & M 55, 11 DC 55; *Berlet v. Weary*, 93 NW 238, 67

Neb 75, 60 LRA 609, 108 Am St Rep 616, 2 Ann Cas 610 and note.

20 *Armstrong v. Ayers*, 19 Conn 540; *Kiser v. Downey*, 1 Del 530; *Murray v. Wilcox*, 97 NW 1087, 122 Iowa 188, 64 LRA 534, 101 Am St Rep 263.

It is necessary that a party claim his exemption by appearing. It seems a claim to the sheriff or constable is unavailing. *Thornton v. American Writing Mach. Co.*, 9 SE 679, 83 Ga 288, 20 Am St Rep 320, note 25 LRA 734; *Smith v. Jones*, 76 Me 138, 40 Am Rep 598.

21 *Armstrong v. Ayres*, supra; *Kiser v. Downey*, supra; *Smith v. Jones*, supra; *Willard v. Sperry*, 1 Wend (NY) 32.

22 *Carl v. Ferrell*, 109 F(2d) 351; *Hart & Foster v. Flynn's Ex'r*, 8 Dana (Ky) 190; *Land Title and Trust Co. v. Rambo*, 34 Atl 207, 174 Pa 568; *Merrick v. Giddings*, 1 MacArthur & M 55, 11 DC 55.

arrest is the taking, seizing, or detaining of the person of another either by touching or by any act which indicates an intention to take him into custody and subject the person arrested to the actual control and will of the person making the arrest.<sup>23</sup> An arrest may consist in taking into custody, under real or assumed authority, another for the purpose of holding or detaining him on a criminal charge or civil demand.<sup>24</sup> According to Blackstone the most unequivocal arrest is made by corporal seizing or touching the defendant's body.<sup>25</sup> The literal tapping on the shoulder with an indication to detain a person so tapped constitutes an arrest and it is immaterial how slight the touch may be.<sup>26</sup> It has been summarized that to constitute an arrest, four requisites are involved, viz., a purpose to take the person into the custody of the law, under a real or pretended authority, and an actual or constructive seizure or detention of his person, so understood by the person arrested.<sup>27</sup> Where a policeman stopped the plaintiff on the street when the defendant employee had called out "stop that woman" the plaintiff was, under these circumstances, arrested by the officer.<sup>28</sup> On the other hand, where a patrolman asked the party if he would go to an office, and such party, it was asserted had been arrested, but no command or restraining word was spoken and the door of the office in which they were was left open, under these circumstances no arrest was made.<sup>29</sup> There are numerous illustrations to be encountered in the reported decision with respect to what constitutes an arrest, but it may be stated tersely that, if any restraint of the liberty is imposed upon the person under claimed legal authority, there is an arrest.<sup>30</sup> It should not be supposed, however, that in order to constitute an arrest it is necessary that

23 *State v. District Court of 8th Judicial District in and for Cascade County*, 225 P 1000, 70 Mont 378; *McAdams v. State*, 235 P 241, 30 Okla Cr 207.

24 *Davis & Allcott Co. v. Boozer*, 110 So 28, 216 Ala 116, 49 ALR 1307; *Central of Georgia Railway Company v. Carlock*, 72 So 261, 196 Ala 650.

25 3 Blackstone Com. 288; *Thompson v. Boston Pub. Co.* 189 NE 210, 285 Mass 344.

26 *Genner v. Sparkee*, 1 Salk 79, 6 Mod 173, 87 Eng Reprint 74, wherein it was said:

"Here was no arrest, the bailiff having not laid hands on the defendant; for his shewing the warrant, and 116

pronouncing the word 'arrest,' without touching him, was no more an arrest than it would be one if a bailiff sees a man look out a window, a pair of stairs, or two high, and tells him he has a writ for him and says that he arrests him."

27 *State v. District Court of 8th Judicial District in and for Cascade County*, 225 P 1000, 70 Mont 378.

28 *Harris v. Terminal Railway Association St. Louis*, 218 SW 686, 203 Mo App 324.

29 *Rezeau v. State*, 254 SW 574, 95 Tex Cr 323.

30 *Peo. v. Esposito*, 194 NYS 326, 118 Misc 667.

the arrested person should be handcuffed or taken forcibly into custody, but it is sufficient, if under asserted legal authority, an officer or other person commands the party arrested to go with him and he submits thereto but not voluntarily.<sup>31</sup> As to what constitutes arrest is frequently defined by statute.

§ 119. Words as Constituting an Arrest.—It has been held that mere words are not sufficient in law as to constitute an arrest.<sup>32</sup> However, this statement is probably subject to qualifications and perhaps exceptions. To consummate an arrest, it is not necessary that the prisoner shall be damaged or other manual caption shall be made. If the prisoner submits, that seems to be sufficient as an arrest, and an arrest may be made without any physical contact of the person arrested.<sup>33</sup> It is only requisite that control over the locomotion of the person to be arrested shall be exercised. If that is accomplished, it is immaterial how it is done.<sup>34</sup> An arrest without physical contact is valid, if the defendant acquiesces and accompanies, in good faith, the officer or other person arresting him.<sup>35</sup> An arrest may be consummated without the laying on of hands, but the restraint imposed upon the person arrested must be unequivocally manifested in some way.<sup>36</sup> The physical act of making the arrest does not, of necessity, have to be done by an officer, but may be performed by another in his presence and at his direction.<sup>37</sup> Where the intent to make the arrest is clearly manifested and is

31. *Singleton v. Kansas City Baseball & Exhibition Co.*, 157 SW 964, 172 Mo App 299.

32. *Genner v. Sparkes*, 1 Salk 79, 6 Mod 173, 97 Eng Reprint 74; *People v. Yerman*, 246 NYS 665, 138 Misc 272. Where officer stated to defendant, who had violated a traffic ordinance in officer's presence, that defendant should appear in city court on following morning did not constitute arrest.

33. *People on Complaint of Nannery v. Clarke*, 12 NYS (2d) 8. Where detective is seeking to make an arrest, a request by such detective that an individual fully disclose his identity is fully justified and proper, though the person asked is not the one sought by the detective.

34. *U. S. v. Benner*, 1 Baldw 234, Fed Cas 14,568; *Field v. Ireland*, 21 Ala 240; *Courtroy v. Dozier*, 20 Ga 369; *Hobbs v. Illinois Central Railway Co.*, 165 NW 912, 182 Iowa 316; *Emery v.*

*Chesley*, 18 NH 198; *Huntington v. Blaisdell*, 2 NH 317; *Gold v. Bissell*, 1 Wend (NY) 210, 19 Am Dec 480; *Strouss v. Gooch*, 8 Me 126; *Thompson v. Boston Publishing Co.*, 189 NE 210, 285 Mass 344; *Jones v. Jones*, 35 NC 448; *Christ v. McDonald*, 52 P(2d) 655, 154 Or 694; *Huntington v. Shultz*, Harp SC 452, 18 Am Dec 660.

34. *People v. Mirabelle*, 276 Ill App 533; *Berry v. Bass*, 102 S 76, 157 La 81; *Wright v. Automobile Gasoline Co.*, 250 SW 308 (Mo); *Johnston v. Norfolk & W. R. Co.*, 97 SE 189, 82 W Va. 692, 6 ALR 1409.

35. *Gold v. Bissell*, supra.

36. *Lawson v. Buzines*, 3 Del 416; *Hill v. Taylor*, 15 NW 899, 50 Mich 549; *Clark v. West*, 126 SW(2d) (Tex Civ App) 569.

37. *Byrd v. Commonwealth*, 164 SE 400, 150 Va 897; *Blatch v. Archer*, Cowp. 63, 98 Eng Rep 969.

followed by a submission an arrest is complete.<sup>38</sup> Where the officer went with the defendant to his residence after having told the defendant that he, the officer, had a writ which called for the arrest of the defendant, and thereupon at the residence of the defendant bail was supplied, this constituted a legal arrest.<sup>39</sup> Lord Hardwicke held that, if a sheriff comes into a room and informs the defendant that he is arrested and locks the door, that is sufficient for the defendant in such case is in custody of the officer.<sup>40</sup> So, too, where a person impersonated an officer and without producing, or even having a warrant, and without any personal contact or laying on of hands, induced the person arrested to go with the purported officer together with a creditor of the person arrested, the arrested party laboring under the belief that he had been legally arrested, is sufficient to constitute, at least, a technical arrest, sufficient to sustain an action for damages.<sup>41</sup> However, if the person to be arrested is never within the actual custody of the officer, and does not submit, then mere words will not amount to an arrest. This is illustrated by a case wherein a sheriff, upon making known his wishes to the person to be arrested, was answered, "wait for me outside, and I will come to you," which the speaker did not do, but thereupon escaped through another exit. This did not constitute an arrest. Likewise, where the officer possessed a warrant authorizing him to make the arrest, but did not at any time touch the person of the defendant or subject him to the control of the officer, and made no use of the process in his possession, and uttered no words of arrest, although the defendant went with the officer to the magistrate, still it was held there was no arrest.<sup>42</sup> As to whether or not a mere notice to appear before a magistrate and compliance therewith constitutes an arrest, the authorities are in conflict. In accordance with one line of authority, such is sufficient to constitute a valid arrest;<sup>43</sup> while this position is disputed by other authorities.<sup>44</sup> As to what constitutes an arrest is declared

38. *Kentucky Bankers Association v. Cassady*, 94 SW(2d) 622, 264 Ky 351; *Rhodes v. Jordan*, 157 So (LaApp) 811.

39. *Reynolds v. Matthews*, 7 Dowl. p. c. 580.

40. *Williams v. Jones*, Cas Temp Hardw 301, 95 Eng Reprint 183.

41. *Wood v. Lane*, 6 C & P 774, 25 ECL 683.

42. *Arrowsmith v. LeMesurier*, 5 B

& P 211, 127 Eng Reprint 605, see also *Berry v. Adamson*, 6 Barn & Cr 528, 13 ECL 242, 108 Eng Reprint 546; *Robbins v. Hender*, 3 Dowl PC 543.

43. *Berry v. Bass*, 102 S 76, 157 La 81, overruling *Thomas v. Henderson*, 61 S 203, 125 La 292; *Rezeau v. State*, 254 SW 574, 85 Tex Cr 323.

44. *People v. Yerman*, 246 NYS 665, 138 Misc 272; *Searls v. Viets*, 2 Thomp & C (NY) 224.

in most jurisdictions by statute which should be consulted and followed.

§ 120. **Use of Force in Making an Arrest.**—Officers do not have absolute license to use any force they may choose in making an arrest for misdemeanor. There must, of course, be some discretion vested in an officer as to the force necessary to be used on such occasion, but officers are sometimes inflated with an exaggerated conception of their office and exercise their powers in an unreasonable, arbitrary and unjustifiable manner. Officers are not relieved from the ordinary dictates of humanity; while they are clothed with great power, they have no right to abuse the same. An officer who intentionally uses more force than is reasonably necessary in making an arrest is oppressively discharging the duties of his office.<sup>45</sup> The rule with respect to the force that an officer may use in making an arrest on civil process or for misdemeanor may be tersely stated; he can only use such force as is necessary to overcome resistance encountered in attempting to make the arrest and protect himself from bodily harm. That is, he can only use force when he meets force, and then he can only use such force as is commensurate with the necessity of overcoming resistance or protecting himself.<sup>46</sup> The standard by which the conduct of the officer is measured is the exercise of sound discretion.<sup>47</sup> Differently stated, the officer's conduct in the use of force may be measured by how an ordinarily prudent and intelligent person when confronted with the same situation would act.<sup>48</sup> An officer has no right to resort to dangerous means in order to effect an arrest, although it has been held that he may attempt to make the arrest and use force without commanding assistance from bystanders.<sup>49</sup> Still, the officer is not required within the measure of the limits above suggested, that is, acting as an ordinarily prudent man would act under the same circumstances, to determine at his peril the precise measure of force that may be resorted to and proceed to the boundary line and suddenly stop there, having a right at all times in making an arrest to be guided by reasonable appearances.<sup>50</sup>

45. *State v. National Surety Company*, 39 SW(2d) 1581, 162 Tenn 547; *People v. State of Colorado for use of Little v. Hutchinson*, CCA 9 F(2d) 275.

46. *Tarwater v. State*, 75 S 810, 16 Ala App 140; *Lentine v. McAvoy*, 136 Atl 76, 105 Conn 528; *Dupre v. State*, 113 SE 428, 153 Ga 798; *West v.*

*Nantz, Adm'r*, 101 SW(2d) 673, 207 Ky 113.

47. *People of State of Colorado for use of Little v. Hutchinson*, supra.

48. *Barrett v. U. S.*, 64 F(2d) 148, 62 App DC 25.

49. *Peo. of Colorado for use of Little v. Hutchinson*, supra; *Gillespie v. State*, 64 SW 947, 69 Ark 573.

50. *Union Indemnity Co. v. Webster*, 119

§ 121. **Reasonableness of Force Used as a Question of Law or Fact.**—It is generally held that the reasonableness of the force used by an officer in making an arrest is determinable as a question of fact. This is true because the conduct of the officer is measured by the actions of an ordinarily prudent man under the same circumstances.<sup>51</sup>

§ 122. **Right to Resist an Unlawful Arrest.**—An arrest which is unwarranted in law constitutes an invasion of the rights of the person attempted to be arrested and may be resisted in as full and ample a manner as any other unlawful attack, assault or invasion of the rights of person.<sup>52</sup> In other words, an attempt to make an unlawful arrest constitutes an illegal attack on a person and he may act in his own self defense, the existence of a warrant in the custody of the officer to the contrary, notwithstanding.<sup>53</sup>

§ 123. **Burden of Proof in Use of Force or Unlawful Arrest.**—The burden of proof with respect to the use of excessive force in making an arrest, or with regard to an unlawful arrest, is the same as obtains in other actions generally and the burden is on the person who asserts the affirmative.<sup>54</sup>

§ 124. **Resort to Force in Felony Arrest.**—What we have said heretofore with respect to the use of force, in making an arrest, has had to do with such arrest in misdemeanor cases. A different rule prevails with respect to the force that may be used where the arrest is being made for a felony. The officer in such cases has the right to overcome resistance to accomplish the arrest and to prevent an escape, even to the extent of taking the life of the felon and before resorting to force to this extent, it is not necessary that the life of the officer shall be endangered. But, on the other hand, there is no absolute right on the part of an officer to take the life of a felon and it only may be done as a last resort and when it is reasonably apparent that the felon cannot be otherwise taken. The taking of the life of even a felon is unjustifiable for the purpose of preventing his escape, if proper diligence and the exercise of due

118 S 794, 218 Ala 468; *People of the State of Colorado for the use of Little v. Hutchinson*, supra.

As to force that may be used in arresting for a felony, see Sec. 124, infra.

51. *Castle v. Lewis*, 254 Fed 917, 166 CCA 279; *Union Indemnity Company v. Webster*, 118 S 794, 218 Ala 120

468; *Love v. Bass*, 238 SW 94, 145 Tenn 522.

52. *Hinton v. Sims*, 158 S 141, 778, 171 Miss 741.

53. *Black v. State*, 225 SW 731, 98 Tex Crim 56.

54. *Henry v. Lowell*, 16 Barb (NY) 268.

caution could have accomplished the same result.<sup>55</sup> In order for the trucidation of a human being by an officer of the law, in attempting to make an arrest, to be justifiable there must be more than a mere appearance of reasonable necessity therefor, and the officer in these circumstances may not arbitrarily determine when he will or will not kill.<sup>56</sup>

§ 125. Use of Force in Arresting on Suspicion of Felony.—A distinction is made by the authorities with respect to the use of force in making an arrest for felonies between the cases wherein the person to be arrested is charged with a felony in a warrant, and the arrest of a person without a warrant on the ground that he is suspected of having committed a felony. When arresting under a warrant charging a felony, taking into consideration that due regard necessary for the safety of others, the arresting officer may use such force as is reasonably necessary to accomplish the arrest, even to wounding or taking the life of the person named in the warrant as a felon. Whereas, when attempting to arrest one under suspicion of having committed a felony, he is not warranted in killing the suspect to make effectual his efforts to arrest, regardless of the reasonableness of the hypothesis or the well grounded suspicion in his mind, unless a felony has been actually committed. It would seem to follow that where a felony has been committed, and the party attempted to be arrested had committed it, an officer or private person could use sufficient force to effect the arrest of the felon with or without a warrant.<sup>57</sup>

55. *Union Indemnity Company v. Webster*, 118 S 794, 218 Ala 468. See Sec. 120, supra; *Johnson v. Chesapeake & O. R. Co.*, 83 SW(2d) 521, 259 Ky 789; *Young v. Amis*, 295 SW 431, 220 Ky 484; *Holloway v. Moser*, 136 SE 375, 193 NC 185, 50 ALR 262.

In the last cited case in holding an officer liable in damages for shooting to death a convicted misdemeanant, the court said, "Let it be observed at the outset that the plaintiff's intestate was not a felon, nor was he offering forcible resistance to the guards or undertaking to escape by overpowering them. He was a misdemeanant attempting to escape by flight, without endangering the life or limb of those who had him in lawful custody at the time." *Com. v. Micuso*, 117 Atl 211, 273 Pa 474; *Thompson v.*

*Norfolk & W. R. Co.*, 182 SE 880, 116 W Va 705; *Love v. Bass*, 238 SW 94, 145 Tenn 522.

56. *Mylett's Adm'r v. Burnley*, 173 SW 759, 163 Ky 277; *Union Indemnity Co. v. Webster*, 118 So 794, 218 Ala 468.

57. *Dixon v. State*, 132 So 684, 101 Fla. 840; *Johnson v. Chesapeake & Ohio Railway Co.*, 83 SW(2d) 521, 259 Ky 789; *Young v. Amis*, 295 SW 431, 220 Ky 484; *Askay v. Maloney*, 166 P 29, 85 Or 333; *Petric v. Cartwright*, 70 SW 297, 114 Ky 103, 24 Ky L 903; 102 Am St Rep 274, 59 LRA 720. In the course of the opinion in the last cited case, the court said, "We have been unable to find any common law authority justifying an officer in killing a person sought to be arrested, who fled from him, where the officer

§ 126. No Authority to Kill or to Prevent a Misdemeanant from Escaping.—An officer who has taken into custody a misdemeanant who attempts to flee and make his escape is not warranted thereby in killing the prisoner, and of course an officer is not warranted in wounding or killing one charged with a misdemeanor in order to arrest him.<sup>58</sup>

§ 127. Question for the Jury as to Necessity of Killing in Making an Arrest.—Whether or not an officer is justified in killing the person he is attempting to arrest, or to prevent his escape, is a question of fact to be resolved by a jury. This is of necessity the case, because the officer's conduct is measured by what a reasonably prudent man would have done under the same circumstances. And where this is the issue to be solved the controversy must be sent to the jury for its determination.<sup>59</sup>

§ 128. Breaking Doors to Make Arrest.—The doctrine that every man's house is his castle is generally held to be inapplicable

acted upon suspicion, and no felony had in fact been committed. The common law rule allowing an officer to kill a felon in order to arrest him rests upon the idea that felons ought not to be at large, and that the life of a felon has been forfeited; for felonies at common law were punishable with death. But where no felony has been committed the reason of the rule does not apply, and it seems to us that the sacredness of human life and the danger of abuse do not permit an extension of the common law rule to cases of suspected felonies. To do so would be to bring many cases of misdemeanor within the rule, for in a large per cent of these cases, the officer could show that he had reason to suspect the commission of a felony, and it would be left entirely with him to say whether he was proceeding against the defendant for a misdemeanor or felony. The notion that a peace officer may in all cases shoot one who flees from him when about to be arrested is unfounded. Officers have no such power, except in cases of felony, and there as a last resort, after all other means have failed. It is never allowed where the offense is only a misdemeanor; and where there is only a suspicion of felony the officer is

not warranted in treating the fugitive as a felon. If he does this, he does so at his peril, and is liable if it turns out that he is mistaken. He may lawfully arrest upon a suspicion of felony, but he is only warranted in using such force in making the arrest as is allowable in other cases not felonies unless the offense was in fact a felony. In all cases, whether civil or criminal, where the persons having authority to arrest and imprison, and using proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and, if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable." *Life & Casualty Insurance Co. v. Hargraves*, 88 SW(2d) 451, 169 Tenn 388; *1 Russell on Crimes*, 665; *Lindle v. Com.* 64 SW 986, 111 Ky 866, 23 Ky L 1307; *Thomas v. Kindead*, 18 SW 854, 55 Ark 502, 29 Am St Rep 70; *Union Indemnity Co. v. Webster*, 118 So 794, 218 Ala 468.

58. *Mingo v. Levy*, 105 NYr 276; see Sec. 125; note 57 supra; *Holloway v. Moser*, 136 SE 375, 193 NC 185, 50 ALR 262.

59. *Mylett's Adm'r v. Burnley*, 173 SW 759, 163 Ky 277; *State v. Blond*, 2 SE 460, 97 NC 438.



in so far as making an arrest is concerned, under process issuing in a criminal case against the party arrested.<sup>60</sup> An officer armed with a warrant of arrest in a criminal case may break either inner or outer doors, if he finds them obstructing his duty in the execution of such process. However, before he is authorized to resort to the extreme measure of breaking doors, he ought to demand admission, and then, if it is refused, his right to break the doors ensues. In making the demand he ought to impart sufficient notice to the occupants of the house; his official capacity and the purpose for which entrance is demanded.<sup>61</sup> The underlying theory of the right to break doors in making an arrest on a warrant is that a man can have no castle as against the King, and in this country as against the State in the execution of its criminal process.<sup>62</sup> The right to break inner or outer doors on the part of the officer armed with a warrant for arrest in a criminal case extends to misdemeanors as well as felonies and especially when the misdemeanor is a breach of the peace and also to process issued on a charge of contempt of court.<sup>63</sup> The right to break and enter to execute a criminal warrant of arrest is not confined to the person who inhabits the house in question, but may likewise be done where the party named in the warrant takes refuge in such house.<sup>64</sup> However, it seems that the authority extended to sheriffs, constables, and other officers armed with criminal process directing an arrest to be made to

60. *State v. Rhodes*, 292 SW 78, 316 Mo 571.

61. *Reed v. Case*, 4 Conn 166, 10 Am Dec 110; *State v. Rhodes*, supra; *State v. Oliver*, 7 Del 585; *Hubertson v. Cole*, 1 Hawaii 72; *McLennon v. Richardson*, 15 Gray (Mass) 74, 77 Am Dec 353; *Hawkins v. Com.*, 14 B Mon 395, 61 Am Dec 147 and note; *Semayne's Case*, 5 Coke 91a, 77 Eng Rep 194, 11 Eng Rul Cas 629.

In the last cited case, it was said, "But before he breaks it, he ought to signify the cause of his coming, and make a request to open doors; and that appears well by the statute of Westm 1, c. (17 which is but an affirmation of the common law) as hereafter appears, for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage

and inconvenience might ensue to the party, when no default is in him; for perhaps he didn't know of the process, of which, if he had notice, it is to be presumed that he would obey it."

62. *Com. v. Reynolds*, 120 Mass 190, 21 Am Rep 510; *State v. Mooring*, 20 SE 182, 115 NC 709; *Semayne's Case*, supra.

63. *State v. Rowley*, 187 NW 7, 197 Iowa 977, 195 NW 881; *State v. Rhodes*, 292 SW 78, 316 Mo 571; *U. S. v. Fall*, 25 Fed Cas 15,079, 1 Cranch CC 487; *State v. Oliver*, supra; *State v. Mooring*, supra; 1 *Russell on Crimes*, (9th American Ed.) 840; Note 11 Eng Rul Cas 636.

64. *McCaslin v. McCord*, 94 SW 79, 116 Tenn 690, 8 Ann Cas 245; *Hawkins v. Com.*, 14 B Mon (Ky) 395, 61 Am Dec 147 and note; *Com. v. Reynolds*, supra; *State v. Mooring*, supra.

break doors in private houses for that purpose, may not be claimed by military officers seeking to arrest deserters.<sup>65</sup>

§ 129. Right to Break Doors in Making an Arrest without a Warrant.—A general rule that may be amalgamated from the adjudicated cases dealing with the question, is that an officer or private person authorized to make an arrest without a warrant, may, after due demand, break open doors of residences and other buildings for that purpose. The authority, however, to go to this extreme to make an arrest without a warrant is confined to felonies or for the purpose of preventing the commission of a felony, or for breach of the peace or to quell a disturbance, and the right to break open doors to suppress a disturbance or arrest for a breach of the peace does not extend to a private citizen.<sup>66</sup> When, however, the arrest is attempted to be made for a felony, the commission of which there only exists a suspicion, it seems that an officer may resort to the extreme of breaking doors for the purpose of encompassing the arrest, but this authority does not extend to a private person.<sup>67</sup> A suspicion of the commission of a misdemeanor by a person in a house will not warrant either an officer or an individual in breaking doors to make an arrest.<sup>68</sup> It seems, however, that where a breach of the peace is being committed, an officer, but not a private person, may go to the extreme of breaking doors to make an arrest without a warrant.<sup>69</sup> An officer is not justified either in making an entry into any residence or other building for the mere purpose of placing himself in a position where he may

65. *Clay v. United States*, Dev Ct Cl 25.

66. *United States v. Chin On*, 297 F 531; *U. S. v. Dean*, 50 F(2d) 905; *Argetakis v. State*, 212 P 372, 24 Ariz 599; *State v. Duffy*, 295 P 953, 135 Or 290; *State v. Yarde*, 254 P 798, 121 Or 207. See note 79, infra, this Sec. *Smith v. Tate*, 227 SW 1020, 143 Tenn 208; *State v. Kittle*, 241 P 962, 137 Wash 173; 1 *Hale P C* 568; *Handcock v. Baker*, 2 B & P 260; *Rockwell v. Murray*, 6 UCQB 412; Note 8 AC 250.

67. *U. S. v. Dean*, supra; *Shanley v. Wells*, 71 Ill 78; *Com. v. Phelps*, 95 NE 868, 209 Mass 396, Ann Cas 1912B 506 and note; *Love v. State*, 107 S 667, 142 Miss 602; *State v. Duffy*, supra; *McCaslin v. McCord*, 94 SW 79, 116 Tenn 690, 8 Ann Cas 245 and note; 124

*Semayne's Case*, 5 Coke, 91a, 77 Eng Rep 194, 11 Eng Rul Cas 629.

68. *Hart v. State*, 145 NE 492, 105 Ind 384.

69. *Adair v. Williams*, 210 P 853, 24 Ariz 422, 26 ALR 278 and note, to the effect an officer cannot arrest without a warrant for a misdemeanor not committed in his presence and therefore may not lawfully enter a private house or inclosure for that purpose. *State v. Lafferty*, 5 Del (6 Harr) 491; *McLennon v. Richardson*, 15 Gray (Mass) 74, 77 Am Dec 353, holding that officer's authority to break open doors and arrest without a warrant is confined to cases where treason or other felony has been committed or there is an affray or breach of the peace in his presence. Note 8 AC 250.

observe the commission of a misdemeanor to the end that he may make an arrest.<sup>70</sup> In other words, the law does not tolerate the idea that anyone may be arrested by a police or other officer for an alleged criminal offense as a misdemeanor except upon a warrant duly obtained from a magistrate, unless the offense is committed in the view of the officer. If a police officer knows facts which show that a criminal offense of the grade of misdemeanor has been committed, but which he did not see, then there is only one course for him to pursue and that is to go before a magistrate, make a written complaint under oath of such facts, and obtain a warrant and then make the arrest upon such warrant.<sup>71</sup> It is hardly necessary to state that where an offense is being committed in a place of business, such as a store, and an officer enters through an open door, he has a right to make an arrest for a misdemeanor being committed at such time and place in his presence.<sup>72</sup> It seems, however, that an officer may, as hereinbefore suggested, break into a dwelling house to suppress the commission of a misdemeanor therein, or prevent the continuance of a breach of peace by arresting the offenders, even at night, but this authority does not extend to a private person.<sup>73</sup> In order to justify the breaking of doors of a dwelling for the purpose of making an arrest, authorized by law, without a warrant, it is necessary that the parties, seeking to make said arrest, whether he be an officer of the law or a private citizen to demand admission for that purpose and it is only when such demand is refused that resort may be had to the extreme measure of breaking down doors.<sup>74</sup>

The maxim that a man's house is his castle only extends to his dwelling house; and therefore, a barn or outhouse, not connected

70. *Adair v. Williams*, supra. See Secs. 170 and 174, infra.

71. *People v. Glennon*, 74 NYS 794, 37 Misc 1, 10 NY Ann Cas 365, 16 NY Cr R 297.

72. *U. S. v. Dillon*, 279 F 639. Hotel bar held to be a place of business. *Le Kwong Nom v. U. S.* 20 F(2d) 470. Smell of opium smoke warranted officer's entering laundry and to make an arrest without a warrant, although upstairs part of building was used for sleeping quarters. *U. S. v. Ludwig*, 42 F(2d) 742; *Steele v. U. S.* (No. 1), 45 S Ct 414, 267 US 499, 69 L ed 157.

73. *Adair v. Williams*, supra; *State v. Stouderman*, 6 La Ann 236; *People v. Woodward*, 190 NW 721, 220 Mich 511; *Rex v. Smith*, 6 C & P 136, 25 ECL 360; *Rockwell v. Murray*, 6 UC QB 412. See note 8 AC 250.

74. *Reed v. Case*, 4 Conn 166, 10 Am Dec 110. This case seems to extend right of arrest and breaking and entering buildings to surety on bail bond in a proper case. The bail rights in the premises seem to be co-extensive with the rights of an officer. *Hubertson v. Cole*, 1 Hawaii 72; *McLennan v. Richardson*, supra; *Semayne's Case*, 5 Coke, 91a, 77 Eug Rep 104, 11 Eug Rul Cas 629.

with his dwelling house, are not within the protection afforded by law to the dwelling house.<sup>74a</sup>

§ 130. **Authority of an Officer to Stop a Train or Bus to Make an Arrest.**—It seems to be reasonably well settled that an officer of the law armed with a warrant has authority to stop a train, bus, street car, or stagecoach, in order to make an arrest whether the person to be arrested is an employee thereon, passenger, or another, and when an officer stops a train or a vehicle to make an arrest, he supersedes the authority of the conductor or other employees in charge thereof, and if the arrest is legal, then the railroad<sup>75</sup> or transportation company cannot be held liable at the suit of the party arrested. If the officer making the arrest has authority so to do, were the person to be arrested not on the train, with or without warrant, then the arrest may be made upon the train or vehicle and the railroad or other employees are powerless to prevent such an arrest. In order to accomplish the arrest, the officer may force his way into a sleeping compartment so to do.<sup>76</sup>

§ 131. **When an Arrest May Be Made.**—In the absence of statute, the general rule is that an arrest made on Sunday or other holiday, or at night, except in cases of pressing necessity on civil process, or a criminal warrant charging a misdemeanor, is regarded as oppressive and without justification. The reason underlying this principle of law is due to the difficulty in making bail at such times.<sup>77</sup> So an arrest made on Sunday, legal holiday, or at night, upon either civil process or a criminal warrant for a misdemeanor which said warrant does not involve a breach of the peace, subjects the officer to liability as for false imprisonment.<sup>78</sup> Statutes are found in most jurisdictions in our time, regulating the times, as well as the manner of making an arrest and these statutes generally enact that an arrest cannot be made on Sunday, a legal holiday or at night, except for treason, felony, or a breach of the peace.<sup>79</sup> In some States, the term, "breach of the peace" is held

74a. Note 11 Eng Rul Cas 637.

75. *Brunswick & Western Railroad Company v. Ponder*, 43 SE 430, 117 Ga 63, 97 Am St Rep 152, 60 LRA 713, 13 Am Neg Cas 254; *Weissengoff v. Davis*, 260 F 16, 7 ALR 307, 43 S Ct 54, 250 US 674, 63 L ed 1201; *St. Johnsbury etc., Railway Company v. Hunt*, 15 Atl 186, 60 Vt 588, 6 Am St Rep 138, 1 LRA 189.

76. *Burton v. New York Central etc.*, 126

R. R. Co., 132 NYS 625, 147 App Div 557, 26 NY Cr 544, 104 NE 1127, 210 NY 567. See also, *Newman v. N. Y. Lake Erie & Western R. R. Co.*, 7 NYS 560, 54 Hun 335.

77. *Bryan v. Comstock*, 220 SW 476, 143 Ark 384, 9 ALR 1346 and note; *Restatement Torts*, Sec. 130.

78. *Restatement Torts*, Sec. 130.

79. Note 9 ALR 1352.

to include all indictable misdemeanors<sup>80</sup> but this it must be confessed is doing serious violence to a simple expression, easily and well understood. Even in those jurisdictions, however, the authority to make an arrest on Sunday, other holiday, or at night does not extend to, or include an infraction of a municipal ordinance.<sup>81</sup>

It should be borne in mind, however, that an officer does not have authority to arrest at any time of day or night for a misdemeanor not committed in his presence without a warrant.<sup>82</sup> In England, by statutory enactment, arrests which may be lawfully made on Sunday are limited to treason, felony, and breach of the peace.<sup>83</sup> However, it seems that sureties on a bail bond may arrest their prisoner on Sunday and that a man may be taken in arrest on Sunday on an attachment for a rescue but if an escape is voluntary, then the defendant cannot be re-arrested on Sunday nor can an arrest be made on Sunday for a penalty even though the same act would sustain a criminal proceeding, since the action for a penalty is civil in character.<sup>84</sup>

§ 132. Effect of Illegal Arrest.—Except the right of civil action for false imprisonment or the maintenance of a writ of habeas corpus to remove illegal restraint from one's liberty, and except as hereinafter noted a party arrested unlawfully is for all practical purposes without remedy, according to the weight of authority and majority holdings.<sup>85</sup> However, if the arrest is made in a civil case and is illegally made, it seems that a definite question is presented and that the party arrested may assert his right to, and obtain a discharge.<sup>86</sup> It has been held, however, that the objection that the defendant in a misdemeanor case was arrested without a warrant for an offense not committed in the presence of the officer making the arrest, is available as a plea to the jurisdiction of the court unless waived.<sup>87</sup> A failure, however, to object on arraign-

80. Note 9 ALR 1352.

81. Note 9 ALR 1352.

82. See Sec. 166 infra.

83. Keith v. Tuttle, 28 Me 326; Murfree on Sheriffs, New Edition, Sec. 124; 29 Charles II, Chap. 7, Sec. 6.

84. Murfree on Sheriffs, Sec. 150.

85. Ex parte Johnson, 17 S Ct 735, 167 US 120, 42 L ed 103; Ker v. Illinois, 7 S Ct 225, 119 US 430, 30 L ed 421; Coleman v. State, 62 SE 497, 4 Ga App 786; State v. Garrett, 45 P 93, 57 Kan 132; People v. Iverson, 61

NYS 220, 40 App Div 301, 14 NY Crim 155; Peo. v. Harmer, 135 NYS 520, 75 Misc 399; Peo. v. Jeratino, 116 NYS 1121, 62 Misc 387, 23 NY Cr 272; In re Fitton, 35 Atl 319, 68 Vt 297; Hollibaugh v. Hehn, 79 P 1044, 13 Wyo 209.

86. Murfree on Sheriffs, New Edition, 150; Benninghoff v. Oswell, 37 How Pr (NY) 235.

87. Peo. v. Burns, 44 NYS 1106, 10 Misc 680, 12 NY Cr 247; Peo. v. Cuatt, 126 NYS 1114, 70 Misc 453.

88. In re Blum, 30 NYS 396, 9 Misc 571, 62 NYS 78; Peo. v. Cuatt, supra. See also Murfree on Sheriffs, Secs. 150 and 151.

88a. Snyder v. United States, 285 F 1, rev. 278 F 650; Weiss v. U. S., 60 S Ct 260, — US —, — L ed —, rev. 103 F(2d) 348; State v. Connor, 89 P (2d) 197, 59 Ida 695; Peo. v. Dolpe, 21 NE(2d) 756, 371 Ill 607; Washington v. State, 145 So 736, 167 Miss 226; Bohannon v. State, 90 P(2d) 675. — Okla Cr —; Booth v. State, 94 P(2d) 846, — Okla Cr —; Grogg v. State, 90 P(2d) 454, — Okla Cr —; Harrington v. State, 91 P(2d) 787, — Okla Cr —; Morris v. State, 92 P(2d) 603, — Okla Cr —, rev. 90 P(2d) 452; O'Neal v. State, 87 P(2d) 1108, — Okla Cr —; Skelton v. State, 93 P(2d) 543, — Okla Cr —; Smith v. State, 58 P (2d) 347, 59 Okla Cr 312; Yeargain v. 128

State, 93 P(2d) 1104, — Okla Cr —; Goss v. State, 124 SW(2d) (Tex Cr) 381; Walker v. State, 125 SW(2d) (Tex Cr) 1047. See Secs. 174 and 175, infra.

88b. Guan v. State, 188 So 568, — Miss —.

89. O'Halloran v. McGuirk, 167 F 493, 93 CCA 129; Giddens v. State, 113 SE 386, 154 Ga 54; Peo. v. Fischetti, 273 Ill App 215; Peo. v. Shanley, 40 Hun 477, 4 NY Cr 472; Crosswhite v. Barnes, 124 SE 242, 139 Va 471, 40 ALR 54 and note.

90. Hunter v. Laurent, 104 S 747, 158 La 874; Peo. v. Shanley, supra.

91. Adams v. State, 48 SE 910, 121 Ga 163; State v. Beal, 87 SE 416, 170 NC 764.

92. Giddens v. State, supra; Peo. v. Fischetti, supra.

ment to the illegal arrest, in any case, constitutes a waiver thereof.<sup>88</sup>

It is now generally held that evidence obtained in making an illegal arrest is, on seasonable objection thereto, inadmissible and that it makes no difference whether the proffered evidence is an article or object or is something observed by the officer making the illegal arrest.<sup>88a</sup>

However, the rule, it has been said, does not extend to voluntary admissions made by the party arrested while an illegal search of his premises is being made.<sup>88b</sup>

§ 133. Necessity of Possession of Warrant.—Where arrest is being made under the authority of a warrant, the officer attempting to execute same, and arrest the party named therein, must be in possession of said warrant or it affords him no protection.<sup>89</sup> The necessity for the possession of the warrant is not relaxed by reason of the fact that the party to be arrested knows of the issuance and existence of such warrant for his arrest.<sup>90</sup> So, where the warrant of arrest is at the officer's house some distance from the place of arrest, this renders the arrest illegal.<sup>91</sup> An arrest cannot be lawfully made where the warrant therefor is in a police station when the arrest is attempted to be made by a police officer on his beat or away from such police station.<sup>92</sup> So too, where the warrant is in the hands of another policeman, or other officer, an officer not possessed of such warrant has no authority to make an arrest. In

88. In re Blum, 30 NYS 396, 9 Misc 571, 62 NYS 78; Peo. v. Cuatt, supra. See also Murfree on Sheriffs, Secs. 150 and 151.

88a. Snyder v. United States, 285 F 1, rev. 278 F 650; Weiss v. U. S., 60 S Ct 260, — US —, — L ed —, rev. 103 F(2d) 348; State v. Connor, 89 P (2d) 197, 59 Ida 695; Peo. v. Dolpe, 21 NE(2d) 756, 371 Ill 607; Washington v. State, 145 So 736, 167 Miss 226; Bohannon v. State, 90 P(2d) 675. — Okla Cr —; Booth v. State, 94 P(2d) 846, — Okla Cr —; Grogg v. State, 90 P(2d) 454, — Okla Cr —; Harrington v. State, 91 P(2d) 787, — Okla Cr —; Morris v. State, 92 P(2d) 603, — Okla Cr —, rev. 90 P(2d) 452; O'Neal v. State, 87 P(2d) 1108, — Okla Cr —; Skelton v. State, 93 P(2d) 543, — Okla Cr —; Smith v. State, 58 P (2d) 347, 59 Okla Cr 312; Yeargain v. 128

State, 93 P(2d) 1104, — Okla Cr —; Goss v. State, 124 SW(2d) (Tex Cr) 381; Walker v. State, 125 SW(2d) (Tex Cr) 1047. See Secs. 174 and 175, infra.

88b. Guan v. State, 188 So 568, — Miss —.

89. O'Halloran v. McGuirk, 167 F 493, 93 CCA 129; Giddens v. State, 113 SE 386, 154 Ga 54; Peo. v. Fischetti, 273 Ill App 215; Peo. v. Shanley, 40 Hun 477, 4 NY Cr 472; Crosswhite v. Barnes, 124 SE 242, 139 Va 471, 40 ALR 54 and note.

90. Hunter v. Laurent, 104 S 747, 158 La 874; Peo. v. Shanley, supra.

91. Adams v. State, 48 SE 910, 121 Ga 163; State v. Beal, 87 SE 416, 170 NC 764.

92. Giddens v. State, supra; Peo. v. Fischetti, supra.

a case where the officer of one city, county or district, telephones to officers of another city, county or district to make an arrest of a party within the last mentioned city, county or district, affords the officer attempting to carry out such instruction no protection and the arrest is illegal, unless such officer would have a right to arrest without a warrant.<sup>93</sup> On the other hand, where the warrant of arrest is in the officer's buggy some two hundred yards away, this is sufficient to authorize the officer in making an arrest under such warrant and is treated as if he had the same in his personal possession.<sup>94</sup> So too, where officers are acting together, and they are sufficiently near to each other at the time of the arrest, the warrant in the possession of anyone is protection to all.<sup>95</sup> Likewise if one officer has the warrant and is near the house of the party to be arrested, another officer is warranted in entering the house to make the arrest.<sup>96</sup> Where an officer is possessed of a warrant and he calls upon citizens, bystanders or other officers to assist him in making an arrest, and if they are acting in conjunction and sufficiently near, the warrant affords protection to all.<sup>97</sup> However, where a sheriff has a warrant for the arrest of a person charged with a misdemeanor and starts in one direction to search for him and orders his deputy to search in another place, this does not come within the rule of being sufficiently near, as to afford both protection under the warrant.<sup>98</sup> But where a sheriff deputizes a citizen to assist in arresting persons who had taken refuge in a house and the sheriff thereupon left the citizen to guard the house and prevent their escape while the sheriff went four miles for assistance, and one of the persons did escape, such citizen had authority to retake the escaping person, as the sheriff possessed of the warrant was regarded as constructively present at the time.<sup>99</sup> Likewise, where a warrant was issued for a party to be arrested, and was delivered to the sheriff who exhibited it to a constable with instructions to arrest the party therein named and the constable arrested the designated party, who thereafter escaped, it was held that the constable's endeavor to re-arrest him was not

93. *McCullough v. Greenfield*, 95 NW 532, 133 Mich 463, 62 LRA 900, 1 Ann Cas 924.

94. *State v. Shaw*, 89 SE 322, 104 SC 359.

95. *Adams v. State*, 57 So 501, 175 Ala 8; *Kratzer v. Matthews*, 206 NW 982, 233 Mich 452; *Peo. v. Durfee*, 29 NW 109, 62 Mich 487; *Com. v. Block*, 12 Pa Co 81; *Lee v. State*, 85 SW 804,

[1 *Anderson on Sheriffs*]-9

47 Tex Crim 620.

96. *Adams v. State*, supra.

97. *Hill v. State*, 68 SE 614, 8 Ga App 77; *Com. v. Block*, supra; *Kerbil v. State*, 5 Tex App 60; *Peo. v. Moore*, 2 Doug (Mich) 1.

98. *Peo. v. McLean*, 36 NW 231, 68 Mich 430.

99. *Coyle v. Hurtin*, 10 Johns. (N Y) 85.

unlawful.<sup>1</sup> An officer is without right to arrest a person even after he has been found guilty of the violation of a municipal ordinance, unless he is in possession of a commitment when the arrest is attempted, and where such commitment has been issued to him, but he has delivered it over to another, he is without justification in taking such defendant into custody.<sup>2</sup>

§ 134. **When Officer Must Exhibit the Warrant.**—As to whether or not an officer is required to exhibit a warrant for arrest held by him commanding the arrest and detention of the named party to such person depends upon the circumstances as to whether or not the arrest is being made by a known officer acting within his territorial jurisdiction. It seems that where a known officer is acting as such within the above mentioned jurisdiction, he is not required to exhibit or show his warrant to a person he seeks to arrest, named in a warrant possessed by him, even though it may be demanded.<sup>3</sup> It seems that the party named in the warrant is not required to know that the officer attempting to arrest him is acting in such capacity where the officer is generally known to be such and is within his territorial jurisdiction. The reason assigned for this rule is not bottomed upon the most substantial foundation—that everyone is bound to know the character of an officer acting within his proper jurisdiction and who is known to be such.<sup>4</sup> However, according to some authorities the right to demand to see the warrant on the part of the arrested party does not arise until he has submitted himself to custody, and the duty of exhibition of the warrant is not entailed upon the officer until offered resistance has ceased.<sup>5</sup> But, after the officer has placed the party under arrest, then he should at least advise the arrested person of the warrant and the substance of its contents and the accused has a right after such submission to inspect the same.<sup>6</sup>

1. *Maughon v. State*, 67 SE 842, 7 Ga App 660. This case is of highly doubtful authority and seems contrary to the great current of adjudicated cases.

2. *State v. Leindecker*, 97 NW 072, 91 Minn 277.

3. *O'Halloran v. McGuirk*, 167 F 493, 93 CCA 129; *Robinson v. State*, 18 SE 1018, 93 Ga 77, 44 Am St Rep 127; *Com. v. Field*, 13 Mass 321; *People v. Moore*, 2 Doug (Mich) 1; *Crosswhite v. Barnes*, 124 SE 242, 139 Va 471, 40 ALR 54 and note; *State v. Brown*, 114 SE 372, 91 W Va 700; *State v.*

*Long*, 108 SE 279, 88 W Va 669; 2 *Hawkins FC* 13, Sec. 28; 2 *Hale PC* 116.

4. *Robinson v. State*, 18 SE 1018, 93 Ga 77, 44 Am St Rep 127; *Com. v. Cooley*, 6 Gray (Mass) 350; *Com. v. Block*, 12 Pa Co 31; *State v. Long*, supra.

5. Note 40 ALR 62. See *Murfree on Sheriffs*, Sec. 153; *Robinson v. State*, supra.

6. *State v. Miller*, 5 Oh S & CPDec 763, 7 Oh NP 458, 13 Oh Cir Ct 67, 7 Oh Cir Dec 552, 55 Oh St 685, 48 NE 1114.

The generally recognized rule, however, sustained by the weight of authority and particularly in case of misdemeanors, requires the officer to exhibit the warrant of arrest before the arrest is made, unless there is some resistance and this requirement finds sanction in statutory enactments in some jurisdictions.<sup>7</sup> But, the situation is entirely different where the arrest is being made by one who is not known to be an officer or by a private citizen holding the warrant.<sup>8</sup>

**§ 135. Necessity of Advice of Intention to Arrest and Offense Therefor.**—It is sometimes enacted in statutes that the officer making an arrest is under duty to advise the person to be arrested of the intention so to do and the offense therefor. But this rule does not come into operation if the party to be arrested knows of the existence of a warrant against him and the offense therein charged.<sup>9</sup>

**§ 136. Officer Under Duty to Arrest Party Named in Warrant.**—A sheriff, constable or other officer attempting an arrest must exercise every precaution to the end that he make no mistake in arresting the person named in the warrant. A failure so to do is not excused by similarity or even identity of names, and if there are a number of persons with the same name within the jurisdiction of the officer, the only safe course he can pursue is to make a return of the warrant with the facts thereon to the effect that he did not know which of the persons bearing the same name he was directed to arrest.<sup>10</sup> It is a legal command that warrants or other process must describe the party against whom it is meant to be issued, and the arrest of one person upon a writ, warrant or other

process, sued out against another, cannot be justified.<sup>11</sup> It is wholly immaterial that in the issuance of a warrant of arrest the magistrate intended to name the party actually arrested therein, if he failed so to do. As for instance, a warrant issued against James West is no authority to arrest Vandy M. West, and the intention of the magistrate issuing the warrant that Vandy M. West should be arrested does not afford protection to the officer arresting him.<sup>12</sup> If the name by which the person sought to be arrested is unknown, then it is necessary that he be sufficiently described to identify him.<sup>13</sup> On the other hand if a party is known by the name inserted in the warrant whether that is his true name or not, he may be arrested under such warrant.<sup>14</sup> It would seem to follow that if a person has a number of names or aliases by which he is well known that an officer would be protected in arresting him under a warrant describing him under any one of the names or aliases. Sometimes statutes authorize the arrest of a person whose name is unknown by the use of a fictitious name in a warrant.<sup>15</sup> But even in such a case where a person is designated by a fictitious name he must be otherwise described so as to identify him or the officer will not be justified in making an arrest thereunder.<sup>16</sup> Where a warrant does not name the person arrested by his true name, it cannot thereafter have breathed into it legal vitality by correcting the name, and likewise an officer may not, upon learning the true name of the person he intends to arrest, and who it was intended to be arrested when the warrant was issued, by inserting such name in the warrant and then arrest him under such warrant.<sup>17</sup>

7. *Crosswhite v. Barnes*, 124 SE 242, 139 Va 471, 40 ALR 54 and note at pages 66 and 71. See Sec. 147 *infra*.

8. *United States v. Jailer*, 26 Fed Cas 15,463, 2 Abb 265; *McCrackin v. State*, 105 SE 487, 150 Ga 718; *Robinson v. State*, *supra*; *Com. v. Field*, 13 Mass 321; *Peo. v. Moore*, 2 Doug (Mich) 1; *Frost v. Thomas*, 24 Wend (NY) 418; *Hodge v. Piedmont & N. R. Co.*, 95 SE 138, 100 SC 62; *Randolph v. Com.*, 134 SE 544, 145 Va 883, 47 ALR 1094. Note 40 ALR p. 70.

9. *Hickey v. Com.*, 215 SW 431, 185 Ky 570. In the last cited case it was said: "It is the officer's duty, if act-

ing under a warrant, to inform the person about to be arrested of the intention to arrest him, and the offense with which he is charged, and, if required, he should show the warrant to the defendant therein, Sec. 39, Criminal Code. But if the defendant in the warrant knows that the officer has it and knows the offense charged against him, it is not necessary that the officer should give the information required by that section of the Criminal Code."

See also, *Bowling v. Com.*, 7 Ky L Rep 821; *Tuck v. Beliles*, 156 SW 883, 153 Ky 848; *Reed v. Com.* 100 SW 856, 125 Ky 126.

10. *Dalton on Sheriffs*, 112, 113.

11. *West v. Cabell*, 14 S Ct 752, 153 US 78, 38 L ed 643; *Miller v. Fano*, 66 P 183, 134 Cal 103; *Harris v. McReynolds*, 51 P 1016, 10 Colo App 532; *Shadgett v. Clippen*, 8 East 328.

12. *West v. Cabell*, *supra*; *Harris v. McReynolds*, *supra*.

13. *Harris v. McReynolds*, *supra*; *West v. Cabell*, 14 S Ct 752, 153 US 78, 38 L ed 643. Wherein the court said, "By the common law, a warrant for the arrest of a person charged with a crime must truly name him, or describe him sufficiently to identify him. If it does not, the officer making the arrest is liable to an action for false imprisonment; and if, in attempting to make the arrest, the officer is killed, 132

this is only manslaughter in the person whose liberty is invaded." See also, 1 Hale PC 577, 580, 2 Hale PC 112, 114; *Foster Crown Law* 312. See also, *State v. Smith*, 285 SW (Mo App) 1039; *State v. Tatar*, 152 SE 748, 108 W Va 709.

14. *Mead v. Haws*, 7 Cow. (NY) 332; *Griswold v. Sedgwick*, 6 Cow. (NY) 456.

15. *Williams v. Tidball*, 8 P 351, 2 Ariz 50.

16. *Allison v. People*, 39 P 903, 6 Colo App 80.

17. *Harris v. McReynolds*, 51 P 1016, 10 Colo App 532; *Newburn v. Durham*, 32 SW 112, 10 Tex Civ App 655; *Alford v. State*, 8 Tex App 645.

§ 137. **Who Is Protected under a Warrant Mismaming Party Arrested.**—Where a private citizen is called upon to assist a public officer known to the citizen to be such, he may aid in making an arrest without any inquiry into the legality or regularity of the process in the officer's hands and while the officer might not be protected by reason of irregularity or illegality of the warrant of arrest he holds, still the citizen called upon and coming to his aid in making such arrest is fully panoplied by any warrant held by the officer.<sup>18</sup> A cognant rule is applicable in a case where a private person assists an officer in the execution of a process but by reason of the misconduct of the officer thereafter he becomes a trespasser ab initio. The private person is, nevertheless, absolved from liability since, as to him an act legal when consummated cannot be thereafter rendered illegal by the misconduct of the officer.<sup>19</sup> It should be noted, however, that the protection accorded to a private citizen does not extend to, nor embrace, another officer assisting in the arrest.<sup>20</sup>

§ 138. **Manner In Which an Arrest Must Be Made.**—It is of great importance that officers of the law understand how an arrest should be made. It is an all too prevalent notion among all officers of every grade throughout the country that they have unlimited power that may be exercised in making an arrest. Sheriffs, constables, policemen, and other officers of the law with revolver in hand and possessed of a warrant charging an offense of no greater grade than a misdemeanor, are supposed to hold the keys of life and death of a person they propose to arrest. This same notion is prevalent among the members of society as well. The exact converse of the supposed existing powers is legally true, and the rule may be tersely stated that the officers of the law are empowered, legally, to do no more than is necessary to bring a party to be arrested within their subjection and control.<sup>21</sup>

18. *Watson v. State*, 3 S 441, 83 Ala 60. See however, *Dietrichs v. Schaw*, 43 Ind 175; *Firestone v. Rice*, 38 NW 885, 71 Mich 377, 15 Am St Rep 266 and note; *McMahan v. Green*, 34 Vt 69, 90 Am Dec 665 and note. See also note 67 Am St Rep 421. Note 14 LRA(NS) 1123. See Sec. 143 infra.

19. *Dehm v. Hinman*, 15 Atl 741, 56 Conn 320, 1 LRA 374.

See also, note 14 LRA(NS) 1123.

20. *Cook v. Hastings*, 114 NV 71, 150 Mich 299, 14 LRA(NS) 1123 and note.

21. *State v. Mahon*, 3 Harr (Del) 509; *Kregger v. Osborn*, 7 Blackf (Ind) 74; *Hawkins v. Com.*, 14 B Mon (Ky) 395, 61 Am Dec 147 and note 161; *Murdock v. Ripley*, 35 Me 472; *Wright v. Keith*, 24 Me 158; *Shovlin v. Com.*, 106 Pa St 369; *State v. McAlley*, 87 M 644; *State v. McNinch*, 90 NC 695; *Beaverts v. State*, 4 Tex App 175; *Giroux v. State*, 40 Tex 97; *Jones v. State*, 26 Tex App 1, 9 SW 53, 8 Am St Rep 454; *Skidmore v. State*, 43 Tex 93; *Harrison v. Hodgson*, 10 B & C 445; *Imeson v. Cope*, 5 C & P 193.

As indicated above, the measure of force that may be employed by an officer lawfully, in making an arrest, is only such force as is reasonably necessary to bring the prisoner within the subjection of the officer's will, or to prevent his escape after being arrested, or prevent inflicting upon the officer bodily harm. All unjustified use of force, or wanton, or willful violence inflicted upon a prisoner is without the pale of the law and in excess of exercise of lawful authority.<sup>22</sup>

The question of whether or not an officer of the law used excessive force in effectuating an arrest, in general, is determinable by the particular facts and circumstances surrounding each case.<sup>23</sup>

In the very nature of things, to a large degree, the amount of force that an officer may use in effecting an arrest is committed to his discretion; but he must act, and must employ that judgment and degree of discretion that an ordinarily prudent man would use and employ in like or similar circumstances.<sup>24</sup> At the same time, however, the officer is not tied down by any precise rule as to the exact amount of force that may be used. In other words, the degree of force permissibly employed by an officer in making an arrest is not determinable by the application of mathematical precision.<sup>25</sup>

It should be remembered that an arresting officer is human and he should be given some leeway within reasonable bounds as to how he should act in effecting a capture of a prisoner, and in so doing he may act upon appearances at the particular time and place so long as he acts reasonably.<sup>26</sup>

An apt illustration of the application of the doctrine we have under consideration, is found in a case where a motor vehicle driver, even though entertaining an intention to resist his arrest but cannot escape, which is reasonably apparent to the arresting

22. *People v. Hutchinson*, 9 F(2d) 275; *Tarwater v. State*, 75 So 816, 16 Ala App 140; *Lentine v. McAvoy*, 105 Conn 528, 136 Atl 76; *Dupre v. State*, 113 SE 128, 153 Ga 798; *Territory v. Machado*, 30 Haw 487; *Com. v. Bollinger*, 240 SW 766, 198 Ky 646; *Caperton v. Com.*, 225 SW 481, 180 Ky 652; *People v. Denker*, 234 NYS 32, 225 App Div 517; *State v. Jenkins*, 143 SE 538, 195 NC 747; *Hulls v. Williams*, 29 P(2d) 582, 167 Okla 346; *Harper v. State*, 207 SW 90, 84 Tex Cr 345; *Coldeen v. Reid*, 182 P 599, 134

107 Wash 508; *State v. Weisengoff*, 101 SE 450, 85 W Va 271.

23. *Murdock v. Ripley*, supra; *State v. McAlley*, supra; *State v. McNinch*, supra; *Shovlin v. Com.*, supra; *Beaverts v. State*, supra; *Giroux v. State*, supra; *Jones v. State*, supra; *Skidmore v. State*, supra; *Imeson v. Cope*, supra.

24. *Barrett v. U. S.*, 64 F(2d) 145, 62 App DC 25; *People v. Hutchinson*, supra; *Dixon v. State*, 132 So 684, 101 Fla 840.

25. *People v. Hutchinson*, supra.

26. *Union Indemnity v. Webster*, 118 So 794, 218 Ala 468.

officer, the shooting into the automobile by the officer in these circumstances fails to find an excuse or justification and amounts to excessive use of violence.<sup>27</sup>

In determining whether an officer of the law, in making an arrest, acted as an ordinarily prudent man would have done under like or similar circumstances, consideration may be given to his right to call to his aid such number of the citizenry as he deems adequate to make effectual his attempt to arrest. However, a single sporadic case is found sustaining the view that the officer, before resorting to force or use of violence, is not required to employ his authority of assembling a posse comitatus. This case, however, makes an adjudication that is prominent only by reason of its solitude.<sup>28</sup>

**§ 139. When a Warrant Must Be Executed.**—It hardly seems to be necessary to state that all process including warrants of arrest and a *capias ad respondendum* must be executed before the return day therein specified or provided by the statutes of the particular jurisdiction. This rule is rather rigidly enforced, as will appear from an applicatory illustration, where it chanced that the return day of the process fell upon Sunday and an arrest was made thereunder on Monday and the defendant detained for two hours, without obtaining a renewal of the process. It was adjudicated that the arrest, detention, and rearrest after the renewal of the process were all illegal and that the defendant whose rights had been invaded was entitled to be discharged. In these circumstances it is held that where the last day of the period within which process was returnable fell upon a Sunday, the return period was shortened and the last day thereof was Saturday and the right to act thereunder expired at the end of such day.<sup>29</sup>

As a general rule, however, warrants of arrest and other process such as *capias ad respondendum*, are returnable in times provided for in statutory enactments; but in the absence of controlling statutory provisions, it seems that warrants of arrest and *capias ad respondendum* may be made returnable by the issuing authority and where issued out of a court operating under statutory authority by which specified terms are designated, such warrants and other process are returnable to the next ensuing term of court.<sup>30</sup>

27. *Ex parte Finney*, 205 P 197, 21 Okla Cr 103.

28. *Gillespie v. State*, 64 SW 947, 69 Ark 573.

29. *Leveridge v. Plaistow*, 2 H. Blacks. 29.

30. *People v. Kent County Circuit Judge*, 38 Mich 308; *Kelly v. Gilman*, 29 NH 385, 61 Am Dec 648; *Simmerman v. Clevenger*, 5 Atl 273, 9 NJL 213; *Ex parte Root*, 5 Atl 273, 4 Cow (NY) 548.

A warrant or *capias* which is made returnable out of term time, is, in the absence of controlling statutory provision to the contrary, held to be void.<sup>31</sup>

Where a warrant or *capias* is made returnable the first day of the following term of the court out of which it issued, means the first day thereof.<sup>32</sup>

In many jurisdictions, however, there are no provisions of law with respect to the time of return of process such as we have under discussion here. In such jurisdictions the court can fix the return date in the process.<sup>33</sup>

After the period for return designated in the writ itself, or provided by statutory provision, the process becomes inoperative or *functus officio*.<sup>34</sup>

Such consequence, however, may be provided against by procuring an alias to be issued, or by having the period extended by the issuing court or in the exercise of lawful authority. Under a statutory provision in Rhode Island, a writ of mesue process directing an arrest to be made and not returnable before a final judgment will be entered, renders such process void.<sup>35</sup>

**§ 140. No Arrest on Civil Process on Sunday.**—It is generally recognized that no writ in a civil action calling for the arrest of the defendant can be executed on Sunday, and it seems that where this rule of law is violated the arrest is illegal and the arrested party is entitled to a discharge.<sup>36</sup>

In England under the statute of 29 Charles II, Chapter 7, Section 6, an arrest may not be made upon Sunday except for treason, felony, or breach of the peace. In those jurisdictions in this country where such statute is in force, by virtue of the adoptive provision of the common law, nothing else appearing to the contrary, it would be controlling and an arrest made in violation thereof is illegal and the prisoner is entitled to his discharge.<sup>37</sup> However, where a statute provides that an arrest on civil process should not be made after sunset unless special authority is issued therefor, it does not apply to an execution for costs, where in the particular

31. *Miller v. Gregory*, 4 Cow. (NY) 504.

32. *People v. Kent County Circuit Judge*, *supra*.

33. *Continental Bank v. DeMott*, 21 NY Super 696; *Crider v. Hammel*, Tapp (Ohio) 49.

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34. *Butler v. Corbett*, 33 SCL 1, 2 Strob 1.

35. *Hathaway v. Wilson*, 161 Atl 234, 52 RI 447.

36. *Lyford v. Tyrrell*, 1 Anstr 85.

37. *King v. Strain*, Blackf (Ind 447); *Hildreth v. Brigham*, 12 Allen (Mass 71).



jurisdiction the execution debtor may be arrested thereon.<sup>38</sup> Mr. Murfree takes the position that where there can be no civil arrest on Sunday or the 4th of July, under a statute, that such provision would operate to protect Jews and others whose religion requires the observance of some other day than Sunday.<sup>39</sup> An arrest was made on Sunday for an offense committed because of its criminal character and on Monday the defendant was detained on civil process. Although the arrest on Sunday was in a measure authorized, still the defendant will be discharged where it appears that the Sunday criminal arrest was not in good faith and was considered an abuse of criminal process.<sup>40</sup> If a prisoner is taken on civil process on a week day and is detained until Sunday and then escapes, he may be retaken on that day because he is regarded as being in custody by reason of the first arrest and it is only an original arrest that is prohibited by the British statute hereinbefore mentioned.<sup>41</sup> If an escape is permitted voluntarily, then the prisoner may not be rearrested on Sunday.<sup>42</sup> Prisoners may be bailed on Sunday.<sup>42a</sup>

§ 141. *The Posse Comitatus or Summoning Bystanders.*—The power and authority of a sheriff, constable, or other officer to raise a posse comitatus for the purpose of executing process existed at common law and is generally confirmed by statute in this country; but before the statutes of our country it was likewise recognized by an act of Parliament. However, the parliamentary enactment was held to be confined to the serving of executions.<sup>43</sup>

The authority of the officer to raise a posse comitatus or to summon bystanders to assist him applies to mesne process and probably to civil process generally.<sup>44</sup> In any case, however, to warrant the exercise of this power the officer must meet with resistance.<sup>45</sup> The adjudications in the United States with respect to the power of the

38. *Julius Stone's Case*, 129 Mass 150.

39. *Murfree on Sheriffs* (New Edition), Secs. 149A, 150A.

40. *Wells v. Gurney*, 8 B & C 771. See Sec. 147, *infra* (On fraud or deception in making an arrest); *Ex parte Eggington*, 18 Jurist 224; *Atkinson v. Jamison*, 5 Term 25; *Wilson v. Tucker*, 1 Salk 78; *Taylor v. Phillips*, 3 East 155; *Benninghoff v. Oswell*, 37 How Pr (NY) 235.

41. *Parker v. Moore*, 2 Salk 620, 6 Mod 95; *Cooper v. Adams*, 2 Blackf (Ind) 204.

42. *Featherstone v. Atkinson*, Barnes 373.

42a. *Atkinson v. Jamison*, *supra*.

43. West 2, 13 Edward 1, Statute 1, Chapter 39.

44. *Williams v. Bunker*, 5 Atl 882, 78 Me 373; *Coyles v. Hurton*, 10 Johns. (NY) 85; *Herser v. Hampton*, 7 Ired (NC) 333; *Sutton v. Allison*, 2 Jones (47 NC) 339; 8 Bacon Abridg. 690.

45. *Coyles v. Hurton*, 10 Johns. (NY) 85; *Herser v. Hampton*, 7 Ired (NY) 85; *Sutton v. Allison*, 2 Jones 47 (NC) 330; *Howden v. Standish*, 12 Jurist 1052; *Rowe v. Ames*, 6 M & W 137

sheriff to raise a posse comitatus to serve civil process are rather few in number. But the right to command the power of the country to the end that an arrest may be made or criminal process executed is undoubted.<sup>46</sup>

The power to call upon bystanders to aid an officer is not confined merely to make an arrest but extends to prevention or suppression of a breach of peace and would likewise seem to embrace the right where the assistance is called for to prevent a rescue or escape of one under arrest.<sup>47</sup> The power of an officer to assemble a posse comitatus to assist him in the execution of the duties of his office extends to his right to do so, even if the members of such posse comitatus are assembled from an adjoining county.<sup>48</sup>

Even a private person unclothed with any official authority may summon bystanders to assist him in making an arrest, even without a warrant, when he is lawfully authorized to make such an arrest.<sup>49</sup> However, the authority to assemble such a posse comitatus is usually confined to the officer or private person making the arrest and does not extend to or embrace members of the posse comitatus to recruit additional members.<sup>50</sup> A mere volunteer cannot of his own volition and without any lawful request or command, join the posse comitatus and act therein.<sup>51</sup> The reason for this rule is apparent upon the most cursory consideration, since the officer or other person lawfully assembling such a posse comitatus is under a duty to not summon a citizen who manifests a tendency or exhibits an intention to do violence to the prisoner.<sup>52</sup> It should be noted, however, that a lawful member of a posse comitatus may do whatever the officer might lawfully do and in so acting, is shielded by the same armor of authority that is thrown around the officer himself.<sup>53</sup> The very exigencies of the situation dispense with the

747; *Lewis v. Alcott*, 3 M & W 188; *Wright v. Lanson*, 2 M & W 739; *Beckford v. Montague*, 2 Esp 475.

46. *Monterey County v. Rader*, 248 P 912, 199 Cal 221, 47 ALR 359; *Caperton v. Com.*, 225 SW 481, 189 Ky 652; *Cornett v. Com.*, 248 SW 540, 190 Ky 236; *Com. v. Sadowsky*, 80 Pa Super 496; *Randolph v. Com.*, 134 SE 544, 145 Va 883, 47 ALR 1084.

47. *U. S. v. Rice*, 27 Fed Cas No. 16,153, 1 Hughes 500; *People v. Brooks*, 63 P 464, 141 Cal 311; *Lanadon v. Wash. County*, 102 P 344, 16 Ida 618; *Com. v. Phelps*, 95 NE 868, 200 Mass 396, Ann Cas 1912B 500; *Firestone v. Rice*, 38 NW 885, 71 Mich 377, 15 Am

St Rep 266; *Rex v. Pinney*, 23 Eng Rul Cas 120, 3 Barn & Ad 947. Even a magistrate under certain conditions, as a riot, may raise a posse comitatus to quell it.

48. *State v. Morgan*, 61 P 527, 22 Utah 102.

49. 2 Hale PC 76.

50. *Salisbury v. Com.*, 79 Ky 425, 3 Ky L 211.

51. *Kirbie v. State*, 5 Tex 60.

52. *Hamlin v. Com.*, 12 SW 146, 11 Ky 348.

53. *Monterey County v. Rader*, 248 P 912, 199 Cal 221, 47 ALR 359; *Byrd v. Com.*, 164 SE 400, 168 Va 87;

issuance of any evidence of authority to members of the posse, or the administration to them of an official oath.

A magistrate may charge a citizen with the duty of executing a warrant of arrest, and the civilian so charged may call others to his aid to carry out the mandate of the magistrate, but he cannot deputize another to act in his stead.<sup>53a</sup>

**§ 142. Expenses of a Posse Comitatus.**—In the execution of criminal process the sheriff is authorized to call to his assistance a sufficient number of bystanders to carry out and perform the duties imposed upon him by law. An illative consequence of this conferred authority is that any expenses incurred in the performing of his duty is a county charge and may be collected from such municipality.<sup>54</sup> Justification for holding a county liable for the expenses incurred in assembling a posse comitatus is found in the fact that in addition to the powers expressly given an officer by statute or conferred by virtue of common law, grants him by implication, such additional powers and authority as are necessary for the efficient exercise of the powers expressly given or such as may be fairly embraced therein.<sup>55</sup>

**§ 143. Duty of Persons Summoned to Respond.**—Persons duly summoned and becoming members of a posse comitatus may do legally whatever the officer himself may lawfully do and are afforded the same protection that is granted to him. In other words, a citizen so summoned is a formally deputized officer of the law.<sup>56</sup>

The power of the sheriff to call upon private persons to assist him in performing the functions of his office clearly exists, and when such persons are properly requested they must comply. It is sometimes provided by statute that a refusal of this duty is a violation thereof for which prescribed punishment may be visited upon the noncomplying requested person.<sup>57</sup>

Krueger v. State, 177 NW 917, 171 Wis 566.

53a. Randolph v. Com., 134 SE 544, 14 Va 134, 47 ALR 1034 and note; 1 Hale PC 85.

54. Lansdon v. Wash. County, 102 P 344, 16 Ida 618.

55. Lewis v. Colgan, 47 P 357, 115 Cal 529. Throop Public Officers, Section 542, 22 Am and Eng Encyclopedia p. 364. Lansdon v. Wash. County, supra.

56. Monterey Co. v. Rader, 248 P 912, 199 Cal 221, 47 ALR 359. The

cited case holds that a bystander summoned by a sheriff or other officer to assist in making an arrest is within the protection of the workmen's compensation law. Byrd v. Com., 164 SE 400, 158 Va 897.

57. North Carolina v. Gosnell, 74 F 734, wherein it is said: "Duly-summoned assistants of an officer are under the same protection of the law which is afforded to the officer who has process in his hands. Both judicial and ministerial officers, in the execution of the duties of their office,

A citizen summoned for duty as a member of a posse comitatus is not required to be informed as to the court from which the process is issued, or as to the character of the offense charged in the process, or the name of the party therein inserted.<sup>58</sup> For that reason he is generally not liable for his obedience in good faith of the commands of the officer even though the officer himself may be a trespasser; or by reason of his subsequent misconduct he may become a trespasser ab initio.<sup>60</sup> It should be noted, however, that some authorities apparently have failed to comprehend the duties imposed upon the citizen when he is required to act as a member of a posse comitatus and these authorities have reached an erroneous conclusion that a citizen thus summoned is bound at his peril to determine the authority of the officer and that his liability is co-extensive with that of the officer, and that he has no more protection than the officer himself can assert or claim.<sup>60</sup> It is no excuse to refuse to assist an officer by reason of the apprehended danger that will thus be entailed in engaging in the undertaking or enterprise.<sup>61</sup>

A party summoned by an officer to assist in making an arrest is not concerned with the guilt or innocence of the party charged or

are under the strong protection of the law; and their legally summoned assistants, for such time as in service, are officers of the law. If the regular officer has process in his hands, the assistant can act under the authority and protection of such process, and may comply with the orders and requirements of his superior officer; and if resistance is made to his performance of such legal duty he may, even during the temporary absence of the officer with process in his hands, resort to such extreme measures as may be necessary for his self-protection and the arrest of the defendant." Coleman v. State, 63 Ala 93; Dougherty v. State, 17 So 393, 106 Ala 63; Peo. v. Pool, 27 Cal 572; State v. Deniston, 6 Blackf (Ind) 277; State v. Freeman, 8 Ia 428, 74 Am Dec 317; Hawkins v. Com., 14 B Mon (Ky) 395, 61 Am Dec 147 and note p. 154; Com. v. Coughlin, 123 Mass 436; State v. Spaulding, 25 NW 793, 34 Minn 361; Coyle v. Hurlin, 10 Johns. (NY) 85; State v. Curtis, 1 Hay (2 NC) 471; State v. Shaw, 25 NC 20; State v. Ditmore, 99 SE 368, 177 NC 502; 140

Com. v. Black, 12 Pa Co 31; Com. v. Sadowsky, 80 Pa Super 496; State v. Hailey, 33 SCL 73; McMahan v. Green, 34 Vt 69, 80 Am Dec 685 and note; State v. Caldwell, 2 Tyler (Vt) 212; Krueger v. State, 177 NW 917, 171 Wis 566; Shawano Co. v. Industrial Comm., 203 NW 590, 210 Wis 513; see also, 283 NW 304, 230 Wis 165; Reg. v. Brown, C & M 314, 41 Eng Cas Law 175. Note 44 Am St Rep 137; 2 Wharton Cr Law (11th Ed) Sec. 856; Bishop, New Cr Proc (2d ed) 185.

58. State v. Ditmore, 99 SE 368, 177 NC 502.

59. Mitchell v. State, 12 Ark 50, 54 Am Dec 253; Dehu v. Hinman, 15 Atl 741, 56 Conn 320, 1 LRA 374; State v. Ditmore, supra. See Sec. 137 supra.

60. Mitchell v. State, supra; Pow v. Beckner, 3 Ind 475; Cooper v. Johnson, 81 Mo 483; Bright v. Patton, 16 App DC 634, 60 Am Rep 396, 5 Mackey 534; Krueger v. State, 177 N W 917, 171 Wis 566.

61. Dougherty v. State, 17 So 393, 106 Ala 63.

the fact that false evidence was given to obtain the warrant of arrest.<sup>62</sup>

Before the citizen may be charged with a criminal offense for failing to assist an officer commanding him so to do, it is necessary that the command should be issued by a known public officer.<sup>63</sup> If a citizen is called upon to, and thus assists an officer, and the lawfulness of his acts are thereafter questioned in a proceeding against the citizen, he will be completely exonerated on it being made to appear that the officer he assisted was a de facto one in so far as the official capacity of the officer is involved.<sup>64</sup> However, a member of a posse comitatus, to be justified in acting, must act in the presence, either actual or constructive, of the officer commanding him so to do.<sup>65</sup>

But where in making an arrest a struggle ensues between the officer and the person whom he is attempting to arrest, it is the duty of the officer's assistants, such as a member of a posse comitatus, to go to his aid, whether commanded to do so or not.<sup>65a</sup>

§ 144. Manner of Deputation.—It is no requirement of the law that in order to be afforded the immunity and protection accorded to an officer under such circumstances a citizen must be formally and specifically called to the assistance of the officer or that he be specially commissioned or sworn in, in that capacity. Still, in the very nature of things a call for assistance on the part of an officer cannot always be addressed with discrimination and to specific individuals. The call in general comes when the officer is hard pressed and the exigency of the case demands that help be forthcoming immediately. It may be in the nature of a cry of despair, or a bugle call to arms to all who may hear it or be advised of it, to rally to the aid of the officer endeavoring to serve legal process and thus maintain the majesty of the law. Therefore, it is readily apparent upon the slightest consideration that under such circumstances there is no time for nicety of expression or the embodiment of precision in the command. Upon receiving a call to thus aid the minister of the law, it is the duty of the citizen who is informed thereof, to fly to the relief of the officer. It is a legal duty;

62. *Meeds v. Carver*, 30 NC 208; *C & P* 775, 32 Eng Cas Law 806; *State v. Ditmore*, supra; *Robinson v. State*, 18 SE 1018, 93 Ga 77, 44 Am St Rep 127; *Coyles v. Hurtin*, 10 Johns. (NY) 85.

63. *Dietrich v. Schaw*, 43 Ind 175.  
64. *Schlencker v. Risley*, 4 Ill 483, 38 Am Dec 100.

65. *Rex v. Whalley*, 7 C & P 245, 32 Eng Cas Law 504; *Rex v. Patience*, 7

65a. *State v. Miller*, 5 Oh S & CP Dec 703, 7 Oh NP 458, 13 Oh Cir Ct 67, 7 Oh Cir Dec 552.

it is a moral duty. It is a duty prescribed by and incident to the right of citizenship.<sup>66</sup>

§ 145. Sufficiency of Conditions Warranting Assembly of a Posse Comitatus.—It may be stated as a general rule as to when the necessity exists for the calling upon the citizenry for forming a posse comitatus is usually left, in the absence of a controlling statute, to the sound judgment and reasonable discretion of the officer himself. And indeed it is a duty, if he has any reason to anticipate resistance to the carrying out or in the discharge of the duties of his office to provide such a force of men as would enable the officer to properly, efficiently, and promptly perform the duties of his office.<sup>66a</sup> It cannot be considered as hardship on an officer to impose the duty that he provide against resistance which he may reasonably anticipate to the end that he may not be taken unawares, and be thwarted in the discharge of his functions.<sup>67</sup> So where a statute provides that an officer may call upon the power of the county to assist in the execution of the duties of his office, only in a case where an emergency exists, it has been held that such a statute is enacted for the purpose of enabling an officer to obtain immediate assistance when suddenly confronted with a dangerous emergency when apprehending, securing, or conveying a person charged with or convicted of crime. And where an officer receives a hurried call to go far in the country on a cold, dark, stormy, winter night to arrest a drunken man who is likely to harm his family, and the officer knows him to be dangerous when inebriated, an emergency exists, warranting a calling upon citizens for aid. Under these circumstances the officer is not required to wait until he has reached an isolated farm house on such a night where other men are unlikely to be found, before calling for aid. An emergency does not mean that the officer is to proceed so cautiously that at a time when he is in the extreme necessity for aid no aid can be had. After all, the determination of the existing of the emergency, or the necessity for immediate aid are matters that must of necessity be left mainly to the exercise of the sober judgment and sound discretion on the part of the officer.<sup>68</sup>

66. *Krueger v. State*, 177 NW 917, 923, 171 Wis 506.

66a. *Monterey Co. v. Rader*, 248 P 912, 190 Cal 221; *Krueger v. State*, 177 NW 917, 171 Wis 506.

67. *Howden v. Standish*, 12 Jurist 1052; *Wright v. Lanson*, 2 M & W 142

739; *Lewis v. Alcock*, 3 M & W 188; *Rowe v. Ames*, 5 M & W 747; *Barker v. St. Quentin*, 12 M & W 441; *State v. Garrett*, 1 Winst. Law 144, 60 NC 144, 84 Am Dec 359.

68. *Mitchell v. Industrial Comm.*, 13 NE(2d) 736, 67 Oh App 319.

§ 146. **Detainers.**—If a prisoner is arrested upon valid process by an officer of the law and at the time there are other writs in his possession against the same party, the officer may detain him after his discharge from the first arrest to answer to other writs upon which he has not been arrested. It would be a useless and idle ceremony to discharge him and immediately arrest him upon the other process held by the officer. If, however, the writ by which the arrest is made is void upon its face being "a piece of parchment purporting to be a writ and endorsed for bail," the arrest by its authority is void and illegal and the detainer upon other process cannot be justified thereby. So where it appears that the sheriff had the defendant in custody in circumstances which make that custody illegal, and the defendant is thereafter discharged from illegal custody, the sheriff is bound to release and discharge him, whatever valid writs he may have held at the time of the illegal arrest or may have received afterwards or during the illegal imprisonment and restraint.<sup>69</sup>

§ 147. **Fraud Not Permissible in Effecting an Arrest.**—While stratagem may sometimes be permissible to make an arrest,<sup>70</sup> still the law will not tolerate either officers or other persons to use trickery, fraud, or misrepresentation to entice a person into a particular jurisdiction to effect an arrest. Courts will not countenance attempts to entice a party into their jurisdiction by fraud, trickery, and misrepresentation and serve him with process, and, if by false statement or fraudulent pretense a party is inveigled within the court's jurisdiction and there served, the service will be set aside.<sup>71</sup> However, an arrest is not unlawful or vitiated where the officer holding a warrant for the arrest of the accused and finds him, armed with a deadly weapon, ready to resist arrest by taking the officer's life, the latter has the right in these circumstances without first producing the warrant, to disarm the accused and to use strategy and deception for that purpose, in order to make the arrest without peril to his own life, and it is sufficient in such case to produce and read the warrant, if requested, after the accused is taken into custody and his resistance has been overcome.<sup>72</sup>

69. Hooper v. Lane, 3 Jurist (NS) 1026, 6 II of L Cas 413; Davis v. Chippendale, 3 Bos & P 232.

70. Rex v. Backhouse, Loftt 61; State v. Miller, 13 Ohio CCT 67, 7 Ohio CD 552.

71. Arnold v. Tourtellot, 13 Pick.

(Mass) 172, note 61 Am Dec 154; Goupil v. Simonson, 3 Abb Pr(NY) 474; Seaver v. Robinson, 3 Duer 622, 2 Abb Pr(NY) 554; Carpenter v. Spooner, 2 Sandf 717.

72. State v. Miller, supra. See Sec. 134 supra.

§ 148. **Where an Arrest May Be Made.**—In England there are numerous localities within the "body of a county" in which the sheriff of the county is by law forbidden to exercise his functions. But, while an arrest in England may not be lawfully made in prohibited places, it is generally held that the validity of an arrest so made is not impaired and the defendant may not obtain his discharge.<sup>73</sup>

In this country there are but few places where an arrest may not be lawfully made. It is the general rule that an officer of the law may execute process anywhere within his county except in the presence of the court or within territory, the jurisdiction of which is vested in the United States.<sup>74</sup> An officer of the law, in his official capacity as such, cannot make an arrest beyond the bounds of the state from which his authority is derived and an arrest in a foreign state is unlawful and unless specially authorized by statute he cannot make an arrest outside of the territorial jurisdiction of his authority, as his county or district.<sup>75</sup>

It is provided in many jurisdictions that under certain conditions and in compliance with statutory enactments, warrants may be executed and arrests made without the territorial boundaries of the county.<sup>76</sup>

The statutory enactments authorizing an arrest to be made upon warrants beyond the limits of the territorial jurisdiction of the officer do not operate to enlarge his powers when acting without a warrant.<sup>77</sup>

The law unquestionably is that a peace officer may pursue and apprehend a person in the same state when charged with a felony;

73. Batson v. McLean, 2 Chit 48; Sparks v. Spink, 7 Taunt 311; Bell v. Jacobs, 4 Bingh 523; Kirkpatrick v. Kelly, 3 Doug 30.

74. Moore v. Green, 73 NC 394, 21 Am Rep 70.

75. Williams v. State, 44 Ala 41; Ex parte Rosenblat, 51 Cal 285; Ex parte Sternes, 23 P 38, 82 Cal 245; Passett v. Chase, 107 So 680, 91 Fla 522; Martin v. Newland, 147 NE 141, 196 Ind 58; Bowlin v. Archer, 162 SW 477, 157 Ky 540; Malcomson v. Scott, 23 NW 160, 56 Mich 459; Knight v. Miles, 272 SW 922, 308 Mo 538; Kendall v. Aleshire, 45 NW 167, 28 Neb 707, 26 Am St Rep 367; In re Fetter, 23 NJL 311, 57 Am Dec 382 and note; Burton v. N. Y. Cen. etc. R. Co. 132 NYS 628, 147 App Div 557, 28 NY Cr 144

544, 104 NE 1127, 210 NY 567; State v. Shelton, 79 NC 605; Stuart v. Mayberry, 231 P 491, 105 Okla 13; Carpenter v. Lord, 171 P 577, 88 Ore 128, LRA1918D 674; Coker v. State, 61 SE 818, 14 Ga App 606; State v. Anderson, 19 SCL (1 Hill) 327; Tarver v. State, 16 SW 1041, 90 Tenn 485; Box v. Oliver, 43 SW(2d) (Tex Civ) 679; Bromley v. Hutchins, 8 Vt 194, 30 Am Dec 465; Nadeau v. Conn, 252 P 913, 142 Wash 243. See Sec. 100 supra.

76. Young v. State, 117 So 3, 22 Ala App 468; Krugg v. Ward, 77 Ill 603; State v. Dooley, 28 SW 558, 121 Mo 591; Peo. v. Harmer, 135 NYS 529, 76 Misc 309; Nadeau v. Conn, supra.

77. Soesamon v. Cruse, 45 SE 757, 133 NC 470; Little v. Rich, 118 SW 1077, 55 Tex Civ App 320.

but even though armed with a warrant the right of pursuit and apprehension does not extend beyond the territorial jurisdiction of the authority issuing a warrant charging a misdemeanor merely. And it must be conceded that the rule applies with even greater force by the different state sovereignties and that the officer of one sovereignty can exercise no authority whatever in another. But on the other hand, where a prisoner has been arrested in one state in due and legal form, that arrest cannot be defeated by the prisoner by forcibly carrying the arresting officer not only out of his bailiwick, but beyond the territorial limits of the sovereignty by which his office was created. In so doing, the prisoner is still under arrest and if the officer can succeed in bringing him back into his state and bailiwick the arrested person will not be heard to say that the arrest is illegal, because made in another jurisdiction since he had carried the officer out of his own proper jurisdiction. Where the officer is forcibly removed beyond the territorial limits of the sovereignty under whose authority he acts, he has the right to return the prisoner to where the original legal arrest was effected.<sup>78</sup> However, the rules discussed herein should not be confused with the right of arrest and extradition where a crime has been committed in one state and the perpetrator thereof has fled the jurisdiction and is located as a fugitive from justice in the confines of another jurisdiction.<sup>79</sup>

**§ 149. Where an Inferior Officer May Not Effect an Arrest.**—As we have just seen in the next preceding section, in the absence of enabling statutory enactments, a sheriff may not arrest beyond the limits of his bailiwick. So, true it is, that a constable, marshal, or municipal policeman cannot effect an arrest beyond the territorial limits of their authority unless such an arrest is made in fresh pursuit of a party who has committed an offense within the territorial limits of the officer's bailiwick and in case they go beyond the same.<sup>80</sup>

**§ 150. An Officer Signing a Complaint Is Not Thereby Disqualified in the Case.**—Upon a complaint made by an officer charging the defendant with a violation of criminal law he is not thereby dis-

78. *Bowlin v. Archer*, supra. See also, *Weissengoff v. Davis*, 260 Fed 16, 7 ALR 307, 40 S Ct 54, 250 US 674, 63 L ed 1201.

79. *George v. Norfolk & W. R. Co.* 88 SE 1030, 78 W Va 345.

80. *In re Hotchkiss*, 6 DC 168; *Law- [1 Anderson on Sheriffs]*—10

*son v. Buzinea*, 3 Har (Del) 416; *Bowlin v. Archer*, 163 SW 477, 157 Ky 540. See Sec. 148, supra; *Brittain v. U. S. Fidelity & Guaranty*, 293 SW 956, 219 Ky 465; *State v. Woodard*, 81 So 337, 144 La 845; *State v. Stobie*, 92 SW 191, 194 Mo 14.

qualified from making the arrest, or from performing his proper functions during the trial.<sup>81</sup>

**§ 151. Arresting Insane Persons.**—The right to arrest and restrain an insane person is not governed by the organic law which provides that no one shall be deprived of liberty, life, or property without due process of law. Restraint under such conditions does not offend against the constitutional inhibition. The conclusion is that the restraint of an insane person in an asylum is lawful, and being lawful to place him there whether it be done by way of protecting persons or property of others, or for the benefit of the insane person himself is in itself due process of law though there may have been no judicial investigation.

The general rule is that an action will not lie for arrest without judicial proceedings, one who is so insane as to be dangerous to himself or others.<sup>82</sup> An insane person may often be restrained by any person; by anyone having an interest in him; or by one whose safety may depend on his detention. He may be taken in charge without a warrant. The arrest or restraint of an insane person or of a person appearing to be insane, in good faith, is not designed as a punishment for an act done.<sup>83</sup> Of course, all such arrests or restraints must be reasonable and in good faith.<sup>84</sup>

Under the right of self defense, it is a lawful exercise of authority to arrest and restrain one of his liberty who is incapable of controlling his own actions, whose being at liberty endangers the safety of others. But this is justified only when the urgency of the case demands immediate intervention. The right to exercise this summary remedy is grounded in a reasonable necessity and ceases with the necessity. A dangerous maniac may be restrained temporarily until he can be safely released or can be arrested under legal process, or committed to an asylum under legal authority. It should be noted, however, that every insane person is not dangerous. Nothing can be more harmless than some of the milder forms of insanity, nor is it any justification that those arresting him were actuated by a desire to promote the alleged lunatic's welfare. The right of personal liberty is deemed too sacred to be left to the whims of an irresponsible individual however conscientious

81. *Mineral City v. Render*, 42 NE 255, 51 Ohio St 122.

82. *Maxwell v. Maxwell*, 177 NW 541, 189 Ia 7, 10 ALR 482 and note; *Van Deusen v. Newcomer*, 40 Mich 90. 146

83. *Peo. v. Chanler*, 89 NE 1109, 196 NY 525, 25 LRA(NS) 946.

84. *Biggaard v. Duvall*, 151 NW 1051, 169 Ia 711.

he may be. The law throws around these persons safeguards of legal protection; so that the postulate seems readily apparent and its soundness inescapable that an insane person, being neither dangerous to himself nor to others his arrest and confinement without a warrant because he is thought to be a nuisance are unauthorized and an invasion of his law-given rights.<sup>85</sup>

It is a safe rule, well recognized and amply sustained that an insane person, who is committing or about to commit what would be a crime if the same act were perpetrated by a sane person, may be arrested under the same conditions as if he were sane. In other words, if it appears that he has committed, is committing, or about to commit a crime, his insanity does not seem to be entitled to any consideration, in so far as arresting him is concerned.<sup>86</sup> It ought to be observed, however, that the arrest of an inoffensive insane person should be proceeded with, cautiously. In order to justify such arrest, the party doing so has the burden of showing that the person arrested and restrained of his liberty was actually a lunatic.<sup>87</sup>

Insanity of a debtor at common law called for no different handling of him, in so far as civil arrest was concerned, than those possessed of sanity.<sup>87a</sup> An insane person arrested in a civil action or under civil process is not at common law entitled to a discharge on establishing his mental condition to be that of insanity at the time of his arrest.

In some jurisdictions<sup>87b</sup> the matter is subject to regulatory statute.<sup>87c</sup>

85. *Maxwell v. Maxwell*, supra; *Look v. Deen*, 108 Mass 116, 11 Am Rep 323; *In re Oakes*, 8 Law Rep (Mass) 122; *Witte v. Haben*, 154 NW 662, 131 Minn 71, LRA1916C 228, Ann Cas 1917D 534; *Keleher v. Putnam*, 60 NH 30, 49 Am Rep 304; *Emmerich v. Thorley*, 54 NYS 791, 35 App Div 452; *In re Allen*, 73 Atl 1078, 82 Vt 365, 26 ALR(NS) 233; *Brookshaw v. Hopkins*, Lofft 235.

86. *Pactz v. Dain*, Wils (Ind) 148; *Lott v. Sweet*, 33 Mich 308; *Rohmer v. Labo*, 157 NW 400, 191 Mich 55; *Forsythe v. Ivy*, 139 So 615, 162 Miss 471. In the last cited case the court said, "But, even if Ivy's mental condition, and his irresponsibility, were not produced by drunkenness, but were produced by other causes, the police-

men were still entitled to take him into custody and care for him until he became mentally responsible and able to take care of himself, or place him with his family and friends who could take care of him."

87. *Fletcher v. Fletcher*, 1 El & El 420, 120 Eng Reprint 967, 5 Jur NS 678, 28 LJQBNS 134, 7 Week Rep 187; *Maxwell v. Maxwell*, 177 NW 541, 130 Ia 7, 10 ALR 482.

87a. *Ex parte Leighton*, 14 Mass 207; *Bush v. Pettibone*, 4 NY 300, see 5 Barb 273; *Nutt v. Verney*, 4 TR 121, 100 Eng Reprint 210; *Phillop v. Sexton*, 3 B & P 550, 127 Eng Reprint 297; *Steel v. Alan*, 2 B & P 362, 126 Eng Reprint 1328.

87b. *Bush v. Pettibone*, supra.

87c. *Bush v. Pettibone*, supra.

§ 152. *Entrapment.*—The zeal of officers of the law is commendable; but the reported decisions are a fruitful source of demonstrative evidence of the over-zealousness of officers of the law, who do not find sufficient violations of law upon which to exercise their energy and ingenuity in the way of real criminal acts, that they actually go out and persons under suspicion are entrapped in the commissions of crime, that had it not been for the luring on of the officer of the law would never have occurred to the perpetrators themselves. If the original intent to commit the supposed crime originated in the fertile mind of an overzealous officer, instead of the defendant, whom the officer brings into the proposed criminal enterprise, then the alleged offender is not guilty of an infraction of the law, calling for the visitation of punishment upon him, since the germ of criminal intent from which the alleged crime was hatched would not find incubation in the brain cell of the alleged perpetrator of the crime. If, on the other hand, the officers of the law merely afforded an opportunity for the operation and facilitation of the accused to carry out and consummate some criminal purpose of his own or that found its origin in his, defendant's mind, then the entrapment is no defense. If the officer merely poses as a criminal and takes part in the illegal scheme and criminal purposes of the defendant, this does not prevent the consummated act from being a crime. The cases cited in the footnotes are teeming with illustrations of the application of the principles enunciated in the foregoing text.<sup>88</sup>

88. *Andrews v. United States*, 16 S Ct 798, 162 US 420, 40 L ed 1023; *Butts v. United States*, 273 F 35, 18 ALR 143 and note; *Fettors v. United States*, 260 F 142, cert. den. 40 S Ct 116, 251 US 554, 64 L ed 418; *Goode v. United States*, 16 S Ct 136, 169 US 663, 40 L ed 297; *Grimm v. United States*, 15 S Ct 470, 156 US 604, 39 L ed 550; *Montgomery v. United States*, 16 S Ct 797, 162 US 410, 40 L ed 1020; *Price v. United States*, 17 S Ct 366, 165 US 311, 41 L ed 727; *Robinson v. United States*, 32 F(2d) 505, 66 ALR 468 and note; *Rosen v. United States*, 16 S Ct 434, 480, 161 US 29, 40 L ed 606; *Scott v. United States*, 19 S Ct 209, 172 US 343, 43 L ed 471; *Sorrells v. U. S.* 53 S Ct 210, 287 US 435, 77 L ed 413, 80 ALR 249 and note, 57 F(2d) 973; *Allen v. State*, 40 Ala 334, 91 Am Dec 477; *Peo. v. Hanselman*, 18 P 425, 76 Cal 460, 9 Am St Rep 238; *Peo. v. Lanzit*, 233 P 816, 70 Cal App 148

498; *Connor v. Peo.* 33 P 159, 18 Colo 373, 25 LRA 341, 36 Am St Rep 296; *Lowe v. State*, 32 So 956, 44 Fla 440, 103 Am St Rep 171; *Slaughter v. State*, 38 SE 854, 113 Ga 284, 84 Am St Rep 242; *State v. Mantis*, 187 P 268, 32 Ida 724; *Love v. Peo.* 43 NE 710, 160 Ill 501, 32 LRA 139; *Nixwonger v. State*, 102 NE 135, 149 Ind 653, 46 LRA(NS) 1; *Thompson v. State*, 18 Ind 386, 81 Am Dec 364; *State v. Abley*, 80 NW 225, 109 Ia 61, 46 ALR 802, 77 Am St Rep 520; *State v. Stickney*, 36 P 714, 53 Kan 308, 42 Am St Rep 284; *Hummelshime v. State*, 93 Atl 990, 125 Md 563, Ann Cas 1917E 1072; *State v. Gibbs*, 123 NW 810, 109 Minn 247, 25 LRA(NS) 440 and note; *State v. O'Brien*, 90 P 514, 35 Mont 482, 10 Ann Cas 1006; *State v. Neeley*, 300 P 561, 90 Mont 199; *State v. Wong Hip Chung*, 241 P 620, 74 Mont 523; *French v. State*, 116 So 705, 149 Miss 684; *State v. Hayes*,

§ 153. **Arrests in Connection with Motor Vehicles.**—For an offense committed, in the view or presence of an officer, an arrest may be made by him without a warrant. This may be accepted as a general rule of law. However, the advent of the motor vehicle on the highways of the country has brought about the enactment of some special laws with respect to them.<sup>89</sup> But generally the old rules of law are found readily adjustable to, and serviceable in application to new situations. It may be stated as a general rule that an offense committed in the presence of an officer in connection with the operation of a motor vehicle, in harmony with the above mentioned general rule, authorizes him to make an arrest without a warrant, and if in connection with the use, management, or operation of a motor vehicle, the officer has reasonable cause to believe that a felony has been committed, he may also arrest without a warrant; moreover the motor vehicle laws generally provide for the arrest of offenders without a warrant whether the violation of the law is a felony or a misdemeanor. But generally he may not arrest without a warrant in such cases for traffic violation not committed in his presence.<sup>90</sup>

The rule thus enunciated with respect to the duty and authority of an officer of the law to make an arrest of a party committing a crime in his presence is applicable to the driving of an automobile by an intoxicated person and the authority to arrest such person without a warrant is beyond dispute, provided such driving is a felony or performed in the officer's presence.<sup>91</sup>

16 SW 514, 105 Mo 76, 24 Am St Rep 360; *Camden v. Public Service Railroad Co.* 86 Atl 447, 84 NJL 305, Ann Cas 1914D 1090; *State v. Dougherty*, 96 Atl 56, 88 NJL 209, LRA1916C 991, Ann Cas 1917D, 950; *Peo. v. Gardner*, 38 NE 1003, 144 NY 119, 28 LRA 699, 43 Am St Rep 741; *Peo. v. Jaffe*, 78 NE 169, 185 NY 497, 9 LRA(NS) 263, 7 Ann Cas 348; *Peo. v. Mills*, 70 NE 786, 178 NY 274, 67 LRA 131 and note; *State v. Salisbury Ice and Fuel Co.* 81 SE 737, 950, 166 NC 360, 403, 52 LRA(NS) 216, Ann Cas 1916C 450, 728; *State v. Smith*, 67 SE 508, 152 NC 798, 30 LRA(NS) 946 and note; *State v. Currie*, 102 NW 875, 13 ND 655, 60 LRA 405, 112 Am St Rep 687; *State v. Hoffman*, 160 P 765, 85 Ore 276, 1 ALR 1683; *State v. Hull*, 54 P 139, 33 Or 59, 72 Am St Rep 694; *Com. v. Hollister*, 27 Atl 386, 157 Pa 13, 25

LRA 349; *Bird v. State*, 90 SW 651, 49 Tex Cr 96, 122 Am St Rep 803; *Speiden v. State*, 3 Tex App 156, 30 Am Rep 120; *Stevens v. State*, 110 SW(2d) 906, 133 Tex Cr 333; *Tones v. State*, 88 SW 217, 48 Tex Crim 363, 1 LRA(NS) 1024, 122 Am St Rep 759, 13 Ann Cas 455; *Bauer v. Com.* 115 SE 514, 135 Va 463; *State v. Jarvis*, 113 SE 235, 105 W Va 499; *Topolewski v. State*, 109 NW 1037, 130 Wis 244, 7 LRA(NS) 750, 118 Am St Rep 1019, 10 Ann Cas 627.

89. *Babbitt Motor Vehicle Law*, Sec. 812.

90. *U. S. v. 1 Cadillac Automobile*, 2 F(2d) 886; *U. S. v. Rembert*, 284 F 990; *Curry v. Com.* 250 SW 797, 199 Ky 90; *Peo. v. Averill*, 208 NYS 774, 124 Misc 383; *State v. Shank*, 202 NV 128, 52 ND 91.

91. *Noe v. Monmouth County, Com.* 149

It has been held that it is the duty of an officer under statutory provisions regulating arrests in connection with violations of law respecting the operation of motor vehicles to arrest, without a warrant, one who is guilty of violation of such law, and especially where he refuses to state his name.<sup>91a</sup>

An officer making an arrest in pursuance of statutes regulating motor vehicular travel must take care to strictly follow and comply with the statutory enactment under which he seeks to justify his acts and conduct.<sup>92</sup>

As to whether or not an officer of the law acted upon reasonable grounds, in making an arrest without a warrant where a felony has been committed but not in his presence, is a factual question solvable by a jury.<sup>93</sup>

§ 154. **Validity of Statute Requiring Traffic Officer to Wear Uniform.**—It seems that it is not competent for the law-making power of a state to prescribe a specified uniform and badge that officers shall wear when making an arrest, with or without a warrant, of a person for speeding or violation of other traffic laws.<sup>94</sup>

§ 155. **Right to Shoot at Fleeing Car.**—The law is not any different in respect to making an arrest in connection with the use of a motor vehicle than in other cases; so it may be said that if it is reasonably necessary to effect the arrest of a felon, an officer of the law may use a deadly weapon and may even go to the extent, for that purpose, of shooting into a fleeing car. But it should be carefully noted that no such power exists with respect to an attempted arrest when the party sought to be arrested has committed no greater offense than a misdemeanor and an officer has no authority to discharge a firearm into an automobile whether fleeing or parked when he has no reason to believe the occupant thereof is guilty of no more than a misdemeanor. Speeding does not warrant the use of force or violence to effect an arrest.<sup>95</sup>

An officer undoubtedly may, without a warrant, arrest a person committing a felony or who has committed one or as to a person who he has reasonable cause to believe has committed a felony

*Pleas Court*, 143 Atl 760, 6 NJM 1010, 150 Atl 920, 108 NJL 584.

91a. *People v. Grange*, 190 NYS 573, 116 Misc 523.

92. *State v. Baker*, 128 Atl 888, 3 NJM 532, see however, 133 Atl 785, 102 NJL 349.

93. *Eberhart v. Murphy*, 188 P 17, 150

110 Wash 158; see also, 194 P 415, 113 Wash 449.

94. *Scoggin v. State*, 38 SW(2d) 502, 117 Tex Cr 294.

95. *Peo. v. Klein*, 137 NE 145, 305 Ill 141. See Secs. 124 et seq.; *Wiley v. State*, 170 P 869, 19 Ariz 346, LRA 1918D 373.



though, in fact, innocent. This is as far as he can go with respect to making an arrest in connection with the commission of a felony and if he exceeds the bounds of the authority thus stated and takes human life he is guilty of criminal homicide. So that if an officer has been notified of the commission of the felony and went out to catch the felon and he and his companions shouted at a car some distance away and then shot at it endeavoring to puncture the tires thereof but instead killed an occupant, it appearing that both cars were traveling at about twenty-five miles per hour on a rough road with mufflers cut out and it was found, factually, that an ordinarily prudent person would have perceived the impossibility of the outcries being heard by the occupants of the other car under the particular facts and circumstances surrounding the occurrence and that therefore the means used in trying to stop the car were unlawful, makes such an officer guilty of criminal homicide. It should be observed that officers have no authority to shoot to effect an arrest except in case of a felony and then only if other means have failed.<sup>96</sup>

On the other hand, however, it has been held that an officer will not be held in damages for shooting at an automobile for the purpose of stopping it, and by reason thereof inflicted damages upon the automobile where the driver thereof was in an intoxicated condition.<sup>97</sup>

§ 156. **Duty of Motor Vehicles to Stop on Demand.**—Statutes are generally found making it the duty of a motor vehicle operator to stop on command of an officer, and a refusal is usually punishable as a misdemeanor under the terms of the statutes.<sup>98</sup>

§ 157. **Necessity of Possession of Warrant When Arresting in Connection with Motor Vehicles.**—Where a sheriff and his deputy are attempting to effect an arrest for a misdemeanor allegedly committed by a motor vehicle operator it is sufficient for the deputy to make the arrest even though the warrant is in the possession of the sheriff.<sup>99</sup>

§ 158. **Resisting an Arrest.**—The law with respect to the re-

96. *Wiley v. State*, 170 P 869, 19 Ariz 346, LRA1918D 373. In the cited case, however, it was held the assistants of the deputy sheriff who shot at the car were not guilty, unless there was a previous understanding of the unlawful means to be employed in concert.

97. *Edgin v. Talley*, 276 SW 591, 169 Ark 662, 42 ALR 1194.

98. *Babbitt Motor Vehicle Law*, 4th ed. Sec. 844.

99. *State v. Freeman*, 119 Atl 688, 122 Me 294, 29 ALR 881. See Sec. 133, *supra*.

sistance to an arrest is no different when the party to be arrested is using a motor vehicle in commission of the crime or otherwise than in other cases, and a person named in a warrant as the defendant in resisting may be liable both criminally and civilly. The driver of an automobile who, after having been placed under arrest by an officer of the law, attempted by increasing the speed of the car and struggling with the officer for its control, and thereby flee, the officer having theretofore stepped upon the running board, and in the struggle drove the car against an obstacle resulting in the death of the officer, is liable in civil damages.<sup>1</sup>

Where an officer of the law stepped upon the running board of an automobile with a warrant for the arrest of the driver thereof and announced to him that he was under arrest, this constituted a completed arrest.<sup>2</sup>

The attempt of one in charge of an automobile to drive it across the state line after the sheriff with a warrant for his arrest has stepped upon the running board and informed the driver that he is under arrest constitutes an unlawful attempt to wrest the automobile from the control of the officer, and, if in the ensuing struggle the officer is killed the driver of the motor vehicle is liable criminally and civilly therefor.<sup>3</sup>

§ 159. **Search of Person Arrested.**—Coincidental with and not preceding the making a lawful arrest, the officer has power to search the person of the prisoner and seize any articles connected with the crime or that may be used in identifying the criminal or that might be used in procuring or effecting an escape or to commit acts of violence; and the rule, in this respect, is no different where the arrest grew out of a situation where a motor vehicle was involved.<sup>4</sup>

1. *Weissengoff v. Davis*, 260 F 16, 171 CCA 52, 7 ALR 307; and note 40 S Ct 54, 250 US 674, 63 L ed 1201. See Sec. 122, *supra*.

2. *Weissengoff v. Davis*, *supra*.

3. *Weissengoff v. Davis*, *supra*; *State v. Krakus*, 93 Atl 554, 5 *Boyce* (Del) 326; *Bowlin v. Archer*, 163 SW 477, 157 Ky 540; *Hawkins v. Com.* 14 B Mon (Ky) 395, 61 Am Dec 147 and note; *State v. Evans*, 61 SW 590, 101 Mo 95, 84 Am St Rep 669 and note; *Leger v. Warren*, 62 Ohio St 500, 51 LRA 103 and note. Sec. 147, *supra*.

4. *U. S.—Agnello v. U. S.* (NY) 46 152

S Ct 4, 269 US 20, 70 L ed 145, see also 290 F 671; *Beard v. U. S.* 82 F (2d) 837, 65 App DC 231, cert. den. 56 S Ct 675, 298 US 655, 80 L ed 1381; *Brady v. U. S.* 300 F 540, cert. den. 45 S Ct 99, 266 US 620, 69 L ed 472; *Cardinal v. U. S.* 79 F(2d) 825; *Day v. U. S.* 37 F(2d) 80; *Furlong v. U. S.* 10 F(2d) 492; *Garake v. U. S.* 1 F(2d) 620; *Gerk v. U. S.* 33 F(2d) 485; *Hadley v. U. S.* 18 F(2d) 507; *Keith v. U. S.* 11 F(2d) 933; *Lawson v. U. S.* 9 F(2d) 746; *Marron v. U. S.* 8 F(2d) 251; *Mattus v. U. S.* 11 F(2d) 503; *Nordelli v. U. S.* 24 F(2d) 665; *U. S. v. Kaplan*, 280 F 963; *U. S. v. One*

The fact that the prisoner is arrested for one crime but is formally charged with a different one thereafter does not render illegal

Cadillac Automobile, 2 F(2d) 886; U. S. v. Stafford, 296 F 702; U. S. v. Stick, 19 F(2d) 161; U. S. v. Vatune, 292 F 497; U. S. v. 76 Five-Gallon Kegs, 43 F(2d) 207; Yip Wah v. U. S. 6 F(2d) 478, cert. den. 46 S Ct 336, 270 US 645, 70 L ed 777.

Ala.—Cobb v. State, 97 So 779, 19 Ala App 345, 97 So 783, 210 Ala 252.

Del.—State v. Gulczynski, 120 A 88, 2 WW Harr (Del) 120.

Fla.—Jeffcoat v. State, 138 So 385, 103 Fla 468.

Idaho.—State v. Arnold, 15 P(2d) 396, 52 Idaho 349.

Ill.—People v. Brown, 188 NE 529, 354 Ill 480; People v. Caruso, 171 NE 129, 339 Ill 258; People v. Hord, 160 NE 135, 329 Ill 117; People v. Kiasane, 179 NE 850, 347 Ill 385, 201 Ill App 621; People v. Preston, 173 NE 383, 341 Ill 407, 77 ALR 631; People v. Reid, 163 NE 344, 336 Ill 421; People v. Roberta, 195 NE 253, 352 Ill 189; People v. Swift, 150 NE 263, 319 Ill 359; People v. Wetherington, 180 NE 843, 348 Ill 310.

Ind.—Allgaier v. State, 164 NE 315, 200 Ind 583; De Long v. State, 168 NE 22, 201 Ind 302; Gears v. State, 180 NE 585, 203 Ind 390; Jameson v. State, 149 NE 51, 196 Ind 483; Ryan v. State, 165 NE 772, 89 Ind App 109.

Ky.—Campbell v. Com. 261 SW 1107, 203 Ky 151; Cawood v. Com. 17 SW (2d) 453, 229 Ky 522; Com. v. Phillips, 5 SW(2d) 887, 224 Ky 117; Elswick v. Com. 261 SW 249, 202 Ky 703; Ingle v. Com. 264 SW 1088, 204 Ky 518; Marrs v. Com. 265 SW 459, 205 Ky 18; Patterson v. Com. 267 SW 160, 200 Ky 258; Ragland v. Com. 265 SW 15, 204 Ky 598; Robertson v. Com. 249 SW 1010, 198 Ky 609.

Mich.—People v. Bartoletta, 227 N W 763, 248 Mich 409; People v. Davis, 228 NW 337, 247 Mich 536; People v. Du Shane, 214 NW 944, 240 Mich 35; People v. Herbat, 194 NW 500, 224 Mich 54; People v. Lewis, 257 NW 843, 269 Mich 382.

Minn.—State v. Pluth, 195 NW 789, 167 Minn 145.

Miss.—Baldwin v. State, 167 So 61, 175 Miss 316; Thompson v. State, 121 So 275, 153 Miss 593; Toliver v. State, 98 So 342, 133 Miss 789; Watson v. State, 146 So 122, 166 Miss 194.

Mo.—State v. Long, 80 SW(2d) 154, 336 Mo 630; State v. Rebasti, 267 SW 858, 306 Mo 336.

Mont.—State v. Mullaney, 16 P(2d) 407, 92 Mont 553; State v. Neidamier, 37 P(2d) 670, 98 Mont 124.

N. Y.—People v. Chiagles, 142 NE 583, 237 NY 193, 32 ALR 676, 199 NY S 256, 204 App Div 706, 199 NYS 940, 206 App Div 726; People v. Kalnin, 189 NYS 359; People v. Manko, 189 NYS 357, 196 NYS 944.

N. C.—State v. Godette, 125 SE 24, 188 NC 407.

Ohio.—Dunning v. City of Cincinnati, 21 Ohio NP(NS) 468.

Okla.—Abbott v. State, 235 P 550, 30 Okla Cr 99; Ashby v. State, 243 P 1003, 33 Okla Cr 297; Brannon v. State, 264 P 835, 39 Okla Cr 207; Bullington v. State, 259 P 876, 38 Okla Cr 214; Carter v. State, 279 P 690, 43 Okla Cr 444; Jay v. State, 258 P 1000, 37 Okla Cr 425; Martin v. State, 277 P 950, 43 Okla Cr 273; Miles v. State, 236 P 57, 30 Okla Cr 302, 44 ALR 20; Newton v. State, 223 P 195, 26 Okla Cr 216; Pruitt v. State, 279 P 707, 43 Okla Cr 420; Rhodes v. State, 237 P 812, 46 Okla Cr 219; Strategier v. State, 32 P(2d) 1054, 56 Okla Cr 11; Wallace v. State, 275 P 354, 42 Okla Cr 143; Weber v. State, 281 P 987, 44 Okla Cr 447; Wheeler v. State, 281 P 599, 44 Okla Cr 445; White v. State, 281 P 824, 45 Okla Cr 103; Winiger v. State, 32 P(2d) 952, 56 Okla Cr 20; Woods v. State, 258 P 816, 37 Okla Cr 377.

Or.—State v. Hayes, 249 P 637, 119 Or 554; State v. Laundry, 204 P 958, 103 Or 443, 206 P 290; State v. McDaniel, 237 P 373, 115 Or 187, 231 P 965.

Pa.—Com. v. Keister, 137 A 223, 289 Pa 225.

Tenn.—Goodwin v. State, 257 SW 79, 148 Tenn 682; Hughes v. State, 238

the search of the prisoner or his suitcase or effects.<sup>5</sup> It follows, of course, that arrest for the former mentioned crime must have been legal in order for the search to have been legal.

The right of search extends not only to the person of the prisoner but to his effects as well, as for example, a suitcase in his possession.<sup>6</sup>

In order for the search of prisoner to be legal his arrest must be legal.<sup>7</sup>

For the search of a prisoner or his effects to be legal, it must follow and not precede the arrest. That is, it must be either contemporaneous with the arrest and incidental thereto or take place thereafter.<sup>8</sup>

The right to arrest must exist prior to making a search and if a search is made and by reason of the facts ascertained therefrom an arrest is made, it follows that both the search and the arrest are illegal, and where the search is made of an automobile but before the same is completed an arrest is made by reason of what the

SW 588, 145 Tenn 544, 20 ALR 639; Trousdale v. State, 76 SW(2d) 646, 168 Tenn 210.

Tex.—Green v. State, 2 SW(2d) 274, 108 Tex Cr 664; Hawley v. State, 290 SW 556, 107 Tex Cr 243; Hayis v. State, 28 SW(2d) 556, 115 Tex Cr 644; Hepworth v. State, 12 SW(2d) 1018, 111 Tex Cr 300; Johnson v. State, 42 SW(2d) 421, 118 Tex Cr 293; Levine v. State, 4 SW(2d) 553, 109 Tex Cr 331; Logan v. State, 296 SW 315, 108 Tex Cr 125, 299 SW 264; Moore v. State, 294 SW 550, 107 Tex Cr 24; Nelson v. State, 14 SW(2d) 847, 111 Tex Cr 425; Phoenix v. State, 17 SW(2d) 820, 112 Tex Cr 491; Washington v. State, 296 SW 512, 107 Tex Cr 214; Watson v. State, 10 SW(2d) 113, 110 Tex Cr 416.

Vt.—Holyoke Mut. Fire Ins. Co. v. Horton, 136 A 385, 100 Vt 228.

Wash.—State v. Anderson, 268 P 874, 148 Wash 310, cert. den. 49 S Ct 94, 278 US 650, 73 L ed 562; State v. Britton, 242 P 377, 137 Wash 360, 247 P 9; State v. Deitz, 239 P 386, 136 Wash 228; State v. Gramps, 263 P 951, 146 Wash 509; State v. Innocenti, 16 P(2d) 439, 170 Wash 286.

W. Va.—State v. Hatfield, 164 SE 518, 112 W Va 424.

Wyo.—State v. Munger, 4 P(2d) 1094, 43 Wyo 404; State v. George, 231 P 683, 32 Wyo 223.

5. State v. Hughlett, 214 P 841, 124 Wash 366; State v. McDaniel, 237 P 373, 115 Ore 187, 231 P 965.

6. State v. Hughlett, 214 P 841, 124 Wash 366.

7. People v. Mirbelle, 276 Ill App 533; State v. McBride, 37 SW(2d) 423, 327 Mo 184, 32 SW(2d) 134; State v. Pinto, 279 SW 144, 312 Mo 99; Rasey v. Cicolino, 1 Ohio App 194, 18 Ohio Cir Ct NS 331; Miles v. State, 236 P 57, 30 Okla Cr 302, 44 ALR 129.

8. Donahue v. U. S. 56 F(2d) 94; Henderson v. U. S. 12 F(2d) 528, 51 ALR 420; U. S. v. Swan, 15 F(2d) 598; State v. Pinto, supra; People v. Chiagles, 142 NE 583, 227 NY 193, 32 ALR 676, 199 NYS 856, 204 App Div 706, 199 NYS 940, 206 App Div 726; Coffelt v. State, 254 P 760, 36 Okla Cr 365; State v. Duffy, 295 P 953, 195 Ore 290; State v. McDaniel, 237 P 373, 115 Or 187, 231 P 965; Chapin v. State, 296 SW 1095, 107 Tex Cr 477; Davis v. State, 21 SW(2d) 609, 113 Tex Cr 421; Grimm v. State, 36 SW(2d) 134, 116 Tex Cr 332; Holyoke Mut. Fire Ins. Company v. Horton, 136 Atl 385, 100 Vt 288.

search revealed and then the search finished, the arrest and search are both unlawful.<sup>9</sup>

As already suggested, an illegal arrest cannot be made the basis of a lawful search, even though the illegality consists in an unauthorized arrest without a warrant.<sup>10</sup>

§ 160. Application of Rule with Respect to Seizing Property of a Prisoner.—While there is some conflict in the adjudications with respect to the nature and extent of property that may be seized and taken from a prisoner, yet the sounder and juster rule is that unless such property is in some way connected with, or evidence of, or constitutes the fruits of the particular crime for which the prisoner is arrested, the officer is without right to seize the same or take it from the possession of the arrested party. Some of the cases, however, go upon what is submitted as an unsound basis for the rule and that is that by so taking the property from the prisoner he may be hampered or prevented from interposing a proper defense.<sup>11</sup>

However, the better reason underlying those holdings controverting the officer's right to take property from a prisoner, innocent within itself, and having no connection with the crime, and not evidence thereof, or in connection with the same and having no bearing upon any issue involved in the trial that may follow is this: that the prisoner has not forfeited his rights of citizenship in advance of being convicted, and neither has his right to own property other than of the character mentioned above been in any

9. *Morgan v. State*, 151 NE 98, 197 Ind 374; *State v. McDaniel*, supra.

10. *Baumhoy v. U. S.* 24 F(2d) 512; *Bolt v. U. S.* 2 F(2d) 922, 55 App DC 120; *In re Phoenix Cereal Beverage Co. Inc.* 58 F(2d) 953; *Warwick v. State*, 149 So 219, 104 Fla 393; *People v. Mirbelle*, supra; *Boyd v. State*, 152 NE 278, 198 Ind 55; *Morgan v. State*, supra; *Robinson v. State*, 141 NE 891, 197 Ind 44; *Castillo v. State*, 135 So 205, 160 Miss 473; *Fulton v. City of Philadelphia*, 148 So 346, 108 Miss 30; *State v. Duniwan*, 269 SW 415, 217 Mo App 548; *Boch v. City of Cincinnati*, 183 NE 119, 43 Ohio App 257, 181 NE 879, 124 Ohio St 660, 181 NE 888, 124 Ohio St 667; *McAdams v. State*, 235 P 241, 30 Okla Cr 207; *Smith v. State*, 4 P(2d) 1076, 52 Okla Cr 315; *Sowards v. State*, 259 P 157,

37 Okla Cr 431; *Wallace v. State*, 294 P 108, 49 Okla Cr 281; *State v. McDaniel*, 237 P 373, 115 Or 187, 231 P 965; *Allen v. State*, 197 NW 808, 183 Wis 323, 39 ALR 782.

11. *Ex parte Hurn*, 9 So 515, 92 Ala 102, 25 Am St Rep 23 and note, 13 LRA 120 and note; *People v. Beach*, 113 P 513, 49 Colo 516, 37 LRA(NS) 873; *Stuart v. Harris*, 69 Ill App 688; *Hubbard v. Garner*, 73 NW 390, 115 Mich 406, 69 ASR 580; *Smith v. Jerome*, 93 NYS 202, 47 Misc 22, 16 NY Ann Cas 153; *Morales v. Vivaldi*, 25 Porto Rico 206; *Bevins v. State*, 7 SW(2d) 532, 110 Tex Cr 52; *Palmetto State Bank v. English*, 186 SE 638, 181 SC 69; *Rex v. Burgess*, 7 C & P 488, 32 ECL 722; *Rex v. O'Donnell*, 7 C & P 138, 32 ECL 539.

way impaired. It would be just as reasonable to contend that the officer might take the shoes that the prisoner was wearing or his hat or overcoat or any other of his clothing having no connection with the crime as to assert he may take property of the above character. So it has been held, and upon the soundest considerations and just principles that where a police officer apprehended a person upon a charge of rape, he had no right to take from him a watch and other articles.<sup>12</sup>

Likewise, if the apprehended person were taken on a charge of larceny of a horse and the animal is found in his possession at the time of his arrest, any money found upon his person ought not to be taken away from him by the officer making the arrest.<sup>13</sup>

But, as has already been suggested, it is the officer's right and duty to take from the prisoner any instrumentality or weapon that might enable the prisoner to commit an act of violence upon another, or aid in his escape, or any instrument that could be used in the commission of any crime, such as burglar tools and the like or concealed weapons, letters, documents, or any of the fruits of the crime, or intoxicating liquor, habit forming drugs or narcotics. So too, the officer may take from his prisoner in custody, and hold for the disposition of the court trying the case, any property unlawfully possessed which the officer, upon reasonable grounds and in good faith, believes to be connected with the offense charged, or, probably, with any other offense or any property that serves to furnish a clue to the commission of the crime charged or the identification of the prisoner.<sup>14</sup>

12. *Rex v. Burgess*, supra; *Rex v. Kinsey*, 7 C & P 447, 32 ECL 700.

13. *Rex v. O'Donnell*, supra; *Rex v. Jones*, 6 C & P 343, 25 ECL 465; *Rex v. Barnett*, 3 C & P 600, 14 ECL 730; *Rex v. Johnson*, 11 Mod 61, 88 Eng Reprint 887.

14. *Carroll v. U. S.* 45 S Ct 280, 267 US 132, 69 L ed 543, 39 ALR 790; *Dixon v. U. S.* 7 F(2d) 818; *Estabrook v. U. S.* 28 F(2d) 150; *Ferracane v. U. S.* 47 F(2d) 677; *Furlong v. U. S.* 10 F(2d) 492; *Haggerty v. Ryan*, 53 F(2d) 1012; *Haning v. U. S.* 59 F(2d) 942; *Maynard v. U. S.* 23 F(2d) 141, 57 App DC 314; *Moder v. U. S.* 64 F(2d) 703, 62 App DC 85, 53 S Ct 660, 289 US 739, 77 L ed 1486; *Owsley v. U. S.* 68 F(2d) 162, 54 S Ct 714, 292 US 635, 78 L ed 1488; *Sayers v. U. S.* 2 F(2d) 146; *U. S. v. Charles*, 8 F 156

(2d) 302; *U. S. v. Park Avenue Pharmacy*, 56 F(2d) 753; *U. S. v. Seltzer*, 5 F(2d) 564; *U. S. v. Thiel*, 52 F(2d) 170; *Welsh v. U. S.* 267 F 819, 41 S Ct 6, 254 US 607, 65 L ed 435, 41 S Ct 9, 254 US 637, 65 L ed 451; *Woods v. U. S.* 279 F 706; *Woolfolk v. State*, 8 SE 724, 81 Ga 551; *State v. Gorman*, 104 NW 225, 106 Ia 237; *Ballow v. Com.* 243 SW 922, 195 Ky 722; *Com. v. Phillips*, 5 SW(2d) 887, 224 Ky 117; *Getchell v. Page*, 69 Atl 624, 103 Me 387, 125 Am St Rep 307, 18 LRA(NS) 253 and note; *Callahan v. State*, 162 Atl 850, 163 Md 178; *Newberry v. Carpenter*, 65 NW 530, 107 Mich 507, 61 Am St Rep 346, 31 LRA 163. The right to search and take property to be used as evidence is confined to defendant's property, and not that of a third party; *People v. Burt*, 194

Sometimes the courts, it is submitted, exceed the bounds of reason in attempting to extend the rule to embrace articles and property of a prisoner that cannot, either upon principle or authority, be justified. These courts hold that the officer may take such articles as jewelry or money and the like, and upon the fallacious basis that the prisoner might use the same to effect an escape.<sup>15</sup>

In one jurisdiction the right to take money from the prisoner provided for by statute.<sup>16</sup>

**§ 161. Right to Search and Seize Property from Prisoner More Extensive Than Search Warrant Rights.**—The search of a prisoner when legally arrested and the right to seize property, articles, and effects found upon him or in his possession, within the limits, set out in the next preceding section, is not, it is seen, restricted to the narrow compass in cases with respect to seizure upon a search made under a search warrant. Rather wide latitude is allowed with respect to property that may be seized on arrest but not so with respect to property that may be taken on a search warrant.<sup>17</sup>

**§ 162. Seizure of Slot Machines Illegally Operated; Purpose of.**—Where officers of the law legally arrested a person for an

NW 547, 224 Mich 171; *People v. Cardella*, 207 NW 141, 233 Mich 505; *Cody v. State*, 148 So 627, 167 Miss 150; *Toliver v. State*, 98 So 342, 133 Miss 789; *Holker v. Hennessey*, 42 SW 1090, 141 Mo 527, 64 Am St Rep 524, 49 LRA 165; *State v. Williams*, 14 SW (2d), 434, 328 Mo 627; *State v. Dia. Court etc.* 268 P 501, 82 Mont 515; *State v. Ladue*, 237 P 495, 73 Mont 535; *State v. Neidamier*, 37 P(2d) 670, 99 Mont 124; *State v. Fowler*, 90 SE 408, 172 NC 905; *State v. Godette*, 125 SE 24, 189 NC 497; *Bullington v. State*, 259 P 876, 38 Okla Cr 214; *Coffelt v. State*, 254 P 760, 36 Okla Cr 365; *Cowan v. State*, 262 P 710, 38 Okla Cr 399; *Estayh v. State*, 52 P (2d) 121, 58 Okla Cr 258; *Gaines v. State*, 230 P 916, 28 Okla Cr 353; *McAdams v. State*, 235 P 241, 31 Okla Cr 207; *McDonald v. State*, 13 P(2d) 213, 53 Okla Cr 443; *Patton v. State*, 279 P 694, 43 Okla Cr 436; *Smith v. State*, 4 P(2d) 1076, 52 Okla Cr 315; *Wallace v. State*, 294 P 198, 40 Okla Cr 281; *Keeler v. Myers*, 249 P 637, 119 Ore 517, 47 S Ct 472, 273 US 668, 757, 71

L ed 831; *State v. Lee*, 253 P 533, 120 Ore 643; *Morales v. Vivaldi*, supra; *State v. Chester*, 129 Atl 596, 46 RI 485; *Palmetto State Bank v. English*, supra; *Bevins v. State*, 7 SW(2d) 532, 110 Tex Cr 52; *Melton v. State*, 10 SW(2d) 384, 110 Tex Cr 439; *West v. State*, 8 SW(2d) 119, 110 Tex Cr 290; *Holyoke Fire Ins. Company v. Horton*, 136 Atl 385, 100 Vt 228; *State v. Britton*, 242 P 377, 137 Wash 360, 247 P 9; *State v. Brown*, 132 SE 368, 101 W Va 160; *State v. Hammond*, 122 SE 363, 96 W Va 98; *Wiggin v. State*, 206 P 373, 28 Wyo 480.

15. *Commercial Exchange Bank v. McLeod*, 19 NW 329, 27 NW 919, 65 Iowa 665; *Holker v. Hennessey*, supra; *Closson v. Morrison*, 47 NH 482, 93 Am Dec 459; *O'Connor v. Bucklin*, 59 NH 589; *Palmetto State Bank v. English*, 168 SE 638, 181 SC 69.

16. *State v. Burns*, 74 P 983, 27 Nev 289.

17. *People v. Chiagles*, 142 NE 583, 237 NY 193, 32 ALR 676, 199 NYS 256, 204 App Div 706, 199 NYS 256, 206 App Div 726.

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offense committed in their presence, the offense being illegal operation of slot machines, such machines could only be held, in the absence of statutory authority to the contrary, for the purpose of using them as evidence against the defendant and for no other purpose.<sup>18</sup>

But in the absence of an arrest lawfully made the right to seize and search a motor vehicle does not exist unless, of course, the officer is possessed of a search warrant authorizing the same. It is generally held that motor vehicles and other instrumentalities of conveyance are within the constitutional ambit against illegal searches and seizures.<sup>19</sup>

**§ 163. Duty of Officer with Respect to Prisoner's Property.**—An officer making an arrest may be under duty in some circumstances to take proper care of the prisoner's property and effects, such as would seem to be dictated by exercise of common sense and ordinary prudence, and if the arresting officer does not see fit to do so, he would, at least be under duty to permit the prisoner to make arrangement therefor, but under ordinary circumstances the officer may not be charged with such duty.<sup>20</sup>

So a deputy sheriff who arrested a motor vehicle driver without a warrant, and without reasonable cause, is responsible for the failure to take care of the motor vehicle and then he and the sheriff would be liable for resulting loss for such failure.<sup>20a</sup>

**§ 164. Factual Question with Respect to Taking Prisoner's Property.**—Whether or not money or other property taken from a prisoner is in fact a part of the fruits of the crime or whether or not the taking is justified in a particular case, and as to whether or not the officer exercised good faith or acted unreasonably or unjustifiably, are all questions of fact that should be submitted to the jury for determination when made an issue in a case.<sup>21</sup>

18. *Haverstick v. State*, 147 NE 625, 196 Ind 145; *Patrick v. Com.* 250 SW 507, 199 Ky 83; *Toliver v. State*, 98 So 342, 133 Miss 789; *Hughes v. State*, 238 SW 588, 145 Tenn 544, 20 ALR 639; *State v. Hughlett*, 214 P 841, 124 Wash 366.

19. *Carroll v. U. S.* 45 S Ct 280, 267 US 132, 69 L ed 543, 39 ALR 790; *Tranum v. Stringer*, 113 So 541, 216 Ala 522; *People v. Montgares*, 168 NE 304, 336 Ill 458; *Robinson v. State*, 141 NE 891, 197 Ind 144; *People v. Miller*, 222 NW 151, 245 Mich 115; 158

*State v. Pigg*, 278 SW 1030, 312 Mo 212; *Strong v. State*, 274 P 890, 42 Okla Cr 114; *Sullivan v. State*, 256 P 654, 38 Okla Cr 200; *Houck v. State*, 16 Ohio App 209, aff. 106 Ohio St 195, 140 NE 112; *State v. De Ford*, 250 P 220, 120 Ore 444; *Tendra v. State*, 13 SW 849, 111 Tex Cr 627; *Wilder v. Miller*, 208 NW 865, 190 Wis 136.

20. *Folson v. Piper*, 186 NW 28, 192 Iowa, 1056.

20a. *Whitehead v. Stringer*, 180 P 486, 106 Wash 501, 5 ALR 358.

21. *Stuart v. Harris*, 69 Ill App 668;

§ 165. **Responsibility of One Procuring an Arrest.**—An insurance company or other person may be liable along with an officer of the law for false imprisonment, assault and battery, or other tort that may result from making an arrest. An insurance company whose agent assisted an officer in making an arrest for the alleged theft of an automobile may be liable along with all other participants therein.<sup>22</sup>

§ 166. **Arrest without a Warrant Generally Considered.**—Except in so far as restraints are imposed upon the right and duty to make an arrest without a warrant, a statute may authorize such without a warrant, but care must be taken by the lawmakers to not impinge upon the constitutional rights and guaranties of the citizen.<sup>23</sup>

Under the above mentioned rule with respect to reasonable statutory grants of powers to arrest without a warrant, it may be illustrated by a statute requiring a nonresident driver of a motor vehicle to exhibit his driver's license on demand of an officer within the state, and authorizing an arrest without a warrant where a compliance with such demand was refused, is not unreasonable.<sup>24</sup>

Likewise a statute granting certain powers to traffic officers with respect to making arrests with or without a warrant when confined to matters properly pertaining to lawful enforcement of traffic laws and regulations does not infringe any provisions of the organic law.<sup>25</sup>

The validity of a statute authorizing arrest without a warrant of a person transporting liquor does not contravene the constitutional exercise of police power.<sup>26</sup>

But it is submitted that a sounder and better rule is enunciated by the Supreme Court of Kansas to the effect that a statute essaying to confer upon police officers plenary powers with respect to arrests with or without a warrant for misdemeanors not committed within their view or presence, and merely on suspicion wherein it was held to be within the ambit of the constitutional restrictions laid against legislative enactments and was adjudged invalid.<sup>27</sup>

Closson v. Morrison, 47 NH 482, 93 Am Dec 459.

22. Hines v. Firemen's Fund Insurance Co. 235 SW (Mo App) 174.

23. Childers v. State, 47 So 70, 156 Ala 96; Burroughs v. Eastman, 59 NW 817, 101 Mich 419, 45 ASR 419 and note, 24 LRA 859 and note; State v. Byrd, 51 SE 542, 72 SC 104.

24. Pine v. Okzewski, 170 Atl 825,

112 NJL 429, see however 168 Atl 48, 111 NJL 172; U. S. v. Batallones, 23 Philippines 42.

25. State v. Smith, 101 So 350, 88 Fla 151.

26. Com. v. Sullivan, 91 Pa Super 544.

27. In re Kellam, 41 P 960, 55 Kan 700.

Heed should ever be paid to the voice of common law as it has echoed down through the ages, loudly proclaiming in the interest of the rights of the citizen, that it must not be forgotten that there can be no arrests without due process of law. An arrest without warrant has never been lawful except in those cases where the public security required it, and this has been confined to felonies and in cases of breach of the peace committed in the presence of the officer.<sup>28</sup>

As a general rule at common law, an arrest could not be made without a warrant. If a felony was committed or breach of the peace threatened or committed within the view or presence of the officer authorized to arrest, it was his duty to arrest without a warrant and carry the defendant before a magistrate without unnecessary delay, or if a felony had been committed and there was reasonable cause to believe that a particular person was the offender, he could be arrested without a warrant, but in our time the matter of arrests is largely the subject of statutory regulations and in the main affirmatory of these salutary rules of the common law.<sup>29</sup>

Where the matter of arrest, without a warrant, is regulated by valid statutory enactments it then becomes the duty of the officer upon occasion arising bringing it within the statute to make an arrest without a warrant, but, in all such cases whoever arrests without a warrant must take care that he is within the statute authorizing his course of conduct for he acts at his peril. Any arrest without a warrant not sanctioned by statutory enactment or the rules of common law is an illegal invasion of the rights of the party taken into custody, for which the person making the arrest may be re-

28. In re Way, 1 NW 1021, 41 Mich 299.

29. Cunningham v. Baker, 16 So 68, 104 Ala 160, 83 Am St Rep 27.

Missouri seems to have overridden the common law safeguards and recognized constitutional guaranties of the rights and liberties of the citizen when it enacted a statute authorizing arrests to be made by police officers of certain designated cities upon reasonable grounds of mere suspicion. State v. Boyd, 84 SW 191, 108 Mo App 518; State v. Grant, 76 Mo 238; State v. Hancock, 73 Mo App 19; Wehmeyer v. Mulvihill, 130 SW 681, 150 Mo App 197; Burns v. Erben, 40 NY 463, 24 160

NY Super Ct 555, 26 How Pr 273; Holley v. Mix, 3 Wend(NY) 350, 20 Am Dec 702.

A less drastic statute than that of Missouri was enacted in Texas, authorizing a magistrate to make an arrest without a warrant where a person was threatening to take the life of another, but this grant of power under such statutory authority did not embrace peace officers, since they are not regarded as magistrates. The extent of the magistrate's power under this statutory enactment was to take only such measures to effectively prevent the execution of the threat. Allen v. State, 66 SW (Tex Cr) 671.

quired to respond either civilly or criminally, or both, as the facts of the particular case warrant.<sup>30</sup>

The right to arrest a person without a warrant is an exception to the general rule, and the conditions under which it is allowable must exist and the law authorizing it must be strictly followed or it is unlawful. The liberty of persons is too sacred to be interfered with without the sanctions with which the law guards it.<sup>31</sup>

One making an arrest without a warrant has the direct obligation of knowing that an offense has been committed in his presence.<sup>32</sup>

The rule authorizing an arrest without a warrant where an offense is committed in his presence is not satisfied where the officer may think an offense is being committed in his presence, or that he has reasonable cause to believe an offense has been committed in his presence.<sup>32a</sup>

An officer of the law cannot assert the right to arrest without a warrant on the basis that an offense has been committed in his presence where he provokes or brings about the commission of the offense.<sup>33</sup> At any rate, the statutory right to arrest without a war-

30. *Carico v. Wilmore*, 51 F 196; *Collier v. Vaccaro*, 51 F(2d) 17 modifying 38 F(2d) 862; *Holmes v. U. S.* 56 App DC 183, 11 F(2d) 569; *In re Kosopud*, 272 F 330; *McWalters v. U. S.* 6 F(2d) 224.

31. *Cunningham v. Baker*, 16 So 68, 104 Ala 160, 53 Am St Rep 27; *Mangino v. Todd*, 98 So 323, 19 Ala App 480; *Wilson v. Orr*, 97 So 133, 210 Ala 93; *Adair v. Williams*, 210 P 853, 24 Ariz 422, 26 ALR 278 and note; *Ex parte Ajuria*, 207 P 516, 189 Cal 799; *McKenna v. Whipple*, 118 Atl 40, 97 Conn 605; *Sims v. Smith*, 161 Atl 239, 115 Conn 279; *Dixon v. State*, 76 SE 794, 12 Ga App 17; *Morgan v. State*, 151 NE 98, 197 Ind 374; *Fitzpatrick v. Com.* 275 SW 819, 210 Ky 385; *Simmons v. Com.* 262 SW 972, 203 Ky 621; *Vinson v. Com.* 293 SW 984, 219 Ky 482; *People v. Bondoni*, 248 NW 027, 263 Mich 295; *People v. Ward*, 196 NW 971, 226 Mich 45; *State v. Bradshaw*, 161 P 710, 53 Mont 96; *State v. Dis. Court*, 232 P 201, 72 Mont 213; *Webb v. Town of Sardis*, 108 So 442, 143 Miss 92; *State v. DeHart*, 129 Atl 427, 3 NJM 71; *People v. Henderson*, 235 NYS 173, 134 Misc 228; *Zuker v. Zarembovitz*, 168

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NYS 805, 181 App Div 288; *Matthews v. State*, 282 P 180, 45 Okla Cr 110; *Smith v. State*, 244 P 52, — Okla Cr —; *Martin v. Cambas*, 293 P 601, 134 Ore 257; *Com. v. Smith*, 43 Pa Co 93; *Com. v. Krubeck*, 23 Pa Co 35; *Callicut v. State*, 68 SW(2d) (Tex Cr) 1047; *Roberts v. State*, 17 SW(2d) 42, 112 Tex Cr 429; *Texas etc. Railway Co. v. Parsons*, 109 SW 240, affirmed 102 Tex 157, 113 SW 914, 132 ASR 857; *Welchek v. State*, 247 SW 524, 93 Tex Cr 271; *Woods v. State*, 46 SW(2d) 704, 119 Tex Cr 43; *Byrd v. Com.* 164 SE 400, 158 Va 897; *Mazzolini v. Gifford*, 98 Atl 904, 90 Vt 352; *Hoch v. State*, 225 NW 191, 199 Wis 63.

32. *Ford v. Oceanic Steamship Co.* 3 Haw Fed 239.

32a. *State v. Small*, 169 NW 649, 184 Ia 382.

33. *Scott v. Feilschmidt*, 182 NW 382, 191 Ia 347. In this case the officer accosted the plaintiff and thereby provoked the difficulty, the plaintiff was not violating any law, nor was she suspected of having committed a felony; there was no lawful reason for the officer to have accosted her under these circumstances, he provoked the commission of the alleged offense 161

rant will be strictly construed against the assertion or exercise of the power.<sup>34</sup> It should be noted, however, that where the party arrested voluntarily submits to the officer's custody or surrenders himself on arrest, no necessity for a warrant exists and he may not thereafter complain.<sup>35</sup>

§ 167. Arrest on Direction of the Court.—Where an offense is committed in the presence of the court regardless of whether or not it is a court of justice of the peace, trial court, or court of last resort, the court may order an officer of the law to arrest the offender and in case he escapes the officer may pursue the offender and retake him without warrant or other authority than the verbal direction to him by the court, and if, in the pursuit it becomes necessary to force an entrance in a building, the verbal direction so given is sufficient authority so to do after the refusal of demand for admission. Likewise, if in the pursuit and the officer's endeavor to prevent an escape, the prisoner assaults or beats the officer such conduct constitutes an assault and battery upon the officer in the discharge of his duty carrying with it a visitation on the offender the punishment that is provided by law for that offense.<sup>36</sup>

The grade of the offense for which the court directs an arrest to be made where it is committed in its presence is immaterial. In this connection it may be stated that trial court has the undoubted right to order the sheriff to make an arrest of a witness who has committed perjury in the presence of the court.<sup>37</sup>

On the other hand, the officer is not justified in making an arrest upon the verbal direction of the court unless the offense was committed in the court's presence and it is important that the officer know that the offense for which he is directed to make an arrest was so committed.<sup>38</sup>

The authority of a justice of the peace to verbally direct an arrest to be made springs from a discharge of his duty as a conservator of the peace.<sup>39</sup>

The power to order an arrest for an offense committed in the

in his presence; *Leighton v. Getchell*, 169 NW(1a) 649.

34. *Rodgers v. Schroder*, 287 SW 861, 220 Mo App 575.

35. *Taft v. Hyatt*, 181 P 561, 105 Kan 35, 180 P 213; *People v. Lowerie*, 128 NW 741, 163 Mich 514; *People v. Bradley*, 111 NYS 625, 58 Misc 507; *State v. Cody*, 241 P 983, 116 Ore 500.

36. *Holcomb v. Cornish*, 8 Conn 376; *Lancaster v. Lane*, 19 Ill 242; *O'Brian* 162

*v. State*, 12 Ind 369; *Com. v. McGahey*, 11 Gray(Mass) 194; *State v. Shaw*, 25 NC 20; *Forriat v. Leavitt*, 62 NH 481; *Johnston v. Moorman*, 80 Va 131.

37. *Lindsay v. People*, 67 Bar 548, 63 NY 143.

38. *Forbes v. Lloyd, Jr* R 10 CL 652; *Maloney v. French, Jr* R 3 CL 391.

39. *Hale PC* 86, 4 Black Comm. 292; *Com. v. McGahey*, supra.

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presence of the court is the same whether the offender is sane or insane.<sup>40</sup>

**§ 168. On Whom Burden of Proof Rests as to Legality of Arrest.**—An officer or other person making an arrest without a warrant should exercise care and proceed with caution lest he should transcend the legal bounds of the exercise of lawful authority. Close observance of this rule becomes more important when it is borne in mind that a person making or causing an arrest without a warrant has the burden to prove the legality thereof.<sup>41</sup>

**§ 169. Arrest for Crime Committed in the Presence of an Officer.**—An officer may, without a warrant, arrest a person for public offense committed or attempted in his presence. That means that the offense or the facts constituting the offense must be revealed in the presence of the officer. An officer cannot lawfully arrest a person without a warrant for the purpose of searching him and ascertaining whether or not he has violated the law, and this is true even if the person were in fact violating the law since the offense was not in legal contemplation committed in the presence of the officer and such an arrest is unauthorized where the facts constituting the violation of law are incapable of being observed or are not in fact observed by the officer. Differently stated, the rule is that the offense must not only be committed in the officer's presence but must be observed by him.<sup>42</sup>

Where an officer could not observe and become cognizant of an act constituting an offense by the use of his senses, then it is not committed in his presence so as to authorize a search of the defendant without a warrant.<sup>43</sup>

The rule requiring the offense to be committed in the presence or view of an officer is not satisfied by merely knowing facts that would create a reasonable suspicion of the commission of the offense as, for instance, seeing what is thought to be a bottle pro-

40. *Lott v. Sweet*, 33 Mich 308; *Van Deusen v. Newcomer*, 40 Mich 90.

41. *Ford v. Oceanic Steamship Co.* 3 Haw F 239.

42. *People v. Johnson*, 48 NW 870, 88 Mich 175, 24 ASR 116, 3 LRA 163; *State v. Pluth*, 195 NW 789, 157 Minn 145; *Halton v. State*, 50 P(2d) 744, 58 Okla Cr 117; *Marple v. State*, 1 P(2d) 836, 51 Okla Cr 240; *Wallace v. State*, 294 P 198, 49 Okla Cr 281; *Sow-*

*ard. v. State*, 251 P 157, 37 Okla Cr 116; *Welles v. State*, 258 P 285, 37 Okla Cr 305; *Tucker v. State*, 71 P(2d) 1092, 62 Okla Cr 406; *Leary v. State*, 67 P(2d) 972, 61 Okla Cr 298; *Kennington, Saenger, Inc., v. Wicks*, 151 So 549, 168 Miss 566; *Hall v. State*, 10 Tenn App 287; *Hughes v. State*, 238 SW 588, 145 Tenn 544, 20 ALR 639.

43. *Smith v. State*, 58 P(2d) 347, 59 Okla Cr 312.

truding from the pocket of a person will not justify the arrest of such person without a warrant upon the assumption that he possesses intoxicating liquor in violation of law.<sup>44</sup>

Where an officer makes an arrest upon the assumption that the driver of a motor vehicle was violating the law by driving such motor vehicle with license tag thereon belonging to another, which conduct was denounced as a crime under a statutory provision in the particular jurisdiction, and it was found upon searching the automobile that it contained intoxicating liquor in violation of law, the search was illegal and the fruits thereof should have been excluded when offered in evidence because the officer did not know and could not tell nor observe that the license tag was registered in another's name and had only been advised theretofore that such was the case.<sup>45</sup>

As already suggested, the officer being located where he could see the crime if he availed himself of his opportunities or unconsciously being present at a time and place where a crime is being committed will not authorize an arrest without a warrant. He not only must be where he can see a crime being committed but must see or perceive by his senses the transaction constituting the commission of the crime.<sup>46</sup>

**§ 170. What Is in the Presence of the Officer.**—It is not necessary that the officer has been apprized of the commission of the crime in his presence by his sense of sight, it is sufficient if the fact of such commission is communicated to him by any of his senses.<sup>47</sup>

44. *Snyder v. U. S.* 285 F 1; see however 278 F 650; *Hughes v. State*, 58 SE 390, 2 Ga App 29, the last mentioned case involved the carrying of a concealed weapon.

45. *Washington v. State*, 145 So 736, 167 Miss 226.

46. *Douglas v. State*, 110 SE 168, 152 Ga 379; *Ramsey v. State*, 17 SE 613, 92 Ga 53; *Dilger v. Com.* 11 SW 651, 88 Ky 550, 11 Ky L Rep 67; *People v. Bartz*, 19 NW 161, 53 Mich 493; *Fulton v. City of Philadelphia*, 148 So 346, 168 Miss 30; *State v. McAfee*, 12 SE 435, 107 NC 812, 10 LRA 607; *Welles v. State*, 258 P 283, 37 Okla Cr 305; *Lamb v. State*, 60 P(2d) 219, 59 Okla Cr 360; *Brown v. Wallis*, 101 SW (Tex Civ App) 1068; *Russell v. State*, 30 SW 674, 37 Tex Cr 314; *U. S. Fidelity & Guaranty Co. v. Henderson*, 203 SW (Tex Civ App) 339; see

however, 10 SW(2d) 534; *Smith v. State*, supra.

47. *McBride v. U. S.* 284 F 416, 287 F 214, cert. den. 43 S Ct 359, 261 US 614, 67 L ed 827; *Garske v. U. S.* 1 F(2d) 620; *Kelly v. U. S.* 61 F(2d) 843, 86 ALR 336; *Peru v. U. S.* 4 F(2d) 881; *Weaver v. Com.* 277 SW 1021, 211 Ky 723; *Puckett v. Com.* 276 SW 809, 210 Ky 764; *Ingle v. Com.* 204 SW 1088, 204 Ky 518; *Campbell v. Com.* 261 SW 1107, 203 Ky 151; *Elswick v. Com.* 261 SW 249, 202 Ky 703; *Silverstein v. State*, 6 Atl(2d) 465, — Md —; *State v. Dis.* Ct. 232 P 201, 72 Mont 213; *Mosier v. State*, 56 P(2d) 908, 49 Okla Cr 106; *Gragg v. State*, 90 P(2d) 454, — Okla Cr —; *State v. McDaniel*, 237 P 373, 115 Ore 187, 231 P 965; *Clark v. State*, 35 SW(2d) 420, 117 Tex Cr 163; *Pitta v. State*, 263 SW 1059, 97



But the rule requires more than that the officer thinks an offense is being committed in his presence or that he has reasonable cause to believe an offense has been committed in his presence, and unless he knows by his senses such offense is being or has been committed in his presence, the right of arrest does not exist except in cases of felony.<sup>47a</sup>

It has been held that it is the well established doctrine throughout the United States that for a crime which officers have probable cause to believe is being committed in their presence, though it be a misdemeanor, duly authorizes them to make an arrest without a warrant. The probable cause that would justify an arrest for a misdemeanor without a warrant must be a judgment based on personal knowledge acquired at the time, through the senses or inferences properly to be drawn from the testimony of the senses. Mere suspicion is not enough to justify an arrest without a warrant for a misdemeanor and a search by force of the person arrested.<sup>48</sup>

It is submitted that the learned court in so holding was engaging in a mere logodaedaly; to say in one breath that as to when an officer may decide an offense is being committed according to the testimony of his senses and then follow it up to say that he cannot arrest on mere suspicion is too abstruse for the comprehension of either the lay or the trained mind and to expect officers of the law who are untrained in fine distinctions of logic as a rule to know when they are acting upon inferences drawn from the testimony of their senses and when they are acting upon a mere suspicion is expecting too much at their hands.

Within the same class of unsound adjudications follows the holding that the offense of carrying a concealed weapon may be committed in the officer's presence justifying an arrest without a warrant where the officer could see the imprint of the weapon in the defendant's pocket.<sup>49</sup>

Tex Cr 642; Yallicker v. Com. 170 SE 734, 161 Va 1014; Quivers v. Com. 115 SE 504, 135 Va 671; State v. Hatfield, 164 SE 518, 112 W Va 424; State v. Lutz, 101 SE 431, 85 W Va 330; State v. Fidelity & Casualty Co. 199 SE 844, — W Va —; Baldwin v. State, 167 So 61, 175 Miss 316.

47a. See Price v. Fehan, 79 Atl 68, 84 Conn 164, 34 LRA(NS) 1182 and note, Ann Cas 1912B 1183.

See Sec. 166, note 32a, supra.

See also, Snyder v. Thompson, 112 NW 239, 134 Ia 725; Stearns v. Titus, 85 NE 1077, 193 NY 272.

48. People v. Eposito, 194 NYS 326, 118 Misc 167; Garske v. U. S. supra; Campbell v. Com. supra; Baldwin v. State, supra.

49. Robinson v. Com. 268 SW 840, 207 Ky 53.

See also, State v. Zupan, 283 P 671, 155 Wash 80, apparently in accord with Robinson v. Com. supra. But see note 44, supra.

It is true enough that in the case of Robinson v. Commonwealth the officer testified that he could see the imprint well enough to tell that it was a bottle but the giving of such conclusion is far from the factual situation necessary to sustain the invasion of the rights of the citizen to make an arrest without a warrant. Indeed the length to which some courts go to sustain an illegal arrest surpasseth all human understanding. So it has been held that where an officer observed a defendant with a paper sack and the neck of a bottle protruding therefrom, the time and the place where the officer had theretofore been informed that the defendant proposed to make a sale of liquor and the defendant fled hurriedly, such officer was justified in inferring that the bottle contained whiskey and thus the arrest was authorized.<sup>50</sup>

How any such conclusion could ever be reached we submit is one of those rules of judicial logic that is too deep for our plodding comprehension. Such decisions as these are only explainable upon the assumption that the learned court receive their judicial training in a prosecutor's office.<sup>51</sup> There can be no quarrel with the rule holding that the officer may become aware that an offense is being committed in his presence by the exercise of his sense of smell or hearing as well as sight.<sup>52</sup>

The fact that the officers of the law used a searchlight to observe the commission of the crime in their presence is not material with respect to their authority to make arrest therefor without a warrant.<sup>53</sup>

It is in the presence of the officer, within the meaning of the rule we have under consideration, where a scientific instrumentality is used to locate and determine the commission of a crime and place thereof. As, for instance, where officers of the law employ an instrumentality to determine by wave length the locality of an illegally operated radio station and heard messages over a radio

50. Baldwin v. State, supra.

51. The above citation cannot possibly be harmonized with Snyder v. U. S. 285 F 1, reversing U. S. v. Snyder, 278 F 650; the learned court of Mississippi seems to have put upon the same plane what the officer heard and what he saw and extracted from the testimony of his senses. It is just a step to holding that the officer may draw from the testimony of his senses that a crime is being committed in his presence where all of the evidence sup-

plied to his senses is purely hearsay and information of third parties.

52. Rocchia v. U. S. 78 F(2d) 960; Wida v. U. S. 52 F(2d) 424; Safarik v. U. S. 60 F(2d) 802, 63 F(2d) 369; Spires v. Com. 269 SW 532, 207 Ky 455; State v. Peters, 242 SW (Mo) 894; State v. Quartier, 236 P 740, 114 Ore 657; State v. Walker, 296 P 850, 135 Ore 680; Callicut v. State, 68 SW(2d) (Tex Cr) 1047; State v. Secrest, 220 P 744, 131 Wash 217.

53. Safarik v. U. S. supra.

receiving set being transmitted therefrom. There is no requirement with respect to distance an officer may have to travel to authorize an arrest without a warrant.<sup>54</sup> The particular offense mentioned above was committed in the officer's presence when he heard the illegal broadcast and determined by the use of the instrument the locality of the illegally operated station. In these circumstances distance seems to be immaterial. That the offense above mentioned was committed in the officer's presence, when he heard the broadcast, cannot be doubted.

If an officer of the law hears a disturbance and proceeds to the place thereof, it may be said that the offense is committed in his presence empowering him to make an arrest without a warrant.<sup>55</sup>

It is particularly true that an officer may make an arrest when he hears a disturbance and proceeds to the locality thereof and the offense is still being continued or has not been completed at the time of the officer's arrival.<sup>56</sup>

Where an officer is sufficiently near to the place of the commission of an assault and battery that he could hear the conversation by the involved parties as well as the sound of the blow that was struck, he may make an arrest without a warrant, since a breach of the peace as well as assault and battery is being committed in his presence though by reason of the darkness he could not see the parties involved therein.<sup>57</sup>

If the officer comes upon the offender before the offense is consummated as a larceny before he has taken the goods away, that is sufficient to make an arrest without a warrant.<sup>58</sup>

A safe guide to follow, is that if the officer as a witness could testify from actual knowledge to every element of the offense then the offense has been committed in his presence and this is true though the offense is of a character that it may take a series of acts to consummate it, and, also a considerable space of time such as in vagrancy.<sup>59</sup>

**§ 171. The Offense Must Be Committed in the Presence of the Arresting Officer.**—It is not sufficient, where the offense is committed

54. Higby v. Pa. R. R. Company, 58 Atl 858, 209 Pa 452; People v. Bartz, 19 NW 181, 53 Mich 493; Dunning v. City of Cincinnati, 21 Ohio NP(NS) 463; Kennington, Saenger, Inc., v. Wicks, 151 So 549, 168 Miss 566; U. S. v. Harnish, 7 F Supp 305.

55. Hawkins v. Lutton, 70 NW 483,

95 Wis 492, 60 ASR 131; Kennington, Saenger, Inc., v. Wicks, supra.

56. Kennington, Saenger, Inc., v. Wicks, supra.

57. State v. McAfee, 12 SE 435, 107 NC 812, 10 LRA 607.

58. State v. Grant, 76 Mo 236.

59. People v. Kraig, 91 P 997, 152 Cal 42.

in the presence of one officer, and another of the same grade, as police officers or deputies sheriff and the like, to make the arrest, the offense not being committed in the presence of the latter. But the rule is different where an officer who is aiding in making an arrest is acting under the orders of his superior officer who is present, the deputy or assistant is justified in so doing in the absence of a warrant, although the offense was not committed in his presence, but in the presence of his superior officer.<sup>60</sup>

**§ 172. Admission of Defendant Sufficient to Make Commission of Offense in Presence of Officer.**—Where the defendant admits to an officer of the law that he is violating the law at the time of such arrest it seems that is sufficient for the officer to act upon in making an arrest without a warrant on the basis that an offense is being committed in his presence, where the arrest does not depend upon such admission alone, as for instance, where a defendant admitted that he possessed intoxicating liquor in violation of law and there were visible indications thereof.<sup>61</sup>

An officer is authorized to arrest one without a warrant for driving an automobile while intoxicated where he admits that he has been driving a motor vehicle immediately before and it is clear that he is intoxicated at the time.<sup>62</sup>

So too, an officer may arrest one for driving a motor vehicle while intoxicated where he not only admits that he has been driving immediately preceding the making of such admission but thereafter starts the engine and attempts to drive again.<sup>63</sup>

But as to what constitutes an admission of the commission of the crime is a matter of considerable importance and is one that the

60. People v. Kraig, 91 P 997, 152 Cal 42; Roberson v. State, 28 So 424, 42 Fla 223.

61. Bell v. U. S. 285 F 145, cert. den. 43 S Ct 521, 262 US 744, 67 L ed 1211. But see note 66a, infra, this section. U. S.—Kaiser v. U. S. 60 F(2d) 410, cert. den. 53 S Ct 118, 287 US 654, 77 L ed 565; Peterson v. U. S. 297 F 1000.

Del.—State v. Gulczynski, 120 A 88, 2 WW Harr 120.

Ga.—Weatherington v. State, 79 SE 240, 13 Ga App 408.

Ind.—Ryan v. State, 165 NE 772, 89 Ind App 109; Drake v. State, 165 NE 757, 201 Ind 235; Moorehead v. State (Ind) 183 NE 801, 204 Ind 307.

Md.—Heyward v. State, 158 A 897, 161 Md 685.

Mich.—People v. Herbat, 194 NW 500, 224 Mich 54.

Miss.—Williamson v. State, 105 So 479, 140 Miss 841.

Mont.—State v. Uotilla, 229 P 724, 71 Mont 351.

N. J.—State v. Murphy, 134 A 900, 4 NJM 957.

Okla.—Love v. State, 299 P 232, 61 Okla Cr 6; Weber v. State, 281 P 987, 44 Okla Cr 447; Miles v. State, 236 P 007, 31 Okla Cr 4; Walker v. State, 230 P 191, 31 Okla Cr 326.

Tex.—Johnson v. State, 42 SW(2d) 421, 118 Tex Cr 293.

62. State v. Murphy, 134 A 900, 4 NJM 957.

63. State v. Ray, 133 A 486, 4 NJM 493.

officer, before making an arrest, should consider with caution. Where a defendant in a vehicle was stopped by the officers and they made inquiry as to the odor of whiskey and he replied that they had him and offered them whiskey to turn him loose was sufficient to authorize his arrest without a warrant upon the charge of transporting intoxicating liquor in violation of law.<sup>64</sup>

On the other hand, where an officer of the law called to a man carrying a sack and directed him to stop and the party, dropping the sack, answered that they had him was insufficient to constitute the commission of an offense in the officer's presence justifying an arrest without a warrant.<sup>65</sup>

So, too, an admission of a commission of offense elicited from the accused by an invasion of his person by the officer as by slapping his pockets will not measure up to the requirement that the offense be committed in the officer's presence, even by such acts the officer discovered that the accused had possession of intoxicating liquor in violation of law, as well as the possession of a deadly weapon. The officer cannot, by illegal acts, discover the commission of an offense and then make an arrest without a warrant upon the assumption that he has witnessed the commission of the crime.<sup>65a</sup>

And a mere admission of the defendant that he is committing crime will not authorize his arrest on the theory a crime is being committed in the officer's presence, there being no more basis for the arrest than the bare admission of the defendant.<sup>66</sup>

**§ 173. Officers Have No Right to Make an Arrest When They Violate the Law to Be Present at the Commission of a Crime.**—Officers of the law have no right to make an arrest for the alleged commission of a crime in their presence, when they violate the law to be present thereat, or obtain knowledge of the commission of the crime by they themselves violating the law.<sup>67</sup>

It is only in cases where, if without unlawful acts on the part of the officers, the commission of the crime came to their knowledge

64. *Patterson v. Com.* 267 SW 160, 208 Ky 259. However, where the stopping of the accused was itself unauthorized, then an arrest cannot legally be made on the ground an offense was being committed in their presence. This question does not seem to have been made in the last cited case.

See Sec. 173, *infra*.

65. *State v. Koiil*, 136 SE 510, 103 W Va 19.

65a. *Allen v. State*, 197 NW 808, 183 Wis 323, 39 Am St Rep 782.

66. *State v. Lutz*, 101 SE 434, 85 W Va 330; see also *Allen v. State supra*.

See Sec. 173, *infra*.

See note 61, *supra*, this section.

67. *Polk v. State*, 142 So 480, 167 Miss 508; *Black v. State*, 74 P(2d) 1172, 63 Okla Cr 317; *Taylor v. State*, 49 SW(2d) 459, 120 Tex Cr 208; *Allen v. State*, 197 NW 808, 183 Wis 323, 39 ALR 782.

or view, that they would have a right to make an arrest without a warrant.<sup>68</sup>

It may be stated generally that under the laws of the United States, a person has a perfect right to drive upon the highways and country or temporary roads established for travelers and if he so desires he has a perfect right to drive off from the highway and stop his car and as long as he is peacefully remaining in his car, officers of the law have no authority to go over to the car and demand to see what is going on or what the occupants thereof are doing. When they do so they are trespassers and violators of the rights of the citizen and where it clearly appears from the record of the trial of the case that when the officers have driven out toward the car, stopped and rushed up to it, they cannot justify their presence upon the basis that the defendant was drinking in a public place and any evidence that is obtained by such illegal acts is inadmissible including what they observed while engaged in such unlawful enterprise.<sup>69</sup> However the contrary has been maintained by one of the appellate courts of California.<sup>70</sup>

While it is true that where officers violate the law to be present at the commission of a crime they cannot claim the right to arrest on the theory a crime is being committed in their presence, still where they are illegally upon premises, only the owner can complain thereat and assert the right to take advantage of the illegal conduct of the officers. Third parties arrested on such premises have no ground of complaint.<sup>71</sup>

**§ 174. Discovery of Commission of Crime by Officers Making Legal Investigation; Arrest Proper.**—The duty to suppress crime and to arrest violators of the law by implication carries with it the right to stop persons for identification and this extends to those traveling on the highways in motor and other vehicles. It has always been the custom for cordons to be thrown out in the vicinity of a crime where an offender is supposed to be in hiding and to stop all persons for the purpose of identification in order that felons may be apprehended. This is a necessary and reasonable restraint

68. *Taylor v. State, supra*. In the last cited case it was said: "If, however, they (the officers) were in his (defendant's) yard unlawfully at the time they discovered the commission of the offense, the arrest of the appellant and the search of his residence cannot be upheld, and the evidence of his guilt obtained by virtue of an il-

legal entry would be inadmissible."

69. *Black v. State, supra*.

70. *Ex parte Ajuria*, 207 P 515, 57 Cal App 667.

71. *Lee v. City of Oxford*, 99 So 609, 131 Miss 647; *Lovern v. State*, 105 So 759, 140 Miss 635; *Polk v. State, supra*.

upon rights and liberties of citizens for the protection of personal safety. The assurance of personal liberty does not license any person to be free from all restraint; on the contrary, it demands such necessary restraint of persons as will insure the utmost amount of personal liberty to each for the safety and well being of society and is paramount to individual liberty. So it is perfectly lawful for officers of the law to stop travelers on the highway in search of a perpetrator of a felony, and even in the prosecution of their efforts to discharge their duty in this respect they discover that a traveler on the highway is committing a felony or misdemeanor, then the right to make an arrest in such case exists upon the authority that the crime is committed in their presence and that they were lawfully there and where they had a right to be.<sup>72</sup>

But an officer of the law is unwarranted in stopping a traveler on the highway on a mere suspicion, although it turns out later that his suspicions were well grounded, and after so stopping the traveler ascertained that he has committed a crime and thereupon arrests him on the assumption of the legal right so to do by reason of the authority of law authorizing an arrest for a crime committed in the officer's presence. Such an arrest is illegal.<sup>73</sup>

§ 175. Garnishment of Prisoner's Property in the Hands of an Officer.—By the great weight of authority, money, property, or effects in the hands of an officer belonging to a prisoner and which has been taken from such prisoner upon his being arrested and searched is not subject to garnishment. A great majority of the courts are in accord with this proposition, in so far as giving sanction to the principle that such property may not be reached by attachment or garnishment process, but the reasons assigned therefor are lacking in unanimity and diversified in character.<sup>74</sup>

72. *Koscielski v. State*, 158 NE 902, 199 Ind 546; *People v. Lewis*, 257 NW 843, 269 Mich 382; *State v. Padgett*, 239 SW 954, 316 Mo 179; *Taylor v. State*, 49 SW(2d) 459, 120 Tex Cr 268; *State v. Zupan*, 283 P 671, 155 Wash 80; *State v. Hatfield*, 164 SE 518, 112 W Va 424.

73. *Catching v. Com.* 264 SW 1067, 204 Ky 439, wherein the court said: "The only witness for the commonwealth was J. C. Gray, town marshal of London, Ky., who stated that he learned that defendant and another had gotten a buggy at a livery stable and gone to the country. Wit-

ness supposed the defendant would return with liquor. Without procuring a warrant, witness went out and met defendant with the intention of arresting and searching him and his buggy. It was dark and he undertook to stop the horse, and flashed a flash light before arresting defendant. This frightened the horse and caused it to shy to the side of the road and throw the buggy and its occupants over an embankment. Witness went to them and found defendant holding a jar, which he seized, and on opening it found it contained whisky."

74. *Ex parte Hurn*, 9 So 516, 92 Ala 171

In some cases the courts rest their decisions upon the reasoning that to permit such garnishment or attachment would result in abuse of criminal process in many cases. It is meant by this, that avaricious and unscrupulous creditors would be actuated, by the desire to collect, to initiate trumped up criminal charges against the debtor to the end his money and effects might, on his arrest, be subjected to garnishment.<sup>75</sup>

Other courts indulge the fiction that the possession of the officer is that of the prisoner and thus eliminating an essential element necessary to warrant the sustaining of a garnishment, and that being the indispensable third party on whom the process may be served.<sup>76</sup>

Other courts still assign a different basis yet for sustaining the exemption of the property from garnishment under the circumstances we have under consideration, and that is custodia legis, meaning it is in legal custody of the law.<sup>77</sup>

The rule of exemption applies to the warden of a prison and to the superintendent of a state department of public safety.<sup>78</sup>

The fact that the arrest was illegally made or the money or property was unlawfully taken from the prisoner does not affect the right of exemption protecting the same from garnishment or attachment process.<sup>79</sup>

102, 25 Am St Rep 23, and note, 13 LRA 120.

However, see note 83, *infra*, this section; *Warren v. Matthews*, 11 So 285, 96 Ala 183, note 16 ALR 378; *Coffee v. Haynes*, 57 P 482, 124 Cal 561, 71 ASR 99 and note; *Connolly v. Thurber-Whyland Co.* 18 SE 1004, 92 Ga 651; *Commercial Exchange Bank v. McLeod*, 19 NW 329, 22 NV 919, 65 Iowa 605, 54 Am Rep 36; *Wallace v. Coyne*, 120 NE 73, 230 Mass 475; *Robinson v. Howard*, 7 Cush(Mass) 257; *Hubbard v. Garner*, 73 NW 390, 115 Mich 409, 69 Am St Rep 580; *Holker v. Hennessey*, 42 SW 1090, 141 Mo 527, 64 Am St Rep 524, and note, 39 LRA 165 and note; *Dahms v. Sears*, 11 P 891, 13 Ore 47; *Hill v. Hatch*, 41 SW 349, 99 Tenn 39, 63 ASR 822; *Richardson v. Anderson*, 18 SW (Tex Civ) 185, 4 Wilson Civ Cas Ct App Sec. 286; *Morris v. Penniman*, 14 Gray (Mass) 220, 74 Am Dec 675 and note.

75. *Cunningham v. Baker*, 16 So 68, 104 Ala 160, 53 Am St Rep 27 and 172

note; *Emmanuel v. Sichofsky*, 247 P 205, 108 Cal 713, 48 ALR 580; *Coffee v. Haynes*, *supra*; *Commercial Exchange Bank v. McLeod*, *supra*; *Robinson v. Howard*, *supra*; *Holker v. Hennessey*, *supra*; *Hill v. Hatch*, *supra*.

76. *Commercial Exchange Bank v. McLeod*, *supra*.

77. *Ex parte Hurn*, *supra*; *Coffee v. Haynes*, *supra*; *Connolly v. Thurber-Whyland Co.* *supra*; *Robinson v. Howard*, *supra*; *Holker v. Hennessey*, *supra*; *Davies v. Gallagher*, 17 Phila (Pa) 229; *Richardson v. Anderson*, *supra*; *State v. George*, 181 SE 713, 110 W Va 465 and authorities therein cited; *Kuehn v. Falkner*, 241 P 290, 136 Wash 676, 45 ALR 571 and note.

78. *Davies v. Gallagher*, *supra*; *State v. George*, *supra*.

79. *Wooding v. Puget Sound National Bank*, 40 P 223, 11 Wash 527; *Ex parte Hurn*, *supra*; *Cunningham v. Baker*, *supra*; *Connolly v. Thurber-Whyland Co.* *supra*; *Commercial Ex-*

The rule under discussion does not shield property or money voluntarily entrusted to the officer by the prisoner.<sup>80</sup> However, the court will not recognize the right of garnishment or attachment in any case where the money or other effects of the prisoner should be held as evidence against him or for other lawful purpose.<sup>80a</sup> But where the purpose for which the money or property was taken has ceased to exist as, for instance, after the conviction of the prisoner, then the rule of exemption does not longer operate.<sup>81</sup>

The rule of exemption is inapplicable to property taken from the person of a convict when he is taken into custody as a fugitive from justice where the process is issued upon a judgment to recover against him because of transactions occurring after his conviction and while he is at large as a fugitive from justice. The reason assigned for this holding is that after the conviction of the debtor there is removed any possibility of a trumped up charge in order to subject the prisoner-debtor's property to garnishment proceedings.<sup>82</sup>

The subject matter we have under discussion is controlled by statutory enactments in some jurisdictions and the governing statute should be consulted with respect thereto. The rule of exemption is not recognized in a few jurisdictions.<sup>83</sup>

§ 176. *Disposition of Prisoner's Property.*—The arrest of a person, and taking his property and effects from him by the officers, does not affect his property rights therein. It still remains his property.<sup>84</sup>

So where a prisoner produces money to pay his fine but before a tender thereof, or payment is made, the same is claimed by his wife informally by assertions of threats made and duress exerted by the prisoner against her, and fraud and collusion between the prisoner and sheriff it was obtained from her; in these circumstances the court is without power to order the same to be taken from the prisoner and held pending an adjudication of the controversy.<sup>85</sup>

However where property is wrongly taken from the accused for

change Bank v. McLeod, supra; Robinson v. Howard, supra; Hubbard v. Garner, supra; Hill v. Hatch, supra.

80. Field v. Rice, 20 Ont 309; Coffee v. Haynes, supra.

80a. Coffee v. Haynes, supra.

81. Emmanuel v. Sichofsky, 247 P 205, 198 Cal 713, 48 ALR 580 and note; Holker v. Hennessey, supra.

82. Emmanuel v. Sichofsky, supra

and note 16 ALR 378.

83. Fitzgerald v. Nickerson, 113 Atl 290, 43 RI 390, 16 ALR 373 and note; Closson v. Morrison, 47 NH 482, 93 Am Dec 459 and note.

84. Thatcher v. Weeks, 11 Atl 599, 79 Me 547; Schwahn v. District Court, 161 NW 556, 36 ND 6.

85. Schwahn v. District Court, supra.

the purpose of using the same as evidence against him if the question is raised in a proper manner, it is the duty of the court to direct the same to be returned to the accused.<sup>86</sup>

The interest of the prisoner in property taken from him by the officers is of such character that where it is not claimed to be the fruits or proceeds of a crime and unquestionably belongs to him, he may validly assign the same after his arrest and while it is in the hands of an officer.<sup>87</sup>

Where it appears that one stole some jewelry, then sold it to certain persons and was thereafter arrested and that a sum of money was taken from his person at the time of the arrest; that the money was the proceeds of stolen property; that the thief was at the time in prison, having confessed the theft of the property, and pleaded guilty thereto; the property had been returned to the owner, the purchasers of the property from which the money in question had arisen had not taken any action for their protection; that the thief by assignment transferred to the plaintiff whatever claim he, the thief, may have had to the property. A demand was made upon the officer holding the same, who was the defendant in a civil action for the recovery of the money in an action for money had and received. This being all of the evidence at the close of the plaintiff's case, it was sufficient to make out a prima facie case.<sup>88</sup>

It is a sufficient answer to the demands of the prisoner for return of his property taken from him upon arrest that the same is being held to be used as evidence on his trial.<sup>89</sup>

While it is true that articles taken from a prisoner on his arrest may not be confiscated or destroyed by the officers without proper proceedings before the court having jurisdiction and only on an order of judgment so directing, yet if the property so taken was of such character that it was held or used by the prisoner for the purpose of violation of the law, or cannot have a lawful use then the property need not be returned to him. This is especially true with respect to counterfeit money and the like.<sup>90</sup>

Articles, property, or effects, taken from the possession of the prisoner upon his arrest and in no way a part of the crime or con-

86. State v. District Court, 198 P 362, 59 Mont 600.

87. U. S. v. Parker, 166 F 137; Dinnebeil v. Ringer, 167 NYS 952, 101 Misc 658; Harawitz v. Murray, 205 NYS 230, 123 Misc 301; Hickey v. Coffey, 166 P 959, 85 Ore 383.

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88. Dinnebeil v. Ringer, supra.

89. U. S. v. Vatune, 292 F 407; State v. Campbell, 110 SE 86, 182 NC 911.

90. Welchek v. State, 247 SW 524, 93 Tex Cr 271; U. S. v. Vatune, supra; Thatcher v. Weeks, supra.

nected therewith should be returned to him. And it may be added, as a general rule, he is lawfully entitled thereto.<sup>91</sup>

The same is true with respect to property innocent within itself and unlawfully seized when the prisoner is arrested.<sup>92</sup> That a person whose property and effects have been seized and taken from him upon his arrest should have the same returned to him upon his discharge or acquittal where the same is a legitimate class of property, cannot be questioned.<sup>93</sup>

It does seem, however, that the officer who lawfully seized property from a prisoner may retain the same until he is ordered to turn it over by his superior officer or an adjudication thereof is made by the court.<sup>94</sup>

It seems however that the court may in a proper case order that the costs of the prosecution be paid out of money or effects taken from the prisoner on his arrest, but this could not be done where it appeared that the same belonged to some other person.<sup>95</sup>

If the money or property that has been taken from one who has been arrested is illegally held or retained after his acquittal or discharge and the property in itself has no indication that it could be used in an unlawful manner, the owner may recover same by civil action.<sup>96</sup>

Even where the property in question is connected with the crime or used in the perpetration of same, yet if it, in reality, belongs to the prisoner and is of a class per se innocent, it should be delivered up to the prisoner when there is no longer any occasion to retain same or where it belongs to another party, it should be delivered to prisoner if he obtains the consent of the true owner thereof.<sup>97</sup>

The officer taking property from a prisoner upon his arrest may not justify his retention thereof upon the ground that he is re-

91. Ex parte Craig, 6 Fed Cas No. 3321, 4 Wash CC 710; Wise v. Mills, 189 F 583, 110 CCA 503; Commercial Exchange Bank v. McLeod, 19 NW 329, 22 NW 910, 65 Ia 665, 54 Am Rep 36; Getchell v. Page, 69 Atl 624, 103 Me 387, 125 Am St Rep 307, 18 LRA(NS) 253; Thatcher v. Weeks, supra; Hoiker v. Hennessey, 42 SW 1090, 141 Mo 527, 64 ASR 524, 39 LRA 165; Morales v. Vivaldi, 25 Porto Rico 206.

92. U. S. v. Poller, 43 F(2d) 911, 74

ALR 1382; People v. Manko, 189 NYS 357, 196 NYS 944.

93. Welch v. Gleason, 5 SE 599, 28 SC 247.

94. Bullock v. Dunlap, 2 Ex D 43.

95. Reg. v. Roberts, LR 9 QB 77.

96. Ferguson v. U. S. 64 F 83, 78 F 103, 24 CCA 1; Welch v. Gleason, supra; State v. Burns, 74 P 933, 27 Nev 289, holding a civil action the exclusive remedy.

97. Wooding v. Puget Sound National Bank, 40 P 223, 11 Wash 527; Morales v. Vivaldi, supra.

taining the same to prevent repetition of the offense, where the property is innocent within itself.<sup>98</sup>

The return of property may be had by a motion or an order to show cause where the applicant is lawfully entitled thereto, as well as by civil action, as we have hereinbefore seen.<sup>99</sup>

Where a prisoner was arrested for larceny, having sold the fruits of his crime and the money was found upon him at the time of arrest and he directed that the same be paid to the owner of the stolen property, the court held that the officer should make such payment since the money was subject to the prisoner's orders and directions.<sup>1</sup>

In any event, a prisoner may not obtain a return to him of money, property, documents, or effects, voluntarily surrendered to the prosecuting or district attorney or officers of the law where they may be used as evidence on his trial.<sup>2</sup>

98. Thatcher v. Weeks, supra.

99. Wise v. Mills, 189 F 583, 110 CCA 503; U. S. v. Parker, 166 F 137; Wooding v. Puget Sound National Bank, supra.

See note 96, supra, this section.

1. Rickers v. Simcox, 1 Utah 33.

2. State v. Brown, 145 P 69, 83 Wash 100.

## SECS.

177. Arrested Party's Right to Bail.
178. Duty of One Making an Arrest with Respect to Prisoner.
179. Right of Prisoner on Being Arrested to Be Taken before Court for Hearing or Examination.
180. Time within Which Prisoner Entitled to Be Taken before Court or Magistrate.
181. What Is Unnecessary Delay in Taking a Prisoner before Magistrate.
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192. Determination of Ownership of Cash Deposit.
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194. Extent of Liability of Sheriff.
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197. Proceedings against Sheriff as Special Bail.
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202. Nature and Character of Bond for Jail Liberties.
203. Custody, Actual or Constructive in Connection with Escape.
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207. Defenses to an Escape.
208. Prisoner Held on Meane Process; Effect of Recapture, Return or Death after Escape.
209. Escape in Criminal Cases; Civil Liability of Sheriff or Constable.
210. Duty of Sheriff to Obey Writ of Habeas Corpus with Respect to Prisoner in His Charge.
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§ 177. Arrested Party's Right to Bail.—It is the duty of one making an arrest to take the prisoner before a proper magistrate or officer that proper proceedings may be instituted to bring the prisoner to trial and that he may be given opportunity for bail and thereby secure his release as the facts of the case and law warrant. This duty on the part of the officer is more imperative where he arrests without a warrant than in the case where that process is issued, but in any case it is his duty to forthwith take the prisoner before a magistrate or other officer. It is not a matter resting in the discretion of an officer to detain a person arrested or restrain him of his liberty. He cannot legally hold a person arrested in his custody for a longer period of time than is reasonably necessary under all circumstances of the case. He is compelled to obtain a proper warrant or order for the further detention of a person so arrested from some tribunal or officer authorized under the law to issue the same. If the arrested person is detained or held by the officer for a longer period of time than is required, under the circumstances without such warrant or authority, the detained person has a cause of action of false imprisonment against the officer and all others who help aid or assist in the unlawful detention. Where the arrest is authorized without a warrant, that is lawful only as a preliminary step toward taking a prisoner before court or other tribunal. The right to release upon bail is so firmly grounded in our system of jurisprudence by our State and federal constitutions, statute and common law, that one accused of crime cannot be deprived of the right with impunity. Whether or not bail is refused is not a matter of concern to or for the determination of the arresting officer. It seems clear enough that these well nigh self-evident principles enunciated hereinbefore are the same whether the right to bail is the subject of a statutory regulation or is governed by common law principles.<sup>1</sup>

An officer of the law cannot justify the delay in taking one he has arrested before a magistrate upon the ground that such delay was necessary to enable him to make an investigation of the charge against the arrested party. It is his principal duty to take such party before the court as soon as it can be done.<sup>2</sup>

1. Von Arx v. Shafer, 241 F 640, 164 CCA 407, LRA1917F 427; Jackson v. Miller, 86 Atl 50, 84 NJL 189; Ocean Steamship Co. v. Williams, 69 Ga 251; Harnes v. Steele, 64 NE 875, 159 Ind 286; Burke v. Bell, 36 Me 317; Markey v. Griffin, 109 Ill App 212; Brock v. 178

Stimson, 108 Mass 520, 11 Am Rep 390; Leger v. Warren, 57 NE 506, 62 Ohio St 500, 51 LRA 193, 78 Am St Rep 738; Schoette v. Drake, 120 NE 303, 130 Wis 18.

2. Keefe v. Hart, 100 NE 558, 213 Mass 476, Ann Cas 1914A 716.

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The failure to take the arrested party before a magistrate to the end that he may give bond without unnecessary delay may render the officer in making the arrest a trespasser ab initio and his good faith in making the arrest will not prevent the entire period of detention from becoming one of false imprisonment.<sup>3</sup>

Liability may be imposed where the officer fails to take the person arrested before the magistrate by the most direct route but some discretion is reposed in the officer with respect to such matter.<sup>4</sup>

Orders from a superior will not justify an arresting officer, or a private party making an arrest from fulfilling the duty to take a prisoner before a magistrate, without unnecessary delay nor will a discharge of this duty be excused on the part of an arresting officer or private citizens or other persons making an arrest by delivering a prisoner into the custody of another. The only effect of other parties participating in the detention is to make them all liable.<sup>5</sup>

The rule is the same where the illegality of the arrest is asserted by reason of invalidity of the law under which it is made.<sup>5a</sup>

Whether the arrested party is guilty or innocent is immaterial where there is unnecessary delay in taking him before a magistrate. An arresting officer unlawfully detaining him is liable therefor.<sup>6</sup>

**§ 178. Duty of One Making an Arrest with Respect to Prisoner.**—When an arrest is made the party making the same owes the duty to the prisoner to treat and dispose of him in the manner by law directed. State officers could lawfully arrest for the violation of the national prohibition law and it would seem to be true with respect to an infraction of any other federal criminal statute.<sup>7</sup>

The arrest for violation of federal law by state officers may be adopted by the federal government.<sup>8</sup>

3. Brock v. Stimson, 108 Mass 520, 11 Am Rep 390; Wright v. Templeton, 67 Atl 817, 80 Vt 358, 13 Am St Rep 990; Davis v. Carroll, 159 NYS 568, 172 App Div 729; Leger v. Warren, supra; Schoette v. Drake, supra.

4. Morris v. Wise, 2 F & F 51; Huber v. Walker, 62 Pa Super 299; Gilbert v. Rider, Kirby (Conn) 180.

5. Gambill v. Cargo, 43 So 866, 151 Ala 421; Odell v. Schroeder, 58 Ill 403; Arteaga v. Connor, 88 NY 403, 2 NY Civ Proc 152, 1: NY Wkly Dig 278; Green v. Kennedy, 46 Barb 16, 48 NY 653; Leger v. Warren, supra; Jones

v. Van Bever, 174 SW 795, LRA1915E 172 and note.

5a. Griffin v. Wilcox, 21 Ind 370; Swart v. Kimball, 5 NW 635, 43 Mich 443.

6. Hendrix v. Manhattan Beach Development Co. 168 NYS 316, 181 App Div 111; Kirk v. Garrett, 35 Atl 1089, 84 Md 383.

7. U. S. v. One Packard Truck, 55 F (2d) 882; Marsh v. U. S. 29 F(2d) 172, cert. den. 49 S Ct 346, 279 US 849, 73 L ed 992.

8. Dodge v. U. S. 47 S Ct 191, 272 US 530, 71 L ed 392; Marsh v. U. S. 179

The authority, with respect to arresting for violation of federal laws, is not confined strictly to state officers but may extend to policemen and marshals of municipalities.<sup>9</sup>

And the duty imposed by law that the person making the arrest shall dispose of his prisoner as the law directs requires that in such circumstances where an arrest is made for violation of federal law by another than federal officers that such prisoners so arrested shall be turned over to the federal government.<sup>10</sup>

Under a statute imposing upon an officer making an arrest the duty to file a complaint the officer is required so to do and he must file a specific complaint against the prisoner. He may not hold him unnecessarily upon arrest made after a search under a search warrant.<sup>11</sup>

Not only is the officer under duty to dispose of the prisoner as the law directs, after making an arrest, but he is likewise bound to use due care in protecting and transporting him while keeping him in custody.<sup>12</sup>

It is no part of an arresting officer's duty to institute an inquisition with respect to his prisoner, or for anyone else to do so out of court.<sup>13</sup>

The fact that the prisoner is arrested for one offense and had committed another in the presence of an officer does not militate against the officer holding him upon the latter mentioned charge.<sup>14</sup> As to whether or not the officer is under duty to take the prisoner, in all cases, before a magistrate is in dispute among authorities. It has been asserted on the one hand that the officer is without authority to release an arrested person without taking him before a magistrate.<sup>15</sup>

While on the other hand it has been maintained with equal positiveness that if the officer arrests the prisoner without a warrant upon the ground that a felony has been committed and he has reasonable cause to believe the prisoner guilty thereof, and he is there-

supra; U. S. v. One Packard Truck, supra.

9. U. S. v. One Packard Truck, supra.

10. U. S. v. One Packard Truck, supra.

11. Goldsberry v. State, 242 SW 221, 92 Tex Cr 108.

12. Alford v. McConnell, 27 FS 176; Clark v. West, 126 SW(2d) (Tex Civ) 569. 180

13. State v. Thomas, 188 NW 689, 193 Ia 1004. See note 18, infra, this section.

14. Waddle v. Wilson, 175 SW 382, 164 Ky 228, but if the arrest is made upon an untenable ground, it cannot be justified on another. Comisky v. Norfolk & W. R. Co. 90 SE 365, 79 W Va 148, LRA1917D 220.

15. State v. Parker, 75 NC 249, 22 Am Rep 669.

after convinced that such belief was unfounded, that then the officer is under duty to release and discharge him from custody.<sup>16</sup>

But it is submitted, however, that regularity of procedure would dictate that in every case a discharge of prisoner arrested should be made by the magistrate or other court. The discharge of a prisoner lawfully arrested is a judicial function and is one that an officer should not attempt, or be permitted to perform. To permit an officer, whether he is a United States marshal or geponic constable to determine when a prisoner caught is to be held or discharged lays open a way to abuse of authority and makes the taking of bribes an easy matter.

An officer of the law has no authority to exact a sum of money from an accused as a fine or penalty for a violation of law. The imposition of fines and penalties is without the pale of the authority of an arresting officer and belongs entirely to the functions of the judiciary.<sup>17</sup>

It is unlawful for an officer of the law to take a prisoner to any place to be questioned other than before a proper court or magistrate and may render a confession obtained inadmissible.<sup>18</sup>

It is pedestrian law that where a prisoner is taken in custody under virtue of the authority of a warrant that the mandates of the warrant should be pursued to the letter in making a disposition of the accused.<sup>19</sup>

It seems that if the officer does not obey the directions of the warrant under which he has made an arrest that such an arrest becomes illegal and does not protect the officer in his doings in the premises.<sup>20</sup>

Where an officer has a warrant for a prisoner that he has arrested under the direction of a magistrate he may hold such prisoner not only upon the directions of the magistrate but on the warrant in his possession as well, without informing the accused thereof.<sup>21</sup>

However in order for the officer to be protected in his obedience to the mandate of a warrant such directions thereof must be legal.<sup>22</sup>

16. Therriault v. Breton, 95 Atl 699, 114 Me 137.

17. Twilley v. Perkins, 26 Atl 286, 77 Md 252, 39 Am St Rep 408, 19 LRA 632.

18. People v. Chrfrikas, 129 NE 73, 295 Ill 222; State v. Thomas, supra.

19. People v. Fick, 26 P 759, 89 Cal

144; Phillips v. Fadden, 125 Mass 198; Oxford v. Berry, 170 NW 83, 204 Mich 197; Wright v. Templeton, 67 Atl 317, 80 Vt 358, 130 Am St Rep 990.

20. Phillips v. Fadden, supra; People v. Fick, supra.

21. U. S. v. Omeara, Fed Cas No 15, 919, 1 Cranch CC 165.

22. Pratt v. Hill, 16 Barb(NY) 303.

§ 179. Right of Prisoner on Being Arrested to be Taken Before Court for Hearing or Examination.—It is the undoubted right on the part of a prisoner, on being arrested by a public officer or private citizen and unquestionably a corresponding duty on the part of the one making the arrest, to take the prisoner before a court or magistrate for a hearing or examination and this must be done without unnecessary delay. The object of this right and corresponding duty is that the prisoner may be examined, held, or dealt with as the law directs and the facts of the case require. While different phraseology has been employed in giving affirmation to the existence of this right and duty, such as that the same may be done "immediately," or "without unnecessary delay," or "forthwith," still all of these different expressions consist merely in difference of wording instead of significance and all mean approximately the same thing: that this right of the prisoner be accorded to him and the duty of the party making the arrest performed with all reasonable dispatch and promptness possible under the circumstances of each particular case.<sup>23</sup>

Where the right to be taken before a magistrate exists in favor of an arrested party and a corresponding duty so to do is imposed upon the person making the arrest, the law does not demand that the party arrested ask to be taken before the magistrate but it makes it the duty of the one making the arrest to take the prisoner before a court or magistrate. Differently stated, the failure to demand his right or the performance of the duty of the person arresting him on the part of the prisoner does not operate against such right or waive the duty of the party making the arrest to grant it.<sup>24</sup>

§ 180. Time Within Which Prisoner Entitled to be Taken before Court or Magistrate.—An officer may not withhold the right of a prisoner or person arrested and in custody to be taken before a

23. Ex parte Harvell, 267 F 997; Rutledge v. Rowland, 49 So 461, 161 Ala 114; Bryan v. Comstock, 220 SW 475, 143 Ark 394, 9 ALR 1340; Ex parte Arata, 198 P 814, 52 Cal App 380; People v. Frugoli, 166 NE 129, 334 Ill 324; State v. Thomas, 188 NW 689, 193 Ia 1004; Hogg v. Lorenz, 29 SW(2d) 17, 234 Ky 751; Folsom v. Piper, 186 NW 28, 192 Ia 1056; Shea v. Sullivan, 158 NE 771, 261 Mass 255; Com. v. Di Stasio, 1 NE(2d) 189, 294

Mass 273; Oxford v. Berry, 170 NW 83, 204 Mich 197; State v. Montgomery, 212 P 341, 28 NM 344; Davis v. Carroll, 159 NYS 568, 172 App Div 729; Bowles v. Creason, 66 P(2d) 1183, 160 Ore 278; Gregg v. First State Bank, 125 SW(2d) (Tex Civ) 319; Floyd v. Chesapeake & Ohio Railway Co., 164 SE 28, 112 W Va 86; Pelouquin v. Hibner, 285 NW 380, — Wis —.

24. Norton v. Mathers, 271 NW 321, 222 Ia 1170.

court or magistrate for any time more than is reasonably necessary under all of the facts and circumstances of the particular case.<sup>25</sup>

To detain the arrested party in custody any longer than is necessary or for any purpose other than taking him before a magistrate is a failure of duty or the invasion of the rights of the party in custody.<sup>26</sup>

No right exists on the part of an officer or any other person having a party under arrest to delay taking him before a magistrate or court for the purpose of making an investigation, for looking up witnesses, and the detention of the arrested party on these grounds is illegal and without justification. Neither may the person holding another in custody delay taking him before the proper court or magistrate for the purpose of eating a meal or to have his clothes cleaned.<sup>27</sup>

Stated in different language, as a general rule, the only purpose for which the officer may lawfully detain his prisoner is for the purpose of taking him before the proper court or magistrate. When the officer oversteps the bounds in respect to the lawful purpose of detention he is without the pale of the protection of the law.<sup>28</sup>

A detention to procure evidence against the prisoner or the hope of extracting a confession from the accused violates the right of the prisoner and is a breach of the duty of the arresting officer to take him without unnecessary delay before a proper court or magistrate.<sup>29</sup>

It is highly improper and an invasion of the lawful rights of the prisoner to take him to any other place than to a proper court or magistrate. And this rule of law applies to taking the prisoner to

25. *People v. Calebressi*, 251 NYS 603, 233 App Div 79.

26. *Cary v. State*, 76 Ala 78; *Potter v. Swindle*, 3 SE 94, 77 Ga 419; *Harness v. Steele*, 65 NE 875, 159 Ind 280.

27. *Brown v. Meier & Frank Co.* 86 P(2d) 79, 160 Or 608, wherein it is said:

"An officer cannot justify the detention of a prisoner for an unreasonable length of time without a warrant on the ground that time is necessary to investigate the case and procure evidence against the person under arrest: 4 *American Jurisprudence*, p. 49, Sec. 70, citing numerous authorities."

*Von Arx v. Shafer*, 241 F 649, 154

CCA 407, LRA1917F 427; *Salo v. Smith*, 143 P 322, 25 Cal App 295; *Blocker v. Clark*, 54 SE 1022, 126 Ga 484, 7 LRA(NS) 268, 8 Ann Cas 31; *Wiggins v. Norton*, 9 SE 607, 83 Ga 148; *Harness v. Steele*, 64 NE 875, 159 Ind 286; *Atchison etc. R. Co. v. Hinsdell*, 90 P 800, 76 Kan 74, 12 LRA(NS) 94, 13 Ann Cas 381; *Keefe v. Hart*, 100 NE 558, 213 Mass 476, Ann Cas 1914A 716; *Diers v. Mallon*, 64 NW 722, 46 Neb 121, 50 Am St Rep 598.

28. *Von Arx v. Shafer*, supra; *State v. Thomas*, 188 NW 689, 193 Ia 1004.

29. *Harness v. Steele*, supra; *Floyd v. Chesapeake and Ohio Railway Co.* 164 SE 28, 112 W Va 66; *State v. Thomas*, 188 NW 689, 193 Ia 1004.

the prosecuting or district attorney or other officer or person than the proper court or magistrate.<sup>29a</sup>

§ 181. **What Is Unnecessary Delay in Taking a Prisoner Before Magistrate.**—What constitutes unnecessary delay or failure to "immediately," "forthwith," or "without delay," in taking a prisoner before a magistrate has been adjudicated in numerous cases. It must be conceded that an officer is permitted to exercise some reasonable discretion in the route chosen to take his prisoner before a court or magistrate.<sup>30</sup>

What is a reasonable time in connection with our discussion depends upon the facts and circumstances of each particular case.<sup>31</sup>

Such matters as the accessibility of the court or magistrate and facilities for transportation, other duties of the officer making the arrest, the intervention of a Sunday or a holiday, intoxication or mental condition of the prisoner, are entitled to consideration.<sup>32</sup>

An officer arresting a prisoner at eleven o'clock at night is not required, it has been held, to take him before a court or magistrate until the following morning, especially when the prisoner was intoxicated.<sup>33</sup>

Likewise it has been held that from sundown until ten o'clock the following morning constitutes a reasonable time, according to law.<sup>34</sup>

The Appellate Court of Illinois held however—but the decision is of highly doubtful soundness—that a person arrested and taken to a city prison at a late hour is not entitled to an immediate trial; the city has a right to hold him in custody until it is able to secure wit-

29a. *People v. Chrfrikas*, 129 NE 73, 295 Ill 222; *State v. Thavanot*, 125 S W 473, 225 Mo 545, 20 Ann Cas 1122; *Brown v. Meier & Frank Co.* 86 P(2d) 79, 160 Or 608, wherein it is said:

"It is not the business of an officer making an arrest to take a prisoner against his will and without his consent before some self-constituted inquisitorial body and, if he does so, all who participate in such unlawful detention are liable in damages."

30. *Gilbert v. Rider, Kirby (Conn)* 180; *Huber v. Walker*, 62 Pa Super 209.

31. *Blocker v. Clark*, 54 SE 1022, 126 Ga 484, 7 LRA(NS) 268, 8 Ann Cas 31; *Oxford v. Berry*, 170 NW 83, 204 Mich 197.

32. *Hayes v. Mitchell*, 69 Ala 452; *Brish v. Carter*, 67 Atl 210, 96 Md 445; 184

*Kent v. Miles*, 27 Atl 194, 65 Vt 582, 68 Vt 48; *Venable v. Huddy*, 72 Atl 10, 77 NJL 351; *Nason v. Fowler*, 47 Atl 263, 70 NH 291; *Wiggins v. Norton*, 9 SE 607, 83 Ga 148; *Markey v. Griffin*, 109 Ill App 212; *Scircle v. Neeves*, 47 Ind 289; *Weiser v. Welty*, 47 NE 639, 18 Ind App 664; *Arneson v. Thorsted*, 33 NW 607, 72 Ia 145; *Pepper v. Mayes*, 81 Ky 673; *Tubbs v. Tukey*, 3 Cush (Mass) 438, 50 Am Dec 744; *Linnin v. Banfield*, 72 NW 1, 114 Mich 93; *Diers v. Mallon*, 64 NW 722, 46 Neb 121, 50 Am St Rep 598; *Hopner v. McGowan*, 64 NY Super 98, 22 NE 558, 116 NY 405; *Raitz v. Green*, 13 Ohio Cir Ct 455, 7 Ohio Cir Dec 238.

33. *Scircle v. Neeves*, supra.

34. *Johnson v. American*, 46 Ga 80.

nesses and prepare for trial, and that it is not unlawful to confine him in the city prison until the following morning to await trial. The decision seems to have been influenced by a statutory provision.<sup>35</sup>

Likewise it has been held that holding the prisoner from Sunday until Tuesday to take him before a magistrate where a magistrate was not obliged to hold examination on Sunday and the sheriff had requested the prosecuting attorney to have a warrant issued on Monday and that the sheriff was entitled to rely on the prosecutor's promise so to do, was reasonable.<sup>36</sup> This decision cannot be justified on reason. It is the sheriff's duty to take the accused before a court or magistrate and that duty may not be discharged by a mere request to another. Besides the sheriff's deputies, in the sheriff's absence, could have discharged that duty.

On the other hand, it has been held that the holding of a prisoner from an afternoon until ten o'clock the following morning is unreasonable and makes the officer liable for false imprisonment and by the great weight of authority, and supported by sounder reasons the arresting party is a trespasser ab initio.<sup>37</sup>

So too, it cannot be said, as a matter of law, that the delay for an hour and a quarter in taking the prisoner before a magistrate is reasonable. This is a question for the jury.<sup>38</sup>

The detention of one hour in a public place without a warrant has been held to be unreasonable.<sup>39</sup> A period of two hours is unreasonable.<sup>40</sup>

The holding of a prisoner from five-thirty in the afternoon until the following morning exceeds a reasonable period.<sup>41</sup>

35. *Hermanson v. Shaffer*, 184 Ill App 273.

36. *Diers v. Mallon*, *supra*.

37. *Von Arx v. Shaffer*, 241 F 649, 154 CCA 407, LRA1917F 427; *Brock v. Stimson*, 108 Mass 520, 11 Am Rep 390; *Tubbs v. Tukey*, 3 Cush (Mass) 438, 50 Am Dec 744; *Piedmont Hotel Co. v. Henderson*, 72 SE 51, 9 Ga App 672; *Hendrix v. Manhattan Beach Dev. Co.* 168 NYS 316, 181 App Div 111; *Snead v. Bonnoil*, 63 NYS 553, 49 App Div 330, 59 NE 899, 160 NY 325; *Wright v. Templeton*, 67 Atl 917, 80 Vt 358, 130 Am St Rep 990, note 13 ALR St Rep 985.

See also, *Korkman v. Hanlon Dry*

*Dock & Shipbuilding Co.* 199 P 880, 53 Cal App 147.

Decisions contra are: *Oxford v. Berry*, 170 NW 83, 204 Mich 197; *Friesehan v. Malnes*, 100 NW 172, 132 Mich 10. See also, *Harbison v. Chicago*, R. I. & P. R. Co. 37 SW (2d) 609, 327 Mo 440, 79 ALR 1, note 13 Ann Cas 985. 1 Restatement, Torts, p. 315, Sec. 130.

38. *Keefe v. Hart*, 100 NE 558, 213 Mass 476, Ann Cas 1914A 716 and note.

39. *Jackson v. Miller*, 86 Atl 50, 84 NJL 139.

40. *Butler v. Stockdale*, 19 Pa Super 98.

41. *Schneider v. McLane*, 36 Barb (NY) 495, 4 Abb Dec 154, 3 Keyes 568, 185

Likewise where the prisoner is detained from five or six o'clock in the afternoon until the following morning at nine or ten o'clock during which time a proper court was in session before which he could have been taken is unreasonable.<sup>42</sup> A detention for thirty-six hours is unreasonable.<sup>43</sup> Forty hours detention is unreasonable.<sup>44</sup>

Failure for two days to take the accused before a magistrate cannot be justified.<sup>45</sup>

So too, four days is an unreasonable length of time. Five days, six days, seven days, have all been adjudicated as unreasonable times within which to detain a prisoner before taking him to a court or magistrate.<sup>46</sup>

A detention of a person in jail before taking him before a court or magistrate for three hours renders the one detaining him liable for false imprisonment.<sup>47</sup>

Detention in jail for seventeen days without a charge being filed and without informing a prisoner of his rights or taking him before a magistrate is unlawful.<sup>48</sup>

Officers who have brought about an arrest of persons suspected of implication in a bank robbery between six and six-thirty in the evening of May 30, where after the sheriff arrived at about six o'clock on the following evening, he being absent, and arranged immediately for an examination of the parties which was commenced promptly on that evening, was not an unreasonable delay, the court holding that the officers were entitled to a reasonable time on June 1 to determine whether or not a formal complaint against any persons should be made.<sup>49</sup>

A sound rule of law is doubtless that officers have no right to hold one arrested in order to make an investigation.<sup>49a</sup>

It is thought that the above discussion sufficiently illustrates the application of the principle under consideration. After all, the reasonableness of the period of detention before taking the prisoner before a court or magistrate is one for the determination of the

42. *Pratt v. Brown*, 16 SW 443, 80 Tex 608.

43. *Woods v. Olson*, 117 Ill App 128.

44. *Roberts v. Brown*, 94 SW 388, 43 Tex Civ App 206.

45. *Burke v. Bell*, 36 Me 317; *Linnen v. Banfield*, *supra*.

46. *Barclay v. Goodale*, Fed Cas No 972; *Burk v. Howley*, 30 Atl 327, 179 Pa 539, 67 Am St Rep 607; *Pinkerton v. Sydnor*, 87 Ill App 76; *Mayberry v. Kelly*, 1 Kan 116; *Anderson v. Beck*, 8 186

So 167, 64 Miss 113; *Green v. Kennedy*, 48 Barb.(NY) 16, 48 NY 663; *Leger v. Warren*, 57 NE 500, 62 Ohio 500, 51 LRA 193, 78 Am St Rep 738.

47. *Goins v. Hudson*, 55 SW(2d) 388, 246 Ky 517.

48. *Knight v. Baker*, 244 P 543, 117 Ore 492.

49. *Paloquin v. Hibner*, 285 NW 380, 231 Wis. 77.

49a. See Secs. 178, 179 and 180 *supra*.

jury, from the facts and circumstances of each particular case.<sup>50</sup>

It is generally held that where the evidence is not in dispute, and that reasonable men could not draw different inferences therefrom, the reasonableness of the detention is a law question, but where the evidence is in conflict, or susceptible of different inferences, then the court is under a duty to send the matter to the jury for its solution.<sup>51</sup>

Likewise it has been held that where the plaintiff was shot in resisting an arrest and was given medical attention and released on bond within an hour thereof, violation of the statute requiring arrested persons to be taken before a magistrate forthwith was not established as a matter of law, and a jury's verdict for the defendant was upheld.<sup>52</sup>

The fact that the prisoner is detained in an uncomfortable cell does not make the imprisonment unlawful where the detention is not unreasonable.<sup>53</sup>

As to whether or not the period of detention after a legal arrest is reasonable or unreasonable as regards the delay in arraignment is wholly immaterial where it appears that such period of time was utilized by the officers to brutally treat the prisoner endeavoring to extort a false confession from him. This is true even where original arrest was lawful, but where the prisoner is detained and beaten up in an attempt to force a confession from him, then his detention becomes illegal ab initio.<sup>54</sup>

50. *Torson v. Baehni*, 5 P(2d) 813, 134 Kan 188.

51. *E. I. Du Pont de Nemours Powder Co. v. Hyde*, 77 So 733, 201 Ala 207; *Harris v. Atlanta*, 62 Ga 290; *Piedmont Hotel Co. v. Henderson*, 72 SE 51, 9 Ga App 672; *Wood v. Olson*, 117 Ill App 128; *Keefe v. Hart*, 100 NE 558, 213 Mass 476, Ann Cas 1914A 716, wherein the court said: "It cannot be said as a matter of law that their delay for an hour and a quarter was reasonable. The facts as to this are not agreed. This interval may have overreached the time for the adjournment of the court to which plaintiff should have been taken and involved longer delay. It is only when the facts are agreed that this issue becomes a question of law as stated in *Loring v. Boston*, 7 Metc.(Mass) 409, 413, and *Gilmore v. Wilbur*, 12 Pick.(Mass) 120, 22 Am Dec 410, cited by the defendants." *Kerr v. Atwood*, 74

NE 917, 188 Mass 506; *Oxford v. Berry*, 170 NW 83, 204 Mich 197; *Diers v. Mallon*, 64 NW 722, 46 Neb 121, 50 Am St Rep 598; *Venable v. Huddy*, 72 Atl 10, 77 NJL 351; *Raitz v. Green*, 13 Ohio Cir Ct 455, 7 Ohio Cir Dec 238; *Williams v. Morris*, 14 Ohio Cir Ct (NS) 353, 32 Ohio Cir Ct 453; *Mulberry v. Fuehlhart*, 53 Atl 504, 203 Pa 573; *Schoette v. Drake*, 120 N W 393, 139 Wis 18; *Beckwith v. Philby*, 6 B & C 635, 13 ECL 287, 108 Eng Rep 585.

52. *Johnson v. Chesapeake & O. Railroad Company*, 83 SW(2d) 521, 259 Ky 789.

53. *Lynn v. Weaver*, 231 NW 579, 251 Mich 265.

54. *Davis v. Carroll*, 159 NYS 568 172 App Div 729; *Dumas v. Erie Railway Co.* 278 NYS 197, 243 App Div 792; *Green v. Kennedy*, 46 Barb 16, 48 NY 653; *Pastor v. Regan*, 30 NYS 657, 9 Misc 547, 90 Hun 65, 35 NYS 187

The detention of a prisoner in an adjoining room until the court or magistrate completes trial that was in progress at the time of prisoner's arrival cannot be made the basis of an action for unreasonable detention.<sup>55</sup>

Likewise where an officer having duly and legally made an arrest, and was then called upon to suppress a riot in another locality, but before departing therefor he made arrangements for the accused to be taken before a magistrate, the question of whether or not the detention was unreasonable is to be decided by a jury.<sup>56</sup>

In order to justify detaining a prisoner over night, the officers should make a reasonable effort to induce the court or magistrate to issue a warrant and fix bail promptly.<sup>57</sup> But, if the delay is occasioned by acceding to request of the prisoner he may not complain thereat.<sup>58</sup>

It seems that where a statute requires that a prisoner shall be detained no longer than a specified number of days or any other fixed time, a detention beyond that period of time makes the officer or other person guilty thereof liable therefor and it is no answer for this delinquency that the party making the arrest and holding the prisoner had no sufficient means during the time to deliver the prisoner before a court or magistrate.<sup>59</sup>

Where a statutory provision requires an officer making an arrest for an offense committed in another county to take such prisoner to such county he is not warranted in detaining the prisoner in the county where the arrest is made until communication can be had with the officers of the county in which the crime was committed and until such officers can come for the prisoner. The statute makes it his duty to deliver the prisoner to the county where the offense is committed and that is what he must do.<sup>60</sup>

A person taking over the custody of a prisoner from an arresting officer then assumes the duty of taking such prisoner before a proper magistrate without unnecessary delay, and is liable for a failure so to do.<sup>61</sup>

1114. See also, *Holley v. Mix*, 3 Wend 350, 20 Am Dec 702. *People v. Mummiauc*, 180 NE 94, 258 NY 394. Period of detention has a bearing on and will be considered on the question of the admissibility of confession.

55. *Hopner v. McGowan*, 54 NY Super 98, 22 NE 558, 116 NY 405.

56. *Raitz v. Green*, 13 Ohio Cir Ct 455, 7 Ohio Cir Dec 238.

57. *Markey v. Griffin*, 109 Ill App 212.

58. *Richardson v. Dybedahl*, 84 N W 480, 14 SD 126.

59. *Barclay v. Goodale*, Fed Cas No 972; *Washer v. Iler*, 29 Ohio Cir Ct 319, 80 NE 1134, 75 Ohio St 638.

60. *Lamb v. Dillard*, 21 SE 463, 94 Ga 200.

61. *Leger v. Warren*, 57 NE 506, 62

Where an officer arrests a person, without a warrant, on suspicion that he has committed a felony, and detains him without bail for two days without obtaining a warrant, such delay will sustain a jury's finding that it is unreasonable, rendering the officer liable, though one of the days was a holiday, there being in the particular jurisdiction a statute authorizing the entertainment of a felony complaint on Sunday or holiday.<sup>62</sup>

It seems however that where a prisoner is intoxicated or is of questionable sanity the officer may, as a rule, detain him until the period of intoxication is past or to make an investigation into his sanity.<sup>63</sup>

It should be remembered, however, that intoxication in any degree and in all cases does not authorize the holding of a prisoner for an unreasonable length of time. Though a party may be under indictment for a bailable felony, yet he is entitled to have bail fixed, and give it, if he is able to go to the courtroom a sufficient length of time for that purpose, though he may be so weak or sick that he is unable to remain long enough for a trial. The right to release upon bail is so firmly grounded in our system of jurisprudence by federal and State constitutions, and statute and common law, that one accused of crime, whether guilty or innocent, cannot be deprived of the right with impunity. Whether bail shall be granted or a party deprived of it is not left to the determination of an arresting officer.<sup>64</sup>

**§ 182. Municipality Has No Authority to Pass an Ordinance Denying a Prisoner His Statutory or Constitutional Rights.**—It is not within the province of a municipality to pass an ordinance authorizing a violation of the statutory rights of one arrested, to be taken before a magistrate and any attempt on the part of a city or village so to do renders the ordinance void.<sup>65</sup>

The courts will endeavor to construe a municipal ordinance and other legislative enactments so as not to violate any rights of a prisoner.<sup>66</sup>

**§ 183. Prisoner May Waive Right to Be Taken before a Magistrate.**—Of course if the delay is occasioned by the person under arrest or he waives the right to be taken before a magistrate im-

Ohio 609, 78 Am St Rep 738, 51 LRA 193.

62. Linnen v. Banfield, 72 NW 1, 114 Mich 93.

63. Mulberry v. Fuellhart, 53 Atl 504, 203 Pa 573; Hutchinson v. Sang-

ster, 4 Green (Iowa) 340; Pepper v. Mayes, 81 Ky 673.

64. Markey v. Griffin, 109 Ill App 212.

65. Burke v. Bell, 38 Me 317.

66. Rutledge v. Rowland, 49 So 461, 161 Ala 114.

mediately he may not assert a claim of unlawful detention or false imprisonment, or claim his rights have been invaded by failure to take him, without unnecessary delay, before a court or magistrate.<sup>67</sup>

Where the prisoner on being arrested consents to accompany an officer to some other place, this constitutes a waiver of the necessity of taking him before a magistrate.<sup>68</sup> If bail is fixed and the prisoner is unable or refuses to give it, then of course his commitment to jail is lawful and proper but the place of confinement must be a proper one, or the detention is illegal.<sup>69</sup>

**§ 184. Termination of Officer's Custody of Prisoner.**—An officer's custody of a prisoner whom he has arrested and brought before a court for trial does not cease until the prisoner has been discharged or a mittimus has been issued for his commitment to jail.<sup>70</sup>

It seems however that the court or magistrate may direct the custody of an arrested prisoner who has been brought before such court or magistrate to pass from the officer to another, or he may assume the responsibility with respect thereto himself. And, when a prisoner is in the custody of a justice of the peace, after his arrest, the justice may use such reasonable force as is necessary to retain the prisoner in custody.<sup>71</sup>

However, on the other hand, where there has been a special deputation to one who is not an officer, such deputation being authorized by statutory law, and a warrant is issued to the party thus deputized and he thereupon executes the warrant by arresting the accused named therein and brings him before a justice issuing the warrant and makes return thereon his official authority has terminated and the justice can not thereafter orally empower him to convey the prisoner to jail.<sup>72</sup> It would seem, however, that if the court or magistrate could deputize a citizen to execute a warrant of arrest, he could be deputized anew to take the prisoner so arrested to jail.

**§ 185. Assault and Battery by Officers of the Law.**—An assault and battery by an officer of the law upon his prisoner cannot be justified upon the ground that it was provoked by the prisoner's

67. Brown v. Meier & Frank Co. 86 P(2d) 79, 160 Or 608; Hogg v. Lorenz, 29 SW(2d) 17, 234 Ky 751; Shea v. Sullivan, 158 NE 771, 261 Mass 255; Bowles v. Creason, 78 P(2d) 324, 159 Ore 129.

68. Klotz v. Cook, 212 SW 917, 184 Ky 735.

69. Dunham v. Solomon, 16 NJL 50; 190

Gibson v. Holmes, 62 A 11, 78 Vt 110, 4 LRA(NS) 451.

70. Com. v. Morihan, 4 Allen(Mass) 585.

71. Myers v. Dunn, 104 SW 352, 126 Ky 548, 41 Ky L Rep 926, 13 LRA(NS) 881.

72. State v. Dean, 48 NC 393.

use of opprobrious words, vile and abusive language or billingsgate, nor that by the use of such language the prisoner becomes a violator of the law, since the arresting officer cannot inflict a penalty for this infraction of a criminal statute. Neither will the officer be warranted in committing an assault and battery upon a prisoner because the prisoner strikes at but misses him.<sup>73</sup>

Neither may an officer justify an assault and battery or injury to his prisoner on the ground that it was inflicted to prevent an escape where there is no evidence of any attempt, nor the entertainment of any intention to escape on the part of the prisoner.<sup>74</sup>

§ 186. **Handcuffing, Photographing, and Taking Bertillon Measurements.**—It seems that in the conduct of an officer, not indicating wantonness and malice in so doing, he may handcuff a prisoner, since it is left to his discretion, but it should not be abused. He is particularly within his rights in handcuffing a prisoner where he has two of them who are strangers to him and it is long after dark and he has a considerable distance to go with them and it is his duty to follow the mandate of the warrant and bring them in. In these circumstances, the officer has the right to handcuff the prisoners.<sup>75</sup>

An officer of the law cannot stop, when the man he arrests is unknown to him at the moment of his arrest, to inquire into his character or as to his intention to escape or his guilt or innocence of the charged offense against him. His duty is to take him, to safely keep him and bring his body before the magistrate. If he does this without wantonness or malice it is not for a court or jury to say that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the accused and to punish a sheriff or constable by way of an assessment against him of damages for doing what honestly appeared to him at the time to be reasonable and right in the discharge of his official duty and in performance of the functions of his office.<sup>76</sup>

It does not seem that in the matter of handcuffing, tying, or fastening his prisoner that the conduct of the sheriff or constable is measured by that of an ordinarily prudent man.<sup>77</sup> And where the

73. *Dixon v. State*, 76 SE 794, 12 Ga App 17; *Grau v. Forge*, 209 SW 369, 183 Ky 521, 3 ALR 642.

74. *Doering v. State*, 49 Ind 56, 19 Am Rep 669.

75. *McCullough v. Greenfield*, 95 NW 532, 133 Mich 463, 62 LRA 906, 1 Ann Cas 924.

76. *Firestone v. Rice*, 38 NW 885, 71 Mich 377, 15 Am St Rep 226; *Butler v. Washburn*, 29 NH 251; *McCullough v. Greenfield*, supra.

77. *Dehm v. Hinman*, 15 Atl 741, 58 Conn 320, 1 LRA 374; *Edger v. Burke*, 54 Atl 980, 90 Md 714; *Cochran v. Toher*, 14 Minn 385.

officer acts within the limits of his authority it seems that he is the judge of the propriety of adopting such mode of procedure in making fast his prisoner. But yet as to whether he transcends his powers or grossly abuses them is a question for the jury.<sup>78</sup>

An officer of the law however may not with impunity handcuff one charged with a misdemeanor to a felon and then parade them through the streets, and if he does so he is liable in damages to the person charged with a misdemeanor.<sup>79</sup> In such case shame, humiliation, and mortification would be elements of damages.

It hardly needs to be noted that it is unnecessary to handcuff a prisoner in order to have him under arrest, or to make the arrest effectual.<sup>80</sup>

It would seem that an analogous principle may be amalgamated from the cases to the effect that an officer would have the same right to handcuff his prisoner when legally arresting without a warrant as when he is acting under the mandates of judicial process. Where it was not shown that the party arrested was a quarrelsome or dangerous man or that there had been any occurrences between him and the officer making the arrest but that the officer acting under authority directed the arrested party to leave the polling place where he had voted and it thereafter appeared that the arrested party had made more or less an indefinite threat against the officer but offered to do no harm to him at the time, and then got upon his mount and started home, but thereafter stopped some three or four hundred yards from the polling place and engaged in conversation with citizens; where he was overtaken and arrested by the said officer, handcuffed, and led through the streets to jail, which caused him extreme humiliation and mortification, such conduct on the part of the officer was unlawful to a criminal extent, for which he was convicted and fined.<sup>81</sup> And indeed justly so! The citizen owes to officers of the law every support in enforcing and upholding the law, but there is no greater duty on any citizen to obey the law than that that rests upon the law's own ministers; no overstepping the mandates of the law ought to be countenanced or lightly passed over.

With respect to the right to photograph and make Bertillon measurements, it is submitted in accordance with the holding of the New York court that the right to personal liberty which exists independent of any express provision of the law includes not only

78. *State v. Stalcup*, 24 NC 50.

79. *Leigh v. Cole*, 6 Cox CC 329.

80. *State v. Deatherage*, 77 P 604, 35 Wash 326.

81. *Giroux v. State*, 40 Tex 97.



absolute freedom of travel but the protection of the person inviolate against attack, stripping or exposure. Constitutional provisions that a citizen shall not be deprived of any of his rights except by the law of the land or judgment of his peers, that he shall not be deprived of his liberty without due process of law are not the sources of the right but constitute a shield against unwarranted interference with such right by any department of the government whether executive, legislative, or judicial, and it may be said that statutory authority cannot confer the power upon officers of the law to take a person accused of an offense into custody after he had been arraigned and taken to jail and take his photograph and measurements for the record of the police department under the Bertillon system. So where members of a city police department seized a person after he had been bailed for an offense and before trial, carried him to a police station and there compelled him to submit to be photographed, measured, etc., for the Bertillon system, such conduct constituted a gross violation of his right to liberty and entitled him to sue every person concerned therein for damages. Such conduct constituted an assault and battery and likewise criminal libel. However, a mandamus would not lie to compel a destruction of the photographs and measurements thus made.<sup>82</sup>

On the other hand, a contrary conclusion has been reached, that it is no violation of constitutional rights for police authorities to measure and photograph according to the Bertillon system, a person arrested for a felony but not yet tried, but this is the ambit of their authority and they may not in advance of conviction place the photograph in the rogues' gallery or distribute copies of it unless the prisoner becomes a fugitive from justice.<sup>83</sup>

The chancery court of New Jersey, it is submitted, reached a most unjust conclusion and utterly devoid of all reason wherein it was held that an arrested person charged with crime could be lawfully fingerprinted, measured, and photographed without his consent and against his will. Such unreasonable decisions, as this, go a long way to strike down personal liberty and invade rights that

82. *Gow v. Bingham*, 107 NYS 1011, 57 Misc 66; *People v. York*, 59 NYS 118, 27 Misc 658; *Owen v. Partridge*, 82 NYS 248, 40 Misc 415, 27 Misc 658; *Bingham v. Gaynor*, 126 NYS 353, 141 App Div 301, reversing 125 NYS 216, 68 Misc 505; see also 96 NE 84, 203 NY 27; *In re Molineux*, 69 NE 727, 177

[1 Anderson on Sheriffs]—13

NY 395, 65 LRA 104.

83. *Downs v. Swann*, 73 Atl 653, 111 Md 53, 34 ASR 566, 23 LRA(NS) 739 and note; *Mabry v. Kettering*, 117 SW 746, 89 Ark 551, 16 Ann Cas 1123 and note; *State v. Clausmier*, 67 NE 541, 154 Ind 509, 77 Am St Rep 511, 50 LRA 73.

have been thought, ever since this government was established, to be inviolate.<sup>84</sup> It is not the sporadic case in which personal liberty and constitutional guarantees are endangered, but each instance seems to be thought to sanction an additional violation of the citizen's right, and therein lurks the menace to be checked and held in due bounds of constitutional law.

The learned Vice-chancellor of New Jersey, in order to reach this most extraordinary conclusion, proceeded upon analogy to the right to search a prisoner when he was arrested and take from him incriminating articles and effects found upon his person. It takes hardly more than an aperçu to disclose the fallacy of this reasoning. When a prisoner is arrested and his property and effects are taken, unless they are criminal within themselves and then after they have served their purpose by way of evidence and the like, he is entitled to their return, but not so with photographs and measurements, but they are placed in the archives of the police department, there to remain for all time to the end that they are a constant reminder that the accused was arrested, measured, photographed, and fingerprinted, whether guilty or innocent. Such being public records, they are subject in many cases and jurisdictions to be inspected by the public eye. It is submitted that an innocent citizen has a right to be free from such minatory storm clouds constantly hanging over his head, ever ready, in many cases, to completely destroy him, regardless of how exemplary a life he may have led. It is rather striking that the courts deem themselves without power to remedy the wrong that has been done the accused in advance of conviction by photographing, measuring, and fingerprinting him. The courts seem to deem themselves powerless to remedy this wrong. A mandamus will not lie and an injunction will not be issued to right the wrong that has been committed against his supposedly inviolate person.<sup>85</sup>

However, where a writ of habeas corpus has been issued to prevent the photographing, fingerprinting and measuring in advance of the accused's conviction and the officers of the law in disregard thereof proceed so to do they are in contempt of court.<sup>86</sup>

It is submitted however that the Supreme Court of Louisiana has enunciated, not only a sound rule of law, but indeed one that is commendable, as sustaining the constitutional and personal rights

84. *Bartletta v. McFeeley*, 152 Atl 17, 107 NJ Eq 141, aff. 156 Atl 658, 109 NJ Eq 241.

85. *In re Molineux*, supra.

86. *People v. Kuhne*, 107 NYS 1020, 57 Misc 30, 111 NYS 1136, 127 App Div 007.

of one under arrest. It is there held that the publication of an innocent man's photograph in the rogues' gallery gives rise to sufficient ground to sustain an injunction. The court intimated that a mandamus may likewise issue to remedy the wrong that had been done the accused.<sup>87</sup>

It has also been held that the prosecution may photograph the accused for the purpose of using the same as evidence against him on the trial and that this did not invade his constitutional right against self-incrimination. It appeared however that no excessive force or duress was employed in taking the picture, but after it was thus taken an objection against its introduction on a trial would be unavailing to accomplish its exclusion.<sup>88</sup>

§ 187. **Bail in General.**—It is the duty of the sheriff or constable to see that a party he takes into custody is taken before a proper court or magistrate to the end that he may have bail fixed and that he may be allowed to find adequate sureties thereon. It is probably true in all jurisdictions that the matter of fixing and admitting to bail is a judicial act, although in some jurisdictions it is likewise true that after the bail is fixed the sheriff may approve the sureties on the bail and discharge the prisoner. Formerly, in England, after a defendant had been taken into custody it was the duty of the sheriff to bail him if he could furnish adequate security or sureties for his appearance in court. Before the enactment of the statute of 23 Hen. 6, ch. 9, it was necessary in order for an accused in custody to procure his enlargement to sue out a writ of mainprise and unless he did so, the sheriff had the right to elect to retain such prisoner in close custody or to release him upon security. In other words, the matter of bail before the enactment of the above mentioned parliamentary statute was left to the discretion of the sheriff unless a writ of mainprise was sued out. However, that act of parliament made it the duty of English sheriffs to let out of prison all manner of persons by them arrested or being in their custody by force of any writ, bill, etc., upon reasonable sureties of sufficient persons having sufficient property within the county. Under the operation of this statute the ancient writ of mainprise became obsolete because the sureties under it who were called mainpernors did not have the privilege accorded to sureties on bail provided for in the above mentioned statute of capturing and surrendering the

87. *Schulman v. Whitaker*, 30 So 737, 115 La 828, see also *Itzkovitch v. Whitaker*, 30 So 499, 115 La 479, 112 Am St Rep 272, 1 LRA(NS) 1147, and

note: *Mabry v. Kettering*, supra.

88. *Shaffer v. U. S.* 2: App DC 417, cert. den. 25 S Ct 798, 196 US 630, 49 L ed 631.

accused. Their liability, too, was more comprehensive, for by their undertaking, the principal should appear and answer the particular matter specified in the process, and also he was compelled under their undertaking to answer any other charge that might be lodged against him.<sup>89</sup>

If the English sheriff refused to take such bail as was prescribed by this statutory enactment of parliament, he was subject to an action for damages, and, if the arrest were on civil process, and plaintiff did not think the security was sufficient he could rule the sheriff to produce the body of the defendant for additional bail and where the plaintiff in a case involving a civil arrest made such motion and no bail was given, but the prisoner was produced, then both the sheriff and the former bail were exonerated. The law of England seems to have been, that, if bail were given to and approved by the sheriff and the defendant failed to appear, the bond was forfeited with consequent liability of the sheriff and the sheriffs was amerced as for a false return. In cases of civil arrest, however, the plaintiff could take an assignment of bail bond, upon which he could thereafter maintain an action and the sheriff would be exonerated.<sup>90</sup>

Some authorities incline to the view that the right to take bail by the sheriff at common law was confined to civil actions.<sup>91</sup>

§ 188. **Right to Admit to Bail.**—While, as we have already seen, in the next preceding section, that formerly sheriffs admitted to bail, it has been said that both at common law and under modern statutes, the sheriff has the right in civil actions to take bail for the appearance of a prisoner arrested therein.<sup>92</sup>

But it may be stated as a general rule that the authority in our time to admit to bail resides, in general, in the judiciary.<sup>93</sup>

In the United States the right to admit to bail is generally regulated by statute and conferred upon courts of different classes and

89. *Watson on Sheriffs*, 103; *Murfree on Sheriffs*, Sec. 180; *Blackstone's Commentaries*, 126; *Ballentine Law Dictionary*, 783; 2 *Bouvier's Law Dictionary (Rawle's 3 Revision)* 2064.

90. *Ex parte Metzler*, 5 Cow.(NY) 287; *Mathison v. Forbus*, 19 Johns.(N Y) 292; *Fish v. Horner*, 7 Mod 62; *Howe v. Granville*, 7 Mod 117; *Grosvenor v. Soame*, 6 Mod 123; *Lord Brooke v. Stone*, 1 Wils 223; *Williams v. Williams*, 1 Salk 99; 1 *Bacon Abridg* 532, 575.

91. 6 Am Jur 50, Sec. 6.

92. *Harris v. Simpson*, 4 Litt.(Ky) 165, 14 Am Dec 101; *Mozorosky v. Hurlburt*, 198 P 566, 211 P 893, 106 Ore 274, 15 ALR 1076 and note, note 39 LRA(NS) 758.

93. *Vanderford v. Brand*, 54 SE 822, 126 Ga 67, 9 Ann Cas 617, and note; *Deming v. Nichols*, 186 SW 113, 135 Tenn 295, LRA1916F 103; *In re Alexander*, 59 Mo 598, 21 Am Rep 393.

the statutes of each particular jurisdiction should be consulted with respect to the power and authority to admit to bail.<sup>94</sup>

The generally prevailing rule in the United States is that the sheriff cannot ordinarily allow bail. In the general nature of things this should be the case because the matter of admission to bail calls for the exercise of judicial discretion to the end that the constitutional provision prohibiting unreasonable or excessive bail should not be violated.<sup>95</sup>

In a few jurisdictions, however, in a limited number of cases, the sheriff may, under statutory provision, admit to bail.<sup>96</sup>

§ 189. *Duty of Sheriff in Taking Bail.*—Wherever the sheriff or other officer is authorized by law to take bail it is incumbent upon him to comply with the law in respect thereto, and it has been held that if he refuses to accept bail with sufficient sureties thereon, he being authorized so to do, this subjects him to an action for damages at the suit of the prisoner.<sup>97</sup>

In a civil action where it is the sheriff's or constable's lawful duty to arrest the defendant and the officer fails so to do, either wilfully or negligently, then the plaintiff in such civil action may hold the officer in damages for the default.<sup>98</sup>

While the sheriff is bound to see to it that bail taken by him is sufficient where he is authorized so to do, it seems that some allowance is made for the inherent infirmity of human judgment, and that all he is required to do is to take a bail sufficient or reputed so to be at the time of the sureties going thereon, and he is not responsible if they thereafter become insolvent.<sup>99</sup>

In order, however, for the sheriff to claim the immunity from liability, he must substantially comply with the law in the taking of bail, and if he is guilty of a default or neglect in compliance with the principal mandates of the law he is liable therefor. So if the law directs a sheriff in those cases where he is authorized to admit to and accept bail to have two sureties thereon then he is liable if

94. *State v. Ricciardi*, 123 Atl 606, 91 NH 223, 34 ALR 609. Note 39 LRA(NS) 758. *Vanderford v. Brand*, supra.

95. *Bryant v. Bisbee*, 237 P 380, 28 Ariz 278, 44 ALR 1495; *Williams v. State*, 6 So 831, 25 Fla 734, 6 LRA 821; *Gregory v. State*, 94 Ind 384, 48 Am Rep 162; *Clatsop County v. Wuo-pio*, 180 P 547, 95 Or 30, note 6 Ann Cas 951, note 15 Eng Rul Cas 230; *State v. Charnock*, 141 SE 403,

105 W Va 8, 56 ALR 1094; *Mozorosky v. Hurlburt*, supra.

96. *Williams v. State*, supra.

97. *Lovell v. Plumber*, 15 East 320.

98. *Sparhawk v. Bartlett*, 2 Mass 188; *Young v. Hosmer*, 11 Mass 89; *Rayner v. Bell*, 15 Mass 377.

99. *Rice v. Hosmer*, 12 Mass 127; *Stevens v. Boyce*, 9 Johns.(NY) 292; *Sherwood v. Pearl*, 1 Tyler(Ver) 314; *Teasdale v. Kennedy*, 1 Bay(SC) 322.

he accepts a bail bond with a single surety, regardless of how solvent that surety may be.<sup>1</sup>

A sheriff cannot say that he is personally liable as surety on bail since any liability attaching to him is in his official character and renders his sureties also liable.<sup>2</sup>

In some states if the sheriff is guilty of default in taking bail, he himself is, by statutory provision, responsible as special bail.<sup>3</sup>

In some jurisdictions, however, in this character of special bail, the sureties on the sheriff's bond are liable only for nominal damages.<sup>4</sup>

The rule seems to be that where the sheriff's or constable's liability depends upon his return, he may not dispute it.<sup>5</sup>

§ 190. *Mode of Taking Bail and Sufficiency of Conditions.*—The mode of taking bail is generally regulated by statute and under statutes generally encountered in the different American jurisdictions, as a rule, it is conditioned, not only for the appearance of the defendant to answer the charge against him, but that he will thereafter submit himself in execution of the court's judgment. While different phraseology is employed in the statutory enactments still they all mean the same, and that is the defendant will be there to answer to the charge and undergo any punishment that may be imposed upon him. This is true whether the sum of the conditions of the bail is that he will appear and answer the information or indictment and will not depart without leave or that he will abide the orders of the court and the like.<sup>6</sup>

It is sometimes held that the signers of the bail bond must sign their names in full, initials being insufficient. But generally this manner of signing is not required; signing by mark, or when the bond is blank, or by initials is sufficient.<sup>7</sup> The signature of the prin-

1. *Rice v. Hosmer*, supra.

2. *Brown v. Lord, Kirby* (Conn) 209.

3. *Gray v. Hoover*, 4 Dev (10 NC) 475; *Hart v. Lanier*, 3 Hawks (NC) 244; *McKee v. Love*, 2 Overton (Tenn) 243; *People v. Dikeman*, 3 Abb A 520, 4 Keyes 93.

4. *Eaten v. Ogier*, 2 Greenl. (Me) 46; *Weld v. Bartlett*, 10 Mass 470.

5. *Simmons v. Bradford*, 15 Mass 82; *Gardner v. Hosmer*, 6 Mass 325; *Shackford v. Goodwin*, 13 Mass 187; *Seeley v. Brown*, 14 Pick.(Mass) 177.

6. *Campbell v. State*, 18 Ind 375, 81

Am Dec 363; *Com. v. Overby*, 80 Ky 208, 3 Ky L Rep 704, 44 Am Rep 471; *State v. Charles*, 105 SW 609, 207 Mo 40, 13 Ann Cas 565; *State v. Funk*, 127 NW 722, 20 ND 145, 30 LRA(NS) 211, Ann Cas 1912C 743.

7. *Hammons v. State*, 59 Ala 104, 31 Am Rep 13. In this case it is held that bail given and taken on Sunday is valid; *Brown v. Colquitt*, 73 Ga 59, 54 Am Rep 867; *Ingram v. State*, 10 Kan 630. Designation of principal by initials is sufficient; *Com. v. Ball*, 6 Bush(Ky) 291; *Carpenter v. Fifield*, 14 RI 73; *Dresser v. Fifield*, 12 RI 24.

cipal, if required, must be personally affixed to the bail and cannot be done by another.<sup>7a</sup> The place of signing is not material as a rule. The signatures need not be at the bottom of bond.<sup>7b</sup>

It is generally held, however, under the more modern decisions, that the defects and irregularities with respect to the names of the sureties or others in the body of the bail do not affect its validity, that it is not even necessary for the name of the principal to appear in the body of the bond, and that blank spaces therein do not militate against said bail being valid and binding.<sup>8</sup>

And where a bond is signed by two persons on one date, as sureties and by another at a later date, the third becomes a party to the instrument so as to make him jointly and severally liable with the others.<sup>9</sup>

Even leaving blank spaces where the principal of the bond should appear does not affect the validity of the bail bond. Neither does leaving the amount of the penalty and the name of the obligee blank where the surety knows whose bond and for what amount he is signing affect its validity, nor will the failure to insert by way of recital in the bail bond the nature of the crime render it invalid.<sup>10</sup>

However, it has been held at an early day in North Carolina that such defects as suggested above are fatal to the validity of the bond.<sup>11</sup>

In any event, however, it is generally true that where a bail bond prescribed by statute is void for failure to measure up to the statutory demands it cannot be enforced as a common law obligation.<sup>12</sup>

Bail bonds are valid only to the extent of the statutory conditions inserted therein; additional conditions are not subject to be enforced.<sup>13</sup>

7a. *Billington v. Com.* 79 Ky 400, 3 Ky L Rep 19. If bond does not comply with statute as to signing, then sureties not bound; *Com. v. Belt*, 51 SW 131, 21 Ky L Rep 339. If one surety does not sign so as to bind him, then other sureties not bound; *Matter of Fowler*, 13 NW 530, 49 Mich 234; *State v. Abrens*, 46 SCL 403; *Grier v. State*, 29 Tex 487.

7b. *State v. Wilcox*, 50 Mo 176. Signature in body of bond above its conditions does not invalidate bond; *Meffowell v. State*, 53 SW 630, 41 Tex Cr 227; *Wilson v. State*, 73 SW 398, 44 Tex Cr 595.

8. Note Ann Cas 1912A 605.

9. *Murray v. People*, 111 P 711, 49 Colo 109, Ann Cas 1912A 693.

10. *Brown v. Colquitt*, 73 Ga 59, 54 Am Rep 867; *State v. O'Keefe*, 108 P 2, 32 Nev 331, 38 LRA(NS) 309 and note; *State v. Bradsher*, 127 SE 349, 189 NC 401, 38 ALR 1102; *Gorman v. State*, 38 Tex 112, 10 Am Rep 29.

11. *Adams v. Hedgepeth*, 5 Jones L (50 NC) 327; *Adams v. Jones*, 1 Winst 190, 60 NC 193.

12. *Territory v. Woodring*, 82 P 574, 15 Okl 202, 1 LRA(NS) 848, 6 Ann Cas 950.

13. Note LRA1917B 990.

It takes more than slight variations from the form prescribed by statute to invalidate a bail bond.<sup>14</sup>

§ 191. Deposit in Lieu of Signed Bail.—It seems that in England and in some, if not all, of the American jurisdictions statutory enactments provide for the making of a deposit in lieu of a personal or signed bail bond.<sup>15</sup> The statutes of any jurisdiction where the question arises should be consulted.

The deposit is generally, but not always, made with the sheriff or other officer having the person in custody but in the absence of statute a deposit in lieu of personal or signed bail is unauthorized and it would seem that if a sheriff discharged a prisoner upon a deposit being made, there being no statutory authority therefor, the sheriff would be liable.<sup>16</sup>

The merely providing for entering into bail with security does not authorize the acceptance of a deposit for bail.<sup>17</sup>

If a sheriff or constable acts in good faith without any corrupt motive, and accepts a deposit in lieu of bail and discharges a prisoner, it will be held not necessarily to mean to amount to a misdemeanor in office.<sup>18</sup>

As an application of the rule with respect to compliance with statute regarding the deposit of money in lieu of bail it seems that a certified check, certificate of deposit, or liberty bonds will answer the purpose of cash in such cases; but it seems, unless cash is realized on securities accepted, the officer would be liable as if money had been taken as bail.<sup>19</sup>

14. 65 Am Dec 549.

15. *Campbell v. Reno County*, 154 P 257, 97 Kan 68, Ann Cas 1918D, 533 and note; *Re Henderson*, 145 NW 574, 27 ND 155, 51 LRA(NS) 328; *Ashmuhs v. Bowyer*, 135 P 413, 39 Okl 376, 50 LRA(NS) 1060; note Ann Cas 1913D 194; *Murfrees on Sheriffs*, Sec. 185.

16. *State v. Owens*, 84 NW 529, 112 Ia 403; *Snyder v. Gross*, 95 NW 630, 69 Neb 340, 5 Ann Cas 152; *Calaway v. Town of Belleville*, 184 Atl 819, 116 NJS 377; *Badolato v. Molinari*, 174 NYS 512, 106 Misc 342, 37 NY Cr 375, wherein it is said: "Under the common law cash could not be accepted as or in lieu of bail. It is acceptable only when authorized by statute." *Com. v. Sitler*, 104 A 604, 261 Pa 261; *Eagan v. Stevens*, 39 Hun(NY) 311; *Bras-*  
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*field v. Milan*, 155 SW 926, 127 Tenn 501, 44 LRA(NS) 1150 and note; *Berume v. Hughes*, 275 SW (Tex Civ App) 268; *Brooks v. Epperson*, 178 SE 787, 164 Va 37; notes 44 LRA(NS) 1150; 5 Ann Cas 153; Ann Cas 1913D 194; *Kellogg v. Witte*, 182 P 670, 107 Wash 691; *Lee v. Severyns*, 276 P 94, 151 Wash 403.

17. Ann Cas 1918D 536. But see, *U. S. v. Widen*, and *Rowan v. Randolph*, infra; *Snyder v. Gross*, 95 NW 630, 69 Neb 340, note 5 Ann Cas 152.

18. *Snyder v. Gross*, supra.  
19. *Kirschbaum v. Mayn*, 246 P 953, 76 Mont 320, 48 ALR 1425.

Sec. 192, notes 23 and 24 infra.  
While the federal statute in terms does not authorize deposit of cash in lieu of bail, still it is held that such may be done and that U. S. Liberty

Indeed, it is sometimes authorized by law to accept mortgage security in lieu of bail.<sup>19a</sup>

Provision for deposit of cash or securities in lieu of bail in a criminal case does not authorize the accepting of such deposit in a civil case, and it would seem vice versa.<sup>19b</sup>

Only the officers specified in the statute may accept a deposit in lieu of bail.<sup>19c</sup>

Where the sheriff or constable accepts a cash deposit in lieu of bail, there being no authority therefor, and the defendant fails to appear in court, then the sheriff or constable should make the same disposition of the deposit as authorized by law for disposing of money collected on a forfeited bail bond.<sup>19d</sup>

§ 192. Determination of Ownership of Cash Deposit.—It is an easy matter for a sheriff or constable holding a cash deposit in lieu of bail to be drawn into a controversy and probably subjected to liability, where there is a contest over the ownership of such funds. However, the deposit presumptively belongs to the prisoner and when the time comes to make disbursement thereof if it is in the hands of a sheriff or constable he may in the absence of contrary claims on the part of the third parties pay it to the discharged prisoner, but if a controversy arises with respect to the ownership of such funds and adverse contentions are made thereto, the only safe course the officer can pursue is to hold the same until title thereto is settled by the court. He should not undertake to settle the same himself.<sup>20</sup> Upon the termination of the case in which a deposit is

Bonds are "cash." U. S. v. Widen, 38 F(2d) 517; Rowan v. Randolph, 268 Fed 529.

See also, Leary v. U. S. 32 S Ct 599, 224 US 507, 56 L ed 899, Ann Cas 1913D 1029; State v. Hart, 227 NW 650, 209 Ia 119; Bringham v. Montcalm Co. 232 NW 348; Mundell v. Wells, 184 P 666, 181 Cal 398, 7 ALR 383, and note; Ann Cas 1913D 195.

A legacy limited to support of legatee may not be used as a deposit in lieu of bail. Sutherland v. St. Lawrence Co. 91 NYS 962, 101 App Div 299, rev. 85 NYS 606, 42 Misc 38.

Depositing money by a third person in lieu of bail does not make the depositor surety on bail. Arnsperger v. Norman, 40 SW 574, 101 Ky 208, 10 Ky L Rep 381.

19a. State v. Jenkins, 28 SE 413,

121 NC 637; Kirschbaum v. Mayn, 246 P 953, 76 Mont 320, 48 ALR 1425.

19b. Van Fossen v. Maffil, 16 Pa Dist. & Co. 623.

19c. Childress v. Boyatt, 190 SW 429, 126 Ark 627; Erickson v. City of Marshfield, 186 P 550, 94 Or 705; Com. v. Hinsdale, 85 Pa Super 238; Kellogg v. Witte, 182 P 570, 107 Wash 691; Lee v. Severyns, 276 P 94, 151 Wash 403, holding a police officer cannot accept cash bail. See Boaz v. Fate, 43 Ind 403.

19d. Rock Island Co. v. Mercer Co. 24 Ill 35.

20. Mundell v. Wells, 184 P 666, 181 Cal 398, 7 ALR 383. Where a cash bail is deposited by a third party, the right to surrender of the defendant and have the money returned is not recognized. (Mundell v. Wells, supra.)

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made in lieu of bail, nothing else appearing, the deposit should be paid over to the defendant.<sup>20a</sup>

While there is a presumption that money put up by a third party as bail belongs to the defendant,<sup>20b</sup> where the deposit is made by a third party and receipt issued to him, the money is regarded as the depositor's with respect to any claim asserted by the defendant or his assignee or creditors.<sup>20c</sup>

It has been held that a deposit in lieu of bail cannot be delivered to anyone but the defendant regardless of who may have made the original deposit.<sup>20d</sup>

Of course, the presumption that the deposit in lieu of bail is the defendant's is conclusive for some purposes, as, for illustration, if it is forfeited.<sup>20e</sup>

A deposit made in lieu of bail cannot be used to pay a fine and costs assessed against accused in the absence of statute, and this is true regardless of who is the owner.<sup>20f</sup>

Accused may, also, recover a deposit made by him in lieu of bail, if there is no statute authorizing such deposit.<sup>20g</sup>

§ 193. Insufficient Substitutes for Bail.—If the sheriff failed to

But it seems where the defendant puts up money for bail, he may surrender himself and take down the deposit. Hermann v. Aaronson, 8 Abb Pr NS (NY) 155. And in England the bail deposited by a third party may be withdrawn with the consent of the defendant, upon his surrendering himself. Douglass v. Stanbrough, 3 A & E 316, 10 ECL 160, 111 Eng Reprint 434; Bull v. Turner, 1 M & W 47, 150 Eng Reprint 340.

20a. Savannah v. Kassell, 41 SE 572, 115 Ga 310; Com. v. DePane, 8 Ky Op 243; Alexander v. Creamer, 61 NYS 539, 41 App Div 211; Peo. v. Gould, 77 NYS 1067, 38 Misc 505. See also 78 NYS 279, 75 App Div 524, 12 NY Ann Cas 61. This case holds deposit must be returned to defendant instead of to a third party making it.

20b. State v. Ow, 84 NW 529, 112 Ia 403; Doane v. Dalrymple, 74 Atl 964, 70 NJL 200.

The presumption is regarded as conclusive under some statutes. Whitaker v. State, 119 P 1003, 31 Okl 65. 202

20c. Finelite v. Sonberg, 78 NYS 338, 75 App Div 455.

If accused surrenders himself, he is entitled to take down a deposit made by him in lieu of bail. Com. v. DePane, 8 Ky Op 243; Hermann v. Aaronson, 8 Abb Pr NS (NY) 155.

20d. Parry v. Folk, 21 Pa Dist & Co 580.

20e. Bankers' Mtg. Co. v. McComb, 60 F(2d) 218; Jacobson v. Hahn, 14 Fed Supp 339; State v. Friend, 236 N W 20, 212 Ia 136; State v. Fowler, 212 NW 293, 192 Wis 151.

20f. U. S. v. Werner, 47 F(2d) 351; U. S. v. Wider, 38 F(2d) 517; Mundell v. Wells, 184 P 666, 181 Cal 398, 7 ALR 383; State v. Fowler, supra; Campbell v. Board of Commrs. 164 P 257, 97 Kan 68, Ann Cas 1918D 533; Crowell v. Circuit Court, 209 NW 539, 50 SD 276.

20g. Brasfield Milan, 155 SW 926, 127 Tenn 561, 44 LRA(NS) 1150 and note; Applegate v. Young, 61 P 402, 62 Kan 100, rev. 58 P 1000, 9 Kan App 493.

discharge his duty with respect to taking sufficient bail, in some jurisdictions by statute, he becomes responsible as special bail.<sup>21</sup>

So if he fails to return a sufficient bail, under some statutory enactments, he is liable as special bail himself.<sup>22</sup>

So where the sheriff took a promissory note in lieu of bail he was held liable thereon.<sup>23</sup>

If a sheriff is authorized to take bail in either a civil or criminal action and he takes an insufficient bail or permits the prisoner to go without bail, he is liable himself as for special bail, and his liability is the same as the sureties on the bail bond would have been had a proper bail bond been given and accrues when it would be a breach of the terms of the bail bond if such had been given.<sup>24</sup>

In some cases the sheriff is held liable as if an escape of the prisoner had occurred. For instances, where he is authorized to take bail and he permits the prisoner to go he cannot be held as a special bail or as if he had signed the bond, but he is liable as for an escape.<sup>25</sup>

In a civil action where plaintiff is given the statutory right to object or except to defendant's sureties on the bail, and upon such exceptions being filed, it then becomes the sheriff's duty to notify the plaintiff in writing of the time and place of justification of the sureties, and if the officer defaults in respect of this, he becomes liable as special bail, despite the fact that the plaintiff was near by and knew of the time and place of justification, and the fact the officer acted in good faith is immaterial.<sup>26</sup>

The sheriff is not liable as for the special bail or for the escape of a prisoner in a civil action where the plaintiff furnished the

21. Murfree on Sheriffs, 182.

22. Bartlett v. Marshall, 2 Bibb (Ky) 467; Handleys, Admrs. v. Ewings, 4 Bibb (Ky) 505.

23. Strong v. Tompkins, 8 Johns. (NY) 98.

See Sec. 191, note 10, supra.

24. Townsend v. Stoddard, 26 Ga 430; DeLongchamp v. Hicks, 25 Ga 200; Adams v. Jones, 40 NC 198; Washington v. Vinson, 49 NC 380; Cooper v. Rivers, 48 So 1024, 95 Miss 423; Brady v. Brundage, 59 NY 310, 2 Thomp. & C 621; McKenzie v. Smith, 48 NY 143, 27 How Pr 20.

See Sec. 191, note 19.

25. Montgomery v. McAlpin, 23 NC 463.

26. Howell v. Jones, 18 SE 672, 113 NC 429. It is submitted that the learned court reached an unsound conclusion. If plaintiff knew of the time and place of justification, what more information could have been imparted by notice? What advantage would a notice have afforded him? How was he injured by failure to give notice when he knew the time and place of the justification and could have attended had he desired? The opinion shows that a written notice was not expressly required by the statute.

debtor with the articles and implements by the means whereof he effected his escape.<sup>27</sup>

It has been held that a sheriff is not liable as special bail after having committed the defendant in civil action on mesne process, where he merely permits him to go at liberty.<sup>28</sup>

Neither is the sheriff liable as special bail if after making an arrest of a prisoner in a civil action, he escapes before reaching the jail.<sup>29</sup>

Where a sheriff accepts a cash deposit from a third party as bail and is under statute liable as special bail, when he fails to take, or takes an insufficient bail bond, and therefore the acceptance of the deposit being unauthorized by law which the sheriff admitted, and also conceded his liability as special bail, impliedly at least, by paying the money into court, the party making such deposit with the sheriff being in pari delicto with the officer, he cannot recover the money paid as such deposit.<sup>30</sup>

Before the sheriff can be held as special bail, all of the statutory provisions and conditions must be complied with, and in a civil action an execution must be issued against the property of the prisoner and returned unsatisfied, or in lieu thereof, there must be proof establishing his nonresidence of the state, and then an execution must issue against the body of the debtor, and it must be returned "not found" and then the sheriff may be proceeded against as for special bail.<sup>31</sup>

Where the statute authorizes exceptions to be filed to the bail bond in a civil action, and notice to the officer, he cannot be held liable as bail for failure to require sufficient bond unless all of the statutory conditions with respect to the exceptions and notice to him are taken and given as required by law and in addition thereto a judgment must be had declaring the insufficiency of the bail and declaring that the officer stand as special bail.<sup>32</sup>

All of these proceedings must be taken before there is a trial and judgment in the principal suit, that is, between the creditor and debtor for it is too late then.<sup>33</sup>

27. Love v. McAllister, 4 Hayw (Tenn) 65.

28. Buffalaw v. Hussey, 44 NC 237. This case appears to be unsound.

29. Hart v. Lanier, 10 NC 244.

30. Cooper v. Rivers, supra.

31. Tiffany v. Harvey, 110 NE 624, 218 NY 300; Gallarati v. Orser, 17 NY 204

Super 94; see however 27 NY 324; Buczynski v. Anderson, 161 NYS 697, 174 App Div 790.

32. Neal v. Gaines, 1 Stew (Ala) 158; Rowand v. Gridley, 1 How (2 Miss) 210; Worth v. Winbourne, 52 NC 431; Watt v. Johnston, 48 NC 124.

33. Worth v. Winbourne, supra.

However, if the sheriff or other officer entirely fails to take any bail and enlarges the prisoner notwithstanding the failure to give bail or where the bond is so defective and imperfect as to amount to no bail at all, then the exceptions to the bail and notice to the officer are not required to be given, since these proceedings are only applicable to cases wherein defective bail is given.<sup>34</sup>

Where the sheriff releases a defendant arrested in a civil action on mesne process on a bond being given he is not liable for failure of the sureties on the bail to justify upon exception to them where the final judgment is rendered against the defendant in the case but is not such as would charge the sureties. It seems that in order to hold the officer in this class of cases it must appear that if a proper bail had been given the sureties thereon would have been liable.<sup>35</sup>

§ 194. **Extent of Liability of Sheriff.**—A statute limiting the damages recoverable from a sheriff in case a prisoner escapes whom he has arrested on mesne process to the amount of loss sustained by the aggrieved party does not operate to limit the liability of the sheriff as special bail in case of escape.<sup>36</sup>

If it is sought to hold the sheriff in such cases as we have mentioned, he is not permitted to show the insolvency of the defendant in the original action by way of mitigation of damages.<sup>37</sup>

§ 195. **Waiver of Liability and Relief Therefrom.**—The liability, as has already been suggested, of the sheriff in case of his taking bail is that of the signer of an ordinary bail bond or, in other words, his liability is the same as if he were not sheriff and instead was a signer on the bond.<sup>38</sup>

It follows, therefore, that he is entitled to take advantage of every defense afforded by law to a surety to avoid the consequences of his, the sheriff's, default which would operate to relieve a signer of bail and to every other defense available to a surety on a bail bond in his situation.<sup>39</sup>

It seems that the officer may protect himself against liability by

34. *Adams v. Jones*, 60 NC 198; *McKee v. Love*, 2 Overt (Tenn) 243.

35. *Gallarati v. Orser*, supra.

36. *Buczynski v. Anderson*, 161 NYS 697, 174 App Div 790.

37. *Winborne v. Mitchell*, 15 SE 892, 111 NC 13; *Bensel v. Lynch*, 44 NY 102, 25 NY Super 448; *Metcalfe v. Stryker*, 31 NY 255, 10 Abb Pr 12, 31 Barb 62; *Buczynski v. Anderson*, supra.

38. *Gallarati v. Orser*, 27 NY 324;

see however, 17 NY Super 94; *McKenzie v. Smith*, 48 NY 143, 27 How Pr 20; *McKee v. Love*, 2 Overt (Tenn) 243; *Metcalfe v. Stryker*, 31 Barb 62, 10 Abb Pr 12, 31 NY 255.

39. *Lewis v. Stevens*, 93 NY 57, 4 NY Civ Proc 224, 2 McCarty Civ Proc 450, 65 How Pr 525; *Douglas v. Haberstro*, 88 NY 611, 25 Hun 262, 62 How Pr 455; *Brady v. Brundage*, 50 NY 310, 2 Thomp & C 621. But, how-

the giving of and having the sureties justify on sufficient bail and he may do this up to the time that process is issued against the debtor.<sup>40</sup>

Where sureties on bail may exonerate themselves by a surrender of their principal, a sheriff, constable, or other officer responsible for taking bail and having defaulted thereon has available unto him this same remedy of surrender and can procure thereby exoneration from liability.<sup>41</sup>

Where individual sureties on a bail seek to exonerate themselves by taking their principal into custody and surrendering him, it is their duty to deliver the principal to the sheriff, but where the sheriff fails to take a sufficient bail or to have the sureties on bail justify on being excepted to as required by law, he must in order to exonerate himself by surrender, rearrest the principal and hold him in custody, to remain there until he is legally discharged. He cannot accomplish this result by arresting the principal and surrendering him to the coroner, since the coroner has no right to receive or detain him in custody.<sup>42</sup>

On failure of sureties to justify after being excepted to, the sheriff becomes liable as bail and the sureties are not thereafter liable as such bail but they are liable to the sheriff for all damages which he might sustain by their omission to justify.<sup>43</sup>

A sheriff who has become liable as bail may escape that liability by showing that the judgment in the original action was void, but a mere irregularity thereof does not have this effect whether such irregularity is in the judgment or proceedings or upon the order of arrest or in the issuance of the execution under which the arrest is made. Excessive judgment over that demanded in the action is treated as a mere irregularity with respect to relieving the sheriff.<sup>44</sup>

Insolvency of the debtor is no defense in an action against the officer as bail, but it seems a different rule applies where he is sued not as bail but as for an escape.<sup>45</sup>

ever, see *Sims v. Tarrant*, 2 Nott & McC (11 SCL) 123.

40. *Buckman v. Carnley*, 9 How Pr (NY) 180.

41. *Huggins v. Fonville*, 14 NC 392; *Douglas v. Haberstro*, 21 Hun(NY) 320, 50 How Pr 104; *Seaver v. Genner*, 10 Abb Pr (NY) 250; *Brady v. Brundage*, supra.

42. *Brady v. Brundage*, 50 NY 310, 2 Thomp & C 621; *Douglas v. Warren*, 206

58 How Pr 264, 19 Hun(NY) 1; *Santos v. Marceques*, 9 How Pr(NY) 188.

43. *Douglas v. Warren*, supra.

44. *Savage v. Hussey*, 48 NC 140; *Bensel v. Lynch*, 44 NY 162; see also 25 NY Super 448; *Douglas v. Haberstro*, 25 Hun 262, 62 How Pr 455, but however see, 88 NY 611.

45. *Metcalfe v. Stryker*, 31 NY 255, 31 Barb 62, 10 Abb Pr 12; *Buczynski v. Anderson*, 161 NYS 697, 174 App Div 790.



In other words, in case of escape if the prisoner was insolvent and without property out of which the execution could have been satisfied and continued to be so, then the plaintiff could not possibly have sustained any damages.<sup>46</sup>

But it seems that if the proceeding against the sheriff asserts his liability as bail for escape of a prisoner, then the insolvency of the prisoner is no defense.<sup>47</sup>

Where the plaintiff's attorney directs the sheriff to return the body execution against the debtor if not found within the time that the officer has to arrest him, then such direction is a complete defense by way of waiver of the sheriff's liability as bail.<sup>48</sup>

Where the plaintiff filed his initial declaration in main action after receiving notice of the bail, the plaintiff's attorney thereby for him waived the exception to the sufficiency of the bail and it made no difference that the bail was not at the time actually filed in the case. That omission could not prejudice the plaintiff as the court would upon application compel the defendant's attorney to have filed bail nunc pro tunc. Under these circumstances any liability for default of the sheriff was waived.<sup>49</sup>

**§ 196. Right of Plaintiff to Instruct Sheriff as to Bail.**—When, by statute or otherwise, it is optional with the plaintiff to require bail or not, an oral direction to the sheriff to require it is sufficient and such direction may be communicated by the plaintiff in person or through the instrumentality of an agent. The officer, however, cannot be held as the constructive agent of the plaintiff for this purpose so that he may decide as such agent and in the interest of the plaintiff whether he will arrest the defendant or merely summon him. The sheriff is in all cases primarily the agent of the law; whether subsidiary to this function he could take a special agency for the plaintiff involving the arrest and imprisonment of the defendant is extremely problematical, but where the law gives the right to command the officer whether he be a sheriff or constable, it is beyond question his duty to obey. However there is no basis for the conclusion that by implication of law he can be invested with the arbitrary authority whether as an agent for the plaintiff or otherwise to decide upon the liberty of one citizen on behalf of or in the interest of another.<sup>50</sup>

46. Buczynski v. Anderson, supra.

47. Buczynski v. Anderson, supra.

48. Douglas v. Haberstro, 2 NY Civ Proc 186. See sec. 199, infra.

49. People v. Stevens, 9 Johns.(NY) 72.

50. State v. Kirby, 4 Ired (20 NC) 90.

**§ 197. Proceedings against Sheriff as Special Bail.**—In proceedings by scire facias or otherwise against a sheriff as special bail it is necessary to set out in an appropriate pleading or proceedings how the officer became such special bail; that the writ in the original action came to his hands in his official capacity; that he arrested the defendant and failed to take bail or was guilty of other default in that connection and that whereby and by the force of the statute in such cases made and provided he became special bail. A neglect to set out these fundamental requirements results fatally to the proceeding.<sup>51</sup>

It is not, however, necessary or required to set out the cause of action upon which the original judgment was rendered. It seems sufficient to state the proceedings step by step and to start with the rendition of the judgment in the original action.<sup>51a</sup>

**§ 198. Escape in Civil Arrest Cases.**—While this subject is not of a great deal of importance in our time of boasted enlightenment and the prevailing exercise of humane considerations, still it is of sufficient importance in some jurisdictions that we should briefly notice it. In former times it was of vast importance because the rule allowing arrest in civil cases was generally applicable and often without the least hint or intimation of fraud, but now it is generally a rare case that warrants such drastic action against the liberty of the debtor.<sup>52</sup>

It was the duty of the sheriff to hold the prisoner in close custody and it seems that errors and irregularities in the proceedings were unavailing to the unfortunate debtor who found himself within the clutches of the law because he was not possessed of sufficient material goods to satisfy the inexorable demands of his creditors, and it was a sad day for the sheriff in olden times when out of the goodness of his heart or when prompted by humane impulses, he allowed his prisoner debtor the least consideration or the most fleeting moment of enjoyment of any liberty or consideration. It should be noted, however, that if the court had no jurisdiction of the subject matter and all proceedings bottomed upon the existence of a supposed jurisdiction, then the writ by which the sheriff held the unfortunate debtor was void and he was not responsible for an escape.<sup>52a</sup>

51. Malpass v. Fennell, 48 NC 79.

51a. Savage v. Hussey, 48 NC 149.

52. Murfree on Sheriffs, Sec. 190.

52a. Ontario Bank v. Hallett, 8 Cow. (NY) 602; Murfree on Sheriffs, 208

supra; Gold v. Strode, 3 Mod 325; Weaver v. Clifford, Cro Jac 3; Mackalley's Case, Cro Jac 280; Burton v. Eyre, Cro Jac 289; Jacques v. Caesar, 2 Saund 100; Scott v. Shaw, 13 Johns.

It was no defense to the officer having a prisoner debtor within his custody that an order of discharge had been made by the court without the authority or jurisdiction to make the same. However, such order of discharge must be void and not merely irregular before it ceased to operate as a protection to the sheriff for discharging a prisoner in his custody.<sup>53</sup>

As a general rule, every liberty given to a prisoner, as we have hereinbefore suggested, not authorized by the strict letter of the law was in the olden times regarded as an escape making the sheriff liable.<sup>54</sup>

A prisoner thus held could not be made a trusty by the sheriff and the allowing him to go at large for any purpose or for any time however short constituted a violation of the law with respect to escapes with the visitation of liability upon a sheriff thus permitting it.<sup>55</sup>

The removal of the prisoner out of the county for any purpose without authority was likewise magnified into a violation of law and constituted an escape.<sup>56</sup>

Where a prisoner escaped from a jail, however, of which the sheriff who had him in custody was not the keeper, but to which the sheriff might lawfully commit a prisoner, it operated to exonerate the sheriff from liability.<sup>57</sup>

The people of our time do not appreciate or understand the significance of the liberty they enjoy. The right not to be subject to imprisonment for debt is a right beyond measure and is a boon to mankind.

§ 199. Liability of Sheriff as Special Bail in Cases of Escape.—Under statutes that formerly existed, some of which still mar the statute books, upon an order of arrest being placed in the hands of the sheriff or constable, it was, and still is where the law has not been changed, the duty of the sheriff to arrest the debtor-defendant and keep him in close custody until he should be discharged by law, or give bail, or make a deposit in such cases as were made and provided by statute. If, after having thus taken the defendant into custody, he escaped even in the technical sense,

(NY) 378; *Hinman v. Brees*, 13 Johns. (NY) 529; *Bissell v. Kip*, 5 Johns. (N.Y.) 89; *Jones v. Cook*, 1 Cow. (NY) 309.

53. *Jackson v. Smith*, 5 Johns. (NY) 115; *Van Slyck v. Taylor*, 9 Johns. (NY) 140.

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54. *Colby v. Sampson*, 5 Mass 310; *Browning v. Rittenhouse*, 40 NJL 230.

55. *Carpenter v. Fifield*, 14 L. I. 73.

56. *M'Gruder v. Russell*, 2 Blackf. (Ind) 18.

57. *Keim v. Saunders*, 13 Atl 710, 120 Pa 121.

the sheriff was liable as for special bail. The measure of his liability in these cases is the same as the bail would have been if such had been given and the sureties thereon had justified. He is entitled, however, to the same powers and rights as to which bail would be entitled under the same facts and circumstances. The result of this rule is that where the sheriff was sued as bail after his prisoner had escaped actually or technically he cannot give in evidence in mitigation of damages, the defendant's insolvency. Nor could he show when sued either as for escape or as for bail that the order of arrest was improperly or irregularly granted or that there was error or irregularity in the judgment or execution. An order of arrest justifies the sheriff in making the arrest and unless set aside justifies a body execution.<sup>58</sup>

Where the sheriff had no power to take bail, however, his liability as bail did not attach on failure to produce the prisoner but he was liable in these circumstances as for an escape.<sup>59</sup>

It has also been adjudicated in at least one case that where the sheriff permitted a prisoner to go at large, the prisoner having been committed as a debtor on mesne process, he was not liable as special bail.<sup>60</sup>

Where the taking of deposit is not authorized by law, a sheriff doing so is liable as special bail, but a third party depositing the same could not recover it from the sheriff since he was in *pari delicto*.<sup>61</sup>

§ 200. Proceedings to Fix Liability of Sheriff.—Where civil arrest statutes still exist authorizing the taking into custody and detention of a debtor or other person in a civil action, care should be exercised to take each step necessary to fix and fasten liability on the sheriff as special bail or as for an escape or whatever the statutory requirements may be, since these proceedings are rather highly penal and disfavored. A strict compliance with them must be had and every step required thereby must actually be taken and no presumptions will be indulged in in favor of the efforts of plaintiff to hold the sheriff in such cases.

58. *Townsend v. Stoddard*, 26 Ga 430; *DeLongchamp v. Hicks*, 25 Ga 200; *Bensel v. Lynch*, 44 NY 162, 25 NY Super 448; *Metcalf v. Stryker*, 31 NY 255, 10 Abb Pr 12, 31 Barb 62; *Jones v. Cook*, 1 Cow. (NY) 309; *Gregory v. Levy*, 12 Barb (NY) 610; *Jewett v. Crane*, 13 Abb Pr 97, 35 Barb (NY) 210

208; *Smith v. Knapp*, 30 NY 581; *Ontario Bank v. Hallett*, 8 Cow. (NY) 192. See sec. 195, *supra*.

59. *Montgomery v. McAlpin*, 23 NC 463.

60. *Buffalow v. Hussey*, 44 NC 237.

61. *Cooper v. Rivers*, 48 So 1024, 95 Miss 423.

§ 201. **Liability as between Officers.**—The actual keeper of the jail is the one who is responsible to the plaintiff in a civil action for an escape. So as a necessary result of an application of this rule of law, a sheriff is held liable by virtue of being jailer instead of sheriff. By reason of this application of the rule we have under consideration, a board of inspectors of a prison are not responsible as jailers for escape of a prisoner.<sup>62</sup>

As has already been suggested in a preceding part of this section, where the sheriff is not the official keeper of the jail and it is beyond his control, he is not liable for an escape therefrom.<sup>63</sup>

Neither is the sheriff nor jailer liable for a prisoner committed on civil process from another county.<sup>64</sup>

It seems that the sheriff's liability with respect to escapes of prisoners held on civil process is the same whether the process issued out of a federal or State court.<sup>65</sup>

A change in the incumbency of the office of sheriff does not affect the liability for escapes occurring during the time that each incumbent has the jail in charge, and the fact that a successor takes over the custody of the jail together with the prisoners therein informally does not affect his liability or that of the predecessor in office insofar as escapes are concerned.<sup>66</sup>

Where a prisoner has given bond for jail liberties which a successor in office has not had assigned him and such prisoner thereafter escapes, then the incumbent is liable notwithstanding the before mentioned bond.<sup>67</sup>

The successor is, of course, liable for an escape of any prisoner that is confined in the jail at the time he succeeds to the custody thereof.<sup>68</sup>

§ 202. **Nature and Character of Bond for Jail Liberties.**—A bond given entitling a prisoner to the liberties of the prison yard operates as substitute for the sheriff's custody of the prisoner, and if properly and legally taken it likewise relieves the sheriff of further responsibility for the prisoner remaining in his custody. These bonds are assignable and if after a breach of the conditions

62. Keim v. Saunders, 13 Atl 710, 120 Pa 121; Smith v. Saunders, 19 Atl 54, 132 Pa 180.

63. Keim v. Saunders, supra.

64. Chipman v. Sawyer, 1 Tyler (Vt) 83, 2 Tyler (Vt) 61.

65. Spafford v. Goodell, Fed Cas No. 13,197, 3 McLean 97.

66. Slemaker v. Marriott, 5 Gill & J (Md) 406.

67. Partridge v. Westervelt, 13 Wend(NY) 500.

68. Stickle v. Reed, 23 Hun(NY) 417; Nynouss v. Tucker, Dyer 66A,

73 Eng Reprint 139; James v. Peirce, 2 Lev 132, 83 Eng Rep 484.

the sheriff refuses to assign the same a cause of action will ensue against the sheriff at the instance of the creditor for such refusal.<sup>69</sup>

The production of a bond in these cases seems to be equivalent to bringing the body of the prisoner into the court.<sup>70</sup>

Where there has been a breach of the bond taken in the cases we have under consideration, the court in its discretion may stay proceedings against the sheriff until he has time to recover upon the bond.<sup>71</sup>

§ 203. **Custody, Actual or Constructive in Connection with Escape.**—In order for there to be an escape with which the sheriff may be charged, it is necessary that the prisoner be in the sheriff's lawful custody. The custody may be constructive as well as actual. This is illustrated by an early English case in connection with prisoners in custody in civil actions; so if a prisoner is in custody in a suit of A and a writ is issued against the same person and delivered at the suit of B and the defendant escapes, the sheriff is liable to an action by B for an escape although there was no actual arrest of the party under the writ in B's suit.<sup>72</sup>

So too, it seems that if a writ against a party who is already in custody is delivered to the sheriff out of his county such defendant if within the sheriff's county is immediately, by construction of law, deemed in the custody of the sheriff in the writ so delivered and if he escapes the sheriff is liable to the plaintiff in that writ. However, if the defendant and not the sheriff is at the time out of the sheriff's county, such is not the case.<sup>73</sup>

§ 204. **What Is Custody and What Is an Escape.**—As to what degree of liberty or being at large will be held an escape at common law, there are numerous discussions and many disagreements. By the Statute of Westminster 2, Chapter 11, it was made lawful to put prisoners in irons for debt. While this could be done under the statute, it was not lawful at common law on the authority of Lord Coke.<sup>74</sup>

This rigor however has long since passed away and would not be tolerated by a government of law and wherever arrests may be

69. U. S. v. Noah, Fed Cas No. 15,894, 1 Paine 368; Palmer v. Sawtell, 3 Greenl(Me) 447; Codman v. Lowell, 3 Greenl(Me) 52; Gunn v. Davis, 26 Ga 169; Com. v. Gower, 4 Litt(Ky) 279; Cargill v. Taylor, 10 Mass 206; Villas v. Barker, 20 Vt 603; Vanmeter v. Giles, 1 Rob (40 Va) 328.

70. Cook v. Irving, 4 Strob 204, 45 SCL 204.

71. Yates v. Yeaden, 4 McCord 18, 15 SCL 18.

72. Frost's Case, 5 Coke 89.

73. Jackson v. Humphreys, Salk 273, Bullers NP 66.

74. 2 Coke Inst 381.

made now in civil actions all that is required is that the sheriff keep his prisoner within the walls of the prison or within what is termed "its rules." It is still, it seems, true that if the sheriff permits a prisoner in his custody by virtue of civil process to go beyond the limits of the prison, even in charge of an officer, unless authorized by orders of a competent court, such act constitutes an escape.<sup>75</sup>

Any liberty that does not have the sanction of law, if granted by the sheriff, is sufficient to make him liable as for an escape.<sup>76</sup>

In England, where a sheriff took his prisoner in response to a writ of habeas corpus to a particular place to testify and permitted him thereafter to proceed some distance beyond that place, this was an escape, although the prisoner returned to the sheriff and was taken back to the jail.<sup>77</sup>

Even the officer incurs liability as for an escape, if, for the purposes of the prisoner he takes him in a roundabout way when he is ordered to take him to a designated place. A sheriff has one duty in such cases and that is to obey the writ according to its demands, such as to take the prisoner to the place directed and return him to the jail without delay and by the most convenient and direct route. The wishes or privileges of the prisoner are entitled to no consideration and are not in any case to be heeded or acceded to. If the officer having him in custody thus obeys the court's directions he is free from liability as for an escape, but on the other hand, from the failure so to do the converse results. In addition to taking the prisoner by the most direct route to the designated place and return, the officer must not, at any time, allow the prisoner out of his custody and control.<sup>78</sup>

It seems, however, that if the prisoner is privileged from arrest

75. *Bartlett v. Willis*, 3 Mass 86; *Benton v. Sutton*, 1 Bos & P 24; *Boyton's Case*, 3 Coke 44.

76. *Colby v. Sampson*, 5 Mass 310; *Clap v. Cofran*, 7 Mass 93; *Cable v. Cooper*, 15 Johns.(NY) 152; *Hassam v. Griffin*, 18 Johns.(NY) 48, 9 Am Dec 184; *Jackson v. Smith*, 5 Johns.(NY) 115; *Palmer v. Hatch*, 9 Johns.(NY) 320; *Wheeler v. Bailey*, 13 Johns.(NY) 366.

77. *Hotchkiss v. Whitton*, 71 Me 577; *Riley v. Whittaker*, 49 NH 145; *Dunford v. Weaver*, 84 NY 445; *Mossdell's Case*, 1 Mod 116; *Kingan v. Hall*, 23 UCQB 503; *Calcutt v. Rut-*

*tan*, 13 UCQB 220; *Haines v. East India Co.* 11 Moore PC 39.

78. *Hassam v. Griffin*, 18 Johns.(N Y) 48, 9 Am Dec 184; *Parsons v. Stanton*, 2 Day (Conn) 300. This case holds a United States marshal may be imprisoned on civil process in a jail in charge of a sheriff. But it seems that a sheriff may not be imprisoned on civil process in his own jail, since to do so would constitute an escape of all prisoners confined therein, for the reason there would be no jailer. *Avery v. Wetmore*, *Kirby* (Conn) 48. *Plaick v. Anderson*, 5 TR 37; *People v. Stone*, 10 Paige(NY) 606; *Boyton's Case*, *supra*.

as a soldier, or by reason of any other exemption recognized by law, while a sheriff or constable is not bound to take notice of such privilege or exemption, but yet if he does, or if the prisoner escapes, the officer may then urge the privilege against liability. The reason for this rule is that no wrong has been done the plaintiff in the civil action. He had no right to arrest the body of the prisoner and being exempt he cannot found an action upon any neglect to enforce a nonexistent right.<sup>79</sup>

Likewise it appears that if the prisoner is discharged from the "rules" under an insolvent law, although such discharge is obtained by fraud, that is sufficient to exonerate the officer from all liability. The reason for this is that although the discharge is procured by fraud it is nonetheless a discharge according to law.<sup>80</sup>

However, the hyper-technical application of the rule has in modern times been greatly relaxed and it has been held under the more modern and less rigorous construction of the law that allowing a prisoner to trim trees and do other small jobs about the courthouse yard and to go across the street and vote at an election does not constitute an escape, with consequent liability of the sheriff.<sup>81</sup>

The modern rule, however, does not go to the extent to shield the sheriff or other officer in permitting a prisoner to be at large generally, for by so doing, a voluntary escape is effected in legal contemplation.<sup>82</sup>

§ 205. *Constructive Escape*.—There may be a constructive escape. This is illustrated by way of a situation where a deputy sheriff, who had charge of the jail for and on behalf of the sheriff, was arrested by the coroner and committed to the jail of which he was a lawful keeper, no other sheriff or deputy being present; and even if the jailer, under these circumstances, takes the proper care of himself as a prisoner, the sheriff is still liable for a constructive escape on the ground that it was his duty to be at the

79. *Green v. Edson*, 2 NH 293; *Ray v. Hogeboom*, 11 Johns.(NY) 433.

80. *Simms v. Slacum*, 3 Cranch 300, 2 L ed 446; *Ammidon v. Smith*, 1 Wheat 447, 4 L ed 132. The term "rules" as hereinabove used means certain limits without the actual walls of a prison where the prisoner on proper security previously given to the proper authority may reside. These limits are considered for all legal and practical purposes as an extension of the prison walls and it is so used in 214

America. The rules or permission to reside without the prison are obtained by any person not committed upon a criminal charge or for contempt, by the satisfying of the marshal or warden or other authority of the security with which he may grant such permission. 3 *Bouvier's LD Rawles* 3rd Rev 2976.

81. *Wheeler v. State*, 17 P 856, 39 Kan 163.

82. *Hoagland v. State*, 40 NE 931, 22 Ind App 204.

jail to receive from the coroner his deputy, who was committed thereto.<sup>83</sup>

It seems, however, by stretching the construction to a greater extent that this constitutes not only a constructive escape as to the jailer himself, but all prisoners in the jail at the time of such committal.<sup>84</sup>

However, Mr. Justice Story reasons that this does not constitute an escape as to the other prisoners, saying: "That commitment, without any new keeper being appointed by the sheriff, was clearly upon authority an escape of the gaoler himself, for which the sheriff would have been liable. But it was not an escape of the other prisoners, if in point of fact they were kept in custody; for although a man may not imprison himself, being gaoler, he may hold others in prison, and he may act as gaoler for the sheriff over others, even when he himself may be committed to the gaol as a prisoner. It is sufficient in such cases, if there be virtual custody by some person having authority from the sheriff, which as to all other persons, the gaoler in such cases has. Nor is there anything in the authorities cited at the bar, which, properly considered, contradicts this."<sup>85</sup>

Where two or more defendants are jointly committed to the sheriff upon a civil judgment against both or all, these are treated as a unit, and if one escapes the sheriff is liable in the same manner as if both or all had gone, and the fact that one or more of the joint judgment debtors, so committed, is or are subject to execution is immaterial, and the relationship between the prisoners as husband and wife and the like does not alter the rule.<sup>86</sup>

In an ancient English case the rule was laid down that if the keeper of the prison was a woman and she married one of the prisoners, this constituted his escape.<sup>87</sup>

The doctrine is enunciated by Mr. Justice Story that it constitutes an escape from the gaoler when he makes a prisoner, committed

83. *Steere v. Field*, 2 Mason 480, Fed Cas No. 13,350; *Colby v. Sampson*, 5 Mass 310; *Gage v. Graffam*, 11 Mass 181; *Skinner v. White*, 9 NII 204; *Day v. Brett*, 6 Johns.(NY) 22.

84. *Steere v. Field*, supra; *Somes v. Lenthall*, *Styles* 465; *Bendison v. Lenthall*, 2 Keble 202, 3 Comyns Dig 601 *Escape C*.

85. *Steere v. Field*, supra.

86. *Whitney v. Reynel*, Cro Jac 657.

87. *Platt v. Sheriffs of London*,

*Plowden* (Folio Edition 1779) 37. We quite agree with Mr. Murfree wherein he said: "Under deep submission to this high and venerable authority, it may well be doubted whether in any sense or for any purpose, marriage can be considered an escape, the universal voice of Christendom pronounces it to be precisely the reverse, and in this degenerate day, it is the divorce that is usually considered the escape." *Murfree on Sheriffs*, Sec. 195.

under civil process, a turnkey of the jail and entrusts him with the keys of the outer as well as inner doors, at all times by day and by night.<sup>88</sup>

However, there is another sort of constructive escape, and it may be summarized briefly, that where a prisoner is permitted more liberty than the law allows, although he still remains in custody, it is nonetheless a constructive escape.<sup>89</sup>

Indeed every unauthorized liberty of the prisoner on a civil commitment without the consent of the plaintiff-creditor or without due authority of law, constitutes a constructive escape.<sup>90</sup>

§ 206. *Kinds of Escape*.—It may be generally said that the escape is the loss of a custody of a prisoner before he is discharged pursuant to law.<sup>91</sup>

Escapes are voluntary, negligent, constructive, and forcible or a prison breach. A voluntary escape occurs when a lawful keeper having a prisoner in his custody voluntarily permits him to escape or go at large and where there is such an escape the officer permitting it is guilty of a tort and breach of duty, whereby he becomes liable to the plaintiff, when the prisoner is held upon process issued in a civil action, for the amount of the plaintiff's judgment and any damages caused thereby.<sup>92</sup>

A voluntary escape is not necessarily confined to the departure of a prisoner by the consent or permission of his gaoler. It may be by default, purpose, or even by connivance, as well as by consent or permission.<sup>93</sup>

88. *Steere v. Field*, supra.

89. *Benton v. Sutton*, 1 Bos & P 24, 126 Eng Rep 757; *Platt v. Locke*, *Plowden* 35, 75 Eng Rep 57.

90. *Cargill v. Taylor*, 10 Mass 206; *Bent v. Stone*, 68 NE 46, 184 Mass 92.

91. *Haupt v. State*, 140 SW 294, 100 Ark 409, Ann Cas 1913C 690 and note.

92. *Hodges v. State*, 8 Ala 55; *Nall v. State*, 34 Ala 262; *Pentecost v. State*, 107 Ala 81, 18 So 146; *Bass v. State*, 29 Ark 142; *Martin v. State*, 32 Ark 124; *Griffin v. State*, 37 Ark 437; *State v. Hamilton*, 37 Ind 502; *State v. Mullen*, 50 Ind 598; *Lakin v. State*, 89 Ind 68; *Com. v. Mitchell*, 3 Bush(Ky) 30; *Colby v. Sampson*, 5 Mass 310; *Lash v. Ziglar*, 27 NC 702; *Currey v. Worthy*, 48 NC 315; *Riley v. Whittiker*, 40 NII 145, 6 Am Rep 474; *People v. Stone*, 10 Paige(NY) 216

606; *Smith v. Com.* 59 Pa St 320; *Hopkinson v. Leeds*, 78 Pa St 396; *Porter v. State*, 34 Tex Cr 364, 30 SW 791; *Watts v. Com.* 39 SE 706, 99 Va 872. Note Ann Cas 1913C 697; *Lansing v. Fleet*, 2 Johns.(NY) 3, 1 Am Dec 142; *Rex v. Fell*, 1 Ld Raym 424; *James v. Peirce*, 2 Lev 132; *Ravenscroft v. Eylea*, 2 Wils C Pl 294.

93. *Hershey v. People*, 12 P(2d) 345, 91 Colo 113; *Adams v. Turrentine*, 30 NC 147; *State v. McLain*, 10 SE 518, 104 NC 894; *Butler v. Washburn*, 25 NH 251; *Tillman v. Lansing*, 4 Johns.(NY) 45; *Cortis v. Dailey*, 47 NYS 454, 21 App Div 1; *Lash v. Ziglar*, supra; *Atkinson v. Jameson*, 6 Times R 25, 101 Eng Rep 14; *Jones v. People*, 1 Saund 34, 85 Eng Rep 85; *Bonafovo v. Walker*, 2 Times R 126, 100 Eng Rep 69.

A negligent escape is one where the prisoner escapes through remissness, heedlessness, or negligence of his custodian.<sup>94</sup>

Russell defines the escape we have under discussion as follows:

"A negligent escape is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued and taken again before he has been lost sight of. And from the instances of this offense mentioned in the books, it seems that where a party so escapes the law will presume negligence in the officer."<sup>95</sup>

We have had occasion already to discuss to some extent a constructive escape, but it may not be out of place to make the observation that there are other constructive escapes than those mentioned in the next preceding section; in any case where a prisoner gets more liberty than is consistent with his lawful confinement, it amounts to a constructive escape.<sup>96</sup>

A forcible escape or prison break is one where a prisoner under arrest unlawfully gains his liberty before he is delivered by due course of law, and where an escape from confinement is effected by the prisoner by force or violence, that amounts to forcible escape or prison break, and is distinguished from rescue, since the latter is effected by aid from others.<sup>97</sup>

The only difference between the consequences of a voluntary and negligent escape of a debtor in execution is that in the former case the sheriff could not retake the party, whereas in the latter he might; and if he did so upon fresh pursuit and subsequently kept the party in custody, the recaption formed a defense to an action afterwards brought against him for an escape.<sup>98</sup>

Where the officer is guilty of permitting a voluntary escape of a prisoner arrested in a civil action he becomes absolutely liable in a civil action.<sup>99</sup>

After the enlargement of the prisoner on the occurrence of a voluntary escape, if the officer forcibly recaptured him, he was guilty of a trespass against the prisoner, but this rule is applicable

94. *Hershey v. People*, supra; *Butler v. Washburn*, supra; *Lansing v. Fleet*, supra; *Atkinson v. Jameson*, supra.

95. *State v. Errickson*, 32 NJL 421; *State v. Wedin*, 89 Atl 753, 85 NJL 309; *Tillman v. Lansing*, 4 Johns.(N Y) 45; 2 *Russell on Crime*, 420; *State v. McLain*, supra; *Adams v. Turrentine*, supra.

96. *Benton v. Sutton*, 1 Bos & P 24, 120 Eng Rep 757; *Platt v. Lock*, Plowd 75, 75 Eng Rep 57.

97. *State v. Sutton*, 84 NE 824, 170 Ind 473, 1 *Russell on Crimes*, 6 Ed 389.

98. *Ann Cas 1913C 697*; *Adams v. Turrentine*, supra.

99. *Note Ann Cas 1913C 697*; *Ravenscroft v. Eyles*, supra; *Atkinson v. Jameson*, supra; *Tillman v. Lansing*, 217

in cases only where the prisoner was held on final civil process as contradistinguished from mesne process.<sup>1</sup>

Where an officer unlawfully discharged the prisoner under advice from the attorney general of the state and a city attorney, both of whom might lawfully advise him, this will prevent the carrying with it the severe consequences attaching to a voluntary escape, and such escape is construed to be merely a negligent one.<sup>2</sup>

Where the warden of a jail, at the request of a prisoner, procured the prisoner's written discharge from a magistrate and thereby relied upon such discharge to be lawful, and suffered the prisoner to go at large, the discharge was a nullity since the magistrate had no authority to grant it, and the officer was at least guilty of a negligent escape.<sup>3</sup>

Where a sheriff permits defendant, committed to his custody for nonpayment of a final judgment, to go at large unattended on his promise to return, this constitutes a voluntary escape, rendering the officer liable for plaintiff's judgment; and after so permitting the prisoner to be at large, the officer cannot, without the plaintiff's consent, receive the prisoner in custody and thereby relieve himself of liability.<sup>4</sup>

Where the plaintiff in the civil action does not know of the escape until the return by the prisoner and the prisoner-debtor thereafter made application for the benefit of the insolvent laws and the creditor-plaintiff resisted the prisoner's application without knowledge of the previous escape, this does not amount to a waiver of the creditor's right to proceed against the sheriff for the escape.<sup>5</sup>

But where the plaintiff elects to sue for an escape, that operates to estop him from opposing the defendant's discharge under bankruptcy or insolvency laws and it seems that where he opposes the application of the prisoner to obtain the benefit of insolvency or bankruptcy law he thereby waives his right to claim damages from the sheriff for having permitted a voluntary escape.<sup>6</sup>

supra; *Peters v. Henry*, 6 Johns.(NY) 121, 5 Am Dec 196; *Richmond v. Tallmadge*, 16 Johns.(NY) 307.

1. *Atkinson v. Mattison*, 2 TR 172; *Ravenscroft v. Eyles*, supra; *Atkinson v. Jameson*, supra; *Richmond v. Tallmadge*, supra; *Peters v. Henry*, supra; *Tillman v. Lansing*, supra; *Lewis v. Moreland*, 2 Barn & Ad 56.

2. But it is no defense, however, that the sheriff acted upon the advice of the committing magistrate in permitting a prisoner to go at large. *State* 218

*v. Manley*, 1 Overt (Tenn) 428; *Bass v. State*, 29 Ark 142; see also *Re Bucks County Prison*, 15 Pa Co 569; *Hershey v. People*, supra.

3. *Meehan v. State*, 46 NJL 365; *Hershey v. People*, supra.

4. *Hoagland v. State*, 0 NE 931, 22 Ind App 204; *Browning v. Rittenhouse*, 38 NJL 279; *Rawson v. Turner*, 4 Johns.(NY) 469; *James v. Peirce*, 2 Lev 132.

5. *Browning v. Rittenhouse*, supra.

6. *Dash v. Van Kleeck*, 7 Johns.(N

However, it has been held in England that nothing could purge the sheriff of liability in cases of voluntary escape.<sup>7</sup>

It has been asserted that the law is settled by ancient and modern authorities that when a sheriff permits the prisoner to be at large, there is a voluntary escape in legal contemplation, nor can the sheriff after such an escape from custody and final process retake the prisoner or receive him back without the judgment plaintiff's consent,<sup>8</sup> or until he has paid the plaintiff's judgment.<sup>8a</sup>

In dealing with arrests, however, where the prisoner has not been taken into custody, and in the use of the term "escape," it is not to be taken in its technical sense, which would imply that the person was previously in custody of the officer and had eluded his vigilance. In this connection, it must be understood in its popular sense, which means to flee from, to avoid, to get out of the way of, and the like.<sup>9</sup>

§ 207. Defenses to an Escape.—It is true that under the more enlightened and modern system of law prevailing in our day, that the tendency is not to hold a sheriff for a prisoner committed to jail in a civil process with the same strictness as formerly prevailed.<sup>10</sup>

Undoubtedly, the law formerly was that nothing would relieve a sheriff from voluntary escape except an act of God or public enemy.<sup>11</sup>

Y) 477, 5 Am Dec 291; *McElroy v. Mancius*, 13 Johns.(NY) 121.

7. *Ravenscroft v. Eyles*, 2 Wils 295.

8. *Hoagland v. State*, 40 NE 931, 22 Ind App 204; *Wheeler v. State*, 17 P 856, 39 Kan 163; *Riley v. Whittiker*, 49 NH 145, 6 Am Rep 474; *Browning's Executor v. Rittenhouse*, 40 NJL 230; see however *Thompson v. Lookwood*, 15 Johns.(NY) 256; *Meehan v. State*, supra; *Spader v. Frost*, 4 Blackf (Ind) 190.

8a. *Littlefield v. Brown*, 1 Wend (NY) 398; *McElroy v. Mancius*, 13 Johns.(NY) 121; *Ex parte Voltz*, 37 Ind 175; *Hoagland v. State*, 40 NE 931, 22 Ind App 204; see also 59 NE 336.

9. *Life & Casualty Insurance Co. v. Hargraves*, 38 SW(2d) 451, 109 Tenn 388; *Love v. Bass*, 238 SW 94, 145 Tenn 522.

10. *Comer v. Huston*, 55 Ill App 153,

wherein it is said: "Counsel for plaintiff in error have collected and cited in their brief quite a number of authorities bearing upon the liability and duty of sheriffs in such cases, from which the rule may readily be deduced that nothing but the act of God or the public enemy will justify a sheriff in permitting a prisoner for debt to be outside the jail, etc.

"It is well said in *Murfree on Sheriffs*, Sec. 190, that the books abound in such cases, yet that most of this law is under the new and more enlightened systems of the present day practically obsolete."

See also, *Murfree on Sheriffs*, Sec. 190.

11. *Rainey v. Dunning*, 6 NC 386; *Patten v. Halsted*, 1 NJL 277. See *Comer v. Huston*, supra; *Murfree on Sheriffs*, Sec. 190; *Fairchild & Bacon v. Case*, 24 Wend(NY) 391; *Wheeler v. Hambright*, 9 Serg & R (Pa) 390; 219

Among other defenses which have been held good and sufficient under the more modern view, it may be mentioned that if the escape was procured by fraud, to which the officer was not a party, he will not be held. So too, where plaintiff's attorney has received the debt and costs he may authorize the prisoner's release from custody without involving the sheriff or constable in any liability. If the plaintiff aids or abets in the escape of a prisoner that he has caused to be confined, of course it is a good defense to his suit against the officer. Generally it may be said that an order of the court discharging the prisoner, if the court has jurisdiction of the cause, is a good and complete defense. Likewise, it seems if one of two joint debtors is discharged, the other may be released.<sup>12</sup>

Likewise, where the creditor, while the prisoner is at large, causes his arrest and thereby prevents his return to the jail seems to be sufficient as a defense for the sheriff, in an action against him for an escape.<sup>13</sup>

It seems that a rescue after recapture is likewise a good and sufficient defense.<sup>14</sup>

But rescue in another State by virtue of legal process after the prisoner's recapture in such State is not recognized as a defense to an action for escape in the State from which he had theretofore escaped.<sup>15</sup>

It must be admitted, however, that it is not a little difficult to see how the sheriff or gaoler could in reason and justice be held liable for an escape, when the prisoner was rescued by force and violence exerted by overpowering numbers. If that is not almost approaching an ancient escape by virtue of a public enemy, we submit it is not easy to comprehend.

In a number of States there are statutory provisions to the effect that the plaintiff or person procuring an arrest in a civil case must advance money for the support of the prisoner while in custody or for certain designated periods, and that in the event this is not

*State v. Halford*, 6 Rich. L 58, 40 SCL 58.

12. *Lampson v. Landon*, 5 Day (Conn) 506; *Ransom v. Keyes*, 9 Cow. (NY) 128; *Dexter v. Adams*, 2 Den (NY) 640. So it is held in the cited case, if the plaintiff's agent and others, acting in concert with such agent, procure an escape, plaintiff cannot recover. *VanWormer v. VanVoast*, 10 Wend.(NY) 356. It appeared in this case that prisoner was seen beyond the jail limits by the creditor and in- 220

duced to so remain in the hope of holding the sheriff as for escape, but it was held this fraud of the plaintiff prevented his recovery against the officer. *Love v. McAllister*, 4 Hayw (Tenn) 65; *Stocking v. Cameron*, UCQBOS (Ont) 475.

13. *Drake v. Chester*, 2 Conn 473.

14. *Cook v. Irving*, 35 (4 Strob) 8 CL 204; *Whithead v. Keyes*, 1 Allen 350.

15. *Griffin v. Brown*, 2 Pick.(Mass) 304.



done then the prisoner shall be discharged, and it is doubtless true that under such statutory enactments it would be a good defense that the sheriff discharged the prisoner because the deposits required by the statute were not made. It is no defense however that the prisoner forcibly broke jail, or that he had a license to go at large from the plaintiff or his attorney, or that after the escape of the prisoner the sheriff had attempted to compose and settle with the plaintiff's attorney, and, of course, no irregularity in the original proceedings may be urged as a defense to an action for an escape. The fact of vagueness of the jail limits, and that it was by accident the prisoner went beyond them is likewise no defense.<sup>16</sup>

Consent on the part of the plaintiff given after the escape without consideration may not be pleaded as a defense.<sup>17</sup>

But it would seem that where there is a good and sufficient consideration for the consent or agreement by the plaintiff that the prisoner may remain at large after an escape this will operate to discharge the sheriff from liability.<sup>18</sup>

It is no defense to an action brought by a wife against the sheriff for a voluntary escape of her husband who has been committed for not complying with an alimony decree, that the husband was permitted to escape at the wife's request.<sup>19</sup>

§ 208. Prisoner Held on Mesne Process; Effect of Recapture, Return or Death after Escape.—The common law right of the sheriff is undoubted, though at his peril, to permit or allow a prisoner in his custody upon mesne process to go at large.<sup>20</sup>

And in these circumstances, the fact that the sheriff had permitted the enlargement of the prisoner did not militate against the sheriff's right to retake and reimprison him at any time before the prisoner was lawfully discharged. The only requisite, in order for the sheriff to escape liability or have visited upon him other consequences dictated by the mandates of the law or the requirement of the process, is that he have the body of the prisoner in court at the times required by the law and the process.<sup>21</sup>

16. Lovell v. Orser, 14 NY Super 340; Sweet v. Palmer, 16 Johns.(NY) 181; Bisell v. Kip, 5 Johns.(NY) 89; Stone v. Woods, 5 Johns.(NY) 182; Vilas v. Baker, 20 Vt 603; Stocking v. Cameron, 6 UCQBOS (Ont) 475.

17. VanWormer v. VanVoast, 10 Wend.(NY) 356. See also, Powers v. Wilson, *infra*; Sweet v. Palmer, *supra*.

18. Powers v. Wilson, 7 Cow.(NY) 274.

19. Prather v. Clarke, 5 (3 Brev) SCL 393.

20. Langdon v. Hathaway, 1 NH 367; Cady v. Huntington, 1 NH 139; Stone v. Woods, 5 Johns.(NY) 182; Cook v. Irving, 35 (4 Strob) SCL 204; Allingham v. Flower, 2 Bos & P 246, 128 Eng Rep 1262; Pariente v. Plumbtree, 2 Bos & P. 35, 128 Eng Rep 1141.

21. See authorities cited footnote 20, this section.

But the rule is entirely different; if judgment has been rendered in the case and if the sheriff permits him after such judgment to go at large, this fixes the sheriff's liability, as a general rule.<sup>22</sup>

§ 209. Escape in Criminal Cases; Civil Liability of Sheriff or Constable.—It seems that the sheriff is responsible to the people or State in the same manner as to a plaintiff in a civil action where there is an escape of a prisoner, held on criminal process. This has reference to his civil liability.<sup>23</sup>

§ 210. Duty of Sheriff to Obey Writ of Habeas Corpus with Respect to Prisoner in His Charge.—It is unquestionably the duty of a sheriff or constable having a prisoner in charge for whom a writ of habeas corpus is issued to obey the process and produce the body of the prisoner before the court at the time and the place as in said writ directed, and after the sheriff has done this, it does seem that if the court had jurisdiction to grant the writ that the production in response to the writ would be a complete defense on the part of the sheriff or constable thereafter when called to account with respect to the body of the prisoner and it would seem to be wholly immaterial whether the demand for production of prisoner was made in a civil or criminal case. The reason of the rule is that by the common law upon the return of a writ of habeas corpus and the production of the body of the prisoner or other person therein mentioned and required to be produced the authority under which the original commitment took place is superseded and even before there is a final disposition under the writ the safekeeping of the prisoner is entirely under the direction and control of the court to which the writ is returnable and when a sheriff has produced the body of the prisoner before a court or judge in response to such writ, his duties as custodian of the prisoner cease, and are definitely terminated unless the prisoner is remanded to the custody of the officer who had theretofore had him in charge, and his escape during the pendency proceedings on the habeas corpus is not an escape from the custody of the sheriff.<sup>24</sup>

22. U. S. v. Brent, Fed Cas No 14, 639, 1 Cranch CC 525; Whithead v. Keyes, 1 Allen (Mass) 350; Griffin v. Brown, 2 Pick.(Mass) 304; Cook v. Irving, *supra*; Stone v. Woods, *supra*.

23. State v. Caldwell, 17 NE 185, 115 Ind 6; Dickinson v. Brown, 1 Esp 218, 170 Eng Rep 334, 1 Peake NP 222

307, 170 Eng Rep 166; Butt v. Jones, Gow 99, 5 ECL 181, 171 Eng Rep 851, 2 Hawkins PC 131.

24. Barth v. Chae, 79 US 400, 12 Wall 400, 20 L ed 393; In re Kaine, 55 US 103, 14 How 103, 14 L ed 345; Rex v. Bethel, 5 Mod 19.

§ 211. Discharge of Prisoner by Court Having Jurisdiction Relieves Sheriff.—Where a prisoner committed to the custody of the sheriff is discharged by a court having jurisdiction of the subject matter, the sheriff is relieved from all liability either civil or criminal, but such does not seem to be the case where the order discharging the prisoner is void upon its face, the court not having jurisdiction of the subject matter to make the order. And it also seems that where the court attempting to discharge the prisoner is one of limited jurisdiction, that the order of discharge, in order to afford protection to the officer in obeying it, should recite the antecedent proceedings upon which the order is based, and this should be done in such a way and to such extent as to show jurisdiction of the court on the face of the order.<sup>25</sup>

However it has been held in the event the order of discharge fails to recite facts to show on its face its validity that this defect may be supplied aliunde.<sup>26</sup>

25. *Ballymore v. Cooper*, 2 Lans(N Y) 70, aff. 46 NY 236; *Wilckens v. Willet*, 4 Abb Dec 598, aff. 12 Abb Pr 319, 21 How Pr 40. But see *Shaffer v. Riseley*, 44 Hun(NY) 8, reversed 114 NY 23, 20 NE 630; *Bennett & Hall v. Burch*, 1 Denio(NY) 141; *Keim*

*v. Saunders*, 13 Atl 710, 120 Pa 121; *Webber & Hand v. Gay & Eysaman*, 24 Wend(NY) 485.

26. *Goodwin v. Griffin*, 88 NY 629; *Shaffer v. Riseley*, supra; *Devellin v. Cooper*, 84 NY 410.

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## CHAPTER VI

## CONTEMPT AND AMERCEMENT OF SHERIFFS AND CONSTABLES

Secs.

212. Contempt of Court.

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215. What Acts Constitute Contempt on the Part of Sheriffs or Constables.

216. Sheriff Liable for Contempt for Act of Deputy.

217. Sheriff or Constable Amerced When.

218. Amercement of a Sheriff or Constable for Deputy's Acts.

219. Ex-sheriff Liable to Be Amerced.

§ 212. Contempt of Court.—Contempt generally is defined as a wilful disobedience of a public authority. Contempt of court consists of disobedience of the orders or process of the court or tribunal or disturbing its proceedings. All courts have an inherent right to vindicate their authority and dignity, enforce their commands, and punish summarily all persons who violate their privileges or disobey the orders of the court, with division in the adjudications hereinafter noted with respect to inferior courts.<sup>1</sup>

The power to punish for contempt has been exercised from the earliest times in the history of English common law and was much broader in England than it has ever been in America. A subject in England could be punished for contempt for scandalizing the sovereign or his ministers or the members of parliament, as well as courts. However, such extensive authority with this great breadth is not in our day and probably never was recognized in the American jurisdictions; and insofar as the punishment for contempt of any body, other than a judicial one, it may be safely said does not exist in the United States.<sup>2</sup>

1. *Pace v. State*, 2 SW(2d) 20, 177 Ark 612; *State v. Morrill*, 16 Ark 384; *In re Shortridge*, 34 P 227, 99 Cal 526, 21 LRA 755, 37 ASR 78; *Ex parte Earman*, 95 So 755, 85 Fla 297, 31 ALR 1226 and note; *Clark v. Pco.*, *Breese (Ill)* 340, 12 AD 177 and note; *Dahnke v. People*, 48 NE 137, 168 Ill 102, 39 LRA 197; *Ex parte Adams*, 25 Miss 883, 59 AD 234 and note; *In re MacKnight*, 27 P 336, 11 Mont 126, 29 ASR 451; *Snow v. Hawkes*, 111 SE 224

621, 183 NC 365, 23 ALR 183.

Compelling plaintiff to dismiss his case by threatening him with arrest may under some circumstances be contempt of court.

*State v. Jones*, 226 P 433, 111 Ore 295, 33 ALR 603; *State v. Woodfin*, 5 Ired 199, 42 AD 161; *U. S. v. New Bedford Bridge*, 1 Woodb & M 401.

2. *Plunkett v. Hamilton*, 70 SE 781, 136 Ga 72, 35 LRA (NS) 583, AC19121; 1259; *Snow v. Hawkes*, supra; *Ex*

The jurisdiction and authority of a superior court to punish persons guilty of contempt has never been questioned since this power is regarded as an essential element of judicial authority in these courts, whether they are state or federal. No grant of power is necessary for these courts to exercise this jurisdiction and authority.<sup>3</sup>

However in many jurisdictions and upon many tribunals the power to punish for contempt is expressly conferred by statutory enactment but it is held that this power adds nothing to the inherent power of superior courts.<sup>4</sup>

The authority of inferior courts in this country to punish for contempt, except as that authority is granted to them and measured by statutory enactments, has been affirmed and denied; the holdings maintaining and affirming the inherent authority to punish for contempt in inferior courts contend that grant of judicial power impliedly carries with it jurisdiction to deal with contempts, while those opposing this view, insist it would be unsafe to vest this power in these courts, often presided over by laymen.<sup>5</sup>

parte Earman, supra; Ex parte Hudgings, 39 S Ct 337, 249 US 378, 63 L ed 656, 11 ALR 333.

Perjury, alone, is not contempt, was held in above entitled case.

3. Gompers v. Bucks Stove & Range Co. 31 S Ct 492, 221 US 418, 55 L ed 797, 34 LRA(NS) 874; Ex parte Hudgings, 39 S Ct 337, 249 US 378, 63 L ed 656, 11 ALR 333; Michaelson v. U. S. 45 S Ct 18, 266 US 42, 69 L ed 162, 35 ALR 451; Myers v. U. S. 44 S Ct 272, 264 US 95, 68 L ed 577; In re Savin, 9 S Ct 699, 131 US 267, 33 L ed 150; Ex parte Terry, 9 S Ct 77, 128 US 289, 32 L ed 405; United States v. Shipp, 27 S Ct 165, 203 US 563, 51 L ed 319; Weldon v. State, 234 SW 466, 150 Ark 407, 18 ALR 202; Blodgett v. Superior Ct. 290 P 293, 210 Cal 1, 72 ALR 482, holding that act of contempt was committed against judge hearing contempt proceeding no ground of disqualification of him; People v. Stapleton, 33 P 167, 18 Colo 568, 23 LRA 787; Cooper v. People, 22 P 790, 13 Colo 337, 373, 6 LRA 430; State v. Howell, 69 A 1057, 80 Conn 668, 125 ASR 141, 13 AC 501; Ex [1 Anderson on Sheriffs]—15

parte Earman, 95 So 755, 85 Fla 297, 31 ALR 1226; Re Hayes, 73 So 362, 72 Fla 558, AC1918B 936; State v. Owens, 256 P 704, 125 Okla 66, 52 ALR 1270; State v. Jones, 226 P 433, 111 Ore 295, 33 ALR 603; Snyder's Case, 152 A 33, 301 Pa 276, 76 ALR 666; Ex parte Wolters, 144 SW 531, 64 Tex Cr Rep 238, AC1918B, 1071; Carter v. Com. 32 SE 780, 96 Va 791, 45 LRA 310; Re Morse, 126 A 550, 98 Vt 85, 36 ALR 527; State v. Cameron, 248 P 408, 140 Wash 101, 54 ALR 311; State v. Fredlock, 43 SE 153, 52 W Va 232, 94 ASR 932; State ex rel. Rodd v. Verage, 187 NW 830, 177 Wis 295, 23 ALR 491; Ex parte Fernandez, 10 CBNS 3, 142 Eng Reprint, 349, 15 Eng Rul Cas 1. Notes 54 ALR 319; 8 ALR 1544; 117 ASR 950; 15 Eng Rul Cas 35.

4. State v. Shumaker, 157 NE 769, 200 Ind 623, rehearing den. 102 NE 441, 163 NE 272, 104 NE 408, 200 Ind 692, 700, 63 ALR 218.

Note 117 ASR 954.

5. Murphy v. Wilson, 46 Ind 537; State v. Shumaker, supra; Morrison v. McDonald, 21 Me 560; In re Kerrigan, 33 NJL 344; Farnham v. Coleman, 103 NW 161, 10 SD 342, 117 ASR 944, 1

§ 213. Necessity of Criminal Intent.—In the larger portion of acts constituting contempt of court, criminal intent is an essential element and must be established in order for the offense to be consummated, and while the proceedings are not strictly criminal they are quasi criminal. However, on the other hand, there are certain acts constituting contempt of court that are complete upon the doing of the act regardless of the actor's intent. Within this category falls that class of acts consisting in publications reflecting upon the court. So, too, a violation of an injunction. The intent in such cases it seems is immaterial and is not an element of a complete consummated contempt.<sup>6</sup> In some cases a contempt could not be committed in the absence of the entertainment of criminal intent, as, for example, false swearing as a witness on the trial of a case.

§ 214. Liability of Sheriffs and Constables for Contempt.—A sheriff, constable, or other officer having charge of a prison and being an officer of the court and charged with the duty of carrying out judgments or sentences of persons committed to his custody may be punished for contempt where he fails to properly execute the sentence, either by being too lenient with respect to or too severe upon the prisoner and it is not material whether state or federal court imposed the sentence. In either case the court has inherent power to punish for contempt for such acts.<sup>7</sup>

In general if a sheriff or constable disobeys any lawful order of a

LRA(NS) 954; State v. Cameron, 248 P 408, 140 Wash 101, 54 ALR 311.

Note 117 ASR 953.

6. Bowles v. U. S., 50 F(2d) 248, cert den 52 S Ct 29, 284 US 648, 76 L ed 550; see also 44 F(2d) 115.

This case holds contempts are sui generis—neither criminal nor civil.

Conley v. U. S. 59 F(2d) 648; State v. Howell, 69 Atl 1057, 80 Conn 668, 125 ASR 141, 13 AC 501 and note; Baumgartner v. Joughin, 141 So 185, 105 Fla 335; see also, 143 So 178, 107 Fla 858; Wilson v. Joughin, 141 So 178, 105 Fla 345; Kneisel v. Ursua Motor Co. 147 NE 243, 316 Ill 336, 39 ALR 1, writ of error dis. 47 S Ct 109, 273 US 772, 71 L ed 884; Coons v. State, 134 NE 194, 191 Ind 580, 20 ALR 900; State v. Fletcher Tr. Co. 5 NE(2d) 538, 211 Ind 27; Telegram Newspaper Co. v. Com. 52 NE 445, 172 Mass 204, 44 LRA 150, 70 ASR 226

280; Weston v. John L. Roper Lumber Co. 73 SE 799, 158 NC 270, AC1913D 373 and note as to intent in violating an injunction being no defense; State v. Owens, 256 P 704, 125 Okl 66, 52 ALR 1270, holding that judge against whom contempt committed is not thereby disqualified; In re Hickey 258 SW 417, 149 Tenn 344; Burdett v. Com. 48 SE 878, 103 Va 838, 68 LRA 251, 106 ASR 916 and note.

See Sec. 216, notes 29 and 30, infra.

7. In re Birdsong, 39 F 599, 4 LRA 628; Ex parte Bowling, 3 F Cas 1,737, 1 Cranch CC 39; In re O'Rourke, 251 Fed 768, holding the motive of the officer in allowing a prisoner, during the term of his sentence, to be at liberty is immaterial; Ex parte Shores, 195 Fed 628; U. S. v. Hoffman, 13 F(2d) 269, affirmed 13 F(2d) 269; Westbrook v. U. S. 13 F(2d) 269;

competent court, he may be adjudged guilty of contempt. This rule applies with respect to failure to carry out the mandate of process directed to him and delivered into his hands.<sup>7a</sup>

§ 215. What Acts Constitute Contempt on the Part of Sheriffs or Constables.—A sheriff or constable may be liable under the law in an action for damages for official default, but it may not be assumed as a corollary of this situation that he is liable to be proceeded against as for contempt. Especially is this true where he acts reasonably and his conduct is attended with good faith.<sup>8</sup>

A contempt may consist in and generally is regarded as such where the officer neglects or refuses to execute and return process properly delivered into his custody. It does not seem to be material whether the neglect to execute process consists in a failure to serve civil process or arrest on a criminal writ.<sup>9</sup>

The courts must have control of their officers and power to compel the prompt and faithful execution of their process. To permit an officer, to whom judicial process is issued, to set himself up as an independent authority, as such officers are sometimes inclined to do,

Howard v. State, 237 P 203, 28 Ariz 433, 40 ALR 1275 and note.

7a. Brannon v. Barnes, 111 Ga 850, 36 SE 689; French v. Kemp, 64 Ga 749; Heard v. Callaway, 51 Ga 314; Currell v. Phillips, 18 Ga 469; Cowart v. Dunbar, 56 Ga 417; Davis v. Irwin, 8 Ga 153; Roche v. Dunn, 106 NW 965, 97 Minn 529; Wandling v. Thompson, 41 NJL 142; Parker v. Bradley, 46 NY Super 244; People v. Lownds, 1 NY Super 252; Holmes v. Rogers, 2 NYS 501; Whitman v. Haines, 4 NYS 48, aff 23 NE 1148, 119 NY 639; Hatfield v. Hatfield, 15 NYSR 788; Mollineaux v. Mott, 79 NYS 661, 78 App Div 493, holding that where a sheriff has failed to return an execution an order may issue directing an attachment for contempt against him unless he returns the writ within a specified time, but such an order should not contain any direction as to the form of the return. McLean v. DuBose, 17 SCL 646; Pitman v. Clarke, 26 SCL 316; Ex parte Thurmond, 17 SCL 605; Kilpatrick v. Vandiver, 9 SCL 341; State v. Charleston Dist. 8 SCL 145; Wood v. Orr, 10

Yerg (Tenn) 505; Crow v. State, 24 Tex 12; Heymann v. Cunningham, 8 NW 401, 51 Wis 506; Wilton v. Chambers, 5 N & M 431, 36 ECL 621; Hatfield v. Hatherfield, 4 M & G 724, 46 ECL 724, 134 Eng Reprint 1084; Blake v. Newburn, 2 Saund & C. 263; Maclean v. Anthony, 6 Ont 330; Rex v. Niagara, Draper (Ont) 331; Phillips v. Cunningham, 5 Yerg (Tenn) 416; Franklin v. Lamb, 1 Johns (NY) 508; People v. Ferris, 9 Johns (NY) 180; Burk v. Campbell, 15 Johns (NY) 450; People v. Champan, 1 Cow (NY) 579; People v. Brown, 6 Cow (NY) 41; Anonymous, 3 Wend (NY) 423; Wilson v. Wright, 9 How Pr (NY) 459; Brown v. Jones, 1 Hill (NY) 204, 3 Abb Pr 80; State v. Heintz, 10 Oh NP NS 569.

8. Heard v. Calloway, 51 Ga 314; Pugsley v. Drew, 52 Ga 339; People v. Shoemaker, 2 Wend (NY) 253; Brown v. Furze, 31 SC 530; Mongie v. Cheney, 19 SCL 145.

9. Gretna v. Rosaner, 97 So 335, 154 La 117; Breuer v. Elder, 22 NW 622, 33 Minn 147; Fiorini v. Fiorini, 203 NYS 785, 123 Misc 325; People v. 227

and execute or not at his pleasure and leisure, or those of the judgment debtor, with impunity, would make the administration of justice a practical mockery.<sup>10</sup>

It may be contempt of court for the sheriff or constable to fail to comply with reasonable instructions given to him by a plaintiff in a civil action, where, of course, the instructions are lawful and of such character as to be the officer's duty to obey them.<sup>10</sup>

In some states the rule is that in a civil action before the officer will be adjudged guilty of contempt it is necessary that the plaintiff show damages by reason of the official neglect.<sup>11</sup>

On the other hand, however, where the officer neglects his official duty, a presumption is indulged that the plaintiff in a civil action is damaged and the burden is upon the sheriff or constable to show that no loss resulted to the plaintiff from his official neglect.<sup>12</sup>

In other jurisdictions the plaintiff is only required to show in a general way that a debtor was possessed of property upon which the sheriff failed to execute, where the default on the part of a sheriff or constable was in failing to collect money.<sup>13</sup>

Where the process, however, is so indefinite and uncertain that it is impossible for the officer to intelligently follow it he cannot be held for contempt for failure to execute it.<sup>14</sup>

Mere failure without any demand of plaintiff or his counsel to pay fees will not constitute a defense for contempt.<sup>15</sup>

Under common law it is a misdemeanor for sheriff or jailer having lawful charge of a prisoner to voluntarily or negligently permit him to depart from his custody, no matter how short a time the departure might be.<sup>15a</sup>

It is contempt of court for a sheriff or jailer to fail to protect a prisoner during the time proceedings are pending in the United

Brown, 6 Cow (NY) 41; People v. Lownds, 1 NY Super 252; Murfree on Sheriffs, New ed. Sec. 1101A; Dunford v. Weaver, 21 Hun 349, aff 84 NY 445; 1 Bliss Code (6th ed) 54, and cases therein cited.

8a. State v. Tipton, 1 Blackf (Ind) 166; Bond v. Weber, 17 Kan 410; Smith v. Martin, 20 Kan 272; Breuer v. Elder, 22 NW 622, 33 Minn 147; Lee v. Dolan, 158 NW 1007, 34 ND 449; Rex v. Sheriff of Middlesex, 1 H Bl 543.

10. Rice v. McClintock, Dud (SO) 354. 228

11. Crooker v. Melick, 24 NW 689, 18 Neb 227; Hellman v. Spielman, 27 NW 131, 19 Neb 152.

12. Reeves v. Parish, 4 SE 768, 60 Ga 222.

13. White v. Rockefeller, 46 NJL, 299.

14. In re Cary, 10 F 622; Whipple v. Hutchinson, 4 Blatchf 190, 28 Fed Cas No 17517; Vose v. Internal Impr. Fund, 2 Woods 647, 26 Fed Cas No 17008.

15. Fiorini v. Fiorini, supra. 15a. Ex parte Shores, 195 Fed 627; 4 Black Com. 129-130; Com. v. Barker, 133 Mass 399; U. S. v. Hoffman, 13

States Supreme Court seeking a review from a state court decision—a stay of proceedings in the state court having been issued by the United States Supreme Court. And this is true even if the Supreme Court did not have jurisdiction of the principal cause.<sup>15b</sup>

§ 216. Sheriff Liable for Contempt for Act of Deputy.—In a proper case a sheriff may even be held guilty of contempt of court for the acts of his deputy.<sup>16</sup>

So where a deputy, undersheriff, or subaltern of the sheriff, collects money or fails to return an execution, or properly serve any other process, the sheriff himself may be held guilty of contempt. Where the default is in the collection of money, the sheriff may be committed until the money is paid, and this is true though he did not receive the money or did not know of its collection or did not know that the process had been executed.<sup>17</sup>

It is a fundamental rule of law that it is no defense to a sheriff or constable charged with contempt for official acts that he was an officer de facto instead of de jure.<sup>18</sup>

By resort to analogous cases where others than a sheriff or constable is charged with contempt the principle extractible therefrom seems to be that as a general proposition advice of counsel is no defense for contempt.<sup>19</sup>

But advice of counsel may be urged as a partial palliation or introduced as lessening the gravity of the offense. This is particularly true where the alleged contemner acted in good faith on such advice, or where to inflict punishment as if no mitigation existed would work an injustice. It is proper in these circumstances in assessing punishment to take into consideration the fact the contemner acted upon advice of counsel.<sup>20</sup>

The situation is different, however, where it is made to appear that the alleged advice of counsel was sought merely as a shield for a deliberate, wilful, or contumacious act.<sup>21</sup>

If the advice of the complaining party expressly or by implication induced the alleged contemner to commit the act, as a gen-

F(2d) 269-276.

15b. U. S. v. Shipp, 27 S Ct 165, 203 US 563, 51 L ed 319, 8 AC 265.

16. People v. Brown, 6 Cow (NY) 41, overruling People v. Waters, 1 Johns Cas (NY) 137; State v. Hamann, 10 Ohio NPNS 569.

17. People v. Brown, supra; State v. Hamann, supra.

18. People v. Wortman, 165 NE 788, 334 Ill 298, 64 ALR 530 and note.

19. Eustace v. Lynch, 80 F(2d) 652; In re La Varre, 48 F(2d) 216.

20. Furrer v. Nebraska Building & Investment Co. 189 NW 295, 109 Neb 1; Eustace v. Lynch, supra.

21. Tornansen v. Melsing, 106 F 775, 45 CCA 615.

eral rule this is a sufficient defense.<sup>22</sup>

However, consent may not justify the violation of an injunction.<sup>23</sup>

It is perhaps unnecessary to add that since advice of counsel is no defense for a stronger reason ignorance of law cannot be urged as an excuse or justification.<sup>24</sup>

Still, acting in ignorance of law but upon good faith may mitigate the culpability and work a lessening of the sentence.<sup>25</sup>

Where intent is an indispensable element of the particular act sought to be charged as contempt, consideration may be given to the alleged contemner's urgency of the ignorance of law in fixing punishment.<sup>26</sup>

Where, however, an officer of the law, as a sheriff, constable, or coroner, acted under an unconstitutional statute which was passed by the legislative body for the guidance of public officers, and such officers are merely attempting to carry it out it would indeed take a strong case to justify the punishment of such officials for carrying out or attempting to carry out the legislative will.<sup>27</sup>

However, where an injunction is issued restraining the execution of process which injunction is void for the want of jurisdiction then it is contempt of court to refuse to violate it, by the officer holding such process, since he is compelled to know whether or not the court issuing the injunction had jurisdiction so to do; so where a court in one county rendered a judgment against the sheriff of another county and issued an execution thereon to the coroner of the latter county with directions to levy upon the sheriff's salary and the court of the county wherein the defendant was sheriff had no jurisdiction to hear and determine a suit to enjoin the coroner from executing such process and an injunction issued in such action was void and

22. In re Sylvester, 41 F(2d) 231; Goss Printing Co. v. Scott, 134 F 880; Owsley v. Central Trust Co. 188 Ill App 526; Ex parte Cash, 99 SW 1118, 50 Tex Cr 623, 123 ASR 865, 9 LRA (NS) 304.

23. Kempson v. Kempson, 48 Atl 244, 61 NJE 303, modified on other grounds, 52 Atl 360, 625, 63 NJE 783, 92 ASR 682, 58 LRA 484; Howard v. Durand, 36 Ga 346, 91 AD 767; Carr v. Dist. Ct. of VanBuren County, 126 NW 791, 147 Iowa 663, AC1913D 378 and note.

Note 9 LRA (NS) 304.

24. In re Hand, 105 Atl 594, 89 NJE 469; In re Bowers, 104 Atl 196, 89 230

NJE 307; People v. Rivlin, 277 Ill App 183, see also 4 NE(2d) 823, 364 Ill 480, 57 S Ct 613, 300 US 642, 81 L ed 857, 57 S Ct 782, 301 US 712, 81 L ed 1304; Appeal of Cichou, 278 NW 1, 227 Wis 62.

25. Seastream v. New Jersey Exhibition Co. 61 Atl 1041, 65 Atl 982, 72 NJE 377; In re Hand, supra; In re Bowers, supra.

26. People v. Hille, 192 Ill App 139; Carr v. Dist. Court of VanBuren County, 126 NW 791, 147 Iowa 663, AC 1913D 378 and note; State v. Sparks, 27 Tex 705.

27. Carr v. VanBuren County, supra.

the coroner obeyed such injunction he is guilty of contempt of the court issuing the execution.<sup>28</sup>

In some cases, the assertion of want of the criminal intent is not regarded as a defense for a sheriff, constable, or coroner, or other officer guilty of contempt, but in many instances, the absence of criminal intent may be urged as a defense.<sup>29</sup>

Lack of criminal intent in any event may be given consideration in mitigation of punishment.<sup>30</sup>

The rule that the lack of intent would not be a defense applies only to civil contempts is supported by the clearest reasons and soundest principles. It is submitted that criminal contempts could not be committed in the absence of the necessary and essential element of criminal intent, and this is particularly true in those jurisdictions such as California, Idaho, and other states having a statute enacting that in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence.<sup>31</sup>

§ 217. Sheriff or Constable Amerced When.—A sheriff who has levied an execution upon personal property but refuses to sell it upon the ground that it was claimed by third persons is liable to be amerced. The only escape from such consequences is by showing that he has demanded indemnity of the plaintiff and it has not been forthcoming or that he, where the local practice authorizes it, has

28. *Hofmann v. State*, 194 NE 331, 207 Ind 695. The last cited case announces the rule in Indiana to be that no court in that state can rightfully enjoin a party from proceeding in a suit in another court having equal power to grant the relief sought by the complaint on which such injunction is prayed, wherein the court said:

"We think it is clear from the above authorities that the Lake Circuit Court was without jurisdiction to hear and determine the suit to enjoin the appellant from executing the process of the Newton Circuit Court, and that said judgment was void and of no force and effect. Appellant was bound to know this. *Kane v. State*, 36 Ind App 51, 74 NE 1102, and should have disregarded the same."

Indiana, etc. *R. R. Co. v. Williams*, 22 Ind 198; *Plunkett v. Black*, 19 NE 537, 117 Ind 14.

29. *U. S. v. Sanders*, 290 F 428; *South Butte Mining Co. v. Thomas*, 260 F 814, 171 CCA 540, cert. den. 40 S Ct 483, 253 US 486, 64 L ed 1026.

Note 8 AC 267; *Daily v. Sup. Ct.* 40 P(2d) 936, 4 Cal App 127; *People v. Gilbert*, 118 NE 198, 281 Ill 619, 204 Ill App 97; *Ex parte Bowles*, 165 Atl 169, 164 Md 318; *State v. Dist. Ct.* 246 P 250, 76 Mont 222.

See Sec. 213, supra.

*In re Hickey*, 238 SW 417, 149 Tenn 344.

30. *U. S. v. Ford*, 9 F(2d) 990; *South Butte Mining Co. v. Thomas*, supra; *Ex parte Bowles*, supra; *People v. Gilbert*, supra; *U. S. v. Sanders*, supra.

31. Cal. Penal Code, Sec. 20; *Kerr's Cal. Penal Code*, Sec. 20; *Idaho Code Anno. 1932*, Secs. 17-114; *Derring's Cal. Penal Code*, Sec. 20.

empaneled a jury to try the title and the claimant has had a favorable verdict at their hands.<sup>32</sup>

But he is not liable to be amerced for failing to levy an execution on land of the alleged defendant's, whose title does not appear on the records of the county, in the absence of a statutory provision authorizing such levy. The presumption in such case is indulged that the sheriff or other officer discharged his duty by making proper search of the records and this is required to be rebutted by evidence.

Where an amercement of the sheriff is sought for negligence in failing to seize personal property, it must be shown that such personalty was within the county and territorial jurisdiction of the officer.<sup>33</sup>

The mere fact of failure to return process will not sustain a motion for the amercement of a sheriff or constable but where there is an inventory filed showing goods upon which the execution might legally be levied then the plaintiff in such execution is entitled to a judgment of amercement.<sup>34</sup>

If the neglect of the performance of a duty is due to the act of the plaintiff who is complainant thereat, it is sufficient for the sheriff or constable to show these facts in exoneration of himself where there is an attempted amercement against him.<sup>35</sup>

An amercement proceedings against a sheriff will not lie where he has levied upon goods which he afterwards becomes satisfied, upon sufficient grounds, are not the property of the defendant and thereupon releases the same and returns the execution nulla bona.<sup>36</sup>

In the execution of process, to a great extent an officer is under the control and subject to the directions of the plaintiff therein or his counsel, and if he fails to obey a lawful direction emanating either from the plaintiff or his counsel, then the officer is subject to be penalized, usually by way of amercement or contempt of court, but in order to thus subject him to such penalties it is necessary that he shall have disobeyed positive, reasonable, and lawful directions. A most cursory consideration would doubtless evolve the principle that a plaintiff first cannot disarm a sheriff or constable

32. *Bond v. Ward*, 7 Mass 123, 5 AD 28 and note where this case is regarded as an important adjudication; *Harris v. Kirkpatrick*, 35 NJL 392; *Bayley v. Bates*, 8 Johns (NY) 185.

33. *Force v. Gardner*, 43 NJL 417.

34. *Ritter v. Marseles*, 24 NJL 627;

*Waterman v. Merrill*, 33 NJL 378;

*Todd v. Hoagland*, 36 NJL 352.

35. *Paterson Bank v. Hamilton*, 13 NJL 159; *Scott v. Dow*, 14 NJL 350; *Stryker v. Marseles*, 24 NJL 542; *Waterman v. Merrill*, supra.

36. *Waterman v. Merrill*, supra;

*Wintle v. Freeman*, 11 Ad & Nel 359, 39 ECL 159.

and then hold him liable for his disobedience to the plaintiff's direction resulting in the non-execution of a writ. So, if the disobedience of such direction is due to the conduct of the complaining party or his counsel, the officer will not be penalized.<sup>37</sup>

§ 218. **Amercement of a Sheriff or Constable for Deputy's Acts.**—

A sheriff or constable may be amerced for official misconduct of his deputy.<sup>38</sup>

Indeed, a statute authorizing the amercement of the sheriff or constable does not warrant such procedure against a deputy for his own defaults, but all proceedings therefor must be directed against the sheriff or constable.<sup>39</sup>

However, by statute the deputy may be subjected to an amercement for his misconduct and the sheriff or constable relieved thereof.<sup>40</sup>

The subject of amercement of officers is, generally, regulated by statutes, and it has been asserted that in absence of statute an officer may not be amerced.<sup>40a</sup>

Some cases hold it is in the discretion of the court as to when an officer shall be penalized under the statute, while others deny this, and hold in a clear case established the penalty must ensue.<sup>40b</sup>

These statutes and proceedings thereunder, being penal in nature, and hold in a clear case established the penalty must ensue.<sup>40b</sup>

§ 219. **Ex-sheriff Liable to Be Amerced.**—An ex-sheriff is liable in the proper case to amercement. However, he is not liable

37. *Kemble v. Harris*, 36 NJL 526; *LeRoy v. Blauvelt*, 13 NJL 341; *Scott v. Dow*, 14 NJL 350; *Stryker v. Merseles*, supra; *Waterman v. Merrill*, supra; *Paterson Bank v. Hamilton*, supra.

38. *Caldwell v. Holly*, 1 AK Marsh (Ky) 429; *Esty v. Chandler*, 7 Mass 464; *State v. Nichols*, 39 Miss 318; *Horne v. Allen*, 27 NC 36.

39. *Caldwell v. Holly*, supra.

40. *State v. Nichols*, 39 Miss 318.

40a. *Lee v. Dolan*, 158 NW 1007, 34 ND 449; *Clark v. Com.* 26 SW(2d) 1041; *Stein v. Scanlon*, 127 P 483, 34 Okl 801, 42 LRA(NS) 895.

In the cited case it is held that before an officer can be amerced it must clearly appear that a valid judgment has been entered; that the judgment

has not been satisfied; that an execution has been lawfully issued thereon; and that it went into the hands of the officer, and he has failed to serve and return the same as by law required.

*Wilson v. Com.* 262 SW 905, 203 Ky 616; *Malchoff v. Knewel*, 215 NW 686, 51 SD 520, holding statutory remedy for amercement is not exclusive.

40b. *Rodgers v. Waters*, 2 Ala 644; *Smith v. Simmons*, 46 Atl 746, 18 Del 462; *McClelland v. Hobbs*, Hard (Ky) 2; *Fisher v. Franklin*, 16 P 341, 38 Kan 251; *Lee v. Dolan*, supra; *Henderson-Sturges Piano Co. v. Smith*, 123 P 454, 33 Okl 335.

40c. *Wilson v. Lowry*, 52 P 777, 6 Ariz 335; *Early Stratton Co. v. Cooper*, 25 SW(2d) 423, 181 Ark 134; *Lewis v. J. C. Pearson Co.* 176 SW 100, 118 Ark 271; *Mayfield Woolen Mills*

unless the process in connection with which the amercement is sought came into his hands while he was sheriff as, for instance, where he receives an execution and levies it before the expiration of his term but is guilty of an official default in connection therewith.<sup>41</sup>

*v. Lewis*, 133 SW 590, 97 Ark 149; *Fisher v. Franklin*, supra; *Fuller v. Wells*, 22 P 561, 42 Kan 551; *Watson v. Boyett*, 118 So 629, 151 Miss 726; *Brady v. Hughes*, 106 SE 829, 181 NC 234; *Moore v. McClief*, 16 Oh St 50; 234

*Stein v. Scanlon*, supra; *Clark v. Com.* supra.

41. *Armstrong v. Grant*, 7 Kan 285; *Bond v. Weber*, 17 Kan 410; *Smith v. Martin*, 20 Kan 575; *Chaffee v. Handy*, 36 La Ann 22.



## CHAPTER VII

## ATTACHMENTS

## SECS.

220. Attachment against a Person.  
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 238. Sheriff Liable for Seizing Goods of Third Person.  
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 240. Duty of Sheriff to Observe the Priority of His Process.  
 241. When a Sheriff May and When He Can Not Demand Indemnity for Levying an Attachment.

§ 220. Attachment against a Person.—In many states<sup>1</sup> it is provided that a defendant may be arrested in a civil action on several different grounds.<sup>2</sup> Arrest in such cases is usually made only upon

1. N. D. Compiled Laws, 1913, Secs. 7488 et seq.; California, Deering's Code 1931, Sec. 478; Kerr's Code, Sec. 478; Idaho Code Anno. 6-101 et seq.; Michigan—Compiled Laws of 1929, 14750.

2. Grounds for arrest.—The defendant may be arrested as hereinafter prescribed in the following cases:

(1) In an action for the recovery of money or damages on a cause of action arising upon a contract express or implied where the defendant is about to depart from the State with intent to defraud his creditors, or when the

action is for wilful injury to person, or character, or to property, knowing the property to belong to another.

(2) In an action for a fine or penalty, or on a promise to marry, or for money or property embezzled, or fraudulently misapplied or converted to his own use, by a public officer or an officer of a corporation, or an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any person in a fiduciary capacity; or for misconduct or neglect in office or in a professional employment, or for a wilful violation of

the furnishing of bond to indemnify the defendant for all damages which he may sustain by reason of the arrest if such arrest is wrongful or without sufficient cause.<sup>3</sup> It is probable all courts in a proper case have inherent power to order the attachment of a person for contempt, or neglect, or refusal to obey the mandates or process of a court.<sup>4</sup> As the attachment for contempt is more or less in the nature of criminal process, arrests thereon are subject to the same rules applicable to arrests in general.<sup>5</sup>

§ 221. What Is an Attachment of Property.—An attachment is not an original action but is a proceeding auxiliary or incidental to the main action and is intended to secure the payment of any judgment that may be recovered therein and no attachment can issue after judgment in the main action.<sup>6</sup> Where an attachment of property is made, it consists of impounding the property before judgment by the sheriff or some other lawful officer, so that in the event the plaintiff does recover judgment, there will be some property out of which the judgment can be satisfied.<sup>7</sup> An attachment is only an incident to a suit and unless the suit can be maintained the attachment must fail.<sup>8</sup> The process of attachment is exclusively regulated by statute although the common law gave the basis for it in the common-law writ of *pone*.<sup>9</sup> In the issuance of an at-

duty.

(3) In an action to recover the possession of personal property unjustly detained when the property, or any part thereof, has been concealed, removed or disposed of to prevent its being found or taken by the sheriff.

(4) When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought. Section 6-102 Idaho Code Annotated, 1932, Civil Procedure, etc.

This is illustrative of the civil arrest provisions to be found in codes and statutes.

3. Statutes and notes, footnote 1, supra.

12 Am Jur p. 390, Sec. 3, p. 405, Secs. 24 et seq.

4. State v. Dunnington, 102 So 478, 157 La 369; In re Lee, 183 Atl 560, 170 Md 43, cert. den. 56 S Ct 947, 236

298 US 680, 80 L ed 1400; State v. Binder, 251 NW 665, 190 Minn 305; Tucker v. Gilman, 14 NYS 392, 20 NY Civ Proc 397, 37 NYSR 958.

5. See Secs. 116 et seq. supra.

6. Whinery v. Kozacik, 22 NE(2d) 829, — Ind —, rev. 11 NE(2d) 80, 104 Ind A 349, 19 NE(2d) 869.

7. Boyer v. Meeks, 164 NE 601, 86 Ind App 450; Nevada First National Bank of Tonopah v. Lamb, 271 Pac 691, 51 Nev 162, 271 Pac 693, 51 Nev 158; Sicklick v. Schasseur, 225 NYS 279, 221 App Div 742; Marsh v. Moore, 161 Atl 227, — RI —.

8. Rorick v. Devon Syndicate, 100 F(2d) 844.

9. Bond v. Ward, 7 Mass 123, 5 AD 28; Penogar v. Kelsey, 44 NE 788, 150 NY 77, 34 LRA 248.

It is said in the cited case: "Its original purpose was to acquire jurisdiction of the defendant by compelling him to appear in court through the seizure of his property, which he forfeited if he did not appear or furnish

tachment the statutory provisions regulating such process must be strictly observed.<sup>10</sup> In some states, however, liberal construction is afforded the provisions of the attachment laws.<sup>11</sup> Garnishment is distinguished from an attachment in that there is no actual seizure of the property in garnishment and no specific lien is acquired by reason of a garnishment levy.<sup>12</sup> The result of a garnishment is the impounding of the property which the garnishee may have in his possession, for which he is compelled to answer until the action has been decided, out of which the garnishment proceedings issued.<sup>13</sup>

§ 222. **Duty of the Sheriff in Case of Garnishment.**—Generally the service of the writ of garnishment does not operate as a physical attachment of any property belonging to defendant described in the writ, but it is notice to the garnishee to retain any effects belonging to the defendant, or to withhold payment of any indebtedness due the defendant.<sup>14</sup> In the execution of the garnishment process, the officer is required only to use reasonable diligence.<sup>15</sup> In the execution of such writ he generally has until its return day to execute it, and he will not be liable for not executing it sooner.<sup>16</sup> Upon the service of a writ of garnishment, the officer is required to make a return and such return is prima facie evidence of service thereof.<sup>17</sup>

sureties for his appearance. 3 Bl. Com. 290, 1 Rolle Abr. Customs of London. K 13; Kneeland, Attachm. Sec. 6; Drake, Attachm. Sec. 5; Ashley, Attachm. 11; Locke, Foreign Attachm. 12. It was part of the service of process in a civil action through a species of distress, in which the goods attached were the ancient vadii or pledges. Bond v. Ward, 7 Mass 123, 128; Gilbert, Law Distress 24. As said in the last case cited: 'The practice of attaching the effects of a defendant, and holding them to satisfy a judgment, which the plaintiff may recover, when, perhaps, judgment may be for the defendant, is unknown to the common law, and is founded on our statute law.'

3 Blackstone Com. 290.

10. *Sweatt v. Grogen*, 25 Fed Sup 585; *U. S. v. Pacific Forwarding Co.* 8 Fed Sup 647; *Herrick v. Herrick*, 65 So 146, 190 Ala 439; *Standard Auto Sales Company v. Lehman*, 186 Pac 178, 43 Cal App 763; *Woods v. Spotirne*, 193 Atl 319, — Del —; *Jewett State Bank v. Evans*, 129 SW(2d)

(Tex Civ App) 1202.

11. *Farmers' & Merchants Bank v. Wells & Potter*, 179 NW 838, 189 Ia 1312; *Lastowski v. Lawnicki*, 179 Atl 266, 115 NJL 230.

12. *Watson v. Goldstein*, 222 NW 509, 176 Minn 18.

13. *Robison v. LaForge*, 17 P(2d) 843, 170 Wash 678, 27 P(2d) 585, 175 Wash 384.

14. *Century Indemnity Co. v. Kofsky*, 161 Atl 101, 115 Conn 193; *Brenton Bros. v. Dorr*, 239 NW 808, 213 Ia 725.

15. *Crosby v. Hungerford*, 12 NW 582, 59 Ia 712; *People v. Colerick*, 67 Mich 362, 34 NW 683; *Guterman v. Sharvy*, 46 Minn 183, 48 NW 780, 24 ASR 218 and note; *Williams v. Sands*, 251 Mo 147, 158 SW 47; *Steele v. Crabtree*, 58 NW 1022, 40 Neb 420; *Watson v. Brennan*, 39 NY Super 81. However, reversed 60 NY 621; *Hale v. Lange*, 8 SW(2d) (Tex Civ App) 1046.

16. *State v. Rollins et al.* 13 Mo 179.

17. *Woods v. Quarles*, 13 SW(2d)

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A deputy sheriff's return on a writ of garnishment may be corrected by the sheriff at any time before filing.<sup>18</sup> The return of the writ or summons in garnishment must meet the requirements of the statute requiring such.<sup>19</sup> Where a sheriff has two or more writs of garnishment in his hands and where he gives preference to a junior writ, he is liable to the plaintiff in the senior writ if he is injured thereby.<sup>20</sup> However, where a sheriff received two garnishments on the same day, the earlier garnishment directing him generally to garnishee a number of persons indebted to the attachment defendant after filling in certain blanks with their names from books in officer's possession, and the later attachment specifically directed him to garnishee certain persons named therein, the officer was not liable to the earlier attachment creditor for obeying the specific directions in the later writ first.<sup>21</sup>

§ 223. **When Attachments Will Issue.**—In the issuance of an attachment, the attaching creditor must follow substantially the requirements of the statutes permitting the attachments. Differently stated, an attachment may be dissolved where it is improperly or irregularly issued.<sup>22</sup> Generally it is required by statute that before a writ of attachment will issue the plaintiff must file an affidavit setting forth the basis of his claim.<sup>23</sup> And, it is essential that the demands of the law be complied with,<sup>24</sup> and if no affidavit, or an insufficient one be filed, the writ of attachment is absolutely

617, 178 Ark 1158; *Kurre v. American Indemnity Co.* 17 SW(2d) 685, 223 Mo App 406.

18. *Simon v. McCay*, 214 NW 63, 239 Mich 337.

19. *James v. Jenkins*, 13 Fed Cas 7181A, *Hempst* 189; *Broadway Insurance Co. v. Wolters*, 128 Cal 162, 60 Pac 766; *Rock v. Singmaster*, 17 NW 744, 62 Ia 511; *McCoy v. Boyle*, 10 Md 391; *Hackett v. Gihl*, 63 Mo App 447; *Howell v. Sherwood*, 242 Mo 513, 147 SW 810; *Bushnell v. Allen*, 48 Wis 460, 4 NW 599.

20. *Grabenheimer v. Budd*, 40 La Ann 107, 3 So 724; *Continental Distributing Company v. Hays*, 86 Wash 300, 150 Pac 416, AC1917B, 708; *Ohlson v. Pierce*, 55 Wis 205, 12 NW 429.

21. *Remington v. Weber*, 39 Pac 822, 11 Utah 181.

22. *Caldwell v. People's Bank*, 75 So 648, 73 Fla 1165.

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ground for quashing an attachment, yet it is not every slight error that will work such result. The defect or error must be material to warrant quashing the proceedings.

*Mason v. Lluellen*, 39 Pac 1117, 4 Ida 415; *A. D. Fletcher & Son v. Gordon*, 259 NW 204, 219 Ia 601; *McLaren v. Hall*, 26 Ia 297; *Jenkins v. First National Bank*, 236 Pac 1085, 73 Mont 110; *Dadder v. Moberly*, 114 P 714, 28 Okl 334; *Fenan v. Butcher*, 6 Atl 67, 113 Pa 292; *Smyth v. Moffett*, 6 Tenn App 381; *Winfree v. Mann*, 153 SE 837, 154 Va 683.

23. *Sandusky Cement Co. v. A. R. Hamilton & Co.* 273 Fed 596; *Continental Oil Co. v. Jameson*, 164 Pac 727, 53 Mont 466; *Campbell v. Brady*, 11 SW(2d) 687, 158 Tenn 98; *Tahoma Finance Company v. Shannon*, 244 Pac 271, 138 Wash 90.

24. See footnote 23, supra.

void.<sup>25</sup> Where an attachment issues on an insufficient affidavit, the defect is not remedied where the defendant appears and pleads.<sup>26</sup> It has been held that where, from the records, it appears that there never was an affidavit, as a basis for the attachment, evidence is not admissible to show that there had been one;<sup>27</sup> but this case is of highly doubtful soundness. And the more modern and better rule is that the absence of an affidavit from the records is not grounds for an objection where it appears that there was in fact an affidavit.<sup>28</sup> In some states the ordinary pleadings are sufficient for the issuance of a writ of attachment, and it is not required that there be a separate affidavit.<sup>29</sup> In such an instance the complaint must meet the requirements of the statutes to warrant an attachment.<sup>30</sup> In order for a writ of attachment to issue, the cause of action must be of the requisite character as provided by statute.<sup>31</sup> Generally, an attachment is limited to actions arising out of a contract.<sup>32</sup> In the absence of statutes specifically permitting, the attachment will not lie and generally is not permitted by statute on actions arising ex delicto.<sup>33</sup> But it would seem that an irregularity occurring in the course of the proceedings is no concern of the sheriff's so long as the writ that is placed in his hands is regular on its face. Under modern statutes in many jurisdictions affidavits in attachment suits and actions are amendable to supply deficiencies and defects consisting of clerical errors, technicalities and matters of form. But such is not the case if the defect asserted goes to substance of the matter.<sup>33a</sup>

25. *Cleveland & Western Coal Co. v. J. H. Hillman & Sons Co.*, 245 Fed 200; *Howard v. Howard*, 39 SW(2d) 245, 239 Ky 160; *Campbell v. Brady*, 11 SW(2d) 687, 158 Tenn 98.

26. *Tyson v. Hamer*, 2 How (Miss) 669.

27. *Bond v. Patterson*, 1 Blackf (Ind) 34.

28. *Biggs v. Blue*, 3 Fed Cas 1403, 5 McLean 148; *Sloan v. Mitchell*, 84 Mo 546.

29. *Smith v. Dungey*, 199 SW 777, 178 Ky 702.

30. *Appleman v. Lynch National Bank*, 298 SW 1097, 221 Ky 415.

31. *Hoosier Veneer Co. v. Trust & Guarantee Co.*, 283 Fed 1, cert den 260 US 738, 43 S Ct 97, 67 L ed 489; *King v. Cline*, 104 Pac 290, 49 Cal App 686.

32. *L. & J. A. Stewart v. Blue Grass Canning Co.*, 117 SW 401, 133 Ky 118;

*Edick v. Green*, 38 Hun (NY) 202; *Pope v. Hibernia Ins. Co.*, 24 Ohio State 481.

33. *Sunderlin v. Warner*, 246 Pac 1, 42 Ida 479; *San Francisco Iron & Metal Company v. Abraham*, 296 Pac 82, 211 Cal 552; see also 287 Pac 569; *Levinson v. Seeman Bros.* 166 Atl 630, 11 N.J Misc 402; *Sally v. Brown*, 295 SW 890, 220 Ky 576.

33a. *Anaheim Nat'l Bank v. Kraemer*, 7 P(2d) 765, 120 Cal A 63; *Rabbit v. Frank C. Weber & Co.*, 130 NE 787, 297 Ill 491; *Booth v. Callahan*, 55 Atl 625, 97 Md 317; *Gill v. Physicians' and Surgeons' Bldg.*, 138 Atl 674, 153 Md 394; *Duxbury v. Dahle*, 81 NW 199, 78 Minn 427, 79 ASR 409; *Patch v. Stewart*, 253 P 254, 78 Mont 192; *Farmers St. Bank v. Gibson*, 278 SW (Mo App) 737; *Gerson v. Bernbaum Clo. Co.*, 11 Pa Dist & Co. 691; T. C. 239

Under statutory authority even amendments may be allowed supplying matters of substance.<sup>33b</sup>

§ 224. **Attachments as Fixing a Lien on the Property Seized.**—The levy of an attachment creates a lien from the time of the levy or service, which ordinarily continues until final disposition of the case, unless in the meantime it is interrupted or dissolved.<sup>34</sup> The lien on the attached property by mesne process dates from the original levy no matter when the judgment is recovered.<sup>35</sup> When property is attached, plaintiff acquires only an inchoate or contingent lien on the property which is subject to his recovering a judgment against the defendant.<sup>36</sup> After an attachment has been levied, and especially after having been carried into decree or judgment, it constitutes a lien good against all persons with notice.<sup>37</sup>

§ 225. **An Attachment Chiefly a Statutory Remedy in Actions Ex Contractu.**—The writ of attachment was unknown to the common law and only has the scope that the various legislatures have chosen to accord it.<sup>38</sup> Attachment being strictly a statutory remedy, as has heretofore been discussed, the relief sought must therefore come within such statutes.<sup>39</sup> Most statutes provide that attachments may issue only when the main action is one arising from contract, either express or implied.<sup>40</sup> In actions ex delicto, unless it is expressly provided by statute, the attachment will not issue.<sup>41</sup>

*May Co. v. Menzies Shoe Co.*, 119 SE 227, 186 NC 144; *N. Y. Cas. Co. v. Lawson*, 24 SW(2d) 881, 160 Tenn 329.

33b. *Rosenberg v. Bullard*, 15 P(2d) 870, 12 Cal A 315; *Hart Co. Deposit Bank v. Hatfield*, 33 SW(2d) 660, 236 Ky 725.

34. *McGaffey Canning Co. v. Bank of America*, 294 Pac 45, 109 Cal App 415; see also 284 P 977; *McInnes v. McKay*, 141 Atl 699, 127 Me 110, affirmed *McKay v. McInnes*, 49 Sup Ct 344, 279 US 820, 73 L ed 975; *Short v. Karnop*, 275 Pac 278, 84 Mont 276; *Hambley & Co. v. H. W. White & Co.*, 133 SE 399, 192 NC 31; see also 135 SE 626, 192 NC 624.

35. *Elkay Reflector v. Savory Inc.*, 57 Fed(2d) 161.

36. *The American (The Emperor)*, 40 Fed(2d) 942; *Federal Land Bank of New Orleans v. Strickland*, 148 S 799, 227 Ala 116; *Hilton Bros. Motor Co. v. 240*

*Dist. Court in and for Millard Co.*, 25 Pac(2d) 595, 82 Utah 372.

37. *Hines v. Fulton*, 140 SE 537, 104 West Va 561; In re: *Bryce Cash Store*, 124 So 544, 12 La App 365.

38. *Porter v. Duke*, 270 Pac 625, 34 Ariz 217; *Ponsonby v. Sacramento, Suburban Fruit Lands Co.*, 291 Pac 167, 210 Cal 229; *C. & E. Marshall & Co. v. Leon*, 267 Ill App 242; *Olds v. Olds*, 200 NW 1, 219 Ia 395, Suppl. 261 NW 488; *Bethell v. Lee*, 158 SE 493, 200 NC 755.

39. *Maesman v. Snyder*, 27 Fed(2d) 542, affirmed 37 Fed(2d) 825; *Ponsonby v. Sacramento Fruit Lands Co.*, 291 Pac 167, 210 Cal 229; *American Fruit Growers v. Walmstad*, 260 Pac 168, 44 Idaho 786; *J. S. Cruse Realty Co. v. Imfeld*, 184 NE 407, 204 Ind 419.

40. *Nevada Co. v. Farnsworth*, 89 Fed 104; *Mason v. Moore*, 298 SW 1100, 221 Ky 481; *Stewart v. Blue Grass Canning Co.*, 117 SW 401, 133

The remedy of attachment can not be made available by pleading in a tort action as one sounding in contract.<sup>42</sup> However, it is expressly provided by statute in some States that an attachment may issue in causes of action arising *ex delicto*.<sup>43</sup> This might become of importance to a sheriff or constable in some cases; as where a writ of attachment is delivered to him and it appears therefrom that it is an attachment issued in a tort action when the statutes of the particular jurisdiction do not provide therefor; it would seem in these circumstances, that such a writ would afford the officer no protection.

**§ 226. Attachment Statutes to Be Strictly Construed.**—As we have heretofore seen, statutes providing for the issuance of writs of attachment being in derogation of the common law must be strictly construed.<sup>44</sup> However, it has been held that attachment statutes, though strictly construed in determining the steps necessary to confer jurisdiction, would be liberally construed in determining whether the acts amount to compliance therewith.<sup>45</sup> But it should be noted that where statutes provide for equitable attachment proceedings, it has been held such statutes, being remedial in character should be liberally construed.<sup>46</sup> In some states, attachment statutes are liberally construed generally in favor of creditors.<sup>47</sup> By statutory mandate, in some jurisdictions, attachment statutes are to be liberally interpreted.<sup>48</sup>

**§ 227. How an Attachment Must Be Executed on Land.**—The attachment of real estate upon mesne process is almost entirely symbolic in its procedure, as will hereinafter be seen. A levy of attach-

Ky 118; *Pope v. Hibernia Ins. Co.*, 24 Ohio St 481; *Devoe v. Stewart*, 32 Tex 712.

41. *San Francisco Iron & Metal Co. v. Abraham*, 296 Pac 82, 211 Cal 552; *Sunderlin v. Warner*, 246 Pac 1, 42 Idaho 479; *Levinson v. Seeman Bros.*, 166 Atl 630, 11 NJ Misc 402.

42. *Powers v. Freeland*, 299 Pac 736, 114 Cal App 146; *Taulbee v. Campbell*, 44 SW(2d) 275, 241 Ky 410.

43. *Daley v. Torrey*, 230 Pac 792, 71 Mont 513; *Gobel v. Gobel Estate Corp.*, 230 NYS 32, 224 App Div 761; *Tisdale v. Eubanks*, 104 SE 339, 180 N C 153, 11 ALR 374; *Smith v. Buck*, 102 NE 392, 119 Ohio State 101, 61 ALR 1343; *Longbotham v. Longbotham*, 18 Pa Co 460.

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44. See Sec. 223; *U. S. v. Pacific Forwarding Co.*, 8 Fed Sup 647; *Bethell v. Lee*, 158 SE 493, 200 NC 755; *West Side Motor Co. v. Politz Bros.*, 161 NE 22, 27 Ohio App 116.

45. *Gill v. Physicians' & Surgeons' Bldg.*, 138 Atl 674, 153 Md 394.

46. *Marsh v. Moore*, 161 Atl 227, 52 RI 458.

47. *Lastowski v. Lawnicki*, 179 Atl 266, 115 NJL 230.

48. *Donnelly v. Dripps*, 167 NW (Iowa) 102; *Miller v. Alaska Canadian Oil etc. Co.*, 4 Alaska 439; *Bridge v. Ring*, 157 NE 496, 25 Ohio App 149; *Force v. Hubbard (B. W. & J. P. Force v. Hubbard)*, 26 Ga 239; *Smith v. Buck*, 162 NE 392, 119 Ohio St 101, 61 ALR 1343, holding that the words "personal

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ment upon realty is attained without actual seizure and without physically taking possession of the realty, but by notice and recording of writ, the object being to make the levy appear on the record, as against the title.<sup>49</sup> There must be some overt act of constructive seizure in order to put the owner or his tenant upon notice, actual or constructive.<sup>50</sup> The law has invented a symbolical seizure of lands owing to the difficulty of taking actual physical possession thereof.<sup>51</sup> In such symbolical seizure the one in possession is not dispossessed,<sup>52</sup> and under such seizure it is not necessary that the officer go into possession of the same<sup>53</sup> or enter upon it.<sup>54</sup> It is not even necessary that he go to a place where he can view it, or have it within his view.<sup>55</sup> A sheriff's levy of attachment upon all the right, title, and interest of a mortgagor in land is equivalent to a levy upon the land itself.<sup>56</sup> Such a levy is in fact a levy upon the realty in actuality.<sup>57</sup> The local statutes should be examined for exactitude of the requirements in respect of attachments. In some jurisdictions real property standing upon the records of the county in the name of the defendant are attached by filing with the recorder of the county a copy of the writ together with the description of the property attached and notice that it is attached.<sup>58</sup> However, where the property doesn't stand in the name of the defendant on the records of the county, it can be attached under some statutes by filing with the recorder of the county a copy of the writ of attachment together with a description of the property and a notice that such real property and any interest that the defendant may have, held or standing in the name of any other person and the person in whose name the title rests should be stated.<sup>59</sup> That is, both the alleged owner and the party in whose

injury" by "wrongful act" included such personal injuries as libel, slander, etc.

See also *Tisdale v. Eubanks*, 104 SE 339, 180 NC 153, 11 ALR 374 and note.

49. In re *Maier Brewing Company (Simons v. Wells)* 56 Fed(2d) 673, cert den 54 S Ct 131, 290 US 695, 78 L ed 598.

50. *Lane v. Bradfield*, 140 SE 417, 37 Ga App 395; *United Provisions Corp. v. Board of Missions*, 124 SE 820, 33 Ga App 9.

51. *Smith v. Brown*, 23 SE 849, 96 Ga 274.

52. *Smith v. Collins*, 2 NW 177, 41 Mich 173.

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53. *Steam Stone Cutter Co. v. Sears*, 9 Fed 8, 23 Blatchf 194.

54. *Perrin v. Leverett*, 13 Mass 128.

55. *Robertson v. Hoge*, 1 SE 667, 83 Va 124.

56. *McDonnell v. Amo*, 34 SW(2d) 212, 162 Tenn 36.

57. *Millet v. Blake*, 18 Atl 293 at 295, 81 Me 531, 10 Am St Rep 275, and note as to sufficiency of officer's return.

58. See Compiled Laws of N. D. 1913 Sections 7547, 7545 and 7546; *Deering's Code of California*, 1931, Section 542; CCP 542, *Kerr's Code* 542. See also 15 Cal Jur 1038; 17 RCL 171; *Idaho Code Annotated*, 1932, Sections 6-505 et seq.

59. See footnote 58, *supra*.

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name the record title stands should be set out in the notice of attachment.

§ 228. **How an Attachment Must Be Levied on Chattels.**—As a generality, in order for an officer to effect a valid levy upon personal property, actual dominion over the property must be assumed by him.<sup>60</sup> The control which he assumes over the property must be such that were it not for the protection of the writ held by him, he would be guilty of trespass.<sup>61</sup> Where goods were in the possession of a customs officer, at the time of the levy and were not at that time and for that reason capable of manual delivery, and the levy and service of the notice of the warrant of attachment, the notice containing a description of the goods, was served on the proper agent of the steamship line, such levy was effective, notwithstanding the fact that the goods were not taken into possession of the officer levying the attachment, and where the bill of lading covering same was surrendered some two hours afterwards, the court held that the service of the warrant and notice and the surrender of the bill of lading were for all practical purposes concurrent.<sup>62</sup> It has been held that a service of a writ of attachment on the defendant is sufficient to maintain the levy where the property consists of heavy and unmanageable articles.<sup>63</sup> Mere entry of the premises where the chattels are located does not constitute a levy as to personal property, but such officer must take and maintain actual custody and control thereof.<sup>64</sup>

§ 229. **Attachment of Bulky Articles.**—In regard to personal property, incapable of manual delivery, it is generally held that such property need not be taken into the actual physical possession of the officer, but that the rule governing the levy on real estate would apply,<sup>65</sup> it being held that the service of the writ upon the defendant was sufficient attachment of such property.<sup>66</sup> But maugre this, with respect to such property, however, there must

60. *Albert Weinbrenner Inc. v. Fine*, 105 Fed(2d) 272; *Ex parte Fuller*, 128 So 483, 90 Fla 1165; *Fleming v. Moore*, 105 S 879, 213 Ala 592.

61. See footnote 60 supra; *Libby v. Murray*, 8 NW 238, 51 Wis 371; *Galla-gher v. Bishop*, 15 Wis 270.

62. *Ratto v. Italia, etc. Lloyd Tries-tino*, 12 NYS(2d) 417, 171 Misc 420.

63. *Irillarry v. Byers*, 257 Pac 540, 84 Cal App 28; *Hart v. Oliver Farm*

*Equipment Sales Co.*, 21 Pac(2d) 96, 37 NM 267, 87 ALR 962.

64. *McBrien v. Harris*, 145 SE 919, 30 Ga App 41; *American Fruit Grow-ers v. Walmsatad*, 260 Pac 168, 44 Ida 786. See Sec. 229, *infra*; *Beemer v. Seaborn*, 22 Pac(2d) 356, 54 Nev 459.

65. *Irillarry v. Byers*, 257 P 540, 84 Cal A 28; *Dreisbach v. Braden*, 40 Cal App 407, 181 Pac 262.

66. *Rudolph v. Saunders*, 111 Cal 233, 43 Pac 619.

be some act that would give as much notice as possible of the existence of a levy thereon.<sup>67</sup> A warehouse has been held personal property not capable of manual delivery within an attachment statute permitting a levy without taking such property into actual custody or possession.<sup>68</sup> It is provided by many statutes, however, how personal property not capable of manual delivery may be attached,<sup>69</sup> and the statutes with respect thereto of any jurisdiction where matter is of concern to an interested party should be consulted. Generally, bulky chattels, incapable of manual possession thereof, on being levied upon, a watchman or keeper should be stationed thereat, and a notice ought to be posted thereon that the same has been attached.

Where an officer was directed under a writ of attachment to take into his possession caged lions, such lions were held not to be property incapable of manual delivery and the posting of the notice of attachment on the cage was held not sufficient to constitute a levy; in such case, the court held a keeper should have been put in charge thereof.<sup>70</sup> In all cases of doubt, the officer should put a keeper in charge of personal property incapable of being physically possessed.

§ 230. **Sheriff's Control of Attached Goods.**—The sheriff's dominion over attached personal property must be such as to put the property out of the control of the attachment debtor.<sup>71</sup> A seizure of property was held sufficient on a writ of attachment although the property wasn't removed from the debtor's premises where no right of an innocent purchaser was involved.<sup>72</sup> A seizure has been held sufficient where the officer executing the attachment took an invoice of the crops and animals and a receipt from the debtor therefor and made a return showing that he had made a levy.<sup>73</sup>

67. *Landers v. Moore*, 106 S 223, 21 Ala A 12, cert den 214 Ala 20, 106 S 225; *Hart v. Oliver Farm Equipment Sales Co.*, 21 Pac(2d) 96, 37 NM 267, 87 ALR 962.

68. *Quarles v. Citizens National Bank*, 31 Fed(2d) 40.

69. *Deering's Code of Civ. Proc. of California*, 1931, Sec. 542; *Cal. Civ. Code* 542; *Kerr's Code Civ. Proc.* 542; *Compiled Laws of N. D.*, 1913, Secs. 7545, 7546, and 7547; *Cotnareanu v. Chase National Bank of the City of New York*, 2 NE(2d) 664, 271 NY 294, 283 NYS 1018, 246 App Div 572; *Du-244*

*gundji v. Paico*, 180 NYS 381, 190 App Div 707.

70. *Knox v. Binkoski*, 122 Atl 400, 99 Conn 582.

71. *Hart v. Oliver Farm Equipment Sales Company*, 21 Pac(2d) 90, 37 NM 267, 87 ALR 962.

72. *Taubel Etc. Co. v. Fox*, 44 S Ct 396, 264 US 429, 68 L ed 770, 286 F 351; *In re Jones*, 42 Fed(2d) 269. The levy in these circumstances would probably not be sustained as against the intervening rights of another attaching creditor.

73. *First National Bank v. Schram*, 211 NW 405, 202 Iowa 791.

And likewise, it has been held sufficient and valid attachment where the sheriff made a sufficient attachment of restaurant fixtures and appointed the manager of the restaurant as keeper.<sup>74</sup> Such attachment, where the goods are left in possession of the defendant as keeper, affords the attaching creditor no protection against an innocent purchaser for value.<sup>75</sup> It was held to be an insufficient seizure of the property where an attachment was attempted to be made on thirty-five cords of pulp wood in a boom containing over three hundred cords of such wood without selecting and separating the attached property.<sup>76</sup>

**§ 231. An Attachment Must Be Actually Levied.**—Where a sheriff in an attempt to levy on a combine and tractor merely posted the notices on the machinery, such levy was held insufficient where there was no actual taking physical possession of the property.<sup>77</sup> A mere attempt to consummate a levy which fails by reason of the fact that, when he attempts to do so, he is prevented from so doing by force and violence, will not amount to an attachment and it has been held that there was no such possession gained by such officer, actual or constructive in the absence of which there can be no levy and innocent third persons will be unaffected by such an attempted attachment.<sup>78</sup> It would seem to follow that where there has been no valid effectual levy that the property may be attached at the suit of other creditors.

**§ 232. Debtor as Sheriff's Agent to Keep Goods Attached.**—Generally where the sheriff permits the defendant debtor to retain control of attached property, the attachment is with respect to other creditors ineffectual.<sup>79</sup> However, it has been held that where the sheriff allowed the debtor to keep possession of the attached property and it was agreed between himself and the debtor that the attachment would not be dissolved by such act, it was good as against third parties having notice of such facts.<sup>80</sup> So too, where the officer placed the attached property in the custody

74. *American National Bank v. John Van Range Co.*, 278 SW 133, 211 Ky 349.

75. *McPartin v. Clarkson*, 215 NW 333, 240 Mich 390, 54 ALR 1535.

76. *Bisbee v. Grant*, 127 Me 775, 142 Atl 775; *Savage v. Grant*, 142 Atl 775, 127 Me 547.

77. *Osborn v. Paul*, 27 SW(2d) (Tex Civ App) 672.

78. *Williams v. Cheesborough*, 4 Conn 330.

79. *Gray v. Bracken*, 140 Atl 354, 107 Conn 300; *Chowning v. Madison Land and Irrigation Co.*, 276 Pac 946, 84 Mont 494.

80. *Titcomb v. Bay State Grocery*, 150 NE 874, 254 Mass 599; *Chowning v. Madison Land & Irrigation Co.*, supra.

of the debtor as keeper, taking keeper's receipt from the debtor, and later placed the property in the custody of the creditor and taking a similar receipt from him, it was held that the attachment lien thereon was not lost and that it had continued throughout.<sup>81</sup> Likewise, where the creditor and debtor in a suit for the provisional seizure of oil entered into an agreement with the officer that the attached oil should continue to be delivered to a third party as theretofore for his use, the attaching officer is not responsible to either the debtor or creditor and such third party cannot be required to account—not being a party to the agreement—even if notice of seizure was served on him.<sup>82</sup> It has been held that the placing of the debtor in charge of the attached property is good as against individuals with notice of such attachment, but that an innocent purchaser for value acquires the property free from such attachment lien.<sup>83</sup>

**§ 233. Sheriff May Appoint an Indifferent Person as Keeper of Attached Goods.**—It is not necessary for the attaching officer to retain actual personal physical custody of the attached goods, but he may deliver such goods to another as the officer's agent or servant as a keeper who acts in the place of the officer in keeping such goods.<sup>84</sup> In an action where an attaching officer first placed the attached property in the possession of the debtor and took from such debtor a keeper's receipt and likewise later did the same with the creditor, the court held that the attachment lien was unimpaired as between the parties.<sup>85</sup> A keeper so appointed generally has only the authority under such appointment to keep the goods himself and may not delegate such power to another.<sup>86</sup>

**§ 234. What Is a Sufficient Attachment and Seizure of Goods.**—For there to be a sufficient attachment and seizure of goods generally there must be an actual seizure or possession thereof.<sup>87</sup> The essential requirement for an attachment is that the attaching officer's acts be sufficient to put the property out of the control of

81. *Myers v. Walker*, 24 Pac(2d) 97, 173 Wash 592. See note 85 infra.

82. *H. R. Hays Lumber Co. v. H. M. Jones Drilling Co.*, 148 S 899, 177 La 626.

83. *American National Bank v. John Van Range Co.*, 278 SW 133, 211 Ky 849; *McPartin v. Clarkson*, 215 NW 338, 240 Mich 390, 54 ALR 1535.

84. *Hart v. Oliver Farm Equipment Sales Co.*, 21 Pac(2d) 96, 37 NM 267, 246

87 ALR 962; *Davidhizer v. Elgin Forwarding Co.*, 173 Pac 893, 89 Ore 89.

85. *Whann v. Hufty*, 12 La Ann 280; *Stewart v. Stewart Drug Co.*, 117 Me 84, 102 Atl 823; *Jolley v. Dunlop*, 147 NW 980, 34 SD 213; *Myers v. Walker*, 173 Wash 592, 24 Pac(2d) 97. See note 81 supra.

86. *Connor v. Parker*, 114 Mass 331.

87. *Albert Weinbrenner Inc. v. Fine*, 105 Fed(2d) 272; *First National*

the attachment debtor.<sup>88</sup> It was held to be a sufficient attachment where the sheriff levied on certain cotton which he did not see and did not take into his custody, where the cotton was stored in a bonded warehouse and the sheriff was told that the cotton was therein and the warehouseman agreed that he would hold it for the sheriff to abide the orders of the court.<sup>89</sup> Where a sheriff made a return as follows, "thirty-five cords of peeled pulp wood in the second boom on Kennebago Lake," and it appeared that all the officer did was to view the thirty-five cords of peeled pulp wood which was in an unsegregated mass of three hundred cords from which the officer made no selection of that portion which he purported to attach but left it all exactly as he had found it floating in the waters in the boom, the court held that it would be necessary to identify the particular wood which had been attached so that the property might be the subject of a specific judgment lien. And therefore the levy was held invalid.<sup>90</sup> In an action where an actual seizure has been made but there is no return made so indicating, such attachment is nevertheless valid.<sup>91</sup> It is a sufficient levy where a sheriff entered the building of the defendant and viewed the merchandise, made known his intention to take them into his possession and attach them and took possession of the building by locking the door to the store. It has been held that such levy was good as against another attachment junior in time, in spite of the fact that the attaching officer did not actually touch any of the goods.<sup>92</sup> Where a sheriff placed a keeper in charge of a vessel but before doing so levied an attachment on the goods aboard the vessel and such keeper received the goods as they were brought up from the hold of the ship, it was held to be a valid seizure.<sup>93</sup>

**§ 235. Duty of the Officer as to the Whole of Property Where Only Part Is Attached.**—Generally an officer in attaching the

Bank v. Kindwall, 206 NW 241, 201 Iowa 82.

88. Hart v. Oliver Farm Equipment Sales Co., 21 Pac(2d) 96, 37 NM 267, 87 ALR 962.

89. Standard Bonded Warehouse Co. v. Cooper and Griffin, 30 Fed(2d) 842.

90. Bisbee v. Grant, 142 Atl 775, 127 Me 775. See also Savage v. Grant, 142 Atl 775, 127 Me 547.

91. McBrien v. Harris, 145 SE 919, 39 Ga App 41.

92. Peevey v. Dickson, 224 Pac 808,

26 Ariz 212. A levy of attachment made by an officer on personal property which he does not see nor have in his possession is void. Los Angeles Soap Co. v. Bossen, 9 Pac(2d) 900, 122 Cal App 237; Parish v. Van Arsdale-Osborne Brokerage Co., 140 P 835, 92 Kan 286, AC 1916B 981, and note; Rogers v. Maine Central Railway Co.; 94 Atl 753, 113 Me 436, Ann Cas 1916B, 999 and note; Denny v. Wurren, 16 Mass 420; Newton v. Adams, 4 Vt 437.

93. Naylor v. Deunne, 8 Pick 198 (Mass) 19 Am Dec 319.

interest of a tenant in common in personal property may have the right to take possession of the whole of the property.<sup>94</sup> But this rule is subject to sharp conflict in the holdings and it has been stated, "In the absence of a statute specifically authorizing it, a sheriff under a writ of attachment against the property of a debtor owning property in common or jointly with another, incapable of being separately attached, may not lawfully seize the entire property. If he does so seize it, he seizes it at his peril, and if the interest of the co-owner is lost by the seizure, the sheriff and those aiding and abetting him are guilty of a conversion of the property, and liable to respond in damages for the loss."<sup>95</sup>

**§ 236. The Force that a Sheriff May Use to Execute an Attachment.**—In the execution of a writ of attachment an officer may not break into a defendant's home to attach or levy upon property therein.<sup>96</sup> However, if such entry is made into a building without force and with permission, he may proceed to execute the writ upon goods within the building.<sup>97</sup> It has been held that a sheriff may not break into a safe deposit box leased jointly to the defendant and another in an absence of a showing that it contained defendant's property where the co-lessee makes oath that it contains no such property. And, where a sheriff broke into a shed to attach a truck, it was held that such shed which was attached to the house was a part of the whole and the sheriff was liable in damages for such breaking and entering.<sup>98</sup> And in such a case where a bond was given to the sheriff to indemnify him against the consequences of a known violation of duty or against the commission of an inten-

94. Bernal v. Hovins, 17 Cal 541, 79 AD 147 and note; Veach v. Adams, 51 Cal 609; Gaar Scott & Co., et al. v. Hurd, 92 Ill 315; First Nat'l Bank v. Schween, 20 NE 681, 127 Ill 573, 11 ASR 174, as to burden being on bailee; note 95 ASR 124 on duty of officer as to intermingled goods; note 95 ASR 125 on duty of officer with respect to levy on partnership property on process against a partner; Branch v. Wiseman, 51 Ind 3; Sharp v. Johnson, 63 P 485, 38 Ore 246, 64 ASR 788, and note.

95. Western Bond and Mortgage Company v. Chester, 259 Pac 13, 145 Wash 81.

In the above mentioned case it was held that the sheriff was liable for the loss of property in question, being a

truck, and that the question of the sheriff's negligence in losing the property was not material but the sheriff having wrongfully seized the property, he was liable for the loss regardless of the care he took of the property after its seizure. Coulson v. Panhandle National Bank, 54 Fed 855, 4 CCA 616; see also Clagett v. Kilbourne, 1 Black US 340, 17 L ed 213.

96. Frothingham v. Maxim, infra; Halsey v. Nichols, 12 Pick (Mass) 270, 22 AD 425; Dupont v. Moore, 106 Atl 417, 86 NH 254.

97. Himmelbauer v. Union Bank & Trust Co. 220 Pac 84, 68 Mont 34.

98. Marshall v. Wheeler, 128 Atl 692, 124 Me 324.



tional and known trespass or criminal act, was held to be void as against public policy, both as to the sheriff and the deputy with consequent result that they were denied a recovery thereon.<sup>99</sup>

To the end that there be no confusion with respect to the principle we have under consideration it ought to be stated that where the act against the consequences of which the indemnity is given, though in fact illegal, is performed under a claim of legal right and a belief on the part of the indemnitee that it is a legal act, as for instance, an apparently legal act which turns out to be a trespass, the indemnity is legal and binding.<sup>99a</sup> Even if the promisor contemplates a wilful trespass, that fact will not avoid the indemnity contract if the act indemnified against doing or omitting to do is not palpably illegal and the promisee proceeded in the belief that he was lawfully entitled to perform the act for which the indemnity is given.<sup>99b</sup>

In New York, it has been held that the sheriff has the power voluntarily to break into a safety deposit box leased solely to an attachment debtor, where the evidence shows that it contains property of such debtor.<sup>1</sup> But, where a safety deposit box is leased jointly to the attachment defendant and another person and no showing whatever is made that it contained any of the property of the defendant and the co-lessee takes an affirmative oath that it does not, the court refused to make an order directing the sheriff to break into such deposit box.<sup>2</sup>

#### § 237. Goods Attached Cannot Be Seized by Another Officer.—

Where there is put into the hands of the attaching officer an attachment running against the same property that he already holds, on a senior writ of attachment, he may make a levy on such property under the junior attachment.<sup>3</sup> The officer in mak-

99. *Frothingham v. Maxim*, 141 Atl 99, 127 Me 58; *Ayer v. Hutchins*, 4 Mass 370, 3 AD 232; *Harrington v. Crawford*, 28 SW 80, 68 Mo App 221, 136 Mo 407, 58 ASR 653, 35 LRA 477; *Webber v. Blunt*, 19 Wend(NY) 188, 32 AD 445, holding bonds given to liberate one lawfully in custody are void; *Freeman on Executions*, Sec. 2759; see also *Hodsdon v. Wilkins*, 7 Greenl 113, 20 AD 347 on bond given to induce non-performance of duty.

99a. *Jacobs v. Pollard*, 10 Cush (Mass) 287, 57 AD 105; *Frothingham v. Maxim*, supra; notes 40 AD 421, 86 ASR 554.

99b. *Avery v. Halsey*, 14 Pick (Mass) 174; *Stone v. Hooker*, 9 Cow (NY) 154; *Coventry v. Barton*, 17 Johns (NY) 142, 8 AD 376; *Frothingham v. Maxim*, supra; 16 Am. & Eng. Encyc. (2d ed) 172; *Jacobs v. Pollard*, supra.

1. *Carples v. Cumberland Coal & Iron Co.*, 149 NE 185, 240 NY 187, 39 ALR 1211. See also 207 NYS 624, 212 App Div 150.

2. *Horace Holding Co. v. Clements*, 215 NYS 169, 127 Misc 83.

3. *Hambley v. H. W. White & Co.*, 133 SE 399, 192 NC 31; *Chowning v. Madison Land & Irrigation Co.*, 276 Pac 940, 84 Mont 494.

ing the second levy is not required to take affirmative action to levy under the second writ. He merely treats the property as seized under the subsequent writ and makes his return accordingly.<sup>4</sup> But, as heretofore has been seen, in order for there to be a valid attachment, a seizure of the property is imperative, followed by a possession of the property by the officer, and this is true even where the officer holds the property attached under a prior attachment, but he cannot assent to a subsequent levy by another officer since there could be no seizure by the second officer.<sup>5</sup> It has further been held that where an attempt is made to attach property which is already under attachment and the officer holding the property agrees to act as the keeper for the subsequent attaching officer, such second levy was valid.<sup>6</sup> Accordingly, in some states, it is held that a subsequent levy may be made by another officer, but such levy is made by notification of the officer in possession of the property of the subsequent attachment.<sup>7</sup> Where such a levy is made, the return by the subsequent attaching officer need not enumerate the property, but it is sufficient that all of the property in the first officer's possession is referred to generally.<sup>8</sup> The rule in regard to a subsequent levy upon realty is different to that applying to personalty, since in an attachment against real property, the officer requires neither title nor possession but merely fixes a lien thereon of record against the title.<sup>9</sup> The subsequent attaching creditor, as against realty acquires a lien by the levy of the writ of attachment, but it is subsequent to the lien of the prior attachment.<sup>10</sup>

#### § 238. Sheriff Liable for Seizing Goods of Third Person.—

An attaching officer must respond in damages for the taking of property in which the attachment debtor has no interest, although such officer attempts to levy only upon the interest of such debtor.<sup>11</sup> As a general proposition the officer who levies upon property belonging to someone else, other than the attachment defendant, is

4. *Chowning v. Madison Land & Irrigation Co.*, supra.

5. *Fidelity and Casualty Company v. Thumm*, 172 NE 631, 35 Ohio App 499.

6. *Patterson v. Stephenson*, 77 Mo 329.

7. *White v. Cutler*, 12 Ill App 38; *Patterson v. Stephenson*, supra; *Woodward v. Lishman*, 78 Atl 701, 80 NJL 586; *National Wall Paper Company v. Fourth National Bank*, 51 SW (Tenn) 1002.

8. *State v. Curran*, 45 Mo App 142.

9. *Starr v. Moore*, 22 Fed Cas, 13315, 3 McLean 354; *Calkins v. Lockwood*, 17 Conn 154, 42 Am Dec 729; *Stillman v. Homer*, 78 Pac 836, 70 Kan 469, 109 ASR 465.

10. *Coffin v. Harrie*, 54 SE 437, 141 NC 707, 6 LRA NS 624; *Johnson v. Burnett*, 12 Ala 743.

11. *Leonard v. Maginnis*, 26 NW 733, 34 Minn 506; *Hallowell & Augusta Bank v. Howard*, 14 Mass 181.

liable to the owner of such property for any damages.<sup>13</sup> A sheriff or constable is not protected from the results of his wrongful act in attaching the property of a third person under an attachment where the court made an order directing the sale of such property as perishable. Such order does not adjudicate the legality of the attachment.<sup>13</sup> The intent with which the officer makes the levy likewise does not relieve him from liability, even though he acted in utmost good faith.<sup>14</sup> Likewise the officer cannot escape liability by the wrongful seizure of property, by offering to return such property to the owner.<sup>15</sup> But it should be noted that the officer is justified in levying on personal property found in the attachment defendant's possession, where the officer has no reason to suppose it does not belong to attachment debtor.<sup>15a</sup> The rule, of course, is inapplicable where the officer levies upon partnership personality under an attachment against one of the partners.<sup>15b</sup>

§ 239. **Right of Sheriff to Attach Choses in Action.**—Under the common law, it was impossible to attach debts or choses in action<sup>16</sup> but it is provided by statute in most States that a debt or chose in action may be levied on under a writ of attachment where such credit runs to the attachment defendant.<sup>17</sup> Generally a money judgment is subject to levy under a writ of attachment as a debt, cause of action, or demand as provided for under statute.<sup>18</sup> It has been held a claim for loss under an insurance policy is ordinarily subject to garnishment immediately on the occurrence of the loss.<sup>19</sup> An indebtedness due by the plaintiff, to a non-resident corporation, secured by stock in a local corporation, was held subject

Levy upon property of another of same name as defendant does not exonerate sheriff.

12. *Wright v. Shelt*, 48 NE 28, 19 Ind App 1; *Englehart v. Sage*, 235 Pac 767, 73 Mont 139, 40 ALR 590 and note.

Levy of attachment on a chose in action is a conversion of the same.

13. *Hill v. Raglan*, 70 SW 634, 114 Ky 209, 24 Ky L 1053.

14. *Meadow v. Wise*, 41 Ark 285; *Sandberg v. Borstadt*, 108 Pac 410, 48 Colo 86; *Sabin v. Chrisman*, 175 Pac 622, 90 Or 85; *Snyder v. Berger*, 6 Atl 733, 3 Sad (Pa) 318; *Campbell v. Ulrich*, 60 SW 272, 24 Tex Civ App 618.

15. *Stephenson v. Wright*, 20 So 622, 111 Ala 579; *Vaughn v. Justice*, 78 SW 424, 25 Ky Law 1606; *Castile v. Ford*,

73 NW 945, 53 Neb 507.

15a. *Fuller Desk Co. v. McDade*, 45 P 694, 113 Cal 360, and authorities cited therein.

15b. *Hughes v. Boring*, 16 Cal 81.  
16. *In re Dukas*, 276 Fed 724; *Sheehy v. Madison Square Garden Corp.*, 193 NE 633, 206 NY 44, Rev 272 NYS 433, 241 App D 504.

17. *La Varre v. International Paper Co.*, 37 Fed(2d) 141; *Pierce v. Pierce*, 56 Pac(2d) 336, 153 Ore 248; *Sheehy v. Madison Square Garden Corp.*, supra.

18. *Shipman Coal Co. v. Delaware & Hudson Company*, 219 NYS 628, 219 App D 312, affirmed 157 NE 859, 245 NY 567; *Rogers v. Logan*, 188 NYS 337.

19. *Ackerman v. Tobin*, 22 Fed(2d) 251

to attachment by the plaintiff.<sup>20</sup> It has been held that a cause of action for personal injury was not subject to attachment at the instance of a creditor, of one bringing the personal injury action, since such action is neither a debt or chose in action, such as might be classed as personal property, within a statute relating to attachment.<sup>21</sup>

An indebtedness due to subsidiary corporation acting as sales agent for nonresident parent corporation is not subject to attachment in a suit against nonresident parent corporation.<sup>21a</sup>

§ 240. **Duty of Sheriff to Observe the Priority of His Process.**—Where a sheriff wrongfully gives preference to a later writ of attachment, when the prior attachment plaintiff is injured thereby, or his recovery diminished, the sheriff is liable in damages for such neglect of duty.<sup>22</sup> Where the sheriff holds an execution for a judgment plaintiff and later there comes into his hands an attachment running against such execution plaintiff, and he levies such attachment on the debt due by the execution defendant to the execution plaintiff, a showing of these facts on the return does not constitute a defense for failure to return the execution or collect the money.<sup>23</sup> A sheriff may be relieved from liability for levying a junior writ where more specific directions are issued thereon indicating the property to be attached.<sup>24</sup>

§ 241. **When a Sheriff May and When He Cannot Demand Indemnity for Levying an Attachment.**—The sheriff is not entitled to demand an undertaking where as a result of seizing property under a writ of attachment, according to its directions, he would incur no liability.<sup>25</sup> It is generally provided by statute that an officer

541, cert den 48 S Ct 321, 276 US 628, 72 L ed 739.

20. *La Varre v. International Paper Co.*, 37 Fed(2d) 141.

21. *Coty v. Cogswell*, 50 Pac(2d) 249, 100 Mont 496.

21a. *La Varre v. International Paper Co.*, supra.

See also, *Anderson, Limitations of the Corporate Entity*, Secs. 312 et seq. 520 et seq.

22. *Grabenheimer v. Budd*, 3 S 724 40 La Ann 107; *Continental Distributing Company v. Hays*, 88 Wash 300, 150 Pac 416, AC 1917B, 708 and note.

23. *Wehle v. Conner*, 69 NY 258.

24. *Remington v. Weber*, 30 P 822, 252

11 Utah 181, where a sheriff received two attachments on the same day, the plaintiff in the earlier directing him generally to garnish any person indebted to the attachment defendant, after filling in certain blanks with their names from books in his possession, and the plaintiff in the junior writ specifically directing him to garnish certain persons named in the writs, the officer was not liable to the senior attachment creditor for obeying the specific directions in the junior writ first.

25. *Stevenson v. Exchange Nat'l Bank*, 10 La App 179, 120 So 96; *Gibson v. Lock*, 58 Miss 298; *Duncan v.*

may require indemnity before proceeding with the execution of process where he may foresee that there may be some liability in proceeding with the execution thereof.<sup>26</sup> Under other statutes the sheriff is not entitled to indemnity bond until there has been an actual assertion of ownership by a third party.<sup>27</sup> However, where such a bond is given to indemnify a sheriff or constable against a known illegal act the bond is void, since it is contrary to public policy. So, too, a bond given to indemnify an officer for a breach of duty, or to procure commission of a crime, or to commit an intentional trespass, or the doing of a wrongful act is void on the basis of countervailing public policy. But a bond indemnifying an officer against the consequences of an act, which, though in fact illegal, if performed under a claim of right and belief that it is legal, makes the bond valid and enforceable.<sup>28</sup>

As a general proposition an officer is entitled to require protection in the form of an undertaking where he has reason to believe that he may suffer liability in seizing the property which he is directed to seize under a writ.<sup>29</sup> However, in demanding an indemnity bond, the officer executing the writ of attachment may not make such a demand on any whim or caprice or arbitrarily but such demand must be supported by a real and material basis.<sup>30</sup>

Johnson, 147 SW(Tex Civ App) 686; Pincock v. Kimball, 64 Utah 4, 228 P 221.

26. Keith v. Drainage Dist. No. 7 of Poinsett County, 38 SW(2d) 753, 183 Ark 786; Endicott-Johnson Corp. v. Davis, 56 SW(2d) 178, 196 Ark 788; Frothingham v. Maxim, 127 Me 58, 141 Atl 99; Kelly v. Baird, 252 NW 70, 64 ND 346; Marsh v. Gold, 2 Pick (Mass) 285

27. Duncan v. Sup. Ct., 285 P 732, 104 Cal App 218; Kelly v. Baird, 252 NW 70, 64 ND 346; Jones v. Huter, 239 NYS 221, 136 Misc 49; B. Altman

& Co. v. Broad Park Plaza Corp., 271 NYS 317, 241 App Div 836.

28. Frothingham v. Maxim, 141 Atl 99, 127 Me 58 and authorities cited in the opinion. See Sec. 236, supra.

29. Mayfield Woolen Mills v. Lewis, 117 SW 558, 89 Ark 488, 16 AC 1041; Bank of Gulfport v. O'Neal, 86 Miss 45, 38 So 630; Omaha Nat'l Bank v. Robinson, 58 Neb 590, 77 NW 73; Head v. Carlin, 240 SW(Tex Civ App) 1051.

30. Planters' Chemical & Oil Co. v. Daniel, 96 So 424, 209 Ala 363; Mayfield Woolen Mills v. Lewis, supra.

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## CHAPTER VIII

## CAPIAS AD SATISFACIENDUM

SECS.

- 242. Classes Privileged from Arrest for Debt.
- 243. Exemptions from Arrest on Final Process in the United States.
- 244. Law of Arrest upon Final Process.
- 245. Confinement Required upon a Capias ad Satisfaciendum.
- 246. Liability of the Sheriff for Escape on Final Process.
- 247. When a Constable May Execute a Ca. Sa.
- 248. Indulgence by Plaintiff to Prisoner upon Final Process.
- 249. Decadence of the Writ of Capias ad Satisfaciendum.

§ 242. Classes Privileged from Arrest for Debt.—A capias ad satisfaciendum as respects the party against whom it is taken is a full satisfaction by force, act, and judgment of law, so that against him and his representatives there can be no other capias or writ issued, for when the plaintiff has begun and chosen to make arrest of the defendant, he may not have issued against the same party another execution. In case he issues such a writ, it amounts to a complete satisfaction of the judgment on which it is taken.<sup>1</sup>

Literally, the definition of the word capias ad satisfaciendum means "you take to satisfy." Such a writ at common law was issued after judgment and by which the sheriff was commanded to take the body of the defendant in execution, and to be responsible for his appearance or to see that his body was in court on the return day of the writ in order to satisfy such judgment.<sup>2</sup> When abbreviated, the writ is usually known as a ca. sa.<sup>3</sup>

§ 243. Exemptions of Arrest on Final Process in the United States.—Generally speaking, as has hereinbefore been seen in previous sections, the same persons who are exempted from arrest upon mesne process are likewise free from arrest of the person upon a capias ad satisfaciendum.

§ 244. Law of Arrest upon Final Process.—In the execution of a writ of ca. sa. the procedure is the same as an arrest upon mesne process. The duty of the officer remains the same to execute the writ according to its direction. If it is requisite, the sheriff must

1. Strong v. Linn, 5 NYL (2 South- 236.  
ard) 799, 803.

2. People v. Hoffman, 97 Ill 234, 3. 1 Bouvier's Law Dictionary  
(Rawle's 3rd ed) p. 419.

assemble a posse comitatus in its execution in the same manner as he would in the execution of a mesne or other process.<sup>4</sup>

Where, under such a writ, a person has been confined in jail, a rescue or an escape therefrom does not relieve the sheriff unless it was effected by the public enemy. As a general proposition, where the ca. sa. is issued for the arrest of a debtor, the creditor is liable for the board of the prisoner while in confinement in jail.<sup>5</sup> However, it has been held that where the sheriff fails to make demand upon the creditor for the board of the prisoner in advance, the sheriff is not justified in releasing the debtor on the ground of nonpayment thereof, and the creditor would have an action against the sheriff and his bond for such release.<sup>6</sup>

**§ 245. Confinement Required upon a Capias ad Satisfaciendum.**—Where the sheriff holds the prisoner under such a writ, he is required to hold him in strict confinement.<sup>7</sup> Where one is arrested upon a ca. sa. the sheriff has no discretion in indulging the debtor and the officer has no right to release him even upon the payment of the debt and costs of the original judgment, such payment not constituting a satisfaction of the writ which requires the production of the body of the debtor in court.<sup>8</sup>

**§ 246. Liability of the Sheriff for Escape on Final Process.**—Where the sheriff has placed one in custody in the execution of the ca. sa. and through no fault of his the prisoner escapes, the sheriff is liable for the whole debt.<sup>9</sup> For an escape from confinement on final process, however technical or nominal, makes the sheriff liable for the whole debt.<sup>10</sup> And where the sheriff fails to commit one to jail in accordance with such a writ, such act of the sheriff renders his sureties on his official bond liable to the party injured.<sup>11</sup>

4. *Abbott v. Holland*, 20 Ga 598; *Rex v. Sheriff of Middlesex*, 1 Barn & Ald 190; where a ca. sa. is directed to a sheriff merely for the purpose of fixing the debtor's bail, the sheriff is not bound to arrest the defendant under such conditions. *VanWinkle v. Alling*, 17 NJL 446; *Compton v. Ward*, 1 Strange 429, 435.

5. *Reinert v. Fidelity & Casualty Co. of New York*, 259 NW 340, 270 Mich. 607.

6. *Reinert v. Fidelity & Casualty Co. of New York*, supra.

7. *Atkinson v. Mattison*, 2 Term R

172; *Hawkins v. Plomer*, 2 Black 1048.

8. *Slackford v. Austin*, 14 East 468; *Crozier v. Pilling*, 4 Barn & Cress 20; *Taylor v. Baker*, 2 Lev 203.

9. 3 Black Com 415; *Watson on Sheriffs*, 143; *Hawkins v. Plomer*, 2 Black 1048.

10. *Alsept v. Eyles*, 2 H Blacks 113, see also note 9.

11. *Snyder v. Com.*, 1 Pen & W. (Pa) 94; where the sheriff was directed to commit one to jail who was convicted of bastardy and the sheriff failed to do so according to the writ, such

**§ 247. When a Constable May Execute a Ca. Sa.**—Where it is provided by statute that the constables are empowered to serve all lawful process issued and legally directed to them, a constable has authority to arrest the debtor and satisfy such a writ by an execution against the debtor's body.<sup>12</sup>

**§ 248. Indulgence by Plaintiff to Prisoner upon Final Process.**—Where through the intervention of the plaintiff who had caused to be issued a writ of capias ad satisfaciendum and pursuant to such writ the sheriff seized the defendant, and thereafter the plaintiff directed that the prisoner be permitted to go at large, the judgment is discharged and the defendant as well as the sheriff is no longer liable upon it.<sup>13</sup> In such an event where one defendant is permitted to go free who has been arrested with others upon a ca. sa. such operates as a satisfaction of the judgment as to all of the defendants, for once the writ of ca. sa. is executed upon, in law it acts as a satisfaction of plaintiff's judgment.<sup>14</sup>

Under a writ of capias ad satisfaciendum a sheriff must be very careful not to grant any privilege inconsistent with the requirements of the writ, under penalty of subjecting himself to liability for such acts as constituting an escape.<sup>15</sup> Where the sheriff has executed upon the body of the defendant under a ca. sa. and subsequently such defendant gains his freedom, unless through the intervention of the creditor or by the authority of law, such constitutes an escape.<sup>16</sup> It has been held that an action of debt will lie against a sheriff who permits an escape.<sup>17</sup>

In *Abbott v. Holland*,<sup>17a</sup> a constable was held liable where a prisoner, held by virtue of a ca. sa., was taken from him by a mob. The court said: "The only sort of rescue which it seems will excuse the sheriff from not bringing in the body of the defendant, whom he has arrested on a ca. sa., is that which is by the King's enemies. A rescue by 'rebels' or 'traitors' will not do. Much less, therefore, will a rescue by a mob do."

**§ 249. Decadence of the Writ of Capias ad Satisfaciendum.**—It is generally provided by constitution or by the laws of various

default would render him liable on his bond to the mother of the child. *Snyder v. Com.*, supra.

12. *Dalton-Ingersoll Co. v. Hubbard*, 54 NE 862, 174 Mass 307.

13. *Blackburn v. Stupart*, 2 East, 243; *Puncher v. Holley*, 3 Wend (NY) 184.

14. *Ransom v. Keyes*, 9 Cow (NY) 128; *Clark v. Clement*, 6 Term R 525.

15. *Colby v. Sampson*, 5 Mass 310; *Lowrey v. Barney*, 2 D Chip(Vt) 11.

16. *Adams v. Turrentine*, 8 Ired L. (30 NC) 147.

17. *Ridgeway's Case*, 3 Coke Rep 52. 17a. 20 Ga 598.

states that imprisonment for debt is prohibited. Such is provided in Alabama, Georgia, Maryland, Mississippi, Missouri, South Dakota, Tennessee, Texas, and Wisconsin. In other states there are similar provisions except in cases of fraud. The states which provide this are in general, Arkansas, California, Florida, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oregon, Wyoming.<sup>18</sup> In Colorado, Illinois, Kentucky, North Dakota, Pennsylvania, Rhode Island, and Vermont the constitutions provide that where there is not a very strong presumption of fraud the defendant shall not be held in jail where he surrenders all of his assets to his creditors according to law. In those states where it is provided an arrest may be made where a debt is created through fraud, the writ of *capias ad satisfaciendum* may still be used and the applicable rules just discussed would apply in the issuance and execution of the writ.

18. In Nevada the constitution adds to fraud as a ground for imprisonment for debt, libel or slander. Constitution article 1, Sec. 14. Now Art. 1, Sec. 35. [1 Anderson on Sheriffs]—17

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CHAPTER IX

CONTEMPT OF COURT—CRIMINAL OFFENSE—PRISONS

SECS.

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- 277. Liability for False Imprisonment.
- 278. Sheriff's Liability to Physician for Medical Services Rendered to Prisoner.

§ 250. Harsh Treatment of Prisoner as Contempt of Court.—It is contempt of court for a sheriff, constable, jailer or other officer having custody of a prisoner to subject him to harsh treatment in excess of the mandate of commitment. It is immaterial whether the prisoner is committed by the state or federal court, the only difference being as to which of the courts he is in contempt.<sup>1</sup> This contempt is committed where it is made to appear that the prisoner

1. In *re Birdsong*, 39 F 509, 4 LRA 628; *Howard v. State*, 237 P 203, 28 Ariz 433, 40 ALR 1275 and note.

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[1 Anderson on Sheriffs]

was chained by the neck to the grating of the cell and was kept in that position for some considerable time. And the fact that the prisoner is guilty of misconduct in the jail is not a justification for this cruel, unusual and inhuman punishment and does not in any way lessen the contempt of court to which his gaoler is subject.<sup>2</sup> Likewise it is contempt of the court sentencing a prisoner to put him in a dark cell or dungeon and keep him therein for thirty days and feeding him during said time on bread and water.<sup>3</sup>

Failure to retain and keep a prisoner, as in the commitment directed, is contempt of court. After a person is committed to prison the gaoler has no discretion except to carry out the mandates of the commitment. He has no right to consult his own convenience nor that of the prisoner. He may not lawfully permit the prisoner to leave the jail and return thereto at his pleasure. Persons are committed to jail for the purpose of imposing upon them the penalties they have incurred because of the violation of law and it is not for the gaoler having custody of the prisoner to conclude that he will remit any part of the punishment. Even in case the prisoner becomes ill or other intervening circumstances shall arise which make it proper to grant to the prisoner some indulgence, the sheriff, constable, or jailer having the prisoner in custody has no discretion in the matter but he must apply to the proper court or other lawfully constituted authority to grant the same. A violation of duty in this regard constitutes contempt of court subjecting the custodian of the prisoner to punishment therefor.<sup>4</sup>

§ 251. Contempt of Court in Failing to Protect Prisoner.—A sheriff, constable, or jailer in charge of a prisoner is in contempt of court for failing to protect him against mob violence; so where the sheriff and jailer in charge of a prisoner under sentence of death imposed by a state court and a mandate of the Supreme Court of the United States has issued staying proceedings pending an appeal from an order of a federal trial court denying relief by Habeas Corpus, it appearing that such sheriff and jailer made no preparation to prevent the murder of the prisoner by a mob, actuated with the intent to prevent the delay by such appeal, although mob violence was reasonably to be anticipated but notwithstanding this, and when the mob attacked the jail no effort was made to resist

<sup>2</sup> In re Birdsong, 39 F 599, 4 LRA 628, and note.

<sup>3</sup> Howard v. State, supra.

<sup>4</sup> U. S. v. Hoffman, 13 F(2d) 269, 278; Howard v. State, 237 P 203, 28 Ariz 433, 40 ALR 1275.

it, nor to save the prisoner, nor to identify the participants in the assaultment of the cell; such conduct on the part of the officers constituted contempt of the Supreme Court of the United States.<sup>5</sup> It seems however that where a sheriff, constable, or other officer is charged with violating a specific order of a court but that the court had no jurisdiction of the subject matter to make the order then it is not contempt of court to violate it.<sup>6</sup>

§ 252. Official Defaults as Contempt of Court.—Failure to execute process as therein directed may operate to make the sheriff, constable, or other officer guilty of contempt.<sup>7</sup> Where a sheriff fails to return an execution as required by law he may be adjudged guilty of contempt.<sup>8</sup> An officer may be adjudged guilty of contempt in a proper case on a sufficient showing for failure to collect or pay over money under an execution.<sup>9</sup> Where the officer, however, acts reasonably and in good faith it is generally held that he is not in contempt and it is not contempt where the showing goes no further than that the officer would be probably liable under the law in an action for damages by reason of a particular default.<sup>10</sup> Usually, if the officer even though tardily performs the duty enjoined upon him by law or by the mandates of process this will be accepted as a purging him of the contempt.<sup>11</sup> But it is no defense to a charge of contempt for failure to execute a writ of execution that the defendant therein promised to pay the judgment, and that

<sup>5</sup> U. S. v. Shipp, 27 S Ct 165, 203 US 563, 51 L ed 319, 8 AC 265 and note; U. S. v. Shipp, 29 S Ct, 637, 214 US 386, 53 L ed 1041.

<sup>6</sup> In re Sawyer, 8 S Ct 482, 124 US 200, 31 L ed 402; Ex parte Fisk, 5 S Ct 724, 113 US 713, 28 L ed 1117, 7 NY Civ Proc 169, 1 How Pr(NS) 432; U. S. v. Shipp, 27 S Ct 165, 203 US 563, 51 L ed 319, 8 AC 265 and note; Ex parte Rowland, 104 US 604, 26 L ed 861.

<sup>7</sup> Hood v. Blair, 10 So 671, 95 Ala 629; Brannon v. Barnes, 36 SE 689, 111 Ga 850; Gladden v. Cobb, 6 SE 163, 73 Ga 235; Roche v. Dunn, 106 NW 965, 97 Minn 529; Tapp v. Bonds, 57 Miss 281; Savage v. Hussey, 48 NC 149; Malpass v. Fennell, 48 NC 79; Disston v. Strauck, 42 NJL 646, 44 NJL 662; Whitman v. Haines, 4 NYS 48, 21 NY St 41, 23 NE 260

1148, 119 NY 639; Parker v. Bradley, 46 NY Super, 244; Holmes v. Rogers, 50 Hun 600, 2 NYS 501, 18 NY 652; Pitman v. Clarke, 26 SCL 316; Cowan v. Sloan, 32 SW 388, 95 Tenn 424; Murray v. Evans, 60 SW 786, 25 Tex Civ App 331; Crow v. State, 24 Tex 12.

<sup>8</sup> Clark v. Foxcroft, 6 Greenl (Me) 296, 20 AD 309; Mollineaux v. Mott, 76 NYS 661, 78 App Div 493.

<sup>9</sup> Ex parte Thurmond, 17 (1 Bailey) SCL 605.

<sup>10</sup> Heard v. Callaway, 51 Ga 314; Pugsley v. Drew, 52 Ga 339; People v. Shoemaker, 2 Wend (NY) 253; Brown v. Furze, 31 (Rich Law) SCL 630; Mcngie v. Cheney, 19 (1 Hill) SCL 145.

<sup>11</sup> Turner v. Winn, 10 SE 368, 83 Ga 761; Perry v. Christie, 65 Ga 642; Harrell v. Feagin, 59 Ga 821; M'Lean v. DuBose, 17 SCL 646.

the officer relied, in good faith, on that promise and delayed making a levy.<sup>12</sup>

In cases where the default consists of failure to pay over money collected on an execution, a demand of the sheriff or constable is a prerequisite to initiation of contempt proceedings against the officer failing to pay over the money.<sup>13</sup>

§ 253. Contempt for Disobedience of Writ of Habeas Corpus.—A sheriff, constable, or other officer having in custody one for whom a writ of Habeas Corpus has been issued and who fails to obey the same by production of the prisoner at the time and place therein directed, or who refuses to make any, or makes an evasive or false, return thereto, or fails to obey the final judgment or order entered in the proceedings, may be adjudged guilty of contempt of court.<sup>14</sup> It may however be a defense to such an adjudication that the prisoner is being held under orders of another competent authority as the War Department of the United States.<sup>15</sup> In order however for a sheriff, constable, or coroner to be in contempt of court for neglect or refusal in obeying a writ of Habeas Corpus the writ should be personally served upon him.<sup>16</sup> If the service of the writ has been waived by the officer then that is sufficient to put him in contempt for disobedience of its mandates or for failure to make proper return thereto.<sup>17</sup> An officer will not be adjudged guilty of contempt where the writ omitted the name of the prisoner.<sup>18</sup> Where there are conflicting orders with respect to the custody of the prisoner from different tribunals, and the officer acts in good faith in failing to produce him, then he will not be held in contempt.<sup>19</sup> In consonance with the general rule there is no contempt where the court issuing the writ of Habeas Corpus had no jurisdiction of the subject matter or authority to grant it, but a mere irregularity or error in the proceedings which does not exceed the court's jurisdiction may not be made the basis for a justification or refusal to produce the prisoner.<sup>20</sup>

12. *Hale v. Lange*, 8 SW(2d), (Tex Civ App) 1046.

13. *Broughton v. State Bank*, 6 Port (Ala) 49; *Allen v. Gant*, 1 A K Marsh. (Ky) 409; *Davis v. Armstrong*, 1 A K Marsh. (Ky) 364.

14. *Robb v. Connolly*, 4 S Ct 544, 111 US 624, 28 L ed 542. Note 84 ALR 813.

15. *Ex parte Field*, 9 F Cases No. 4761, 5 Blatchf 63; *In re Farrand*, 9 F Cases No. 4678, 1 Abb US 140; *U. S. v. Tod*, 291 F 605, note 84 ALR

813; see also *Ex parte Young*, 50 F 526.

16. *Hcg. v. Rowe*, 71 LTNS 578.

17. *People v. Bradley*, 60 Ill. 390.

18. *Watson's Case*, 9 Ad. & El. 731, 112 English Reprint 1389.

19. *Greene v. Carpenter*, Rap. Jud., Quebec 22 CS 104.

20. *Nebraska Children's Home Society v. State*, 78 NW 267, 57 Neb 765; *Com. v. Sage*, 28 Atl 863, 160 Pa 399; *Com. v. Porter*, 24 Pa Dist 653; *People v. Bradley*, supra.

§ 254. Criminal Responsibility of Sheriff for an Escape.—At common law it was a misdemeanor for a sheriff or other officer having lawful charge of a prisoner to negligently permit him to depart from his custody no matter for how short a time the departure might be.<sup>21</sup>

§ 255. Of What Permitting an Escape Consists.—At common law everyone who knowingly and with intent to save him from trial permitted anyone in his lawful custody to gain his liberty otherwise than in due course of law, committed the offense of voluntary escape and was guilty of high treason if the escaped prisoner was in his custody charged with high treason. Also he became an accessory after the fact to the felony of which the escaped prisoner was guilty if he was in his custody for and was guilty of a felony; the custodian was guilty of a misdemeanor if the escaped prisoner was in his custody for a misdemeanor.<sup>21a</sup>

So too at common law if a sheriff or other officer who had the custody of a prisoner charged with and guilty of a capital offense, and the officer knowingly gave him his liberty with an intent to save him either from his trial or execution, the officer was guilty of a voluntary escape and thereby involved in the guilt of the same crime of which the prisoner was guilty and stood charged with.<sup>22</sup> It is immaterial from what place the prisoner escapes so far as concerns the liability of an officer permitting him so to do. The prison may consist of a chamber in a private residence or other place of confinement or even from constructive arrest in the open street. Any undue liberty wrongly allowed a prisoner which he uses to effect his escape makes the custodian giving the liberty indictable at common law.<sup>23</sup>

If the warrant or other process of commitment was regular and issued from a tribunal having jurisdiction of the subject matter the prisoner's guilt or innocence or the regularity of prior procedure

21. *U. S. v. Hoffman*, 13 F(2d) 269, 13 F(2d) 278; *Ex parte Shores*, 195 F 627; *Com. v. Barker*, 133 Mass 399.

21a. *Martin v. State*, 32 Ark 124; *Meehan v. State*, 46 N.JL 355; *Weaver v. Com.*, 29 Pa 445; *Peoples v. State*, 14 SW (Tex App) 352; *Carter v. State*, 14 SW 350, 29 Tex App 5; *Stephens' Digest, Cr. Law, Article 144 Hawkins PC 192, 190, 197*; 1 *Russell on Crimes* 583.

22. *Meehan v. State*, supra; *Peoples v. State*, supra; *Carter v. State*, supra; 1 *Russell on Crime*, supra; *Hawkins PC*, supra.

23. *State v. Doud*, 7 Conn 384; *State v. McLain*, 10 SE 518, 104 NC 894; *Smith v. Com.*, 59 Pa 320; *Hopkinson v. Leeds*, 78 Pa 396; *Luckey v. State*, 14 Tex 400; *Meehan v. State*, supra; *Reg. v. Shuttleworth*, 22 UCQB 372; *Rex v. Bootie*, 2 Burr 864.



was immaterial.<sup>24</sup> However, if the imprisonment and warrant or process of commitment was void or illegal on its face then the sheriff or other officer was not subject to prosecution for an escape.<sup>25</sup> This is still the law in the American jurisdictions unless it has been changed by statute.

§ 256. **What Is Necessary to Make Negligent Escape.**—If the offense charged is a negligent escape it is unnecessary for the prosecution to prove negligence on the part of the defendant since by law it is implied.<sup>26</sup>

The law is so exacting of a sheriff or other custodian of a prisoner where an escape takes place that if the defense is interposed that the prisoner by force rescued himself or was forcibly removed from custody by others and the officer thereupon made fresh pursuit after him but that the same was ineffectual; that the officer took every precaution in his power to prevent the escape or effect a recapture of the fleeing prisoner the burden of making out this defense is thrown upon the defendant, and he may not exonerate himself for such an escape except by proof that the escape was brought about by the act of God or an irresistible adverse force.<sup>27</sup>

§ 257. **Who Is Responsible for Escape.**—It would seem that the general rule of law with respect to responsibility, applicable to these offenses we have under consideration is that all parties aiding, participating, or concerned therein are criminally liable therefor, so that deputies of a jailer are charged with the same high responsibility as is imposed upon the jailer or the sheriff, or his deputies. However, the rule does not embrace persons who are merely the servants of the sheriff or jailer as contra-distinguished from deputies.<sup>28</sup> In order to fasten responsibility upon a sheriff or jailer for permitting or negligently allowing an escape it is unnecessary that he be a de jure officer. It is sufficient if he be a de facto one. The legality of the appointment or election of the sheriff or jailer will not be inquired into.<sup>29</sup>

§ 258. **What Acts Constitute an Escape on the Part of a Custodian.**—In order to constitute an allowance of an escape on the

24. *State v. Bates*, 23 Iowa 96; *State v. Murray*, 15 Me 100; *Holland v. State*, 60 Miss 939; *State v. Garrell*, 82 NC 580; *State v. Brown*, 82 NC 585, 3 Wharton's Cr Law, 11th ed., Secs. 1998, 2005.

25. 3 Wharton's Cr. Law, 11th ed., Secs. 1998, 2005.

26. *Blue v. Com.*, 4 Watts Pa 215; 1 Hale P C 600.

27. *Shattuck v. State*, 51 Miss 575, 3 Wharton's Cr Law, 11th ed. Sec. 1999.

28. *Kavanaugh v. State*, 41 Ala 399; *State v. Lewis*, 18 SE 89, 113 NC 622; *State v. Errickson*, 32 NJL 421.

29. *Hawkins PC*, Chapter 19.

part of a sheriff, constable, or other custodian, there must be some loss of custody or control, but even if the custodian temporarily loses such control that amounts to escape provided of course it was negligently done or permitted by the officer, or that the prisoner was voluntarily allowed his liberty, and officer's motives in enlarging his prisoner are of no moment.<sup>30</sup>

Flight on the part of the prisoner is legally not regarded as an escape so as to involve the custodian in the commission of the offense, if he does not lose sight of his prisoner, but if sight of the prisoner is lost that amounts to a consummation of the offense on the part of the custodian provided of course the other elements are present.<sup>31</sup>

§ 259. **Officer Not Criminally Liable for Escape by Subordinate.**—Under the modern view an officer in order to be criminally responsible for an escape must actually have the immediate custody of the prisoner. In other words, it takes some personal act on the part of the defendant involving an escape before he can be held responsible criminally therefor, and if the escape is permitted or suffered by a deputy or subordinate then the chief officer not participating therein is not subject to prosecution for such an escape.<sup>32</sup> It may be provided by statute however that the sheriff may be punished for an act of his deputy in such cases.<sup>33</sup> But under such statute the deputy or subordinate permitting or allowing the escape must have been appointed by the sheriff or other officer it is sought to hold responsible for such deputy's delinquency.<sup>34</sup> Formerly, there was a conflict in the authorities as to whether the chief officer was liable for an escape suffered or permitted by deputy.<sup>35</sup>

30. In *re O'Rourke*, 251 F 768. In this case, the sheriff, in allowing the prisoner to go at large was actuated by laudable, charitable motives of enabling the prisoner to earn a living for his family. *Ex parte Shores*, 195 F 627; *Haupt v. State*, 140 SW 294, 100 Ark 409, AC 1913C 690 and note; *Saylor v. Com.*, 93 SW 48, 122 Ky 776, 29 Ky L 337; *Lynch v. Com.*, 73 SW 745, 115 Ky 309, 24 Ky L 2180.

31. *Perry v. State*, 63 Ga 402, 1 Hale P C, page 602, 2 *Hawkins P C*, Chapter 19, Sec. 613.

32. *Nall v. State*, 34 Ala 262; *Com. v. Mitchell*, 3 Bush(Ky) 30; *Com. v. Houseman*, 3 Ky L 331; *Staton v. Com.*, 264

3 Ky L 471, 11 Ky Op 374; *State v. Dean*, 48 NC 393; *Garver v. Territory*, 49 P 470, 5 Okl. 342; *Com. v. Shields*, 60 Pa Super 194; *Barthelow v. State*, 26 Tex 175; *Watts v. Com.*, 39 SE 706, 99 Va 872.

33. *State v. Wedin*, 89 Atl 753, 85 NJL 399.

34. *State v. Wedin*, supra.

35. *Rex v. Fell*, 1 Ld Rym 424, 91 English Reprint 1181, 12 Mod 226, 88 English Reprint 1279, 1 Salk 272, 91 English Reprint 237, 1 Hale P C, page 507, 2 *Hawkins P C*, Chapter 19, Sec. 27; *Woodgate v. Knatchdull*, 2 TR 148, 100 English Reprint 80; *Sanderson v. Baker*, 3 Wils C P 310, 95 English Reprint 1072.

In a prosecution for suffering or permitting an escape by a custodian it is immaterial that he is merely a *de facto* officer instead of a *de jure* one; neither is his failure to take the oath of office or give bond material, nor is it of any consequence that his term of office has since expired or that he is only temporarily in office.<sup>36</sup> The fact that the defendant was a deputy sheriff acting without a written appointment when he suffered or permitted the escape does not militate against the right of the state to hold him criminally therefor.<sup>37</sup> The principle that seems to be extractable from the adjudications bearing upon the matter under discussion is to this effect; that if the officer had authority to arrest and would be protected as an officer in so doing, he may be guilty of the offense of escape where he commits that offense and the elements thereof are present.<sup>38</sup> It would seem to follow from the foregoing observations that a member of *posse comitatus* or other person lawfully deputized might commit the offense we have under consideration. It should not be overlooked, and in harmony with the foregoing observations, that in any event the custody of the prisoner must be lawful and that the offense can not be committed if the custody of the prisoner is void as under a void commitment, or an entire want of jurisdiction on the part of the court issuing process by virtue of which the prisoner was taken into custody; then an offense would not be committed. But on the other hand, if the commitment of the prisoner to the custody of the officer was merely voidable or there was some irregularity or illegality in the antecedent proceedings this would not affect the right of custody and would not defeat a prosecution for escape. So too, a defect in a warrant, information, or indictment, or an error of law in the conduct of the trial would not be a defense to a prosecution for an escape.<sup>39</sup>

Where the prisoner is committed under a federal court commitment and his custodian thereafter commits the offense of escape, he is subject to prosecution under either state or federal law.<sup>40</sup> The guilt or innocence of the prisoner, or the fact that he was

36. *Pentecost v. State*, 18 So 146, 107 Ala 81; *Kavanaugh v. State*, 41 Ala 399; *State v. Maberry*, 34 SCL 144.

37. *Pentecost v. State*, *supra*.

38. *Pentecost v. State*, *supra*; and it seems that an officer may still be guilty of an escape; even if arrest is irregular, as where it is made under a warrant that has been lost.

39. *Martin v. State*, 32 Ark 124; *Housh v. People*, 75 Ill 487; *State v. McLain*, 10 SE 518, 104 NC 894; *State v. Garrell*, 82 NC 580; *Com. v. Shields*, 50 Pa Super 194; *Rex v. Bootie*, 2 Burr 804, 96 English Reprint 605; *Pentecost v. State*, *supra*; *Rex v. Fell*, *supra*; *State v. Dean*, *supra*.

40. *Ex parte Shores*, 105 F 627.

thereafter acquitted of the offense involved in the escape does not affect the guilt or innocence of the officer committing the offense of escape.<sup>41</sup> The triviality of the offense for which the prisoner is committed will not operate as a defense to an officer suffering or permitting him to escape.<sup>42</sup>

The fact that the officer did not have a warrant in his possession when he made the arrest, having lost the same, may not be urged as a defense for permitting or suffering an escape of his prisoner.<sup>43</sup> It seems though, that the release of a prisoner by reason of a void discharge of a court or magistrate, or a wholly invalid pardon, or on advice of the magistrate who committed him, or a discharge on bail upon the orders of a magistrate, of course, is a complete defense to a prosecution for an escape.<sup>44</sup> And this would seem to be true even though the bail taken by the magistrate was defective or wholly void.<sup>45</sup> But the magistrate taking such bail would be guilty of such offense and not the sheriff.<sup>46</sup>

A release of one arrested without warrant where no charge is filed especially if he has not committed any offense, can not be made the basis of a prosecution against the officer releasing him.<sup>47</sup>

It is no defense that the sheriff permitted the prisoner to be enlarged, out of charitable motives, that he might perform some work or labor for the benefit of his family, and the like.<sup>48</sup>

§ 260. Intent of Custodian.—Where the custodian of a prisoner is charged with the suffering or permitting an escape, it is necessary that he harbor a specific intent to save the prisoner from punishment. The absence of such an intent on his part, according to the great weight of authority, is fatal to the prosecution.<sup>49</sup> It would seem that with respect to negligent escapes no specific intent is required, but it is sufficient that the custodian is guilty of negligence, and while formerly there was no legal answer sufficient to exonerate the accused of the charge of negligent escape except the

41. *Weaver v. Com.*, 29 Pa 445; *Reg. v. Shuttleworth*, 22 UCQB 372.

42. *Com. v. Shields*, *supra*.

43. *Pentecost v. State*, *supra*.

44. *People v. Hanchett*, 111 Ill 90; *Lynch v. Com.*, 73 SW 745, 115 Ky 309, 24 Ky L 2180; *Meehan v. State*, 40 NJL 355; *State v. Manley*, 1 Overt. (Tenn.) 428.

45. *State v. Arthur*, 26 SCL 456.

46. *State v. Arthur*, *supra*.

47. *Habersham v. State*, 56 Ga 61.

48. *In re O'Rourke*, 251 F 766; *In re Bucks County Prison*, 15 Pa Co 569.

49. *Steere v. Field*, 22 F Cases No. 13350, 2 Mason 486; see however, *Haupt v. State*, 140 SW 294, 100 Ark 409, AC 1913C 690, and note; *Lynch v. Com.*, 73 SW 745, 115 Ky 309, 24 Ky L 2180; *Meehan v. State*, 40 NJL 355; see however, *Richardson v. Rittenhouse*, 40 NJL 230; *People ex rel Backus v. Stone*, 10 Paige (NY) 606; *Barthelov v. State*, 26 Tex 175; *Reg. v. Hawke*, 28 NB 400.

departure of the prisoner was by the act of God or a superior force, as a public enemy and the like, but now negligence under the more enlightened view must be proved, and is usually a question of fact in each particular case.<sup>50</sup>

§ 261. **Summary Treatment of Statutory Criminal Offenses Committed by Sheriffs and Constables.**—In the absence of statutory provision to the contrary, the mere default or official misconduct in a sheriff or constable does not constitute a criminal offense as a general rule. So a criminal prosecution may not be maintained against a sheriff or constable for wilfully, unlawfully, and corruptly violating his duty in not returning process issued to him, as by the statute directed it to be returned, there being no principle at common law making such conduct an offense and there being no statutory law denouncing it as a crime.<sup>51</sup>

It seems however that the Supreme Court of Indiana, at an early day reached a converse conclusion and held that an officer is guilty of a criminal offense in wilfully failing in discharge of his official duty.<sup>52</sup> However, there are statutes in many jurisdictions prescribing criminal responsibility and punishment for numerous acts of sheriffs and constables. Acting without bond is penal under some statutes.<sup>53</sup>

A statute which provides that if any sheriff or his deputy, coroner, or other officer shall make a false return on any process such officer shall be liable to pay the sum of five hundred dollars, creates a penal offense against the officer committing the act.<sup>54</sup> A sheriff or constable may of course be punished for failing or refusing to perform a duty imposed by law where such failure is made a criminal offense by statute.<sup>55</sup> It is also provided in some jurisdictions that it is a criminal offense to levy upon exempt property of a judgment debtor.<sup>56</sup> But a statute against unjust or oppressive conduct on the part of an officer is not violated by levying upon property unless it is greatly in excess of the amount

50. *Nall v. State*, 34 Ala 262; *State v. Mullen*, 50 Ind 598; *Shattuck v. State*, 51 Miss 575; *State v. Blackley*, 42 SE 569, 131 NC 726; *State v. Johnson*, 94 NC 924; *State v. Wedin*, 89 Atl 753, 85 NJL 399; *Garver v. Territory*, 40 P 470, 5 Okl 342; *Watts v. Com.*, 39 SE 706, 99 Va 872; *Lynch v. Com.*, supra; 1 Hale P C page 596.

51. *State v. White*, 5 Snead (Tenn) 202.

52. *State v. Berkshire*, 2 Ind 207.

53. *U. S. v. Evans*, 25 F Cases No. 15064, 1 Cranch C C 149.

54. *State v. Nichols*, 39 Miss 318.

55. *State v. Berry*, 85 SE 387, 169 NC 371; *State v. Furguson*, 76 NC 197; *Gordon v. State*, 2 Tex App 154.

56. *Pippin v. State*, 36 Tex 696.

of the demand.<sup>57</sup> But such statute is violated by levying upon exempt property.<sup>58</sup>

A statute against oppressive or unjust conduct is not violated by levying upon property of a stranger to the judgment or execution where the officer acts in good faith and particularly when he has taken an indemnifying bond.<sup>59</sup> A statute making it a criminal offense for an officer to fail to perform a duty imposed upon him by law covers failure to perform duties on the part of sheriffs and constables.<sup>60</sup> Statutes are to be found penalizing the forcible entry into a dwelling house to serve civil process.<sup>61</sup> So too, statutes make criminal a refusal on the part of the officer to set off debtor's exemption out of property levied upon or selling exempt property under execution or to bid at his own sale or purchase thereat.<sup>62</sup> It seems to be immaterial under a statute forbidding an officer to become a bidder at his own sale that he in reality bids for another.<sup>63</sup> Also statutes are to be encountered making it a penal offense to refuse to hold a sale. This statute is violated if officer refused to sell because there was only one bidder thereat.<sup>64</sup> Failing to pay over money collected in his official capacity is also a statutory criminal offense in some jurisdictions.<sup>65</sup> Neglect or failure to return process delivered to him for service is a penal offense under some statutory enactments.<sup>66</sup> Under a statute prescribing penalty for failure or neglect to return any precept notice or process to him tendered or delivered which it is his duty to execute, it is immaterial whether the process is civil or criminal. Failure or neglect with respect to either makes him guilty of the offense.<sup>67</sup> A false return may likewise constitute violation of a statutory provision denouncing the making of such.<sup>68</sup>

There are statutes in some jurisdictions making it a criminal offense for an officer himself not to enforce penal laws of the jurisdiction. A failure on his part in this regard is sufficient to

57. *Pippin v. State*, supra.

58. *Pippin v. State*, supra.

59. *State v. Taton*, 69 NC 35.

60. *Stewart v. State*, 4 Blackf. (Ind) 171; *Ormond v. Ball*, 48 SE 383, 120 Ga 916; *People v. Weston*, 4 Park Cr (NY) 226; *State v. Berry*, supra; *State v. Furguson*, supra; *Gordon v. State*, supra.

61. *State v. Armfield*, 9 NC 246, 11 AD 762.

62. *State v. Carr*, 71 NC 106; *State* 268

*v. Haggard*, 1 Humph (Tenn) 390; *Chambers v. State*, 3 Humph (Tenn) 237.

63. *Chambers v. State*, supra.

64. *State v. Johnston*, 2 NC 293.

65. *Mahar v. State*, 28 Ark 207; *State v. Longley*, 10 Ind 482.

66. *State v. Berry*, 85 SE 387, 169 NC 371.

67. *State v. Berry*, supra.

68. *State v. Johnston*, 2 NC 293; *State v. Joyce*, 2 NC 43.

incur responsibility.<sup>69</sup> There are also statutory provisions requiring or directing the disposition of intoxicating liquor obtained by an officer, also describing the time at which such is to be done, and where such provision enacts that contraband liquor within five days shall be delivered to the sheriff of the county, where seized by another officer, he is not guilty of such an offense where he holds it pursuant to the direction of a magistrate who issued a search warrant under which it was seized, and such magistrate directs the seizing officer to hold subject to the orders of the criminal court.<sup>70</sup> Where the duty prescribed by statute is required to be performed by the sheriff, a constable can not be convicted for failure to perform it. In these circumstances the word "sheriff" is not broad enough to embrace a constable.<sup>71</sup>

§ 262. Violation of Criminal Laws Generally.—It ought not to be assumed from the previous treatment in the next preceding section that officers of the law are immune from liability for violation of general criminal laws. Where the officer commits an offense that all persons are prohibited from committing he is of course guilty of the crime denounced by law.<sup>72</sup> So if an officer commits a criminal trespass he suffers the same penalty and consequence therefor as any other citizen doing or committing the same act.<sup>73</sup>

§ 263. Sheriff as Jailer.—It seems that under the common law the sheriff was ex officio jailer, and that by virtue of his position as such he was the official custodian and in charge of all prisoners confined therein. The official duty of such custodian is sometimes recognized and conferred by statute.<sup>74</sup> While it is true that the sheriff may personally take charge of and look after the jail or prison, however he may employ deputies and keepers therefor, as in his discretion he deems best. A deputy sheriff is not by virtue of his office authorized to act as the deputy jailer.<sup>75</sup>

69. *State v. Reichman*, 188 SW 225, 135 Tenn 653, 188 SW 597, 135 Tenn 685, AC 1918D, 889.

70. *State v. Yearwood*, 83 SW(2d) 894, 169 Tenn 191.

71. *State v. Kirby*, 6 So 578, 41 La Ann 298.

72. *Duckett v. State*, 21 SE 73, 93 Ga 415.

73. *Duckett v. State*, supra.

74. *Sawyer v. Commissioners of Androscoggin County*, 102 Atl 228, 116

Me 408; *Bowie v. Evening News Co.*, 134 Atl 214, 151 Md 295; *Ex parte Buck*, 81 So 651, 104 Miss 661; *Afferbach v. York County*, 146 NW 1050, 95 Neb 611; *Sturr v. Buckley*, 52 Atl (NJ) 692; *Virtue v. Essex County*, 50 Atl 360, 07 NJL 139; *State v. Brunst*, 26 Wis 412, 7 AR 84.

75. *Burr v. Norton*, 25 Conn 103; *Dunkel v. Hall County*, 131 NW 973, 89 Neb 585; *Skinner v. White*, 9 NH 204; *Becker v. Ten Eyck*, 6 Paige (NY) 68.

It seems that where the constitution merely creates the office of sheriff without prescribing his duties or authorizing the legislature so to do, by reason of his common law position as such that he then becomes jailer and that it is not within the power of the legislature to take the functions of jailer away from him.<sup>76</sup>

§ 264. Criminal Liability in Connection with Prisons.—Where the sheriff is jailer he is subject to criminal prosecution under a statute prescribing punishment as a crime for wilful neglect in the discharge of his official duties as such, or for misfeasance or malfeasance in office, where he permits the jail to become so unsanitary and filthy as to endanger the comfort and lives of those confined therein.<sup>77</sup>

It is competent to enact by statute, making it a duty of sheriffs and jailers to receive from constables and other officers all persons who shall be apprehended for offenses against the state, and to provide that if sheriffs or jailers fail to receive any such offender he shall be adjudged guilty of a misdemeanor. It was held that this section required a sheriff or jailer to receive persons from peace officers before commitment, where the arrest has been legally made either with or without a warrant and that the refusal on the part of the sheriff or jailer to receive such a prisoner because no commitment was produced did not constitute a defense.<sup>78</sup>

It is submitted however that this decision can not be sustained as a general rule. If the arrest of the prisoner were illegal then the sheriff would be civilly liable in detaining him, and unless there were some protection to the sheriff in such case it would seem that the sheriff would be between Charybdis and Scylla. That is, if the sheriff refused to receive the prisoner when he had been illegally arrested, that he would be subject to criminal prosecution, and if he did receive him he would be subject to civil suit for false imprisonment. It is a decision that ought not to be imposed upon the sheriff. A sheriff may not justify his refusal to receive a prisoner where the duty is imposed upon him by statute to receive such when arrested by peace officers, upon the ground that the warrant under which the prisoner was arrested did not have

76. *People ex rel. McEwan v. Keeler*, 29 Hun(NY) 175, 64 How Pr 478; *State v. Cummins*, 42 SW 880, 89 Tenn 667; *Felts v. Memphis*, 2 Head (Tenn) 650; *State v. Brunst*, supra; *Virtue v. Essex*, supra. See however contra, *McDaniel v. Armstrong*, 69 Atl 805, 17

(5 Pennewill) Del 240.

77. *McBride v. Com.*, 4 Bush(Ky) 331; *Lynch v. Com.*, 73 SW 745, 115 Ky 309, 24 Ky L 2180.

78. *State v. Kelly*, 87 Atl 128, 84 NJL 1, see also 94 Atl 1103, 80 NJL 704.

the personal seal magistrate issuing the warrant; a personal seal is not required in such case to be affixed.<sup>79</sup>

Where there is a general statute providing for the prosecution of officers for official misconduct, such statute is applicable to sheriffs who are jailers, and authorizes a prosecution for the furnishing a prisoner in his charge in jail with intoxicating liquors.<sup>80</sup> In all such cases where an officer is subject to criminal prosecution for the infraction of statutory enactments pertaining to his office, it is necessary that the joint operation or union of act and intent concur on the part of the sheriff in order to make him liable criminally.<sup>81</sup> However, it seems that criminal negligence would generally operate to supply the necessary intent and particularly where the statute punishes as criminal the negligent doing of the prohibited act.<sup>82</sup>

It should be noted that every trivial deviation from the strict letter of the law with respect to duties of the sheriff does not call for the visitation upon him of punishment as a crime. The application of this rule is found in a case where a sheriff or jailer is bound by statute to see that a prisoner held for nonpayment of fines shall work out the same at hard labor on public works of the county, and prescribes a small fine for dereliction of such duty, and where a jailer permits a prisoner to do work other than that prescribed by statute, it was held that it was not such misfeasance, warranting indictment of the sheriff or jailer but that the small statutory fine could be inflicted for the technical violation of the mandates of the statute.<sup>83</sup>

§ 265. Sheriff Not Criminally Liable for Misconduct of Subalterns.—A sheriff is not criminally liable as a keeper of a jail or prison for the acts or misconduct of his deputies, assistants, or subalterns. So where the jailer appointed by the sheriff or a deputy or other assistant furnished intoxicating liquor to prisoners and the sheriff is without misconduct on his part in connection therewith, he is not liable criminaliter for the acts of the jailer.<sup>84</sup> Neither is the sheriff liable for the misconduct of other subordinates or assistants that he has appointed where he does

79. State v. Kelly, supra.

80. In re Bucks County Prison, 15 Pa Co 560; State v. Sellers, 7 Rich. Law (41 SC) 368.

81. Lynch v. Com., supra.

82. Lynch v. Com., supra.

83. Lovill v. Com., 20 SW 540, 93 Ky 507, 14 Ky L 490.

84. State v. Sellers, 7 Rich. Law (41 SCL) 368.

not participate therein as, for instance, where such subordinates or assistants are guilty of embezzlement or malversation.<sup>85</sup>

§ 266. Civil Liability in Connection with Jails and Prisons.—Where a matter arises calling for the exercise of judgment or discretion for its decision and determination, the sheriff in these circumstances acts in a quasi judicial capacity and so long as he exercises his best judgment and his conduct is in good faith, and malice or fraud do not enter therein he is not personally liable although he makes an error in his judgment. In order for the officer to assert the immunity, with which the law clothes him, in acting as hereinbefore stated, it is necessary that his acts remain within the ambit of his authority, for when he passes beyond the authority conferred upon him, he is without the pale of the protection afforded him by law.<sup>86</sup> As a general rule the powers, duties, rights and responsibilities of a sheriff as jailer are prescribed by statute, and as his powers and duties, rights and liabilities, are thus circumscribed by the legislative enactments of the particular jurisdiction and they should be consulted and followed.<sup>87</sup> In the main, however, it may be stated that the sheriff's duties are ministerial or public in character rather than judicial.<sup>88</sup> The duties imposed upon a sheriff as jailer or warden of a prison require him to take into his custody, keep and maintain prisoners who are properly committed to his charge and to continue them in his custody until they are discharged therefrom in due course of law.<sup>89</sup> It seems however that before the sheriff could be placed in default with respect to the receiving and retaining of a prisoner in

85. Montgomery v. State, 65 So 572, 107 Miss 518.

86. Porter v. Haight, 45 Cal 631; McClellan v. Carter, 117 SE 118, 30 Ga App 150; Overmyer v. Barnett, 123 NE 654, 70 Ind 569; Schoettgen v. Wilson, 48 Mo 253, see also Gearin v. Marion County, 223 P 929, 110 Ore 390; Sanders State Bank v. Hawkins, 142 SW (Tex Civ) 84.

87. People v. Inspectors & Agent of State Prison, 4 Mich 187; American Disinfecting Co. v. Oktibbeha County, 110 So (Miss) 869; Pacific Coal Co. v. Silver Bow County, 256 P 386, 79 Mont 323; State v. Holcomb, 65 NW 873, 46 Neb 612; State v. Coffin, 46 NE 819, 56 Ohio State 240; Carolina Nat'l Bank v. State, 38 SE 629, 60 SC 465, 85 ASR 272

865; State v. Trotter, 218 SW 230, 142 Tenn 160; Clark v. Kelly, 133 SE 366, 101 W Va 650, 46 ALR 799.

88. Devlin v. McDermott, 86 Atl 500, 84 NJL 403; Sullivan v. McOsker, 86 Atl 497, 84 NJL 380, see however 83 Atl 481, 83 NJL 16; Clark v. Kelly, supra.

89. State ex rel. Murphy v. Sup. Ct. of Maricopa County, 246 P 1033, 30 Ariz 332, 47 ALR 401; Ex parte Higgins, 232 P 767, 70 Cal App 170; Lynch v. Com., 73 SW 745, 115 Ky 309, 24 Ky L 2180; Bowie v. Evening News Co., 134 Atl 214, 151 Md 285; State v. Kelly, 87 Atl 128, 84 NJL 1; see also 84 Atl 1103, 86 NJL 704; State v. Cyrus, 97 SE 412, 83 W Va 30.

custody that the original commitment or process by which the prisoner is delivered to the sheriff should be left with him as evidence of authority to imprison the party named therein, and that a copy of such commitment or process will not answer this purpose.<sup>90</sup>

A sheriff directed to imprison one committed to his custody is under a duty to literally confine such person in the jail, and he should not permit him to be without the confines thereof for any purpose, even in charge of the sheriff or another officer, and where the sheriff or jailer if, in the particular instance there is a jailer independent of the sheriff, refuses to so imprison persons committed to his custody, it seems the court making such commitments may place another in charge of the jail.<sup>91</sup> If a prisoner is delivered into the sheriff's custody and he has a commitment already for his detention which had theretofore been issued, it is the sheriff's duty to detain him in prison even though if arrested by other officers illegally.<sup>92</sup>

It is just as much a part of the sheriff's duty to look out for and protect the health, and preserve the lives of prisoners as it is to detain them in prison.<sup>93</sup> It hardly need be observed that the sheriff in maintaining the jail is required to properly feed the prisoners, and to do so it is necessary that he cause the food to be properly cooked and prepared, which it seems he may do within the jail or outside thereof, and it is likewise his duty to supply to the prisoner a sufficient quantity of drinking water, wholesome in quality.<sup>94</sup> In the preservation of the health and lives of the prisoners the sheriff may in a proper case resort to forcible feeding, where they refuse to eat but as to whether or not such an extreme measure is necessary is a factual question for the decision of a jury when properly raised in an action and submitted to them.<sup>95</sup> In order for the sheriff to properly discharge his duties as a jailer, it is necessary that he keep and maintain the jail in a clean and sanitary condition.<sup>96</sup> It is necessary that the sheriff shall equip the jail in his charge with sufficient beds, and supply thereat such quantities of fuel as the climatic conditions of the locality demand.<sup>97</sup> Whatever is

90. *Townsend v. Babbitt*, 11 Gray (Mass) 468.

91. *State v. Brown*, 126 P 245, 8 Okl. Cr. 40, AC 1914C 394; *State v. Cyrus*, supra.

92. *Ex parte Higgins*, supra.

93. *Leigh v. Gladstone*, 26 TLR 139.

94. *State v. Trotter*, supra; *Pacific*

[1 *Anderson on Sheriffs*]-18

*Coal Co. v. Silver Bow County*, supra.

95. *Leigh v. Gladstone*, supra.

96. *Ex parte MacDonald*, 187 P 991, 45 Cal App 430; *Ackley v. Perrin*, 79 P 192, 10 Idaho 531; *Bowling Green v. Rogers*, 134 SW 921, 142 Ky 558, 34 LRANS 461; *Clark v. Kelly*, supra.

97. *American Disinfecting Co. v. Ok-*

necessary for the maintaining of the jail in a clean sanitary manner and to protect and guard the prisoners therein, the sheriff may do.<sup>98</sup> It is the duty of the sheriff to furnish medical and surgical aid to prisoners within his custody.<sup>99</sup>

Under the rule with respect to furnishing medical assistance to a prisoner confined in a jail it is immaterial whether he has been committed as a result of a preliminary hearing, or upon final judgment of a conviction, or whether he is even confined in a jail, since if it is necessary to confine him in a hospital the duty is the same.<sup>1</sup>

A sheriff may not permit the child of an inmate to be or reside in the jail even upon payment therefor.<sup>2</sup>

Before the sheriff receives a prisoner, arrested in a civil action, it is his right and duty to demand proper authority therefor, but if the prisoner has been properly committed in such action it seems the absence of a commitment delivered to a sheriff does not render him liable.<sup>3</sup>

A sheriff occupying a portion of the jail constructed for that purpose, is within his rights and may not be called upon to pay rent therefor, but while he may occupy the same, rent free, he may not lease or let it to another.<sup>4</sup>

§ 267. *Status of Sheriff's Assistants.*—A county jail, of which the sheriff is ex officio jailer, is regarded as an institution of the county, and assistants and other employees engaged by the sheriff thereat are regarded as public employees, and in the performance of their duties are performing public functions.<sup>5</sup>

§ 268. *Right of Sheriff or Jailer to Punish Prisoners.*—The power to punish prisoners, in our time, in the charge of a sheriff or jailer may well be doubted, in the absence of statutory authority, but it seems that authority and power to administer corporal punishment of prisoners, may in the absence of constitutional inhibition, be con-

*tibbeha County*, 110 So(Miss) 869; *Spicer v. Williamson*, 132 SE 291, 191 NC 487, 44 ALR 1280; *Moore v. Servening*, 3 Yeates(Pa) 443; *Hale v. Johnston*, 203 SW 949, 140 Tenn 182.

98. *American Disinfecting Co. v. Ok-tibbeha County*, supra.

99. *Spicer v. Williamson*, supra.

1. *Spicer v. Williamson*, supra

2. *Peters v. White*, 53 SW 726, 103 Tenn 390.

3. *Jordan v. McAllister*, 40 Atl 324, 91 Me 481.

4. *Benton County v. Harman*, 101 Ind 551; *Miller v. Porter*, 8 B Mon (Ky) 282; *Thompson v. Probert*, 2 Bush(Ky) 144.

5. *Devlin v. McDermott*, 86 Atl 500, 84 NJL 403; *Sullivan v. McOsker*, 86 Atl 497, 84 NJL 380, see also 83 Atl 481, 83 NJL 16; *Bell v. City of Cincinnati*, 88 NE 128, 80 Ohio St 1, 23 LRA(NS) 910.

ferred upon jailer or sheriff by legislation for disciplinary purposes.<sup>6</sup>

In any event, in the absence of specific statutory authority, the question whether a given measure of prison discipline can be authorized by those in charge depends upon whether or not such is reasonably necessary.<sup>7</sup> The growing humanitarian sentiments of the age demand that punishment of a crime should be humanely administered, with due regard for the rights of the prisoner.<sup>8</sup> In the last analysis however, the strict right of the sheriff or jailer to inflict corporal punishment on a convict is dependent upon the legislative will as expressed in its statutory enactments, and the statutes of a particular jurisdiction wherein the question is involved should be consulted, but in any case the punishment of this sort can not exceed what is reasonably necessary under the facts and circumstances of each case.<sup>9</sup>

The reason for the disposition, on the part of the people of our day, against such punishment is that the discipline in prison is necessarily peremptory, and when punishment is inflicted by flogging whether or not it is justly imposed rests in the opinion of the officer who orders it. There is no inquiry or publicity, either as to the justice of it, or its extent as commensurate with the offense. The extent of the punishment, if legal, is committed to the arbitrary power of men who may happen to be unjust or of bad judgment. Their action is irreviewable except in some cases of gross excess when the matter may possibly be brought to public attention, and then the victim is at every disadvantage. The punishment, if by flogging, has already been inflicted whether justly or not and the suffering therefrom and degradation thereof can not be removed. The victim is usually ignorant, and always impecunious, and generally without friends. His fellow convicts often dare not testify in his behalf, and their testimony will not carry the weight given to that of those in authority.<sup>10</sup>

It may be safely asserted however that in advance of conviction there can be no infliction of corporal punishment as upon a prisoner confined in a county jail awaiting trial in charge of the sheriff. Where statutes purport to authorize, in certain cases personal chastisement of convicts the punishment must be kept within the strict

6. *State v. Revis*, 136 SE 346, 193 NC 192, 50 ALR 98, and note.

7. *State v. Nipper*, 81 SE 164, 166 NC 272, AC 1910C, 126 and note.

8. *State v. Nipper*, supra.

9. *Westbrook v. State*, 66 SE 788, 133 Ga 578, 18 AC 295, 26 LRA(NS) 591.

10. *State v. Nipper*, supra.

provision of the statute, and where a statute provides that no whipping shall be administered to a convict by a whipping boss or other officer or person except in cases where it is reasonably necessary to enforce discipline, or compel work or labor by the convict the punishment may not be administered except within the strict letter of the statute. In consonance with this rule it was held that where there was some difficulty among members of a chain gang, and when the warden or jailer attempted to administer chastisement with a strap to one of the prisoners who had a knife and in the difficulty that ensued, killed another prisoner who was aiding and abetting in the efforts to administer chastisement, that this was sufficient to reduce the homicide from murder or manslaughter.<sup>10a</sup>

§ 269. *Liability for Injury to Prisoners.*—If punishment is lawfully administered to prisoners whether it is corporal or otherwise and within proper bounds, and is authorized by prison regulations or statutory enactments, and is inflicted without malice, and there is an entire absence of intent to injure the prisoner, the sheriff, jailer or other officer having charge of such prisoner is not liable civilly for injuries resulting therefrom, even though serious in character and permanent in consequence.<sup>11</sup>

In order for a sheriff, jailer, or other custodian of a prisoner to be liable for injuries to a prisoner, it must appear that they had knowledge of the cause or condition to which the injury was attributed, and accordingly it has been held that a custodian of a prison is not liable for injuries caused by the unhealthy or unsanitary condition of the jail where it was not shown that the custodian knew thereof, and it was likewise not made to appear that he had control of same.<sup>12</sup> However, it would seem that this rule would not hold good where the custodian of the prison was negligent in not knowing the condition obtaining in the prison within his charge. The sheriff, jailer, or other custodian of a prison has likewise been held not responsible for not furnishing medical aid and assistance to a prisoner who had sustained an injury at the hands of a fellow prisoner in the absence of proof that the sheriff, jailer, or other custodian knew thereof, or by the exercise of reasonable care should have known of the same.<sup>13</sup>

It can not be a sound rule of law that a sheriff, jailer, or other

10a. *Westbrook v. State*, supra.

11. *Stephens v. Conley*, 138 P 189, 48 Mont 352, AC 1915D, 958, and note.

12. *Bishop v. Lucy*, 50 SW 1029, 21 Tex Civ App 326.

13. *Moxley v. Roberts*, 43 SW 482, 19 Ky L 1328.



custodian of a prison can negligently fail to know what it is his duty to know and thereby escape the consequences attendant upon such negligent conduct. The sounder and better rule seems to be that it is a breach of duty of a sheriff, jailer, or other custodian of the prison to keep the same in an unsanitary condition and he is liable for an injury proximately resulting therefrom. So too, where he fails in his duty to furnish sufficient food, wholesome in character, to properly sustain the inmates, he is liable. He is likewise responsible for failing to maintain the prison in a warm condition.<sup>13a</sup>

At common law it is unlawful to put a prisoner in irons or chains except when necessary to prevent his escape, and it would seem to follow as an illative result of this salutary common law rule that where the sheriff, jailer, or other custodian put him in irons or chains in such a manner as to inflict injury upon him, civil liability would ensue therefor. A sheriff may be held liable for negligently failing to isolate a prisoner who is inflicted with a contagious disease.<sup>14</sup>

**§ 270. Liability for Torts of Subordinates in Injuring Prisoners.**—The general rule with respect to the liability of a custodian of a prison for the conduct of his agent or subordinate is applicable here and is measured by the right of control and a sheriff, jailer, or other custodian of a prisoner is liable for the torts or misconduct of his subordinates when he has control of their acts. Whether he exercised it or not would seem to be immaterial, but he is not liable even though appointed by him when he does not have control or authority over them.<sup>15</sup>

**§ 271. Liability for Injuries Inflicted upon Prisoner by His Fellow Prisoners.**—A sheriff, jailer, or other custodian is under a duty to use reasonable care to prevent infliction of injuries upon a prisoner by his fellow prisoners, and, if he is derelict in this duty and as a proximate result thereof, a prisoner is injured, then the sheriff, jailer, or custodian of the prison will be required to respond in damages. On the other hand, where he is not negligent, or his negligence is not a proximate cause of such injury, or where he had neither reason nor occasion to anticipate the probability of such injury then he will not be held liable.<sup>16</sup>

13a. See Sec. 266, supra.

14. In re Birdsong, 39 F 599, 4 LRA 628; Hunt v. Rowton, 288 P 342, 143 Okl 181.

15. City of N. Y. v. Fox, 133 NE

434, 232 NY 167; Hale v. Johnston, 203 SW 949, 140 Tenn 182; Lunsford v. Johnston, 179 SW 151, 132 Tenn 615.

16. Hillman v. City of Anniston, 108 277

The sheriff, jailer, or other custodian of a prison and the sureties on his official bond are civilly liable for injuries resulting from the doings of what is known as "Kangaroo Court" conducted in the prison by the prisoners, of which the sheriff, jailer, or custodian, knew and which practice had obtained in the prison for several years past.<sup>17</sup> The custodian of a prison owes a duty to a prisoner to not permit a dangerous practice in the prison; and a breach of this duty imposes liability.

It is the duty of the sheriff, jailer, or other custodian of a prison to safely keep and protect the prisoners in his charge from unlawful injury and this duty is no less violated if the injuries are inflicted by a third party than if caused by the sheriff himself where the sheriff knew or ought to have known thereof in time to prevent the same, and if unlawful assaults and batteries are made upon prisoners in the jail by others who are confined therein, the sheriff will be responsible in an action for damages to the prisoner suffering the injury, if the sheriff and his deputies, or the jailer and his employees, are near when the contemplated assault and battery takes place and do not use every reasonable means to prevent it. Such neglect on the part of either the sheriff, deputies, or jailer, is a failure to effectively perform a lawful duty rendering not only the officer, but the sureties on his official bond, liable.<sup>18</sup>

**§ 272. Liability for Mob Violence.**—It may be stated as a general rule, finding sanction in the adjudicated cases, that a sheriff or other officer who is guilty of negligence and by reason thereof, a prisoner is killed by a mob, that the sheriff or other officer and his official bondsmen are liable therefor to the widow, heirs or beneficiaries under the death statute in the particular jurisdiction or to the prisoner himself where he is injured but not killed.<sup>19</sup>

The theory of liability in such cases is that of the duty to exercise reasonable care for the safety of the prisoner, and arises from the sheriff or other officer having the person of the prisoner committed to his custody by virtue of his office; it has been aptly reasoned

So 539, 214 Ala 522, 46 ALR 89 and note; Ratliff v. Stanley, 7 SW(2d) 230, 224 Ky 819, 61 ALR 500, and note.

17. Hixon v. Cupp, 49 P 927, 5 Okl 545; Eberhart v. Murphy, 188 P 17, 110 Wash 158, 194 P 415, 113 Wash 449, but however see Riggs v. German, 142 P 479, 81 Wash 128; Ratliff v. Stanley, supra. 278

18. Hixon v. Cupp, supra.

19. Indiana v. Gobin, 94 F 48; Asher v. Cabell, 50 F 818, 2 US App 159, 1 CCA 693; Ex parte Jenkins, 58 NE 500, 25 Ind App 532, 81 ASR 114; State to Use of Cocking v. Wade, 40 Atl 104, 87 Md 529, 40 LRA 628, note 18 ALR 201; Hixon v. Cupp, 49 P 927-929.

that the sheriff is bound to the exercise of due care and diligence in keeping possession of property levied on by virtue of his office so as to preserve the lien unimpaired. He leaves the property at his peril in the possession of the debtor; he is bound to take ordinary care of property levied on to prevent its deterioration or destruction, and if he neglects so to do he is liable for the resulting injury. He must exercise ordinary care in moving goods and in selecting a fit place for their deposit. He must use due care to feed and water livestock seized by him by virtue of a lawful writ. For failure to use ordinary care in the cases above mentioned he and his sureties on his official bond are responsible. This liability grows out of a breach of duty to exercise care imposed upon him by law in respect of property seized by virtue of his office. If the law imposes a duty of care in respect of animals and goods which he has taken into his possession by virtue of his office, why should not the law impose the duty of care upon him in respect of human beings who are in his custody by virtue of office? Is a helpless prisoner in the custody of the sheriff less entitled to care than a bale of goods or a dumb animal? The law is not subject to any such reproach. When a sheriff by virtue of his office has arrested and imprisoned a human being he is bound to exercise ordinary and reasonable care under the circumstances of each particular case for the preservation of his life and health. This duty of care is one owing by him to the person in his custody by virtue of his office and for a breach of such duty he and his sureties on his official bond are responsible in damages.<sup>20</sup>

So it may be generally said that where a sheriff or other officer knowing that certain lawless persons are hostile to a prisoner in his custody and delivers him for transporting shackled to a deputy whom he knows to be incompetent and unfit, the superior officer is liable on his official bond because of his own negligence for the killing of such prisoner by a mob through the deputy's unfitness.<sup>21</sup>

§ 273. Liability for Injury by Insane Prisoner.—Where the sheriff confines a prisoner in a cell with another prisoner who is insane, and who had been placed in said cell without searching him for weapons, and such lunatic thereafter injures or kills the fellow prisoner with whom he is confined, it is for the jury to say whether or not the sheriff is liable for such death, or injury, but it seems that in order to hold the sheriff in these circumstances it is necessary that he was or his deputies were negligent or had knowledge

20. *Indiana v. Gobin*, supra.

21. *Asher v. Cabell*, supra.

that should have put them on guard with respect to the likelihood of injury or death by one prisoner as against another.<sup>22</sup>

§ 274. Liability for Denial of Prisoner's Right to Consultation with Attorney.—The right to counsel is guaranteed by state and federal constitutions, and in most jurisdictions the state or government will furnish counsel if by reason of the defendant's poverty he is unable to procure same. An indispensable part of the right to counsel is the right of consultation between the accused and his counsel privately, and it is the duty of sheriff, jailer, or other custodian of the prisoner before conviction, and thereafter where the prisoner is entitled to legal consultation, to provide for and afford every reasonable opportunity for free and full consultation between them.<sup>23</sup> For an invasion of this right of consultation between a prisoner and his counsel there are a number of remedies. If the case is pending in the trial court, the court or judge will make an order granting such right.<sup>24</sup> Mandamus will lie to protect and enforce this invaluable right.<sup>25</sup>

Likewise, where there is a statute or constitutional provision providing for the free consultation between a prisoner and his counsel and there is an unlawful denial of such right an action for damages will lie against the sheriff, jailer, or other officer denying such right, but the right of action for damages exists in favor of the prisoner only and not counsel.<sup>26</sup>

It is a denial of the right to grant it only on condition that sheriff, jailer, or some other officer shall be present thereat, and it would seem that his granting of the right only on condition that the consultation take place in the presence of an officer is such a denial thereof for which any one of the foregoing mentioned remedies would be available.<sup>27</sup> It likewise would seem to follow that if the prosecuting attorney was a party to the denial of such right, he, along with the sheriff, jailer, or other custodian of the prisoner

22. *Kusah v. McCorkle*, 170 P 1023, 100 Wash 318, LRA1918C, 1158, and note.

23. *People v. Bostic*, 141 P 380, 167 Cal 754. The constitutional guaranty of right to counsel does not connote the right to counsel to be furnished at state or governmental expense. *Houk v. Board of Com'rs of Montgomery County*, 41 NE 1068, 14 Ind App 602; *State v. Rollins*, 24 So 604, 50 La Ann 925; *People v. Risley*, 13 Abb N Cas 280

186, 66 How Pr 67, 1 NY Cr 492; *People v. Abetti*, 152 NYS 890, 31 NY Cr 168; *State v. Davis*, 130 P 962, 9 Okl Cr 94, 44 LRA(NS) 1083 and note; *Hamilton v. State*, 153 SW 331, 68 Tex Cr 419; *Waggoner v. State*, 98 SW (Tex Cr) 255.

24. *State v. Davis*, supra.

25. *People v. Risley*, supra.

26. *McPhail v. Delaney*, 110 P 64, 48 Colo 411.

27. *State v. Davis*, supra.

would be liable in damages or subject to be made a defendant in such mandamus proceeding or respondent in an application to the court, for an order.<sup>28</sup>

**§ 275. Duty to Care for Prisoner's Property.**—Statutes are sometimes enacted that it is the duty of the custodian of the prisoner to receive and care for any of the prisoner's property, and these statutory provisions are applicable particularly to those convicted of crime, but this does not authorize the sheriff, jailer, warden, or other custodian of a prison to receive payment of a certificate of deposit in a bank belonging to a convict, and such payment by the bank is made at its risk.<sup>29</sup>

**§ 276. Liability for Defective Premises.**—There is indeed a paucity of authority upon the question of the liability of the sheriff for the defective condition of the premises in connection with the jail. There is no doubt, unless he has charge of the jail, that he is not liable. That is law; to sustain it the citation of the authorities is unnecessary, and no reported cases have been found holding him liable for defective conditions of the premises in his charge, but it is submitted that if the sheriff permits the jail to become so defective that a prisoner or another who is lawfully on the premises is proximately injured thereby, that he would be liable. It has been held however that a sheriff, jailer, or other officer is not guilty of negligence proximately causing the death of a visitor to the jail whose death was brought about by falling down an open elevator shaft from an upper floor of the courthouse where the jail was located, where the sheriff or jailer directed the person to search for an elevator button in a dark corridor, where it appears that there was no knowledge on the part of the sheriff or jailer of the defective condition of the elevator shaft door.<sup>30</sup>

A sheriff or jailer may be held liable where he permits the jail to become a nuisance, and it would seem that liability would attach where he maintained a jail or prison in his charge so that the windows overlooking adjoining property destroyed its privacy, and the prisoners therein confined were allowed to make loud noises and utter indecent language within the hearing distance of the occupants of the adjoining property, and likewise were permitted to go around in the prison scantily clad within the view of persons

28. *McCleary v. State*, 89 Atl 1100, 122 Md 394.

29. *Thompson v. Niles*, 87 NW 732, 115 Iowa 67.

30. *Richardson v. Hills*, 104 SW(2d) 151, see however *Finkelstein v. City of New York*, 169 NYS 718, 183 App Div 539.

on such property, and that foul odors were permitted to escape through the windows to the occupants of contiguous premises.<sup>31</sup>

However, a municipality, it was held, in the cited case, was not liable upon the ground that the keeping of a prison was a governmental function. But yet, the rule seems to be that the erection of a prison adds nothing which is desirable to the neighborhood, and detracts much from it; but this, and similar inconveniences, are to be borne by the citizens in the vicinity of whose property such public buildings are located, and for this inconvenience and depreciation in property values so occasioned, the law affords no compensation, but it does not, however, follow because the erection of such a building was a public necessity, and the authorities had the right to select the lot upon which it was erected, it can be so maintained as to constitute a nuisance. While the authorities have a right to use and maintain it for the purposes intended, the duty rests upon them to maintain it in a proper manner and if they fail in this respect it seems to follow that the sheriff, jailer, or other custodian thereof would be responsible.<sup>32</sup>

**§ 277. Liability for False Imprisonment.**—If the sheriff, constable, or other officer arrests one man on process against another, he thereby renders himself liable to the person so arrested as for false imprisonment although the names of both men are identical.<sup>33</sup> Of course, if the arrested person so acts as to bring on the arrest then he cannot complain.<sup>33a</sup> Certainly a legal commitment is full protection to the officer in detaining a prisoner in jail.<sup>34</sup> But process void on its face cannot be relied upon to justify restraining the citizen of his liberty.<sup>34a</sup> If the arrest is made out of ill will or anger upon a trumped up charge which the officer is unable to

31. *City of Bowling Green v. Rogers*, 134 SW 921, 142 Ky 558, 34 LRA (NS) 461, and note.

32. *Long v. Elberton*, 34 SE 333, 109 Ga 28, 46 LRA 428, 77 ASR 363.

33. *Harris v. Louisville N. O. & T. R. Co.* 35 F 116; *Mitchell v. Malone*, 77 Ga 30; *Comer v. Knowles*, 17 Kan 436; *Anderson v. Beck*, 64 Miss 113; *Berrer v. Moorhead*, 22 Neb 687, 36 N W 118; *Miller v. Foley*, 28 Barb (NY) 630; *Scott v. Ely*, 4 Wend (NY) 555; *Ryburn v. Moore*, 10 SW 393, 72 Tex 885; *Formwalt v. Hilton*, 1 SW 376, 66 Tex 288; *McMahan v. Green*, 34 Vt 69, 80 AD 665; *Smith v. Weekes*, 282

18 NW 778, 60 Wis 94; *Gelzenleuchter v. Niemeyer*, 25 NW 442, 64 Wis 316, 64 AR 616; *Jarman v. Hooper*, 6 M & G 827-847.

33a. *Hays v. Creary*, 60 Tex 445; *Bonesteel v. Bonesteel*, 30 Wis 511.

34. *Collins v. Brackett*, 25 NW 708, 34 Minn 339.

34a. *Lueck v. Heisler*, 58 NW 1101, 87 Wis 644; *Messman v. Ihlenfeldt*, 62 NW 522, 89 Wis 585; *Frazier v. Turner*, 45 NW 411, 76 Wis 562; warrant for larceny, failing to state value of subject thereof no justification for arrest; *Gelzenleuchter v. Niemeyer*, supra.

sustain and is not based upon a warrant, regular upon its face, then the officer is liable for false imprisonment.<sup>35</sup> It is no justification for a private citizen in making an illegal arrest that he procured an officer to assist him.<sup>35a</sup> It would seem to follow that in any case where an arrest is illegal, and the prisoner is detained for any time, however short, this constitutes an unlawful arrest and false imprisonment.

§ 278. Sheriff's Liability to Physician for Medical Services Rendered to Prisoner.—It cannot be declared as a matter of law that a sheriff or other officer is under legal obligation to provide medical attention for a prisoner in his custody, and to pay therefor personally. But if it is made to appear that at the time the sheriff requested a physician to perform services for a prisoner in his custody that he, the sheriff, intended to pay therefor and it was so understood between the physician and the sheriff, and that the physician rendered such services in reliance on the agreement of the sheriff to pay for same personally, then the sheriff would be personally liable for the value of the services so rendered to his prisoner. It is primarily however, an obligation of the county to pay for services rendered. While the sheriff may be and is under a duty to procure such services, still it is a county obligation.<sup>36</sup>

35. *Smith v. Dutton*, 37 So 864, 113 La 882.

35a. *Harris v. Louisville N. O. & T. R. Co.* 35 F 116.

36. *Spicer v. Williamson*, 132 SE

291, 191 NC 487, 44 ALR 1280, and note.

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## CHAPTER X

### THE JURY

- 279. Duty of Sheriff at Common Law to Select Jurors.
- 280. Challenge to the Jury for the Partiality of the Summoning Officer.
- 281. Consanguinity or Affinity of the Sheriff to a Party Cause of a Challenge to the Jury.
- 282. Connection of the Sheriff with One of the Parties Will Be a Ground for Challenge to the Panel.
- 283. When Sheriff is Party to the Suit Challenge to the Panel.
- 284. When the Officer is Attorney of a Party.
- 285. Interference of Litigant When Cause of Challenge to the Panel.
- 286. De Facto Officer Not Ground of Challenge to Panel.
- 287. Rule as to Professional Jurors.
- 288. Sheriff Must Not Catechiae Prospective Jurors.
- 289. Sheriff Must Not Excuse Talesmen from Service.
- 290. Duty of Sheriff in Charge of Jury.
- 291. Isolation of Jury in Criminal Cases; Duty and Responsibility of Sheriff.

§ 279. Duty of Sheriff at Common Law to Select Jurors.—At common law the sheriff, pursuant to writs of venire facias directed to him by the appropriate court, selected jurors to appear at a certain date.<sup>1</sup> Pursuant to such writ he was required to select a panel of no less than forty eight nor more than seventy two jurors. He could select any qualified man in the county on the panel.<sup>2</sup> This procedure of allowing the sheriff to select the jurors has long since been done away with by statute in most of the states, and a substantial compliance with the statute in such case made and provided is required, but when the compliance is substantial, that is sufficient.<sup>3</sup> In all of the United States appropriate statutes have been enacted designating the way in which the jurors should be selected, possibly with one or two exceptions.<sup>4</sup>

§ 280. Challenge to the Jury for the Partiality of the Summoning Officer.—It is now and was at common law a ground for challenging the jury if it is shown that the officer who summoned them was partial to one side or the other in the action.<sup>5</sup> Where it is shown

1. *Watson on Sheriffs*, 271.

2. 3 *Blackstone's Comm.* 358; *Thompson & Merriam, Juries*, Sec. 44, p. 40.

3. *Benson v. Com.* 60 SW(2d) 941, 249 Ky 328; *Harris v. State*, 125 So

253, 155 Miss 794; *Armstrong v. State*, 18 SW(2d) 622, 113 Tex Cr Rep 171.

4. *Murfree on Sheriffs*, Sec. 382, p. 172.

5. *Watkins v. State*, 295 P 417, 49 Okl Cr 443; *Hammock v. State*, 6 P

that the sheriff summoning the special veniremen was a client of the attorney on one side, and also several of the special veniremen were such attorney's friends, and lodge brothers and were selected from a particular vicinity, it was held insufficient to show that the sheriff was biased.<sup>6</sup> It is submitted that the challenge in these circumstances ought, to have been sustained. A litigant should not be compelled to try his case before a jury so palpably subject to influence as indicated above. It has been held that a sheriff who is not the sole witness in a criminal case but whose evidence is affirmatively shown by the record to be corroborative merely, is not, by the fact that he is called as a witness, and his name, as such, is indorsed upon the information charging the offense to be tried, disqualified thereby from performing the duties of his office; nor do these facts render a panel of jurors selected, and summoned by him under direction of the court subject to challenge.<sup>7</sup> Some distinction, however, seems to be taken in a case where the officer is not the sole witness for the prosecution and in a case where he is; in the latter case, it is ground for challenge.<sup>7a</sup> Under some statutes it is ground for challenge to the panel where the officer selecting and summoning the veniremen would be disqualified to serve as a juror on the case; and where he would be subject to a challenge as a juror because he had formed or expressed an opinion as to the merits of the case, this is sufficient ground to challenge a panel on which the veniremen were selected and summoned by him.<sup>7b</sup> The true test is the officer's implied bias, such as by reason of relationship or interest as would render him disqualified to serve as a juror; if the answer is in the affirmative then any jury panel summoned by him is subject to challenge.<sup>7c</sup> It also seems the array

(2d) 16, 52 Okl Cr 429; *Oliphant v. State*, 282 SW 206, 153 Tenn 130.

Where the sheriff and deputies are entitled to half of the fines imposed in liquor prosecutions they are disqualified to summon a jury to try a defendant for possession and transportation of liquor. *Oliphant v. State*, supra.

*Quinebaug Bank v. Tarbox*, 20 Conn 510; *State v. Barber*, 88 P 418, 13 Idaho 65; *People v. Felker*, 28 NW 83, 61 Mich 114; *State v. Dibley*, 147 SW 111, 242 Mo 461; 3 Black Com. 359.

6. *Anderson v. Southern Pacific Co.* 18 P(2d) 703, 129 Cal App 206.

7. *Noonan v. State*, 221 NW 434, 117 Neb 520, 60 ALR 1118; *Booth v. State*, 94 P(2d) (Okl Cr App) 846; *Watkins v. State*, 295 P 417, 49 Okl Cr 443.

7a. See cases cited note 7, supra, this section.

7b. *People v. Le Doux*, 102 P 517, 155 Cal 535; *People v. Coyodo*, 40 Cal 536; *Riley v. Southern Pac. Co.* 207 P 699, 57 Cal App 477; *State v. Jordan*, 112 P 1049, 19 Idaho 192; *State v. Kent*, 62 NW 631, 4 ND 577, 27 L.R.A. 686.

7c. *Riley v. Davis*, supra; *State v. Jordan*, supra.

is challengeable, under some statutes on the ground of implied bias, where a disqualified officer summons, but does not select the veniremen.<sup>7d</sup> Where the ground of challenge is that officer summoning the veniremen had not taken the oath prescribed by law before executing the venire, it is no ground of complaint that the oath is taken and same men are re-summoned on the panel by the same officer.<sup>7e</sup> The fact that a deputy is disqualified does not operate to disqualify the chief officer to select or summon a jury, but the converse is true if the principal officer is disqualified.<sup>7f</sup> And, it would seem to follow, that where one deputy was disqualified to act, that would not militate against other qualified deputies selecting and summoning veniremen in the name of the sheriff.

**§ 281. Consanguinity or Affinity of the Sheriff to a Party Cause of a Challenge to the Jury.**—At common law it constituted a good ground of challenge to the jury panel summoned by the sheriff that he was related by consanguinity or affinity to one of the parties in the action even to the ninth degree.<sup>8</sup> It has been held that where the sheriff who summoned the jury was a son of a party that constituted a good ground for challenge to the panel, but that such an objection came too late on motion for a new trial.<sup>9</sup> Where the summoning officer was uncertain as to his relationship to the person for whose death the defendant is on trial the panel should not be quashed, especially where it appears by affirmative and clear proof that the ministerial duty of summoning the jury was properly performed.<sup>10</sup>

**§ 282. Relation of the Sheriff with One of the Parties Will Be a Ground for Challenge to the Panel.**—It is important that the sheriff in summoning the jurymen must be impartial and unbiased.<sup>11</sup> It is sufficient to show partiality or bias if he is a party to the action.<sup>12</sup> It also shows partiality or bias on the part of the

7d. *Cowgill v. Wooden*, 2 Blackf (Ind) 332; *Woods v. Rowan*, 5 Johns. (NY) 133; *Munshower v. Patten*, 10 Serg & R (Pa) 334, 13 AD 678; *Hammock v. State*, supra.

7e. *Parker v. State*, 261 SW (Tex Cr App) 782, 98 Tex CRR 209.

7f. *People v. Le Doux*, supra, note 7b.

8. *Allen v. Com.* 12 SW 582, 11 Ky L 555; *Vernon v. Manners*, 3 Dyer 319; *Goodman v. Frankellin*, 5 Coke 36B; *Oulton v. Morse*, 2 Kerr (NB) 286

77. See also *Murfree on Sheriffs*, Sec. 385.

9. *Rector v. Hudson*, 20 Tex 234.  
10. *Com. v. Manfredi*, 29 Atl 404, 162 Pa 144.

11. *Cravens v. U. S.* 62 F(2d) 261, certiorari denied, 55 S Ct 694, 289 US 733, 77 L ed 1481; *Welch v. State*, 254 P 503, 36 Okl Cr 298.

12. *General Film Co. v. McAfee*, 145 P 707, 58 Colo 344; *State v. Winchester*, 122 NW 1111, 18 ND 534, 21 AC 1190, 10 ND 750.

sheriff if he is a relative of a party<sup>13</sup> or has acted as an attorney in behalf of one of the parties to the lawsuit in which he summons the panel. It is also ground for challenge if it is shown that the officer will benefit one way or the other in the outcome of the lawsuit in which he summons the jury, although his name does not appear as a party of record.<sup>14</sup>

The above mentioned rule in regard to the summoning of a jury has application although the sheriff himself has nothing to do with the selection of the individuals that comprise the jury.<sup>15</sup> Where the parties consent to summoning a jury panel by a sheriff who it appears, may be, so interested as to be biased or partial, cannot after the verdict of the jury raise error on this ground.<sup>16</sup>

### § 283. When Sheriff Is Party to the Suit Challenge to the Panel.

—It was early decided that where the sheriff was a party to the action, that constituted good ground to challenge a jury panel summoned by him to act. This was held to be so, even though he had nothing to do with making up of the jury list, but merely served the writ upon them, which directed them to appear. The early case of *Woods v. Rowan*, 5 Johns. (N. Y.) 133, laid down the rule as follows: "It is true that the sheriff no longer selects the whole panel, and that it now is his duty to summon all such persons as shall have been previously balloted by the clerk; and hence it is argued, that the challenge to the array in this case, was properly overruled. I cannot accede to this conclusion. The sheriff certainly may select such of them as he may suppose will best subserve

13. *Allen v. Com.* 12 SW 582, 11 Ky L. 555.

14. *People v. Felker*, 28 NW 83, 61 Mich 114; *People v. Tweed*, 50 How Pr (NY) 286, 11 Hun 195.

In the case of *People against Tweed*, the court said, "The remaining question is, who should summon the talesmen? It is claimed that the sheriff of the city and county is a party to the suit, because, by his negligence, Tweed was allowed to escape, and as there was an order of arrest, he may be made liable. This, it is argued, makes the sheriff a party in fact, though not so on the record. The strength of this argument is somewhat doubtful. It does not appear that the property of Tweed may not be ample to meet the recovery, if one be had. Still, we can readily see, as the claim made is

about \$1,000,000.00, that the sheriff must feel a good deal of solicitude as to the result, and his feelings, at least, must be with the defense. Regarding him as honest, but still human, the court should not allow, unless so required, his duty and his interest to collide. Apart from any statute, the court has power to see its orders executed by a proper person. In this case it will exercise it by directing the summoning of the tales by one of the coroners." *People v. Tweed*, 50 How Pr Rep 286, 290, 11 Hun 195.

15. *Woods v. Rowan*, 5 Johns (NY) 133; *Munshower v. Patten*, 10 Serg & R (Pa) 334, 13 AD 678; see note 7d, Sec. 280, supra.

16. *State v. Steen*, 158 P 499, 29 Idaho 337.

his purpose, and by summoning them, and omitting to summon the rest, he may in many cases as effectually pack a jury, as if he had the power of selecting the whole panel." The rule is followed in Indiana.<sup>17</sup>

§ 284. When the Officer Is Attorney of a Party.—One of the grounds for challenge to the panel at common law was and still in general is, that the sheriff who summoned the jury was an attorney or acted as an attorney for one of the parties to the action in which the jury was to sit.<sup>18</sup> It is likewise held at common law, that if the sheriff who summoned the jury was also the prosecutor, that such constituted a good ground for challenge to the panel.<sup>19</sup> Such objection must be taken in good time or it is waived.<sup>20</sup> These rules, no doubt, obtain in our day in most, if not all jurisdictions.

§ 285. Interference of Litigant When Cause of Challenge to the Panel.—It goes without saying that the litigant to a cause should not endeavor to influence the sheriff in the selecting of the jury, so that the litigant would have an advantage over an adversary in court. The Pennsylvania court said: "We think it proper to call the attention of the members of the bar again to the danger of in any manner interfering with or attempting to influence in the performance of their duties of public officers whose duty it is to fill the jury wheel. Even when this is done without an improper motive it is bound to arouse a suspicion of unfairness and of an effort to obtain an undue influence in the trial of causes."<sup>21</sup> It is the duty of the sheriff to see that every specie of interference by the parties be prevented, and that no discrimination be made between such interference as may be harmless, and such as may be injurious.<sup>22</sup> If there is any discrimination by the sheriff, when he is influenced by one of the litigants, it is good ground for challenge to the panel.<sup>23</sup>

§ 286. De Facto Officer Not Ground of Challenge to Panel.—It was early held that it was not good ground of challenge to the panel, that the one who summoned the jury was a de facto officer,

17. *Cowgill v. Wooden*, 2 Blackf (Ind) 332. See note 7d, Sec. 280, supra.

18. *Tallman v. Woodworth*, 2 Johns (NY) 385; *Watkins v. Weaver*, 10 Johns (NY) 107; *Bayliss v. Lucas*, Cowp 112, 98 Eng Rep 995.

19. *Rex v. Shepard*, 1 Leach CC 119.

20. *Rex v. Shepard*, supra.

21. *Lewis v. Stineman*, 25 Pa Dist 240, 43 Pa Co 589.

22. *McDonald v. Shaw*, 1 NJL 6.

23. *Quinebaug Bank v. Tarbox*, 20 Conn 510.

and did not have good title to his office at the time the jury was summoned.<sup>24</sup> Where a special officer was appointed to serve a special venire for thirty persons, and subsequently it turned out that such officer did not take an oath of office before summoning his first veniremen, it was held that nevertheless such was not ground for challenge to the panel since the officer was a de facto one. The general rule seems to be that the legal right of a sheriff or other officer to his office cannot be collaterally attacked upon a motion to quash a venire of jurors.<sup>25</sup>

§ 287. **Rule as to Professional Jurors.**—In many states it is provided by statute that the sheriff should refrain from selecting anyone who may be regarded as a professional juror. The local sheriff in summoning a juror should consult his local statutes to determine whether there is in his particular state such an enactment. It is sometimes made a misdemeanor for an officer to summon a professional juror for service. In addition, it is in some states provided by statute that a talesman is disqualified when he has served as a juror within a specified time or for a stated length of time within a specified period.<sup>26</sup> These statutes, directed as they are at eliminating the professional juror are to be given a liberal construction to effectuate their wholesome object.<sup>26a</sup>

§ 288. **Sheriff Must Not Catechise Prospective Jurors.**—The duty of the sheriff ceases upon his summoning the prospective jurors as directed. It is no part of his duty to inquire, or question a venireman in regard to his qualifications.<sup>26b</sup> It has been by the Court well said: "Under our system of administering criminal law, the jury is a feature of the very highest importance. The selection of the jury is not a mere gesture. The rhetorical remark of a British statesman that 'The whole machinery of the state, all the apparatus of the sys-

tem, and its varied workings, end in simply bringing twelve good men into the box' carried a real truth. Although men may differ widely as to the merits of the jury system, yet it would seem to be apparent that unauthorized communication with jurors, such as the one here under consideration, whether by private litigants or public officials, are not calculated to increase respect for the system nor to eliminate its faults. The sending out of the questionnaire by the clerk was open to numerous and serious objections; it was without authority of law."<sup>27</sup> It has been held that the summoning officer is beyond the scope of his duty in interrogating prospective jurors which he is summoning as to whether or not they have scruples against or object to the death penalty.<sup>28</sup> On the other hand it has been held that where a sheriff questions a juror and rejects him because of his response to questioning by the sheriff, that, unless it is shown that the officer acted corruptly or that the defendant was prejudiced in some way by such rejection, a verdict rendered by a jury summoned by such sheriff, in this manner, will not be vitiated.<sup>29</sup>

§ 289. **Sheriff Must Not Excuse Talesmen from Service.**—The exclusive power to excuse a citizen from jury duty rests alone with the court.<sup>30</sup> Even though the sheriff knows or has cause to believe that part of the jurors which he summoned are ill, or in some manner disqualified from serving on the jury, and thus exempt this does not excuse his failure to summon them.<sup>31</sup> The sheriff is likewise exceeding his authority, even in a jurisdiction where he is authorized to select as well as summon the jury, to excuse the talesmen after he has been directed to appear and serve as a juror, and substitute another in his place.<sup>32</sup> In order, however, for such excusing to constitute grounds for reversing the judgment, or granting a new trial it must appear that the officer's motives were corrupt, or that the parties were prejudiced by his action.<sup>33</sup>

290. **Duty of Sheriff in Charge of Jury.**—An officer having charge of a jury, is under duty to see that they are kept apart and to themselves, and that no one speaks to them while they are de-

27. In the case of *Wilson v. United States*, 104 F(2d) 81, where a similar questionnaire was sent out, the Gideon case was distinguished upon the ground that the facts were distinguishable. *Gideon v. United States*, supra.

28. *Joy v. State*, 14 Ind 139.

29. *Joy v. State*, supra.

30. *Ayers v. Metcalf*, 39 Ill 307; *State v. Switzer*, 145 P 925, 38 Nev 108; *Brooklyn v. Patchen*, 8 Wend (NY) 47.

31. *Ezell v. State*, 15 So 810, 102 Ala 101; *Gay v. State*, 49 SW (Tex Cr) 612, 40 Tex Cr 242.

32. *Brooklyn v. Patchen*, supra.

33. *Ayers v. Metcalf*, supra.

[1 Anderson on Sheriffs]

24. *House v. Broom*, Cro Eliz 369. See also *Turner v. Hill*, 21 La Ann 543; *State v. Ferray*, 22 La Ann 423.

25. *State v. Ferray*, 22 La Ann 423; *Turner v. Hill*, 21 La Ann 543; *Greenwood v. State*, 299 P 248, 51 Okl Cr 74.

26. *Denver City Tramway Co. v. Kennedy*, 117 P 167, 50 Colo 418; *Dedge v. State*, 47 So 43, 68 Fla 240; *Wall v. State*, 54 SE 815, 120 Ga 80; *Brown v. State*, 57 SE 1021, 1 Ga App 518; *Mason v. State*, 83 NE 613, 170 Ind 195; *Brooks v. Jennings Agricultural Joint-Stock Ass'n*, 73 NE 951, [1 Anderson on Sheriffs]—19

35 Ind A 221; *State v. Lowe*, 44 P 20, 56 Kan 594; *People v. Thacker*, 66 N W 562, 108 Mich 652; *Burden v. People*, 26 Mich 162; *Figg v. Donahoo*, 95 NW 1020, 4 Neb (Unoff) 661; *Fooshee v. State*, 108 P 554, 3 Okl Cr 666; *Smith v. State*, 52 SW 192, 102 Tenn 721; *Monk v. State*, 11 SW 460, 27 Tex App 450; *State v. Hall*, 64 P 153, 24 Wash 255; *Hughes v. State*, 85 NW 333, 109 Wis 397.

26a. *Atlanta, etc. R. Co. v. Ray*, 70 Ga 674; *Bissell v. Ryan*, 23 Ill 566.

26b. *Gideon v. U. S.* 52 F(2d) 427.



liberating upon a verdict.<sup>34</sup> The officer has no right to, and, it is his duty not to remain in the jury room while the jury is deliberating. And, in particular, he should not, at any time, talk to them about the case, and where the officer threatened to fine one juror, who declined to vote, it was held to be reversible error.<sup>35</sup> The officer has no right to suggest matters to bring about, or to try to frighten them into an agreement.<sup>36</sup> However, it is proper for the officer in charge to answer the foreman of the jury as to whether or not they could obtain further information, in regard to part of the evidence which was not clear.<sup>37</sup> It is also proper for the officer in charge of the jury to carry a message to the court, that the jurors requested that the court instruct them further in regard to a particular point, which was not clear to them.<sup>38</sup> It is not proper for the jurors to send the officer in charge to secure evidence while attempting to arrive at a verdict. And the officer in charge should refuse a request in such case.<sup>39</sup> Likewise, they have no right to send the officer and the officer has no right to go after books and papers which are material to the case, particularly where the officer goes privately and without any information thereof on the part of the attorneys or the trial judge.<sup>40</sup>

Generally, in the absence of statutory or constitutional provision, it is within the trial court's discretion, as to whether or not the jurors should be separated before a final submission of the case to them, and unless so directed it is no concern of the officer.<sup>41</sup>

Where one of the jurors becomes ill he may be treated under the charge of the officer, by a physician.<sup>42</sup>

§ 291. Isolation of Jury in Criminal Cases; Duty and Responsibility of Sheriff.—It is the duty of the officer in custody of the jury to prevent the jurors from being separated at any time so that the question can not be raised that they were subject to outside in-

34. *Brossard v. Chicago, M. & St. P. R. R. Co.*, 149 NW 915, 167 Iowa 703.

35. *Heston v. Neathammer*, 54 NE 310, 180 Ill 150. See Sec. 291, note 40, *infra*.

36. *Alabama Fuel & Iron Co. v. Rice*, 65 So 402, 187 Ala 458; *Obear v. Gray*, 68 Ga 182.

37. *Baird v. Stephens*, 228 NW 212, 68 ND 812.

38. *Baird v. Stephens*, *supra*.

39. *Ketchum v. Chicago, St. Paul,*

*M. & O. R. R. Co.*, 136 NW 634, 150 Wis 211.

40. *Ketchum v. Chicago, St. Paul, M. & O. R. R. Co.* *supra*.

41. *Cook v. Miller*, 130 Atl 571, 103 Conn 267; *Smith's Adm'x. v. Middleboro Electric Co.*, 174 SW 773, 104 Ky 46, AC1917A, 1164; *Warner v. N. Y. Central Railway Co.*, 52 NY 437, 11 Am R 724; *Poole's Seed & Implement Co. v. Rudene*, 200 P 1104, 117 Wis 150.

42. *Spencer v. Johnson*, 151 NW 684, 185 Mich 85.

fluence.<sup>43</sup> Prejudice will usually be presumed where there is a separation, in cases where the offense committed is punishable by death or life imprisonment.<sup>44</sup> However, it is generally held in any event that if prejudice is shown a new trial will be granted.<sup>45</sup> It is likewise the duty of the officer during the deliberation of the jury to stay out of the jury room.<sup>46</sup> Where an officer in charge of the deliberating jury, permits a stranger to mingle with them, he is subject to punishment by the court as for contempt.<sup>47</sup> From the above and foregoing it can be seen that it is the duty of the sheriff, in criminal cases to keep the jury separate and apart from others, and free from all outside influence, so that they can arrive at a verdict fairly and impartially.

43. *Ferguson v. State*, 129 SW 813, 95 Ark 428; *State v. Robinson*, 43 Am R 799, 20 W Va 713; *Nicholson v. State*, 100 P 929, 18 Wyo 298.

44. *Smith v. State*, 40 Fla 203, 23 So 854; *State v. Baudoin*, 40 So 42, 115 La 773.

45. *Holt v. U. S.*, 31 S Ct 2, 218 US 245, 54 L ed 1021; *People v. Cord*, 108 P 511, 157 Cal 562; *Com. v.* 292

*Edgerton*, 86 NE 708, 200 Mass 318.

46. *Quinn v. State*, 30 NE 300, 130 Ind 340; *Gandy v. State*, 40 NW 302, 24 Neb 716. See Sec. 290, note 35, *supra*.

47. *People v. Flack*, 9 NYS 279, 8 NY Cr 31, affirmed 10 NYS 475, reversed on other grounds, 26 NE 267, 125 NY 324; *Com. v. Lombardi*, 70 Atl 122, 221 Pa 31.

CHAPTER XI

CIVIL LIABILITY OF SHERIFF FOR WRONGFUL ARREST AND MISCONDUCT

SECS.

- 292. Liability for Taking Prisoner before Wrong Magistrate.
- 293. Liability for Malicious Arrest.
- 294. Civil Liability for Assault and Battery.
- 295. Liability for Cruelty or Exposure of Arrested Party.
- 296. Conversion of Prisoner's Property.

§ 292. **Liability for Taking Prisoner before Wrong Magistrate.**—Where a party is arrested upon a charge and the officer making the arrest thereafter contrary to the provisions of a statute requiring the taking of the prisoner before a court or magistrate within the municipality where the arrest is made, takes him before a court or magistrate in another city, town, or village, such conduct amounts to an invasion of the prisoner's right for which the officer is liable and he is a trespasser upon the rights of the arrested party in so doing. The course of conduct as set out above is not a substantial compliance with the statute; a substantial compliance therewith is the officer's measure of duty.<sup>1</sup> Statutes designating the magistrate before whom a prisoner is to be taken are mandatory, and not merely directory.<sup>1a</sup> However, at common law, which is the controlling rule in the absence of statute, if the prisoner commits a felony in one county and flees to another, on being arrested in the latter county he must be taken before a magistrate of the latter, and if arrested and he thereafter breaks custody, and flees into another county he may be taken before a magistrate of either county.<sup>1b</sup>

§ 293. **Liability for Malicious Arrest.**—Where a police officer engages in a quarrel which had terminated, and then the officer arrests the other party upon a charge of breach of the peace and imprisons him for about one hour which arrest appeared to be wholly unjustified, and of which the arrested party was thereafter acquitted, the officer is liable in damages for false ar-

1. *Wiggins v. Norton*, 9 SE 607, 83 Ga 148; *Papineau v. Bacon*, 110 Mass 319. See also *Gainey v. Parkman*, 100 Mass 316.

1a. *Lamb v. Dillard*, 21 SE 463, 94 Ga 206.

1b. 1 Hale PC 580.

rest, false imprisonment, and assault and battery.<sup>2</sup> Other arrests than those prompted by malevolence may make the officer liable therefor; within this category falls arrests, even under process, at times unwarranted by law, as at night or on Sunday or a holiday. It is sometimes enacted by statute that an arrest for certain offenses, usually misdemeanors, can not be effected at night and an arrest made in violation thereof is an invasion of the arrested party's rights rendering the officer making it liable for assault and battery, for false imprisonment, and the like.<sup>2a</sup> A request from an officer of another county to arrest one on a misdemeanor is no authority therefor, and an arrest made in response thereto is illegal rendering the arresting officer liable.<sup>2b</sup> Indeed there is no authority to arrest any fugitive except as conferred by legislative enactment which must be strictly pursued.<sup>2c</sup> In the absence of statute an arrest of a fugitive can not be made upon a request from the state from which it is asserted that the alleged fugitive fled by telegraph, personally or otherwise.<sup>2d</sup> An arrest made upon a ground which turns out to be untenable in law is not justifiable on another when the right of the arresting party is thereafter questioned.<sup>2e</sup>

§ 294. **Civil Liability for Assault and Battery.**—A sheriff, constable, or other officer has no license to commit an unlawful assault and battery upon a citizen. This conduct warrants the visitation upon him of damages therefor.<sup>3</sup> If an officer of the law uses more force than is reasonably necessary to bring a party he proposes to arrest under his subjection, he is liable therefor, and in all probability would be regarded as a trespasser ab initio. In other words, it is not the province of the sheriff, constable, or other officer to exert

2. *Smith v. Dulion*, 37 So 864, 113 La 882.

2a. *Murphy v. Kron*, 44 Hun 624, 8 NY St 230, 20 Abb N Cas 259; *MacDonnell v. McConville*, 132 NYS 1095, 148 App Div 132, 103 NE 1126, 210 NY 529.

2b. *Malcomson v. Scott*, 23 NW 160, 56 Mich 459.

2c. *Bank of Cottonwood v. Hood*, 149 So 676, 227 Ala 237; *Ex parte Rosenblat*, 51 Cal 285; *State v. Engle*, 162 Atl 922, 115 Conn 638; *MacDonnell v. McConville*, supra.

2d. *Harris v. Louisville N. O. & T.*

R. Co. 35 F 116; *Cunningham v. Baker*, *Peterson & Co.* 16 So 68, 104 Ala 160, 53 ASR 27; *Simmons v. Vandyke*, 37 NE 973, 138 Ind 380, 26 LRA 33, 46 ASR 411; *Wells v. Johnston*, 27 So 185, 52 La Ann 713; *Scott v. Eldredge*, 27 NE 077, 154 Mass 25, 12 LRA 379; *State v. Shelton*, 70 NC 605; *State v. Engle*, supra.

2e. *Wright & Taylor v. Leigh*, 16 SW (2d) 493, 229 Ky 32; *Noe v. Meadows*, 16 SW (2d) 505, 229 Ky 53, 64 ALR 648; *MacDonnell v. McConville*, supra.

3. *Moriarity v. Harris*, 10 Ont L 610, 6 Ont WR 232.

more force upon a citizen than is necessary for the carrying out of his duties, and discharging the functions of his office. The rule that, except in self-defense, the officer has no right to shed blood in arresting or preventing the escape of one he has arrested for an offense less than a felony, springs from the principles, and humane consideration, of due regard for life, rights, and liberties of the prisoner.<sup>4</sup>

An officer is liable generally where he kills, when he is attempting to arrest or prevent an escape after an arrest for a misdemeanor. However the rule would seem to be different where the arrested party attempts a felonious assault on the officer. The theory of some of the cases is, in this respect, by such an assault on the officer he thereby commits a felony, and then the officer may resort to force in making the arrest, or preventing an escape, and he is not liable civilly for wounding or taking the life of the prisoner.<sup>5</sup>

It is wholly unlawful for an officer of the law to shoot at a party guilty of a misdemeanor when the party is doing nothing more than fleeing, and the same is true with respect to shooting at a fleeing automobile.<sup>6</sup>

An officer is without authority to strike a prisoner in the face with a billy when the prisoner is guilty of no greater misconduct than refusing to place his hands in a position where they can be readily handcuffed. And it would seem to follow that if the prisoner was arrested for a felony, but was merely disobedient in this respect—not resisting and making no attempt to escape—still the officer would be liable in damages for injuries thus inflicted.<sup>7</sup>

Where an officer made an arrest of a party under a mistake as to identity, and still laboring under the mistake shot him, when he was attempting to escape, the officer is liable civilly if in the exercise of due care and diligence the mistake could have been discovered before firing the shot.<sup>8</sup> An officer firing a shot at a prisoner, under circumstances making it illegal for him so to do, is liable to a third party whom he accidentally shoots even though the third party in the excitement runs in the line of fire, and would

4. *Edgin v. Talley*, 276 SW 591, 169 Ark 662, 42 ALR 1194, and note; *Towle v. Mathews*, 62 P 1064, 130 Cal 574; *Lane v. Butler*, 225 Ill App 392.

5. *Hickey v. Com.* 215 SW 431, 185 Ky 570; *Collins v. Com.* 233 SW 896, 102 Ky 412; *Head v. Martin*, 3 SW 622, 85 Ky 480, 9 Ky L 45, note, 3 LRA 770; *Geros v. Harries*, 236 P 220, 65 Utah 227, 39 ALR 1297.

6. *Brown v. Weaver*, 23 So 388, 76 Miss 7, 71 ASR 512, 42 LRA 423; *Edgin v. Talley*, supra.

7. *Brown v. Wyman*, 105 NW 52, 224 Mich 300.

8. *Kopplekom v. Huffman*, 10 NW 577, 12 Neb 95.

See also *Helgeson v. Powell*, 34 P (2d) 957, 54 Idaho 667.

not otherwise have been shot, and the fact that such third party does so will not render him guilty of contributory negligence barring a right of recovery.<sup>9</sup>

Where a number of officers agree to wait upon a highway and intercept, and stop or attempt to stop travelers thereon with the view to finding someone violating the law are acting without the pale of lawful authority; and if there is no statute authorizing such action the common law certainly can not be appealed to to sustain it, and where they attempt to halt a traveler without a warrant or making known their identity to him who is peaceably traveling in a lawful manner, the officers are guilty of a wanton wrong with respect to such citizen, and further, the agreement to wait upon the highway, to stop travelers for the purpose of ascertaining if the law is being violated makes all of the officers liable for an act of any one of them, since such interception is not authorized under these circumstances, and where an accosted citizen believes he is being stopped by highwaymen, although it had been agreed by the officers that no shots were to be fired, still if the citizen thinking he is about to be robbed, and flees, and one of the officers shoots him, all of the officers are liable therefor, and the fact that the citizen was riding in an automobile and which after being accosted and by reason of his belief that he was about to be placed in the hands of highwaymen, the automobile speeded up in violation of a speed law is no defense to the officers for shooting the citizen; also the fact that another occupant of the car in which the injured citizen was riding possessed whiskey, which was unknown to the injured party, is no defense for the conduct of the officers, in shooting into the automobile and injuring the citizen under these circumstances. Neither is it any defense in such an action where the officers had information that liquor would be transported in violation of a law during certain hours of the night and agreed to intercept travelers over such road during such time, while they were acting without a warrant of arrest, but they were actuated by good intentions; and, the further fact, that they were acting upon the advice given them by an attorney of the city, that they had authority to stop and arrest travelers unlawfully transporting liquor, is no defense in a suit for damages by the aforesaid injured party.<sup>10</sup>

9. *State v. Cloud*, 116 So 814, 160 Miss 697; *Mitchell v. Hughes*, 176 P 26, 104 Wash 231; *Edgin v. Talley*, supra.

10. *Mitchell v. Hughes*, supra.

§ 295. **Liability for Cruelty or Exposure of Arrested Party.**—An officer may not lawfully expose to cold or deprive a prisoner of suitable clothing or covering while he is in the custody of the officer, or is being transported to jail or other place, and such conduct on the part of the officer would be unlawful and would subject him to liability for damages.<sup>11</sup>

If a prisoner is unlawfully assaulted or otherwise ill treated during the time he is arrested he is entitled to recover at least nominal damages.<sup>12</sup> An officer having a prisoner in custody may lawfully resort to taking his measurements and otherwise take steps necessary for identification and recapture in case of escape, and so long as this is done without malice, wantonness, or recklessness, and within the bounds of the common dictates of humanity the officer is not guilty of assault and battery in so doing.<sup>13</sup>

§ 296. **Conversion of Prisoner's Property.**—It may be stated as a general rule where an officer takes from the prisoner property to the possession of which the officer was not lawfully entitled, he may be sued in action of trover for conversion. An officer upon arresting a person charged with larceny who takes from him other property than that alleged to have been stolen, and refuses to restore it upon demand, and retains possession thereof after the accused has been convicted is liable in damages for conversion. If the property so taken is a promissory note and during the interim while it is in possession of the officer, the maker becomes insolvent, the measure of damages is the value of the note at the time of the conversion by the officer and the interest thereon thereafter for which recovery may be had against the officer.<sup>14</sup> An officer may likewise commit an act of conversion in failing to return to the prisoner property taken from him on his arrest, on demand upon his discharge, and it will be no defense to the action that afterwards the complainant in the criminal complaint upon which the accused was arrested, who was not in fact the owner of the goods taken by the officer, has nevertheless taken a default judgment against him for the goods and has taken them from the officer's possession.<sup>15</sup>

11. *Petit v. Colmery*, 55 Atl 344, 4 Pen(Del) 266, see also *Eberhart v. Murphy*, 194 P 415, 113 Wash 449, 188 P 17, 110 Wash 158.

12. *Union Indemnity Co. v. Cunningham*, 114 So 285, 22 Ala App 226; see also Sec. 294, supra.

13. *State v. Clausmier*, 57 NE 541, 154 Ind 599, 50 LRA 73, 77 ASR 511.

14. *King v. Ham*, 6 Allen (Mass) 298.

15. *Fitzgerald v. Jordan*, 11 Allen (Mass) 128.

## CHAPTER XII

## NE EXEAT, INJUNCTION, ATTACHMENT, AND SUBPOENA

## SECS.

- 297. Intermediate and Ancillary Process.
- 298. Writ of Ne Exeat.
- 299. Writ of Injunction and Its Service.
- 300. Binding Effect of Knowledge of Injunction.
- 301. Service of Injunction upon Corporation.
- 302. Subpoena for Witnesses
- 303. Subpoena for Witnesses in Criminal Case.
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- 306. By Whom Subpoena ad Testificandum May Be Served.
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- 311. Breaking Doors to Serve.
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- 313. Subpoena Duces Tecum.
- 314. Subpoena Duces Tecum in Cases Where Witness Testifies by Deposition.
- 315. What May Be Produced in Response to Subpoena Duces Tecum.
- 316. Applicability of Subpoena Duces Tecum to Corporate Records.
- 317. Statutory Enactment as Not Preventing Production of Documents and Papers on Subpoena Duces Tecum.
- 318. The Service of Void Subpoena Duces Tecum.
- 319. Subpoena Duces Tecum Directed to and Served upon an Unincorporated Association.
- 319A. Service of Subpoena Duces Tecum Generally Considered.
- 320. Service of Habeas Corpus ad Testificandum.
- 321. Service and Obedience to Writ of Habeas Corpus ad Testificandum.
- 322. Attachment of Witness for Contempt.
- 323. Arresting Witness on Attachment.
- 324. Authority to Break Doors in Executing an Attachment for Contempt.

§ 297. **Intermediate and Ancillary Process.**—It is necessary to notice some intermediate and ancillary process that a sheriff from time to time may be called upon to serve. These are the writs of ne exeat, injunction, attachment and a subpoena.<sup>1</sup>

§ 298. **Writ of Ne Exeat.**—Originally, this was a prerogative writ obtaining in England and generally issued for political reasons requiring security of persons contemplating a departure be-

1. *Murfree on Sheriffs*, Sec. 340.

yond the realm and prohibited their departure without the King's permission.<sup>2</sup> Later, it was applied as a civil remedy and issued out of the English court of chancery, to prevent debtors' escape from creditors. It seems to have made its appearance during the reign of Queen Elizabeth and to have become firmly established in the system of English jurisprudence, as a remedial civil process, grantable by the court of chancery, largely based on equitable demands and was treated in effect as process to hold a defendant to equitable bail or to give security to answer a decree that may be rendered against him.<sup>3</sup> In this respect it is similar to civil arrest, at common law. It is referred to in Lord Bacon's ordinances, and it is there stated that it may issue in cases of interlopers in trade, great bankrupts in whose estates many subjects were interested or other cases that concerned a multitude of the King's subjects; also in cases of duels and divers others.<sup>4</sup> The original form of this writ was *ne exeat Regno* or *ne exeat Regnum* but the form of the writ assumed in the American jurisdictions is *ne exeat Republica*. Perhaps its more modern form is regarded as limited process and the function of which is to hold to bail or compel a party to give security to abide a decree that may be rendered against him.<sup>5</sup> The writ has been largely abolished in the American jurisdictions upon the basis that it was unsuited to American institutions but it still clings to the obtaining systems of jurisprudence in some states.<sup>6</sup> Even in those jurisdictions, where the writ of *ne exeat* no longer exists, other similar proceedings are substituted for it, performing largely its functions and attaining in general its results.<sup>7</sup> The commencement of the suit in a proper court is a prerequisite to the issuance of the writ, and to this extent the sheriff is concerned with the court issuing the writ to the end that it had jurisdiction of the subject matter. It can only be issued out of a court of chancery or other court corresponding thereto. It can not be issued by a justice of the peace. But whatever court issues the

2. 2 Kent's Com. 33 et seq. Note 14 AD 560.

3. Adams v. Whitcomb, 46 Vt 708; Russell v. Ashby, 5 Ves Jr 91; Biapham's Prin. Eq. (4th ed) Sec. 581. Note 14 AD 560.

4. Note 14 AD 560.

5. Lamar v. Lamar, 51 SE 703, 123 Ga 827, 107 ASR 169, 3 AC 294; note 14 AD 560; McGee v. McGee, 8 Ga 295, 52 AD 407; Adams v. Whitcomb, 46 Vt 708; Davidor v. Rosenberg, 100

NW 925, 130 Wis 22, 118 ASR 986, and note; Biapham's Prin Eq (4th ed) 581.

6. Bronk v. State, 31 So 248, 43 Fla 461, 99 ASR 119; Midland County v. Broat, 52 NW 972, 50 Minn 502, 17 LRA 312; Davidor v. Rosenberg, supra.

Notes 14 AD 561, 28 AD 429, 118 ASR 989, 3 AC 297.

7. Notes 3 AC 297, 14 AD 561; Davidor v. Rosenberg, supra.

writ it must pursue the course of practice of the court of chancery.<sup>8</sup> It may be issued to protect and make effectual an order or decree for the payment of alimony.<sup>9</sup> This writ must be served upon a week day and it is not lawful to serve it either on Sunday or a holiday.<sup>10</sup> And if the defendant makes bond after a writ is served upon him on Sunday, the whole proceeding is void and the bond is ineffectual for any purpose, and no liability may be asserted thereon.<sup>11</sup> Before the writ will be issued the plaintiff is required to give bond, but failure so to do does not vitiate the writ and, if legal on its face, doubtless protects an officer executing it.<sup>12</sup>

The writ of *ne exeat* is executed in general like any other order, or process authorizing an arrest, and upon being arrested and giving bond the defendant is entitled to his discharge.<sup>13</sup> It seems that in these cases that the court endorses on the writ the amount of bail necessary to enlarge the defendant, and that the officer performs the function of accepting and approving the bail.<sup>14</sup> Indeed, it may be stated that upon the giving of the bond endorsed upon the writ by the court, with sureties of sufficient qualifications, the sheriff is duty bound to discharge the defendant.<sup>15</sup> It was formerly held in England that the sheriff could demand any bond he desired when he had the defendant in custody under this writ.<sup>16</sup> But in this country, if the sheriff refuses to take sufficient bail, the defendant may apply to the court to be discharged under bail tendered, and if it seems to be sufficient the court will discharge the defendant.<sup>17</sup> However the sheriff taking bail acts at his peril, and it would seem to follow that in the event no bail is given the sheriff has but one duty and that is to retain the defendant in custody and produce him in court.<sup>18</sup>

8. Note 118 ASR 994.

9. Lamar v. Lamar, supra; Bronk v. State, supra.

10. Jewett v. Bowman, 27 NJE 275. Notes 14 AD 563, 118 ASR 997, 7 LRA 398.

11. Jewett v. Bowman, supra.

12. Spivey v. McGehee, 21 Ala 417; Bronk v. State, 31 So 248, 43 Fla 401, 99 ASR 119; Straughan v. Inge, 3 Ind 167; Graham v. Noble, 19 La App 512.

13. Griswold v. Hazard, 11 S Ct 972, 141 US 280, 35 L ed 678; McGee McGee, 8 Ga 295, 52 AD 407; Old Hickory Distilling Co. v. Bleyer, 74 Ga 201; Burnsides v. Blythe, 60 Ky (11 B Mon) 6; Cary v. Cary, 30 NJE 300

3.

14. Harris v. Hardy, 3 Hill(NY) 393; Viadero v. Viadero, 7 Hun (NY) 313; Mitchell v. Bunch, 2 Paige(NY) 606, 22 AD 609; McNamara v. Dwyer, 7 Paige(NY) 239, 32 AD 627; Gleason v. Bisby, 1 Clarke Ch (NY) 551; Denton v. Denton, 1 Johns Ch (NY) 441; Gibbert v. Colt, 1 Hopk Ch 490, 14 AD 557.

15. Note 118 ASR 997.

16. Bochen v. Wood, Turn & Russ 332.

17. Brayton v. Smith, 6 Paige(NY) 489.

18. Murfree on Sheriffs, Sec. 349; Brayton v. Smith, supra.

§ 299. Writ of Injunction and Its Service.—A writ of injunction like that of ne exeat is issued only by the court of chancery. It is a judicial process whereby a party is required to do a particular thing or refrain therefrom according to the exigency of the writ.<sup>19</sup> The writ, has been variously defined in numerous cases, but the above is sufficient for our purposes. Lord Eldon called it a most powerful instrument.<sup>20</sup> It may be served, as a general rule, with the original process, issuing out of the court at the time of the commencement of the suit, or it may be served before or after. The time of service seems to be wholly immaterial.<sup>21</sup> In the absence of statutory provision to the contrary it seems that the original writ of injunction should be shown to the defendant and a copy thereof delivered to him.<sup>22</sup> However the service in many jurisdictions is regulated by statute and the statute with respect thereto should be consulted and complied with.<sup>23</sup> It seems, that service upon the defendant's attorney and where there is more than one defendant if they are all represented by the same attorney, is sufficient.<sup>24</sup> It is unnecessary to serve the agents, servants, and employees with a writ of injunction although they may be affected thereby.<sup>25</sup> And service on an agent of an individual defendant of a writ of injunction may be sufficient to bind the defendant and is certainly sufficient to bind a corporation.<sup>26</sup>

§ 300. Binding Effect of Knowledge of Injunction.—An injunction may be served upon any day of the week, or any time of the day.<sup>27</sup> If it is difficult or for any reason the writ or process of injunction can not be served formally then any sort of knowledge or notice regardless of how it may be given or acquired constitutes sufficient service to bind the defendant, or other party enjoined, and makes him guilty of contempt of court if he violates the injunction. A telephone call, a telegram, or a letter or any sort of verbal com-

19. *United States v. Haggerty*, 116 F 510.

20. *Murfree on Sheriffs*, Sec. 351.

21. *Robertson v. Robertson*, 58 Ala 68; *Heyman v. Landers*, 12 Cal 107; *Lash v. McCormick*, 14 Minn 492; *Daly v. Amberg*, 27 NE 1038, 126 NY 490, 13 NYS 379.

22. *Edmondson v. Mason*, 16 Cal 386; *Haring v. Kauffman*, 13 NJE 397, 79 AD 102.

23. *Eureka Lake etc. Canal Co. v. Sup. Ct.* 5 P 490, 66 Cal 311, 6 S Ct

429, 116 US 410, 29 L ed 671; *Edmondson v. Mason*, supra.

24. *Seebor v. Hess*, 5 Paige(NY) 85. See however Sec. 300, note 29, infra.

25. *Daly v. Amberg*, 13 NYS 379, 27 NE 1038, 126 NY 490.

26. *Porcher v. Pearsons-Taft Land Credit Co.* 114 SE 634, 154 Ga 483.

27. *Ulman v. Ritter*, 72 F 1000; *Kelly v. Montebello Park Co.* 118 Atl 600, 141 Md 194, 28 ALR 33; *Cape May, etc. R. Co. v. Johnson*, 35 NJE 422; *Farnsworth v. Fowler*. 1 Swan (Tenn) 1, 55 AD 718.

munication is sufficient to command obedience to a writ of injunction at the hands of the party enjoined. He will be just as much guilty of contempt of court for disobedience if he has knowledge, no matter how acquired, of the issuance of the injunction, as if he had been formally served with the writ itself.<sup>28</sup> It must be actual notice to, or knowledge by the defendant personally of the existence of the injunction in order to have the same effect as service of the writ itself, and notice to his attorney will not suffice.<sup>29</sup> But actual notice to officers or agents of a corporation is notice to a corporation itself.<sup>30</sup> Even a failure to name or describe a party affected by an injunction does not absolve him from punishment for its disobedience.<sup>31</sup>

Information supplied by plaintiff's attorney to a defendant of the existence of an injunction against the defendant is sufficient to bind the defendant in as full and ample a manner as if he had been formally served with the process.<sup>32</sup> Even a telegram signed by a party known to the defendants to be a judge stating that he had signed an order for an injunction is sufficient service to make one disregarding this information, and violating the injunction in contempt of court.<sup>33</sup> And, of course, it is sufficient if the service of a copy of the order is made upon a defendant affected by an injunction, whether the service is made by a sheriff or another.<sup>34</sup> The injunction becomes effective from the time it is ordered, and clearly notice received thereafter is sufficient to bind the defendant,

28. *McCauley v. First Trust etc. bank*, 276 F 117; *In re Rice*, 181 F 217; *Ex parte Lennon*, 17 S Ct 658, 166 US 548, 41 L ed 1110; *Pitcock v. State*, 121 SW 742, 91 Ark 527, 134 ASR 88; *Dunn v. Harris*, 86 SE 556, 144 Ga 157; *Carson v. Ennis*, 92 SE 221, 146 Ga 728, LRA1917E, 650; *Harris v. Hutchinson*, 140 NW 830, 160 Iowa 149, 44 LRA(NS) 1035; *Eaton v. DeGraff*, 169 NW 187, 184 Iowa 769; *Carr v. Van Buren County Dist. Court*. 126 NW 791, 147 Iowa 863, AC 1913D 378; *State v. Sides*, 148 P 624, 95 Kan 633; *Kelly v. Montebello Park Co.* 118 Atl 600, 141 Md 194; *White v. Wadhams*, 179 NW 245, 211 Mich 658; *Davis v. Champion Fiber Co.* 63 SE 178, 150 NC 84; *People ex rel. Stearns v. Marr*, 74 NE 431, 181 NY 463, 100 ASR 562, 3 AC 25; *Corbett v. Bryan*, 200 P 450, 83 Okl 39; *State v. Adcock*, 51 SW(Tenn Ch App) 992; *State ex*

rel. *Lindsley v. Wallace*, 195 P 1049, 114 Wash 602, 15 ALR 383.

29. *Greenleaf v. Leach*, 20 Vt 281. See however Sec. 209, note 24, supra.

30. *Golden Gate Con. Hydraulic Mining Co. v. Yuba County Sup. Ct.* 3 P 628, 65 Cal 187; *Rochester, etc. R. Co. v. N. Y. etc. R. Co.* 48 Hun 190, 14 NY Civ Proc 262.

31. *In re Lady Bryan Mining Co.* 14 F Cas No 7980, 6 NBR 252; *Buffandeau v. Edmondson*, 17 Cal 436, 79 AD 139.

32. *Anderson v. Hall*, 68 SE 43, 128 Ga 525; *Crucia v. Behrman*, 84 So 525, 147 La 144.

33. *State v. Knight*, 54 NW 412, 3 SD 509, 44 ASR 809, see also: *Cape May R. Co. v. Johnson*, 35 NJE 422.

34. *Fowler v. Beckman*, 30 Atl 1117, 66 NH 424; *In re Bryant*, 4 Ch D 98; *Ex parte Langley*, 13 Ch D 110.

and make him guilty of contempt of court if he violates it, but in order to have this effect it must be established that he had knowledge of and understood the injunction and that therefore his violation thereof was wilful.<sup>35</sup> An injunction granted on a final hearing, and as part of the decree, is binding upon the party enjoined and he is charged with notice thereof, and no further service of notice is necessary.<sup>36</sup> Where parties are in court when an order for injunction is pronounced, no further service thereof is necessary to bind them.<sup>37</sup>

It seems that, in California, it is necessary to formally serve an injunction before the defendant is bound thereby, that the giving of verbal notice of its issuance is insufficient, but where the party enjoined is in court no further notice seems to be necessary.<sup>38</sup> Also, in that state, a copy of the injunction must be delivered by the sheriff or other officer serving the same.<sup>39</sup> But the failure to serve an affidavit, upon which an injunction is based, along with service of the writ in California, is immaterial and does not prevent a defendant from being bound.<sup>40</sup> Under some statutes actual personal service of an injunction is not necessary. It is sufficient service of an injunction by leaving it at the house of the defendant but it would seem in such circumstances that the defendant, might purge himself of contempt by a sworn denial of personal service or actual notice or knowledge of the injunction.<sup>41</sup>

In some jurisdictions it is also provided by statutory enactments, that under certain conditions as, for instance, a defendant evades the personal service of an injunction that the personal service may be dispensed with, and substituted service, as leaving it at his residence may be resorted to, but it seems that this can only be done in

35. *Dowagiac Manufacturing Co. v. Minnesota Moline Plow Co.* 124 F 736, aff. 129 F 1005, 64 CCA 122; *Cooley v. Ayres*, 163 NW 625, 180 Iowa 740; *Wingert v. State*, 103 Atl 437, 132 Md 243; *Ehret v. Wrangler*, 129 NYS 546, 70 Misc 627, rev. 129 NYS 551, 144 App Div 480, 98 NE 1102, 204 NY 630; *State v. Erickson*, 120 P 104, 66 Wash 639, aff. 34 S Ct 717, 234 US 103, 58 L ed 1237.

36. *Hawkins v. State*, 26 NE 43, 126 Ind 294.

37. *Bunting v. Powers*, 120 NW 679, 144 Iowa 65; *Ochampaugh v. Powers*, 120 NW (Iowa) 680; *State v. Sides*, 148 P 624, 95 Kan 633; *New York Bank Note Co. v. Kerr*, 77 Ill App 53.

38. *Elliott v. Osborne*, 1 Cal 396; 14 Cal Jur 247.

39. *Edmondson v. Mason*, 16 Cal 386.

40. *Ex parte Brambini*, 218 P 569, 192 Cal 19. It seems that the court in the last cited case rather receded from its former position that an informal notice of injunction was insufficient; the court saying: "It is claimed that the service of the injunctive orders was void because not accompanied by an affidavit. This is entirely immaterial, because if the defendants knew the injunctions were issued, they were guilty of contempt in violating such orders."

41. *Morris v. Bradford*, 19 Ga 527.

these jurisdictions when authorized by the court.<sup>42</sup> That it requires an order of the court to authorize this method of service; and that an officer may not resort thereto without the authority of such an order.

§ 301. *Service of Injunction upon Corporation.*—In most jurisdictions the statutory enactments provide the manner of serving process generally, as well as injunctions, upon corporations and these statutes should be followed, but it may be stated that where an injunction issues against a municipality service upon the mayor or other corresponding officer of the city will be sufficient.<sup>43</sup> It is probably true under most statutes that service may be made upon a corporate president, agent, and the like.<sup>44</sup> But in any case, in the absence of controlling statutory provisions to the contrary, there must be personal service.<sup>45</sup>

Service upon an agent of a foreign corporation transacting business for the corporation within the state seems to be sufficient whether the corporation has complied with local laws or not.<sup>46</sup>

Generally an attorney for a corporation cannot be served as an agent of it.<sup>46a</sup> Under the common law rule only the president of a corporation could be served, and this is the rule in the absence of a controlling statute or constitutional provision. If there is no such officer as president, then the officer corresponding thereto may be served.<sup>46b</sup>

§ 302. *Subpoena for Witnesses.*—Subpoena is that process by which a witness, in either a civil or criminal case, is required to appear and testify thereat. The technical name of the ordinary subpoena is subpoena ad testificandum, and if it is desired that the witness bring with him a document or other article or object that

42. *Jordan v. Wapello Dist. Court*, 38 NW 430, 74 Iowa 762; *Haring v. Kauffman*, 13 NJE 397, 78 AD 102; *Morris v. Bradford*, supra.

43. *People v. Sturtevent*, 9 NY 263, 59 AD 536.

44. *Golden Gate Hydraulic Mining Co. v. Sup. Ct. of Yuba County*, 3 P 628, 65 Cal 187; *Rochester etc. Co. v. New York, etc. R. Co.* 48 Hun 190, 14 NY Civ Pr 262.

45. *Horrigan Contracting Co. v. Columbia Insurance Company*, 89 Atl 210, 4 Del 454.

46. *Poroher v. Pearsons-Taft Land* 304

*Credit Co.* 114 SE 634, 154 Ga 483.

46a. *Washington & R. R. Co. v. Johnson*, 96 Atl 445, 127 Md 218, see *Olsen v. Jacklowitz*, 285 NYS 098, 247 App Div 753, holding that where proper officer or agent is served, and he directs the serving officer to turn the process over to corporation's attorney, this does not affect the validity of the service.

46b. *Martin v. Atlas Estate Co.* 65 Atl 881, 72 NJE 416; *DeWolf v. Mallett*, 3 Dana (33 Ky) 214; *Wartrace v. Wartrace & B. G. Turnpike Co.* 2 Cold (42 Tenn) 515.



may be used as autoptic evidence that may be compelled by a subpoena duces tecum.<sup>47</sup>

§ 303. Subpoena for Witnesses in Criminal Case.—Compulsory process for witnesses in criminal cases is guaranteed to the defendant. This means such process as will bring defendant's witnesses into court.<sup>48</sup> A sheriff, coroner, or constable, whose duty it is to serve subpoenas has a function to perform under the before mentioned constitutional guaranty, for the reason that that guaranty includes of course the right to have process issued, but also connotes an equally important and existing right to have process served, and the officer, into whose hands it is delivered, is under a duty of either serving it, or showing a good and sufficient reason for the lack thereof. This is necessary, in order that the defendant may be accorded his full constitutional rights. A sufficient showing for failure to serve may be satisfied by the officer making it appear that he has made an honest, full and diligent effort to serve it, but has been unable to do so.<sup>49</sup> It is the right of the defendant in a criminal prosecution to determine whether he requires returns upon his subpoenas, and attachments for his witnesses named in the subpoenas before going to trial, and if the witnesses are unobtainable without any fault of defendant on a showing of materiality of their evidence he is entitled to a continuance.<sup>50</sup> Where an officer made a return, that he received a subpoena for the named witness, and had inquired of a number of people, naming them and was informed by all of them that the witness was a deserter from the army, and in hiding and that the officer was, after diligent search, unable to find him and took the witness stand and testified to the same facts, this is sufficient to show diligence on the part of the officer.<sup>51</sup> On the other hand, a return that it was served by making due and diligent search in Pike and Lincoln counties and not being able to find a named witness, all this done on the 16th day of August is insufficient to show due and proper diligence to serve the process or subpoena in a criminal case and would doubtless be true in a civil case. A sheriff can

47. State ex rel. Everglades Cypress Co. v. Smith, 139 So 794, 104 Fla 91; E. H. Taylor, Jr. and Sons v. Thornton, 109 SW 40, 178 Ky 463; Matter of Strauss, 52 NYS 392, 30 App Div 610, 5 NYAC 275, 27 NYCivPr 291, 52 NE 646, 157 NY 720; Hoyt v. Jackson, 7 NYCivPr 374.

48. Ex parte Marmaduke, 4 SW 91, [1 Anderson on Sheriffs].—20

91 Mo. 228, 60 AR 250; State v. Wilcox, 114 NW 687, 21 SD 532.

49. Fugate v. Com., 200 SW 338, 202 Ky 509; Hoskins v. Com., 287 SW 924, 216 Ky 358.

50. State v. Morgan, 82 So 711, 145 La 585.

51. State v. King, 80 So 616, 144 La 430.

not as was attempted in the cited case, claim due diligence unless he makes at least one trip to the residence of the witness or where he is supposed to reside, and the return should show this fact.<sup>52</sup> In order for the officer to discharge his part of the constitutional guaranty to defendant for compulsory process for witnesses, it is necessary that he use all ordinary diligence.<sup>53</sup>

§ 304. Service of Subpoena ad Testificandum Generally.—A subpoena is regarded ordinarily as a writ, the power of which is required to be exhausted before it may be regarded as served. However a subpoena for two or more witnesses is deemed served each time one of such witnesses is properly summoned or subpoenaed.<sup>54</sup> In the absence of a statute to the contrary a service of a subpoena ad testificandum is generally made by reading, and showing the original subpoena to the witness or witnesses therein named, and delivering to him or them a copy or memorandum containing the substance of the subpoena. It must be served upon him or them personally.<sup>55</sup>

A service of a subpoena on the attorney of a corporation is not sufficient to bind the agents or officers thereof or to require them to appear as witnesses.<sup>56</sup> It seems that sending to and receipt by a witness of a subpoena by mail binds the witness to obey its mandates.<sup>57</sup> On the other hand, a service of a subpoena by reading over the telephone is not sufficient service. Of course, if authorized by statute such telephonic service would be sufficient.<sup>58</sup>

§ 305. Place of Service of Subpoena.—The service of a subpoena issuing out of a state court can not be made without the bounds of the state, and an effort so to do is a mere nullity, and where a subpoena shows by the officer's return that it was served in a certain county, naming it, the court will judicially notice the existence of such county by that name within the state and if there is none then it will be assumed that it was served without the boundaries of the state which service is a mere nullity.<sup>59</sup> Un-

52. State v. Huff, 61 SW 900, 161 Mo 459.

53. Smith v. State, 44 SE 817, 118 Ga 61.

54. Murphy v. Fayette County, 13 Mont Co(Pa) 81.

55. In re Haines, 51 Atl 929, 67 NJL 442; Egan v. Finney, 72 P 133, 42 Ore 599; Tooney v. State, 5 Tex 306

App 163; Sefton v. Lundi, 4 Ch Chamb (Ont) 33.

56. Dunwick Township School Trustees v. McBeath, 4 UCCP(Ont) 228.

57. Chicago etc. R. Co. v. Dunning, 18 Ill 494.

58. Ex parte Terrell, 95 SW (TexCr) 530.

59. State v. Huff, 61 SW 900, 161 Mo 459.

[1 Anderson on Sheriffs]

der some statutes a service any place within the state even though without the county where the witness is supposed to appear is considered sufficient.<sup>60</sup>

**§ 306. By Whom Subpoena ad Testificandum May Be Served.**—Generally speaking, a subpoena for witnesses may be served by the sheriff, or constable, or any other lawful officer of the jurisdiction. Persons or officers who may serve subpoenas are usually designated by statute, and the statute should be consulted with respect thereto. However, in some jurisdictions persons who are not parties to the suit and over a designated age, are empowered by statutes enacted, to serve subpoenas on witnesses.<sup>61</sup> It has even been held that a party to an action or any person may serve a subpoena.<sup>62</sup>

**§ 307. When Subpoena Must Be Served.**—It seems that a subpoena served upon a witness at any time before the date on which he is required by the terms thereof to appear is sufficient, but of course is insufficient, if served after such date.<sup>63</sup>

**§ 308. Return of Service of Subpoena and Effect Thereof.**—A return showing that the subpoena was served in a named county, then the court will determine whether such county is within the state and if the state does not have a county by that name the presumption is indulged that it is a county in another state.<sup>64</sup> A return, to be sufficient should be specific not only the witnesses served whose names should be set out therein, but likewise

60. Federal statute, Sec. 878 Revised Statutes, compiled statutes, 1497, 28 USCA Sec. 654, provides that subpoenas for witnesses where required to attend the court of the United States may go into any other district, but in cases where the distance from the place of holding court is greater than one hundred miles, then it takes an order of the court for the subpoena to be issued. In re Trachtenberg, 8 F(2d) 791; Dreskill v. Parish, 7 F Cases #4075, 5 McLean 213, 7 F Cases #4076, 5 McLean 241; in re Woodward, 30 F Cases #18000, 8 Ben 112; Ferriman v. People, 128 Ill App 230, but see Washoe County v. Humboldt, 14 Nev 123; Downey v. Fenn, 124 NYS 876.

61. Chicago Etc. R. Co. v. Dunning, 18 Ill 494; Ferriman v. People, 128 Ill

App 230; Larimore v. Bobb, 21 SW 922, 114 Mo 446; Doyle v. St. Louis Transit Co., 101 SW 598, 124 Mo App 504; Egan v. Finney, 72 P 133, 42 Ore 399; Gordon v. Scott, 10 F Cases #5620, 6 Phila 484, 3 Pittsb Rep 109, 2 Nat'l Bankruptcy Reg 86; Holt v. Nielson, 109 P 470, 37 Utah 506, wherein it is suggested that a subpoena may be served by any person. Attachment of Spencer, MacArthur & M (11 DC) 433.

62. Lyon v. Marshall, 1 Pa Co 80; Holt v. Nielson, 109 P 470, 37 Utah 566; Egan v. Finney, supra; Larimore v. Bobb, supra.

63. Schroeder v. State, 166 NE 28, 89 Ind App 254; Scriber v. Reeves, 1 Phila (Pa) 284, 9 Leg Int 2.

64. State v. Huff, 61 SW 900, 161 Mo 459.

the witnesses not served should be so stated by name.<sup>65</sup> A return that the subpoena had been served by the reading in the hearing of a named witness is insufficient to comply with the statute requiring it to be read to the witness. Where the statute requires in case a subpoena is not served to state the cause thereof it is insufficient to merely return that the subpoena was not executed or the witness was not found. So too, a return that the witness is a fugitive from justice without more is an insufficient return. The return should show and certify the facts or circumstances upon which such conclusion is based.<sup>66</sup> A subpoena, like any other process, should be executed and returned in the name of the sheriff, constable, or other chief officer and not in the name of a deputy.<sup>67</sup>

In most jurisdictions a return of the sheriff or other officer serving a subpoena may be amended, but this rule does not seem to apply to a wholly insufficient return, and especially after an attachment for contempt is issued for the witness upon which he has been arrested and committed to jail.<sup>68</sup> A return by a sheriff, constable, or other officer establishes prima facie that service has been made but it does not operate conclusively upon the parties, and it may be disproved by evidence aliunde.<sup>69</sup>

**§ 309. Return by an Individual.**—In those jurisdictions where a subpoena, or other process for that matter, may be served by a certain designated person his return is usually provided for being evidenced by his affidavit, and a return by him to be sufficient must comply therewith.<sup>70</sup>

**§ 310. Time of Service of Subpoena.**—It seems that a subpoena may be served any time of the day or night, but can not be served on Sundays or holidays.<sup>71</sup>

**§ 311. Breaking Doors to Serve.**—An officer, it seems in the United States, is not authorized to break doors of a residence in order to serve a subpoena. He must obtain permission to enter the house for that purpose.<sup>72</sup>

**§ 312. Necessity for Payment of Witness Fees and Mileage.**—

65. Tooney v. State, 5 Tex App 163.

66. State v. Baum, 26 So 67, 51 La Ann 1112; Neyland v. State, 13 Tex App 536; Tooney v. State, supra.

67. State v. Huff, supra.

68. In re Quick, 1 Ohio NPNS 57.

69. Ferriman v. People, 128 Ill A 494; State v. Baum, supra.

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70. In re Quick, 1 Ohio NPNS 57.

71. Hager v. Danforth, 8 How Pr (NY) 435, 20 Barb. 16; Murfree on Sheriffs, Sec 356.

72. Hager v. Danforth, 8 How Pr (NY) 435, 20 Barb 16; Murfree on Sheriffs, Sec. 356.

It is the generally accepted rule at common law, and in many jurisdictions finding confirmation by statutory enactment, that at the time of the service of a subpoena ad testificandum the witness fees and miles for travel to and from the place he is to appear and in addition thereto for one day's attendance must be paid or tendered, and especially if a demand therefor is made or notice given of the requirement that the same be paid before the witness will appear. This rule however does not apply to criminal cases, nor to proceedings by the state seeking an abatement of a nuisance.<sup>73</sup> In some jurisdictions it is held that the provision requiring the payment of witness fees and mileage at the time of service of summons is absolute and must be complied with.<sup>74</sup>

Where a witness is required to stay more than the one day for which he has been paid at the time his fees are advanced when he is subpoenaed, he can demand and is entitled to receive additional witness fees for the time he is required to stay over and above the one day.<sup>75</sup> A witness however is not entitled to depart without notifying the litigant who subpoenaed him or his counsel of the intention so to do. This seems to be true even though his witness fees are unpaid; and, it would seem, also, that if his fees are paid pursuant to law he would have no right to depart, with or without notice.<sup>76</sup> In some jurisdictions the requirement that witness fees and mileage be paid to the witness in advance or at the time of the service of subpoena on him has been abrogated by statutory enactment.<sup>77</sup> Some authorities announce the rule that if a wit-

73. In re Boeshore, 125 F 651; In re Thomas, 23 F Cases #13889, 1 Dill 420; People v. Grand, 2 P 912, 7 Colo 190; People v. Healey, 139 Ill App 363; Bonner v. People, 40 Ill App 628; State v. Keenan, 82 NW 792, 111 Iowa 280; State v. Kaemmerling, 111 P 441, 83 Kan 387, 31 LRA(NS) 781, and note; Chase v. Kalamazoo Circuit Judge, 117 NW 660, 154 Mich 271; Kipp v. Dawson, 60 NW 845, 59 Minn 82; Huckins v. State, 86 NW 485, 61 Neb 871; Quinby v. Ellithorp, 170 NYS 960; Egan v. Finney, 72 P 133, 42 Ore 509; Brown v. McCloud, 190 P 578, 96 Ore 549; Cullers v. Birge, 34 SW(Tex) 986; State v. Sup. Ct. of King County, 121 P 836, 67 Wash 370; Rozek v. Redzinski, 58 NW 262, 87 Wis 525.

74. Bliss v. Brainard, 42 NH 255; Hurd v. Swan, 4 Den(NY) 75.

75. Hurd v. Swan, 4 Den(NY) 75; Mattock v. Wheaton, 10 Vt 493.

76. Bliss v. Brainard, supra.  
77. Norris v. Hassler, 23 F 581; U. S. v. Durling, 25 F Cases #15010, 4 Biss 509.

There are cases holding that even where a witness is in court or has responded to the subpoena and appeared thereat he may still resort to the expedient of refusing to be sworn or produce documents called for until his fees have been paid. Kipp v. Dawson, 60 NW 845, 59 Minn 82; Quinby v. Ellithorp, 170 NYS 969; Smith v. Barger, 9 Yerg(Tenn) 322. Some federal cases hold that it is only where the witness is impecunious and is unable to pay his traveling expenses that he may demand that they be advanced to him. Norris v. Hassler, supra.

ness appears without having his fees paid he waives the right to demand them.<sup>78</sup> It has also been held that if the witness does not raise the objection of the nonpayment of his mileage on or before the return day it is waived.<sup>79</sup> As to the right of the witness when he is paid insufficient mileage, but has received some money, the holdings are in conflict. Some authorities hold that where he does not object at the time the money is paid to him he is compelled to attend and obey the subpoena despite the fact that he has not been paid sufficient witness fees and mileage.<sup>80</sup> While other cases hold that if a witness has not been paid sufficient fees and mileage that he may refuse to obey the subpoena and is within his lawful rights, but he must return the money that has been paid him in order to avail himself of the privilege of refusal.<sup>81</sup> Where a witness has made an affidavit to be used as evidence in the case and is thereafter called for cross-examination he is not entitled, as a condition precedent to giving evidence on such cross-examination, to demand and receive from the party calling him for cross-examination, his witness compensation. The reason of this rule is that he is not the witness of that party.<sup>82</sup>

§ 313. Subpoena Duces Tecum.—We have already had occasion to define a subpoena duces tecum.<sup>83</sup> Generally speaking a subpoena duces tecum can bring any party into court with required autoptic evidence who is subject to an ordinary subpoena. The only difference between the two is that a subpoena ad testificandum requires merely the presence of the witness in court while the subpoena duces tecum requires not only his presence in court but that he bring with him books, papers, documents, or articles, referred to, and described in the subpoena duces tecum. No immunity can be claimed against a subpoena duces tecum that could not be claimed with respect to a subpoena ad testificandum. The subpoena duces tecum should be directed to and served upon the person who has control of, and is capable of, producing the books, papers, documents, or articles called for. It likewise may be issued to, or served upon any person reasonably supposed to have such documents, papers, records, or articles, wanted by a litigant

78. Cullers v. Birge, 34 SW(Tex) 980; Rozek v. Redzinski, 58 NW 262, 87 Wis 525.

79. In re Hall, 296 F 780, 2 F(2d) 1016.

80. Leber v. U. S., 170 F 881, 96 CCA 57; Andrews v. Andrews, 2 Johns 310

Cases (NY) 109; Norris v. Hassler, supra.

81. Pease v. Bamford, 51 Atl 234, 96 Me 23; Hurd v. Swan, supra.

82. Emerson v. Irving, 4 BC 56; Mansel v. Clarricarde, 54 LJCh 982.

83. Bliss v. Brainard, 42 NH 255. See Sec. 302, supra.

in court.<sup>84</sup> Where the records desired are corporate records, a subpoena duces tecum should be issued to, and served upon the officer or agent having the actual custody of the books, records, or documents, and he may be required to produce the same without regard to the master's orders to the contrary.<sup>85</sup> But an officer of a corporation cannot be compelled to produce books, the possession of which he does not have, although he had same theretofore in his possession and under his control, but had sent them, before the subpoena was served, to the home office of the corporation in another state, and at the time of the serving of the subpoena they were in the custody and under the control of an officer over whom the subpoenaed witness had no authority.<sup>86</sup> A mere clerk of a corporation cannot be required, under a subpoena duces tecum, to produce the books and records of the corporation.<sup>87</sup> Neither may a mere agent, servant, or employee of an individual be compelled to produce his employer's books, but it seems the proper method of obtaining such books and records is by a subpoena directed to, and served upon the employer himself.<sup>88</sup> This rule holds good even though the servant has the actual physical possession of the books, documents, or papers called for in a subpoena duces tecum, but which in truth and in fact belong to, and are subject to the direction of his employer.<sup>89</sup>

A subpoena duces tecum will lie as to an adverse party who is competent as a witness, according to the weight of authority and sustained by the better reasons.<sup>90</sup> It seems that where the view obtains that a party to the action may not be compelled to respond to a subpoena duces tecum it extends to and protects one against such subpoena becoming effective who is a party and is tempora-

84. *Norwich Union Fire Insurance Society v. Gomez*, 1 Porto Rico F 498; *Norris v. Sykes*, 23 F Cases #13707, 18 Alb LJ 416, 10 Ben 162, 7 Am Law Record 370; *Russell v. McLellan*, 21 F Cases #12158, 3 Woodb. & M. 157; *Steed v. Cruise*, 70 Ga 168; *Murray v. Elston*, 23 NJE 212.

85. *U. S. v. Watson*, 266 F 736; *Blitch v. State*, 90 SE 42, 145 Ga 832.

86. *Norris v. Sykes*, supra.

87. *Bank of Utica v. Hilliard*, 5 Cow (NY) 153.

88. *Lorenz v. Lehigh Navigation Co.*, 5 Leg Gaz(Pa) 174; *Morris v. Creel*, 2 Va Cas 49; *Bank of Utica v. Hilliard*, supra.

89. *Eccles & Co. v. Louisville & Nashville R. Co.* (1912) 1 KB 135.

90. *American Lithographic Co. v. Werckmeister*, 31 S Ct 676, 221 US 603, 55 L ed 873, affirming 165 F 428, 91 CCA 376; *Bullock Electric Manufacturing Co. v. Crocker-Wheeler Co.*, 121 F 200; see however *Klair v. Phila. B. & W. R. Co.*, 78 Atl 1085, 25 Del (2 Boyce) 274; *Campbell v. Johnston*, 3 Del Ch 94; *State ex rel. Everglades Cypress Co. v. Smith*, 139 So 794, 104 Fla 91; *Ex parte Calhoun*, 13 SE 694, 87 Ga 359; *Duke v. Brown*, 18 Ind 111; *Murray v. Elston*, 23 NJE 212; *Bonesteel v. Lynde*, 8 How Pr(NY) 226, 352; *People ex rel. Valiente v.*

rily entrusted with a document, record, or paper called for in the subpoena.<sup>91</sup> A partner may be compelled to respond to a subpoena duces tecum and produce documents or records therein specified and even where a party may not be compelled to respond to such subpoena a partner of one of the parties is not within the rule exempting parties from such obedience.<sup>92</sup> It seems that the clerk of a court of coordinate jurisdiction is exempted from responding to a subpoena duces tecum by the operation of some matter of courtesy. However, such exemption by operation of the above mentioned rule of courtesy is one for the witness to claim and the adverse party may not predicate an objection to the evidence thereon.<sup>93</sup> However, the rule of courtesy applicable to a clerk of a court of coordinate jurisdiction is inapplicable to other officers of such court as, for instance, a receiver appointed thereby.<sup>94</sup>

§ 314. **Subpoena Duces Tecum in Cases Where Witness Testifies by Deposition.**—So far as the effectual operation of a subpoena duces tecum is concerned it is of no importance as to whether the witness is to testify in open court or by deposition. In either case the subpoena we have under consideration, is an effective method to obtain the production of books, records, documents, or other things properly producible under a subpoena duces tecum.<sup>95</sup>

§ 315. **What May Be Produced in Response to Subpoena Duces Tecum.**—There is no doubt but what all manner of documentary evidence such as books, papers, records, accounts, bills, contracts, letters, telegrams, drawings, plans, sealed packets containing writings, public records of any agency created by or under a statute, public reports made by administrative officers, stenographic transcripts of evidence, and all classes, kinds, and sorts of public records and documents of whatsoever nature and character including even a list of persons holding post-office boxes may be called for, and required to be produced by the subpoena duces tecum.<sup>96</sup> It has been held that a subpoena duces tecum could not be used for

*Dyckman*, 24 How Pr(NY) 222; *Mitchell's Case*, 12 Abb Pr(NY) 249, but see *Trotter v. Latson*, 7 How Pr(NY) 281; *In re Both*, 192 NYS 822, 200 App Div 423, 39 NY Cr 440.

91. *LaFarge v. LaFarge Fire Insurance Co.*, 14 How Pr(NY) 20; *Bank of Utica v. Hilliard*, supra.

92. *United States v. Collins*, 145 F 312

709; *Forbes v. Samuel* (1913) 3 KB 706.

93. *San Juan Fruit Co. v. Carrillo*, 8 Porto Rico F 176.

94. *Eykelboom v. People*, 206 P 388, 71 Colo 318.

95. *United States v. Collins*, 145 F 700.

96. *In re Hirsch*, 74 F 928, aff. 87

the purpose of compelling the production of property, particularly where it is of considerable bulk.<sup>97</sup> But probably the position with respect to the production of property under a subpoena duces tecum could not be maintained with respect to such articles as jewelry, and the like, and the courts have seized upon statutory provisions that give little indication of legislative intent to extend the rule to property.<sup>98</sup>

**§ 316. Applicability of Subpoena Duces Tecum to Corporate Records.**—It is of little importance that the records, documents, or other evidence called for in a subpoena duces tecum happen to belong to, and be possessed by a corporation, foreign or domestic.<sup>99</sup>

**§ 317. Statutory Enactment as Not Preventing Production of Documents and Papers on Subpoena Duces Tecum.**—Where a statute provides all records, reports and information concerning any

F 1005, 31 CCA 350; Johnson Steel Street Rail Co. v. North Branch Steel Co., 48 F 191; Corbett v. Gibson, 6 F Cas #3,221, 16 Blatchf 334; In re Shephard, 3 F 12, 18 Blatchf 225; Wertheim v. Continental R. & Trust Co., 15 F 716, 21 Blatchf 240; Schuricht v. McNutt v. Willis, 26 F(2d) 388; U. S. v. Cerecedo, 6 Porto Rico F 626; Martinez de Hernandez v. Bertran, 1 Porto Rico F 269; Norwich Union Fire Ins. Soc. v. Gomez, 1 Porto Rico F 498; Essgee Co. of China v. U. S., 43 S Ct 514, 202 US 151, 67 L ed 917; Bowden v. Webb, 173 SW 181, 116 Ark 310; Peterson Bros. v. Mineral King Fruit Co., 74 P 162, 140 Cal 624; Ex parte Calhoun, 13 SE 694, 87 Ga 359; In re Lester, 77 Ga 143; Atlantic Coast Line Railway Co. v. Hill, 77 SE 316, 12 Ga App 392; State v. Smithers, 14 Kan 629; Randall v. Hodges, 3 Bland (Md) 477; Stevens v. Locke, 125 So 529, 156 Miss 182; State ex rel. Tune v. Falkenhainer, 231 SW 257, 288 Mo 20; Rice v. Rice, 25 Atl(NJ) 321; Borden v. Wolf Silk Co., 155 A 623, 108 NJE 438; In re Edge Ho Holding Corporation, 176 NE 537, 256 NY 374, rev 231 App Div 505, 248 NYS 42; In re Foster, 124 NYS 667, 139 App Div 769, 123 NYS 465, 68 Misc 120; In re Green, 157 NYS 87, 92 Misc 503, aff 157 NYS 1127, 172 App Div 928; State v. Yeo

Guck, 195 P 363, 99 Ore 231; American Car & Foundry Co. v. Alexandria Water Co., 70 Atl 667, 221 Pa 529, 128 Am SR 749, 15 Ann Cas 641; Delaney v. Regulators of Philadelphia, 1 Yeates (Pa) 403; see Shippen's Lessee v. Wells, 2 Yeates(Pa) 260, 261; In re Schaeffer, 19 Pa Dist 647; Kilpatrick v. State, 189 SW 267, 80 Tex Cr 391; Ex parte Gould, 132 SW 304, 60 Tex Cr 442, 31 LRA(NS) 836; Maryland Casualty Co. v. Clintwood Bank, 154 SE 492, 155 Va 181; State v. Sup. Ct. of Washington for Spokane County, 187 P 358, 109 Wash 634, 9 ALR 157; Liebneow v. Philippine Vegetable Oil Co., 39 Philippine 60; Rex v. Daye (1908) 2 KB 333.

97. Johnson Steel Street Rail Co. v. North Branch Steel Co., 48 F 191; In re Shephard, 3 F 12, 18 Blatchf 22; Hirshfield v. Craig, 145 NE 816, 239 NY 98, mod 205 NYS 201, 209 App Div 555, motion to amend remittitur den 148 NE 725, 240 NY 608.

98. Finnick v. Peterson, 6 Philippine 172.

99. U. S. v. Watson, 266 F 736; In re Sykes, 23 F Cas #13,707, 18 Alb LJ 416, 10 Ben 162; Blitch v. State, 90 SE 42, 145 Ga 882; Ex parte Schoepf, 3 Ohio NPNS 93; Lorenz v. Lehigh Nav. Co., 5 Leg Gaz(Pa) 174.

bank, other than those required by law to be public, shall be open only to such officers and employees of the state who may have authority to have such information, and to any authorized agent of such bank and the imparting of such information by any employee or officer of the state may be sufficient cause for his removal from the position he occupies under the state government, it is held that this statute is insufficient to shield a witness from being required to respond to a subpoena duces tecum and produce pertinent records and documents called for therein and it would be the sheriff's or constable's duty in spite of such statute to serve such subpoena duces tecum on the employee or officer of the bank.<sup>1</sup>

**§ 318. The Service of Void Subpoena Duces Tecum.**—The sheriff is concerned as to validity of a subpoena duces tecum. It is necessary that the subpoena be fair on its face before the officer is protected in acting under it. If a subpoena duces tecum issues in a criminal proceeding before a magistrate, and said proceeding is against John Doe and Richard Roe (fictitious names) and a subpoena duces tecum is issued to the persons intended by such fictitious designation requiring them to appear in such proceeding, and bring certain designated books and records, such a subpoena is void, and, it is doubtful if an officer would be warranted in acting under it to an extent to incur liability.<sup>2</sup> And doubtless a sheriff or constable would not incur any liability if he refused to serve such a subpoena, because liability can never be predicated upon the failure to do an act in violation of law or a void act. An omnibus subpoena duces tecum requiring all or a substantial part of the books and records of a witness is void, at least in the absence of a clear showing that all of such books and records contain evidence material to the inquiry or investigation.<sup>3</sup>

A subpoena duces tecum requiring a telegraph company to produce all messages sent from a specified town before a stated date

1. Maryland Casualty Co. v. Clintwood Bank, 154 SE 492, 155 Va 181. In the course of the opinion the court said: "The trial court held that the reports and letters could not be required to be produced by the subpoena duces tecum. In this we think it erred. These statutory provisions should be construed to relate to information of a confidential nature affecting the business of the bank. They should be strictly construed, when invoked for the limitation of judicial inquiry, and are sub-

ject to the right of every litigant to call for and produce evidence affecting his substantial rights." The statute before the court in the above cited case was Sec. 56, Acts 1928, p. 1330 c. 507.

2. In re Both, 192 NYS 822, 200 App Div 423, 39 NY Cr 446.

3. Kullman, Salz & Co. v. Sup. Ct. of Calif. in and for Solano County, 114 P 589, 15 Cal App 270; People v. Reynolds, 182 NE 754, 350 Ill 11; Ex parte Gould, 132 SW 364, 60 Tex Cr 442, 31 LRA(NS) 835, and note.

ordering intoxicating liquors is too broad to be valid and is void. The fact that it may be possible under the law, under some conditions, to order intoxicating liquor without committing an offense against the law is a strong circumstance against the validity of such a subpoena and a sheriff would not incur liability in refusing to serve it.<sup>4</sup> A subpoena duces tecum is likewise invalid where it directs the witness to bring such documents from a mass of papers as shall in the witness' judgment have any bearing on the case or issue to be tried.<sup>5</sup> It may be stated generally that a subpoena duces tecum, in order to be valid, must specify with as much precision and particularity as is possible in describing the documents or papers to be produced.<sup>6</sup> Where it is desired to require the production of books and records of a corporation a proper procedure seems to be to issue a subpoena duces tecum directed to, and have it served upon an officer or agent of the corporation who has the possession of the desired documentary evidence.<sup>7</sup> In the state of Louisiana, however, a contrary rule prevails and in that jurisdiction the subpoena duces tecum may be directed to and served upon the corporation and it will be required to respond thereto and produce the documentary evidence called for therein.<sup>8</sup> Some other authorities follow the rule obtaining in Louisiana where the ad testificandum clause is omitted from the subpoena duces tecum and where this rule is recognized, and in Louisiana as well, the officer, agent, or employee having the possession of the documentary evidence called for must respond to the subpoena and produce the same.<sup>9</sup> These are matters that may be of importance to a sheriff when he is directed to serve a subpoena duces tecum on a corporation or its officers or agents and it may likewise be necessary for a sheriff or constable to give them consideration if he is called upon to account for failure to serve a subpoena duces tecum upon such corporation or its officers or agents.

4. Ex parte Gould, supra.

5. Elting v. U. S., 27 Ct Cl (US) 158.

6. U. S. v. Hunter, 15 F 712; Murray v. State of La., 10 S Ct 990, 103 US 101, 41 L ed 87; Ex parte Jaynes, 12 P 117, 70 Cal 638; People v. Reynolds, 182 NE 754, 350 Ill 11; Ex parte Brown, 72 Mo 83, 37 AR 426; American Car & Foundry Co. v. Alexandria Water Co., 70 Atl 867, 221 Pa 529, 128 ASR 749, 15 Ann Cas 641, and note; Ex parte Gould, 132 SW 364, 60 Tex Cr 442, 31 LRA (NS) 835, and note.

7. Wilson v. U. S., 31 S Ct 538, 221 US 361, 55 L ed 771, AC 1912D 558; Com. v. Southern Express Co., 169 SW 517, 100 Ky 1, LRA 1915B 913, AC 1910A 378.

8. Keiffe v. LaSalle Realty Co., 112 So 799, 163 La 824, 53 ALR 92 and note; Rawlings v. Schwartz, 118 So 602, 167 La 61; Ascension Red Cypress Co. v. New River Drainage Dist., 125 So 730, 169 La 606.

9. Wilson v. U. S., supra; Com. v. Southern Express Co., supra.

§ 319. Subpoena Duces Tecum Directed to and Served upon an Unincorporated Association.—A sheriff or constable may sometimes be called upon to serve a subpoena duces tecum calling for books, records or papers in the possession of an unincorporated association. As a rule it may be said that a subpoena in these circumstances ought to be directed to and served upon the person having possession of the desired documentary evidence. However, where such association is recognized as a legal entity and transacts under a name by which it is known, it seems that such subpoena may be directed to and served upon such unincorporated association by serving it on a manager, agent, or member thereof and that the officers, agents and employees or those having possession of the documentary evidence described in the subpoena duces tecum would be under a legal duty to produce the same.<sup>10</sup>

§ 319A. Service of Subpoena Duces Tecum Generally Considered.—A subpoena duces tecum may be served, as a general rule, like a subpoena ad testificandum. And, it seems that a subpoena of any sort for two or more witnesses is regarded as served each time a witness named therein is summoned.<sup>11</sup>

§ 320. Service of Habeas Corpus ad Testificandum.—The writ of habeas corpus ad testificandum is a writ resorted to, and used, for the purpose, when it becomes necessary, in a trial to require an inmate of an insane asylum or a prisoner in confinement to give testimony in any court.<sup>12</sup> Differently stated, the writ will lie to procure the evidence of any witness in lawful custody, and it is immaterial whether he is serving a sentence under final conviction in a penitentiary or has been committed to an insane asylum.<sup>13</sup> Statutes are encountered prohibiting the use of a writ of habeas corpus ad testificandum, but such statutes are generally not applicable to the obtaining of a writ on behalf of the state.<sup>14</sup>

10. Brown v. U. S., 48 S Ct 288, 276 US 134, 72 L ed 500.

11. Murphy v. Fayette County, 13 Montg County (Pa) 81.

12. In re Thaw, 166 F 71, 91 CCA 657, AC 1915D 1025; U. S. v. Schultz, 37 F(2d) 619; Ex parte Bollman, 4 Cranch 75, 2 US 554, 2 L ed 554; Ex parte Marmaduke, 4 SW 91, 91 Mo 228, 60 AR 250, note; Com. v. Ross, 13 Pa Dist 493.

13. People v. Willard, 28 P 585, 92

Cal 482; Roberts v. State, 72 Ga 673; VanVliissingen v. VanVliissingen, 173 Ill App 124; Hayden v. Com., 131 SW 521, 140 Ky 634; Com. v. Ross, 13 Pa Dist 493; In re Thaw, supra; U. S. v. Schultz, supra.

14. State ex rel. Rudolph v. Ryan, 38 SW(2d) 717, 327 Mo 728; State v. Adair, 68 NC 68; Ex parte Harris, 73 NC 65; State v. Jones, 97 SE 32, 176 NC 702.

§ 321. **Service and Obedience to Writ of Habeas Corpus ad Testificandum.**—It seems that the writ of habeas corpus ad testificandum is available when the witness is in the military or naval service as well as when he is in prison.<sup>15</sup> When there is delivered to a sheriff, constable, or other officer having the custody of a witness, a writ of habeas corpus ad testificandum, the custodian of such witness has but one duty—obedience to the mandates of the writ by producing the witness; but when the witness is in the custody of another, and the sheriff receives a writ of habeas corpus ad testificandum demanding his production, then the sheriff's duty is to serve the writ on the custodian of the designated witness, and it is the duty of such custodian to produce him in accordance with such writ.<sup>16</sup> It is probably necessary in a civil case to tender the necessary expenses of the custodian of the witness to and from the place where he is to testify, and would certainly be required to do so if demanded.<sup>17</sup> This is wholly unnecessary however in a criminal case.<sup>18</sup> If the writ has been improvidentially or illegally issued, or the court has exceeded its jurisdiction in awarding the writ, the sheriff or other officer to whom it is delivered to serve is under a duty to serve it, since these questions can only be urged by the custodian of the prisoner.<sup>19</sup> It is the duty of the sheriff, constable or other custodian of the witness who produces him in response to a writ of habeas corpus ad testificandum to retain him in custody at all times during his attendance at court and the court or other authority issuing the writ has no power to direct otherwise or to dispose of his custody by ordering him into the charge of another during his attendance at court and it is of course the duty of sheriff, constable, or other custodian to return him to the place of confinement whence he came.<sup>20</sup> It is immaterial whether witness is imprisoned under a judgment of a state or federal court, and, if imprisoned under a federal judgment or order still the state court has authority to require his production under a writ of habeas corpus ad testificandum and vice versa.<sup>20a</sup> While the question has not arisen in any reported

15. 1 Greenleaf on Evidence, Sec. 312, p. 372.

16. Roberts v. State, 72 Ga 673; State ex rel. Rudolph v. Ryan, 38 SW (2d) 717, 327 Mo 728, 1 Greenleaf on Evidence, Sec. 312, p. 372; Noble v. Smith, 5 Johns(NY) 357; Murfree on Sheriffs, Sec. 360.

17. Noble v. Smith, supra.

18. Roberts v. State, supra; State v. Ryan, supra.

19. People v. Sebring, 35 NYS 237, 14 Misc 31, 9 NY Cr 545; Koecker v. Koecker, 7 Phila(Pa) 364.

20. People v. Kersten, 109 NE 1012, 209 Ill 597; People v. Stone, 10 Paige (NY) 606; Com. v. Rotan, 82 Pa Super 172.

20a. U. S. v. Schultz, 37 F(2d) 619.

case within the ambit of our research, still no good reason appears why a writ of habeas corpus ad testificandum may not be issued requiring the sheriff, constable, or other custodian of the prisoner to produce him along with the documentary evidence possessed by the prisoner.

§ 322. **Attachment of Witness for Contempt.**—In case a witness has been duly subpoenaed and contumaciously neglects or refuses to attend the trial, according to the commands or direction of the subpoena, he is guilty of contempt for which an attachment may issue to a sheriff or constable to attach or arrest him therefor. Generally a witness may not be attached for contempt unless he has been duly served with a proper and legal subpoena together with a tender made of his fees and mileage and has thereafter failed to appear.<sup>21</sup> In some cases, however, the court may in the exercise of sound discretion issue an attachment for a witness even though he has not been subpoenaed by the court but it will only do this in cases where it has reason to believe that the witness would not obey the subpoena or the witness may be guilty for failing to appear where he has waived or dispensed with the service of subpoena. A situation calling for attachment of a witness in advance of subpoena is where it appears that the witness will not be available for service of a subpoena when it may be had, as generally, a subpoena cannot issue until the trial date is fixed.<sup>22</sup> Of course if a witness can give bond for his appearance then there is no occasion to attach and hold him to insure his presence at the trial.

§ 323. **Arresting Witness on Attachment.**—The attachment for arrest of a witness for contempt of court for failing to obey a subpoena should be directed to the proper officer.<sup>23</sup> It is the duty of the officer, of course, upon receiving an attachment to make arrest of the witness, but he is without authority to search the witness, or incarcerate him in jail unless he has been taken before the court or magistrate against whose authority it is alleged he has

21. Ex parte Peck, 19 F Cases #10,885, 3 Blatchf 113; Berry v. Cunningham, 49 S Ct 452, 279 US 593, 73 L ed 867, reversing 29 F(2d) 917, reversing 25 F(2d) 733; Myers v. State, 95 So 331, 19 Ala App 98; Moon v. State, 262 SW 658, 164 Ark 486; Robinson v. Com., 199 SW 28, 178 Ky 557; State v. Johnson, 7 So 670, 41 La Ann 318

574; Tooney v. State, 5 Tex App 103; Cline v. State, 31 SW 176, 34 Tex Cr 415.

22. Crosby v. Potts, 69 SE 682, 8 Ga App 463; Berry v. Cunningham, supra; Myers v. State, supra.

23. U. S. v. Potter, 27 F Cases #16,076.



committed a contempt, but incarceration may then be directed by the court, as punishment or in default of bail.<sup>24</sup>

§ 324. Authority to Break Doors in Executing an Attachment for Contempt.—It seems that in order to arrest a witness for whom an attachment has been issued upon a charge of contempt of court the officer may break outer or inner doors to execute the same. The rule is applicable in all cases of arrest for contempt.<sup>25</sup>

24. *Gordon v. Denison*, 22 Ont App 315, reversing 24 Ont 576. Am Ed) 840; *Harvey v. Harvey*, 26 LRChDiv 644, 51 LT(NS) 508, 33 WR 76, 48 JP 468; *Burdett v. Abbot*, 14 East 167, 104 Eng Rep 501.

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## CHAPTER XIII

### ATTENDANCE AT COURT

#### SECS.

325. Duty of Sheriff as an Attending Officer on Court.  
 326. Personal Presence of the Sheriff Not Essential.  
 327. Duty of Sheriff to Keep Order in Court.  
 328. Duty of Sheriff to Have Sufficient Number of Deputies on Hand.

§ 325. Duty of Sheriff as an Attending Officer on Court.—It is one of the many duties of the sheriff to attend sessions of particular courts.<sup>1</sup> It is sufficient for the sheriff to fulfil the duty of attendance on the court by a qualified deputy.<sup>2</sup> It has also been held that where there is a probate court in the county, the sheriff or qualified deputy is required to attend on it when in session.<sup>3</sup> The responsibility of the sheriff is limited to the direction of the court, and he has no right, or authority to make motions, or present questions to the court on behalf of parties to a suit.<sup>4</sup> When the sheriff attends the court he attends as an officer of the court.<sup>5</sup> Where it is lawful, the sheriff is entitled to charge fees for attending court.<sup>6</sup> It is plain that the duties incumbent upon the sheriff in attending court may be discharged by him through a deputy. There is nothing in the law that demands that the sheriff in person shall attend upon the courts. This could not be the case since there might be two or more courts, or departments of the same court, of equal dignity and jurisdiction in session at the same time.<sup>7</sup> It is the duty of the sheriff to be present himself, or through a deputy and provide sufficient deputies to carry out the court's orders.<sup>8</sup>

§ 326. Personal Presence of the Sheriff Not Essential.—It is not necessary that the sheriff attend in person to execute the duty of attending upon the courts, but he may perform that duty by

1. *LaSalle v. Milligan*, 32 NE 196, 143 Ill 321, 34 Ill App 340; *Robson v. Dickinson County*, 65 P 520, 8 Kan App 374; *Green v. State*, 89 Atl 608, 122 Md 288.

2. *McGuffie v. State*, 17 Ga 497, see Sec. 326 infra.

3. *LaSalle v. Milligan*, supra.

4. *Rhodes v. Moseley*, 6 Fla 12.

5. *State ex rel. Andrews v. Superior Court of Maricopa County*, 6 P(2d) 192, 39 Ariz 242.

6. *Calhoun County v. Liddon*, 138 So 389, 103 Fla 833; *Sturtevant v. Bergen County*, 143 Atl 360, 105 NJL 129.

7. *Merrill v. Phelps*, 84 P(2d) (Ariz) 74.

8. *Merrill v. Phelps*, supra.

a duly qualified deputy.<sup>9</sup> While the judge of the court may direct what they should do he has no right or authority to interfere in the choice of deputies who are to attend upon the court.<sup>10</sup>

§ 327. **Duty of Sheriff to Keep Order in Court.**—As has heretofore been seen, the sheriff has the duty to attend the sessions of courts of record. While attending such sessions it is his duty to see that order is preserved and dignity of the court is maintained. The sheriff is under a duty to perform any duties that the court may require. It is likewise the duty of the sheriff not only to see that peace and quiet are maintained in the court but also to see that his deputies, constables, and other officers in the court perform the duties assigned to them. The sheriff is the immediate officer of the court and should see that all of its orders in its behalf are properly carried out and obeyed.<sup>11</sup>

§ 328. **Duty of Sheriff to Have Sufficient Number of Deputies on Hand.**—In order for the sheriff to properly perform his duties he may, of necessity, act through deputies, which is permissible, as has heretofore been stated. In waiting upon the court it is for him to provide a sufficient number of deputies to perform the court's requirements.<sup>12</sup> When the court requires the sheriff to produce the prisoners, it should be done promptly and without delay. Also he should act quickly in the summoning of witnesses or jurymen so that there will be no delay.<sup>13</sup>

9. *Merrill v. Phelps*, 84 P(2d) (Ariz) 74. See Sec. 325, supra, note 2; *McGuffie v. State*, 17 Ga 497 at 508. In an action where the sheriff failed to attend but a deputy at his direction was present, where such a question was raised on motion to quash a panel of jurors, it was held that it was not necessary for the personal presence of the sheriff to the organization and continuance of the court. *McGuffie v. State*, 17 Ga 497.

10. *State v. Leavitt*, 260 P 164, 44 Idaho 739. It has also been held that a [Anderson on Sheriffs]—21

sheriff is required to attend a county board of review at its sessions where ordered to do so in view of local statute. *Board of Commissioners of Boon County v. Lewis*, 144 NE 623, 81 Ind App 601; *State ex rel. Hillis v. Sullivan*, 137 P 392, 48 Mont 320; *Merrill v. Phelps*, supra.

11. *Smith's Coroners and Constables*, pages 64 and 192.

12. *Merrill v. Phelps*, 84 P(2d) (Ariz) 74.

13. *Murfree on Sheriffs (New Ed.)*, Sec. 430.

## CHAPTER XIV

## EXECUTION—HOMESTEAD, REALTY, PERSONALTY, EXEMPTION

## Secs.

329. Property Liable to Execution.
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367. Interests of Heirs and Distributees Subject to Levy.

- 368. Assets of Decedent Not Liable to Execution against Executor in His Individual Capacity.
- 369. Standing Timber Cannot Be Levied Upon.
- 370. Levy on Crops.
- 371. Equitable Interests as Subject to Execution.
- 372. Life Estate or Less as Subject to Seizure and Sale.
- 373. Franchise as Subject to Execution.
- 374. Choses in Action.
- 375. Property in the Possession of or Adversely Held by a Third Person.
- 376. Distributive Share Subject to Seizure under Execution When.
- 377. Fixtures as Subject to Seizure under Execution.
- 378. Fructus Naturales as Subject to Levy.
- 379. Fructus Industriales as Subject to Levy.
- 380. Intoxicating Liquors as Subject to Levy.
- 381. Unpublished Manuscripts.
- 382. Money as Subject to Execution.
- 383. Patents as Subject to Levy.
- 384. Copyright as Leivable.
- 385. Trademark as Leivable.
- 386. Good Will Not Subject to Levy.
- 387. Wages and Salaries as Leivable.
- 388. Salaries Due Public Officers as Leivable.
- 389. Governmental Officers, Agents, and Subdivisions as Garnishees.
- 390. Director General of Railroads as Subject to Garnishment.
- 391. Corporations Owned by Government or State Not Subject to Garnishment Process.
- 392. State Institutions as Subject to Garnishment.
- 393. Corporations Generally as Subject to Garnishment.
- 394. Receivers, Trustees, and Others Subject to Be Made Garnishees.
- 395. Property in the Hands of Trustee in Bankruptcy as Subject to Levy.
- 396. Property in the Hands of a Guardian Not Subject to Levy.
- 397. Assets Involved in Assignments for the Benefit of Creditors as Subject to Levy.
- 398. Property of a National Bank as Not Subject to Levy.
- 399. Property in Hands of Sheriff Not Subject to Levy under Federal Process.
- 400. Public Property and Funds as Subject to Levy.
- 401. Property Dedicated to Public Use as Subject to Levy.
- 402. Property Dedicated to Cemetery Purpose Exempt from Levy.
- 403. Sale of Property Dedicated to Public Use on Execution against Dedicator.
- 404. The Interest of Homesteader as Subject to Levy.
- 405. Interests in Public Lands as Subject to Seizure and Sale.
- 406. Interest of Tenant by the Curtesy as Subject to Levy.
- 407. Dower Right as Subject to Seizure.
- 408. Exemption of Personalty by Statute.
- 409. Tools of Trade.
- 410. Right of Polyartist or "Jack of All Trades" to Claim a Number of Exemptions.
- 411. Tools or Implements Exempt to Agriculturists.
- 412. Exemption of Earnings.
- 413. Good Faith Essential to Secure an Exemption.

- 414. Debtor Entitled to Exemptions although He Has Other Property.
- 415. No Lien of Execution on Exempt Property.
- 416. When Marriage Will Defeat the Lien of an Execution.
- 417. Insurance Money as Exempt.
- 418. Debtor May Sell or Mortgage Exempt Property.
- 419. Necessity of Claiming Exemption.
- 420. When Sheriff Must Show Property Is Exempt.
- 421. Sheriff's Duty to Acquaint Debtor with the Right to Exemption and Duty of Debtor to Turn Out Other Property.

§ 329. **Property Liable to Execution.**—Under the existing system obtaining in the American jurisdictions, it is by no means true that all of the property of the defendant whether real, personal, or mixed is subject to and can be taken in execution. The execution at common law was known as a fieri facias. The general rule is now under an execution, and was at common law that where the sheriff is or was armed with a writ of execution or fieri facias he "goes for all in sight." However, there are numerous exceptions to the rule, as to what he can go in for, and take under the writ we have under consideration.<sup>1</sup> Where the common law rule has not been modified by statutory enactment, the law is that an execution issuing upon a judgment at law cannot be levied upon a purely equitable interest in real estate, or personal property of the judgment debtor, and the rule is not different where the judgment debtor is in possession of the property.<sup>2</sup>

The reason of the rule, for not allowing an equitable interest in property to be levied upon under a legal execution, was or is that such an estate is uncertain and it is doubtful if it would produce a sum sufficient in proportion to its value upon forced sale, to warrant such course. Persons, in purchasing real property generally, insist upon a certainty of the title and where there is doubt in this respect they decline to invest their money to any great extent.<sup>3</sup> In order to reach such equitable interests it was and is necessary under the common law that the creditor go into a court of equity and there file a suit to subject the equitable interests to the judg-

1. Murfree on Sheriffs, Sec. 440.

2. Potter v. Couch, 11 S Ct 1005, 141 US 296, 35 L ed 721; Mayer v. Wilkins, 19 So 632, 37 Fla 244; Thalheimer v. Tischler, 46 So 514, 55 Fla 706, 17 LRA (NS) 841, 15 AC 863; Tischler v. Robinson, 48 So 45, 56 Fla 699; Georgia Veneer etc. Co. v. Stevens, 97 SE 524, 148 Ga 522; Russell v. Lewis, 2 Pick. (Mass) 508; Gorham v. Arnold, 22 Mich 247; Gorham v. Wing, 10 Mich

486; Rowland Hardware etc. Co. v. Lewis, 92 SE 13, 173 NC 290; Smith v. Collins, 86 Atl 957, 81 NJE 348; Hogan v. Jaques, 19 NJE 123, 97 AD 644; Bates v. Lidgerwood Manufacturing Co., 29 NE 102, 130 NY 200, affirming 4 NYS 524; Eldredge v. Mill Ditch Co., 177 P. 939, 90 Ore 590; Holmes v. Wolfard, 81 P 819, 47 Ore 93; Wylie v. White, 10 SCE 294.

3. Holmes v. Wolfard, supra.

ment.<sup>4</sup> The rule that a legal execution could not be levied upon equitable title of property has failed to find ecumenical recognition, and even in the absence of statute, equitable interests have been levied upon in satisfaction of an execution issuing on a judgment at law.<sup>5</sup> The great drift of neoteric legislation is toward the position that all property of the debtor whether his title is legal or equitable, may be levied upon and subjected to a satisfaction of a purely legal judgment, and this is true without regard to the nature and character of the property whether it is real or personal.<sup>6</sup> But even under the modern statutes an interest in real or personal property that is wholly undetermined, entirely uncertain or largely contingent, is not subject to levy at law; it being readily apparent that it would not bring a price right, fair, or equitable to either the debtor or creditor.<sup>7</sup> The law with respect to when equitable interest may be levied upon, under an execution issuing on a judgment at law, is so conflicting in the different jurisdictions, it is impossible (in treating the subject in a work general in character, such as we are now attempting) to amalgamate from the divergent adjudications a general rule and it is suggested that the local statutes and judicial pronouncements be consulted with respect thereto.

§ 330. Execution against Trust Interests.—It was the common law rule that no trust interest of the beneficiary could be taken or levied upon under an execution issuing upon a judgment at law.<sup>8</sup> And where not changed by statute this is the controlling rule of law. While at common law trust interests were not subject to execu-

4. *Smith v. McCann*, 24 How(US) 398, 16 L ed 714; *Doheny v. Atlantic Dynamite Co.*, 23 SE 525, 41 W Va 1; *Thalheimer v. Tischler*, supra.

5. *Flanagin v. Daws*, 7 Del(2 Hous) 476; *Atwater v. Manchester Savings Bank*, 48 NW 187, 45 Minn 341, 12 LRA 741; *Chahoon v. Hollenback*, 16 Serg & R(Pa) 425, 16 AD 587; *Auwerter v. Mathiot*, 9 Serg & R(Pa) 397.

6. *Dunkerson v. Goldberg*, 162 F 120, 89 CCA 120; *Reed v. Munn*, 148 F 737, 80 CCA 215, cert den 28 S Ct 255, 207 US 588, 52 L ed 353; *Jarvis v. Chancellor & Lyon Co.* 177 P 27, 20 Ariz 134; *Humphrey v. Gerard*, 77 Atl 65, 83 Conn 346; *Middletown Savings Bank v. Jarvis*, 33 Conn 372; *Whiteford v. Footman*, 104 Ill App 562, *Sheppard v.*

*Messenger*, 77 NW 515, 107 Iowa 717; *Robertson v. Howard*, 109 P 696, 82 Kan 588, reversed 112 P 162, 83 Kan 453, Rev 33 S Ct 854, 229 US 254, 57 L ed 1174; *Poole v. French*, 80 P 997, 71 Kan 391; *William v. Lobban*, 104 SW 53, 206 Mo 399; *Hammond v. Johnston*, 6 SW 83, 93 Mo 193, error dismissed 12 S Ct 141, 142 US 73, 35 L ed 941; *First Nat'l Bank v. Logue*, 106 NE 21, 89 Ohio St 288, LRA1915B 340; *Columbus Nat'l Bank v. Tenn Coal etc. R. Co.*, 57 NE 450, 62 Ohio State 504; *Calhoun v. Leary*, 32 P 1070, 6 Wash 107; *Gordon v. Hillman*, 182 P 374, 107 Wash 400.

7. *Humphrey v. Gerard*, supra.

8. *Coombs v. Jordan*, 3 Bland Ch (Md) 284, 22 AD 236.

tion at law, but by virtue of statutory enactment they have been attempted to be made subject thereto, however, construction of these statutes has greatly restricted the effectual operation thereof.<sup>9</sup> And under such construction it is held that the only trusts contemplated thereby were pure and simple trusts and where the beneficiary has the whole beneficial interest, and the trustee merely holds the legal title; and that the more complicated trusts are not within the ambit of the statute, such as where other persons are beneficially interested, and if a creditor would satisfy his judgment out of trust property falling within this class, resort must be had to chancery to accomplish that result. In addition to this it is generally held that the statute of frauds is confined to estates of freehold or lands and tenements and that it does not extend to trusts in chattel interests, as estates for years or to equitable interests in personal property generally. This is a further restriction by way of construction that has been placed upon the statute.<sup>10</sup> So where the statute of frauds as enacted by the English parliament has been passed by the legislatures of the American jurisdictions this rule obtains.<sup>11</sup> Where however, the property of the judgment debtor is his in fact and may for all purposes upon his demand become his as a legal property right it may be subjected to the satisfaction of the demands of his creditors holding judgments at law.<sup>12</sup> However, where a debtor conveys lands in trust to pay certain debts, the remainder thereof after the satisfaction of such debts to be paid to the debtor, it is not subject to an execution against the debtor and a sale made by the sheriff thereunder conveys no title.<sup>13</sup> An extreme case of how far courts have gone in holding equitable interests were not subject to a judgment at law, was, wherein it was held that though the trustee had made a deed of the trust property to the beneficiary, but which was unrecorded, the property still could not be reached on an execution at law.<sup>14</sup>

9. *Chase v. York County Savings Bank*, 36 SW 406, 89 Tex 316, 32 LRA 785, 59 ASR 48. and note 29 Charles II, Sec. 3.

10. *Bogert v. Perry*, 17 Johns.(NY) 351, 8 AD 411; *Rice v. Burnett*, 17 SCE 579, 42 AD 336; *Shute v. Harder*, 1 Yerg(Tenn) 3, 24 AD 427; *Coombs v. Jordan*, supra.

11. *Smith v. Gilbert*, 41 Atl 284, 71 Conn 149, 71 ASR 163; *Johnson v. Whilden*, 81 SE 1057, 166 NC 104, AC 1916C 783, 88 SE 223, 171 NC 153; 326

*Pritchard v. Brown*, 4NH 397, 17 AD 431; *Hogan v. Jaques*, 19 NJE 123, 97 AD 644; *Rice v. Burnett*, supra; *Chase v. York County Savings Bank*, supra.

12. *Ullman v. Cameron*, 78 NE 1074, 186 NY 330, 116 ASR 553.

13. *Sprinkel v. Martin*, 66 NC 55; *McKeithan v. Walker*, 66 NC 95; *Brown v. Graves*, 11 NC 342, 4 Hawke 342; *Harrison v. Battle*, 16 NC 537, 2 Dev Eq 537; *Thompson v. Ford*, 7 Ired (29 NC) 418.

14. *Carter v. Porter*, 55 Me 337.

§ 331. **Trustee's Interest Not Subject to Execution.**—The law is that the trustee's interest in trust property cannot be subjected to execution. Among other reasons assigned for this rule is that a trust estate cannot be passed by a judgment against a trustee for his individual debts.<sup>15</sup> However, it seems that a different rule may be recognized by way of estoppel where credit was extended upon the faith of ownership of such property in the trustee as the true and full owner thereof, and even in these circumstances all of the elements of estoppel would have to be established.<sup>16</sup>

§ 332. **Remainders and Reversions as Subject to an Execution.**—As to whether or not remainders and reversions of a chattel after a life estate therein may be subjected to a satisfaction of the remainderman's or reversioner's indebtedness the authorities are in dispute. One line of authorities holds that the holder of the particular estate as temporary owner is entitled to the exclusive use thereof and that any violation of this right, even under an execution, is a trespass and the sheriff or constable levying thereon may not remove him from possession.<sup>1</sup> This view has been controverted however.<sup>2</sup> The prevailing view, with respect to a vested remainder, is that it may be taken on execution against the remainderman before the determination of the particular estate, and this seems to be true with respect to undivided interests of a remainderman in a vested remainder in property.<sup>3</sup> A like view prevails with respect to a remainder in tail as well as a reversion in fee.<sup>4</sup> While reversions and vested remainders in real estate are, as a rule, subject to execution and sale it seems that in the absence

of a statutory enactment to the contrary it must be levied upon as such; that is to say, as a remainder or reversion and that a sheriff's or constable's deed where it purported to convey a fee simple title when in truth and fact the judgment debtor had no more than a remainder or reversion such deed conveyed no title.<sup>5</sup> South Carolina, holds that a contingent remainder may be assignable but is not subject to execution.<sup>6</sup>

§ 333. **What Interests in Land Subject to Execution.**—The discussion of this section may be initiated with a statement that contingent interests of tenants by entirety in land are subject to execution and sale.<sup>7</sup> However, where the contingency attaching to and attending an inchoate right is such as to amount to uncertainty with respect to the ultimate taker of the estate, or where it is limited to an event which it is uncertain whether or not it will ever occur has been held not subject to seizure and sale. This amounts to a mere expectancy or a possible hope of some time becoming the owner and possessed of the property and therefore is beyond the reach of the law as a property interest.<sup>8</sup> The same rule seems to apply to contingent remainders and reversions; that is, they are not subject to seizure and sale against the contingent reversioner or remainderman.<sup>9</sup> This rule is applicable particularly to contingent remainders and reversions where it is uncertain who the ultimate taker will be until the particular estate has terminated. Such estates are regarded as having no present value and therefore it would be unjust to sacrifice even these possible interests.<sup>10</sup> However, this view is not without a challenge to its soundness.<sup>11</sup>

Under some authorities, where the lands are held under an adverse title in adverse possession, they are not subject to execution and a levy followed by necessary proceedings ripening into the issuance of a sheriff's deed conveys no title.<sup>12</sup> A mere naked claim

15. *Sapero v. Neiswender*, 23 F(2d) 403; *Smith v. McCann*, 24 How (US) 398, 16 L ed 714; *Townsend v. Greeley*, 5 Wall. (US) 326, 19 L ed 547; *Cunningham v. Bank of Nampa*, 88 P 975, 13 Idaho 167, 10 LRA(NS) 706, 121 ASR 257; *Baker v. Copenbarger*, 15 Ill 103, 58 AD 600; *Boatick v. Keizer*, 4 J J Marsh.(Ky) 597, 20 AD 237; *Palmer v. Northern Mutual Relief Ass'n.*, 56 NE 828, 175 Mass 396, 78 ASR 503; *Campfield v. Johnson*, 5 N.JE 245; *Ransom v. Wickstrom*, 146 P 1041, 84 Wash 419, LRA1916A 588; *Marx v. Parker*, 37 P 675, 9 Wash 473, 43 ASR 849, and note; *Farmers Bank v. Gould*, 35 SE 878, 48 W Va 99, 86 ASR 24.

16. *First Nat'l Bank of Arcadia v. Savarese*, 134 So 501, 101 Fla 480;

*Home Savings & State Bank v. Peoria Agricultural & Trotting Society*, 69 NE 17, 206 Ill 9, 99 ASR 132; *Frank v. Linkop Realty Corp.*, 151 Atl 550, 106 N.JE 567; *Marx v. Parker*, supra.

1. *Goode v. Longmire*, 35 Ala 668, 76 AD 309; *Sale v. Saunders*, 24 Miss 24, 57 AD 157; *Allen v. Scurry*, 1 Yerg (Tenn) 36, 24 AD 436.

2. *Blanton v. Morrow*, 7 Ired E 47, 42 NC 47, 53 AD 391.

3. *Ducker v. Burnham*, 34 NE 558, 146 Ill 9, 37 ASR 135, notes 23 LRA 645, 30 LRA(NS) 115; *Deadman v. Yantis*, 82 NE 592, 230 Ill 243, 120 ASR 29.

4. *Burton v. Smith*, 13 Pet(US) 464, 10 L ed 248; notes 23 LRA 645, 30 LRA(NS) 115.

5. *Kissom v. Nelson*, 2 Heisk(Tenn) 4; *Kelly v. Morgan*, 3 Yerg(Tenn) 437; *Carnes v. Apperson*, 2 Sneed (Tenn) 562.

6. *Roundtree v. Roundtree*, 2 SE 474, 26 SC 450.

7. *Hoffmann v. Newell*, 60 SW(2d) 607, 249 Ky 270, 69 ALR 489; *De Haas v. Bunn*, 2 Pa State 335, 44 AD 201.

8. *Fallon v. Worthington*, 22 P 960, 13 Colo 559, 6 LRA 708, 16 ASR 231; *Patterson v. Caldwell*, 17 Atl 18, 124 Pa 455, 10 ASR 598. But see note 6 supra sec. 332.

9. *Suskin v. Rumley*, 37 F(2d) 304, 328

68 ALR 768; *Haward v. Peavey*, 21 NE 503, 128 Ill 430, 15 ASR 120, and note; *Saunders v. Wilson*, 220 NW 344, 207 Iowa 526, 60 ALR 786; *Walker v. Al- verson*, 68 SE 966, 87 SC 55, 30 LRA (NS) 115.

10. *Smith v. Gilbert*, 41 Atl 284, 71 Conn 149, 71 ASR 163, notes 23 LRA 642, 30 LRA(NS) 116.

11. Notes 60 ALR 806, 30 LRA(NS) 115, et seq. 23 LRA 645.

12. *Ring v. Gray*, 6 B Mon(Ky) 388; *Griffith v. Houston*, 7 J J Marsh.(Ky) 385; *McConnell v. Brown*, 6 B Mon (Ky) 478.

of ownership of the land, unaccompanied by possession, does not constitute such a "right, title, or interest" that can be sold under execution and after-acquired title by the execution defendant, subsequent to the sale does not enure to the benefit of the execution purchaser.

Where there is a sale in these circumstances, and the execution defendant thereafter enters into possession of the lands he cannot be evicted therefrom at the instance of the purchaser at such sale.<sup>13</sup> Within the same category falls a mere pre-emption claim on public lands.<sup>14</sup> So too, of a mere statutory right of a person to be paid for improvements made by him on lands while unlawfully in possession thereof.<sup>15</sup> Similarly it has been held that the mere equitable lien of the vendor of real estate after a conveyance thereof, absolute on its face, may not be subjected to the satisfaction of a judgment rendered against the vendor by a levy and sale thereof.<sup>16</sup> The reason underlying the conclusion that such an equitable lien is not subject to seizure and sale is that it is merely a personal right residing in the original vendor unassignable and nontransferable by the will of the parties or by operation of law.<sup>17</sup> It seems that property that has been fraudulently conveyed may be reached upon an execution at law and this is true notwithstanding the creditor of the transferor may assail the transfer in equity, or may bring a creditor's bill for the purpose of subjecting the voluntarily conveyed property to the payment of his judgment.<sup>18</sup> The fact that the judgment debtor and another resorted to the subterfuge of a judicial sale, does not militate against the right of the judgment creditor to levy upon the property the subject matter of such sale.<sup>19</sup> So too, where the grantee in a fraudulent conveyance in turn makes a fraudulent conveyance, the property may still be reached by levying thereon under an execution on a judgment of a creditor of the initial fraudulent grantor, although

13. *Jackson v. Hagarman*, 1 Wend (NY) 502.

14. *Bray v. Ragsdale*, 53 Mo 170; *Hatfield v. Wallace*, 7 Mo 112; *Bower v. Higbee*, 9 Mo 259.

15. *Hendricks v. Snediker*, 30 Tex 296.

16. *Ross v. Heintzen*, 36 Cal 313; *Baum v. Grigsby*, 21 Cal 172, 81 AD 153; *Lewis v. Covillaud*, 21 Cal 178; *Williams v. Young*, 21 Cal 227; *Bancroft v. Cosby*, 18 P 504, 74 Cal 583.

17. *Bancroft v. Cosby*, supra.

18. *Lynch v. Burt*, 132 F 417, 67 CCA 305; *Gunn v. Hardy*, 31 So 443, 130 Ala 642; *Rountree v. Marshall*, 59 P 109, 6 Ariz 413; *Allee v. Shay*, 208 P 902, 92 Cal App 749; *Butler v. San Francisco Gas etc. Co.*, 141 P 818, 168 Cal 32; *Webster v. Lowe*, 170 P 850, 177 Cal 385; *Sewell v. Price*, 128 P 467, 104 Cal 265; *Wolters v. Rossi*, 59 P 143, 126 Cal 644; *Maxwell v. Gillespey*, 243 P 497, 116 Okl 68.

19. *Lynch v. Burt*, supra.

the judgment creditor may then be under the necessity, instead of causing a sale under the levy, of filing a bill in equity to subject the property to the lien of levy.<sup>20</sup> No reason is apparent why the officer making the levy, might not bring such a bill in equity to subject the property to the lien of levy. But, if the subject matter of the fraudulent transfer has been converted into money, or other property it seems, then, that there is no right to levy on the substituted money or other property; so, too, where the res has reached the hands of an innocent purchaser.<sup>21</sup> According to the weight of authority, the fact that the judgment to the satisfaction of which it is sought to subject the fraudulently conveyed property was not rendered until after such conveyance is immaterial.<sup>22</sup>

§ 334. **Modern Statutes with Respect to Levy on Land.**—In some jurisdictions the codes provide substantially for the levy upon and sale of both real and personal property or any interest therein of the judgment debtor not exempt under the law.<sup>23</sup> Under these provisions any interest legal or equitable which the defendant has in lands is subject to execution.<sup>24</sup> It may be generally said that if a deed of trust or any other conveyance whatever leaves an interest in the conveyed property in the grantor such interest may be seized and sold on an execution against him.<sup>25</sup> Under these statutes it seems clear that the interest of the beneficiary under a trust may be reached on an execution. It also seems that the interest of a fraudulent vendor may be seized and sold under an execution by virtue of these statutory provisions.<sup>25a</sup>

§ 335. **Levy upon Incorporeal Rights in Land.**—A levy upon land and the sale thereof will carry with it any easement that may be ap-

20. *Wyman v. Fox*, 59 Me 100.

21. *Carville v. Stout*, 10 Ala 796; *Post v. Bird*, 9 So 888, 28 Fla 1; *Rutledge v. Evans*, 11 Iowa 287; *Morse v. Aldrich*, 130 Mass 578; *Thurber v. Blanck*, 50 NY 80, 14 Abb Pr (NS) 319; *Lanning v. Streeter*, 57 Barb (NY) 33; *Richards v. Ewing*, 11 Humph (Tenn) 327; *Guyton v. Chasen*, 101 SW 290, 45 Tex Civ App 354.

22. *Smith v. Reid*, 31 NE 1082, 134 NY 568; *Chautauqua v. Risley*, 4 Deno 480, reversed 19 NY 369, 75 AD 347; see 24 Am Jur 298, Sec. 160, 27 CJ 706, Sec. 543; *Lynch v. Burt*, supra.

23. Cal. Code of Civil Procedure, Sec. 330

688; *Deering's Cal. Code of Civil Procedure*, 688; *Kerr's Cal. Code of Civil Procedure*, 688; *Idaho Code Anno.* 1032, Sec. 8-201; *Compiled Laws of Maryland*, Sec. 77.

24. *Godfrey v. Monroe*, 35 P 761, 101 Cal 224.

25. *Kennedy v. Nunan*, 52 Cal 326; *King v. Gotz*, 11 P 650, 70 Cal 236, note 97 AD 314; *LeRoy v. Dunkerly*, 54 Cal 452; *Janes v. Throchmorton*, 57 Cal 368; *McIlvaine v. Smith*, 42 Mo 45, 97 AD 295, and note.

25a. *Lynch v. Burt*, 132 F 417, 67 CCA 305; *Gunn v. Hardy*, 31 So 443, 130 Ala 642; *Hershey v. Latham*, 42

purtenant to the land.<sup>26</sup> The rule is the same where the land sold under an execution is subject to an easement; that is, the purchaser takes subject thereto.<sup>27</sup> An ungranted residue of a right of way may be annexed to a particular messuage or cease, either by express stipulation, or necessary implication, according to the occasion of the grant.<sup>28</sup> However, the existence of a permanent easement in land in favor of an adjoining proprietor and against an execution purchaser must be clearly established and permanent in its nature in order to be asserted.<sup>29</sup> As to existence of an easement, it is generally regarded as a factual question for the jury's determination.<sup>30</sup> When land of the debtor is set off on an execution to which no access can be had, except over other lands of the judgment debtor, the purchaser at such execution sale may have set off to him a right of passage over such other lands, either separately or jointly with judgment debtor.<sup>31</sup> The general common law rule is that mere incorporeal rights such as an easement are not subject to levy, seizure and sale.<sup>32</sup> The reason an easement is not subject to seizure and sale under an execution is that it is not transferable either voluntarily or involuntarily.<sup>32a</sup> This rule is applicable to deposits in banks where certificates therefor have been issued, also bills and notes, book accounts, judgments, rights under insurance policies, a stock exchange seat, license franchises, patent rights, copyrights, and rights in unpublished manuscripts, shares of stock in incorporated companies.<sup>33</sup>

Ark 305; Judson v. Lyford, 24 P 286, 84 Cal 506; see also Maxwell v. Gillespy, 243 P 497, 118 Okl 98.

26. Cooper v. Shannon, 85 P 175, 36 Colo 98, 118 ASR 95 and note. This case involved water rights. Morgan v. Mason, 20 Ohio 401, 55 AD 464; Bear v. Bitzer, 16 Pa State 175, 55 AD 490; McCrady v. Brisbane, 10 SCL 104, 9 AD 676.

27. Phillips v. Phillips, 48 Pa 178, 86 AD 577.

28. Kirkham v. Sharp, 1 Whart(Pa) 323, 29 AD 57 and note.

29. Grubb v. Gilford, 4 Watts(Pa) 223, 28 AD 700.

30. Lippencott v. Allander, 27 Iowa 460, 1 AR 299.

31. Taylor v. Townsend, 8 Mass 411, 5 AD 107.

32. Taylor v. Townsend, 8 Mass 411, 5 AD 107, wherein the court said, "nor would a levy upon such incorporeal

right be good, standing by itself; for it is nothing, except in relation to some actual, corporeal property, of which it is a mere incident or quality." Baker v. Kenney, 124 NW 901, 145 Iowa 638, 139 ASR 456.

32a. Wagner v. Hanna, 38 Cal 111, 99 AD 354; Vandalia R. Co. v. Furnas, 108 NE 401, 182 Ind 300; Kixmiller v. Baltimore etc. R. Co., 111 NE 401, 60 Ind App 680.

33. Lowmore v. Berry, 19 Ala 130, 54 AD 183, note 14 LRA(NS) 1235; McMillan v. Richards, 9 Cal 365, 70 AD 655; Dore v. Dougherty, 13 P 621, 72 Cal 232, 1 ASR 48; Lowenberg v. Greenebaum, 33 P 794, 90 Cal 162, 21 LRA 399, 37 ASR 42, note 14 ALR 285; San Francisco v. Anderson, 36 P 1034, 103 Cal 69, 42 ASR 98, notes 21 ALR 399, 92 ASR 446; De Ruiter v. De Ruiter, 62 NE 100, 28 Ind App 9, 91 ASR 107; Talcott v. Field, 52 NW 400,

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The license of a physician or surgeon or an attorney at law, at common law are not subject to seizure and sale.<sup>34</sup> Since these are mere grants of a personal privilege, it is doubtful if they could be sold under an execution or otherwise, if it were attempted to be authorized by statute. The same is true with a corporate franchise.<sup>35</sup> The license of an auctioneer, peddler, liquor dealer, and the like are not subject to seizure and sale under an execution.<sup>36</sup> It must not be supposed however, that the legislative power may not enact laws authorizing the seizure and sale of all kinds of incorporeal rights.<sup>37</sup> But this could hardly apply to a license to render personal service. In most jurisdictions there are statutory provisions for the reaching of some classes of incorporeal property by garnishment process and the statutes of each jurisdiction should be consulted.

§ 336. Public Property.—As a general rule, in the absence of a statute to the contrary, property held by municipalities or federal or state governments is not subject to seizure and sale under process.<sup>38</sup> However, the matter of exemption in such cases is generally provided for by statutory enactments. This exemption has been held to extend to a lease of public property to an individual as lessee.<sup>39</sup>

§ 337. Sundry Interests in Land Exempt from Execution.—The lands of a deceased debtor cannot be taken in execution under a judgment against one who is acting as an executor de son tort.<sup>40</sup> It seems, also, that where lands have been conveyed by an executor in trust for the payment of the testator's debts they are not subject to an execution.<sup>41</sup> It has also been held that the undivided

34. Neb 611, 33 ASR 662, note 16 LRA (NS) 319; note 1 ALR 654.

35. Ager v. Murray, 105 US 126, 26 L ed 942, note 40 AR 124; Stevens v. Gladding, 17 How(US) 447, 15 L ed 155; Stephens v. Cady, 14 How(US) 628, 14 L ed 528; Barclay v. Smith, 107 Ill 349, 47 AR 437; Husband v. Linehan, 181 SW 1089, 168 Ky 304, AC 1917D 954.

36. Notes 20 LRA 737, 31 LRA (NS) 636, 5 AC 514.

37. Barclay v. Smith, supra.

38. Collier v. Stanbrough, 6 How (US) 14, 12 L ed 324; Laird v. Carton, 89 NE 822, 196 NY 169, 25 LRA (NS) 189.

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39. Townsend v. Greeley, 5 Wall (US) 326, 18 L ed 547; Hart v. Burnett, 15 Cal 630; Chicago v. Hasley, 25 Ill 595; State v. New Madrid County, 51 Mo 82; Darlington v. New York, 31 NY 104, 28 How Pr 352, 88 AD 248; Blaine County v. Foster, 37 P(2d) 306, 109 Okla 384; Emery County v. Burrenson, 47 P 91, 14 Utah 328, 37 LRA 732, 60 ASR 898; note 89 ALR 863.

40. Buckingham v. Reeve, 19 Ohio 399. The court rather went off on the theory that the lease was not realty; the question being whether a judgment attached to the leasehold.

41. Mitchell v. Lunt, 4 Mass 654.

42. Helm v. Darby, 3 Dana(Ky) 185; Houston v. Childers, 24 La Ann 472.



share of one of several devisees in one of several parcels of land is not subject to sale under execution.<sup>42</sup> But the contrary has been maintained.<sup>43</sup> And doubtless under the modern statutory view the interest of such beneficiary could be reached on an execution.<sup>44</sup>

§ 338. **Homestead Exemption.**—The homestead exemption is a right existing by virtue of statute or constitutional provision, and in the absence of a recognition of such rights in the organic law or enactments of the legislature it does not exist, since it was unknown to the common law, and is largely an American institution; and we seem to be indebted to Texas for this beneficent provision for the benefit of debtors in straitened circumstances.<sup>45</sup> The homestead right can be no greater than is provided for in the constitution or statute creating and recognizing the right.<sup>46</sup> The matter of homestead exemption is one of great extent and there are numerous adjudications thereon and time and space will not permit a full discussion and development of the subject or perusal of the law relating thereto in all of its kaleidoscopic ramifications. So extensive is the subject that Judge Seymour D. Thompson found materials that expanded under his facile pen into a rare ponderous volume replete with illuminating discussion and exposition of legal principles with marked learning.<sup>47</sup>

We pause here on our long journey through our most enchanting subject to say that a debtor cannot, by asserting his exemption right to a homestead, perpetrate a fraud upon his creditors; so where it is necessary under the requirement of local law to execute, acknowledge and file for public record a formal declaration of homestead a distressed debtor has a perfect right to do that at any time before a lien attaches and no creditor may complain thereat.<sup>47a</sup>

42. *Clarke v. Harker*, 48 Ga 596.

43. *Cartlet v. Harlow*, 12 Mass 348, 7 AD 76; *Atkins v. Bean*, 14 Mass 404; *Baldwin v. Whiting*, 13 Mass 57.

44. Cal. Code of Civil Procedure, Sec. 689; Kerr's Cal. Code of Civil Procedure, 698; Idaho Code Anno, 1932, Sec. 8-201; Compiled Laws of Maryland, Sec. 77.

45. *Union Oil Co. v. Norton-Morgan Commercial Co.*, 202 P 1077, 23 Ariz 236; *Cherokee Const. Co. v. Harris*, 122 SW 435, 92 Ark 260, 135 ASR 177; *Mills v. Stump*, 128 P 349, 20 Cal App

84; *Riggs v. Sterling*, 27 NW 705, 60 Mich 643, 1 ASR 554; *Lindley v. Davis*, 14 P 717, 7 Mont 206; *In re Cook*, 117 P 27, 34 Nev 217; *Barney v. Leeds*, 51 NH 253; 1 Paschal Digest L(Tex), Article 3798; *Evans v. Jensen*, 168 P 762, 51 Utah 1, LRA 1918B 812.

46. *Mansfield v. Hill*, 107 P 471, 108 P 1007, 56 Ore 400.

47. See Thompson on Homesteads and Exemptions.

47a. *King v. Goetz*, 11 P 656, 70 Cal 236.

§ 339. **Liberal Construction of Exemption Laws.**—It is trite learning that the courts liberally construe exemption laws in favor of the judgment debtor. Indeed, it sometimes seems that the liberal construction with respect to these laws knows no bounds at the hands of the American judiciary. So it has been held that where for many years a debtor made farming his principal occupation and intended to do so again, after he was dispossessed of his property through foreclosure proceedings; that the mere fact that he was not so engaged at the time of levy and sale of his hay under execution did not deprive him of his exemption rights under statute providing for a farmer to claim exemption on four horses and feed for same for six months although the evidence showed that the farmer was feeding the hay to his horses, but that he intended to sell what remained of it and to purchase other hay for the same purpose at another point some distance away, and continue his occupation of farming; the learned court holding that although he was a farmer without a farm; a farmer not engaged in farming; a farmer who intended, not to feed, but sell the hay, all did not militate against his right to an exemption given to a farmer.<sup>48</sup> This case well illustrates the general liberality given to exemption laws.

§ 340. **Exemption as against Purchase Money Obligation.**—The prevailing view in the United States seems to be that a debt or obligation owing for the purchase money of exempt personal property is in no better position than any other obligation unless there exists in a particular jurisdiction a statutory or constitutional provision to the contrary.<sup>49</sup> Even in those jurisdictions where personal property otherwise exempt can not be claimed as such as against its purchase price, where a note is given for such purchase price, and it is transferred the transferee can not collect the same out of the otherwise exempt chattel.<sup>50</sup>

§ 341. **Common Law Exemptions.**—Exemptions in the main are provided for and regulated by statutes which, of a particular jurisdiction, should be consulted. However, some things were exempt from seizure and sale even at common law. As a general

48. *Aslett v. Evans*, 280 P 1036, 48 Idaho 206.

49. *Liddell v. Jones*, 88 SW 901, 76 Ark 344, 113 ASR 99; *Helton v. Van-*

*derpool*, 64 SW(2d) 883, 251 Ky 312; *Maxon v. Perrott*, 17 Mich 332, 97 AD 191; *Langevin v. Bloom*, 71 NW 697, 69 Minn 22, 65 ASR 546.

50. *Langevin v. Bloom*, supra.

rule it may be said that the common law exempts to a debtor his wearing apparel.<sup>51</sup>

It may be stated as a general rule that articles in the physical personal possession of the debtor may not be seized under an execution or attachment. The reason underlying this rule is that to do so would be a trespass against the person of the debtor. However, they may be, in a proper case, reached by the judgment creditor by procuring the appointment of a receiver and obtaining a court order that the receiver be put in possession thereof.<sup>52</sup> It hardly need be noted that this would not apply as to actual wearing apparel.

§ 342. **Exemptions of Vehicles Carrying U. S. Mail.**—It may be stated as a general rule of law that vehicles actually engaged in carrying of U. S. mail, or where located at a post office, or other place, preparatory to the carrying of such mail are not subject to seizure under process.<sup>53</sup> The rule has been tersely stated by Mr. Justice Brewer that, "the strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or transportation of the mails."<sup>54</sup> However, it has been held that unless the vehicle is actually engaged in carrying mail it is not within the protection of the law.<sup>55</sup> Such seizure under an execution when the vehicle is engaged in the carrying of U. S. mail would probably subject the sheriff to a criminal prosecution for obstructing the passage of mails.<sup>56</sup>

Not only is the vehicle engaged in carrying U. S. mail exempt from seizure under civil process, but likewise the operator thereof or a mail carrier may not be taken in arrest on civil process or probably on the charge of having committed a misdemeanor, but this does not extend to felonies.<sup>57</sup> It seems that a sheriff by seizing such vehicle while it is engaged in, or about to become engaged in the carrying of mail, would be liable also in a civil action

51. *Mack v. Parks*, 8 Gray (Mass) 517, 69 AD 267; *Cooke v. Gibbs*, 3 Mass 193; *Frazier v. Barnum*, 19 NJE 316, 97 AD 666; *Bumpus v. Maynard*, 38 Barb (NY) 626; *Hurdistey v. Barney*, Comb 356, 90 Eng Rep 525; *Field v. Adames*, 12 A&E 649, 40 ECL 324, 113 Eng Rep 900.

52. *Cooke v. Gibbs*, supra; *Frazier v. Barnum*, supra.

53. *U. S. v. Barney*, 24 F Cases #14525, 3 Hughes 545, 3 Hall Law J

126, 2 Wheeler Cr Cas 513; *Harper v. Endert*, 103 F 911; *U. S. v. Sears*, 55 F 268; see however, *Harmon v. Moore*, 59 Me 428.

54. *In re Debs*, 15 S Ct 909, 158 US 204, 39 L ed 1092.

55. *Lathrop v. Middleton*, 23 Cal 257, 93 AD 112.

56. 18 USCA, Sec. 324.

57. *U. S. v. Kirby*, 7 Wall. (US) 492, 19 L ed 279; *Penny v. Walker*, 64 Me 430, 18 AR 209.

for damages proximately caused thereby, not only to the mail carrier, but to any person receiving mail that was delayed by reason of the seizure.<sup>58</sup>

§ 343. **Pension Moneys Exempt.**—The federal statute provides that no sum of money due or to become due, to any pensioner, shall be liable to attachment, levy, or seizure, by or under any legal or equitable process whatsoever, whether the same remains with the pension office, or any officer or agent thereof, or is in the course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner. Pension money is designed, in part at least, to enable the pensioner to support his family, and the statute should not be strained so as to enable him to avoid this duty when the proceeding is by the wife seeking support from the pensioner.<sup>59</sup> The federal statute may not be asserted by a pensioner who has in his possession pension money when it is sought by his wife to enforce her right to separate maintenance. In other words, pension money is not exempt under the statute for alimony claims or support.<sup>60</sup> Indeed, it is a general rule that has grown up under the above mentioned statute that pension money is not exempt as against any claim after it has been actually received by the pensioner.<sup>61</sup>

Differently stated, it may be said that the federal statute does not purport to protect pension money after it has inured wholly to the benefit of the pensioner, but to protect it while in the pension office, or in the hands of its agents or officers, and while it is in the course of transmission to the pensioner. Generally stated, a sheriff or constable would be perfectly safe in levying upon pension money that has reached the pensioner and has been thereafter deposited in a bank, or property purchased therewith might be, with safety, levied upon by an officer.<sup>62</sup>

58. *Cohen v. Cohen*, 63 SW 544, 26 Tex Civ App 315.

59. 38 USCA, Sec. 54; *Tully v. Tully*, 34 NE 79, 159 Mass 91.

60. *Tully v. Tully*, supra.

61. *Kellogg v. Waite*, 12 Allen (Mass) 529; *Spelman v. Aldrich*, 126 Mass 113; *In re Ferguson's Estate*, 123 NW 123, 140 Wis 583, 17 AC 1189; *Tully v. Tully*, supra.

62. *In re Stout*, 109 F 794; *McIntosh v. Aubrey*, 22 S Ct 561, 185 US 122, 46 L ed 834; *Price v. Society for Savings*, 30 Atl 139, 64 Conn 362, 42

ASR 198; *Faurote v. Carr*, 9 NE 350, 108 Ind 123; *Cavanaugh v. Smith*, 84 Ind 380; *Webb v. Holt*, 11 NW 658, 57 Iowa 712; *Farmer & Sons v. Turner*, 21 NW 140, 64 Iowa 690; *Crow v. Brown*, 46 NW 993, 81 Iowa 344, 11 LRA 110, 25 ASR 501; but see, *Marquardt & Sons v. Mason*, 54 NW 72, 87 Iowa 136; *Cranz v. White*, 27 Kan 319, 41 AR 408; *Johnson v. Elkins*, 13 SW 449, 90 Ky 163, 6 LRA 552, 11 Ky L 967; *Curtis v. Helton*, 59 SW 745, 109 Ky 493, 95 ASR 398 (but see contra *Roblon v. Walker*, 82 Ky 60, 60

It has also been held that the specific money received by the pensioner from the government in payment of the pension granted to him can not be reached by a creditor, and applied to a payment of a debt to the creditor by any judicial process, and this would seem to indicate that it was the intention of the court to hold that insofar as the identical money was concerned it could not be reached at any time and applied in liquidation of the indebtedness of the pensioner.<sup>63</sup>

It has also been held that the pension money in the hands of the pensioner's wife retains its distinctive character as a pension and that the statute should be liberally construed in favor of the pensioner.<sup>64</sup> But the sounder rule seems to be that there is nothing in the statute that protects said money any farther than the time of delivery to the pensioner, and that the words of the statute that the pension money "shall inure wholly to the benefit of such pensioner" relate to the words "due, or to become due" and have no force after the public obligation has been discharged by delivery of the money to the pensioner or his agent.<sup>65</sup>

Differently stated, the rule is that money derived from a government pension is protected by congressional statutory enactment against the demands of creditors of the pensioner while it remains in the pension office or in the hands of any officer or agent thereof, or is in the course of transmission to the pensioner, but after it reaches his hands it becomes the same as any other money.<sup>66</sup> An application of the rule with respect to when the money is in transmission, is found in a case where pension money was paid to the guardian of an insane pensioner and by the guardian loaned out; it is in these circumstances in process of transmission to the pensioner, and still under the control of the federal government and is exempt.<sup>67</sup>

In consonance with the rule enunciated by the Wisconsin court

AR 878, 5 Ky L 799; Hudspeth v. Harrison, 8 Ky L 304; Friend v. Garcelon, 77 Me 25, 52 AR 739; Crane v. Linneus, 77 Me 59; Jardain v. Fairton Savings Fund Ass'n, 44 N.J. 376; Rozelle v. Rhoads, 9 Atl 160, 116 Pa 129, 2 ASR 591; Pentz v. First Nat'l Bank, 75 Pa Super 1; Martin v. Hurlburt, 14 Atl 649, 60 Vt 364; Bank of Kingwood v. Murdock, 37 SE 548, 48 W Va 301; McFarland v. Fish, 12 SE 548, 34 W Va 548; Spelman v. Aldrich, supra; Kellogg v. Waite, supra.

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63. Folschow v. Werner, 7 NW 911, 51 Wis 85.

64. Adams v. Newell, 8 Vt 190; Bullard v. Goodno, 50 Atl 544, 73 Vt 88.

65. McIntosh v. Aubrey, 22 S Ct 561, 185 US 122, 46 L ed 834; In re Ferguson's Estate, 123 NW 123, 140 Wis 583, 17 AC 1189.

66. Sohl v. Wainwright Trust Co., 130 NE 282, 76 Ind App 198.

67. Manning v. Spry, 96 NW 873, 121 Iowa 191.

and hereinbefore referred to, comes the holding that money received from the U. S. government as a pension and remaining unchanged in the pensioner's hands at the time of his initiation of bankruptcy proceedings may be claimed by him as exempt from liability for his debts, and free from claims of his trustee in bankruptcy.<sup>68</sup> On the other hand, however, in accordance with the ruling of the court in the case of *In re Ferguson's Estate*<sup>69</sup> it was held that the words "inure wholly to the benefit of such pensioner" meant only that the pension funds were protected until they came safely into the hands of the pensioner, after which they are liable for his debts, and that therefore pension money in the hands of a bankrupt at the time of his adjudication, although neither invested or commingled with other funds is not exempt.<sup>70</sup>

There is nothing in the federal statute militating against the position that, upon the consideration of the financial resources of a husband in a divorce action pension money may be considered, in determining the amount of alimony that the husband should be required to pay, and this would seem to be true insofar as such consideration is concerned even though the pension money has not been paid, but is treated as probable income.<sup>71</sup>

**§ 344. Exemption of Veteran Payments and Pensions.**—The federal statute provides that payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, and exempt from the claims of creditors and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Under this statute it has been held that negotiable notes and U. S. bonds purchased out of payments or benefits under the laws relating to World War veterans and held by his guardian were not exempt from execution upon a judgment against the veteran.

The provision of the above mentioned section does not justify the inference that investments made, out of the benefit payments, should be exempt from claims of creditors; when investments are made bona fide and a transmutation takes place, creditors have a right to collect their just debts.<sup>72</sup> In harmony with this enunciation by the Supreme Court of the U. S. it has been held that the section referred to

68. *In re Bean*, 100 F 262.

69. *In re Ferguson's Estate*, 123 NW 123, 140 Wis 583, 17 AC 1109.

70. *In re Jones*, 166 F 337.

71. *Wheeler v. Wheeler*, 94 Atl (N.J.) 85; *Bailey v. Bailey*, 66 Atl 1014, 76 Vt 264, 65 LRA 332, 104 ASR 935.

72. *Carrier v. Bryant*, 59 S Ct 707.

[1 Anderson on Sheriffs]

above does not extend so as to exempt realty which has been purchased with the proceeds of pension, compensation or other payments made to veterans.<sup>73</sup>

It has been held that it appears quite certain that the term "beneficiary under any of the laws relating to veterans" is at least broader than "beneficiary designated by the policy" and, in fact is broad enough to include the insured, or otherwise his exemption would have no statutory basis; and that where the death of the designated beneficiary occurred in the lifetime of the veteran, and then the veteran died, and thereafter his insurance passed to his estate, it is subject to the payment of the insured's debts.<sup>74</sup>

There is nothing in the statute mentioned that prevents a state from seeking expenses of hospitalization of a mentally incompetent ward whose estate represented accumulations of payments under the congressional act, since, upon commitment for hospitalization, the veteran became a ward of the state and the state was seeking only reimbursement for his support from the pension money which it was intended to provide.<sup>75</sup> Where the beneficiary of a war risk insurance policy was the sole distributee of the insured on the death of the beneficiary named in the policy, (the insured having predeceased the beneficiary) the proceeds of the policy were liable for the beneficiary's debts.<sup>76</sup>

The Supreme Court of the United States, in construing the above mentioned section, held that war risk insurance money paid to the estate of the insured was subject to the claims of his creditors.<sup>77</sup>

This section does not require that a minor, whose estate consisted of payments by the United States government as dependency compensation under the United States laws, which was deposited in a bank as financial tutor should be granted the priority of payment against the assets of the bank after its failure.<sup>78</sup>

The statute exempting payments under the laws relating to veterans from seizure before and after receipt by the beneficiary

306 US 545, 83 L ed 977 affirming 198 SE 651, 214 NC 174; *McCurry v. Peek*, 187 SE 854, 54 Ga App 341.

73. *McCurry v. Peek*, 187 SE 854, 54 Ga App 341; *Henderson v. City of Missoula*, 79 P(2d) 547, 100 Mont 590, 116 ALR 1425.

74. *In re Bollow's Estate*, 270 NW 82, 223 Wis 262, 109 ALR 429, and note.

75. *In re Lewis' Estate*, 283 NW 21,

287 Mich 179.

76. *Walker v. Queener*, 124 SW(2d) 236, 174 Tenn 129. See also *Singleton v. Check*, 52 S Ct 257, 284 US 403, 76 L ed 419, 81 ALR 923.

77. *Pagel v. Pagel*, 54 S Ct 497, 291 US 473, 78 L ed 921; *Walker v. Queener*, supra.

78. *Brock v. Citizens State Bank & Trust Co.*, 182 So 679, 190 La 572, annulling 180 So 650, 172 So 546.

of veterans though passed<sup>79</sup> before Adjusted Compensation Payment Act authorizing issuance and payment of bonds on surrender by World War Veterans of adjusted service certificate, applies so as to exempt from execution funds received by World War veterans in payment of bonds.<sup>80</sup> It has been held, also, that a world war veteran's bank deposit of moneys received from the United States "as a payment of benefit" is exempt from garnishment under this section.<sup>81</sup> This statute will not admit of the construction that it was intended to apply only in favor of the children, widows, and estates of veterans but the veteran himself comes within its purview, since it is clear that the statute was intended to protect the veteran during his lifetime.<sup>82</sup>

The exemption provided for under the federal statute, we have under discussion, is inapplicable to debts and claims against an incompetent veteran for the care of his minor children. So where a creditor has a claim against a veteran for the necessary and reasonable support of the veteran's minor children the exemption under the above mentioned statute is inapplicable and a sheriff or constable would be warranted in levying upon money or proceeds of benefits received by such veteran from the federal government on such a claim.<sup>83</sup>

**§ 345. Exemption as against Purchase Money Claims.**—As a rule, an exemption statute operates against the purchase price in the same manner as any other debt although in some statutes exceptions are made in favor of such obligations of the debtor and a chattel, although otherwise exempt may be subjected to the satisfaction of a claim for its purchase price.<sup>84</sup> The fact that the property attempted to be seized for its purchase price has been set apart as exempt with

79. 38 USCA, Ch 11.

80. *Culp v. Webster*, 70 P(2d) (Cal Super) 273.

81. *Elbert Sales Co. v. Granite City Bank*, 192 SE 66, 55 Ga 835.

82. *Lawrence v. Shaw*, 57 S Ct 443, 306 US 246, 81 L ed 623, 108 ALR 1102, rev. 186 SE 504, 210 NC 352; see also *Culp v. Webster*, supra.

83. *Gaskins v. Security, First Nat'l Bank*, 86 P(2d) 681, 30 Cal App 409.

84. *In re Nunemaker*, 208 F 491; *In re Phillips*, 209 F 400; *In re Stern*, 208 F 488; *Friedman v. Sullivan*, 2 SV 785, 48 Ark 213; *Liddell v. Jones*, 89 SW 961, 76 Ark 344, 113 ASR 99; *Cator v. Blount*, 25 So 283, 41 Fla 138; 340

*Shear v. Reynolds*, 90 Ill 238; *Donnelly v. Dripps*, 167 NW (Iowa) 102; *Hellton v. Vanderpool*, 64 SW(2d) 883, 251 Ky 312; *Rynella Mill etc. Co. v. Segura*, 55 So 2, 128 La 643; *Feenstra v. Tanis*, 108 NW 674, 145 Mich 409; *Gottesman v. Chipman*, 83 NW 1026, 125 Mich 60; *Beffarrab v. Spell*, 100 SE 321, 178 NC 231; *Northern Shoe Co. v. Cecka*, 135 NW 177, 22 ND 631; *State v. Shook*, 118 NE 1010, 97 Ohio State 164; *Fehley v. Barr*, 66 Pa 196; *Mos-teller v. Holborn*, 114 NW 693, 21 SD 547; *Westchester Fire Insurance Co. v. Goggan*, 203 SW (Tex Civ App) 163; *Houlehan v. Ressler*, 41 NW 720, 73 Wis 567.

respect to other obligations of the claimant does not prevent the seizure and sale in those jurisdictions where property is not exempt from a purchase money obligation.<sup>85</sup> In New Jersey it was held that an exemption statute in favor of cemeteries was sufficient to prevent the collection even of a purchase money mortgage.<sup>86</sup> The lien for purchase money on land is not impaired by the debtor procuring its allotment as a homestead, and it seems that where a sheriff has been notified that an execution in his hands represented the purchase price of the homestead he is bound to levy thereon.<sup>87</sup> It would be a safer practice to have the judgment recite that it was for purchase money and describe the property therein, and have execution follow the judgment.<sup>87a</sup>

**§ 346. Rights of Third Parties with Respect to the Enforcement of Purchase Money Claims.**—The rights of an assignee holder of a purchase money obligation to enforce the same against the property, even though as to other obligations, it would be exempt is well established. At one time this view was oppugned, but the more neoteric and enlightened adjudications have now rendered the holdings thereon in practical unanimity, and whatever authority that might be asserted as militating against the rule may well be characterized as negligible.<sup>88</sup> The rule subjecting exempt property to liability for the purchase price thereof, under statutory enactments, is not so wide in scope and broad in application as to permit the pursuit of an identical piece of property in the hands of a purchaser or subsequent purchasers or third parties buying the same from the original purchaser.<sup>89</sup>

A statute providing that personal property is in all cases subject to execution for the purchase money thereof and shall in no case be exempt except in the hands of an innocent purchaser for value and without notice, a levy thereon for the purchase money thereof does not operate to create a priority over earlier levies, since such a statute is construed to create an exemption only and is not one fixing a lien on or regulating the rights of priorities by the different

85. *Loyless v. Collins*, 55 Ga 370; *Tift v. Newsom*, 44 Ga 600.

86. *Spear v. Locust Wood Cemetery Co.*, 66 Atl 1068, 72 N.J.E. 821.

87. *Baker v. Bower*, 44 Ga 14.

87a. However see *Rogers v. Brackett*, 25 NW 601, 24 Minn 279.

88. *Langevin v. Bloom*, 71 NW 697, 69 Minn 22, 65 A.S.R. 546; *Graham v.*

*McCampbell, Meigs* (Tenn) 52, 33 AD 126, notes 28 AD 199, 12 AD 263, but see *Weil v. Nevitt*, *infra*.

89. *Bridgeford v. Adams*, 45 Ark 136; *Weil v. Nevitt*, 31 P 487, 18 Colo 10; *Norris v. Brunswick*, 73 Mo 256; *Haworth v. Franklin*, 74 Mo 106; *Straus v. Sole Leather Pad Co.*, 14 SW 940, 102 Mo 261 (*Straus v. Rothan*).

creditors.<sup>90</sup> Under a statute excepting otherwise exempt property from the exemption laws, as against the purchase price thereof while in the hands of the vendee, where such property is sold in judicial proceedings this does not operate to entitle the purchaser to claim the proceeds of the sale as exempt for the reason that the property is no longer in the hands of the vendee.<sup>91</sup>

**§ 347. Right of Vendee in Garnishment to Claim Benefits of Exemption.**—Where a creditor of the seller garnishes a debt in the hands of the purchaser, such debt being for a chattel exempt in the hands of the purchaser, except as against the purchase price, the garnishee can not set up such exemption, as a bar to the garnishment proceedings, nor, when a judgment is rendered against the purchaser, as garnishee, and such property is levied on by virtue of the garnishee judgment can the purchaser assert his claimed right of exemption as against such judgment.<sup>92</sup>

**§ 348. Advances to Raise Crops as Purchase Money.**—Advances to the debtor which were used in raising a crop are treated as money due for the purchase price thereof and the crop is not exempt therefrom.<sup>93</sup> So where the creditor makes advances, and takes a lien authorized by statute therefor on growing crops, this transaction is treated in the same manner as if the obligation were for purchase money.<sup>94</sup>

**§ 349. Judgments Treated as Purchase Money When.**—Where a judgment is taken for the conversion of a chattel, such judgment is not treated as one for the purchase price thereof, and exemption rights may be maintained against it.<sup>95</sup> In case a seller takes the

90. *Straus v. Sole Leather Pad Co.*, 14 SW 940, 102 Mo 261 (*Straus v. Rothan*).

91. *Mullinix v. Simon*, 186 F 776, 116 CCA 399.

92. *Liddell v. Jones*, 88 SW 961, 76 Ark 344, 113 ASR 99; *Creanor v. Creanor*, 36 Ark 91; *Morris v. Ham*, 1 SW 519, 47 Ark 293; *Smith v. Butler*, 80 SW 580, 72 Ark 350.

93. *Stephens v. Smith*, 62 Ga 177; *Tift v. Newsom*, 44 Ga 600; *Farmer v. Greer Fertilizer Co.*, 86 SE 639, 102 SC 285.

94. *Tift v. Newsom*, *supra*.

95. *Hoyt v. VanAlstyne*, 15 Barb (NY) 568. It is submitted this holding

is untenable; suppose A takes B's horse, and converts him, and B's counsel, instead of bringing replevin sues in trover for conversion, and after judgment is had, it turns out A still has the horse, but no other property, can it be said that it would be a sound doctrine, to allow the tortfeasor to keep the fruit of his wrongful act and claim as exempt? Of course E might, in these circumstances still bring replevin for his horse, since the title has not passed. 65 CJ 130, Sec. 244. So, we have here, under the doctrine of *Hoyt v. VanAlstyne*, a case where one may claim an exemption right in a chattel to which he has no title—that he does not even own.

buyer's note and thereafter negotiates it and is later sued thereon jointly with the buyer by the seller's indorsee and the seller thereafter pays such note it is not then treated as a purchase money judgment and exemption may be claimed against it.<sup>96</sup> So, too, the exemption may be set up as against a judgment in favor of a surety for the purchase price of an otherwise exempt chattel, the surety having paid the purchase price, and thereupon seeks to recover what he has paid for his principal.<sup>96a</sup> But, on the other hand, a creditor who takes a purchase money note, and reduces it to judgment, and thereafter enters into future negotiations with the purchaser, and makes additional loans to him, upon which a judgment at a later time is taken for both the purchase price note and for the subsequent loan, the judgment, in these circumstances, is regarded pro tanto, a purchase money judgment against which to that extent the claim of exemption upon the property purchased is unavailing.<sup>97</sup>

In an action by the vendor of personal property upon the vendee's note, received in full payment and satisfaction of the price of the property, is an action for the "purchase money" of the property, within a statute rendering property otherwise exempt as non-exempt in so far as the purchase price is concerned. And the fact that the action is for purchase money is enough to bring it within the above mentioned statute without the fact that the note is for purchase money being stated or alleged in the complaint, or recited in the judgment or execution.<sup>98</sup> Statutes are to be encountered placing fraud in the obtaining of goods or incurring the obligation on the same basis as purchase money.<sup>98a</sup>

The note which is the foundation of a judgment must represent the purchase price of the property, and will not extend to a transaction where it is arranged by the seller for the buyer to give his note to a creditor of the seller. As against such a claim the assertion of the exemption will be sustained. For example, where A sold a horse to B, A being indebted to C for land, and B by agreement of all the parties gave his note to C who credited it on the land account, it was held under these circumstances that the horse was exempt from seizure on a judgment predicated on the note; that extinguishment of the land account was the consideration for the

96. *Harley v. Davis*, 10 Minn 497.

96a. *Smith v. Slade*, 57 Barb(NY) 637.

97. *State v. Shook*, 118 NE 1010, 97 Ohio State 164; see also *Fox v. De-Long*, 1 Woodw Dec(Pa) 137.

98. *Rogers v. Brackett*, 25 NW 601,

34 Minn 279; *Shreck v. Gilbert*, 73 NW 276, 52 Neb 813; *Taylor v. Rice*, 44 NW 1017, 1 ND 72; *Sobolisk v. Jacobson*, 69 NW 46, 6 ND 175.

98a. *Shreck v. Gilbert*, supra; *Taylor v. Rice*, supra; *Sobolisk v. Jacobson*, supra.

note and the horse was not.<sup>99</sup> The fact that security has been given for a note does not militate against the right to enforce a judgment recovered thereon against the chattel which was the consideration for the note.<sup>1</sup> If the seller of personal property brings an action for its conversion against a third party seeking to recover it or its value, and a money judgment is had in such action, it will not be regarded as a judgment representing the purchase money to which the right of exemption for the chattel involved therein may not be claimed.<sup>2</sup>

§ 350. *Loan of Money to Purchase Chattel as Constituting Purchase Money.*—Where one loans money to another to purchase chattel, he is regarded in law as having a purchase money claim, insofar as the particular chattel is claimed exempt, and the exemption would not be sustained.<sup>3</sup> The creditor may not subject other exempt property to his claim than that represented by the purchase money transaction. A creditor may, under the generally prevailing doctrine, cause to be taken upon execution property of his debtor otherwise exempt where the creditor's claim represents the purchase price of such property, but the rule has never been made to apply to other exempt property.<sup>4</sup> So, where a surety signs a note for his principal which note is given for the purchase price of otherwise exempt property he can not be deprived of his right of exemption with respect to such note; that is to say, the surety's exempt property cannot be taken to satisfy said note.<sup>5</sup> It necessarily results, from consideration of these holdings, that it is indispensable, in order to subject apparently exempt property to a satisfaction of a creditor who asserts that he holds a purchase money claim against it, that such property be identified and that it be established in truth and in fact represents the creditor's claim.<sup>6</sup> So where the buyer purchases the same general classes of property from different sellers some of which are paid and others not paid, then the burden seems to be upon the creditor to identify his particular property in order to subject it to a seizure in spite

99. *Washington v. Cartwright*, 65 Ga 177.

1. *Roberts v. McGur*, 40 NW 370, 82 Mich 221. See also Sec. 340.

2. *Williams v. American Slicing Machine Co.*, 98 SE 270, 148 Ga 770. See note 95 supra this sec.

3. *Dosbaugh Nat'l Bank v. Jelf*, 119 P 538, 86 Kan 41. See also *State Bank v. Shepherd*, 162 P 653, 105 Kan 206, 344

3 ALR 1014; but see, *Houlchan v. Rassler*, 41 NW 720, 73 Wis 557; *Lagune v. Quinones*, 23 Porto Rico 358.

4. In re *Hammonds*, 198 F 574; In re *Tobias*, 103 F 63, *Loyless v. Collins*, 55 Ga 370; *Gibbons v. Gaffney*, 26 Atl 24, 154 Pa 48. See sec. 340 supra.

5. *Davis v. Peabody*, 10 Barb(NY) 91.

6. *Wagner v. Olson*, 54 NW 286, 3 ND 69.

of its exempt character.<sup>7</sup> But this need not be done in an action wherein the purchase money claim is reduced to judgment.<sup>7a</sup>

§ 351. **Costs Treated as Purchase Money.**—Where a judgment is obtained for the purchase money of a chattel, the costs taxed in the action wherein the judgment is procured partake of the same characteristics as the judgment and the chattel may not be claimed as exempt as against such costs.<sup>8</sup>

§ 352. **Failure to Pay Assumed Debts as Part of Purchase Consideration No Claim of Exemption in Vendor's Action.**—Where a partner purchased the partnership assets and paid the consideration therefor, partly in cash and the rest in assuming partnership obligations, he can not assert a right to exemption out of the assets so purchased, when sued by the retiring partner for the purpose of compelling the purchaser of the partnership assets to pay the assumed debts.<sup>9</sup>

§ 353. **Estoppel by Recital in Purchase Money Judgment.**—Where a judgment recites that it is for the purchase money of a chattel, the debtor cannot assert that this is not a fact, or even that a part of the judgment was not due for purchase money.<sup>10</sup>

§ 354. **Homestead and Bankruptcy Law in Force.**—The great weight of authority is that the mere filing of a petition in bankruptcy constitutes a caveat, an attachment, and injunction. This rule is so well established it now has an aphoristic recognition to the effect that the "filing of the petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction."<sup>11</sup> Differently stated, the rule has been enunciated that the filing of a petition is an assertion of jurisdiction, with a view to the determination of the status of the bankrupt, and a settlement and distribution of his estate, the exclusive jurisdiction of which rests in the bankruptcy court, and from the time of filing of the petition in bankruptcy the estate of the bankrupt is regarded as in custodia legis.<sup>12</sup> So it would seem to follow that unless the

7. Canadian Law Book Co. v. Fieldhouse, 3 Alta L 384, 12 West LR 396; In re Hammonds, supra; Wagner v. Olson, supra.

7a. See Sec. 349, note 98 supra.

8. Woodland Cemetery Co. v. Stout's Adm'r., 97 SW 766, 30 Ky L 165.

9. Platt v. Platt, 39 So 536, 60 Fla

594, see also Porter v. Teate, 17 Fla 813; Whitaker v. Elliott, 73 NC 186.

10. In re Hawbicker's Estate, 6 Pa County 570.

11. May v. Henderson, Jr., 45 S Ct 456, 268 US 111, 69 L ed 870, 5 ABR (NS) 739, reversing 289 F 192, 3 ABR (NS) 285.

12. Acme Harvester Co. v. Beekman

judgment, upon which an officer is proceeding, had been a lien upon the homestead for more than four months before the filing of the petition in bankruptcy, that the officer would have but one duty, and that would be to desist and stay all proceedings until a determination of the matter in bankruptcy. The mere fact that there has been a levy upon a piece of property, that could be, but has not been claimed as a homestead does not by any means forestall the right of the debtor to claim it, and then go into bankruptcy. In many states there are statutory requirements, to the effect, that a debtor who would assert his homestead right, must file a declaration of homestead and record it, in the same manner as a conveyance of real property or otherwise make a record of his assertion of the homestead right in and to a particular piece or parcel of land, and, in these circumstances, undoubtedly the law is that, notwithstanding the fact that a piece or parcel of land he desires to claim as a homestead has been levied upon under an attachment or execution, if the lien of levy was created within four months next preceding his adjudication in bankruptcy, may still be claimed as exempt. The adjudication serves to dissolve the lien and he may then assert his rights to the exemption; so in those jurisdictions where it is necessary for the homestead declaration to be filed, the debtor may after a levy upon property he desires to claim as a homestead file a declaration thereof in accordance with the state statute, and then initiate proceedings in bankruptcy leading to an adjudication, which operates as a dissolution of all liens against his property whether exempt or nonexempt created within four months next preceding. This course of procedure operates to free his homestead of the lien created within the above mentioned time but leaving it subject to the claim of exemption.<sup>13</sup>

§ 355. **Choses in Action Not Liable to Seizure under an Execution.**—At common law choses in action, such as judgments, notes, accounts, and the like, are not subject to seizure under a writ of execution or attachment, and this still would be true in the absence of a statutory enactment, but there are probably statutes in all jurisdictions directing how these assets may be reached. In the absence of such statute they could be reached by resort to a court of chancery upon a bill constructed along lines designed to effectuate the desired result.<sup>14</sup>

Co., 32 S Ct 96, 222 US 300, 56 L ed 208.

13. In re Forbes, 186 F 79, 108 CCA 191; In re Tune, 115 F 900; Chicago

B. & Q. R. R. Co. v. Hall, 33 S Ct 885, 229 US 511, 57 L ed 1306, 128 NW 645, 88 Neb 20.

14. McGehee v. Cherry, 6 Ga 550;



§ 356. **Property in Custodia Legis.**—Generally speaking, property in custodia legis is not subject to seizure, under an execution or attachment. And this is true even where there may be some error or irregularity in the appointment of a receiver or in the proceedings in which the property was placed in his possession.<sup>15</sup> It has been held however, that it is merely the possession of the receiver that is protected and not the title, and that if a levy on real estate can be made without disturbing the possession of the receiver then it may be done.<sup>16</sup> Likewise it seems that if a levy is made upon property in the hands of a receiver and no proceedings are taken by way of contempt of court, or otherwise, to protect the possession of receiver, it may be assumed that the court appointing such receiver is in accord with the proceedings taken to levy upon property in his hands.<sup>17</sup> The same rule with respect to receivers, and the property in their hands as not being subject to levy under an execution, or attachment, applies to trustees in bankruptcy, assignees for the benefit of creditors, auditors, or commissioners in equity, and clerks of court.<sup>18</sup> It has been held, however, that under some statutory enactments an assignee for the benefit of creditors and the assets in his hands are not within the ambit of the law's protection against seizure and sale of property in custodia legis.<sup>19</sup> The same protection as is thrown around property in the custody of a receiver under the rule, that it is in custodia legis, is applicable with like force with respect to property in the hands of guardians of infants, or incompetents.<sup>20</sup> However the position with

respect to the extension of the protection to property in the hands of a guardian of an infant or incompetent is not without opposition.<sup>21</sup>

§ 357. **Redemption Money as in Custodia Legis.**—Where it is necessary to file a bill in equity, or take other action to redeem property that has been sold under judicial process and the redemption money is paid into court simultaneously with the filing of the action for redemption, it is not subject to seizure under an execution by way of garnishment, or otherwise, whether the execution is against the redemptioner or the redemptionee.<sup>22</sup> Some authorities maintain the view that redemption money is not in custodia legis after it becomes settled as to whom the same belongs, and there remains nothing further than for the custodian thereof to pay it over, and that under these circumstances an execution against the owner of such fund may be levied thereon.<sup>23</sup> However the contrary has been maintained.<sup>24</sup>

§ 358. **Property Held on Execution as in Custodia Legis.**—Where money has been collected upon an execution, in the absence of statutory enabling act, it is not liable to be taken in satisfaction of another execution.<sup>25</sup> So far as the right to seize money collected under an execution is concerned, the fact that the levy is attempted to be made thereon by a different officer upon process issuing from another court, or different jurisdiction, is wholly immaterial.<sup>26</sup> The rule is no different where a United States marshal

*McClelland v. Hubbard*, 2 Blackf(Ind) 361; *Johnson v. Crawford*, 6 Blackf(Ind) 377; *Osborn v. Cloud*, 23 Iowa 104, 92 Am Dec 413; *Ingalls v. Lord*, 1 Cow(NY) 240; *Taylor v. Gillelan*, 23 Tex 508.

15. *John Hetherington & Sons v. Rudisill*, 28 F(2d) 713, 62 ALR 377; *Wiswall v. Sampson*, 14 How(US) 52, 14 L ed 322; *Clear Creek Power and Development Co. v. Cutler*, 245 P 939, 79 Colo 355, 48 ALR 237; *New Haven Wire Co. Cases*, 18 Atl 266, 57 Conn 352, 5 LRA 300; *Cobb v. Camden Savings Bank*, 76 Atl 607, 106 Me 178, 20 AC 547; *Pelletier v. Greenville Lumber Co.*, 31 SE 855, 123 NC 596, 68 ASR 837, note 39 ALR 22; *Walling v. Miller*, 15 NE 65, 108 NY 173, 2 ASR 400; *Beardslee v. Ingraham*, 76 NE 476, 183 NY 411, 3 LRA(NS) 1073;

*Jenkins v. Purcell*, 29 App DC 209, 9 LRA(NS) 1074.

16. *Albany City Bank v. Schermerhorn*, 9 Paige(NY) 372, 39 AD 551, but see *Wiswall v. Sampson*, supra.

17. *Coe v. Columbus P. & I. R. Co.*, 10 Ohio State, 372, 75 AD 518.

18. *Bank of Tenn. v. Horn*, 17 How.(US) 157, 15 L ed 70; *Hamilton-Brown Shoe Co. v. Mercer*, 51 NW 415, 84 Iowa 537, 35 ASR 331; *Rockland Savings Bank v. Alden*, 68 Atl 863, 103 Me 230, 14 LRA(NS) 1220, 13 AC 806; *Dale v. Brumbly*, 58 At' 807, 99 Md 466, 64 LRA 112; *Gillespie v. Keating*, 36 Atl 641, 180 Pa 150, 57 ASR 622; *Blair v. Cantey*, 29 SCL(2 Speers) 34, 42 AD 360; *French v. White*, 62 Atl 35, 78 Vt 89, 2 LRA(NS) 804, 6 AC 475.

19. *State v. Rose*, 58 NW 514, 4 ND 319, 26 LRA 593, and note.

20. *Shumaker v. Bohrofen*, 250 NW 347

683, 217 Iowa 34, 92 ALR 914; *Sturgis v. Sturgis*, 93 P 696, 51 Ore 10, 15 LRA(NS) 1034, 131 ASR 724, note 92 ALR 920.

21. *Allison v. Taylor*, 6 Dana(Ky) 87, 32 Am Dec 68; *Gressly v. Hamilton County*, 114 NW 191, 136 Iowa 722, 15 AC 354; *Greenwood v. Wilkinson*, 256 P 46, 124 Okla 300; *Thacher v. Dinamore*, 5 Mass 299, 4 Am Dec 61; *Pollock v. Horn*, 43 P 885, 13 Wash 626, 52 ASR 66.

22. *Hine v. Brown*, 205 SW 657, 135 Ark 393, note 94 ALR 1051. The learned annotator in the above mentioned note assigns additional reason why such money could not be reached on an execution against the redemptioner, and that is, upon depositing the money his title thereto passes from him which is undoubtedly sound. *Killdrew v. El-* 348

*Hott*, 8 Humph(Tenn) 515; *Withers v. Pemberton*, 3 Coldw(Tenn) 56, see also *Terry v. Deitz*, 49 Ind 293.

23. *Allen v. Larson*, 256 NW 178, 64 ND 727, 94 ALR 1046 and note.

24. *Lightner v. Steinagel*, 33 Ill 510, 85 AD 292; *Smith v. Finlen*, 23 Ill App 156; *Meyers v. Willsey*, 205 NW 373, 164 Minn 450; *Davis v. Seymour*, 16 Minn 210.

25. *Jones v. Merchants Nat'l Bank*, 76 F 683, 22 CCA 483, 35 LRA 698; *Hagan v. Lucas*, 10 Pet(US) 400, 9 L ed 470; *Taylor v. Carryl*, 20 How(US) 583, 15 L ed 1028; *Cowart v. W. E. Caldwell Co.*, 88 SE 500, 134 Ga 544, 30 LRA(NS) 720, and note; *Jones Stationery & Paper Co. v. Case*, 26 Kan 200, 40 AR 310.

26. *Pulliam v. Osborne*, 17 How(US) 471, 15 L ed 154; *Pitkin v. Burnham*,

attempts to levy upon money collected by sheriff, constable, or other state officer, or vice versa.<sup>27</sup> It seems that the rule exempting property from levy in custodia legis applies where a forthcoming bond has been given for the property, and also where the property has been replevined by a third party under a claim of purchase from the judgment debtor. And, during the pendency of the replevin action against the officer, such property is not subject to levy under another execution since it is still regarded in custodia legis.<sup>28</sup>

The rule exempting property in the hands of a sheriff or constable as in custodia legis has been held to not apply to surplus money remaining in the hands of such officer arising from the sale of property levied upon and sold under an execution, which surplus was in the hands of the sheriff or constable after having satisfied all claims in his hands against such debtor, and the balance belongs to the judgment debtor and is subject to other executions in the hands of the officer holding such surplus.<sup>29</sup> The rule is especially applicable, it is held, where such surplus or balance is attempted to be appropriated in the satisfaction of an execution held by a different officer than the holder of such surplus, or where the execution issued from a different court or jurisdiction.<sup>30</sup>

**§ 359. Proceeds on Execution Distributable to Creditors.**—An officer who collects money on an execution, and who holds another execution against the creditor in the former execution, may not apply said money in satisfaction of the execution held against the former execution creditor. Neither may he serve himself with process thereby impressing said money with a lien or levy. But in such case the second execution would have to be served on him by another officer.<sup>31</sup> There are authorities however holding that

87 NW 160, 62 Neb 385, 55 LRA 280, 89 ASR 763; Keating v. Spink, 3 Ohio State 105, 62 AD 214; Hagan v. Lucas, supra; Taylor v. Carryl, supra.

27. Keating v. Spink, supra.

28. Crittenden v. Lingle, 14 Ohio State 182, 84 AD 370, and note; Lugenbeal v. Lemert, 42 Ohio St 9; Knight v. Kinney, 7 Ohio CC 69; Hagan v. Lucas, supra.

29. Turner v. Fendall, 1 Cranch (US) 117, 2 L ed 63; Lightner v. Steinagel, 33 Ill 510, 85 AD 292; Commerce Vault Co. v. Barrett, 78 NE 47, 222 Ill 169. 6 AC 652, 113 ASR 382; Larsen v. Ditto,

90 Ill App 384; Payne v. Billingham, 10 Iowa 360; Walton v. Compton, 28 Tex 589; Wiant v. Hays, 18 SE 807, 38 W Va 681, 23 LRA 82, note 6 Ann Cas 655; Stehenson v. Douglass, 2 New Brunsw 281; Fieldhouse v. Croft, 4 East 510.

30. Hagan v. Lucas, supra.

31. Turner v. Fendall, 1 Cranch (US) 117, 2 L ed 63; Clymer v. Willie, 3 Cal 363, 58 AD 414; Hardy v. Tilton, 68 Me 195, 28 AR 34; Rudy v. Com., 35 Pa 166, 78 AD 330; Prentiss v. Bias, 4 Vt 513, 24 AD 631.

the officer may in these circumstances apply the money in his hands in satisfaction of the second execution against the creditor in the former.<sup>32</sup>

**§ 360. Property Subject to Lien.**—Where it appears that property is held by a judgment debtor in the capacity of a factor, consignee, or pawnee, or otherwise, under a lien it cannot be seized upon an execution against the lien holder.<sup>33</sup> The rule is the same where the title to property is even placed in the name of an agent to enable him to sell it.<sup>34</sup> In order, of course, for the operation of the rule that such property may not be taken on an execution against the consignee, agent or bailee for sale, the transaction must be in good faith, and must not be colorable, evasive, or fictitious.<sup>35</sup> Differently stated, the rule undoubtedly is that in all classes of bailments the bailed property is not subject to be seized on execution or otherwise by creditors of the bailee.<sup>36</sup> However, where the bailee under the contract of bailment obtains an interest or special property in the thing bailed, an execution will lie to reach such an interest.<sup>37</sup> Still, the fact remains that whether a mere bailee has

32. Ex parte Fearle, 13 Mo 467, 53 AD 155; Dolby v. Mullins, 3 Humph (Tenn) 437, 39 AD 180; Tucker v. Atkinson, 1 Humph (Tenn) 300, 34 AD 650; Mann v. Kelsey, 12 SW 43, 71 Tex 609, 10 ASR 800.

33. Vermont Marble Co. v. Brow, 41 P 1031, 109 Cal 236, 50 ASR 37, and note; Fleet v. Hertz, 66 NE 858, 201 Ill 594, 94 ASR 192; Kentucky Refining Co. v. Globe Refining Co., 47 SW 602, 104 Ky 159, 84 ASR 468, 42 LRA 353; Harding v. Stevenson, 6 Har & J (Md) 264; Holly v. Huggelrod, 8 Pick. (Mass) 73, 19 AD 303; Kittredge v. Sumner, 11 Pick. (Mass) 50; Dewes Brewery Co. v. Merritt, 46 NW 370, 82 Mich 198, 9 LRA 270; Heberling v. Jaggard, 49 NW 396, 47 Minn 70, 28 ASR 331; Sargent and Co. v. DeSoto Paint & Varnish Co., 77 SW (2d) 444, 168 Tenn 247; Barnes Safe & Lock Co. v. Bloch Tobacco Co., 18 SE 482, 38 W Va 158, 45 ASR 840, 22 LRA 850; Legg v. Evans, 6 Ness & W 39.

34. Ransom v. Wickstrom, 140 P 1041, 84 Wash 819, LRA1916A 688.

It was decided in the last cited case that the fact it was necessary to intro-

duce parol evidence of the true relation between principal and agent contrary to the written bill of sale did not in any way prevent the establishment of the true relation between the principal and agent, the court citing the following authorities to sustain its position: 3 Jones on Evidence, Sec. 28, page 31, see note LRA1916A, 592.

35. Columbus Buggy Co. v. Turley, 19 So 232, 73 Miss 529, 32 LRA 260, 55 ASR 550; Barnes Safe & Lock Co. v. Bloch, supra.

36. Equitable Trust Co. v. Conn. Brass & Man'f. Corp. 290 F 712; Cable Co. v. Elliot, 203 SW (Mo App) 211; Cooperider v. Myre, 175 NE 235, 37 Ohio App 502; Leitch v. Sanford Motor Truck Co. 103 Atl 658, 279 Pa 100; Star Show Case Manufacturing Co. v. Friedman, 181 Atl 861, 120 Pa Super 109; First Nat'l Bank v. Jones, 269 SW (Tex Civ App) 468.

37. Houston v. Simpson, 46 NC 513; Hartford v. Jackson, 11 NH 145; Herzog's Cloak etc. Co. v. Fedorko, 105 Atl 21, 92 NJL 34; Allen v. Russell,

an interest in the subject of bailment, which is subject to levy as against him, is often a question of great refinement and nicety.<sup>38</sup>

Thus it has been held that an instrument between the owner of a farm and his son, by which the son, who was the tenant, is given the management of the farm, implements, livestock thereon, with full liberty to sell and dispose of the same, replace old livestock and worn out implements with new, and appropriate the net proceeds to himself, and is charged with the duty to make all repairs, pay all taxes and operating expenses, and is given as his own, the net profits from the farming operations, but without fixing any purchase price or providing for payment by the son, while either party was at liberty to terminate the arrangements at will, upon such termination the son would be required to turn back the implements, livestock, etc., of the same kind and amount as when he took charge thereof, and in as good condition as the same was at that time, although the personal property was assessed for taxation in the name of the son, does not give title to such personalty to the son so as to subject it to a levy on an execution against him.<sup>39</sup> On the other hand however, it seems that the interest of the bailor is subject to be taken on an execution against him.<sup>40</sup>

The fact that the bailee has a lien upon the personal property, the subject matter of bailment, in no way oppugns the right of a creditor of the bailor to levy thereon, but, of course, the interest of the bailee would have to be taken into account and protected by a sheriff or constable making a levy. It would seem to be a necessary result of these adjudications, that where personal property is delivered to an artisan or mechanic to be altered or repaired by him and by virtue of which he has a common law lien thereon to retain and hold onto such property until he is paid, that both his interest, and the interest of the owner would severally be subject to levy under process directed against the owner for his interest therein and likewise with respect to workman under an execution directed against him for his interest therein.<sup>41</sup> But, where goods are placed in the custody of a factor, and the owner has been permitted to anticipate with respect to the proceeds of sale of certain

19 Tex 87; Smith v. Niles, 20 Vt 315, 49 AD 782.

38. Herzog's Cloak etc. Co. v. Fed-orko, supra.

39. Arnold v. Hatch, 20 S Ct 625, 177 US 276, 44 L ed 769.

40. Fleet v. Hertz, 86 NE 858, 201

Ill 594, 94 ASR 192; Milliken-Helm Commission Co. v. Albers Commission Co. 147 SW 1065, 244 Mo 38; Jenkins v. Eichelberger, 4 Watts (Pa) 121, 28 AD 691; Buckner v. Croissant, 3 Phila (Pa) 219.

41. Herzog's Cloak, etc. Co. v. Fed-orko, supra.

of the property, and has drawn drafts upon the factor which have been accepted or paid by him it seems that such goods in these circumstances may not be levied upon under an execution directed against the owner.<sup>42</sup>

§ 361. Levy of an Execution on Firm Property for Individual Debt.—This subject is now regulated in many jurisdictions by statutory enactments, but in the absence of statute, the matter was and is involved in a great deal of confusion. It seems that the common law rule was that a judgment against a member of a firm could be enforced against firm property, but only to the extent of the debtor partner's interest therein, which would mean, of course, his interest after whatever firm creditors there were, were paid in full.<sup>43</sup> The right to levy upon the interest in a partnership, to satisfy an execution issued against an individual member, is well established, but the difficult question comes as to the mechanical operation of the actual levy, and the subjection of the partner's interest therein to the payment of a judgment rendered against him individually.<sup>44</sup> According to some authorities there may not be an actual seizure, but only a constructive levy is permitted.<sup>45</sup> On the other hand, there are authorities holding that the officer should seize the partnership assets, and take possession thereof.<sup>46</sup> Other cases hold that the officer may levy upon only the debtor's interest in what is necessary to satisfy the execution against the partner.<sup>47</sup> While still other authorities are found declaring it is the duty of the officer to levy upon the entire partnership assets.<sup>48</sup>

It has been held however, but of highly doubtful soundness, that partnership property may be levied upon and sold under an execution on a judgment against all of the members of the partnership upon a joint indebtedness even though such indebtedness had

42. Lambeth v. Turnbull, 5 Rob (La) 264, 39 AD 530.

43. Lyndon v. Gorham, 15 Fed Cas No. 8640, 1 Gall 307; Merrill v. Rinker, 17 Fed Cas No. 9471, Baldwin 528; U. S. v. Williams, 28 Fed Cas No. 16719, 4 McClean 236; Wilson v. Strobach, 59 Ala 488; Robinson v. Tevis, 38 Cal 611.

44. Jones v. Thompson, 12 Cal 191; Weber v. Hertz, 58 NE 676, 188 Ill 68; Swan v. Gilbert, 51 NE 604, 175 Ill 204, 67 ASR 208; Darnell v. State Nat'l. Bank, 158 P 921, 59 Okla 204, LRA1016F 1279; Jones v. Richardson, 42 SW 440, 99 Tenn 614.

45. Vandike v. Rosskam, 67 Pa 330.

46. Andrews v. Keith, 34 Ala 722; Clark v. Cushing, 52 Cal 617; Wickham v. Davis, 24 Minn 107; Barrett v. McKenzie, 24 Minn 20; Cogswell v. Wilson, 21 P 388, 17 Ore 31; Lee Dinsmore, 162 NW 749, 30 SD 26.

47. Aldrich v. Wallace, 6 Dana (Ky) 287, 33 AD 495.

48. Tait v. Murphy, 2 So 317, 80 Ala 440; Weber v. Hertz, 58 NE 676, 188 Ill 68; Ernest v. Woodworth, 82 NW 661, 124 Mich 1; Hutchinson v. Dubois, 7 NW 714, 45 Mich 143; Blumenfeld v. Seward, 14 So 442, 71 Miss 342.

no connection with the partnership operations.<sup>49</sup> It is submitted that, it is well settled that, the officer cannot in an execution against an individual partner levy upon specific articles of the partnership.<sup>50</sup> The existence of a mortgage on the interest of one partner, does not prevent the levying upon the entire partnership property for a partnership debt.<sup>51</sup>

§ 362. **Subject of Partner's Interest after Levy.**—We have now progressed in our discussion to where we have the partner's interest levied upon by whatever method that is recognized in a particular jurisdiction. The question now is, what shall be done? It is manifest that nothing has been accomplished by a mere levy. It is thought that the Supreme Court of California at an early day stated the correct procedure, after a seizure by a sheriff of partners' interest, wherein it was said, "By such seizure (of the partnership effects), the sheriff acquires a special property in the goods seized; and the judgment creditor himself may, and the sheriff, also, with the consent of the judgment creditor, may file a bill against the other partners for the ascertainment of the quantity of that interest, before any sale is actually made under the execution. The judgment creditor, however, is not bound, if he does not choose, to wait until such interest is so ascertained, but he may require the sheriff immediately to proceed to a sale, which order the sheriff is bound by law to obey. In the event of the sale, the purchaser at the sale is substituted to the rights of the execution partner, quoad the property sold, and becomes a tenant in common thereof; and he may file a bill, or a bill may be filed against him by the other partners, to ascertain the quantity of the interest which he has acquired by the sale."<sup>52</sup> It would seem, in the absence of statutory provision directing a different course, that the above mentioned procedure after levy might safely be adopted. In any case, it would be the duty of the sheriff or constable to consult with the judgment creditor with respect to the course to be pursued. Of course, the matter of subjecting a partner's interest in partnership property to an individual execution has been regulated in many jurisdictions and the statutes of

49. *Saunders v. Reilly*, 12 NE 170, 105 NY 12, 59 AR 472.

50. *Williams v. Lewis*, 17 NE 202, 115 Ind 45, 7 ASR 403; *Gillham v. Kerone*, 45 Mo 487; *Whigam's Appeals*, 63 Pa St 104.

51. *Sheehy v. Graves*, 58 Cal 449; [1 *Anderson on Sheriffs*]-23

*Commercial Bank v. Mitchell*, 58 Cal 42.

52. *Jones v. Thompson*, 12 Cal 101; *Robinson v. Tevis*, 38 Cal 611; *Commercial Bank v. Mitchell*, 58 Cal 42; *Story on Partnerships*, Sec. 263.

any state or jurisdiction should be consulted with respect how to proceed therein.

The uniform partnership law provides that on due application to a competent court by any judgment creditor of a partner, the court which entered the judgment order or decree, or any other court, may charge the interest of the debtor partner with the payment of the unsatisfied amount of such judgment debt, with interest thereon, and may then, or later, appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts, and inquiries which the debtor partner might have made, or which the circumstances of the case may require. The interest charged may be redeemed at any time before the foreclosure sale or, in case of a sale directed by the court, may be purchased without thereby causing a dissolution, with separate property, by any one or more of the partners, or with partnership property, by any one or more of the partners with the consent of the partners whose interests are not charged or sold. It is provided in the act also that nothing therein shall be held to deprive a partner of his rights, if any, under the redemption laws as regards his interest in the partnership.<sup>53</sup> Under the uniform partnership law, a sheriff or constable, would not have any authority to make any levy whatsoever. Partnership property, insofar as an execution against an individual partner is concerned, has been eliminated from the functions of an officer holding an execution against such individual partner.

§ 363. **Levy on Partner's Property for Partnership Debt.**—The common law rule is that a judgment against all of the partners for a partnership debt is joint and several and that an execution may be levied upon the partnership property or the individual property of any or all of the partners. And, it seems to be true, that the partnership property must be applied first to the satisfaction of firm debts, before individual creditors can become entitled to anything, and that not only this, but all equities between the parties

53. *California Laws* 1920, Ch 864; *Colorado Laws*, 1931, Ch. 129; *Idaho Laws*, 1910, Ch. 154; *Ill. Laws*, 1917, 625; *Maryland Laws* 1916, Ch. 177; *Mass. Laws*, 1922, 486; *Mich. Laws*, 1917 #72; *Minn. Laws* 1921, 487; *Nevada Laws*, 1931, 74; *New Jersey Laws*, 1919, Ch. 212; *New York Laws*, 1919, Ch. 408; *Oregon Laws*, 1939, Ch. 354

550; *Pennsylvania Laws*, 1915, #15; *South Dakota Laws*, 1923, Ch. 296; *Tennessee Laws*, 1917, Ch. 140; *Utah Laws*, 1921 Ch. 89; *Virginia Laws*, 1918, Ch. 365; *Wisconsin Laws*, 1916, Ch. 358; *Wyoming Laws*, 1917, Ch. 97; *Alaska Laws* 1917, Ch. 17; *Uniform Partnership Act*, Sec. 28.

[1 *Anderson on Sheriffs*]

must be adjusted before individual creditors may share in partnership assets.<sup>54</sup> On the other hand, the individual creditors have a right to a priority of payment out of individual assets over partnership creditors.<sup>55</sup> However, if the judgment is rendered against the partnership in its name and not against the individual members thereof, and the execution runs against the partnership only, on such an execution the officer would not have any right to levy upon individual property. But if it runs against both the partnership in its own partnership name, and the individual members thereof, then the partnership property may be reached prior to payment of individual creditors. Judgments by virtue of statutory enactments in many jurisdictions may be taken against a partnership in its firm name and to this extent the partnership is treated as a legal entity similar to that that attaches to a corporation.<sup>56</sup> Where part of the partners are not served with process, a judgment may be rendered against the partnership and those who have been served. So too where one partner has been served with process. This is, of course, by virtue of a statutory enactment working a metamorphosis as to the common law rule.<sup>57</sup>

54. *Lovins v. Laub*, 147 NYS 304, 85 Misc 336; *Ryckman v. Manerud*, 136 P 826, 68 Ore 350, AC1915C 522; *Moore Grocery Co. v. McCan*, 169 SW (Tex) 191.

55. *Lewis v. U. S.* 92 US 618, 23 L ed 513; *In re Groetzinger*, 110 F 366, aff. 127 F 814, 62 CCA 494; *Clark v. Johnson*, 61 So 34, 7 Ala 507; *Dilworth v. Curts*, 29 NE 861, 139 Ill 608; *Firsch-Wickwire Co. v. Denison Clothing Co.* 138 NW 1101, 158 Iowa 117; *Taylor v. Riggs*, 57 P 44, 8 Kan App 323.

56. *Yarbrough v. Bush*, 69 Ala 170; *McCoy v. Watson*, 51 Ala 466; *Ratchford v. Covington County Stock Co.* 55 So 806, 172 Ala 461; *Flowers v. Strickland*, 73 SE 1092, 10 Ga App 739; *Nussbaum v. Connor*, 21 SE 709, 94 Ga 530; *Waxelbaum v. Connor*, 19 SE 805, 94 Ga 529; *Lansing v. Bever Land Co.* 138 NW 833, 158 Iowa 693, rev. 132 NW 177; *State v. Kiefer*, 163 NW 698, 183 Iowa 319; *Latta v. Olsen*, 172 NW 162, 187 Iowa 1288; *Broatch v. Moore*, 63 NW 30, 44 Neb 640; *Hamner v. Ballantyne*, 52 P 770, 16 Utah 436, 67 ASR 643.

57. *Ratchford v. Covington County*

*Stock Co.* 55 So 806, 172 Ala 461; *New Coronada Coal Co. v. Jasper*, 222 SW 22, 144 Ark 58; *Maclay Co. v. Meads*, 112 P 195, 14 Cal App 363, 113 P 364; *Ingraham v. Gildermeester*, 2 Cal 88; *Hayman v. Weil*, 44 So 176, 63 Fla 127; *Little Rock Cooperage Co. v. Hodge*, 37 SE 743, 112 Ga 521; *Clein v. Diamond*, 87 SE 1101, 17 Ga App 652; *Ferry v. Mattox*, 58 SE 291, 2 Ga App 104; *Warren Brick Co. v. Lagarde Lime etc. Co.* 76 SE 761, 12 Ga App 58; *Felsenthal v. Durand*, 86 Ill 230; *Sherburne v. Hyde*, 57 NE 776, 185 Ill 580; *Mulligan v. Alsen*, 222 Ill App 615; *Willock v. Wilson*, 59 NE 757, 178 Mass 68; see *C. A. Babcock Co. v. Katz*, 253 P 373, 121 Ore 64; *Winters v. Means*, 41 NW 157, 25 Neb 241, 13 ASR 489; *Broatch v. Moore*, 63 NW 30, 44 Neb 640; *Daniel v. Bethell*, 83 SE 307, 167 NC 218; *Burton v. Roff*, 292 SW 159, see also 275 SW (Tex Civ) 273; *Glasscock v. Price*, 47 SW 905, 92 Tex 271; *Sugg v. Thornton*, 9 SW 145, 73 Tex 666, affirmed 10 S Ct 103, 132 US 524, 33 L ed 447; *Roberta v. Toney*, 131 SE 532, 100 W Va 688; *Bowdish v. Groscup*, 74 SE 950, 70 W Va 758.

§ 364. **Goods Fraudulently Purchased.**—Where goods are fraudulently purchased by a judgment debtor, on a credit, with the object in view of subjecting them to the execution of the plaintiff the attempt so to do would be futile, because such goods cannot be taken under execution, since the judgment debtor has no title therein due to the fact that the title never passed from the seller.<sup>58</sup>

§ 365. **Levy upon Goods Sold on a Conditional Sales Contract.**—While there is some difference of opinion, the weight of authority seems to be that a buyer under a conditional sales contract before he has paid the purchase price, has no such property interest in the subject matter of the conditional sales contract that may be subjected to a levy and sale at the instance of his creditors.<sup>59</sup> While confessedly the buyer has a certain interest in such property conditionally sold, yet it is not of that character that is subject to a levy under an execution or a writ of attachment, until the conditions he has undertaken have been performed. This is especially true where the title is retained until the property is paid for instead of a mere reservation of title by way of security.<sup>60</sup> Neither the payment of part of the purchase price by the buyer nor the fact that he is per-

58. *VanCleaf v. Fleet*, 15 Johns. (N Y) 147; *Allison v. Matthieu*, 3 Johns. (NY) 235; *Hitchcock v. Covill*, 20 Wend (NY) 167, reversed 23 Wend (N Y) 611; *Durell v. Holley*, 1 Paige (N Y) 492, 19 AD 444; *Lupin v. Marie and Varet*, 2 Paige (NY) 169, 6 Wend 77, 21 AD 256; *Lloyd v. Brewster*, 4 Paige (NY) 537, 27 AD 88; *Acker v. Campbell*, 23 Wend (NY) 372; *Olmsted v. Hotailing*, 1 Hill (NY) 317; *Cary v. Hotailing*, 1 Hill (NY) 311, 37 AD 323; *Ash & Anners v. Putnam*, 1 Hill (NY) 302.

59. *Thornton v. Cook*, 12 So 403, 97 Ala 630; *Bickerstaff v. Doub*, 19 Cal 109, 79 AD 204; *Hefner v. Jackson*, 273 P 37, 95 Cal App 476; *Johnson v. White*, 46 Cal 328; *Cooley v. Gillan*, 6 Atl 180, 54 Conn 80; *Forbes v. Marsh*, 15 Conn 384; *Hughes v. Kelly*, 40 Conn 146; *Woodruff v. M. G. McDonald Furniture Co.* 23 SE 195, 96 Ga 86; *Keck v. State*, 39 NE 899, 12 Ind App 119; *Owens v. Hastings*, 18 Kan 446; *Ayer v. Bartlett*, 6 Pick. (Mass) 71; *Hill v. Freeman*, 3 Cush (Mass) 267; *Tyler v. Freeman*, 3 Cush (Mass) 261; *Heath v. Randall*, 4 Cush (Mass) 195; *Malden*

*Center Garage v. Berkowitz*, 168 NE 916, 269 Mass 303; *Hussey v. Thornton*, 4 Mass 405, 3 AD 224; *Silver Bow Mining & Milling Co. v. Lowry*, 12 P 652, 6 Mont 286; *Cardinal v. Edwards*, 5 Nev 36; *Cole v. Berry*, 42 NJL 308, 36 AR 511; *Strong v. Taylor*, 2 Hill (NY) 326; *Piser v. Stearns*, 1 Hill (N Y) 86; *Herring v. Hoppock*, 15 NY 409; *Hasbrouck v. Lounsbury*, 26 NY 598; *Burchell v. Green*, 27 NYS 82, aff. 29 NYS 1141, 6 Misc 236; *Whitney v. Biggs*, 156 NYS 1107, 92 Misc 424; *Sage v. Sleutz*, 23 Ohio St 1; *McIver v. Williamson-Halsell-Frazier Co.* 92 P 170, 19 Okla 454, 13 LRA (NS) 606; *Central Loan & Trust Co. v. Campbell Commission Co.* 49 P 48, 5 Okla 396, reversed on other grounds, 19 S Ct 346, 173 US 84, 43 L ed 623; *Sanders v. Wilson*, 8 Mackey (19 DC) 555.

60. *Lucas v. Birdsey*, 41 Conn 357; *Brown v. Haynes*, 52 Me 578; *Drew v. Smith*, 59 Me 393; *Marquette Man'f. Co. v. Jeffery*, 13 NW 592, 49 Mich 283; *Nat'l. Cash Register Co. v. Coleman*, 32 NYS 693, 85 Hun 126.

mitted to have possession, and use of the personalty sold before it is paid for, without further consent of the seller, operates to change the rule with respect to its seizure by the creditors of the buyer.<sup>61</sup>

The position that the goods are not subject to seizure at the instance of the buyer's creditors is strengthened, when there has been a default on the part of the buyer, or a demand has been made for the return of the property by the seller by reason of a default in payment, or other condition broken and still more, it may be urged that the creditors of the buyer possess no right to subject the conditionally purchased property of their debtor to their claims after it has been repossessed by the conditional seller.<sup>62</sup> It is immaterial, so long as the transaction is one of conditional sales, how it may be characterized by the parties to it. That is, where it is in the form of a lease it in no way militates against the operation of the majority rule as set out heretofore.<sup>63</sup> The condition does not necessarily have to be one of payment, in order to withhold title from buyer, and in such fashion that his creditors may not reach the same. It may be that when property is delivered to the purchaser that before title passes he is required to give security, or it may be delivered on trial or any other lawful condition.<sup>64</sup> Where the statute does not require the contract to be registered, the fact that the levying creditor of the buyer did not know of the existence of the conditional sales contract does not change the non-leviable character of the property covered thereby. No title passes by a sale under execution and the view is not different where the purchaser is bona fide.<sup>65</sup> In the absence of a statutory provision to the contrary, it would seem that the fact that the conditional sales contract was oral would not change the situation in any way.<sup>66</sup> If the property is attached by a creditor of the buyer, the seller may elect thereupon to terminate the bailment or contract and repossess the prop-

61. *Armington v. Houston*, 88 Vt 449, 91 AD 366; *Keck v. State*, supra.

62. *Redwine v. Trowbridge*, 279 P 606, 99 Cal App 762; *Northern Rock Island Plow Co. v. Hackett-Gates-Hurty Co.* 206 NW 446, 165 Minn 282; *Buckmaster v. Smith*, 22 Vt 293; *Martin v. Eames*, 26 Vt 476; *Mount v. Harris*, 1 Smedes & M 185, 40 AD 89; *Sage v. Sleutz*, supra.

63. *Goodell v. Fairbrother*, 12 RI 233, 34 AR 631.

64. *Whitcomb v. Woodworth*, 54 Vt 544; *Hussey v. Thornton*, supra.

65. *Bradshaw v. Warner*, 54 Ind 58; *Hodson v. Warner*, 60 Ind 214; *Blanchard v. Child*, 7 Gray (Mass) 155.

66. *Meier & Frank Co. v. Sabin*, 214 F 231, 130 CCA 605; *Blackwell, Thompson & Co. v. Walker Brothers & Co.* 5 F 419, 2 McCrary 33; *Blackford v. Neaves*, 205 P 587, 23 Ariz 501; *Estes v. Lamb*, 233 SV 99, 149 Ark 369; *Roudeman v. Arnold*, 166 NW 985, 200 Mich 162, 8 ALR 789.

erty.<sup>67</sup> However, it should be noted that the above mentioned view is not maintained without a challenge to its soundness and other authorities can be found holding that the buyer has a leviable interest.<sup>68</sup> There is little doubt however that the creditors of the seller may levy upon the property sold under a conditional sales contract.<sup>69</sup> The rule seems to be the same with respect to levy on the property by the seller's creditors, where the transaction is one by which the title is reserved by way of security as in the cases of pure conditional sales.<sup>70</sup> However this position has even been disputed.<sup>71</sup> If the seller however, has disposed of his interest in the conditional sales contract then in that case nothing remains in him, by way of interest in the chattel upon which a levy can be made.<sup>72</sup>

§ 366. *Interest in Decedent's Estates as Subject to Levy.*—Where, under the local law, a devise or legacy has not vested in the legatee or devisee, it is not, without the executor's assent, subject to seizure under an execution or attachment.<sup>73</sup> Also, if the property has been sold, or is subject to be sold for the payment of debts under a power of sale conferred upon the executor, then it is not subject to be seized by creditors of the legatee or devisee under an execution or attachment.<sup>74</sup> But if, on the other hand, there is vested in the legatee or devisee a title to said property it may be seized and sold at the instance of his creditors, like any other asset owned or held by him.<sup>75</sup> Assets of an estate are not subject to sale upon judgment against decedent.<sup>76</sup>

§ 367. *Interests of Heirs and Distributees Subject to Levy.*—Since the title to personal property in most, if not all jurisdictions, rests primarily in the real or personal representative, an heir possesses no title or interest that may be seized upon by his creditor under an execution during the process of administration.<sup>77</sup> How-

67. *Bigelow v. Huntley*, 8 Vt 151.

68. *Savelle v. Wauful*, 16 NYS 219, 21 NY Civ Pr 18, aff. 63 Hun 627, 10 NYS 1007, 43 NYS 988; *Rose v. Story*, 1 Pa St 190, 44 AD 121; *Packard Motor Car Co. v. Mazer*, 77 Pa Super 348.

69. *Escobar v. Rogers*, 189 P 268, 182 Cal 603.

70. *Marquette Man'f. Co. v. Jeffery*, 13 NW 592, 49 Mich 283.

71. *Hall v. Larey*, 73 Ga 697.

72. *Escobar v. Rogers*, supra.

73. *Suggs v. Sapp*, 20 Ga 100; *Stout v. LaFollette*, 64 Ind 365.

74. *Comrie v. Kleman*, 147 NYS 589, 162 App Div 510, 118 NE 1055, 222 NY 958.

75. *McIntosh v. Walker*, 17 Ala 20; *Taylor v. Bacon*, 142 SW 1128, 102 Ark 97; *McClellan v. Solomon*, 2 So 825, 23 Fla 437, 11 ASR 381; *Hewitt v. Durant*, 44 NW 318, 78 Mich 186; *Hopping v. Grey*, 89 Atl 27, 82 NJE 502.

76. *Snodgrass v. Cabiness*, 15 Ala 160; *Johnson v. Pickering* (1908) 1 KB 1.

77. *Hancock v. Titus*, 39 Miss 224.

ever the undivided interest in land may be subjected to a seizure and sale upon an execution issued against an heir subject, of course, to the payment of the decedent's debts.<sup>78</sup>

§ 368. **Assets of Decedent Not Liable to Execution against Executor in His Individual Capacity.**—The property of the testator, in the hands of his executor, cannot be seized in satisfaction of an execution on a judgment against the executor personally. The rule is not changed by the fact that the executor is a de son tort one.<sup>79</sup> But if an executrix marries again and commits a devastavit, converts the goods to her own use, and then delivers them to her husband, they may be taken in execution against him.<sup>80</sup> However, where the execution is against the executor in his official capacity, and to be levied de bonis testatoris ac si, the sheriff cannot seize under it, a chattel specifically bequeathed, provided the executor has residuary estate in his hands, and the executor's assent does not change the rule.<sup>81</sup>

§ 369. **Standing Timber Can not Be Levied Upon.**—Standing timber can not be sold under an execution apart from the real estate. The reason of this rule is that it constitutes a portion of the freehold and passes by a conveyance of it. It can only become personalty by severance, or by such instruments in writing as in contemplation of law operates as a severance.<sup>82</sup>

§ 370. **Levy on Crops.**—Where a landlord furnishes the land and supplies to make a crop, and keeps a general supervision over the farm, and agrees to pay the cropper a certain portion thereof for his labor, judgments against the cropper cannot be enforced thereon.<sup>83</sup> So, the general rule is that the cropper has no such interest in the crop that can be subjected to the satisfaction of an execution until there is a division thereof, for until that time arrives and such division is made, the whole of the crop belongs to

78. *Dinsmoor v. Rowse*, 65 NE 1079, 200 Ill 555; *Hardy v. Wallis*, 103 Ill App 141; *Byerly v. Sherman*, 102 NW 157, 126 Iowa 447; *Trowbridge v. Cunningham*, 66 P 1015, 63 Kan 847; *Malgamba v. McLean*, 173 P 1175, 89 Ore 307.

79. *Grant v. Williams*, 6 Ired (28 NC) 341; *Newman v. Farr*, 4 Term R 651; *McLeod v. Drummond*, 17 Ves Jr 152; *Gaskell v. Marshall*, 1 M Rob 132; *Fenwick v. Laycock*, 1 G & D 532.

80. *Quick v. Stains*, 1 B & P 293.

81. *Bobo v. Grimke*, 1 McMull Eq (SC) 304; *Alston v. Foster*, 16 NC 337, 1 Dev E 337.

82. *Putney v. Day*, 6 NH 430, 25 AD 470; *Olmstead v. Niles*, 7 NH 522; *Slocum v. Seymour*, 36 N.JL 138; *Green v. Armstrong*, 1 Denio (NY) 550; *Buck v. Pickwell*, 27 Vt 157.

83. *Almand v. Scott*, 4 SE 892, 80 Ga 95, 12 ASR 241.

the landlord.<sup>84</sup> The rule, however, is different where the relationship between the grower of the crop, and the owner of the land is that of landlord and tenant, where this is the case until there has been a division, title to the entire crop is in the tenant and seems to be subject to execution on a judgment against him.<sup>85</sup> Of course, if the relationship is that of tenants in common, then the share of either the crop raiser or the owner of the land may be subject to execution against him in advance of a division.<sup>86</sup> While a sheriff may seize the whole crop for the purpose of selling the interest of one tenant in common, still this does not mean that he may sell the entire crop on an execution against a tenant and owner of an undivided interest therein. When the sale is made the purchaser merely supplants the tenant whose interest has been sold under an execution.<sup>87</sup> Under statutory provisions, the interest of the land owner may be subjected to a sale under an execution against him, and the same is true with respect to an execution against the party raising the crop.<sup>88</sup> It is sometimes said that the estate in the land during the term of the lease is in the lessee, and that his engagement to pay the landlord a fractional part of the crop is an executory contract and vests no title in the landlord until it has been executed.<sup>89</sup>

The crop grower may sell his crop at any stage, even before maturity or harvesting, and his title therein will pass in a sale without any written memorandum; and after such a sale has been made the crop may not be reached upon an execution issued against the

84. *Truitt v. Warrington*, 84 Atl 9, 3 Boyce (Del) 357; *Andrew v. Newcomb*, 32 NY 417; *Case v. Hart*, 11 Ohio 364, 38 AD 735; *Selecman v. Kinnard*, 55 Mo App 635; *Rogers v. Collier*, 2 Bailey (SC) 581, 23 AD 153, however see *Hare v. Pearson*, 26 NC 76.

85. *Thiel v. Pacific Fruit & Produce Co.* 4 P (2d) 356, 61 Idaho 145; *Washburn-Wilson Seed Co. v. Alexie*, 35 P (2d) 990, 54 Idaho 727; *Dixon v. Nicolls*, 39 Ill 372, 89 AD 312; *Sargent v. Courier*, 66 Ill 245; *Pickens v. Webster*, 31 La Ann 870, see however *D. M. Ferry & Co. v. Forquer*, 202 P 193, 61 Mont 336, 29 ALR 642, and note; *Tipton v. Martzell*, 57 P 806, 21 Wash 273, 75 ASR 838; *Truitt v. Warrington*, supra.

86. *Thompson v. Mawhinney*, 17 Ala 362, 52 AD 170; *Bernal v. Hovious*, 17 360

Cal 541, 79 AD 147; *Veach v. Adams*, 51 Cal 609; *Hansen v. Dennison*, 7 Ill App 73; *Williams v. Smith*, 7 Ind 559; *Lufkin & Wilson v. Preston*, 3 NW 58, 52 Iowa 235; *Waltsan v. Bryan*, 64 NC 764; *Sharp v. Johnson*, 63 P 485, 38 Ore 246, 84 ASR 788; *Devore v. Kemp*, 3 Hill (SC) 259.

87. *Moulton v. Robinson*, 27 NH 550; *Bernal v. Hovious*, supra; *Veach v. Adams*, supra.

Notes 97 AD 348, 100 AD 641.

88. *Campbell v. McKinnon*, 14 Man. 421.

89. Note 23 LRA 258; *Ross v. Swaringer*, 9 Ired (31 NC) 481; *Gordon v. Armstrong*, 27 NC 409.

See also *Haywood v. Rogers*, 73 NC 320; *Devore v. Kemp*, 3 Hill (SC) 259; *Deaver v. Rice*, 4 Dev & Bat (NC) 431, 34 AD 388, 20 NC 567.



grower.<sup>90</sup> Where lessee or tenant stipulated that crops raised on land during the term should be used upon the land, although sub modo the property of the lessee, such crops are not liable to be taken on an execution against him.<sup>91</sup>

§ 371. **Equitable Interests as Subject to Execution.**—Under the common law rule no property could be reached on an execution, unless the execution defendant was the owner of the legal title. As a corollary to this statement it may be said that, therefore, equitable interests, in either real or personal property were excluded from the class of property subject to be taken under an execution at law. The fact that the debtor was possessed of the property, in which he only held an equitable interest, does not change the situation.<sup>92</sup> It should be noted however that the trend of modern legislative enactments, is in the direction of making all interests, whether legal or equitable, in realty or personalty, subject to be seized under an execution at law against the owner thereof.<sup>93</sup> In some jurisdictions however, it has been deemed nec-

90. Northern v. State etc. 1 Ind 113; Craddock v. Riddlesbarger, 2 Dana (Ky) 205; Whipple v. Foot, 2 Johns. (NY) 418, 3 AD 442; Austin v. Sawyer, 9 Cow(NY) 39; Jones v. Flint, 10 Ad & El 753, 37 ECL 396, 113 Eng Rep 285.

91. Coe v. Wilson, 46 Me 314; Moore v. Holland, 39 Me 307; Garland v. Hilborn, 23 Me 442; Lewis v. Lyman, 22 Pick.(Mass) 437; Snetzing v. Leitch, 32 Ont 440.

92. Potter v. Couch, 11 S Ct 1005, 141 US 296, 35 L ed 721; Smith v. McCann, 24 How(US) 398, 16 L ed 714; Wilson v. Beard, 19 Ala 629; Tischler v. Robinson, 48 So 45, 56 Fla 609; Thalheimer v. Tischler, 46 So 514, 55 Fla 706, 17 LRA(NS) 841, 15 AC 863; Mayer v. Wilkins, 19 So 632, 37 Fla 244; Georgia Veneer etc. Co. v. Stevens, 97 SE 524, 148 Ga 522; Baker v. Copenbarger, 15 Ill 103, 58 AD 600; Martin v. Jewel, 37 Md 530; Gypsum etc. Co. v. Kent Circuit Judge, 57 NW 191, 97 Mich 631; Norman v. Jackson Circuit Judge, 7 NW 796, 45 Mich 204; Williams v. Lobban, 104 SW 58, 206 Mo 399; Rowland Hardware etc. Co v. Lewis, 92 SE 13, 173 NC 290; Smith v. Collins, 86 Atl 967, 81 NJE

348; Bates v. Lidgerwood Man'f. Co. 29 NE 102, 130 NY 200, 4 NYS 524; Culp v. Jacobs, 174 NE 242, 123 Ohio St 109; Hauelsen v. Szalay, 109 NE 602, 33 Ohio App 359; Eldredge v. Mill Ditch Co. 177 P 939, 90 Ore 590; Holmes v. Wolford, 81 P 819, 47 Ore 93; Doheny v. Atlantic etc. Co. 23 SE 525, 41 W Va 1.

93. Reed v. Munn, 148 F 737, 80 C CA 215, cert. den. 28 S Ct 255, 207 US 588, 52 L ed 353; Dunkerson v. Goldberg, 162 F 120, 80 CCA 120; Jarvis v. Chanslor, 177 P 27, 20 Ariz 134; Lynch v. Cunningham, 21 P(2d) 154, 131 Cal App 164, rehearing denied, 21 P(2d) 973; Humpfrey v. Gerard, 77 Atl 65, 83 Conn 346; Middletown Savings Bank v. Jarvis, 33 Conn 372; First Nat'l. Bank v. Peel, 145 So 177, 107 Fla 413; Whiteford v. Hootman, 104 Ill App 562; Sheppard v. Messenger, 77 NW 515, 107 Iowa 717; Koeliker v. Denkurgler, 83 P(2d) 703, 148 Kan 503, 119 ALR 1, see also 86 P(2d) 740, 119 ALR 1525; Robertson v. Howard, 109 P 696, 82 Kan 588; Poole v. French, 80 P 997, 71 Kan 391; Thompson v. Zurich State Bank, 260 P 658, 124 Kan 425; Hudson v. Murray, 135 So 11, 172 La 642; Johnson v.

essary that the holder of the equitable title must be possessed of the property, in order to subject it to an execution at law.<sup>94</sup> It has likewise been held under some statutory enactments, that a bond holder for title of realty, had no interest subject to levy, under an execution at law.<sup>95</sup> In some jurisdictions equitable interests in both real and personal property have been subjected to an execution at law in the absence of statutory enactments.<sup>96</sup>

There are classes of equitable interests which, under any view, may not be subjected to seizure and sale by virtue of execution at law. This is well illustrated by a case holding that the mere right of action to have a deed absolute on its face, declared, in equity, to be mortgage is not such a right as may be seized upon and sold under an execution at law.<sup>97</sup> The same rule is applicable with respect to non-seizure of a purely contingent and undetermined interest in property that is of such character, as to be wholly incapable of being appraised. The underlying principle sustaining these adjudications is that property interests or title of this sort are of such uncertain character and quantity as to render it unfair to seize the same on an execution at law. The unfairness, consisting in the probability of sacrificing whatever interest the debtor possessed without profit to the creditor.<sup>98</sup> It was declared, at an early day, in Massachusetts, that where there was a mere equitable interest it could not be sold under an execution at law,

Bolt, 146 So 375, (La App), 138 So 897, 19 La App 477, 144 So 296; Hammond v. Johnston, 6 SW 83, 93 Mo 108; Gordon v. Tate, 284 SW 407, 314 Mo 508; Cowan v. Storms, 2 Atl (2d) 183, 121 NJL 336; First Nat'l. Bank v. Logue, 106 NE 21, 89 Ohio St 288; Columbus Nat'l. Bank v. Tennessee Coal etc. R. Co. 57 NE 450, 62 Ohio St 504; Tucker v. Denico, 61 Atl 642, 27 RI 639; Calhoun v. Leary, 32 P 1070, 6 Wash 17; York v. State, 34 P(2d) 911, 178 Wash 280; Gordon v. Hillman, 182 P 574, 107 Wash 490; Williams v. Lobban, supra.

94. Rosenfield v. Chada, 10 NW 405, 12 Neb 25; Plattsmouth First Nat'l. Bank v. Tighe, 68 NW 490, 49 Neb 209; Shoemaker v. Harvey, 61 NW 109, 43 Neb 76.

95. First Nat'l. Bank v. McFarlin, 92 SE 69, 146 Ga 717; Virginia-Carolina Chemical Co. v. Rylee, 78 SE

27, 139 Ga 660, but however see First Nat'l. Bank v. Logue, supra; Muir v. Bosey, 146 P 595, 23 Wyo 46, where it appears a contrary result was reached.

96. Flanagan v. Daws, 7 Del 476; Atwater v. Manchester Savings Bank, 48 NW 187, 45 Minn 341, 12 LRA 741; Stephens Appeal, 8 Watts & S (Pa) 186; Rodebaugh v. Sanks, 2 Watts (Pa) 9; Chahoon v. Hollenback, 16 Serg & R(Pa) 425, 16 AD 587; Auwerter v. Mathiot, 9 Serg & R(Pa) 397; Cavene v. McMichael, 8 Serg & R(Pa) 441; Ely v. Beaumont, 5 Serg & R(Pa) 124; Lazarus v. Bryson, 3 Binn(Pa) 64; Burd v. Dansdale, 2 Bin(Pa) 80; Waters v. Collot, 2 Yeates(Pa) 26, 1 L ed 307; Roe v. Humpfreys, 1 Yeates (Pa) 427, 2 Dall(Pa) 223, 1 L ed 357.

97. Evans v. Brendle, 91 SE 723, 173 NC 149.

98. Humpfrey v. Gerard, 77 Atl 65, 83 Conn 340.

for where there was no legal right there was no legal remedy, and the same seems to be the rule announced by the court of the King's Bench in England.<sup>99</sup>

§ 372. **Life Estate or Less as Subject to Seizure and Sale.**—A life estate in personalty impressed with a trust in favor of a life tenant and other persons could not at common law be subjected by ordinary process at law to a judgment against such life tenant.<sup>1</sup> But it is now generally held under liberalized statutory enactments that life estates, generally, as well as estates for years, may be seized and sold under executory process in satisfaction of a judgment at law.<sup>2</sup> Of course if there is a statutory provision to the contrary, or a prohibition in the instrument creating the estate against seizure and sale then such life estate is not subject to be taken on execution at law.<sup>3</sup> Under the modern view, whether an estate for years is regarded as personalty, or considered as realty, it seems that there is a general consensus to be found in the adjudicated cases to the effect that it may be seized on an execution issued upon a judgment at law.<sup>4</sup> Even in England it was held that a tenancy from year to year was subject to be taken and sold on an execution at law. An assignable leasehold in personalty under some statutes may be subject to execution.<sup>5</sup> The fact that a lease contains a provision against assignment or subletting does not prevent its being seized under executory process.<sup>5a</sup> The fact

99. *Badlam v. Tucker*, 1 Pick.(Mass) 389, 11 AD 202; *Scott v. Scholey*, 8 East 467, 103 Eng Rep 423, 11 ERC 647.

1. *Wylie v. White*, 31 SCE 204, 10 Rich E 294.

See also *McLemore v. Abell*, 125 So 601, 12 La App 147.

2. *Coyne v. Plume*, 97 Atl 337, 90 Conn 293; *Armour Fertilizer Works v. Lacy*, 91 SE 12, 146 Ga 190; *Bozeman v. Bishop*, 20 SE 11, 94 Ga 459; *North Georgia Fertilizer Co. v. Leming*, 76 SE 95, 138 Ga 775; *Rusk v. Hill*, 49 SE 261, 121 Ga 378; *Henderson v. Harness*, 52 NE 68, 170 Ill 302; *Thompson v. Murphy*, 37 NE 1094, 10 Ind App 404; *Cashman v. Bangs*, 86 NE 932, 200 Mass 498; *Ehrisman v. Sener*, 29 Atl 719, 102 Pa 577; *Hahn v. Hutchinson*, 28 Atl 167, 159 Pa 133.

3. *Hatcher v. Smith*, 31 SE 447, 103 Ga 843; *Emerson v. Marks*, 24 Ill App 642; *Redman v. Hubbard*, 130 SW

955, 140 Ky 71, 37 LRA(NS) 728; *Cashman v. Bangs*, supra; *DuFour v. Bubb*, 48 Atl 900, 199 Pa 107; *Henry v. McClellan*, 23 Atl 385, 146 Pa 34.

4. *James G. Wilson Man'f. Co. v. Chamberlain-Johnson-Dubose Co.* 79 SE 465, 140 Ga 593; *Barr v. Doe*, 6 Blackford (Ind) 335, 38 AD 146; *Averill v. Taylor*, 8 NY 44; *Bigelow v. Finch*, 17 Barb(NY) 394; *Doe v. Peters*, 44 NC 437, 59 AD 503; *Harvey Coal etc. Co. v. Dillon*, 53 SE 928, 59 W Va 605, 630, 6 LRA(NS) 628.

5. *Hendon v. McCoy*, 133 So 295, 222 Ala 515. This case treats the relationship as one of bailment, although it is in the form of a lease.

5a. *Furnum v. Hefner*, 21 P 955, 79 Cal 575, 12 ASR 174; *Miller v. Bankers Mtg. Co.* 287 P 618, 130 Kan 543; *McLemore v. Bell*, 125 So 601, 12 La App 147; *Hockman v. Sunhew Pet. Corp.* 11 P(2d) 778, 92 Mont 174.

Notes 14 LRA(NS) 1203, AC1013B 890.

the lessor is the U. S. Government does not in any way militate against a seizure under executory process of the lessee's interest.<sup>5b</sup>

§ 373. **Franchise as Subject to Execution.**—At common law a franchise held in trust for the public use, as well as for the profit of the holder thereof as, for instance, a quasi public corporation, as a ferry privilege, or turnpike road, or, for the operation of any public utility was not subject to execution for the debts of the holder thereof. The property right in such franchise under the common law rule could only be reached by a proceeding in equity especially designed for that purpose.<sup>6</sup> It has even been held that under the common law rule, where it was attempted to seize and sell property that could only be used in conjunction with a franchise it was not subject thereto as, for example, the right-of-way of a railway company.<sup>7</sup> However, under modern statutory enactments the law now generally, as recognized in most jurisdictions, that a franchise and property used in conjunction therewith may be subject to seizure and sale on an execution issuing upon a judgment at law.<sup>8</sup> It seems that a franchise created by a private con-

5b. *Hockman v. Sunhew Pet. Corp.* supra.

6. *Gue v. Tide Water Canal Co.* 24 How(US) 257, 16 L ed 635; *Gregory v. Blanchard*, 33 P 199, 98 Cal 311; *Munroe v. Thomas*, 5 Cal 470; *Risdon Iron etc. Co. v. Citizens Traction Co.* 54 P 529, 122 Cal 94, 68 ASR 25; *Thomas v. Armstrong*, 7 Cal 286; *Wood v. Truckee Turnpike Co.* 24 Cal 41; *Hatcher v. Toledo etc. R. Company*, 62 Ill 477; *Louisville etc. R. Co. v. Boney*, 20 NE 432, 117 Ind 501, 3 LRA 435; *State v. Hare*, 23 NE 145, 121 Ind 308; *Brady v. Johnson*, 26 Atl 49, 75 Md 445, 20 LRA 737; *Eldredge v. Mill Ditch Co.* 177 P 939, 90 Ore 590.

7. *Connor v. Tenn. Central R. Co.* 100 F 931, 48 CCA 730, 54 LRA 487; *East Alabama R. Co. v. Doe*, 5 S Ct 860, 114 US 340, 29 L ed 130; *Bittick v. Georgia F. & G. R. Co.* 82 SE 541, 142 Ga 159; right to levy upon action houses denied; *City of Atlanta v. Grant*, 57 Ga 340; *Georgia Power Co. v. City of Decatur*, 159 SE 863, 173 Ga 219.

8. *Covington Drawbridge Co. v. Shepherd*, 21 How(US) 112, 16 L ed 364

38; *International Coal Min Co. v. Pennsylvania R. Co.* 152 F 554; *Memphis, etc. R. Co. v. Berry*, 41 Ark 436, 112 US 609; 5 S Ct 299, 28 L ed 837; *Morgan v. Louisiana*, 93 US 217, 23 L ed 860; *Keystone Bank v. Donnelly*, 196 F 832; *Gregory v. Blanchard*, 33 P 199, 98 Cal 311; *People v. Duncan*, 41 Cal 507; *People v. Lawley*, 119 P 1089, 17 Cal App 331; *Wood v. Truckee Turnp. Co.* supra; *Atlanta v. Grant*, 57 Ga 340; *State v. Hare*, 23 NE 145, 121 Ind 308; *Indianapolis, etc. Gravel Road Co. v. State*, 4 NE 316, 105 Ind 37; *Louisville etc. R. Co. v. Boney*, supra; *Rowe v. Major*, 92 Ind 200; *Lawrence v. Morgan's Louisiana, etc. R. etc. Co.* 2 So 69, 39 La Ann 427, 4 ASR 265; *Simmons v. Worthington*, 49 NE 114, 170 Mass 203; *Williams v. East Wareham etc. R. Co.* 50 NE 646, 171 Mass 61; *James v. Pontiac, etc. Plank Road Co.* 8 Mich 91; *Ripley v. Evans*, 49 NW 504, 87 Mich 217; *Hart v. Sea Coast Credit Corporation*, 169 Atl 648, 115 NJE 28, aff. 174 Atl 525, 110 NJE 573; *Randolph v. Larned*, 27 NJE 557; *McNeal Pipe etc. Co. v. Howland*, 16 SE 857, 111 NC 616, 20

tract is not subject to seizure and sale, even under the modern view, such as one held by the associated press to receive news.<sup>9</sup> But it has been held that franchise to occupy a place in a public market may be seized and sold under a legal execution.<sup>10</sup> Such franchises as those granted to railroads, streets railroads, toll bridges, etc., are subject to execution under the modern statutory enactments.<sup>11</sup> In consonance with the common law rule, that statutes in derogation of the common law will be strictly construed, this class of statutory enactments is subject to a strict construction.<sup>12</sup>

**§ 374. Choses in Action.**—In the absence of a contrary statute, the common law rule is that choses in action are not subject to seizure and sale on an execution. The only exception to this appears to have been in those cases where the chose was voluntarily surrendered up by the execution defendant.<sup>13</sup> In most jurisdictions however choses in action may be reached by garnishment process, which is universally regulated by statute and the local statute should be consulted. In some jurisdictions there are statutes authorizing choses in action to be levied on as property, or

LRA 743; *Coe v. Columbus, etc. R. Co.* 10 Ohio St 372, 75 AD 518; *Salt Creek Valley Turnp. Co. v. Parks*, 35 NE 304, 50 Ohio St 568, 28 LRA 769; *Seymour v. Milford, etc. Turnp. Co.* 10 Ohio 476; *Greensburg Fuel Co. v. Irwin Natural Gas Co.* 29 Atl 274, 182 Pa 78; *Bayard's App.* 72 Pa 453; *Louenschlager v. Benton*, 3 Grant (Pa) 384, 4 Phila 382; *Philadelphia etc. R. Co.'s. App.* 13 Atl 708, 120 Pa St 90; *Reed v. Penrose*, 36 Pa 214, 2 Grant 472; *Gulf etc. R. Co. v. Newell*, 11 SW 342, 73 Tex. 334, 15 ASR 789; *Texas-Mexican R. Co. v. Wright*, 31 SW 613, 82 Tex 346, 31 LRA 200; *Winchester etc. R. Co. v. Colfelt*, 27 Grat(Va) 777; *Eldridge v. Smith*, 34 Vt 484; *Lawrence v. Times Printing Co.* 61 P 166, 22 Wash 482; *East Boston Freight R. Co. v. Hubbard*, 10 Allen (Mass) 459 and note.

9. *Lawrence v. Times Printing Co.* 61 P 166, 22 Wash 482. This case holds that the franchise subject to seizure and sale under an execution at law is limited to a grant of rights or privileges by public or quasi authority.

10. *Green v. Western Nat'l. Bank*, 38

Atl 131, 86 Md 279.

11. *People v. Lawley*, 119 P 1089, 17 Cal App 331; *Gregory v. Blanchard*, 33 P 199, 98 Cal 311; *Williams v. East Wareham etc. R. Co.* 50 NE 646, 171 Mass 61.

12. *James v. Pontiac etc. Plank Road Co.* 8 Mich 91; *Gregory v. Blanchard, supra.*

13. *Newberry v. Davison Chemical Co.* 65 F(2d) 724, cert. den. 54 S Ct 75, 290 US 660, 78 Led 571; *In re Stamford Road Const. Co.* 5 F Supp 650; *Hill v. Favour*, 84 P(2d) 575, 52 Ariz 561; *Hoxie v. Bryant*, 63 P 153, 131 Cal 85; *Fallon v. Worthington*, 22 P 960, 13 Colo 559, 16 ASR 231, 6 LRA 708; *Fidelity etc. Co. v. Macon Exchange Bank*, 28 SE 393, 100 Ga 619; *Crawford v. Schmitz*, 29 NE 40, 139 Ill 564, 41 Ill App 357; *Beckman Supply Co. v. Newell*, 118 NE 962, 68 Ind App 679; *Champagne v. Bloch*, 46 So 207, 121 La 103; *Digney v. Blanchard*, 118 NE 250, 229 Mass 235; *Wilde v. Mahaney*, 67 NE 337, 183 Mass 455, 62 LRA 813; *Jensen v. Oceana Circuit Judge*, 160 NW 620, 194 Mich 405.

in accordance with special statutory provisions relating to this species of property.<sup>14</sup> So it may be concluded that in the absence of express statutory authority, choses in action such as bonds, notes, county warrants, and other securities may not be seized under an execution, and this is especially true after they have been transferred by the original payee, but if the execution defendant delivers the same up voluntarily with the full intention of subjecting them to sale under an execution against him it seems that the sheriff or constable may proceed to sell the same.<sup>15</sup> The seizure and sale under execution of such species of property, as we have under discussion, is authorized in many jurisdictions by virtue of statutory enactments; so a cause of action for damages for breach of contract is subject to sale under execution.<sup>16</sup> An open account evidenced by an entry in an account book may not be seized and sold by taking the evidence thereof in such book and this is especially true where the accounts themselves have theretofore been sold or assigned.<sup>17</sup>

**§ 375. Property in the Possession of, or Adversely Held by a Third Person.**—A mere right of property in chattels which are adversely held by third persons, whose possession originated and was continued in good faith, is not subject to seizure under an attachment or execution.<sup>18</sup> It seems however that, if property is wrongfully taken from the owner thereof it may still be subject to seiz-

14. *Adams v. Hackett*, 7 Cal 187; *Crandall v. Blen*, 13 Cal 15; *Davis v. Mitchell*, 34 Cal 81; *Meserve v. Sup. Ct.* 38 P(2d) 453, 2 Cal App(2d) 468; *Hammond v. Johnston*, 6 SW 83, 93 Mo 198, writ of error dismissed, 12 S Ct 141, 142 US 73, 35 L ed 941.

15. *New Orleans v. Stemple*, 20 S Ct 110, 175 US 309, 44 L ed 174; *Crawford v. Schmitz, supra*; *McKnight v. Knisely*, 25 Ind 336, 87 AD 364; *Jensen v. Oceana Circuit Judge, supra*; *People v. Wayne County*, 5 Mich 223; *People v. Nat'l. Mutual Insurance Co.* 46 NYS 102, 19 App Div 247, 4 NY AC 340; *Fieldhouse v. Croft*, 4 East 510, 102 Eng Rep 926; *Knight v. Cridle*, 9 East 48, 103 Eng Rep 491; *Armstead v. Philpot*, 1 Dougl 231, 99 Eng Rep 151; *Francis v. Nash*, 2 Barn 225, 94 Eng Rep 404.

16. *New Orleans v. Stemple, supra*; *Hoxie v. Bryant, supra*; *Meserve v. 366*

*Superior Court, supra*; *DeBearn v. DeBearn*, 81 Atl 223, 115 Md 668, 36 LRA(NS) 421, see also 32 S Ct 834, 225 US 695, 56 L ed 1261; *State v. District Court*, 240 P 667, 74 Mont 355.

See also *Brenton Bros. v. Dorr*, 239 NW 808, 213 Iowa 725; *Johnson v. Dahlquist*, 225 P 817, 130 Wash 29.

17. *Jobin-Marrin Co. v. Betts*, 1 West LR 369; *Corticelli Silk Co. v. Balfour*, 5 Terr L 385; *Rennie v. Quebec Bank*, 3 Ont L 541, 1 Ont WJR 286, 1 Ont L 303; *Moore v. Roper*, 35 Can SC 533.

18. *Carlos v. Ansley*, 8 Ala 900; *Horton v. Smith*, 8 Ala 73, 42 AD 628; *Wier v. Davis*, 4 Ala 442; *Com. v. Abell*, 6 JJ Marsh.(Ky) 476; *Thomas v. Thomas*, 2 AK Marsh.(Ky) 430; *Corticelli Silk Co. v. Balfour*, 5 Terr L 385.

ure and sale in the hands of the taker, because the title remains in the hands of the lawful owner.<sup>19</sup> While the rule formerly appears to have been otherwise, it now seems to be settled, that any interest in real property, whether adversely held or not, may be seized and sold under an execution, and it does not seem to be of any importance whether the execution is directed against the one in the adverse possession or the claimant not in possession. Some courts bottom their holdings, in accordance with the above textual statement, upon the ground that the adverse possession rule is inapplicable to execution or judicial sales.<sup>20</sup> It seems that a mere chattel interest in property assigned to or otherwise put in the possession of a third party may not be reached upon an execution at law, but may be taken by appropriate chancery proceedings.<sup>21</sup>

§ 376. —Distributive Share Subject to Seizure under Execution When.—An execution cannot be levied upon the share of a distributee of an estate in personalty before such share is assigned in severalty to the execution defendant. The reason for this is the distributee's interest in such property, before distribution, is a mere chose in action, and is therefore not subject to execution or writ of attachment.<sup>22</sup>

While it seems that an argument of equal cogency may be urged against the levy upon the heir's interest in land, yet the contrary view appears to be maintained by the overwhelming weight of authority.<sup>23</sup> However, an heir's interest in land is not subject to

19. *Ball v. Liney*, 48 NY 6, 8 AR 511; in the last cited case the court said, in the course of the opinion: "After conversion of property, the title still remains in the owner, and the property can be taken from the wrongdoer upon an execution against the owner and sold, and the proceeds applied upon his debt, and the owner will thus have the benefit of the property; and in such case the wrongdoer can set up his seizure and sale, not as an entire defense, but in mitigation of damages, for the reason that it would be unjust for the owner to recover the value of property after he has thus had the benefit of it. It is not the fact of the seizure that gives the defense, but that it has been seized under such circumstances that the owner has had, or could have, the benefit of it."

20. *High v. Nelms*, 14 Ala 360, 48 AD 103; *Preston v. Breckinridge*, 6 SW 641, 86 Ky 619, 10 Ky L 2; *Myers v. Sanders*, 7 Dana (Ky) 506; *State v. Judge*, 19 So 668, 48 La Ann 667; *Woodman v. Bodfish*, 25 Me 317; *Rogers v. Brown*, 61 Mo 187; *Trimm v. Marsh*, 54 NY 599, 13 AR 623, but see however, *Campbell v. Point St. Iron Works*, 12 RI 452; *Ring v. Gray*, 6 B Mon (Ky) 368; *Griffith v. Huston*, 7 JJ Marsh. (Ky) 385; *Shepherd v. McIntire*, 4 JJ Marsh. (Ky) 110; *McConnell v. Crown*, 5 TB Mon (Ky) 478.

21. *Boyce v. Smith*, 16 Mo 317; *King v. Bailey*, 8 Mo 332; *Yeldell v. Stemmons*, 15 Mo 443; *Bailey v. Burton*, 8 Wend (NY) 339; *Hendricks v. Robinson*, 2 Johns. Ch (NY) 283, aff. 17 Johns. 438.

22. *Hancock v. Titus*, 39 Miss 224.

23. *DuBose v. Cleghorn*, 65 Gr. 302; 367

seizure under an execution where the levy thereof was made upon the land after the administrator had sold the same, and had paid the money into court, the heirs having consented to confirmation thereof, although such confirmation had not been had at the time the levy was made.<sup>24</sup>

§ 377. Fixtures as Subject to Seizure under Execution.—Fixtures that have become a part of the realty, and which are not by law or agreement subject to removal, are not subject to seizure and sale, apart from the real property and would seem to be not subject to seizure and sale upon executory process directed against the tenant upon the real property at all.<sup>25</sup>

The rule is not changed by the fact that the fixtures are temporarily severed from the real estate.<sup>26</sup> Fixtures removable under agreement or by law are subject to be levied upon under an attachment or execution against the owner, whether landlord or tenant.<sup>27</sup>

§ 378. Fructus Naturales as Subject to Levy.—It may be stated generally that fructus naturales are not subject to levy under an execution, or attachment separate and apart from the realty.<sup>28</sup> This includes trees, bushes, timber, grasses, and perennial plants, such as are incident to the soil, and likewise would include the unharvested produce of trees, vines, and the like, including fruits and berries.<sup>29</sup> However, it seems that a contrary rule obtains in Maryland.<sup>30</sup> Apparently, the contradistinguishing feature, as a general rule, is that if the vine, plant, or tree is perennial in nature, and is required to be planted but once and thereafter produces annually it is treated as fructus naturales.<sup>31</sup>

§ 379. Fructus Industriales as Subject to Levy.—The common

*Dinsmoor v. Rowae*, 65 NE 1079, 200 Ill 555; *Hardy v. Wallis*, 103 Ill App 141; *Byerly v. Sherman*, 102 NW 157, 126 Iowa 447; *Rausch v. Moore*, 48 Iowa 611, 30 AR 412; *Trowbridge v. Cunningham*, 66 P 1015, 63 Kan 847; *Malagamba v. McLean*, 173 P 1175, 89 Ore 307.

24. *Cunningham v. Richardson*, 122 P 368, 68 Wash 24.

25. *Friedly v. Giddings*, 119 F 438, aff. 128 F 355, 63 CCA 85, 65 LRA 327; *Taylor v. Plunkett*, 58 Atl 384, 4 Pennw (Del) 467; *Off v. Finkelstein*, 65 NE 439, 200 Ill 40, 100 Ill App 14.

26. *Moore v. Cunningham*, 23 Ill 328; *Congregational Society v. Flem-* 368

*ing*, 11 Iowa 533, 79 AD 511; *Rogers v. Gilinger*, 30 Pa 185, 72 AD 694.

27. *McNally v. Connolly*, 11 P 320, 70 Cal 3; *Kile v. Giebner*, 7 Atl 154, 114 Pa 381.

28. *Sparrow v. Pond*, 52 NW 36, 40 Minn 412, 32 ASR 571, 16 LRA 103; *Rogers v. Elliott*, 59 NH 201, 47 AR 192.

29. *State v. Gemmill*, 6 Del (1 Houst) 9; *Sparrow v. Pond*, supra.

30. *State v. Fowler*, 42 Atl 201, 88 Md 601, 71 ASR 452, 42 LRA 849. What the court did was to hold peaches and the like, although growing on trees, were fructus industriales.

31. *Sparrow v. Pond*, supra.

law rule which prevails generally throughout the United States seems to be to the effect that fructus industriales are subject to seizure and sale as personal property and that this is true at any stage of the crop's growth.<sup>32</sup>

Sometimes the subject in the United States is regulated by statute, and the levying of an execution upon immatured crops is prohibited.<sup>33</sup>

§ 380. **Intoxicating Liquors as Subject to Levy.**—Notwithstanding the fact that the sale of intoxicating liquors may be entirely prohibited, or at least regulated, does not prevent them from being seized under an attachment and execution and sold pursuant to law as other personal property.<sup>34</sup>

However, it is perfectly clear that where the possession of intoxicating liquor is prohibited, it would not be subject to seizure and sale, since the officer of the law could not expose to public sale property that would make the buyer guilty of a criminal offense as soon as the sale was consummated. The law would not tolerate such a transaction. And, in addition to this, a statute may be so worded as to absolutely prohibit the sale of intoxicating liquors by anyone.<sup>35</sup>

Neither may a purported sale under execution be resorted to as a subterfuge to circumvent the law prohibiting sales of intoxicating liquor.<sup>36</sup>

§ 381. **Unpublished Manuscripts.**—Since one may write without any intention of publication, he may treat of principles and characters without restraint, with a view to mental improvement, or from

32. Polley v. Johnson, 35 P 8, 52 Kan 478, 23 LRA 258, and note; Throop v. Maiden, 34 P 801, 52 Kan 258; Voils v. Battin, 50 P 940, 6 Kan App 742; Sparrow v. Pond, 52 NW 36, 49 Minn 412, 32 ASR 571, 16 LRA 103, and note; Erickson v. Patterson, 50 NW 690, 47 Minn 525; Johns v. Kamarad, 96 NW 118, 2 Neb 157; Sims v. Jones, 75 NW 150, 54 Neb 769, 69 ASR 749; Edwards v. Thompson, 4 SW 913, 85 Tenn 720, 4 ASR 307.

33. Ellithorpe v. Reidesil, 32 NW 238, 71 Iowa 315; Burleigh v. Piper, 2 NW 520, 51 Iowa 649; Shannon v. Jones, 34 NC 206; Ellis v. Bingham, 160 SW(Tex) 602; Tipton v. Martzell, 57 P 806, 21 Wash 273, 75 ASR [1 Anderson on Sheriffs]—24

838; Edwards v. Thompson, supra.

34. Fears v. State, 29 SE 463, 102 Ga 274; Standard Oil Co. v. Angevine, 51 P 70, 6 Kan App 312; Nichols v. Valentine, 36 Me 322; Wildermuth v. Cole, 43 NW 889, 77 Mich 483, see however where the contrary view is maintained; Hines v. Stahl, 99 P 273, 79 Kan 88, 131 ASR 280, 20 LRANS 1118, 17 AC 298; Kiff v. Old Colony etc. R. Co., 117 Mass 591, 19 AR 429; Barron v. Arnold, 11 Atl 298, 16 RI 22; Lanahan v. Bailey, 31 SE 332, 53 SC 449, 69 ASR 884, 42 LRA 297.

35. Lanahan v. Bailey, supra.

36. State v. Johnson, 33 NH 441; Fears v. State, supra.

some other motive, and there is no law which can compel an author to publish his work nor can another determine an essential matter of publication which rests with an author; his manuscripts however valuable cannot without his consent be seized by his creditors as property. He has an absolute right to publish, or forever withhold it from the public just as his fancy may dictate, and for this reason they are not subject to levy under an attachment or seizure and sale on an execution.<sup>37</sup>

Since manuscripts are not subject to attachment or levy under an execution they may not be the subject matter of a fraudulent transfer.<sup>38</sup>

However there is a class of unpublished manuscripts and books that may be reached and subjected to a sale at the instance of the owner's creditor. Within this class falls abstract books and records. These, as a rule, are never intended to be published. They are merely books and records used in making up abstracts of titles, and this species of unpublished manuscripts are not within the ambit of protection of the rule we have under consideration.<sup>39</sup>

§ 382. **Money as Subject to Execution.**—The generally prevailing doctrine, under modern adjudications, is to the effect that money may be taken under attachment or execution if in the possession of the debtor provided however that the same can be accomplished without violating the personal security of the execution defendant. Occasionally this matter is regulated by statutory enactments.<sup>40</sup>

The rule enunciated by the early English cases was contrary to the principle sustained by modern adjudications.<sup>41</sup> However, in

37. Bartlett v. Crittenden, 2 F Cas No. 1076, 5 McLean 32, note 51 LRA 381; Harper v. Donohue, 144 F 491, aff. 146 F 1023, 76 OCA 678; Oystead v. Shed, 12 Mass 506; Dart v. Woodhouse, 40 Mich 399, 29 AR 54.

38. Perry v. Big Rapids, 34 NW 530, 67 Mich 146, 11 ASR 570; Dart v. Woodhouse, supra.

39. Leon Loan etc. Co. v. Leon Equalization Board, 53 NW 94, 86 Iowa 127, 41 ASR 486, 17 LRA 199; Banker v. Caldwell, 3 Minn 94; Washington Bank v. Fidelity Abstract etc. Co., 46 P 1036, 15 Wash 487, 55 ASR 902, 37 LRA 115.

40. Yazoo & M. Valley R. Co. v. Clarksdale, 42 S Ct 27, 257 US 10, 66 370

L ed 104; Turner v. Fendall, 1 Cranch (US) 117, 2 L ed 53; Kimbrough v. Alred, 80 So 617, 202 Ala 413; Exchange Nat'l Bank v. Stewart, 48 So 487, 158 Ala 218; In re Nerac, 35 Cal 392, 95 AD 111; Green v. Palmer, 15 Cal 411, 76 AD 492; Richards v. Heger, 99 SW 802, 122 Mo 512; Spencer v. Blaisdell, 4 NH 198, 17 AD 412; Dawson v. Holcomb, 1 Ohio 275, 13 AD 618; Prentiss v. Bliss, 4 Vt 513, 24 AD 631; Russell v. Lawton, 14 Wis 202, 80 AD 769.

41. Prentiss v. Bliss, 4 Vt 513, 24 AD 631; Willows v. Ball, 2 NR 376; Knight v. Criddle, 9 East 48, 103 Eng Rep 401; Fieldhouse v. Croft, 4 East 510, 102 Eng Rep 926.

any case, before the sheriff can take money on an execution or attachment he must do so without violating the personal security of the debtor. That is, he cannot justify forcibly seizing or taking the money from the debtor.<sup>42</sup> It seems that it is of no importance whether the money is bullion, treasury notes, or bank bills.<sup>43</sup>

Sometimes it is enacted by statute that money shall not be taken on an execution until efforts have been exhausted to find other property. While it is true, as we have just observed, that the officer may not forcibly take money from the debtor, yet that is not the case literally, under all circumstances. It perhaps would be correct to say, if it were necessary to go into the debtor's clothing and extract the money from his pocket the officer could not do so, but if the money may be taken into the officer's possession without resorting to such extreme measures it may be subjected to levy under an attachment or execution.

So, where the debtor was walking along the street with a bag of gold coins in his hand, and the officer seized him and forcibly took it from him in virtue of an execution in the officer's hands, such levy was sustained, the court holding that the execution debtor could claim no exemption from seizure of the coin held in his hand and likened the situation to a case where the officer might take a horse away from the debtor which was held by him by having the bridle in his hand.<sup>44</sup>

There is no doubt of the right of an officer to levy upon a horse being ridden by the judgment debtor at the time of making the levy.<sup>45</sup> Under a statute in Pennsylvania, coin and bank notes may be seized and levied upon in payment of debts, except in cases where such money is raised by execution at the suit of the debtor, or in the personal possession of the debtor.<sup>46</sup>

If the debtor delivers the money to the officer for some other purpose than for the purpose of payment on the execution, still the officer may retain it under authority of the execution, as where the debtor hands some money over to the officer and seeks his opinion as to whether or not it is counterfeit; the officer, having a writ of execution or attachment in his possession, is warranted in retaining the same. It hardly need be added that it is unnecessary to sell money levied upon under an execution, but it seems that a con-

42. *Prentiss v. Bliss*, supra.

43. *State v. Lawson*, 7 Ark 391, 46 AD 293; *Princeton Bank v. Crozer*, 2 Zab (22 NJL) 383, 53 AD 254; *Prentiss v. Bliss*, supra; *Spencer v. Blaisdell*, supra.

44. *Green v. Palmer*, 15 Cal 411, 76 AD 492.

45. *State v. Dilliard*, 3 Ired (NC) 102, 38 AD 708.

46. *Herron's Appeal*, 29 Pa 240.

trary view was at one time entertained; since then statutes have been generally enacted that money levied upon may not be sold but may be credited upon the judgment debt.<sup>47</sup> However, money cannot be levied upon as property of a judgment debtor until it has actually reached his hands, although intended for him, nor after it has passed out of his control, as where he deposits it with a bank or a third party.<sup>48</sup>

The principle that the money must have reached the hands of the debtor before it is subject to levy may be illustrated by a supposition that A is indebted to B, a small part of which B agreed to pay to C on account of money he owed him. B then gave C an order on A for the whole sum and in payment thereof A gave C a check on a bank. C presented the check at the bank and the money was counted out to him and laid upon the counter of the bank. D, an officer who was standing by and had in his hands an execution against B, seized the money by way of execution before C had time to take it up. In these circumstances it was held at the time of the levy there was no such title to the money in B as would previous to delivery to him enable the officer to seize it as B's property.<sup>49</sup> The officer may not levy upon money in his hands which he has collected on an execution in favor of the judgment debtor.<sup>50</sup> It must not be supposed by the suggestion heretofore that if the money has been deposited with a bank or third party it could not be reached upon garnishment process; what is intended thereby is that the identical money could not be levied upon as a tangible thing.<sup>51</sup>

§ 383. *Patents as Subject to Levy.*—Patents are not subject to levy under an execution or attachment. The reason assigned for this rule is that it is an incorporeal thing without tangible substance.<sup>51a</sup> Another reason sometimes assigned for the nonleviability with respect to patents, is that it does not exist in any particular state or

47. *Brooks v. Thompson*, 1 Root (Conn) 216; *Sheldon v. Root*, 16 Pick (Mass) 567, 28 AD 286; *Noble v. Kelly*, 40 NY 415.

48. *McMillan v. Richards*, 9 Cal 365, 70 AD 655; *Moorman v. Quick*, 20 Ind 67; *Winton v. State*, 4 Ind 321; *Scott v. Smith*, 2 Kan 438; *Wash v. Hendrick*, 136 SW 883, 143 Ky 443; *Carroll v. Cone*, 40 Barb(NY) 220; *Berkman v. N. Y. Produce Exchange Bank*, 167 NYS 441, 101 Misc 282; *Summerfield v. Goldstein*, 112 NYS 357, 69 Misc 387.

49. *Moorman v. Quick*, supra.

50. *Winton v. State*, 4 Ind 321; *Herron's Appeal*, supra.

51. *Humphreys v. Hopkins*, 22 F 802, 81 Cal 551, 6 LRA 702, 15 ASR 76; 2 *Bouvier's Law Dictionary* (Rawle's 3rd Rev.) 1334.

51a. *Inventions Corporation v. Hobbs*, 244 F 430, 157 CCA 58; *Ball v. Coker*, 168 F 304; *Jewett v. Atwood Suspender Co.* 100 F 647; *Newton v. Buck*, 72 F 777, however reversed 77 F 614, 23 CCA 355; *Erle Wringer Man'f Co. v. Nat'l Wringer Co.* 63 F 248; *Stephens v. Cady*, 14 How(US) 528, 14 L ed 528; *Ager v. Murray*, 105 US 126,

district, but the ambit of its existence is coterminous with the territorial confines of the United States.<sup>52</sup>

§ 384. **Copyright as Leviable.**—Since a copyright is regarded as property in notion and has no corporeal tangible substance, it, like a patent, is not subject to levy under an execution or attachment.<sup>53</sup> So, a copyright, like a patent, has no local existence but is coextensive within the territorial limits of the United States.<sup>54</sup> Where a copyright of a map was taken out under national copyright laws and copper plate engravings were made thereof which were seized and sold under an execution it was held that while the purchaser acquired title to the tangible thing itself, the copper plate, he did not acquire the right to strike off and sell copies of the map which was protected by a copyright.<sup>55</sup>

§ 385. **Trademark as Leviable.**—Since a trademark is inseparably bound up with the good will of a business it may not be seized and sold under an execution or attachment.<sup>56</sup>

§ 386. **Good Will Not Subject to Levy.**—It is undoubtedly true that good will of business is an asset, one that has recognition, and is afforded protection in law; it may be subject to sale and transfer in connection with some piece of tangible property or right of property to which it is an incident. It may also pass to a trustee in bankruptcy on its owner's becoming a bankrupt.<sup>57</sup> Yet it is asserted

28 L ed 942; *Pacific Bank v. Robinson*, 57 Cal 520, 40 AR 120, notes 17 AC 391, 20 English Rul Cas 771; *Peterson v. San Francisco*, 46 P 1060, 115 Cal 211.

52. *Stevens v. Gladding*, 17 How (US) 447, 15 L ed 155; *Ager v. Murray*, supra.

53. Note 40 AR 124, see sec. 383, supra; *Stephens v. Cady*, 14 How (US) 528, 14 L ed 528; *Millar v. Taylor*, 4 Burr 2396.

54. *Stevens v. Gladding*, 17 How (US) 447, 15 L ed 155.

55. *Werckmeister v. Springer Lithographing Co.* 63 F 808; *Stephens v. Cady*, 14 How (US) 528, 14 L ed 528. During the course of the opinion Mr. Justice Nelson of the Supreme Court of the United States said, "Lord Mansfield observed in *Millar v. Taylor* that 'no disposition, no transfer of paper upon which the composition is

written, marked, or impressed (though it gives the power to print and publish), can be construed a conveyance of the copy (by which he means copyright, as appears from a previous part of his opinion), without the author's expressed consent' to print and publish, much less against his will."

56. *Milliken v. Dart*, 26 Hun (NY) 24; *Prince Manufacturing Co. v. Prince's Metallic Paint Co.* 20 NYS 462, 60 Hun 583, 15 NYS 240, 39 NY St Rep 438, see also *Taylor v. Bemis*, 23 F Cases No. 13779, 4 Biss 406.

57. *Washburn v. Nat'l Wall Paper Co.* 81 F 17, 26 OCA 312; *S. F. Myers Co. v. Tuttle*, 183 F 235; *Merchants Ad-Sign Co. v. Sterling*, 5 P 468, 124 Cal 429, 71 ASR 94, 46 LRA 142; *Harshbarger v. Eby*, 156 P 619, 28 Idaho 753, AC 1917C 753; *Hansen Mercantile Co. v. Wyman etc. Co.* 117 NW 926, 105 Minn 491, 21 LRANS 727.

with confidence and beyond peradventure of doubt, that it cannot be sold separate and apart from some tangible assets to which it adheres, and has become definitely affixed thereto. It is probably true that if the tangible asset is seized and sold under an execution the good will would pass with it.

§ 387. **Wages and Salaries as Leviable.**—It is generally recognized under all statutes for one reason or another, or under one species of process or another, wages and salaries are subject to be levied upon by process of garnishment or direct attachment, to satisfy a judgment creditor's claim whether under writ of attachment or execution.<sup>58</sup> Since a statute which authorizes the seizure of wages in satisfaction of an execution, or a levy thereon to enforce a writ of attachment, is in derogation of common law, the strict construction rule applies.<sup>59</sup> It may be stated, as a general rule, that future wages are not subject to be impounded either in legal or equitable proceedings.<sup>60</sup> However, it is possible that this common law rule could be changed by appropriate legislation.

A statute authorizing the levy on wages under execution or attachment is generally held retroactive to a limited extent and may be resorted to on a judgment already rendered, or in proceedings already pending when such statute becomes effective. The reason underlying these adjudications is that such statute affects the remedy of the creditor.<sup>61</sup>

§ 388. **Salaries Due Public Officers as Leviable.**—Salaries of public officers or employees are generally held not to be subject to an execution or attachment, and the rule is the same where the wages are already earned or are to be earned, in the future, or are already payable or are payable at some future time. Of course, this is subject to statutory changes, but the above and foregoing is the rule in the absence of a special statutory enactment governing the question.<sup>62</sup> The theory of such nonleviability does not spring from any

58. *Trapp v. Brown*, 107 Atl 413, 93 NJL 171, 104 Atl 302, 91 NJL 481.

59. *Trapp v. Brown*, supra.

60. *Holmes v. Millage* (1893) 1 QR 551, 10 ERC 604.

61. *Petersen v. Jersey City*, 97 Atl 963, 89 NJL 93; *Russell v. Mechanics Realty Co.* 96 Atl 657, 88 NJL 532; *Laird v. Carton*, 89 NE 822, 196 NY 169, 25 LRANS 189 and note.

62. *Jaffe v. McAduy*, 79 So 391, 202 Ala 53; *Gerald v. Walker*, 78 So 856, 201 Ala 502; *Skewes v. Tennessee Coal* 374

etc. Co. 27 So 435, 124 Ala 629, 82 ASR 214; *Skews v. Huey*, 26 So 1034, 122 Ala 674; *Shepherd v. Jones*, 153 So 223, 228 Ala 307; *Roesch v. W. B. Worthen Co.* 130 SW 551, 95 Ark 482, 31 LRANS 374; *Lawson v. Lawson*, 111 P 354, 158 Cal 446; *Ruperich v. Baehr*, 75 P 782, 142 Cal 190; *Trow v. Moody*, 150 P 77, 27 Cal App 403; *Troy Laundry etc. Co. v. Denver*, 53 P 256, 11 Colo App 368; *Lewis v. Denver*, 48 P 317, 9 Colo App 328; *Farmers Bank v. Ball*, 46 Atl 751, 2 Pennw.



consideration for the debtor, but is predicated upon the theory of public policy, and upon the assumption to permit it would militate against the proper rendition of public service.<sup>63</sup>

Another reason assigned why such garnishment is not allowed is that a political subdivision cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits in order that one private individual may the better collect a demand due from another. A private corporation must assume the same duties and liabilities as private persons, since it is created for private purposes. But a city, county, or other political subdivision is part of the government. Its powers are held in trust for the common good. It should be permitted to act only in reference to that object, and should not be subjected to duties, liabilities, or expenditures, merely to promote private interests or private convenience.<sup>64</sup> The rule of nonleviability of salaries due to public employees has been applied where a municipal corporation was the garnishee; likewise a county, and a school district.<sup>65</sup>

(Del) 374; *Born v. Williams*, 7 SE 868, 81 Ga 796; *Tabb v. Mallette*, 47 SE 587, 120 Ga 97, 102 ASR 78; 56 ALR 602; *Dodd v. Burnett*, 188 SW 884, 172 Ky 89; *Dickinson v. Johnson*, 61 SW 267, 110 Ky 236, 22 Ky L 1086, 96 ASR 434, 54 LRA 566; *Sanders v. Herndon*, 93 SW 14, 122 Ky 760, 29 Ky L 322, 121 ASR 493, 5 LRANS 1072; *Orme v. Kingsley*, 75 NW 1123, 73 Minn 143, 72 ASR 611; *Sandwich Manuf. Co. v. Krake*, 68 NW 606, 66 Minn 110, 61 ASR 395; *Stockard v. Hamilton*, 180 P 294, 25 NM 240; *Southwestern Savings, Loan Etc. Ass'n v. Await*, 166 P 1181, 22 NM 607, LRA 1917F 1117; *Albuquerque First Nat'l Bank v. Scott*, 163 P 1084, 22 NM 411; *Owen v. Terrell*, 162 P 171, 22 NM 373; *Keene v. Smith*, 75 P 1065, 44 Ore 525; *Dickens v. Bransford Realty Co.* 210 SW 644, 141 Tenn 387; *Baird v. Rogers*, 32 SW 630, 95 Tenn 492; *Thompson v. Cutlers*, 35 SW (Tex Civ App) 412; *Sanger v. Waco*, 40 SW 549, 15 Tex Civ App 424; *Tribune Reporter Printing Co. v. Homer*, 169 P 170, 51 Utah 153.

63. *Bank of Winfield v. Brumfield*, 124 So 628, 11 La App 647; *Baltimore*

*v. Root*, 8 Md 95, 63 AD 692; *Orme v. Kingsley*, 75 NW 1123, 73 Minn 143, 72 ASR 611; *Rickey v. Slingerland*, 206 NYS 961, 143 Misc 583, note 17 AC 526; *Southwestern Savings, Loan Etc. Assn. v. Await*, supra; *Skewes v. Tennessee Coal Etc. Co.* supra; *Shepherd v. Jones*, supra.

64. *Duval County v. Charleston Lumber & Mfg. Co.* 33 So 531, 45 Fla 256, 60 LRA 549, 3 AC 174; *Merwin v. City of Chicago*, 45 Ill 134, 92 AD 204; *Wood v. State*, 25 NE 190, 125 Ind 219; *Memphis v. Laski*, 9 Heisk (Tenn) 511, 24 AR 327.

65. *McLellan v. Young*, 54 Ga 399, 21 AR 276; *Wallace v. Lawyer*, 54 Ind 501, 23 AR 661; *Keyser v. Rice*, 47 Md 203, 28 AR 448; *School District v. Gage*, 39 Mich 181, 33 AR 121, note 56 ALR 621, however see *Waterbury v. Deer Lodge County*, 26 P 1002, 10 Mont 515, 24 ASR 67; *Geist v. St. Louis*, 57 SW 766, 136 Mo 643, 79 ASR 545; *Graf v. Wilson*, 125 P 1005, 62 Ore 476, AC 1914C 162; *Sandwich Manuf. Co. v. Krake*, supra; *Baltimore v. Root*, supra; *Orme v. Kingsley*, supra; *Skewes v. Tennessee Etc. Coal Co.* supra.

Some courts seem to have been hard pressed for a tenable reason to assign why the wages of public officers or employees could not be subjected to garnishment under an attachment or execution, and while thus submerged in difficulties for a sufficient basis upon which to bottom a decision they have asserted that the compensation of these officers was not an indebtedness or wages within the garnishment laws or rules in regard thereto.<sup>66</sup> The paucity of protection is so ample in scope, and so extensive in character that the courts have found it convenient to apply it to money due a jailer for fees and services, and in the hands of the sheriff which was allowed to the jailer by the fiscal agents of the county.<sup>67</sup> So too, with respect to money due jurors.<sup>68</sup> Of course it should be noted that this rule may be changed by statutory enactment and the statutes from each jurisdiction where the question arises should be consulted. But in any event, the exemption has not been stretched to the extent of shielding property of the officer purchased with proceeds of salary or income from his office.<sup>69a</sup>

§ 389. **Governmental Officers, Agents, and Subdivisions as Garnishees.**—Intimately connected with the subject matter in the next preceding section comes a consideration of the question of whether or not governmental officers, agents, or subdivisions of government may be charged as garnishees, and it may be stated as a general rule that in the absence of statute to the contrary they may not be so charged.<sup>69</sup> The decisions however with respect to the exemption

66. *McLellan v. Young*, supra; note 54 LRA 570; but generally the exemption of salaries or remuneration of public officers from levy is predicated on the broad ground that to permit it would countervene public policy. 54 LRA 568.

67. *Webb v. McCauley*, 4 Bush (Ky) 8.

68. *Chealy v. Brewer*, 7 Mass 259.

69a. *Dickinson v. Johnson*, 61 SW 267, 110 Ky 236, 54 LRA 566, 96 ASR 434. In the last cited case the court said: "It has been repeatedly decided by this court that pension money received by a pensioner and invested in real estate can be subjected to the demand of an antecedent creditor, and it would be entirely inconsistent with such a rule to hold that an officer's fees or salary invested in real estate should be exempt from antecedent

debts, even if we were deciding—which we do not—that an officer's fees or salary are exempt by statute from the debts of the officer."

69. *Gumbell v. Pitkin*, 8 S Ct 379, 124 US 131, 31 L ed 374; *Riggin v. Billiard*, 20 SW 402, 56 Ark 476, 35 ASR 113; *Gilman v. Contra Costa County*, 8 Cal 52, 68 AD 290; *Tyler v. Akerman*, 96 So 638, 85 Fla 485; *Duval Co. v. Charleston Lumber & Mfg. Co.* 33 So 531, 45 Fla 256, 60 LRA 549, 3 AC 174; *Leake v. Lacey*, 22 SE 655, 95 Ga 747, 51 ASR 112; *Hines v. Minor*, 105 SE 851, 26 Ga App 278, note 44 LRANS 218; *Baltimore v. Root*, 8 Md 95, 63 AD 692; *Hoyt v. Paysee*, 269 P 607, 61 Nev 114, 60 ALR 819, notes 60 ALR 823, 37 LRA 207; *Southwestern Savings, Loan Etc. Assn. v. Await*, 166 P. 1181, 22 NM 607, LRA:0171 1117;

of municipal or public corporations being made garnishees are not harmonious.<sup>70</sup> A county court clerk comes within the purview of the rule of exempting public officers from liability to garnishment process.<sup>71</sup>

It seems that where a judgment in garnishment proceedings is rendered against an exempt government agent, county, municipality, or other governmental subdivision, that such judgment is subject to be adjudicated invalid.<sup>72</sup> As to whether or not the exemption we have under consideration may be waived, the authorities are in hopeless conflict.<sup>73</sup> Some cases hold to the view that if any waiver takes place it must be by the debtor himself.<sup>74</sup> This contention is surely untenable, since it is generally asserted that the exemption of such governmental agencies is predicated upon public policy, and not for the benefit of the debtor; how can it be said that he alone can waive it when it is not for his benefit; what is he waiving? The rule of public policy is for the benefit of the public! Other cases hold that the counties, municipalities, or other governmental agents may waive the right.<sup>75</sup> It has been asserted also that the immunity from garnishment in such cases may not be waived because it is a jurisdictional matter.<sup>76</sup> Still other cases hold that it is a matter of public policy and is not subject to waiver either by the garnishee or the debtor.<sup>77</sup>

§ 390. Director General of Railroads as Subject to Garnishment.—The director general of railroads, operating through, under, and by virtue of governmental authority, may not be summoned as garnishee. But this ruling seems to have been bottomed upon an inhibition against this contained in the presidential proclamation under which the railroads were taken into governmental control during the World War.<sup>78</sup> However, it would seem that funds in

Dow v. Irwin, 157 P 400, 21 NM 576, 1RA1916E 1153; Flood v. Libby, 80 P 533, 38 Wash 306, 107 ASR 851; Welch Lumber Co. v. Carter Bros. & Bird, 88 SE 1034, 78 W Va 11, 2 ALR 1583 and note.

70. Note 2 ALR 1586.

71. Dale v. Brumbly, 56 Atl 807, 98 Md 468, 64 LRA 112.

72. Duval County v. Charleston Lumber & Mfg. Co. 33 So 531, 45 Fla 256, 60 LRA 549, 3 AC 174; State v. Tyler, 45 P 31, 14 Wash 495, 37 LRA 207, 53 ASR 878.

73. See 2 ALR 1586.

74. School Dist. v. Gage, 39 Mich 484, 33 AR 421; Sherman v. Shobe, 58 SW 949, 94 Tex 126, 36 ASR 825.

75. Dollman v. Moore, 12 So 23, 70 Miss 267, 19 LRA 222, note 75 ASR 782.

76. Porter Etc. Hardware Co. v. Perdue, 16 So 713, 10C Ala 293, 53 ASR 124.

77. Welch v. Carter Bros. & Bird, 88 SE 1034, 78 W Va 11, 2 ALR 1583.

78. Davis v. L. N. Dantzer Lumber Co. 89 So 148, 126 Miss 812, rev. 90 So 739, 133 Miss 317; cert. gr. 42 S Ct 133, 257 US 632, 66 L ed 407, rev.

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the hands of a director general of railroads could not be reached by virtue of general principles of law.

§ 391. Corporations Owned by Government or State Not Subject to Garnishment Process.—A governmentally owned soldiers' home whether operated under a corporate form or not, does not seem to be subject to garnishment process, seeking to impound funds in its hands owing to another.<sup>79</sup>

It seems that the Maine court was influenced in its decision by the fact that the statute in that state provided that all corporations having a place of business, or doing business within the state were subject to garnishment process, and that the soldiers' home referred to in the above case was located on land ceded to the government, prevented the operation of garnishment process against such soldiers' home by a creditor of the garnishment process debtor because the soldiers' home was not within the state court's jurisdiction.<sup>80</sup> But, undoubtedly the great weight of authority at this time sustains the position that a governmentally owned corporation, whether owned by the federal or state government, can be made a garnishee.<sup>81</sup> However, the adjudications holding that such governmentally owned corporations are subject to garnishment process are not without opposition.<sup>82</sup>

§ 392. State Institutions as Subject to Garnishment.—It may be stated as a general rule that an unincorporated institution, conducted and under the control of the state is not subject to be made a garnishee at the instance of a creditor against one to whom such institution owes money. It would seem to be immaterial whether an institution is an asylum, school, or other institution.<sup>83</sup>

43 S Ct 340, 261 US 280, 67 L ed 654, 28 ALR 834 and note where numerous cases are collected.

79. Brooks Hardware Co. v. Greer, 87 Atl 889, 111 Me 78, 46 LRANS 301, and note; Foley v. Shriver, 81 Va 568.

80. Brooks Hardware Co. v. Greer, supra.

81. Com. Finance Corp. v. Landis, 261 F 440; Burr v. Hefner, 286 NW 169, 289 Mich 91, 60 S Ct 489, 308 US 541, 84 L ed 456, see also note 82 infra.

82. Keifer & Keifer v. Reconstruction Fin. Corp. 69 S Ct 517, 306 US 381-397, 83 L ed 784 and exhaustive note appended thereto, page 794; Central 378

Market v. King, 272 NW 244, 132 Neb 380, cert. den. on the ground no final judgment entered; 58 S Ct 17, 82 L ed 531, 302 US 687; H. & P. Paint Supply Co. v. Ortloff, 289 NYS 367, 159 Misc 886, see also Casper v. Regional Agricultural Credit Corp. 278 NW 896, 202 Minn 433; Gill v. Reese, 4 NE(2d) 273, 53 Ohio App 134; Haines v. Lone Star Shipbuilding Co. 110 Atl 788, 268 Pa 92, 118 Atl 909, 275 Pa 260; Home Owners Loan Corp. v. Hardie, 100 SW (2d) 238, 171 Tenn 43, 108 ALR 702 and note.

83. O'Neill v. Sewell, 11 SE 831, 85 Ga 481; Dewey v. Garvey, 130 Mass 86.

§ 393. Corporations Generally as Subject to Garnishment.—It may be stated as a general rule that corporations generally are subject to garnishment and this includes foreign corporations,<sup>84</sup> national banks,<sup>85</sup> and railroad corporations.<sup>86</sup> And, of course, generally speaking, a private corporation may be served as garnishee to tie up any debt or obligation it owes to the principal defendant.<sup>87</sup>

§ 394. Receivers, Trustees, and Others Subject to Be Made Garnishees.—Property in the hands of a receiver or trustee is generally regarded as not subject to be reached on a garnishment against one to whom such receiver or trustee owes money. The reason for this holding, in so far as the receiver is concerned, is that the possession of the receiver is regarded as the possession of the court or in custodia legis. A receiver or other appointee can be made a garnishee with the consent of the court.<sup>88</sup>

A receiver may be garnisheed after the purposes of the receivership have been carried out and there remains, at that time, a balance in his hands.<sup>89</sup> It does not make any difference whether the garnishee attempted to be held is a receiver, court commissioner, trustee, and the like, or other similar officer; the rule is the same, so long as he is holding property under the authority of the court.<sup>90</sup> An additional reason assigned why property in the hands of receiver

84. *Goodwin v. Claytor*, 40 SE 173, 137 NC 224. 67 LRA 209, 107 ASR 479; *Neufelder v. German-American Ins. Co.* 33 P 870, 6 Wash 336, 22 LRA 287, 36 ASR 166.

85. *Earle v. Pennsylvania*, 20 S Ct 915, 178 US 440, 4 L ed 1146; *Nat'l City Bank v. Stupp Bros. Bridge & Iron Co.* 113 So 340, 147 Miss 747; *Markham-Stephens Co. v. E. L. Richmond Co.* 99 SE 17, 177 NC 364.

86. *Missouri v. Taylor*, 45 S Ct 47, 266 US 200, 69 L ed 247, 42 ALR 1232; *Bingenheimer Merc. Co. v. Weber*, 191 NW 620, 49 ND 312, 27 ALR 1392; *Baltimore & Ohio R. Co. v. Allen*, 52 SE 463, 58 W Va 388, 3 LRANS 608 and note 112 ASR 975.

87. *Louisville & N. R. Co. v. Deer*, 26 S Ct 207, 200 US 176, 50 L ed 426; *Parker, Peebles & Knox v. El Saieh*, 141 Atl 894, 107 Conn 545, 59 ALR 1424, notes 27 ALR 1396, 94 ALR 1017; *Missouri v. Taylor*, supra.

88. *Central Trust Co. v. Chattanooga R. & C. R. Co.* 68 F 685; *Central*

*Trust Co. v. Wheeling & L. E. R. Co.* 189 F 82; *Wiswall v. Sampson*, 14 How (US) 52, 14 L ed 322; *Davis v. Gray*, 16 Wall (US) 203, 21 L ed 447; *Ellery v. Cumming*, 14 P(2d) 709, 40 Ariz 512, 83 ALR 1081 and note; *Crane v. Pacific Bank*, 39 P 215, 106 Cal 64, 27 LRA 562; *Argues v. Union Savings Bank*, 65 P 307, 133 Cal 139; *Hospelhorn v. General Motors Corp.* 182 Atl 442, 169 Md 564; *Riesner v. Gulf C. & S. F. Ry. Co.* 30 SW 53, 89 Tex 656, 33 LRA 171, 59 ASR 84; *Boylan v. Hines*, 59 SE 503, 62 W Va 486, 13 LRANS 757, 125 ASR 893; *Jenkins v. Purcell*, 29 App DC 209, 9 LRANS 1074.

89. *Dunsmoor v. Furstenfeldt*, 26 P 518, 88 Cal 522, 12 LRA 503, 22 ASR 331; *Robertson v. Detroit Pattern Works*, 116 NW 196, 152 Mich 612, 15 AC 131; *Nat'l Surety Co. v. Hurley*, 153 NW 740, 130 Minn 392, LRA1018F 440, note 71 ASR 372.

90. *Boylan v. Hines*, supra.

or other appointee of the court may not be levied upon is that this would defeat the ends for which the appointment was made.<sup>91</sup> On the other hand, it has been held that where the debt is owing from the receivership itself, a garnishment will lie and that a receiver may be held in these circumstances as a garnishee.<sup>92</sup> It also seems that receivers operating property within the state where the appointment was without the state may be reached by garnishment in the former state.<sup>93</sup> It has also been held that the receiver holds in trust for the owner where an appointment of the receiver was void, and that property in his hands may be garnisheed or reached on other executory process by way of levy. In these circumstances the purported receiver has possession of the property, it is true, but not as an officer of the court, or law. It is only where property is lawfully taken by virtue of legal process that it is in custodia legis.<sup>94</sup>

If the receiver is garnisheed in his individual capacity that will not operate to impress a lien upon funds or property he holds as receiver owing or belonging to the attachment or execution debtor.<sup>95</sup> It is immaterial whether the receiver is appointed by a federal or state court; in either case the law affords him the same protection.<sup>96</sup> It has been held however, that the rule does not afford a federal court receiver protection against state court process. The fallacy of this holding stands out in bold relief upon an apercu.<sup>97</sup> A federal statute authorizes suits against a federal court receiver without consent of the appointing court "in respect of any act or transaction of his in carrying on the business connected with such property."<sup>97a</sup> But, notwithstanding this statutory enactment, a federal court re-

91. *Field v. Jones*, 11 Ga 413.

92. *Irwin v. McKechnie*, 59 NW 987, 58 Minn 145, 26 LRA 218, 49 ASR 495; but this case is of highly doubtful soundness, and the converse is sustained on principle and by adjudications. See *Central Trust Co. v. Chattanooga R. & C. R. Co.* 68 F 685; *Davis Coal & Coke Co. v. Hess*, 30 Pa Super 193; *Cross v. Brown*, 33 Atl 147, 19 RI 246.

93. *Central Trust Co. v. Chattanooga R. & C. R. Co.* 68 F 685; *Phelan v. Ganabin*, 5 Colo 14; *Taylor v. Columbian Ins. Co.* 14 Allen (Mass) 353; *Paige v. Smith*, 90 Mass 305; *Folger v. Columbian Ins. Co.* 99 Mass 380

276, 96 AD 747, 20 Wall.(US) 1, 22 L ed 307; *Fithian v. N. Y. & E. R. Co.* 31 Pa 114; *Cook on Corp.* (6th Ed.) 3093; *High on Receivers* (4th Ed.) 181.

94. *Greene v. Williams*, 48 Atl 798, 22 RI 547, 41 Atl 1005, 21 RI 100.

95. *Fleming v. Gillespie*, 54 P 653, 7 Okl 430.

96. *Ke-bun Oil Co. v. Hamilton*, 61 F (2d) 215, 85 ALR 204; *Earle v. Pennsylvania*, 20 S Ct 915, 178 US 440, 44 L ed 1146; *Irwin v. McKechnie*, supra.

97. *Irwin v. McKechnie*, supra, notes 26 LRA 218, 15 AC 131.

97a. 28 USCA, sec. 125.

ceiver cannot be made a garnishee without the consent of the court appointing him.<sup>97b</sup>

§ 395. **Property in the Hands of Trustee in Bankruptcy as Subject to Levy.**—Property in the hands of a trustee in bankruptcy is not subject to be impressed with a lien either by levy thereon or by garnishment proceedings. The reason for this rule is obvious, since it is readily apparent that by such proceedings against a trustee in bankruptcy it is sought to fix a lien upon assets in custodia legis, and would likewise nullify the bankruptcy proceedings, the general object of which is to reduce the assets to cash and distribute them among creditors with the least possible delay.<sup>98</sup>

§ 396. **Property in the Hands of a Guardian Not Subject to Levy.**—According to the great weight of authority, property in the hands of a guardian of an incompetent person, or of a minor, is not subject to be impressed with a lien under executory process. In many jurisdictions however this question is regulated by statute, and the statutes of the particular jurisdiction ought to be consulted.<sup>99</sup> It seems however that a contrary view has been maintained in Ohio and Tennessee and that in those jurisdictions the property of an incompetent, or an infant in the possession of a guardian, may be seized on executory process, such as an execution or writ of attachment.<sup>1</sup>

§ 397. **Assets Involved in Assignments for the Benefit of Creditors as Subject to Levy.**—While an assignment for the benefit of creditors does not strictly speaking place the property involved in custodia legis, still it is so closely related thereto as to be regarded within the protection thereof.<sup>2</sup> However, a contrary view has

97b. *Central Trust Co. v. Chattanooga R. & C. R. Co.* 68 F 685; *Central Trust Co. v. East Tenn. V. & G. R. Co.* 59 F 523; *Comer v. Felton*, 61 F 731, 10 CCA 28; *Central Trust Co. v. Wheeling & L. E. R. Co.* 189 F 82.

98. *Acme Harvester Co. v. Beckman Lumber Co.* 32 S Ct 90, 222 US 300, 58 L ed 208; *Cowart v. W. E. Caldwell Co.* 68 SE 500, 134 Ga 544, 30 LRANS 720; *Rockland Savings Bank v. Alden*, 68 Atl 863, 103 Me 230, 14 LRANS 1220, 13 AC 806; *McMorran v. Clark*, 188 NE 668, 40 Ohio App 338.

99. *Derzis v. Vafee*, 150 So 401, 227

Ala 471; *Pugh v. Jones*, 112 NW 225, 134 Iowa 746, 11 LRANS 706, 120 ASR 451, 13 AC 499; *Shumaker v. Bohrofen*, 250 NW 683, 217 Iowa 34, 92 ALR 914.

1. *Arbaugh v. Myers*, 8 Ohio Dec Rep 617, 9 Wkly L Bul 64; *Dial v. Wood*, 9 Baxt (Tenn) 296.

2. *Crapo v. Kelly*, 16 Wall.(US) 610, 21 L ed 430; *Fenton v. Edwards*, 58 P 320, 126 Cal 43, 40 LRA 832, 77 ASR 141; *Handley v. Pfister*, 39 Cal 283, 2 AR 440; *Woodward v. Brooks*, 20 NE 685, 123 Ill 222, 3 LRA 702, 15 ASR 104; *Thompson Co. v. Whitehead*, 56 NE 1100, 185 Ill 454, 76 ASR 51; *Ham-*

found favor in some jurisdictions.<sup>3</sup> It seems however, that the assignment must be made in good faith, in order to prevent the property involved therein from being leviable, and the fact that the amount of property transferred is out of all proportion to the total sum of the debts secured is sufficient to warrant attaching the property in the hands of the assignee, and operates to take it out of protection afforded by law.<sup>4</sup> Likewise, if there is a surplus left over after the assignment trust is fully administered, this is subject to a levy or impressment of a lien of any nonassenting creditor of the assignor.<sup>5</sup> It seems however, that the assignee for the benefit of creditors may be subjected to a garnishment to reach the interest of a creditor secured by the assignment; that the limit of the shielding effect of the law, in extending its inhibition against levying of executory process is with respect to debts of the assignor, and the beneficiaries cannot claim the benefit of such protection.<sup>6</sup> And this is certainly true after the property has been converted into money and is held ready to distribute among the creditors.<sup>7</sup> Likewise the compensation due to an assignee for the benefit of creditors whose term of office has terminated and the vacancy has been filled by another, may be reached by garnishment process by his creditor.<sup>8</sup>

§ 398. **Property of a National Bank as Not Subject to Levy.**—The federal statute provides inter alia “and no attachment, injunction or execution shall be issued against such association (national bank) or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court.”<sup>9</sup> So, under this statute all national banks are protected, whether solvent or insolvent, as against writs or process executory in character issuing before final judgment out of any state court.<sup>10</sup> It is also held

*Ilton-Brown Shoe Co. v. Mercer*, 51 NW 415, 84 Iowa 537, 35 ASR 331; *Elton v. O'Connor*, 68 NW 84, 6 ND 1, 33 LRA 524.

3. *State v. Rose*, 58 NW 514, 4 ND 319. Note LRA 1918F 443.

4. *Hempstead v. Johnston*, 18 Ark 123, 65 AD 458; *Borden v. Sumner*, 4 Pick (Mass) 265, 16 AD 338.

5. *Johnson v. Star*, 47 SW(2d) 608, 121 Tex 195, aff. 53 S Ct 265, 287 US 527, 77 L ed 473; *Webb v. Peele*, 7 Pick (Mass) 247, 19 AD 284; *Moody v. Carroll*, 8 SW 510, 71 Tex 143, 10 ASR 734.

6. *Nat'l Surety Co. v. Hurley*, 153

NW 740, 130 Minn 392, LRA 1918F 440.

7. *Dunsmoor v. Furstenfeldt*, 26 P 518, 88 Cal 522, 12 LRA 508, 22 ASR 331.

8. *Stuckey v. McKibbin*, 8 So 379, 92 Ala 622.

9. 12 USCA, sec. 91.

10. *Pacific Nat'l Bank v. Mixer*, 8 S Ct 718, 124 US 721, 31 L ed 567; *Van Reed v. People's Nat'l Bank*, 25 S Ct 775, 198 US 554, 49 L ed 1161, 3 AC 1154, affirming 66 NE 16, 173 NY 314, 105 ASR 660, which affirmed 73 NYS 514, 67 App Div 75; *Dennis v. First Nat'l Bank*, 59 P 777, 127 Cal

that this provision of the federal statute in conjunction with 12 USCA, sec. 192, is sufficient, in addition to any other protective laws, to prevent the seizing of its assets in the hands of a national bank receiver where such receiver and the bank are made defendants.<sup>11</sup>

§ 399. **Property in Hands of Sheriff Not Subject to Levy under Federal Process.**—Property in the hands of sheriff by virtue of state court process is not subject to seizure by United States marshal on process issued out of a federal court.<sup>12</sup> Likewise where the federal court obtains a first levy upon property it cannot be displaced or supplanted by an officer on process issuing out of a state court.<sup>13</sup> Likewise where a sheriff sells property which he has levied upon without any knowledge or notice of a bankruptcy proceeding the sale will be upheld.<sup>14</sup> It is generally held that where a sheriff has seized property under executory process issuing out of a state court, that his possession cannot be supplanted by replevin brought in a federal court, although the state court might take the property from the sheriff in replevin; and so, too, a United States marshal's possession under executory process issuing out of a United States court, cannot be disturbed by a state court replevin action.<sup>14a</sup> The rule is not changed by the fact that the property has been taken out of the possession of the sheriff on a forthcoming bond; still the same may not be taken in replevin or seized on federal process.<sup>14b</sup> Where property has been replevined in a state court, it cannot be replevined again in the federal court.<sup>14c</sup>

§ 400. **Public Property and Funds as Subject to Levy.**—It may be stated as a general rule, in the absence of a statutory enactment

453, 78 ASR 79; Meyer v. First Nat'l Bank, 77 P 334, 10 Idaho 175; Posselius v. First Nat'l Bank, 251 NW 429, 264 Mich 687, 99 ALR 342, and note; cert. den. 54 S Ct 631, 292 US 627, 78 L ed 1481; McBride v. Illinois Nat'l Bank, 112 NYS 794, 128 App Div 503.

11. Jenkins v. First Nat'l Bank, 236 P 1085, 73 Mont 110.

12. Sharp v. Bonham, 213 F 660; Taylor v. Carryl, 20 How (US) 583, 15 L ed 1028; Pulliam v. Osborne, 17 How (US) 471, 15 L ed 154; Trumbo v. Cumming, 20 SC 334.

13. Cohen v. Solomon, 60 F 411; Jackson v. Parkersburg etc. R. Co. 233 F 784; Moore v. Withenburg, 13 La Anno 22; Coffin v. Harris, 54 SE 437,

141 NC 707, 6 LRANS 624.

14. Conner v. Long, 104 US (Otto) 228, 26 L ed 723; Pulliam v. Osborne, supra.

14a. Melvin v. Robinson, 31 F 634; Porter v. Davidson, 62 F 626; Domestic Soc. v. Hinman, 13 F 161, 2 McCrary 543; U. S. v. Dantzler, F. Cas. No. 14,917, 3 Woods 719; Freeman v. Howe, 24 How (US) 450, 16 L ed 749; Covell v. Heyman, 4 S Ct 355, 111 US 176, 28 L ed 390; Lewis v. Buck, 7 Minn 104, 82 Am Dec 71; Booth v. Ableman, 16 Wis 160, 84 Am Dec 711.

14b. U. S. v. Dantzler, F. Cas. No. 14,917, 3 Woods 710.

14c. Porter v. Davidson, supra.

or constitutional provision authorizing the same, that public property or funds belonging to the United States government, state, county, or municipal government, is not subject to levy under an execution or attachment. And even where a levy on the property or funds is permitted by virtue of a statutory enactment or constitutional authority property still may not be levied upon when used for public purposes, such as buildings used therefor, streets, alleys, parks, squares, wharves, waterworks, fire equipment, and the like; and the same is true with respect to property used for school purposes and owned by a municipal corporation or quasi municipal corporation, such as a school district. The reason for these holdings is that such property is held in trust for the public. The reason that governmental funds are not subject to seizure is that they are collected for governmental purposes, and upon that basis are impressed with a trust, and to permit such levies would thwart the governmental functioning of such municipal corporation or quasi municipal corporation. It is sometimes asserted that as a basis for refusal to permit such seizure of public funds to allow it would work a preference to a particular creditor.<sup>15</sup> However, where a municipality, or other governmental subdivision, owns property which is not used in or necessary for the discharge of governmental functions, such property may be seized and sold on executory process against such municipality, but before this can be done it must be determined judicially whether such property is necessary for the discharge of governmental functions by a governmental unit like those hereinabove mentioned.<sup>16</sup>

15. In re New York, 41 S Ct 592, 256 US 503, 65 L ed 1063; New Orleans v. Morris, 105 US 300, 26 L ed 1184; Klein v. New Orleans, 99 US 149, 25 L ed 430; New Orleans v. Louisiana Construction Co. 11 S Ct 908, 140 US 654, 35 L ed 556; Townsend v. Greeley, 5 Wall.(US) 326, 18 L ed 547; Ellis v. Pratt City, 20 So 649, 111 Ala 629, 33 LRA 264, 56 ASR 76; Maricopa County v. Hodgins, 60 P (2d) 15, 46 Ariz 247, 101 ALR 793; Mayrhofer v. Board of Education, 26 P 646, 89 Cal 110, 23 ASR 451; Gilman v. Contra Costa County, 8 Cal 52, 68 AD 290; National Fire Proofing Co. v. Huntington, 71 Atl 911, 81 Conn 632, 20 LRA NS 261, 129 ASR 228; Coral Gables v. Hepkins, 144 So 385, 107 Fla 778; Special Tax School Dist. v. Smith, 54 So 376, 61 Fla 782, AC 1913A 757; 384

Finnegan v. Fernandina, 15 Fla 379, 21 AR 292; Curry v. Savannah, 64 Ga 290, 37 AR 74; Ransom v. Boal, 29 Iowa 68, 4 AR 105; American-La-France & F. Industries v. Winnfield, 168 So 293, 184 La 1043; Morgantown Hardware Co. v. Morgantown Graded School, 64 SE 764, 150 NC 680, 134 ASR 953, 17 AC 130; Piscataway Township v. First Nat'l Bank, 169 Atl 757, 111 NJL 412, 90 ALR 423; Vanderpoel v. Mount Ephraim, 168 Atl 575, 111 NJL 423, 39 ALR 862, and note; Darlington v. New York, 31 NY 164, 88 AD 248, 28 How Pr 352; Beadles v. Fry, 8 P 1041, 15 Okl 428, 2 LRANS 855; Emery v. Burreasen, 47 P 91, 14 Utah 328, 37 LRA 732, 60 ASR 898.

16. Southern R. Co. v. Hartshorne, 43 So 583, 150 Ala 217, 124 ASR 68;

§ 401. **Property Dedicated to Public Use as Subject to Levy.**—Cities, towns, and villages hold the titles to streets, alleys and public squares, in trust for the public, and upon principle, such trust property can no more be sold to satisfy the debts of the city than can any other trust property be sold to satisfy the debts of the trust holding interest therein.<sup>17</sup> It should be noted however, that a private party cannot claim that he has made a dedication of his lands so as to prevent a sale of it on execution against him, and especially when it is laid off as a town by persons holding adversely to the claimant, the latter never having recognized the plat representing such laying off and dedication. In other words, a debtor will not be permitted to hide behind an alleged dedication to public use, and thereby protect his property from being seized, and sold in satisfaction of his debts.<sup>18</sup>

§ 402. **Property Dedicated to Cemetery Purpose Exempt from Levy.**—It is beyond cavil that where property had been duly and legally platted and dedicated to cemetery purposes, and was used at all times thereafter as a public burying ground for the benefit of the people of the vicinage, that it is exempt from seizure and forced sale within the scope and purview of a statute which declares that lands appropriated and set apart for burial grounds either for public or private use and so recorded in the county clerk's office in such county wherein the cemetery is situated, shall not be subject to execution and sale. It is not the policy of the law, nor the intention of the legislature in exempting such property from execution that the spirit of discord shall be permitted to invade the silent precincts of the dead, and there hold high carnival in an unseemly contest as to which of contending litigants shall profit by the sale of the necessary part of mother earth to enfold in its peaceful embrace the last that is mortal of man.<sup>19</sup>

§ 403. **Sale of Property Dedicated to Public Use on Execution**

*Equitable Loan & Security Co. v. Edwardsville*, 38 So 1016, 143 Ala 182, 111 ASR 34; *State v. Buckles*, 35 NE 846, 8 Ind App 282, 52 ASR 476; *Farmerville v. Commercial Credit Co.* 136 So 82, 173 La 43, 76 ALR 686; *Sherman v. Williams*, 19 SW 606, 84 Tex 421, 31 ASR 66, and note; *Beadles v. Fry*, supra; *Darlington v. New York*, supra.

17. *City of Alton v. Illinois Transp.*

[1 *Anderson on Sheriffs*].—25

*Co. 12 Ill 38, 52 AD 479, and note; Ransom v. Boal*, 29 Iowa 68, 4 AR 195.

18. *Rector v. Hartt*, 8 Mo 448, 41 AD 650, see also 13 Mo 497.

19. *First Nat'l Bank v. Hazels*, 89 NW 378, 63 Neb 844, 56 LRA 765 and notes; *Oakland Cemetery Co. v. People's Cemetery Ass'n*, 57 SW 27, 93 Tex 509, 59 SW 289; see also *Close v. Glenwood Cemetery*, 2 S Ct 267, 107 US 466, 27 L ed 408.

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against Dedicator.—The purchaser of property that has been dedicated to public use under a judgment and execution against the dedicator, takes the same subject to all of the rights of the public in and by virtue of the dedication.<sup>20</sup>

§ 404. **The Interest of Homesteader as Subject to Levy.**—The federal statute provides that: "No lands acquired under the provisions of the homestead laws and laws supplemental and amendatory thereof shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."<sup>21</sup> Many decisions have been rendered by the courts construing this statute, and of course it is readily apparent upon a mere apercu that the land is not liable to seizure and sale for a debt contracted prior to the issuing of the patent.<sup>22</sup> But the question arose as of what date the patent would be regarded as issued. Whether the actual issuance of the patent after final proof had been made and approved was the date prior to which the lands were not subject to levy or the date of the final proof and certificate would be regarded as the date of the patent, and not subject to levy for debts contracted prior thereto. But this question has definitely been settled by the Supreme Court of the United States and an indebtedness which accrued after a final certificate and before the issuance of a patent is affected by this situation as well as an indebtedness that was contracted before final certificate. In other words, the land remains exempt to the entryman with respect to debts contracted by him before the actual issuance of the patent.<sup>23</sup>

A homestead entry for which patent is issued in the year 1925 was not liable for the satisfaction of a judgment for a breach of promise of marriage which judgment was entered within the state where the homestead entry was made in 1928, but was in turn based on a foreign judgment in another state in 1921, since the liability for breach of promise when merged into a foreign judgment was regarded as a debt contracted prior to issuance of patent within the purview of the above mentioned section.<sup>24</sup> The exemption also extends to what is regarded as enlarged homesteads.<sup>25</sup> The exemption likewise operates to protect land acquired under the stock

20. *Hooper v. Haas*, 164 NE 23, 332 Ill 561, 63 ALR 658.

21. 43 USCA, sec. 175.

22. *Buchser v. Morse*, 196 F 577, 202 F 854, 121 CCA 212, 34 S Ct 46, 231 US 157, 58 L ed 166.

23. *Ruddy v. Rossi*, 39 S Ct 46, 248 386

US 104, 63 L ed 148, 8 ALR 843, reversing 154 P 977, 28 Idaho 376.

24. *Duling v. Salaz*, 26 P(2d) 1069, 93 Colo 453.

25. *In re Auge*, 238 F 621; *First State Bank v. Bottineau County Bank*, 185 P 182, 56 Mont 363, 8 ALR 631.

[1 *Anderson on Sheriffs*]

raising homestead law.<sup>26</sup> The exemption operates against the United States government, states, counties, and the like and also with respect to statutory liability as well as a contractual one.<sup>27</sup> On the other hand however, the general rule has been announced to be that in the absence of a statutory provision protecting or exempting the same from execution the interest of a debtor in public lands may be levied upon under an execution whether a patent has been issued or not.<sup>28</sup>

§ 405. **Interests in Public Lands as Subject to Seizure and Sale.**—It seems that at common law uninfluenced by protective statutory provisions, any interest a citizen may have in public lands is subject to seizure and sale for his debts.<sup>29</sup>

Through appropriation by virtue of proper filing on a part of the public domain, as a mining claim, the claimant acquires a vested interest in the exclusive occupation and enjoyment of the land, as against all of the world, subject only to the right of the government by whose license and permission his possession is acquired, and the right to protect the property for the time being, is as full as if he were the tenant of a superior proprietor for years or life. Therefore, the postulate must be apparent as an illative result of the interest thus acquired that mining claims may be subjected to a satisfaction of a judgment against the claimant by virtue of seizure and sale under executory process.<sup>30</sup> There is a sharp conflict in the adjudications with respect to whether or not a mere permissive occupier of public land has such an interest therein as may be subjected to a sale under execution. Alabama holds that there is no such interest as may be seized under executory process issuing on a judgment while on the other hand Illinois maintains the affirmative.<sup>31</sup> Decisions are not wanting however, to the effect, that if the occupier of such lands has made improvements thereon that the improvements them-

26. 43 USCA, Sections 291 et seq.; *Citizens Nat'l Bank v. Ruley*, 228 P 416, 29 NM 602.

27. *Fink v. O'Neil*, 1 S Ct 325, 106 US 272, 27 L ed 106; *Codington County v. Lindner*, 103 NW 573, 39 SD 936.

28. *Roads v. Symmes*, 1 Ohio 281, 13 AD 621. See Sec. 405, note 29 infra.

29. *Carroll v. Safford*, 3 How(US) 441, 11 L ed 671; *Levi v. Thompson*, 4 How(US) 317, 11 L ed 586; *Goodlet*

*v. Smithson*, 5 Port (Ala) 245, 30 AD 561, see also sec. 404, note 28 infra; *Rogers v. Brent*, 10 Ill 573, 50 AD 422, 5 Gilman 573; *Roads v. Symmes*, 1 Ohio 281, 13 AD 621.

30. *Merced Mining Co. v. Fremont*, 7 Cal 130; *McKeon v. Bisbee*, 9 Cal 137, 70 AD 642; *State v. Moore*, 12 Cal 56, note 68 AD 274.

31. *Rhea v. Hughes*, 1 Ala 219, 34 AD 772; *Switzer v. Skiles*, 3 Gil (Ill) 529, 44 Am Dec 723.

selves may be subjected to a sale under an execution against the owner thereof.<sup>32</sup>

§ 406. **Interest of Tenant by the Curtesy as Subject to Levy.**—At common law, it seems that, the interest or right of a tenant by the curtesy is subject to an execution against the tenant whether the right is consummate or initiate.<sup>33</sup> Tenancy by the curtesy is initiate before the wife's death, where all elements of curtesy are present, and it is consummate when her death occurs.<sup>33a</sup> Sometimes it is enacted by statutory provision that such interest shall be exempt from seizure and sale under an execution.<sup>34</sup>

Under a statute which enacts that the property of a married woman shall not be liable for the debts of her husband, his tenancy by the curtesy is not liable to be sold to pay any debt contracted by him after the effective date of the act.<sup>35</sup> Under other statutory provisions however, it is held that a husband has an estate by the curtesy after the death of his wife in lands which he had voluntarily settled upon her, if he did not, by express terms or by implication, relinquish such right in the instrument of conveyance; such

32. *Wilson v. Webster, Morris* (Iowa) 312, 41 AD 230; *Zickafosse v. Hulick*, 1 Morris (Iowa) 175, 39 AD 458; *Ratcliff v. Bridger*, 1 Rob (La) 67, 36 AD 683.

33. *Stanley v. Bonham*, 12 SW 706, 52 Ark 354; *Hampton v. Cook*, 42 SW 535, 64 Ark 353, 62 ASR 194; *Coquard v. Pearce*, 56 SW 641, 68 Ark 93; *Gay v. Gay*, 13 NE 813, 123 Ill 221; *Beale v. Knowles*, 45 Me 479; *Roberts v. Whiting*, 16 Mass 186; *Day v. Cochran*, 24 Miss 261; *Deming v. Miles*, 53 NW 665, 35 Neb 739, 37 ASR 464; *Robie v. Chapman*, 59 NH 41; *VanDuzer v. VanDuzer*, 6 Paige Ch. (NY) 366, 31 AD 257; *Wickes v. Clarke*, 8 Paige Ch. (NY) 161; *Schermerhorn v. Miller*, 2 Cow (NY) 439; *Canby's Lessee v. Porter*, 12 Ohio 79; *Day v. Burgess*, 202 SW 911, 139 Tenn 559, LRA1918E 692, 134 ASR 948; *Mattocke v. Stearns*, 9 Vt 326; *Uhler v. Adams*, 1 App DC 392.

33a. *Carrington v. Richardson*, 79 Ala 101; *Hunter v. Whitworth*, 9 Ala 965; *Hampton v. Cook*, 42 SW 535, 64 Ark 353, 62 ASR 194; *Todd v. Oviatt*, 20 Atl 440, 56 Conn 174, 7 LRA 693; *Jackson v. Jackson*, 33 NE 51, 144 Ill 388

274, 36 ASR 427; *McNeer v. McNeer*, 32 NE 681, 142 Ill 388, 19 LRA 256; *Johnson v. Gordon*, 140 SW 538, 145 Ky 421; *Powell v. Powell*, 183 SW 625, 267 Mo 117, 188 SW 795; *Healey v. Tillberry*, 183 SW 666, 192 Mo App 509; *Withnell v. Withnell*, 96 NW 221, 69 Neb 605; *Richardson v. Richardson*, 64 SE 510, 150 NC 549, 134 ASR 948; *Hackensack Trust Co. v. Tracy*, 99 Atl 846, 86 NJE 301.

34. *Hitz v. Nat'l Metropolitan Bank*, 4 S Ct 613, 111 US 722, 28 L ed 577; *Mattoon v. McGrew*, 5 S Ct 369, 112 US 713, 28 L ed 824; *Mitchell v. Violett*, 47 SW 195, 104 Ky 77, 20 Ky L 378; *Curry v. Bott*, 3 Pa State 400; *Welsh v. Solenberger*, 8 SE 91, 85 Va 441.

35. *Sill v. White*, 26 Atl 396, 62 Conn 430, 20 LRA 321; *Bruce v. Nicholson*, 13 SE 790, 109 NC 202, 26 ASR 562; *Carroll v. Sanford*, 83 Atl 855, 34 RI 337, 40 LRANS 1204, AC 1914C 1183; *Bankers Loan & Investment Co. v. Blair*, 39 SE 231, 99 Va 606, 86 ASR 914; *Hitz v. Nat'l Metropolitan Bank*, supra; *Mattoon v. McGrew*, supra.



right of the tenant by the curtesy may be seized and sold under the execution against him.<sup>36</sup>

§ 407. **Dower Right as Subject to Seizure.**—In the absence of statutory provision to the contrary, the dower right of a wife or widow, in advance of the actual assignment thereof, is not subject to seizure and sale on execution against her. The reason of this seems to be that in advance of assignment it is a mere inchoate right and does not possess that tangibility that is an indispensable characteristic, in order to be treated as property.<sup>37</sup> It is sometimes held that the dower interest may be subjected to a judgment against the beneficiary thereof in a court of equity.<sup>38</sup> The fact that under a statutory enactment the dower is enlarged into a fee simple estate does not operate to remove the exemption, nor does the fact that under statutory authority the dower interest prior to assignment is subject to sale; neither does a statute authorizing a creditor to have the dower assigned in order to subject it to a levy and sale militate against nonrecognition of the common law dower prior to assignment.<sup>39</sup>

§ 408. **Exemption of Personalty by Statute.**—It should be noted at the outset of a treatment and discussion of the subject of this section that it is regulated purely by statute, and statutes of a jurisdiction involved should be examined, and that the scope and extent of a general enchainment intended for the guide of officers, members of the bench and bar, applicable to all jurisdictions could not permit a full treatment and analysis of local statutory provision. It may be noted however, that in some jurisdictions personal property, irrespective of its description, is exempted from execution up to a certain amount, although in a majority of them the articles that are exempt by virtue of statute are enumerated, specified, and listed.

36. *Anderson v. Tydings*, 8 Md 427, 63 AD 708; *First Nat'l Bank v. Godfrey*, 117 SE 680, 94 W Va 1, 30 ALR 1054; *Depue v. Miller*, 64 SE 740, 65 W Va 120, 23 LRANS 775.

37. *Carnall v. Wilson*, 21 Ark 62, 76 AD 351; *Hagan v. Chapman*, 41 Atl 974, 1 Penn (Del) 445; *Traders Insurance Co. v. Newman*, 22 NE 423, 126 Ind 554; *Harper v. Clayton*, 35 Atl 1083, 84 Md 346, 35 LRA 211, 57 ASR 407; *Flynn v. Flynn*, 50 NE 650, 171 Mass 312, 42 LRA 98, 68 ASR 427; *McMahon v. Gray*, 22 NE 923, 150

Mass 289, 5 LRA 748, 15 ASR 202; *Clelland v. Clelland*, 235 SW 816, 291 Mo 312; *Tenbrook v. Jessup*, 46 Atl 516, 60 NJE 234; *Good v. Crist*, 156 NE 146, 23 Ohio App 484; *Baer v. Ballingall*, 61 P 852, 37 Ore 416; *North v. Puckett*, 46 SW(2d) 73, 164 Tenn 100, 81 ALR 1107; *Huddleston v. Miller*, 64 SE 538, 81 W Va 357.

38. *North v. Puckett*, supra.

39. *Rausch v. Moore*, 48 Iowa 611, 30 AR 412; *Young v. Thrasher*, 61 Mo App 413; *Clelland v. Clelland*, 235 SW 816, 291 Mo 312.

The personal property is, chiefly, confined to articles of absolute necessity, upon which the sheriff is forbidden to lay a heavy hand in execution. It may be mentioned that these statutes usually embrace wearing apparel, furniture, household goods, agricultural implements, tools of a mechanic, draft horses or work animals, wagons and vehicles, and the like, and sometimes go to the extent of exempting to professional men the necessities for carrying on such profession. In many jurisdictions the instruments of a physician, surgeon, or dentist, the books of a lawyer, a notary's seal and the like are exempt.<sup>40</sup>

§ 409. **Tools of Trade.**—It may be safe to assert that all exemption laws exempt certain tools of trade or business of the debtor. These tools are variously designated as tools, instruments, and the like.<sup>41</sup> Generally, tools of a trade, within the purview of exemption statutes, is confined to what may be classified as simple tools and cannot be, by construction, expanded to embrace expensive machinery.<sup>42</sup> The exemption does not as a rule include large and expensive machinery such as printing plants and the like and cannot by virtue of a statute exempting "tools and instruments" or "implements" and the like, of a trade or business embrace such classes of machinery.<sup>43</sup> In order for the claimant to successfully assert the exemption, he must use the tools in his trade or business which gives him the right of exemption under the statute.<sup>44</sup> However the ex-

40. *Lenoir v. Weekes*, 20 Ga 596; *Amend v. Murphy*, 69 Ill 337; *Maxon v. Perrott*, 17 Mich 332, 97 AD 191; *Hall v. Penney*, 11 Wend (NY) 44, 25 AD 601; *Brackett v. Watkins*, 21 Wend (NY) 68; *Fowler v. Gilmore*, 30 Tex 432; *Tanner v. Billings*, 18 Wis 163, 86 Ac. Dec 775.

41. *Dowd v. Heuson*, 252 P 260, 122 Kan 278, 52 ALR 823; *Wamberg v. Hart*, 221 P 547, 114 Kan 908, 36 ALR 666; *Armstrong-Turner Millinery Co. v. Round*, 186 P 979, 100 Kan 146, 9 ALR 1255; *Schwartz v. Dennis*, 70 So 857, 138 La 848, AC 1917D 94; *Church v. First Nat'l Bank*, 238 NW 192, 255 Mich 595, 82 ALR 645; *State v. Justice of the Peace Court*, 55 P(2d) 691, 102 Mont 1, notes 2 ALR 818, 9 ALR 1020; *Hoyt v. Pullman*, 152 P 386, 51 Okl 717, LRA1910B 1288.

42. *Sallee v. Waters*, 17 Ala 482; *Atwood v. DeForest*, 19 Conn 513; 390

*Lenoir v. Weekes*, 20 Ga 596; *Boston Belting Co. v. Ivens*, 28 La Ann 695; *Danforth v. Woodward*, 10 Pick (Mass) 423, 20 AD 531; *Buckingham v. Billings*, 13 Mass 82; *Richie v. McCauley*, 4 Pa 471; *Cullers v. James*, 1 SW 314, 66 Tex 494; *Thresher v. McEvoy*, 193 SW (Tex Civ) 159; *Henry v. Sheldon*, 35 Vt 427, 82 AD 644; *Thompson on Homesteads, Etc.*, Secs. 756, 757, and cases therein cited.

43. *Seeley v. Gwillim*, 40 Conn 106; *Jenkins v. McNall*, 27 Kan 532, 41 AR 422; *Willis v. Morris*, 1 SW 799, 66 Tex 628, 59 AR 634; *Cullers v. James*, supra; even though the printing press be merely a job press; *Boston Belting Co. v. Ivens*, supra; *Richie v. McCauley*, supra.

44. *Julius v. Druckrey*, 254 NW 358, 214 Wis 643, 94 ALR 293; *Jenkins v. McNall*, supra.

emption laws have been construed sufficiently broadly as to embrace a motor and lathe as an "implement."<sup>45</sup>

§ 410. Right of Polyartist or "Jack of All Trades" to Claim a Number of Exemptions.—While it is undoubtedly true that the article claimed as a "tool" or "implement" and to have it exempted it must be one connected with and used by the debtor in his main business; it cannot be a "tool" or "implement" used in some other business, or in a business carried on through the agency of others, or that is kept by the debtor for the purpose of letting out or hiring to others.<sup>46</sup>

A question of some nicety has arisen with respect to whether or not a debtor may claim exemptions appertaining to more than one occupation, trade, or business. However, after all, as to whether or not a debtor may claim as exempt, tools or implements that he uses in one or more trades or occupations depends upon the statute in the particular jurisdiction. So, cases are to be found which hold, and properly so, it is thought, that where by the exemption statutes the tools or implements pertaining to any given trade are specifically named, and expressly exempted, or where tools or implements in any specified trade with a maximum value, are exempted, then the debtor is confined to one trade or occupation or, in other words, to one class of exemption. He cannot claim exemptions to the full value allowed by the statute in the particular jurisdiction in more than one class. But such cases are to be distinguished from those arising under a statute that does not specify that tools of a blacksmith, or of a carpenter, or of an electrician, are exempt, or that a carpenter may claim exemptions to a specified amount or a blacksmith may likewise do so, but where the debtor is a "jack of all trades" or a polyartist and insists upon other exemptions for the full value given by the statute he may, until he has had the full value, claim exemptions for one or more trades or occupations, such as a carpenter, blacksmith, or electrician where it appears that he actually uses them in all of the occupations and is engaged therein.<sup>47</sup>

In the course of the opinion in *In re Robinson* the very learned Judge Dietrich said, "So far as appears, the debtor was actually using all of the tools or implements as an artisan or mechanic in making his living. He was in the general repair business, a 'jack

45. *In re Robinson*, 208 F 176.

46. *Mack v. Boots*, 239 P 794, 29 Ariz 118; *Brusie v. Griffith*, 34 Cal 302, 91 AD 695; *Meyer v. Meyer*, 23 Iowa 359, 92 AD 132; *State Bank v.*

*Shepherd*, 182 P 653, 105 Kan 206, 9 ALR 1014; *Jenkins v. McNall*, 27 Kan 532, 41 AR 422.

47. *In re Robinson*, 208 F 176.

of all trades,' as he put it, and naturally required a great variety of tools; but such a trade or calling is quite as legitimate, and perhaps no less useful to society, and possibly quite as efficient a means of earning a livelihood for the debtor and his family, as a trade or calling more highly specialized. Suppose that in a small community, where there is not a sufficient amount of either carpenter's work or painting to engage all of the time of one man, a mechanic qualifies himself to render efficient service both as a carpenter and a painter, and purchases the necessary tools and appliances for carrying on both lines of work, and in fact follows both trades, and depends for his livelihood upon his earnings in both; is there any reason either in the spirit or in the letter of the statutes, when fairly construed, why he should not be permitted to claim as exempt, up to the value of five hundred dollars, (the amount of the exemption allowed by the statute,) the tools of both callings? None is apparent; but that is substantially the case here." Of course,<sup>48</sup> it must be recognized that the exemption statute should not be construed so as to permit the assertion of double exemptions and this may not be done by the debtor resorting to the subterfuge of claiming exemptions in a number of occupations in that manner.<sup>49</sup>

The position maintained by Judge Dietrich in *In re Robinson* is opposed by the Supreme Court of Wisconsin, at a comparatively early day where it was adjudicated that a debtor may not claim exemptions both as a mechanic and a miner.<sup>50</sup>

§ 411. Tools or Implements Exempt to Agriculturists.—The statutes generally provide for exemptions to debtors, who are engaged in the business of farming or agriculture, and the statutes of the particular jurisdictions ought to be consulted for the provisions thereof. However, it may be stated as a general rule that unless there are specific statutory provisions allowing exemptions to a farmer or agriculturist the general exemption laws will not cover expensive machinery such as reapers and the like.<sup>51</sup> But under the liberal construction placed upon the statute by the Supreme Court of Idaho it is immaterial whether the farmer is engaged in farming

48. *Hart & Co. v. Cole*, 76 NE 940, 73 Ohio St 267, 4 AC 217.

49. *Dowd v. Heuson*, 262 P 260, 122 Kan 278, 52 ALR 823; *Wallins Nat'l Bank v. Turner*, 290 SW 194, 221 Ky 562; *Rivet v. George M. Murrell Planting & Manufacturing Co.*, 46 So 210, 121 La 201, 126 ASR 320.

*Mack v. Boots*, supra; *State Bank*

*v. Shepherd*, supra; *Jenkins v. McNall*, supra.

50. *Knapp v. Bartlett*, 23 Wis 68, 99 AD 109.

51. *Meyer v. Meyer*, 23 Iowa 359, 92 AD 432; *Martin v. Buewell*, 80 Atl 628, 108 Me 263; *Ford v. Johnson*, 34 Barb (NY) 364.

not. If he merely intends to engage in farming some time in the future that is sufficient.<sup>52</sup> According to the pronouncement of the learned court of that state, a farmer who has no farm and did not raise the hay he has for his animals, but who intends to farm and raise hay, that is sufficient.<sup>53</sup>

It should not be overlooked that there are exemptions in many states to different classes of trades, such as lawyers, doctors, ministers of the Gospel and the like, but a treatment of the exemption statutes accorded to the followers of these trades or professions is beyond the scope of this work.

§ 412. Exemption of Earnings.—There is generally found in the exemption statutes of the various jurisdictions exemption of a percentage or portion of a debtor's earnings, who is the head of a family. Earnings has been defined as gains derived from services without the aid of capital, so where an office is held and the occupant thereof is paid in fees, such fees are exempt under a statute providing for the exemption of earnings of the judgment debtor.<sup>54</sup>

Differently stated, it is not material how the debtor works, whether by stipulated price per hour, or whether he works by the job or piece.<sup>55</sup> But, even the liberal construction of an exemption statute will not warrant the exemption of wages to a debtor who is actually engaged in business or is an independent contractor, and the fact that he performs some of the work or labor that goes to produce the mass income will not change the situation.<sup>56</sup>

The declared purpose of the exemption laws, with respect to the earnings of the debtor, is to protect a certain class of debtors who, together with their families, are mainly dependent upon his personal earnings.<sup>57</sup> The courts however have drawn some rather fine distinctions in reaching a conclusion in connection with the application of exemption statutes in certain cases. For example money arising from the operation of a boarding house is not exempt.<sup>58</sup> A saloon keeper's income from his business is not regarded

52. Aslett v. Evans, 280 P 1036, 48 Idaho 206.

53. Aslett v. Evans, supra.

54. Shriver v. C. & F. Co., 141 Atl 434, 155 Md 51, 58 ALR 767; Rikerd Lumber Co. v. Chrouh, 98 NW 739, 135 Mich 703, 106 ASR 416; Dayton v. Ewart, 72 P 420, 28 Mont 153, 98 ASR 549; Adcock v. Smith, 37 W 91, 97 Tenn 373, 56 ASR 910; Brown v. Hebard, 20 Wis 326, 91 AD 408.

55. Rikerd Lumber Co. v. Chrouh,

supra; Adcock v. Smith, supra; Brown v. Hebard, supra.

56. Shelly Smith, 13 NW 419, 59 Iowa 455; Heard v. Crum, 18 So 934, 72 Miss 157, 55 ASR 520; Prince v. Brett, 47 NYS 402, 21 App Div 190; Youst v. Willis, 49 P 56, 5 Okl 170.

57. Shriver v. C. & F. Co. 141 Atl 434, 155 Md 51, 58 ALR 767.

58. Shelly v. Smith, supra; Youst v. Willis, supra. But see Vanderhorst v. Bacon, 38 Mich 609, 31 AR 328.

as income for his personal service.<sup>59</sup> But in the case of a subcontractor who contributed no capital to the venture, but merely furnished his services, the earnings are regarded as exempt.<sup>60</sup> Likewise the mere fact, it has been held, that the debtor employed a team in his work did not prevent the earnings thereof, along with his own, from being exempt.<sup>61</sup> It has also been held that a lump sum owing to an artist for painting a portrait is exempt as earnings.<sup>62</sup> The Supreme Court of Iowa even extended the exemption of earnings to a physician.<sup>63</sup> Generally the right to exemptions is limited both as to amount and time within which it is earned.<sup>64</sup> Also exemptions are usually limited to the head of a family.

§ 413. Good Faith Essential to Secure an Exemption.—It is necessary that the claim for exemption should be sustained by good faith.<sup>65</sup> This rule, requiring good faith in order for the debtor to be entitled to claim his exemptions, is found in the statutory enactments of some jurisdictions.<sup>66</sup>

§ 414. Debtor Entitled to Exemptions Although He Has Other Property.—The mere fact that the debtor is possessed of other property does not militate against his right to claim exemptions.<sup>67</sup>

§ 415. No Lien of Execution on Exempt Property.—In some jurisdictions, statutes are to be found providing that an execution, under specified conditions, is a lien upon certain property. However, such statutes are inoperative, as far as exempt property is concerned, and the debtor is at liberty to sell it if he so elects.<sup>68</sup> In some jurisdictions, by virtue of statutory enactments as well as under common law rules, there is a presumption of fraud attaching where it is claimed that property has been sold but no delivery has been made to the buyer. This presumption does not obtain with

59. Prince v. Brett, supra.

60. Banks v. Rodenbach, 7 NW 152, 54 Iowa 695.

61. Kuntz v. Kinney, 33 Wis 510.

62. Millington v. Laurer, 56 NW 333, 89 Iowa 322, 48 ASR 385.

63. McCoy v. Cornell, 40 Iowa 457.

64. Howard Coal Company v. Savage, 100 Atl 369, 116 Me 115, LRA 1917D 898, and note.

65. Frazier v. Barnum, 19 NJE 316, 97 AD 666

66. In re Powell, 230 F 316; In re Dobbs, 172 F 682, 175 F 319; In re

Hardy, 229 F 825; McNally v. Mulheim, 4 SE 332, 79 Ga 614; McWilliams v. Bones, 10 SE 723, 84 Ga 109.

67. Amend v. Murphy, 69 Ill 337; Wilcox v. Hawley, 31 NY 658; Wheeler v. Cropsay, 5 How Pr (NY) 288; Thompson on Homesteads and Exemptions, Sec. 735.

68. Cook v. Baine, 37 Ala 350; Morris v. Tennent, 56 Ga 577; Godman v. Smith, 17 Ind 162; Bevan v. Hayden, 13 Iowa 122; Frost v. Shaw, 3 Ohio St 270; Denny v. White, 2 Cold (Tenn) 283, 88 AD 596; Jewett v. Guyer, 38 Vt 209.

respect to exempt property and would not be subject to the presumption by reason thereof authorizing a levy upon the same.<sup>69</sup>

§ 416. **When Marriage Will Defeat the Lien of an Execution.**—Even though an execution may be a lien on property generally, it does not create a lien on exempt property.<sup>70</sup> By the weight of authority it seems that even though a debtor may not be entitled to claim property as exempt against an execution lien because of the fact that he is unmarried, which is necessary in the particular jurisdiction to assert the right, yet if he marries after a levy but before the sale of property he may still claim the property as exempt to which he is entitled by reason of his marriage.<sup>71</sup> Some authorities hold that he must have the marital or domestic status before a judgment or execution lien attaches.<sup>71a</sup> Likewise where an insolvent debtor has money which is liable for his debts, but upon which no lien has been acquired, he may invest the same in land or other property and claim exemption therein, and it does not alter the rights of the debtor even if in making the metamorphosis of the property he acted fraudulently.<sup>72</sup>

§ 417. **Insurance Money as Exempt.**—It may be stated as a general rule that where property, whether improvements on realty or personalty, is exempt and is covered by insurance and is thereafter destroyed, the insurance money assumes the same character as the property itself and is also exempt.<sup>73</sup> The reason of this rule is

69. *Foster v. McGregor*, 11 Vt 595, 34 AD 713; *Thompson on Homesteads and Exemptions*, Sec. 738.

70. *Pool v. Reid*, 15 Ala 826; *Ray v. Yarnell*, 20 NE 705, 118 Ind 112; *Barnard v. Brown*, 13 NE 401, 112 Ind 53; *Godman v. Smith*, 17 Ind 152; *Vandibur v. Love*, 10 Ind 54; *Wash v. Hendrick*, 136 SW 883, 143 Ky 443; *Paxton v. Freeman*, 6 JJ Marsh (Ky) 234, 22 AD 74.

71. *Watson v. Simpson*, 5 Ala 233; *Robinson v. Hughes*, 20 NE 220, 117 Ind 293, 10 ASR 45, 3 LRA 383 and note; *Stout v. Price*, 56 NE 357, 55 NE 984, 24 Ind A 300; *Trotter v. Dobbs*, 38 Miss 198; *Letchford v. Cary*, 52 Miss 791; *Irwin v. Lewis*, 50 Miss 108; *Rollings v. Evans*, 23 SC 316; *Chafee & Co. v. Rainey*, 21 SC 11.

71a. *Rix v. McHenry*, 7 Cal 89; *Symonds v. Lappin*, 82 Ill 213; *Rein-*

*bach v. Walter*, 27 Ill 393; *Elston v. Robinson*, 21 Ia 531; *Thompson v. Pickel*, 20 Ia 490; *Hale v. Heaslip*, 16 Ia 451; *Bullene v. Hiatt*, 12 Kan 98; *Mills v. Spaulding*, 50 Me 57; *Bowker v. Collins*, 4 Neb 494; *Gray v. Putnam*, 28 SE 149, 51 SC 97; *Pender v. Lancaster*, 14 SC 25, 37 Am Rep 720; *Dye v. Cooke*, 12 SW '31, 88 Tenn 275, 17 ASR 882; *McManus v. Campbell*, 37 Tex 267; *Stone v. Darnell*, 20 Tex 11; *Upman v. Second Ward Bank*, 15 Wis 449; *Thompson on Homesteads and Exemptions*, Sec. 319.

72. *Reeves v. Peterman*, 19 So 512, 109 Ala 366. See also *Dye v. Cooke*, 12 SW 631, 88 Tenn 275, 17 Am St Rep 882.

73. *Ellis v. Pratt City*, 20 So 649, 111 Ala 629, 56 ASR 76, 33 LRA 204. Proceeds of insurance on city hall are exempt; *Wilson v. Lowry*, 52 P 777, 5 395

that money due on the policy stands in place of the property destroyed, and this must be true whether the money takes the place of the property by contract, or is acquired in invitum by proceedings against the owner.<sup>74</sup>

If a trespasser takes and converts exempt personalty, the cause of action against the tortfeasor, and money arising therefrom would be exempt.<sup>74a</sup> The fact that the creditor has a lien upon the property destroyed does not alter the situation with respect to the debtor's right to assert his exemption; so if the creditor holds a mortgage on the property and the debtor has it insured for his own benefit, in the absence of a stipulatory provision in a contract to the contrary, the debtor may claim the insurance as exempt.

However, under an agreement between a mortgagee and a mortgagor that the latter will insure the property for the benefit of the mortgagee, then the rule is different and the mortgagee has an equitable lien on the proceeds of the insurance policy and no doubt they may be subjected to a liquidation of the debt.<sup>75</sup> However, the holdings that the proceeds of insurance on exempt property is also exempt have not escaped challenge.<sup>75a</sup> In order, however, for the debtor to successfully claim the insurance money as exempt, the property must be exempt at the time of its destruction, and the fact that it would have been exempt at the time suit to collect the insurance was brought does not entitle the debtor to assert the exemption.<sup>76</sup> The exemption statutes generally provide for the exemption of proceeds of life insurance up to a certain amount, or

74a. *Reynolds v. Haines*, supra.

75. *Healey Ice Machine Co. v. Green*, 181 F 890, aff. 191 F 1004, 111 CCA 668; *Farmers Loan etc. Co. v. Penn Plate Glass Co.*, 22 S Ct 842, 186 US 434, 46 L ed 1234; *Columbia Ins. Co. v. Lawrence*, 10 Pet (US) 507, 9 L ed 512; *Chipman v. Carroll*, 35 P 1109, 53 Kan 163, 25 LRA 305; *Cameron v. Fay*, 55 Tex 58; *Mueller v. Richardson*, 18 EW 603, 82 Tex 361; *Connally v. Hopkins*, 195 SW (Tex Civ) 656; *Mosley v. Stratton*, 203 SW (Tex Civ App) 397; *Ward v. Goggan*, supra; *Westchester Fire Ins. Co. v. Goggan*, supra.

75a. 8 Couch Cyc. of Ins. Law, Sec. 1930.

76. *Peerless Packing Co. v. Burckhard*, 155 P 1037, 90 Wash 221, LRA 1917C 353, AC 1618R 247.

*Ariz 335*; *Houghton v. Lee*, 50 Cal 101; *Langley v. Finnall*, 83 P 291, 2 Cal App 231; *Reynolds v. Haines*, 49 NW 951, 83 Iowa 342, 32 ASR 311, 13 LRA 719; *Armstrong-Turner Millinery Co. v. Round*, 180 P 979, 106 Kan 146, 9 ALR 1255; *Thompson Ritchie Co. v. Graves*, 120 So 634, 167 La 1024, 63 ALR 1283; *Fletcher v. Staples*, 64 NW 1150, 62 Minn 471; *Bliss v. Raynor*, 91 Hun 250, 36 NYS 156, 72 NY St 57; *Bayer v. Sack*, 121 NYS 1122, 66 Misc 536; *Westchester Fire Ins. Co. v. Goggan*, 203 SW (Tex Civ App) 163; *Geise v. Pennsylvania Fire Ins. Co.*, 107 SW (Tex Civ App) 555, 112 SW 1044, 102 Tex 39, 132 ASR 846; *Ward v. Goggan*, 23 SW 479, 4 Tex Civ App 274; *Puget Sound Dressed Beef & Packing Co. v. Jeffs*, 39 P 902, 11 Wash 406, 48 ASR 885, 27 LRA 808

74. *Reynolds v. Haines*, supra.

up to the amount that a provided premium will purchase.<sup>77</sup> However, unless the statute expressly provides otherwise, the exemption only operates in so far as the decedent is concerned. That is, his creditors may not take the insurance money in satisfaction of their debts, but the creditors of the beneficiary may seize the insurance money in satisfaction of such beneficiary's obligations.<sup>78</sup> Of course, if the statute is so worded as to exempt the insurance money in the hands of the beneficiary against his or her creditors, then the statutory exemption will be given effect.<sup>79</sup>

**§ 418. Debtor May Sell or Mortgage Exempt Property.**—A debtor may sell or mortgage his exempt property and his creditors may not complain, even though the debtor intended to defraud them.<sup>80</sup> The proceeds however, resulting from the sale or mortgage are not exempt, and this seems to be true whether the debtor receives money or other nonexempt property for his property that is exempt.<sup>81</sup> Of course if exempt property is exchanged for exempt property it may not be seized by the debtor's creditors.<sup>82</sup> On the other hand however, it has been held that where property is purchased with money that is exempt, that the property so purchased will be exempt; and so too, where exempt property is purchased with non-exempt money.<sup>83</sup> The fact that labor may be combined

77. *In re Morse*, 206 F 350; *Hing v. Lee*, 174 P 356, 37 Cal App 313; *Northwestern Mutual Life Ins. Co. v. Chehalis County Bank*, 118 P 326, 65 Wash 374; *Ellison v. Straw*, 92 NW 1094, 116 Wis 207.

78. *Martin v. Martin*, 58 NE 230, 187 Ill 200; *Murray v. Wells*, 5 NW 182, 53 Iowa 256; *Hathorn v. Robinson*, 51 Atl 236, 96 Me 33; *Rice v. Smith*, 16 So 417, 72 Miss 42; *Ogle v. Barron*, 92 Atl 1071, 247 Pa 19; *Levy v. Davis*, 142 SW 1118, 125 Tenn 342.

79. *Holmes v. Marshall*, 79 P 534, 145 Cal 777, 104 ASR 86, 69 LRA 67, 2 AC 88; *Emmert v. Schmidt*, 68 P 1072, 65 Kan 31.

80. *Reeves v. Peterman*, 19 So 512, 109 Ala 366; *Cook v. Baine*, 37 Ala 350; *Pool v. Reid*, 15 Ala 828; *Sannoner v. King*, 5 SW 327, 49 Ark 299, 4 ASR 49; *Doherty v. Ramsey*, 27 NE 879, 1 Ind App 530, 50 ASR 223; *Pickrell v. Jerauld*, 27 NE 433, 1 Ind App 10, 50 ASR 192; *Fejavary v. Brosch*, 2 NW 963, 52 Iowa 88, 35

AR 261; *Kay v. Furlow*, 152 So 315, 178 La 637; *U. S. Building & Loan Ass'n v. Stevens*, 17 P(2d) 62, 93 Mont 11; *Ridenour v. Scott*, 177 NE 926, 39 Ohio App 529; *Thompson on Homesteads and Exemptions*, Sec. 739.

81. *Friedlander v. Mahoney*, 31 Iowa 311; *McLeod's Trustee v. McLeod*, 89 SW 109, 28 Ky L 284; *Salsbury v. Parsons*, 38 Hun (NY) 12; *Thompson on Homesteads and Exemptions*, Sec. 739; *Cook v. Baine*, supra; *Pool v. Reid*, supra. But see sec. 417, note 74a, supra.

82. *Johnson v. Franklin*, 63 Ga 378; *Morris v. Tennent*, 56 Ga 577; *Booth v. Martin*, 139 NW 888, 158 Iowa 434; *Cook v. Allee*, 93 NW 93, 119 Iowa 226; *Harris v. Todd*, 158 SW(Tex) 1189.

83. *Johnson v. Redwine*, 33 SE 676, 105 Ga 449; *Vanhook v. Robinson*, 105 SW 129, 31 Ky L 1347; *Nicholson's Trustee v. Nicholson*, 101 SW 985, 125 Ky 629, 31 Ky 217, 128

with the proceeds of exempt property in the purchase of other property, unless the amount of each can be separated, it is held in Georgia operates to exempt the entire property. This rule applies to a crop raised by the cojoint employment of exempt property and the debtors labor.<sup>84</sup>

**§ 419. Necessity of Claiming Exemption.**—An exemption is a personal privilege, and the debtor, who is entitled thereto, is under the necessity of asserting the same, and in the absence of such claim it is waived.<sup>85</sup> Unless the head of the family is absent from home, or is laboring under some incompetency, the exemption must be claimed by him, but in case he is absent from home at the time when it is necessary to make the claim, or is incompetent from any cause to make the claim, then another may make the claim therefor.<sup>86</sup> However, the right to claim exemption is not assignable or transferable, and an assignee or mortgagee or other person claiming by right of transfer cannot assert the same.<sup>87</sup>

**§ 420. When Sheriff Must Show Property Is Exempt.**—When a defendant in an execution is in possession of personal property, and the sheriff or constable is sued for failure to seize the same under an execution, then it becomes the officer's duty to show that such property is exempt, or such other facts justifying his failure to make a levy. The burden of proof in such cases is upon the officer.<sup>88</sup>

ASR 263; *Booth v. Martin*, supra; *Reeves v. Peterman*, supra.

84. *Reed v. Holbrook*, 39 SE 445, 113 Ga 1168; *Brand v. Clements*, 42 SE 711, 116 Ga 392, 94 ASR 133.

85. *Simpson v. Simpson*, 30 Ala 225; *Gresham v. Walker*, 10 Ala 370; *Brown v. Leitch*, 60 Ala 313, 31 AR 42; *Williamson v. Harris*, 57 Ala 40, 29 AR 707; *Noland v. Wickham*, 9 Ala 169, 44 AD 435; *In re Pillsbury's Estate*, 166 P 11, 175 Cal 454, 3 ALR 1396; *Pappas v. Capps*, 263 P 411, 83 Colo 222, 57 ALR 834; *Lindley v. Miller*, 67 Ill 244; *Perkins v. Bragg*, 29 Ind 507; *Gregory v. Latchem*, 53 Ind 449; *Booth v. Propp*, 242 NW 60, 214 Iowa 208, 81 ALR 919; *Dowling & Allgood v. Wood*, 101 NW 113, 125 Iowa 244, 106 ASR 301; *Church v. First Nat'l Bank*, 238 NW 192, 255 Mich 595, 82 ALR 645; *Harley v. 398*

*Procurier*, 72 NW 1099, 115 Mich 53, 40 LRA 150, 69 ASR 546; *Orr v. Box*, 22 Minn 485; *Tomson v. Lerner*, 25 P (2d) 209, 37 NM 546, 96 ALR 246; *Baker v. Brintnall*, 52 Barb (NY) 188, 5 Abbott Prac (NS) 253; *Conley v. Chilcote*, 25 Ohio State 320; *Butt v. Green*, 29 Ohio State 667; *Childers v. Brown*, 158 P 166, 81 Ore 1, AC 1918D 170; *Bair v. Steinman*, 52 Pa 423. See sec. 702, infra.

86. *White v. Swann*, 56 SW 635, 68 Ark 102, 82 ASR 282; *Ecker v. Lindskog*, 81 NW 805, 12 SD 428, 49 LRA 155; *Harley v. Procurier*, supra.

87. *Eberhart's Appeal*, 39 Pa 503, 80 AD 536; *Sherrille v. Chaffee*, 21 Atl 103, 17 RI 195, 33 ASR 863.

88. *Bonnell v. Bowman*, 53 Ill 460; *People v. Palmer*, 46 Ill 398, 95 AD 418.

§ 421. Sheriff's Duty to Acquaint Debtor with the Right to Exemption, and Duty of Debtor to Turn Out Other Property.—Statutes are sometimes encountered imposing upon the sheriff or constable the duty of acquainting the debtor with his right to claim exemptions, and it has been held that the duty exists independent of statute, in that it is declared to be the duty of sheriff or constable to call upon the debtor to make selection of his exemptions at the time of levy.<sup>89</sup> However, if the debtor in advance of making a levy asserts his right to an exemption, then the officer is under no duty to impart information to him with respect to his rights.<sup>90</sup> An officer is not liable for levying upon the debtor's exempt property when he has non-exempt property, but refuses to turn it out to be levied upon.<sup>90a</sup> However, there are adjudications imposing no duty on the debtor to turn out other property for seizure as a condition precedent to right to claim exemption.<sup>90b</sup> The more modern view is that the officer is under no duty to advise the debtor with respect to his right to exemptions.<sup>90c</sup>

89. *Cook v. Scott*, 1 Gil (Ill) 333; *McCluskey v. McNecley*, 3 Gil (Ill) 578; *State v. Barada*, 57 Mo 562; *State v. Romer*, 44 Mo 99; *Pyett v. Rhea*, 6 Heisk (Tenn) 136. See sec. 702, *infra*.

90. *Brown v. Hoffmeister*, 71 Mo 411.

90a. *Florida Loan & T. Co. v. Crabb*, 33 So 523, 45 Fla 306;

*Smothers v. Holly*, 47 Ill 331; see also *Cook v. Scott*, *supra*; *McMasters v. Alsop*, 85 Ill 157; *Udell v. Howard*, 28 Ill App 124; *McGee v. Anderson*, 40 Ky (1 B Mon) 187, 36 Am Dec 570.

90b. *Bray v. Laird*, 44 Ala 295; *Stirman v. Smith*, 10 SW 131, 10 Ky L 665; *Anderson v. Ege*, 46 NW 362, 44 Minn 216.

90c. *Parsons v. Evans*, 145 P 1122, 44 Okl 751, LRA1915D 381.

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## CHAPTER XV

## LEVY OF AN EXECUTION UNDER COMMUNITY PROPERTY LAW

Secs.

422. Community Property Subject to Levy for Community Debts.  
 423. Satisfaction of Judgment against Both Husband and Wife under Community Property Law.  
 424. Judgment against Husband Alone for Community Obligation Levy May Be Made on Community Property.  
 425. Levy of an Execution on Judgment against the Wife.  
 426. Judgment against the Husband Alone Presumptively on a Community Obligation.  
 427. Death of Wife as Not Preventing Levy and Sale of Property When.  
 428. Community Property Subject to Levy Regardless of Name in Which It Stands.  
 429. Liability of Community Property for Antenuptial Debts.  
 430. Effect of Seizure and Sale of Wife's Separate Property for Community Obligation.

§ 422. Community Property Subject to Levy for Community Debts.—In some jurisdictions it is enacted by statute that community property shall be liable for community debts.<sup>1</sup> And the rule, formerly in Washington and perhaps in a number of the community property states was, that during the marriage, community debts have no priority over separate debts in their enforcement and collection, and that a levy of an execution made on community property for a separate debt of a husband will not be postponed to a later levy for a community debt.<sup>2</sup> However, in a later case, the court of last resort in that jurisdiction receded from the above mentioned position, and held that community property was not subject to levy at all for a separate debt of the husband.<sup>3</sup>

§ 423. Satisfaction of Judgment against Both Husband and Wife under Community Property Law.—Under a judgment against a husband and wife in solido, the sheriff is authorized, by virtue thereof, to levy upon the separate property of either or upon the community property.<sup>4</sup> And under a statute providing that if it appears in an

1. *Gibbons v. Goldsmith*, 222 F 826, 138 CCA 252; *Villescaz v. Arizona Copper Co.*, 179 P 963, 20 Ariz 268; *Holt v. Empey*, 178 P 703, 32 Idaho 106; *Taylor v. Murphy*, 60 Tex 201; *Lee v. Henderson*, 12 SW 181, 75 Tex 190; *Portis v. Parker*, 22 Tex 699.

2. *Morse v. Estabrook*, 52 P 531, 19 Wash 92, 67 ASR 723.

3. *Schramm v. Steele*, 166 P 634, 97 Wash 309.

4. *Smallwood v. Pratt*, 3 Rob (La) 132.

action against a husband and wife that it was for necessities furnished to the wife, and was reasonable in amount and otherwise proper, the court shall decree that an execution thereon may be levied upon either the community property or the wife's separate property; an execution may be issued on a judgment so obtained, and may be levied upon the property of a wife although the judgment does not direct it.<sup>5</sup>

§ 424. **Judgment against Husband Alone for Community Obligation Levy May Be Made on Community Property.**—Since the husband is, under the community property law, the manager of the community composed of himself and wife, it seems to be well settled that a judgment rendered against him alone may be satisfied by levy of an execution upon community property where the judgment is based upon a community obligation.<sup>6</sup> It may be stated, as a general rule, that the wife is not a necessary party to an action involving the community property, and that a suit may be brought against the husband alone with respect thereto, and the wife may not complain when the community property is levied upon to satisfy the judgment.<sup>7</sup>

In an action to foreclose a mortgage and recover on the notes secured thereby, where the complaint's allegation as to the community character of the obligation was admitted by the answer, the judgment provided that if after the sale of the property impressed with a mortgage lien, a deficiency remained that the plaintiff should have a judgment therefor against the husband, but failed to make any reference to the community property, but the obligation was primarily a community liability, an execution issuing upon such deficiency judgment is properly leviable against the community property.<sup>8</sup> Indeed, it seems to be established that an execution issuing upon a judgment that is entirely silent as to the character of the obligation upon which the judgment is founded is regarded as evidencing a community obligation and even though the judgment is against the husband alone, the community property may be levied upon in liquidation of the amount due thereon. It is like-

5. *Carson v. Taylor*, 47 SW 305, 19 Tex Civ App 177.

6. *Gibbons v. Goldsmith*, 222 F 826, 138 CCA 252; *Kelly v. Robertson*, 10 La Ann 303; *Cline v. Upton*, 56 Tex 319; *Cowan v. N. O. Nelson Man'f Co.*, 34 SW (Tex) 1045; *Calhoun v. Leary*, 32 P 1070, 6 Wash 17; *Woste v. Ruggie*,

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122 P 988, 68 Wash 90.

7. *Cutmore v. Medlenka*, 44 SW (Tex Civ App) 676; *Turner v. Bellingham Bay Lumber & Man'f Co.*, 37 P 674, 9 Wash 484.

8. *Mineah v. Duffy*, 175 P 170, 103 Wash 547.

wise also well established that the husband's property may be taken in satisfaction of the judgment.<sup>9</sup>

§ 425. **Levy of an Execution on Judgment against the Wife.**—It has been held that a judgment against a married woman for her separate debt should direct the manner of execution, and that first the profits from her separate property should be taken in satisfaction of the judgment, and secondly, the property itself; but in the default of such direction the execution may be levied generally upon the corpus of her separate estate.<sup>10</sup> It is submitted however that this rule could not be enforced in those community property states which provide that the profits of separate property of either the husband or wife become community, for the obvious reason that this would be taking community property in satisfaction of a separate obligation of the wife, which is generally not permissible.

§ 426. **Judgment against the Husband Alone Presumptively on a Community Obligation.**—A judgment rendered against the husband alone is presumptively based on a community obligation, and binds the community, and the sheriff or constable is at liberty to levy upon community property to satisfy it.<sup>11</sup>

§ 427. **Death of Wife as Not Preventing Levy and Sale of Property When.**—A levy and sale of community property may be made under a judgment upon a community liability against the husband alone after the death of the wife, and such sale conveys all of the interest of both husband and wife in the community property, in these circumstances.<sup>12</sup> On the other hand, where the estate of a deceased husband is insolvent, and no property, except some that was covered by a mortgage comes into the hands of the wife and minor children, a personal judgment should not be rendered against them upon a debt secured by said mortgage.<sup>13</sup>

§ 428. **Community Property Subject to Levy Regardless of Name in Which It Stands.**—Whether property is community or not is determinable by the manner of its acquirement rather than the name in which it is acquired or stands of record. Community prop-

9. *Mineah v. Duffy*, supra.

10. *Womack v. Womack*, 8 Tex 397, 58 AD 119.

11. *Merritt v. Newkirk*, 285 P 442, 155 Wash 517; *Woste v. Ruggie*, 122 P 988, 68 Wash 90; *Fitch v. Nat'l Bank of Commerce*, 50 P(2d) 910, 184 Wash 294; *Van Geest v. Stocks*, 88 P(2d) 402

406, 198 Wash 218.

12. *Primm v. Barton*, 18 Tex 206; *Claiborne v. Tanner*, 18 Tex 68; *Carter & Rust v. Conner*, 60 Tex 52; *Brunson v. Donald*, 3 SW(2d) (Tex Civ App) 596.

13. *Ingram v. Dowling*, 11 SW(2d) (Tex Civ App) 325.

[1 Anderson on Sheriffs]



erty is always liable for community debts regardless of the name in which the title thereto stands; that is, whether in the name of the husband or wife. So, an execution may be levied, although it runs against the husband alone, upon lands or other property that stands in the name of the wife, if such property is in fact community.<sup>14</sup>

§ 429. **Liability of Community Property for Antenuptial Debts.**—It may be stated as a general rule that community property is liable for the antenuptial debts of both husband and wife, and is subject to levy under an execution issued on a judgment therefor.<sup>15</sup> However, it seems that the husband must be made a party to the action and that the judgment must run against him before the community property can be seized upon for an antenuptial obligation of the wife.<sup>16</sup>

§ 430. **Effect of Seizure and Sale of Wife's Separate Property for Community Obligation.**—Where a judgment is rendered against the husband or wife on a community obligation and the wife's separate property is levied upon and sold, in satisfaction thereof, to a purchaser who has notice of the separate character of the property, such sale confers no title on such purchaser, and the fact that the property stands in the name of the husband does not change the situation.<sup>17</sup>

14. *Theus v. Smith*, 189 So 305, — La App —. See Sec. 430 infra.

15. *VanMaren v. Johnson*, 15 Cal 308; *Packard v. Arellanes*, 17 Cal 525; *Vlautin v. Bumpus*, 35 Cal 214; *Taylor v. Murphy*, 50 Tex 291; *Zeliff v. Jennings*, 61 Tex 458; *McKay on Com-*

*munity Property*, 2d Edition, Sec. 793 et seq.

16. *VanMaren v. Johnson*, 15 Cal 308; *McKay on Community Property*, supra.

17. *Raley v. Abright*, 43 SW (Tex Civ App) 538. See Sec. 429, supra.

## CHAPTER XVI

## BODY EXECUTION

## SECS.

- 431. Arrest on Body Execution.
- 432. Duty of Officer to Search for Property before Making an Arrest on Body Execution.
- 433. Direction to the Officer with Respect to Serving Body Execution.
- 434. Arrest on an Alias Execution.
- 435. When the Service of a Body Execution Is Commenced May Be Finished after Expiration of Term of Office, or Return.
- 436. Force in Serving a Body Execution.
- 437. The Dwelling of Another as Asylum for a Fugitive Debtor.
- 438. Right to Break Inner Doors.
- 439. What Constitutes an Arrest under Body Execution.
- 440. Return of Writ.

§ 431. **Arrest on Body Execution.**—Where the law authorizes it, a sheriff or constable may, on an execution directed to him from a proper court, arrest a defendant in a civil action upon a body execution. However, the officer cannot make the arrest outside of the territorial jurisdiction of his lawful authority, but he is not required to make the arrest of the debtor or defendant in the county of his residence.<sup>1</sup>

§ 432. **Duty of Officer to Search for Property before Making an Arrest on Body Execution.**—An officer, in some jurisdictions, is required to attempt to find property to satisfy the demand in a body execution before making an arrest, and is likewise under duty to discharge the defendant, if arrested where property is tendered, out of which the demand may be satisfied.<sup>2</sup>

§ 433. **Direction to the Officer with Respect to Serving Body Execution.**—As to when and how the officer shall execute a body execution is largely left to his discretion, so long as he acts reasonably and in good faith.<sup>3</sup> A statute providing that no arrests shall

1. *Ex parte Cleveland*, 36 Ala 306; *Emery v. Brann*, 67 Me 39; *Dalton-Ingersoll Co. v. Hubbard*, 64 NE 862, 174 Mass 307; *O'Brien v. Annis*, 120 Mass 143; *Fisher v. Young*, 85 NYS 115, 41 Misc 552, 88 NYS 1101, 95 App Div 619; *Spitker v. Abrahams*, 404

121 NYS 818, 136 App Div 841.

2. *Blakely v. Weaver*, 46 Hun 174, 10 NY St Rep 793.

3. *Johnson v. Scott*, 121 SW 695, 134 Ky 736; *Wright v. Keith*, 24 Me 158; *Manuel v. Bates*, 104 Mass 354.

be made after sunset unless specially authorized by the magistrate issuing the warrant, is inapplicable to an arrest upon a body execution.<sup>4</sup>

However, where the creditor assumes to direct the actions of the officer and attempts to require him to make an arrest but without commitment of the debtor or defendant, the sheriff or constable holding the body execution is warranted in not serving the same.<sup>5</sup> The reason underlying this rule is perfectly patent, since an officer who arrests a judgment creditor on an execution cannot lawfully hold him in custody against his consent in order to procure an interview with the creditor or his attorney, for the purpose of negotiating with the debtor, or for the purpose of the creditor's issuing further directions to the officer as to the service of the execution or disposition of the arrested debtor.<sup>6</sup>

§ 434. **Arrest on an Alias Execution.**—It seems that where an execution on a judgment is returned unsatisfied before the expiration date specified therein, and that on the same day an alias execution is issued, an arrest may be made on the alias after the return day of the original, and that such an arrest is legal.<sup>7</sup>

§ 435. **When the Service of a Body Execution Is Commenced, May Be Completed after Expiration Term of Office or Return Date.**—Under a statute authorizing an officer to complete the service of an execution after the return day thereof, when the service of same was begun before that day, where a debtor is arrested and enters into a recognizance and submits himself to an examination for the purpose of claiming the benefit of the poor debtor's oath, but which benefit is denied him, and a certificate to that effect is annexed to the execution, this operates to cause the execution to resume its former vitality and power, and the officer is thereby empowered to detain the debtor thereunder, even though the return date of the execution has passed.<sup>8</sup>

In the course of the opinion of *In re Ruberg* the court said, "When the service of an execution is begun before the return day, it may be completed after the return day, whether the service is by a levy upon the lands or goods of the debtor, or by an arrest of his person.

4. *Julius Stone's case*, 129 Mass 156. Mass 79; *Boston & M. R. R. v. D'Almeida*, 103 NE 1065, 221 Mass 380; *Brazill v. Green*, 137 NE 340, 243 Mass 252, see also *Rammel v. Watson*, 31 NJL 281.
5. *French v. Bancroft*, 1 Metcalf (Mass) 502.
6. *French v. Bancroft*, supra.
7. *Lovegrove v. Brown*, 60 Me 592; *Chesebro v. Barne*, 39 NE 1033, 163 Mass 33.
8. *In re Ruberg*, 43 NE 911, 166 Mass 33.

This is the rule at common law, as well as under the statutes. The taking of the debtor by the officer into custody on the execution, after the certificate of the refusal of the oath or oaths has been annexed to it, is not a new or second arrest but is a resumption or continuance of the original arrest, which has been suspended during the proceedings under the recognizance." The rule with respect to the completion of service of a body execution after it has once been begun is of so far reaching effect in its application that it is held that the service of a writ of execution duly commenced by a constable may be completed by him, even after the expiration of his term of office and a demand upon trustees of an execution debtor, named in the writ and a search for goods and effects of the debtor is such a commencement of service of the execution as will warrant a constable or other officer in completing the service after the expiration of his term of office, by arresting the debtor on the execution.<sup>9</sup>

§ 436. **Force in Serving a Body Execution.**—In the absence of statutory enactment, or constitutional provision to the contrary, the common law rule was that outer door of the judgment debtor's dwelling could not be forced for the purpose of serving the writ. This was the rule with respect to making a levy and it is likewise so in the service of a body execution except in those cases where the king was a party; then the exact converse of the statement was true.<sup>10</sup> Before a writ of execution against the body of the debtor, as well as process generally, can be any protection to the officer, he must remain within the law.<sup>11</sup> However the protection against the forcing of doors to execute process in general, including a body execution, only extends to and covers the dwelling of the execution debtor and will not embrace other buildings unless connected with and are a part of the residence itself.<sup>12</sup>

9. *O'Brien v. Annis*, 120 Mass 143.
10. *Boggs v. Vandyeke*, 3 Har (Del) 288; *Groves v. Bloxom*, 3 Houst (Del) 544; *Snydacker v. Brosse*, 51 Ill 357, 99 AD 551; *McGee v. Givan*, 4 Blackf (Ind) 16; *Calvert v. Stone*, 10 B Mon (Ky) 152; *Swain v. Mizner*, 8 Gray (Mass) 162, 69 AD 244; *Welch v. Wilson*, 24 NW 27, 34 Minn 92; *State v. Whitaker*, 12 SE 456, 107 NC 802; *People v. Hubbard*, 24 Wend (NY) 369, 35 AD 628; *Hillman v. Edwards*, 60 SW 788, 28 Tex Civ App 308; *Launock v. Brown*, 2 B & Ald 592, 106 Eng 406.
- Rep 482; *Burdett v. Abbot*, 14 East 1, 104 Eng Rep 601, 5 Dow 165, 3 Eng Rep 1289, 4 Taunt 401, 128 Eng Rep 384.
11. *State v. Hooker*, 17 Vt 658.
12. *Nelson v. Van Gazelle Man'f Co.*, 17 Atl 943, 45 NJE 594; *Haggerty v. Wilber*, 16 Johns. (NY) 287, 8 AD 321; *Fullerton v. Mack*, 2 Aik (Vt) 415; *Hodder v. Williams*, (1895) 2 QB 663; *Penton v. Brown*, 1 Keb 698, 83 Eng Rep 1193, 1 Sid 186, 82 Eng Rep 1047.

The fact that the residence of the debtor is a combination of business establishment and dwelling does not in any way relax the rule with respect to the protection accorded thereto.<sup>13</sup> However, the rule seems to be different where distinct segregated portions of the building are used for a residence and business, but the rule is not relaxed in so far as the residence part of the building is concerned and the doors thereto may not be broken or forced, while the officer would be justified in so doing in the portion of the building used for business purposes only.<sup>14</sup> It would likewise seem to be true that if the debtor took refuge in a vacant building suitable for dwelling purposes but not in use at the time, the rule with respect to breaking and forcing an entrance is inapplicable with respect thereto, and the sanctity of the dwelling has no application in the circumstances. The debtor may not take refuge behind the protection accorded a dwelling when a building is vacant and he attempts to use it for an asylum against the execution of the writ. It seems too that the protection is relaxed where the party to be arrested takes refuge in another's residence.<sup>15</sup>

The law so jealously guards this sanctity of the dwelling that any building connected therewith, and that may be regarded as a part thereof, entrance therein may not be forced in order to execute a body execution or other civil process. So, where it is necessary to force a door to a shed connected with a dwelling, the officer exceeds the bounds of his legal empowerment when he does so, to serve civil process such as a body execution.<sup>16</sup> Differently stated, it is undoubtedly true that the law has thrown its protecting arm around the dwelling place of every man because it is the place of family repose. It is therefore proper, not only that the law accord the quiet and peace of the house in which the family sleep, but also any outbuildings which are properly appurtenant thereto, and which as one whole contribute directly to the comfort and convenience of the place of habitation.<sup>17</sup> May it ever be said in eulogy of the common law that it equally guards and shields the dwelling against unlawful invasion whether it be the hovel of its humblest

13. *Hudson v. Fletcher*, (Sask) 10 West LR 15; *Welch v. Wilson*, *supra*.

14. *Stearns v. Vincent*, 15 NW 80, 50 Mich 209, 45 AR 37.

15. *Oystead v. Shed*, 13 Mass 520, 7 Am Dec 172; *Gordon v. Clifford*, 28 NH 402; *Stitt v. Wilson*, *Wright* (Ohio) 505; *Lee v. Gansel*, 1 Cowp 1, 98 Eng Rep 700, 935, *Lofft* 374.

16. *Prothingham v. Maxim*, 141 Atl 99, 127 Me 58; *Marshall v. Wheeler*, 128 Atl 692, 124 Me 324; *Osley v. Nichols*, 12 Pick (Mass) 270, 22 AD 425; *Jacobs v. Pollard*, 10 Cush (Mass) 287, 57 AD 105.

17. *Mitchell v. Com.*, 11 SW 209, 88 Ky 349, 10 Ky L Rep 910; *Marshall v. Wheeler*, *supra*.

citizen or a castle erected as a monument to affluence and wealth. It may be so insecure that the rain will trickle in and the wind will whistle through, yet the state in all of its power may not enter therein.

§ 437. **The Dwelling of Another as Asylum for a Fugitive Debtor.**—A debtor against whose body an officer of the law holds an execution may not seek an asylum in the dwelling of another and if the owner of such dwelling admits him, he does so at his own peril, and an officer, in these circumstances, is warranted in forcing doors to take in execution the body of the defendant under civil writs.<sup>18</sup> But an officer who forces an entrance in the dwelling of a third party to take in execution the body of a debtor, does so at his peril, and if it turns out that he has acted erroneously his conduct is a trespass.<sup>19</sup>

§ 438. **Right to Break Inner Doors.**—It would seem by consideration of analogous principles, that a rule of law may be amalgamated, tersely stated to the effect that if an officer has gained a peaceful entry in a dwelling, that he may break inner doors therein in order to arrest a debtor on a body execution, but before he may do this it is an indispensable condition precedent that he demand that the inner doors be opened and such demand be refused.<sup>20</sup> A cognate rule, by resort to analysis of similar principles, may be formulated by the statement that an officer who has entered a dwelling for the purpose of subjecting a debtor to custody in obedience to a body execution, and has undertaken the discharge of such duty, but if he is then forcibly ejected from the dwelling, in these circumstances he is warranted in breaking open whatever doors that may be thrust in his way of re-entry.<sup>21</sup>

18. *DeGraffenreid v. Mitchell*, 3 McCord (SC) 506, 15 AD 648.

19. *Benson v. Dyer*, 69 Ga 190; *Burton v. Wilkinson*, 18 Vt 186, 46 AD 145; *McGee v. Given*, 4 Blackf (Ind) 16; *Semayne's Case*, 5 Coke 91a, 11 ERC 829, 77 Eng Rep 194; *Ratcliffe v. Burton*, 3 B & P 223, 127 Eng Rep 123; *Morrish v. Murrey*, 13 M & W 52, 153 Eng Rep 22; *Johnson v. Leigh*, 6 Taunt 246, 1 ECL 528, 128 Eng Rep 1020; *DeGraffenreid v. Mitchell*, *supra*. While it is true that these cases are based upon execution of civil process generally, the rule is no doubt the

same with respect to the service of a body execution.

20. *Prettyman v. Dean*, 2 Har(Del) 404; *Snydacker v. Brosse*, 51 Ill 357, 90 AD 551; *Hubbard v. Mace*, 17 Johns. (NY) 127; *Williams v. Spencer*, 5 Johns. (NY) 352; *Lee v. Gansel*, 1 Cowp 1, 98 Eng Rep 935, *Lofft* 374, 98 Eng Rep 700; *Rex v. Bird*, 2 Show 87, 89 Eng Rep 811; *Hutchinson v. Birch*, 4 Taunt 619, 128 Eng Rep 473.

21. *Saunders v. Millward*, 4 Har(Del) 246; *State v. Beckner*, 31 NE 950, 132 Ind 371, 32 ASR 257; *Glover v. Whittenhall*, 6 Hill (NY) 597; *Pugh v. Grif-*

So too, if an arrest under body execution has actually been made and the person arrested breaks custody and escapes or otherwise flees and thereafter takes refuge in his dwelling, the law is that the sanctity of the dwelling is no protection to him against the officer who seeks to recapture his prisoner and the officer in pursuit of the defendant in body execution after making known his purpose by demanding an entry and admission having been refused, may break inner or outer doors to effectuate a recapture.<sup>22</sup> Even though admission through an outer door is obtained by subterfuge, that does not militate against the officer's right to force an inner door, so long as the entry is obtained peaceably.<sup>22a</sup> It ought to be noted, that officers of the law have no right under any circumstances to burn, or otherwise destroy a building in order to effect an arrest for any offense, whether a felony or misdemeanor, with or without a warrant. And, of course, no such power could be claimed in order to effectuate an arrest under warrant or execution in a civil action.<sup>22b</sup> The rule, it seems, is not changed by virtue of the ownership of the building, whether by the party sought to be arrested or another, and, for such destruction, it is submitted, the officer is civilly liable in damages.<sup>22c</sup> It is highly doubtful if any such far reaching and extensive power as authorizing destruction of buildings to make an arrest could be validly conferred by the lawmaking power.

§ 439. What Constitutes an Arrest under Body Execution.—It may be stated as a general rule that in order to constitute taking the defendant into custody under a body execution there must be an arrest in some form by unequivocal conduct. Some authorities seem to hold that the laying on of hands by an officer upon his prisoner is an indispensable requisite to make effectual a legal taking into custody.<sup>23</sup> Other courts however have enunciated a less technical rule and have dispensed with the requisite of manual caption

6th, 7 A & E 827, 112 Eng Rep 681; *Bannister v. Hyde*, 2 E & E 627, 105 ECL 627, 121 Eng Rep 235; *Aga Kur-boolie Mahomed v. Reg.*, 4 Moore PC 230, 13 Eng Rep 293; *Engleton v. Gutteridge*, 11 M & W 465, 152 Eng Rep 889.

<sup>22</sup> *Allen v. Martin*, 10 Wend (NY) 300, 25 AD 564.

<sup>22a</sup> *Rex v. Backhouse*, Lofft 61, 93 Eng Rep 533.

<sup>22b</sup> *American Central Ins. Co. v.*

*Stearns Lumber Co.*, 140 SW 148, 145 Ky 255, AC 1913B, 623, 36 LRA(NS) 566. See also *Rhode Island Ins. Co. v. Fallis*, 261 SW 892, 203 Ky 112, 37 ALR 432; *Goodman v. Condo*, 12 Pa Super 456.

<sup>22c</sup> *Goodman v. Condo*, supra. See also *Rhode Island Ins. Co. v. Fallis*, supra.

<sup>23</sup> *Lawson v. Buzines*, 3 Har (Del) 416.

of the prisoner or even the touching of his person.<sup>24</sup> It seems in application of the more liberal rule enunciated by some courts that where the prisoner is in the custody of the sheriff and the body execution is delivered to the sheriff, that that is sufficient. But, as in arrests generally, the legality thereof is determined by the intent and understanding of the officer and the prisoner.<sup>25</sup>

§ 440. Return of Writ.—A return of the body execution is not a requisite to a legal imprisonment of the defendant.<sup>26</sup> It seems that in the absence of a statute to the contrary the body execution must be returned within a "reasonable time," and as to what constitutes a reasonable length of time presents a factual question. There is no connection between the returning of the writ and the imprisonment of the debtor. That is, the returning of the writ does not operate to terminate the debtor's imprisonment.<sup>27</sup> A return of a cepi, or a return of cepi corpus et B. B., or a return of cepi corpus et est in custodia, or a return of cepi corpus et est languidus in amplified form seem to be sufficient.<sup>28</sup>

The return cepi signifies that the officer has taken the body of the debtor in custody. The return of cepi corpus et B. B. means that the officer has taken the defendant into custody and discharged him on bail. And the return cepi corpus et est in custodia shows that the officer has taken the body of the execution defendant into custody and retains him; and the return cepi corpus et est languidus certifies that he has taken the body of the execution defendant into custody and that he is sick.<sup>29</sup> If the officer makes a return substantially disclosing the facts of his doings in the premises that is sufficient; so if the officer makes a return that he has in custody the dead body of the defendant it is unnecessary to do more or to disclose where the death occurred.<sup>30</sup> If the officer makes a

<sup>24</sup> *Richardson v. Rittenhouse*, 40 N JL 230.

<sup>25</sup> *Simmons v. Richards*, 50 NE 617, 171 Mass 281; *Jones v. Jones*, 35 NC 448, 46 NC 491; *Matter of Johnson*, 21 Abb N Cases (NY) 172; *Bissell v. Gold*, 1 Wend (NY) 210, 19 AD 480; *Robertson v. Shannon*, 2 Strob (SC) 419.

<sup>26</sup> *Fulton v. Wood*, 3 Har & M (Md) 99.

<sup>27</sup> *People v. Hanchett*, 111 Ill 90.

<sup>28</sup> *State v. Lawson*, 2 Gill (Md) 62; 1 *Bouvier's Law Dictionary*, Rawle's 3rd Ed., 441.

<sup>29</sup> 1 *Bouvier's Law Dictionary*, supra.

<sup>30</sup> *Christie v. Goldsborough*, 1 Har & M (Md) 640; *Lichfelt v. Kopp*, 38 Mich 312. The following return was held sufficient in the cited case; "I hereby certify and return that after diligent search and inquiry I am unable to find the within named defendant Jacob Bettinger within my bailiwick and can not have his body as I am within commanded," under a statute requiring where defendant could not be that the return should be "that the defendant could not be found

return that he has not arrested the debtor by reason of illness of the latter, then he should show by his return that to make an arrest would endanger the life of the execution defendant.<sup>31</sup> Upon proper application the sheriff may amend his return if he applies to the court seasonably, and when the return is thus amended it operates nunc pro tunc, as of the date of the return of the writ.<sup>32</sup>

within his county." *Orvis v. Isle La-Mott*, 12 Vt 195. 464; *Malone v. Samuel*, 3 AK Marsh (Ky) 350, 13 AD 172; *Orvis v. Isle La-Mott*, supra.

31. *Bramble v. Poultney*, 12 Vt 342.

32. *Lines v. State*, 6 Blackf (Ind)

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## CHAPTER XVII

## EXECUTION—FIERI FACIAS

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## SECS.

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§ 441. **Fieri Facias Generally.**—The execution which is used today for the purpose of satisfying a money judgment is a descendant of the common law writ of fieri facias. The word fieri facias means the general execution commanding literally to the sheriff "that you cause to be made" enough money to satisfy the judgment upon which the execution issued.<sup>1</sup> Differently phrased, an execution "is the end and life of the law." It is the instrumentality that rears the fruits of the litigation for the successful party.<sup>2</sup> In other words, the office of the execution is to enforce and to give effect to a judgment which has theretofore been rendered in the action and upon which the execution is issued.<sup>3</sup> After judgment, an execution, for the purpose of obtaining satisfaction thereof issues as a matter of course, and it does not constitute an independent action.<sup>4</sup> At common law an execution for the satisfaction of a money judgment, known then as the writ of fieri facias, commanded the sheriff only to seize the goods and chattels of a defendant.<sup>5</sup> In most jurisdictions however, such execution runs against both the personal and the real property.<sup>6</sup> In some jurisdictions there is a limitation upon the execution against land, it being provided that the personal property should first be exhausted before resort be had to the real property.<sup>7</sup>

§ 442. **When Officer Is Protected by Writ of Execution.**—As has heretofore been seen in Section 88, an officer is protected if the writ is regular on its face. In regard to the claims of third parties claim-

ing the property which has been levied upon under a writ of execution, it is generally provided by statute that the sheriff is entitled to be indemnified against such claims when properly presented to him.<sup>8</sup> This matter will be considered in detail in a subsequent chapter.<sup>9</sup> It is the general rule that an officer in the execution of the writ on personal property may not break an outer door of a dwelling or habitation, to levy upon personal property therein. But when entry through an outer door is gained, then inner doors may be forced in order to seize the goods of the judgment debtor in the execution.<sup>10</sup> The officer may break into a garage, barn, or other out building, within the curtilage where it is not connected with the dwelling, in order to levy an execution.<sup>10a</sup>

Some distinction has been made with respect to the right of an officer to force an entry into a dwelling, and the rule seems to be well settled that if the execution defendant takes refuge with his property in the dwelling of another, or stores or secretes his property therein, then the rule with respect to breaking and entering does not apply and the officer arriving with an execution may force an entry to levy on goods under these circumstances, but, even in such case the officer forces the entrance at his peril, and if it turns out he was in error, then he is liable. The rule prohibiting the officer from forcing an entrance applies to all dwellers in, or occupants of, the dwelling as a residence or place of abode.<sup>11</sup> As to what is an outer door of an apartment house there is some confusion in the cases. Some adjudications hold that the outer door of the locked apartment is the door protected, while others decide that the outer door of the building is the only door to which the protection extends.<sup>12</sup> However, in view of the modern modes of living in large apartment houses, it is submitted that the rule treating locked apartments as a dwelling, protecting the outer door thereof, is the sound-

1. State ex rel. First National Bank v. Ogden, 49 P(2d) 565, 173 Okla 285.

2. Beard v. Wilson, 12 SW 567, 52 Ark 290; Scott Register Co. v. Holton, 157 SE 433, 200 NC 478; Coke on Litt. 289.

3. Scott Register Co. v. Holton, supra.

4. Lahman v. Supernaw, 47 F(2d) 810.

5. Dorn v. Stidham, 137 SE 331, 139 SC 66; Smith v. Ford, 161 Atl 214, 5 WW Har(Del) 175; 3 Blackstone Com.

417.

6. Smith v. McCann, 24 How (US) 398, 16 L ed 714; Fish v. Fowle, 58 Cal 373; Green v. Marks, 25 Ill 221; Hulbert v. Hulbert, 111 NE 70, 216 NY 430, LRA1916D 661, AC 1917D 180.

7. Jackson v. Parkersburg Etc. R. Co., 233 F 784; Haws v. Fracarol, 27 F(2d) 74; Blasingame v. Wallace, 261 P 42, 32 Ariz 580; Bartholomew v. Hook, 23 Cal 277; In re Dissolution of Field Body Corp., 215 NW 6, 240 Mich 28; Stone-Ordean-Wells Co. v. Strong, 20 P(2d) 639, 94 Mont 20.

8. Stephenson & Bernard Realty Co. v. Sheehan, 144 Eo 370, 25 Ala App 269; Castera v. Gabellieri, 48 P (2d) 179, 8 Cal App (2d) 716.

9. See Sec. 488 et seq.

10. Snyderacker v. Brosse, 51 Ill 357, 99 Am Dec 551; Keith v. Johnson, 1 Dana (Ky) 604, 25 Am Dec 167; Platt v. Brown, 16 Pick (Mass) 553; Stearns v. Vincent, 15 NW 86, 50 Mich 209, 45 AR 37; Silverman v. Stein, 217 NW 785, 242 Mich 64, 57 ALR 209 and note; Trainer v. Saunders, 113 Atl 591, 270 Pa 451, 19 ALR 861; DeGraffenreid v. Mitchell, 3 McCord (SC) 414

506, 15 AD 648; Douglass v. State, 6 Yerg (Tenn) 525; Fullerton v. Mack, 2 Aikens (Vt) 415; Burton v. Wilkinson, 18 Vt 180, 46 Am Dec 145.

10a. Silverman v. Stein, supra.

11. Oystead v. Shed, 13 Mass 520, 7 Am Dec 172; Curtis v. Hubbard, 1 Hill 330, 4 Hill (NY) 437, 40 Am Dec 292. Note 57 ALR 219; Trainer v. Saunders, supra; DeGraffenreid v. Mitchell, supra.

12. Swain v. Mizner, 8 Gray (Mass) 182, 69 Am Dec 244; Stearns v. Vincent, 15 NW 86, 50 Mich 209, 45 AR 37. Note 57 ALR 216.

er one. As has already been seen, if an officer gains peaceful admission to the inside of a house he may thereafter demand that the inner doors be opened to him, and if they are not so opened he may then break them.<sup>13</sup> As to what is a breaking through a door or window of a dwelling is in somewhat of a state of confusion. Some cases apply the test of what would be a breaking in burglary, and if the officer's act is equal to the breaking by the burglar, then entry of the officer is unwarranted. Under this rule, the officer cannot turn a bolt or lift a latch.<sup>13a</sup> But this position has met with a challenging array of adjudications. According to these authorities, the mere lifting of a latch or turning a bolt or key does not amount to a breaking, even if the officer climbs a fence or wall.<sup>13b</sup>

All authorities agree that it is a "breaking" to open unfastened, but closed window, opening a window shutter, or opening a closet door and entering through a window.<sup>13c</sup> The opening of a partly closed window is not a breaking.<sup>13d</sup> It seems if the officer resorts to subterfuge to gain admission to a dwelling, that such is regarded as lawful.<sup>13e</sup> After an officer has lawfully entered a dwelling or other structure and made a levy therein he may break doors or windows, inner or outer, in order to remove the property levied upon.<sup>13f</sup> While our present discussion is devoted to the service of executions, still some rules are equally applicable to the service of civil process generally, including attachments or executions for the person.<sup>13g</sup> It is doubtful if any comprehensive safe rule can be formulated from the conflicting adjudications upon this subject, but we make bold to assert that an officer would be within his lawful rights if he can gain an entrance to a dwelling to serve civil process where he can do so without any unseemly act, or a disturb-

13. *Prettyman v. Dean*, 2 Har (Del) 494; *Snydacker v. Brosse*, 51 Ill 357, 99 AD 551; *Cantrell v. Conner*, 6 Daly (NY) 39; *Hubbard v. Mace*, 17 Johns. (NY) 127.

13a. *Walker v. Fox*, 2 Dana (Ky) 404; *Curtis v. Hubbard*, 1 Hill (NY) 336, 4 Hill 437, 40 Am Dec 292.

13b. *Groves v. Bloxom*, 3 Houst (Del) 544; *Cate v. Schaum*, 51 Md 299; *Murray v. Vaughn*, 10 Pa Co 657; *Ewald v. Fidelity Title & T. Co.* 43 Pa Super 593; *Crabtree v. Robinson* (1885) LR 15 QB Div 312, 54 LJQBNS 444, 33 Weekly Rep 936, 50 JP 70; *Eldredge v. Stacey* (1882) 15 CBNS 458, 10 Jur NS 517, 9 LTNS 291, 12 Weekly Rep 51; *Long v.*

*Clarke* (1894) 1 QB 119, 63 LJQBNS 108, 89 LTNS 654, 42 Weekly Rep 130, 58 JP 150.

13c. *Foley v. Martin*, 75 P 842, 142 Cal 256, 100 Am St Rep 123, 71 P 165; *Jewell v. Mills*, 3 Bush (Ky) 62; *Hillman v. Edwards*, 66 SW 788, 28 Tex Civ App 308; *Nash v. Lucas* (1887) LR 2 QB 590, 8 Beat & L 531; *Reg. v. Lockwood* (1858) 4 Weekly Rep 465; *Cate v. Schaum*, supra; *Curtis v. Hubbard*, supra; *Groves v. Bloxom*, supra.

13d. *Crabtree v. Robinson*, supra.

13e. See Sec. 438, note 22a.

13f. *Saunders v. Millward*, 4 Del (Har) 240.

13g. See Sec. 438, supra.

ance of the peace, or forcing or opening doors or windows, or entering when an entry is forbidden by an occupant.

§ 443. *Possession Essential to Valid Levy.*—In order for there to be a valid levy by an officer, the property must be taken into his actual or constructive possession. But as to chattels which are incapable of manual delivery, because of bulk or for some other reason, there must be some constructive symbolical possession. In regard to land, as has heretofore been taken up, the delivery is symbolical or constructive when it is such as to give notice to anyone thereafter that the land is in the possession of the levying officer.<sup>14</sup> Some cases hold constructive possession will not suffice where actual possession may be had.<sup>14a</sup> Other authorities hold the rule is satisfied if the officer is possessed of power to control the property.<sup>14b</sup> If the articles are ponderous, actual possession need not be taken of them.<sup>14c</sup>

§ 444. *Time and Place of Levying an Execution.*—As to the place of levy, it is generally held that an officer's authority is limited by the territorial limits of the county, district, or precinct within which he is an officer.<sup>15</sup> It follows therefore, as a matter of course, that the officer can only levy upon property within his county or district. In some jurisdictions, this is modified by statute, and the officer may levy upon property outside of his county, district, or precinct.<sup>16</sup> In regard to the time of levy, the officer has no authority by virtue of it until the writ has been delivered to him, and thereafter he must follow the directions as contained in it.<sup>17</sup> The levy must be made before the expiration of the return date contained in the writ or fixed by law.<sup>18</sup>

14. *Giddings v. Freedley*, 128 F 355, 63 CCA 85, 65 LRA 327; *Crisman v. Dorsey*, 21 P 920, 12 Colo 567, 4 LRA 664; *Trainer v. Saunders*, 113 Atl 681, 270 Pa 451, 19 ALR 861.

14a. *Nat'l Bank v. Duff*, 94 P 260, 77 Kan 248, 15 AC 882, 16 LRA (NS) 1047, 127 ASR 417; *State v. Nansen*, 232 P 329, 132 Wash 563; *Crisman v. Dorsey*, supra.

14b. *Dixon v. White Sewing Machine Co.*, 18 Atl 502, 128 Pa 397, 3 LRA 659, 15 ASR 683; *Manufacturers & M. Ins. Co. v. O'Maley*, 82 Pa 400, 22 AR 769; *Commonwealth Ins. Co. v. Berger*, 42 Pa 285, 82 Am Dec 504.

14c. *Hill v. Harris*, 10 B Mon (Ky) 416

120, 50 Am Dec 542; *Hart v. Oliver Farm Equipment Sales Co.*, 21 P(2d) 90, 37 NM 267, 87 ALR 962.

15. *Short v. Hepburn*, 75 F 113, 21 CCA 252; *Booker v. Bass*, 66 SE 283, 127 Ga 133; *Benson v. Smith*, 42 Me 414, 66 AD 285; *Lewis v. Norton*, 34 NE 544, 159 Mass 432, affirmed 41 NE 290, 164 Mass 209.

16. *McLanahan v. Goodman*, 108 Atl 200, 265 Pa 43; *Cundiff v. Teague*, 46 Tex 475; *Booker v. Bass*, supra.

17. *Hall v. Crocker*, 3 Metcalf (Mass) 245.

18. *Riley v. Washington* (La App) 161 So 896; *Fredd v. Darnell*, 162 Atl 230, 107 NJE 240.



Where an execution was issued on July 1, 1859, and was levied on September 30, 1875, it was held that the execution was dormant even when the dormancy statute is considered as tolled by reason of the acts of Georgia legislature known as the stay laws, from 1860 to 1868, and the levy was void as against a claimant under a will.<sup>19</sup> Where the return date on a writ of execution has expired before seizure is made by virtue of the writ, such levy is invalid.<sup>20</sup> Vitality cannot be breathed into an execution by taking the writ to the clerk of the court and having the dates changed; in these circumstances a new or alias writ must be issued, and the altered writ will not be treated as an alias. When the writ expires under the time limit, nothing can be done whatsoever. However, if a levy is made before the expiration of the time in which the writ is returnable, a sale may be held thereafter, even though the levy is made on the return day.<sup>20a</sup>

§ 445. **Insufficient and Excessive Levy.**—In making a levy upon property the officer must guard against taking insufficient property to satisfy the writ and yet must watch not to take too much so as to make the levy excessive or oppressive.<sup>21</sup> What might appear an excessive levy, still it may not be such in fact by reason of the character of the property as where it is indivisible, and must all be levied upon.<sup>21a</sup>

19. *Pearson v. Fox*, 145 SE 875, 167 Ga 448.

20. *Riley v. Washington*, 161 So 896, — La App —, where the statute provided that levy should be made on execution within seventy days of its issuance and toward the end of the seventy days the execution was returned to the clerk who changed the dates on the writ and it was thereafter sent to the sheriff for levy which was made, it was held that the writ was invalid as not constituting an alias writ and the time on the original having elapsed, it was no authority for the officer to act.

20a. In re Schwab Printing Co., 59 F (2d) 726; *Dugat v. Babin*, 8 Mart (NS) (La) 391; *Willoughby v. Dewey*, 63 Ill 246; *Davis v. Moore*, 103 Ill 445; *Phillips v. Dana*, 3 Scam (Ill) 551; *Latham v. Glascock*, 108 So 100, 160 La 1089; *Siess v. Couvillion*, 5 La App 464; *Riley v. Washington*, supra. See Sec. [1 Anderson on Sheriffs]—27

435, supra. U. S. v. Hogg, 112 F 909, 50 CCA 808.

21. *Schroeder v. Young*, 16 S Ct 512, 161 US 334, 40 L ed 721; *Governor v. Powell*, 9 Ala 83, see also 13 Ala 520; *Leavitt v. Smith*, 14 Ala 279; *Patterson v. Powell*, 15 Ala 205; *Stark v. Cummings*, 58 SE 130, 127 Ga 107; *French v. Snyder*, 30 Ill 339, 83 AD 193; *Indiana Central Railway Co. v. Bradley*, 15 Ind 23; *Drake v. Brickner*, 163 NW 597, 180 Iowa 1166; *Muir v. Pettit*, 35 SW 907, 18 Ky L Rep 169; *Costa v. Goldenberg*, 154 NE 570, 258 Mass 264; *Williams v. Eastman*, 95 NE 401, 208 Mass 579; *Handy v. Clippert*, 15 NW 507, 50 Mich 355; *Mason v. Wilks*, 288 SW (Mo App) 938; *Dewitt v. Oppenheimer*, infra; *Pugh v. Calloway*, infra; *Denvrey v. Fox*, infra; *Barfield v. Barfield*, infra.

21a. *Bridge v. Exchange Bank*, 56 SE 97, 126 Ga 821, 115 ASR 118, 8 LRA(NS) 463; *Wilkinson v. Holton*, 417

In exercising a judgment as to the amount of property necessary to satisfy the writ, the officer should have a reasonable amount of discretion as to the quantity of property necessary to be levied upon; and in determining the amount of property to be levied upon liens against the property may be considered; also the fact of a forced sale may be considered in determining whether or not the levy was excessive.<sup>22</sup>

The sheriff is accountable to the plaintiff if he fails to levy upon enough property to satisfy the writ, and if he levies upon too much so as to make it oppressive he is liable to the defendant.<sup>23</sup> If the sheriff in good faith feels that all of the property of the execution defendant is insufficient to pay the cost of the levy and sale and to pay nothing on principal he may refuse to execute the writ and return the execution unsatisfied.<sup>24</sup> Where the judgment is in rem against particularly described realty, there can be no sustained charge of excessiveness, in regard to the levy.<sup>25</sup> Likewise the sheriff is not responsible for an insufficient levy where certain property is specifically designated by the plaintiff to be seized, notwithstanding the writ directs the officer to levy upon all of the judgment debtor's property.<sup>26</sup>

In regard to determining whether seizure is excessive the quality, quantity, and kind of property seized, the prevalent prices and the general conditions prevailing at the time of seizure should be considered, so too, the encumbrances thereon must be taken into consideration.<sup>27</sup>

46 SE 620, 119 Ga 557; *Stacey Lumber Co. v. Cazier* (Alta) 17 Dom LR 823, 28 West LR 945, 6 West Wkly 1382.

22. *Levens v. State*, 57 So 497, 3 Ala App 45; *Wallace v. Atlanta Medical College*, 52 Ga 164; *Mullings v. Bothwell*, 20 Ga 706; *Barfield v. Barfield*, 77 Ga 83; *Mills v. Larrance*, 111 Ill App 140; *Vanosdall v. Hamilton*, 77 NW 9, 118 Mich 533; *Denvrey v. Fox*, 22 Barb (NY) 522; *Pugh v. Calloway*, 10 Ohio State 488; *Lynch v. Com.*, 6 Watts (Pa) 495, 31 Am Dec 490; *Atcheson v. Hutchison*, 51 Tex 223; *Cornelius v. Burford*, 28 Tex 203, 91 Am Dec 309; *Dewitt v. Oppenheimer*, 51 Tex 103; *Mara v. Branch*, 135 SW (Tex Civ App) 661.

23. *Governor v. Carter*, 3 Hawks (NC) 328, 14 Am Dec 588, see also 418

authorities cited Notes 21 and 22 supra; *Cornelius v. Burford*, 28 Tex 203, 91 AD 309.

24. In re Mowry, 12 Wis 52.

25. *Edwards v. Decatur Bank & Trust Co.*, 167 SE 292, 176 Ga 194; *Foster v. Cotton States Electric Co.*, 157 SE 636, 172 Ga 231.

26. *Pappas v. Capps*, 263 P 411, 83 Colo 222, 57 ALR 834.

27. *Auto Painting and Repairing Co. v. Ware*, 159 So 749 (La App). It was held an abuse of discretion, where the property seized by virtue of a writ of execution was appraised at the sum of \$1785.50 to satisfy a judgment amounting to approximately \$400.00. *Auto Painting and Repairing Co. v. Ware*, supra. See note 22, supra this section.

[1 Anderson on Sheriffs]

§ 446. **Insufficient Levy Measure of Damages.**—Where the sheriff, in making a levy, fails to levy upon sufficient property that a reasonable and prudent man would deem sufficient to satisfy the amount required by writ, plus the costs, if other property is available, the sheriff is liable to the party who had issued the process if loss results.<sup>28</sup>

The measure of damages for which the sheriff is liable is the difference between the amount named in the writ with costs, and the amount which would have been realized from a sale if all of the goods of defendant had been seized.<sup>29</sup> The sheriff however is not liable for the full amount which the writ requires, unless the whole amount is lost and the sheriff could have seized, by the exercise of due diligence, sufficient goods to have satisfied the whole writ.<sup>30</sup> The sheriff is not liable where, after seizure, there is a subsequent depreciation in the value of the goods seized and the loss sustained by plaintiff is due to such depreciation rather than a failure to make a levy upon sufficient property to satisfy the writ.<sup>31</sup> If such depreciation could have been foreseen by a reasonable and prudent man and should have been so foreseen, in that instance the sheriff is liable for an insufficient levy, since the loss is occasioned by a failure to levy upon sufficient property to satisfy the execution rather than the depreciation.<sup>32</sup>

§ 447. **Excessive Levy.**—If the sheriff by reason of overdiligence, or from excessive caution in executing a writ of execution takes possession, in making the levy of more than by any reasonable probability is required to satisfy the writ, the sheriff becomes liable to the defendant for making an excessive levy.<sup>33</sup> The general rule for determining whether an officer acted oppressively in making a levy, is that if the value of the property levied upon would be equal to the amount of the debt sought to be recovered, making proper allowance for depreciation in value naturally incident to the property, and depreciation in price as the usual effect of a forced

28. *Adams v. Spangler*, 17 F 133, 5 McCrary 334; *French v. Snyder*, 30 Ill 339, 83 AD 193; *Conway v. Magill*, 73 NW 702, 53 Neb 370.

29. *Farmers etc. Bank v. Maines*, 183 F 37, 105 CCA 320; *Taylor v. Com.*, 3 Bibb (Ky) 356; *Adams v. Spangler*, supra.

30. *Com. v. Lightfoot*, 7 B Mon (Ky) 298.

31. *Lawson v. State*, 10 Ark 28, 50 AD 238; *Governor v. Carter*, 3 Hawks (NC) 328, 14 Am Dec 588.

32. *Dewitt v. Oppenheimer*, 51 Tex 103; *French v. Snyder*, supra.

33. *Levens v. State*, 57 So 407, 3 Ala App 45; *Costa v. Goldenberg*, 154 NE 579, 258 Mass 264; *Mason v. Wilks*, 288 SW (Mo App) 938; *Father-ee v. Williams*, 35 SW 324, 13 Tex Civ App 430.

sale and in addition, for costs and incidental expenses; if the property levied upon does not exceed the total of these then the levy is not oppressive. These important questions must be determined by an appeal to the standard of test of the judgment of an ordinarily prudent and reasonable man.<sup>34</sup> The officer does not become liable however, by the mere fact that a levy may be excessive, where the officer acts in good faith and believes, and such belief is what reasonable men might also believe, that the levy was not excessive.<sup>35</sup> In determining whether a levy is excessive, the quantity, quality, and kind of property seized, the prevalent prices and general conditions prevailing at the time may all be considered.<sup>36</sup> It should be noted that the liability of the officer may be waived by the debtor for making an excessive levy.<sup>37</sup>

§ 448. **Excessive Levy Does Not Vitiating Proceedings.**—Where an excessive amount of property has been levied upon by an officer, this will not invalidate the levy or affect the sale, and it is good until set aside in appropriate proceeding for that purpose.<sup>38</sup> It has been held however, where the levy is so grossly excessive, and the amount received from the sale of the property is unreasonably inadequate, that these facts warrant the setting aside of the sale as void.<sup>39</sup> Where such a levy and sale is made, the purchaser thereat is not an innocent party, and the court in the cited case pronounced such sale invalid without further showing, and there is no presumption that the land was offered, in these circumstances, in small parcels as required by statute.<sup>40</sup>

§ 449. **Where Sufficient Property Is Levied on, Additional Levies Thereafter When.**—Where sufficient property has been levied upon to satisfy the execution this constitutes a prima facie satisfaction of the judgment.<sup>41</sup> Where an officer has made an adequate seizure of

34. *Williams v. Eastman*, 95 NE 401, 208 Mass 579; *Atcheson v. Hutchison*, 51 Tex 223; *Cornelius v. Burford*, 28 Tex 203, 91 Am Dec 309; *Mara v. Branch*, 135 SW (Tex Civ App) 661; 2 *Freeman on Executions*, Sec. 253.

35. *Devereaux Co. v. Silsby*, 114 Atl 460, 120 Me 362; *Jensen v. Cannell*, 76 Atl 914, 106 Me 445; *Costa v. Goldenberg*, 154 NE 579, 258 Mass 264; *Gallegos v. Sandoval*, 106 P 373, 15 NM 216.

36. *Auto Painting and Repairing Co. v. Ware*, 169 So (La App) 749.

37. *State v. Stoutt*, 253 SW 43, 215

Mo App 361.

38. *Backus v. Barber*, 65 NW 370, 107 Mich 468; *Dezell v. Odell*, 3 Hill (NY) 215, 38 AD 628; *McConnell v. Kaufman*, 32 P 782, 5 Wash 686.

39. *Hollinshead v. Woodward*, 57 S E 79, 128 Ga 7; *Cook v. Jenkins*, 30 Iowa 462.

40. *Cook v. Jenkins*, 30 Iowa 462. The facts of the cited case were that land appraised at \$800.00 was levied upon and sold for a judgment of \$21.00 and costs less than the amount.

41. *U. S. v. Dashiell*, 3 Wall (US) 688, 18 L ed 268; *Barber v. Reynolds*,

property it is not lawful to make an additional levy until the property seized by the first levy is sold, and it is shown that the first levy was insufficient.<sup>42</sup>

It has been held to be a satisfaction of a judgment pro tanto, where there has been a seizure of personalty that would in part satisfy the judgment. Where there has been a levy on sufficient property to satisfy the judgment the presumption of satisfaction of the judgment is rebutted where it is shown that for some reason, sufficient in law, the levy did not in fact satisfy the judgment.<sup>43</sup>

§ 450. **Sheriff's Title to Property Levied Upon.**—Where an officer seizes property under a writ of execution he acquires a special property right in the goods levied upon, and it follows of course that he has the right to possession of such goods for the purpose of executing the writ.<sup>44</sup> The interest which the officer has, by virtue of the writ and levy, ends when the judgment is satisfied, or when the purpose of the writ is consummated.<sup>45</sup> Where the possession of the officer is interfered with, he, alone, may sue for such interference.<sup>46</sup>

The officer having possession under an execution or attachment may maintain an action against any one interfering therewith; he may sue for damages to it, or he may replevin it to regain its possession, or he may bring an action in trover for conversion; in short, he may do anything or take any action that he could do if he were the lawful, exclusive owner for the time being and for the purpose of carrying out the writ he is the owner.<sup>46a</sup> It seems the action for

44 Cal 519; *Hanness v. Bonnell*, 23 NJ L 159; *Beaumont v. Eason*, 12 Heisk (Tenn) 417; *Cornelius v. Burford*, 28 Tex 203, 91 Am Dec 309. The serving of a garnishment is not regarded as a levy upon sufficient property to satisfy the judgment.

42 *Harris v. Evans*, 81 Ill 419; *Lindley v. Kelley*, 42 Ind 204; *Ladd v. Blunt*, 4 Mass 402; *Godfrey v. Gibbons*, 22 Wend (NY) 569.

43 *Scherr v. Himmelmann*, 53 Cal 312; *New Zealand Insurance Co. v. Maaz*, 59 P 213, 13 Colo App 493; *Curtis v. Root*, 28 Ill 367; *Peoria Savings etc. Co. v. Elder*, 45 NE 1083, 105 Ill 55; *McLellan v. Whitney*, 15 Mass 137; *East Greenwich Inst. for Saving v. Allen*, 47 Atl 885, 22 RI 337; *Wood v. Conrad*, 50-NW 903, 2 SD 405.

44 *Pitkin v. Burnham*, 87 NW 160,

62 Neb 385, 89 ASR 763, 55 LRA 280; *Love v. Johnston*, 72 NC 415; *Pedrick v. Keummell*, 65 Atl 846, 74 NJL 379; *Steffin v. Steffin*, 4 NY Civ Proc 179.

45 *Higdon v. Warrant Warehouse Co.*, 63 So 938, 10 Ala App 496.

46 *Newberry v. Davison Chemical Co.*, 65 F(2d) 724, cert den 54 S Ct 75 (2 cases) 290 US 660, 78 L ed 571; *Yokoyama v. San Carlos Operating Co.*, 259 NYS 471, 144 Misc 733.

46a. *Gulf C. & S. F. R. Co. v. Cities Service Co.*, 273 F 946, 281 F 214; *Hagan v. Lucas*, 10 Pet (US) 400, 9 L ed 470; *Peck v. Jennings*, 7 How (US) 612, 12 L ed 841; *Williams v. Herndon*, 12 B Mon (Ky) 484, 54 Am Dec 551; *Cox v. Martin*, 21 So 611, 75 Miss 229, 36 LRA 800, 65 Am St Rep 604; Pen-421

interference with property levied upon by a deputy can be maintained by the principal officer, as the sheriff or constable, or in the name of the deputy or in the joint names of the sheriff or constable and the deputy.<sup>46b</sup> It is immaterial whether the action by the officer is against defendant in the execution or attachment or strangers to the process.<sup>46c</sup> It does not seem necessary that officer's pleadings refer to the writ under which he held the property, or that he was holding by virtue thereof.<sup>46d</sup> He may even maintain an action for trover, when such goods are levied upon by virtue of another writ, in the hands of another officer, state or federal.<sup>47</sup> As has been suggested, an officer may maintain an action of replevin where property he has seized by virtue of a writ of execution is taken out of his possession or that of his keeper.<sup>48</sup> A mere right of levy, where the levy upon property has not been consummated, will not afford the officer the right to maintain an action of replevin against anyone who takes the goods before he gets them.<sup>49</sup> It goes without saying that upon the satisfaction of the writ of execution, the writ has served its purpose and the special title of the sheriff ends and that of the owner again becomes paramount.

§ 451. **A Levy Must Be Actual; Lien of Execution.**—At common law an execution was a lien on the debtor's personalty from the teste of the writ.<sup>50</sup> The teste of the writ of execution at common

*land v. Leatherwood*, 8 SE 234, 101 NC 509, 9 ASR 38; *Poole v. Symonds*, 1 NH 289, 8 Am Dec 71; *Dezell v. Odell*, 3 Hill (NY) 215, 38 Am Dec 628; *Swezey v. Lott*, 21 NY 481, 78 Am Dec 160; *Trovillo v. Tilford*, 6 Watts (Pa) 468, 31 Am Dec 484; *Wehraham v. Snow*, 2 Wms Saund 8 Ed 1871; *Newberry v. Davison Chemical Co.*, supra.

46b. *Gibbs v. Chase*, 10 Mass 125; *Wilson v. Gale*, 4 Wend (NY) 623; *Burton v. Winsor Utah Silver Mining Co.*, 2 Utah 240; *Spencer v. Williams*, 2 Vt 209, 19 Am Dec 711; *West v. Thompson*, 27 Vt 613; *Stanton v. Hodges*, 6 Vt 64. This case holds, apparently, that action must be brought in the name of the deputy. *Miller v. Goold*, 2 Tyler (Vt) 439.

46c. *Mollison v. Eaton*, 16 Minn 426, Gil 283, 10 Am Rep 150; *Brewster v. Vail*, 20 NJL 56, 38 Am Dec 547; *Nagle v. Stroh*, 4 Watts (Pa) 124, 28 Am Dec 695; *Trovillo v. Tilford*, supra. 422

46d. *Penland v. Leatherwood*, 8 SE 234, 101 NC 509, 9 Am St Rep 38.

47. *Mulheisen v. Lane*, 82 Ill 117; *Davidson v. Waldron*, 31 Ill 120, 83 AD 206; *Vanosdall v. Hamilton*, 77 N W 9, 118 Mich 533; *Mollison v. Eaton*, 16 Minn 426, Gil 383, 10 Am Dec 150; *Pettes v. Marsh*, 15 Vt 454, 40 AD 689; a mere right of levy is insufficient to give the levying officer such an interest in the goods of a debtor as would sustain an action of trover.

48. *Field v. Fletcher*, 78 NE 107, 191 Mass 494 see note 46a supra; *Conlen v. Lemmerman*, 93 Atl 722, 87 NJL 84; *Pracht v. Gunn*, 74 NYS 901, 69 App Div 396.

49. *Mulheisen v. Lane*, supra.

50. *Reardon v. Rock Island Plow Co.*, 168 F 654, 94 CCA 118, 32 S Ct 164, 222 US 354, 56 L Ed 231; *Coughlan v. White*, 66 NC 102; *Bond v. Willett*, 31 NY 102, 1 Abb Dec 165, 1 (40 NY) Keyes 377, 29 How Pr 47; *Edwards v. Thompson*, 4 SW 913, 85

law was of the first day of term of court during which the judgment was rendered. So, under the rule, an execution might be a lien on the debtor's personalty before the judgment was actually rendered.<sup>50a</sup>

As has heretofore been seen in Section 224, in order for the personal property to become subject to an attachment lien there must be an actual taking into possession by the sheriff, except as to chattels which are too bulky to be taken into the sheriff's actual custody. The law is different in regard to the creation of liens under executions. In some states under statutes the delivery of the execution to the sheriff of the county or its issuance effects a lien on the personal property of the debtor.<sup>50b</sup> In a few states influenced by statutes the levy on personalty is invalid unless the officer takes actual possession and control of the property.<sup>51</sup>

The seizure of personal property under a writ of execution divests the owner only of the legal possession but not of ownership. And it does not have this effect where property levied upon is realty. It takes a sale to transfer the title to property levied upon under an execution.<sup>52</sup> It therefore follows that the owner may sell the property whether real or personal subject to the levy.<sup>53</sup> Where

there has been an attachment levied in the action, the lien of the execution however created, relates back to the date of the levy of the attachment on property affected thereby.<sup>53a</sup> A word about the procedure in connection with respect to execution levy relating back to levy of attachment; this need not be shown by the levy of the execution but will suffice if it appears from the record.<sup>53b</sup>

§ 452. *Chattels Levied on Are in the Custody of the Law.*—After the levy of an execution the property is then in custodia legis.<sup>54</sup> By virtue of such possession the officer may protect such custody by bringing an action of trespass.<sup>55</sup> Or he may also bring an action for the conversion of such property.<sup>56</sup> While property is in the officer's custody by virtue of a writ of execution, even a tax collector and the purchaser of the property at a tax collector's sale under a distress warrant acquires no title.<sup>57</sup> The officer's possession of property levied upon under an execution or attachment may be protected by contempt proceedings.<sup>57a</sup>

§ 453. *When Property Can Be Said to Be in Custody of the Law.*—The rule that property in custodia legis is not subject to seizure under process issued out of another court is so fundamental that it may now be regarded as pedestrian, and in the absence of statutes therefor, the courts will not tolerate invasion of its jurisdiction by the seizure of property already within its custody, either by virtue of process or by reason of the same having been placed in the custody and control of an agency of the court, such as commis-

Fuller v. Loring, 42 Me 481. However, where the interest levied upon is an equity of redemption, it seems in that case, the title of the debtor is then divested. Lunt v. Cook, 55 NE 468, 175 Mass 1, 75 Am St Rep 472; Clifton v. Owens, 87 SE 502, 170 NC 607; Alexander v. Springs, 5 Ired (27 NC) 476; Pedrick v. Keummell, 65 Atl 846, 74 NJL 379; Catlin v. Jackson, 8 Johns.(NY) 520; Hammock v. Qualls, 201 SW 517, 139 Tenn 388; Cundiff v. Teague, 46 Tex 475; Walradt v. Phoenix Ins. Co., supra.

53a. *Mattocks v. Farrington*, 16 F. Cases # 9298, 2 Hask 331; *Salem First Nat'l Bank v. Redman*, 57 Me 405; *Avery v. Stephens*, 12 NW 211, 48 Mich 246; *Huxley v. Harrold*, 62 Mo 516; *Harbison v. McCartney*, 1 Grant Cases (Pa) 172.

versing 228 NYS 748, 223 App Div 859, holding that an execution did not create a lien at the time of issuance. *Grimes v. Rodgers*, 263 Ill App 429; *Webster v. Industrial Acceptance Corp.*, 28 SW(2d) 959, 234 Ky 613; *Drewry v. Baugh & Sons*, 143 SE 713, 150 Va 394.

51. *Hagan v. Cosper*, 292 Pac 1020, 37 Ariz 209; *Brown v. Vaughan*, 42 SW (2d) 558, 184 Ark 364; *City Fuel & Supply v. Nichols Roofing Co.* 223 NW 751, 207 Iowa 860; *In re Phipps*, 163 SE 801, 202 NC 642; *McManus v. Bank of Greenwood*, 171 SE 473, 171 SC 84.

52. *New Orleans Bank & Trust Co. v. City of New Orleans*, 147 So 42, 176 La 946; *Walradt v. Phoenix Ins. Co.*, 32 NE 1063, 136 NY 275, 32 Am St Rep 752, 64 Hun 129, 19 NYS 293, 45 NY St Rep 908, holding a levy does not avoid an insurance policy. *Yokoyama v. San Carlos Operating Co.*, 259 NYS 471, 144 Misc 733.

53. *Fry v. Mobile Branch Bank*, 16 Ala 282; *Atwood v. Pierson*, 9 Ala 656; *Schenck v. Sithoff*, 75 Ind 485;

*Tenn 720*, 4 Am St Rep 307; *Stahlman v. Watson*, 39 SW (Tenn Ch App) 1055; *Mercein v. Burton*, 17 Tex 208; *Anderson v. Taylor*, 6 Lea (Tenn) 382; *Fayne v. Drewe*, 4 East 523, 102 Eng Rep 931; *Baskerville v. Brocket*, Cro Jac 449, 79 Eng Rep 384.

50a. *Farley v. Lea*, 20 NC 307, 32 Am Dec 680; *Dibble v. Taylor*, 29 SCL (2 Speers) 308, 42 Am Dec 368; *Moses v. Blackwell*, 43 SCL (9 Rich) 42; *Union Bank v. McClung*, 9 Humph (Tenn) 91; *Bond v. Willett*, supra.

50b. *First State Bank of Crook, Colo., v. Fox*, 10 F(2d) 116; *C. T. C. Investment Co. v. Daniel Boone Coal Corp.*, 58 F(2d) 305; *In re Miller*, 45 F(2d) 909; *In re New Lots Sash & Door Corp.*, 3 F Supp 570; *In re Liberty Lumber Co.*, 6 F Supp 397. There is an apparent conflict in the construction of the execution statute in New York Civil Practice Act, section 679, between the federal court in *In re Liberty Lumber Co.*, 6 F Supp 397, holding that the lien attaches on the issuance of the execution, and in *Baker v. Hull*, 166 NE 175, 250 NY 434, re-

53b. *Mattocks v. Farrington*, supra.

54. *Hooker v. Wiggins*, 139 So 803, 104 Fla 355; *Yokoyama v. San Carlos Operating Co.*, 259 NYS 471, 144 Misc 733; *Keystone Pipe & Supply Co. of Texas v. Milner*, 297 SW (Tex Civ App) 1089; *Walker v. Com.* 18 Gratt (59 Va) 13, 98 Am Dec 631; *August v. Gilmer*, 44 SE 143, 53 W Va 65.

55. *Higdon v. Warrant Warehouse Co.*, 63 So 938, 10 Ala App 496, see Sec 450, supra. *Gibbs v. Chase*, 10 Mass 125; *Scott v. Morgan*, 94 NY 508.

56. *Davidson v. Waldron*, 31 Ill 120, 83 AD 206, see Sec. 450, supra; *Caldwell v. Eaton*, 5 Mass 399.

57. *Hartwell v. Bissell*, 17 Johns.(N Y) 128.

57a. *August v. Gilmer*, supra.

sioner, receiver, and the like.<sup>58</sup> It is not material how the interference takes place; that is, whether it is attempted through another officer by an execution, or otherwise.<sup>59</sup> The rule is especially applicable where the officer attempting to seize property in custodia legis is acting under process from a different court or jurisdiction, or is a different officer than the one having the property in charge.<sup>60</sup> This question has frequently arisen where it has been attempted to levy upon property in custodia legis by reason of its being in the hands of a sheriff and the levy is attempted to be made by a United States marshal, and vice versa.<sup>61</sup> Undoubtedly, in the absence of statute, this is the law in all jurisdictions recognizing common law rules. It probably could be asserted, with a high degree of assurance with respect to accuracy, that this is true in all cases, except where the property is held under an execution that is fraudulent as against creditors.<sup>62</sup> It seems however, that if the property is held under process, valid on its face, that that is sufficient to bring it within the ambit of protection thrown around property by virtue of the rule with respect to in custodia legis. The validity of the judgment upon which the process issued is not a subject of inquiry.<sup>63</sup> The courts so jealously guard against the invasion of their jurisdiction with respect to property in custodia legis that it is held, where the property is in possession under a forthcoming bond, the rule applies.<sup>64</sup> Neither may an officer who has collected money on an execution apply it on an execution he holds against the creditor in the first mentioned execution. Such money is in custodia legis and is not subject to be applied in this manner.<sup>65</sup> The rule has even been held applicable to redemption money, especially where the same is paid into court in connection with an action brought to redeem.<sup>66</sup>

58. Hagan v. Lucas, 10 Pet (US) 400, 9 L ed 470; Taylor v. Carryl, 20 How (US) 583, 15 L ed 1028; Ford v. Judsonia Merc. Co., 12 SW 876, 52 Ark 428, 6 LRA 714, 20 ASR 192; Cowart v. W. E. Caldwell Co., 68 SE 500, 134 Ga 544, 30 LRA(NS) 720; Re Kohl's Guardianship, 266 NW 800, 221 Wis 385.

59. Keating v. Spink, 3 Ohio State 105, 62 Am Dec 214, see also 6 Ohio State 206.

60. Pitkin v. Burnham, 87 NW 160, 62 Neb 385, 55 LRA 280, 80 ASR 763; Keating v. Spink, supra; Taylor v. Carryl, supra; Hagan v. Lucas, supra.

61. Keating v. Spink, supra, see Sec. 401, infra.

62. United States v. Conyngham, F. Cas. # 14850, 4 Dall 358, 1 L ed 865, Wall Sr 178; Davidson v. Waldron, 31 Ill 120, 83 Am Dec 206.

63. Pitkin v. Burnham, supra.

64. Hagan v. Lucas, supra.

65. Turner v. Fendoll, 1 Cranch (U S) 117, 2 L ed 53; Hardy v. Tilton, 68 Me 195, 23 AR 34; Prentiss v. Bliss, 4 Vt 513, 24 Am Dec 631.

66. Lightner v. Steinagel, 33 Ill 510, 85 Am Dec 292; Smith v. Finlen, 23 Ill App 156; Terry v. Deitz, 49 Ind 293; Meyers v. Willsey, 205 NW 373, 164 Minn 450; Davis v. Seymour, 16

The rule of protection even extends to a case where goods have been replevined from an officer who had levied upon them by a person not a party to the writ, and in these circumstances, the goods are not leviable thereafter by the same or another officer holding other process.<sup>66a</sup> The protection, under this rule, extends to and covers property delivered to a third party claimant who has given bond therefor, where the bond is conditioned that property will be returned to the officer if the claimant's asserted title is adjudged untenable.<sup>66b</sup>

§ 454. When Property in the Custody of Law is Amenable to Legal Process.—As has heretofore been seen, property in the custody of the law is generally not subject to be levied upon by other officers. Where a guardian is appointed to care for the property of an incompetent judgment debtor, such property is in custodia legis and cannot be levied upon by virtue of a writ of execution without the permission of the court who placed the guardian in charge thereof.<sup>67</sup> It should be observed that a levy on money in custodia legis is valid and enforceable by the court having control of the funds, though not enforceable by the court issuing the execution process under which the levy is made.<sup>68</sup>

Where the court appoints one to carry out the directions of a will with respect to land, and such land is in control of the court's appointee for this purpose, such property is not in custodia legis to the extent that will prevent an execution being levied upon it.<sup>69</sup> In order to reach the interest of a legatee in personal property in possession of the administrator or executor of an estate by virtue of a writ of execution, the statutes authorizing such procedure must be strictly followed.<sup>70</sup> Generally an heir's interest in an estate in the hands of the administrator or executor being in the custody of the law is not subject to seizure and sale under execution.<sup>71</sup>

In some states it is held, although there is a conflict on the ques-

Minn 210, Gil 184; Killdrew v. Elliott, 8 Humph (Tenn) 515; Withers v. Pemberton, 3 Cold (Tenn) 56.

66a. Goodheart v. Bowen, 2 Ill App 578.

66b. See Sec. 461, note 66b.

67. McCracken v. Lott, 44 P(2d) 355, 3 Cal(2d) 164.

68. Bernatein v. New Jersey Bankers' Securities Co., 171 Atl 145, 115 NJE 347; Fredd v. Darnell, 162 Atl 236, 107 NJE 249; Conover v. Ruck-

man, 33 NJE 303; Crane v. Freese, 16 NJL 305.

69. Brett v. Fielder, 277 P 216, 136 Okl 222.

70. In re Bennett's Estate, 90 P(2d) 84, 13 Cal(2d) 354, see also 81 P(2d) 432.

71. First Nat'l Bank v. Browne, 18 SW(2d) 772, reversed in Gregg v. First Nat'l Bank, 28 SW(2d) 179; Lousaac v. Jacobson, 7 Alaska 598.

tion, property taken by police merely for safe keeping where the prisoner is in custody on a criminal charge, that such property is subject to levy and sale under a writ of execution.<sup>72</sup>

Where goods are levied upon by a landlord by virtue of a distress warrant, such property is held not to be in custody of the law to the extent that they may not be levied upon under an execution by the sheriff.<sup>73</sup> The reason for the rule exempting property in custodia legis from seizure under executory process is based on the necessity incident to orderly judicial procedure.<sup>74</sup> The immunity of property in custodia legis from execution depends upon whether substantial confusion or embarrassment to the initial jurisdiction would result from enforcement of executory process against property from another tribunal.<sup>75</sup> So, it was held that an execution on judgment debtor's right, title, and interest in funds in the hands of a special master arising from a partition sale would not interfere in any way with a court of initial jurisdiction, and such levy was not invalid.<sup>76</sup>

In accordance with the above cited rule where the executrix would not be dispossessed by virtue of execution, nor the administration under the will interrupted, a devisee's interest in an estate in the hands of such executrix was held subject to execution and sale.<sup>77</sup>

**§ 455. Right of Junior Execution to Seize Property Already Levied Upon.**—Where property has been levied upon under a writ of execution and subsequently there issues a junior writ against the same debtor, the delivery of the junior writ to the same officer constitutes a constructive levy upon the property.<sup>78</sup> Where an officer receives additional executions to be levied upon property that has already been in custody under a senior writ, he is only required to endorse a levy on the subsequent writs and then apply the proceeds arising from a sale of the property, in these circumstances, in the proper order.<sup>79</sup>

Where a levy on property already levied upon is permissible and

72. *Fidelity & Casualty Co. v. Thumm*, 172 NE 631, 35 Ohio App 499, see Sec. 175, *supra*.

73. *Sookiasian v. Swift & Co.*, 100 Pa Super 69.

74. *Fredd v. Darnell*, 152 Atl 236, 107 NJE 249.

75. *Fredd v. Darnell*, *supra*.

76. *Fredd v. Darnell*, *supra*.

77. *Gregg v. First Nat'l Bank*, *supra*.

78. *Leach v. Pine*, 41 Ill 65, 89 AD 375; *Brown v. Loesch*, 29 NE 450, 3 Ind App 145; *Smith v. Rogers*, 73 SW 243, 99 Mo App 252; *Penland v. Leatherwood*, 8 SE 234, 101 NC 509, 9 ASR 38; *Millville Nat'l Bank v. Shaw*, 42 NJL 550; *Peck v. Tiffany*, 2 NY 451; *Ryan v. Root*, 47 NE 51, 58 Ohio St 302.

79. *Goodheart v. Bowen*, 2 Ill App 578; *State v. Curran*, 46 Mo App 142. 427

there is a second levy made by virtue of a junior writ by a different officer, he merely notifies the officer in possession of the property of the fact of levy under the junior writ, and this has been held to constitute a valid levy and to entitle the junior levy to the surplus after satisfaction of the senior process.<sup>80</sup>

**§ 456. Fraud of Plaintiff in Holding Up Execution.**—An execution cannot be converted into an instrumentality of fraud, and a creditor cannot resort thereto to keep the debtor in possession of his property. So, if a creditor attempts to accomplish such results by holding up the levy under an execution and, during such time, another execution is received by the officer and levied, then the latter takes priority over the execution so held up.<sup>81</sup> Likewise if the plaintiff in an execution delivers it to a sheriff or constable and instructs the officer to make no levy thereunder until the plaintiff therein shall give the officer further instruction, or until another day, and it follows in the meantime that another comes into the hands of the same or another officer, accompanied with instructions to proceed, and he makes a levy and takes possession of the execution defendant's property, the second execution is first in order; and, the rule is the same when direction with respect to the first execution is not to proceed unless urged to levy under junior process. Differently stated, and assuming the form of a general rule, it may be said that any act of the creditor diverting the execution from its lawful mission—to obtain satisfaction of the judgment—renders it inoperative against other creditors and it loses its priority.<sup>81a</sup> So, too, a levy upon unripe and growing crops, made at a time when it cannot be expected to be fully executed by a sale of the crops during the life of the writ, and evincing an intention to hold such levy for a time merely as security, is invalid as to subsequently acquired liens upon such crops. The rule of law controlling in such cases may, with a satisfactory degree of assurance, be stated that any act which shows that a party does not intend that a writ shall be executed before its return day, or in accordance with the statutory provisions relating to final process, will, as between

80. *Allen v. Davis*, 53 Mo App 15; *Penland v. Leatherwood*, 8 SE 234, 101 NC 509, 9 ASR 38; *Benson v. Berry*, 65 Barb (NY) 620; *State v. Curran*, *supra*.

81. *Williams v. Mellor*, 19 P 839, 12 Colo 1; *Gilmore v. Davis*, 84 Ill 487, see note 82 *infra*, this section. *Burleigh v. Piper*, 2 NW 520, 51 Iowa 649; 428

*Lovick v. Crowder*, 8 Barn & Cr 132; *Kempland v. McAuley*, Peake's NP 66.

81a. *Berry v. Smith*, Fed. Cas. # 1359, 3 Wash CC 60; *Wise v. Darby*, 9 Mo 131; *Gilmore v. Davis*, *supra*. But see *Cumberland Bank v. Hann*, 19 NJL 166; *Hurst v. Hooper*, 12 Mees & W 670.

creditors of the debtor, discharge the property seized from the lien of the execution.<sup>81b</sup>

Where an execution creditor delivers a writ to an officer and directs him not to levy, or to await further directions in the matter, or in any way impedes the speedy levying of the writ, such creditor acquires no lien on the execution debtor's property and any one executing a writ subsequent thereto acquires a prior lien.<sup>82</sup> The foregoing principles, as to the levy of a writ of execution, applies only to chattels, and there is no forfeiture of priority where the writ is to be levied upon real estate; the reason for this is that the judgment is an independent lien upon realty aside from the writ of execution.<sup>83</sup> In some jurisdictions it is required that there be a fraudulent intent before the senior writ loses its priority, but it is held even in these cases, that such intent is evinced by acts such as we have hereinbefore discussed.<sup>84</sup> In other jurisdictions it is held that the rule of forfeiture applies although there was no fraudulent intent by the senior execution creditor.<sup>85</sup> It is submitted this is the better rule. The consequence of conduct should follow without the interposition of unnecessary obstacles. Where such execution creditor has once lost his priority he cannot regain it.<sup>86</sup> It should be noted, however, that when, after a levy is made, if the officer making it is instructed not to sell, the execution thereupon becomes dormant, and during the period of its dormancy the plaintiff is liable to lose his lien through a number of acts of the debtor or other of his creditors, but the lien is not ipso facto by virtue of such period of dormancy vitiated and, as against the execution debtor and his heirs, executors or administrators, and others not having acquired intervening liens, the mere suspension of the execution has no effect on the lien, and if plaintiff in the dormant execution issues instructions to the of-

81b. *Excelsior Needle Co. v. Globe Cycle Works*, 62 NYS 538, 48 App Div 304; *Burleigh v. Piper*, supra.

82. *In re Rayford Truck Etc. Co.*, 250 F 634, see note 81, supra. *Dutertre v. Driard*, 7 Cal 549; *Sweetser v. Matson*, 39 NE 1090, 153 Ill 568, 46 ASR 911, 27 LRA 374; *Syfers v. Bradley*, 16 NE 805, 115 Ind 345, also 17 NE 619; *Smith v. Spencer*, 25 NC 256; *Smith v. Erwin*, 77 NY 466; *Sweet v. Williams*, 29 Atl 350, 162 Pa State 94; *Hammock v. Qualls*, 201 SW 517, 139 Tenn 383; *Wunsch v. McGraw*, 29 P 832, 4 Wash 72.

83. *Slattery v. Jones*, 8 SW 554, 98

Mo 216, 9 ASR 344; *Muir v. Leitch*, 7 Barb (NY) 341; *McLaughlin v. McLaughlin*, 85 Pa 317.

84. *State v. Records*, 5 Har(Del) 146; *Fischel v. Keer*, 45 NJL 507.

85. *In re Zeis*, 229 F 472, but see 245 F 737, 158 CCA 139; *Montgomery Branch Bank v. Broughton*, 15 Ala 127; *Sweetser v. Matson*, 39 NE 1090, 153 Ill 568, 46 ASR 911, 27 LRA 374; *Sage v. Woodin*, 68 NY 578; *Keyser's Appeal*, 13 Pa 409, 53 AD 487.

86. *In re Zeis*, 229 F 472, but see 245 F 737, 158 CCA 139; *Berry v. Smith*, 3 F. Cases # 1359, 3 Wash CC 60.

ficer to proceed—no intervening rights being in existence—the dormant execution again becomes vitalized, and may be proceeded under, and any rights attempted to be asserted which came into existence after issuance of the instructions to proceed are inferior to the execution lien.<sup>87</sup> It must be apparent that another creditor seeking to take advantage of the period of dormancy of a prior execution is not affected by notice of such prior execution. If such were not the case, the whole salutary purpose of the rule would be rendered nugatory, since, all that would be required to keep alive the lien through the period of dormancy would be to take care that notice was imparted to others.

§ 457. **Right of Plaintiff to Control Execution.**—In the absence of fraud, the plaintiff, in the action, has a lawful right to control the execution, issued therein, and it is the duty of the officer to follow all lawful directions given him by the plaintiff, unless they are for some legal reason improper.<sup>88</sup> An illustration of what may be an improper instruction given to the sheriff or constable by the execution plaintiff is found in those instances where to carry it out would produce great sacrifice.<sup>89</sup> Of course the sheriff may, and it is his duty, to disobey the instructions of the execution plaintiff to levy upon the exempt property of the defendant.<sup>90</sup> However, the judgment creditor is not under any duty to give instructions to the officer holding an execution in his favor, but it is merely a privilege. If the officer is not directed by the judgment creditor then the only directions he needs to follow are those given in the writ of execution itself.<sup>91</sup> When it is conceded that the plaintiff has a legal right to give proper directions to the officer a principle of law becomes readily apparent, that such directions when obeyed will protect the officer against any penalties incurred by any irregularities consequent thereon.<sup>92</sup> Some authorities sustain the proposition that the execution is the judgment creditor's process and is largely within his ex-

87. *In re Zeis*, 245 F 737, 158 CCA 139; *Sparre v. Abbott*, 40 Ill App 646; *Miller v. Kosch*, 26 NYS 183, 74 Hun (NY) 50, 56 NY St Rep 162; *Freelurger's Appeal*, 40 Pa 244.

88. *Patton v. Hamner*, 28 Ala 618; *Tucker v. Bradley*, 15 Conn 46; *Lawyer's Coop. Pub. Co. v. Bennett*, 16 So 185, 34 Fla 302; *Swan v. Gilbert*, 51 NE 604, 67 Ill App 236, 175 Ill 204, 67 ASR 208; *Wells v. Bower*, 25 NE 603, 126 Ind 115, 22 ASR 670; *Mer-*

*ritt v. Grover*, 16 NW 860, 61 Iowa 99; *Bryan v. Hubbs*, 69 NC 423; *Ansonia Brass Co. v. Babbitt*, 8 Hun 157, 74 NY 305; *Habersham v. Sears*, 5 P 208, 11 Ore 431, 50 AR 481; *Yost v. Smith*, 105 Pa 628, 51 AR 210.

89. *McDonald v. Neilson*, 2 Cow (NY) 139, 14 AD 431.

90. *Swan v. Gilbert*, supra.

91. *Ansonia Brass Co. v. Babbitt*, supra.

92. *Thompson v. Goding*, 63 Me 425.



clusive control.<sup>93</sup> If a judgment has been assigned, of which the officer holding the execution is informed, then the assignee may assume the role of judgment creditor, and give directions to the officer, although it is imperative that the officer be given notice of such assignment and it is not sufficient that it appears merely on the records of the court or in the case.<sup>94</sup> After an assignment is made, then the judgment creditor has no right to give any directions, and under an execution taken out by the assignee of the judgment and delivered to an officer, the officer is not subject to the directions of the original judgment creditor. Neither may a person who is not a party to the record exercise any control of the officer's doings under an execution.<sup>95</sup> It seems that the plaintiff in an execution may withdraw the same from the officer at any time before it is executed, but not afterwards.<sup>96</sup> And, if the plaintiff takes the execution out of the hands of the officer after a levy and retains it until after the day of sale prescribed by law, the sheriff or constable is justified not only in failing to hold the sale but in surrendering the property to the execution defendant.<sup>97</sup> A direction to the officer to not hold the sale is tantamount to withdrawing the execution from his hands.<sup>98</sup>

**§ 458. Rule as to Priorities of Executions.**—In the absence of any lien relating back to the teste or other earlier date, it is the duty of the sheriff or constable to levy the first execution delivered to him prior to making levies under executions subsequently placed in his hands, and to apply the proceeds of property seized to the satisfaction of such senior execution.<sup>99</sup>

93. *Burnside v. Pendleton*, 132 SW 221, — Ark —; *Curry v. Equitable Surety Co.*, 148 P 914, 27 Colo App 175; *Peck v. City Nat'l Bank*, 16 NW 681, 51 Mich 353, 47 AR 577; *Welsh v. Lawler*, 68 Atl 218, 73 NJE 371, 133 ASR 737.

94. *Bressler v. Beach*, 21 Ill App 423; *State v. Herod*, 6 Blackf (Ind) 444; *Root v. Wagner*, 30 NY 9, 86 AD 348; *Owens v. Clark*, 15 SW 101, 78 Tex 547; *Daugherty v. Moon*, 59 Tex 307.

95. *State v. Herod*, supra; *Bressler v. Beach*, supra; *Yost v. Smith*, supra; *Daugherty v. Moon*, supra.

96. *Smith v. Columbia Bank*, 22 F. Cases # 13011, 4 Cranch CC 143; *Smith v. Martin*, 54 Ga 600; *Groover*

*v. White*, 54 Ga 601; *Kirland v. Robinson*, 24 Ind 105; *Bingham v. Smith*, 64 Me 450; *Isler v. Colgrove*, 75 NC 334; *Cumberland Bank v. Hann*, 19 N JL 166; *Smith v. Erwin*, 77 NY 460; *Wehle v. Conner*, 69 NY 546; *Root v. Wagner*, supra.

97. *Smith v. Martin*, supra; *Groover v. White*, supra.

98. *Smith v. Martin*, supra; *Groover v. White*, supra; *Bingham v. Smith*, supra; *Cumberland Bank v. Hann*, supra; *Smith v. Erwin*, supra; *Wehle v. Conner*, supra; *Isler v. Colgrove*, supra.

99. *Harrison v. Stipp*, 8 Blackf (Ind) 455; *Hutchinson v. Johnson*, 1 Term 131; *Drewe v. Lainson*, 11 Ad & El 537; *Jones v. Atherton*, 7 Taunt 431

It should be noted however, that where there is any probability that serious legal complications will arise questioning the sheriff or constable's conduct as to the distribution of proceeds of property seized under an execution, the officer should pay the money into court or bring an appropriate proceeding, such as declaratory judgment action, for his own protection, and thereby invoke the court's judgment, as to his duty in the premises. It is the positive duty of the sheriff or constable to make levies under executions in the order in which they come into his hands in those states where the priority of the lien is controlled by the receipt of process by the officer. It is incumbent upon him to levy such executions so as to protect the legal priority of satisfaction, and the only excuse that can be made available, is that the judgment creditor of the senior execution so interfered with the discharge of the officer's duty that the execution was thereby caused to become dormant or to be postponed to the satisfaction of the junior execution. If the sheriff or constable finds himself without this justification he will be held liable, and such pleas as due diligence, honest motives, or mistakes in judgment are utterly unavailing, nor can the belief by the sheriff that the goods levied upon under the senior execution would render sufficient money to satisfy the same, be held an adequate excuse.<sup>1</sup>

Where a sheriff has two executions in his hand, and he levies under the last received, and fails to levy under the first, the judgment creditor whose writ is not executed upon may not share in the proceeds arising from the sale of the property levied under the latterly received execution but he is restricted to his remedy against the officer.<sup>2</sup> In controversies arising between an execution plaintiff and an officer, the officer's return is conclusive as against him as to property levied upon.<sup>2a</sup>

**§ 459. Sheriff's Duty as to Fraudulent Practices of Parties.**—Under certain circumstances, it is incumbent upon the sheriff or constable to investigate the conduct of the defendant and to ferret out fraud practiced upon his creditors; thus, where a fraudulent judgment, as to creditors has been rendered, an execution levied and goods seized thereunder, coming into the hands of the

56; *Smallcomb v. Cross*, 1 Ld Raym 251; *In re Crosthwaite*, Ex parte *Pierce*, 14 LRQB 966, 54 LJQB 316, 52 LTNS 518, 33 WR 614, 2 MBR 105.

1. *Ohlson v. Pierce*, 12 NW 429, 55 Wis 205.

2. *Sweet v. Williams*, 29 Atl 350, 432

162 Pa 94; *Schuylkill County's Appeal*, 30 Pa State 358; *McClelland v. Slingluff*, 7 Watta & S (Pa) 134, 42 AD 224; *Landis v. Evans*, 6 Atl 908, 113 Pa 332; *Appeal of Stroudsburg Bank*, 17 Atl 668, 126 Pa 523.

2a. *Ohlson v. Pierce*, supra.

sheriff or constable by reason thereof, it is the officer's duty, after having notice of the existence of fraud in the rendition of the judgment, or in case he could have discovered it by reasonable inquiries and investigation, to sell the goods so seized under a subsequent execution grounded upon a bona fide debt. If he fails to sell such goods for that purpose, it seems, he incurs liability to the plaintiff in the second execution and this is true notwithstanding the fact that he himself innocently transferred such goods to a supposedly innocent purchaser under the fraudulent execution. It becomes his duty upon being made aware of the fraud to seize the goods again and subject them to the payment of the second bona fide execution.<sup>3</sup> As to how the sheriff or constable could satisfy the purchaser at such sale would seem to be the officer's problem.

It would seem too, if property is levied upon under a writ founded on two demands, one of which is honest, and the other fraudulent, then such levy is wholly void as against subsequent levies, and that the one honest demand will not save the judgment its just fate.<sup>4</sup> A sheriff's sale on a fraudulent judgment to the plaintiff therein, or to another having notice of the fraud is wholly void, and any creditor thus defrauded may treat the sale as a nullity.<sup>5</sup>

**§ 460. Sheriff's Property in Goods Seized; Special and Subordinate.**—The levy of an execution upon goods vests in the sheriff a property right in them. This right of property is recognized only for the purpose of protecting the interest of the officer until he shall have performed his duty by making a sale thereof, and delivering the same to the purchaser thereat. His title is in all other respects subordinate to the title of the owner who can sell, mortgage, or insure the property subject only to the lien of the execution.<sup>6</sup> The sheriff's title is not subordinate to that of the owner but is regarded as a part of it, except for the purpose of collecting

3. *Fairfield v. Baldwin*, 12 Pick. (Mass) 388 at 397; *Warmall v. Young*, 5 Barn & Cr 660; *Tyler v. Duke of Leeds*, 2 Stark 218; *Barber v. Mitchell*, 2 Dowl PC 577; *West v. Skipp*, 1 Ves Sr 244; *Wintle v. Freeman*, 11 Ad & El 509, 1 G & D 93; *Shattock v. Carden*, 6 Exch 725; *Christopherson v. Burton*, 3 Exch 160; *Imray v. Maganay*, 11 Mees & W 267.

4. *Fairfield v. Baldwin*, supra.

5. *Pierce v. Jackson*, 6 Mass 242; *Gilbert v. Hoffman*, 2 Watts (Pa) 66,

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26 AD 103; *Hall v. Hamlin*, 2 Watts (Pa) 354; *Foulk v. McFarlane*, 1 Watts & S (Pa) 207, 37 AD 467.

6. *Hagan v. Lucas*, 10 Pet (US) 400, 9 L ed 470, see Sec. 450, supra; *Atwood v. Pierson* 9 Ala 656; *Schroeder v. Tomlinson*, 39 Atl 484, 70 Conn 348; *Leach v. Pine*, 41 Ill 65, 89 AD 375; *Travers v. Cook*, 42 Ill App 580; *Rice v. Tower*, 1 Gray (Mass) 426; *Stack v. Olmsted*, 86 NW 851, 127 Mich 359; *Alexander v. Springs*, 5 Ired (27 NC) 475.

the debt it is subordinate to it, and is subject to be extinguished, in the event the execution debtor shall satisfy the writ. And, if the sheriff is instructed by the execution creditor not to proceed with the sale, or receives other instructions amounting to a withdrawal of the execution from his hands, the title reverts back to the owner. And, if he suspends proceedings under the execution by reason of directions given him by the plaintiff and another writ is placed in his hands the second levy takes precedence over the first.<sup>7</sup>

However some of the American cases incline to the contrary view which is well illustrated by a New Jersey case holding that where the delay occurs under the directions of the plaintiff it will not postpone the execution to junior process unless such delay is so gross and excessive as to evidence extreme negligence or fraud.<sup>8</sup>

**§ 461. Conflict between Sheriff and United States Marshal.**—There is sometimes a conflict of jurisdiction between a sheriff or constable and a United States marshal. This occurs when both have levied executions, or have attempted so to do, upon the same property, the executions issuing from the state courts to the sheriff or constable and those to the marshal from the United States court. The rule prevails in such case that the first in time is the first in right, and that the one making a levy upon the property first thereby withdraws it from the reach of the other and such withdrawal continues so long as the possession is retained under the first levy. The officer who has thereby made a levy acquires such property in the goods levied upon that his possession may be protected by such legal action that is necessary to protect the first possession.<sup>9</sup> So where property is levied upon and is thereafter delivered under

7. *Kempland v. McCauley*, Peake N-PC 95, see Sec. 456 et seq., supra; *Pringle v. Isaac*, 11 Price 445; *Smallcomb v. Cross*, 1 Ld Raym 251; *Sturgis v. Bishop*, 7 Ellis & B 542; *Hunt v. Hooper*, 12 Mees & W 664.

8. *Cumberland Bank v. Hann*, 19 N-JL 166, see also *Casher v. Peterson*, 4 NJL 317; *Matthews v. Warne*, 11 NJL 295; *Williamson v. Johnston*, 12 NJL 86; *Sterling v. Van Cleve*, 12 NJL 286; *Cook v. Wood*, 16 NJL 254.

9. *Adler v. Roth*, 5 F 895, 2 McCrary 445, see Secs. 450, 453, supra; *Corning v. Dreyfus*, 20 F 426, but see 8 S Ct 379, 124 US 131, 31 L ed 374; *Hale v. Bugg*, 82 F 33; *Tefft v. Sternberg*, 40 F 2, 5 LRA 221; *Melvin v. 434*

*Robinson*, 31 F 634; *Senior v. Pierce*, 31 F 625; *Covell v. Heyman*, 4 S Ct 355, 111 US 176, 28 L ed 390; *Krippendorf v. Hyde*, 4 S Ct 27, 110 US 276, 28 L ed 145; *Taylor v. Carryl*, 20 How (US) 583, 15 L ed 1028; *Wabash R. Co. v. Adelbert College*, 28 S Ct 182, 208 US 38, 52 L ed 379, rehearing 28 S Ct 425, 208 US 619, 52 L ed 642; *Pulliam v. Osborne*, 17 How (US) 471, 15 L ed 154; *Brown v. Clarke*, 4 How (US) 4, 11 L ed 850; *Hagan v. Lucas*, 10 Pet (US) 400, 9 L ed 470; *Langdon & Co. v. Brumby*, 7 Ala 53; *Logan v. Lucas*, 59 Ill 237; *Metzner v. Graham*, 57 Mc 404; *Coffin v. Harris*, 54 SE 437, 141 NC 707, 6 LRA (NS) 624; *James v. Kennedy*, 10 Heisk (Tenn) 607.

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a state statute to a claimant upon his giving a bond, one of the conditions of which is that in case of a decision adverse to his claim, the property shall be returned to the sheriff, the possession of such claimant is the possession of the sheriff, and the property is still in the custody of the law, and it is immaterial whether bond is given to a state or federal officer by a claimant; the rule is the same.<sup>10</sup>

§ 462. Conflict between Execution and Attachment.—As has heretofore been seen, property in the custody of the law cannot be subjected to a writ of execution except under certain circumstances. Likewise it is seen that where once property is attached, a junior writ must take subject to the prior writ. So, where property is held by a writ of attachment, a subsequent levy by another officer by virtue of a writ of execution would be a nullity so far as the attachment lien is concerned.<sup>11</sup>

§ 463. Duty of Sheriff to Levy Promptly.—An execution plaintiff has the right to insist that the sheriff levy within a reasonable time upon the property of the defendant against whom the process is directed, even though such execution plaintiff has not given instructions to the sheriff as to where any of the execution debtor's property may be. This is particularly so if the sheriff can, by reasonable effort, find property which is subject to the writ.<sup>12</sup> It is the general duty of the officer to make a levy under the execution as soon as it comes to his possession.<sup>13</sup> However, he has authority to levy within any time during the period within which the writ is returnable.<sup>14</sup> But still, if a loss results by reason of the officer taking the full time allowed by law or the writ, he will be liable, provided he has failed to carry out lawful instructions given him by the plaintiff, if it appears that by following such instructions, loss would have been avoided. The rule controlling such cases is that if it can be reasonably inferred from the evidence that a prompt levy upon, and sale of, the debtor's property, would

10. Hagan v. Lucas, supra, see Sec. 453, supra.

11. Hagan v. Lucas, 10 Pet (US) 400, 9 L ed 470, see Secs. 452 et seq. Gibbons v. Ellis, 165 P 783, 63 Colo 76; Davenport v. Lacon, 17 Conn 278; Martin v. Dryden, 1 Gil (Ill) 187; In re Bryce Cash Store, 124 So 544, 12 La App 365 Grand Island Banking Co. v. Costello, 63 NW 376, 45 Neb 119; Oswego First Nat'l Bank v. Dunn, 97 NY 149, 49 AR 517; Mc-

Carthy v. Farley, 267 NYS 733, 149 Misc 360; Lowman & Hanford Co. v. Ervin, 200 P 221, 157 Wash 649.

12. Hargrave v. Penrod, Beecher's Breese (Ill) 401, 12 AD 201; Steele v. Crabtree, 58 NW 1022, 40 Neb 420; Habersham v. Sears, 5 F 208, 11 Ore 431, 50 AR 481.

13. Goode's Adm'r v. Miller, 78 Ky 235.

14. U. S. v. Hogg, 112 F 909, 50 OCA 609; State v. Leland, 82 Mo 260

have enabled the judgment creditor to collect his debt, then the officer is liable therefor.<sup>15</sup> In other words, the sheriff must use due diligence in an attempt to secure the necessary moneys the writ directs.<sup>16</sup>

§ 464. Execution against One of Two Tenants in Common.—Where a sheriff under a writ of execution levies upon the interest of a cotenant, he has the right to take into his possession the common property of the cotenants by virtue of the writ, and thereby the execution defendant's interest in such property may be sold.<sup>17</sup> If a sheriff levies upon property of cotenants who are not parties to the execution, and it is not directed against them, he is liable for such levy, and he becomes in such case a trespasser ab initio.<sup>18</sup> In the sale of property levied upon under a writ of execution, the sheriff has no right to make a partition of the property.<sup>19</sup> Likewise where the sheriff foreclosed a mortgage against a tenant in common, he could not eject the other tenants in common, but he could place the purchaser in sale in joint possession along with the other cotenants. If he attempts to do more, he is liable as a trespasser.<sup>20</sup>

What has been said in the foregoing part of this section would have equal application whether the property were real or personal,<sup>20a</sup> except that the officer upon levying on realty would not have a right to dispossess the other cotenants and, in most states, the execution defendant.

15. Hale v. Lange, 8 SW(2d) (Tex Civ App) 1046, see also Ranlett v. Blodgett, 17 NH 298, 43 Am Dec 603; Goodrich Lumber Co. v. Valley Plumbing & Supply Co., 267 SW (Tex Civ App) 1036.

16. Davis v. Griffin, 150 So 326, 227 Ala 390; where a statute provides for actions against an officer in neglecting to return an execution within the return date the word "officer" includes both sheriff and constable. Ditsch v. Finn, 252 NW 562, 214 Wis 305.

17. Conolley v. Power, 232 P 744, 70 Cal App 70; Pettingill v. Bartlett, 1 NH 87; Beezley v. Crossen, 17 P 577, 16 Ore 72; Spalding v. Allred, 64 P 1100, 23 Utah 354.

18. James v. Graham, 78 SE 82, 114 SC 107; Spalding v. Allred, supra; Conolley v. Power, supra.

19. Conolley v. Power, supra.

20. James v. Graham, supra.

20a. Hill v. Jones, 65 Ala 214; Thompson v. Mawhinney, 17 Ala 362, 52 Am Dec 176; Stanton v. French, 23 P 355, 83 Cal 194; Waldman v. Broder, 10 Cal 378; McDaniel v. Columbus Fertilizer Co., 34 SE 508, 109 Ga 284; Smith v. Crawford, 81 Ill 296; Thornburg v. Wiggins, 34 NE 909, 135 Ind 178, 41 Am St Rep 422, 22 LRA 42; Trabue v. Conners, 1 SW 470, 84 Ky 283, 8 Ky L 288; Michigan State Bank v. Kern, 155 NW 502, 189 Mich 467; Midgley v. Walker, 60 NW 290, 101 Mich 583, 45 Am St Rep 431; Jones v. Richardaon, 42 SW 440, 99 Tenn 614; Spalding v. Allred, 64 P 1100, 23 Utah 354; Burton v. Kennedy, 21 At 529, 63 Vt 350, 25 Am St Rep 760; Morris v. Baird, 78 SE 371, 72 W Va 1, AC 1915A 1273 and note; for levy on partner's interest see Sec. 361, supra; Pettingill v. Bartlett, supra.

§ 465. **Confusion of Goods.**—Where the goods of another are mixed with those of an execution debtor so that the levying officer cannot distinguish between them he may seize the whole provided the other co-owner declines, fails or refuses to point out the goods or part not belonging to the execution defendant.<sup>21</sup> Where there is such confusion of goods, the sheriff will not be liable until demand has been made upon him by a third party claiming a part of the goods, and the claimant is required in making his demand to specifically point out his property, in order to fasten liability upon the officer.<sup>22</sup> However, the officer has been subjected to liability for levying upon such confused goods where the confusion was due to the act of someone else other than the owner, and nothing was done to mislead the officer.<sup>23</sup> Where the goods are claimed by a third person and confused with those of the execution debtor, and such third person asks that he be allowed to designate his goods and the officer refused, it is not necessary that such third party make a demand before bringing an action for conversion of his goods.<sup>24</sup> In general, where goods have been confused with those of an execution debtor and the officer levies upon the whole, and where the third party claimant notifies the officer of his ownership whether the goods were intermingled with his consent or not, and he designates the particular goods which he owns, and asks that they be returned to his possession, the officer is subjected to liability for not returning the goods.<sup>25</sup>

§ 466. **When Sheriff May Sell Goods Seized in Execution.**—After the sheriff has once levied upon property and taken it into his possession, it is not only his duty to sell it but he assumes liability in the event that he does not.<sup>26</sup> However, if the execution debtor offers, at the time of sale of his property, to satisfy the judgment by paying the necessary money, the officer is under a duty to accept the money and not to hold the sale or stop it if it has begun, and bidders thereat may not complain. When the money is paid, the purposes of the execution have been accomplished.<sup>27</sup> An officer may hold an execution sale after the expiration of his term of office, if the levy

21. *Wellington v. Sedgwick*, 12 Cal 409; *Mayer v. Wilkins*, 19 So 632, 37 Fla 244.

22. *Smith v. Welch*, 10 Wis 91; *Wellington v. Sedgwick*, supra.

23. *Foot v. People*, 14 Ill App 280.

24. *Greenberg v. Stevens*, 114 Ill App 483, 72 NE 722, 212 Ill 606.

25. *Wellington v. Sedgwick*, 12 Cal

469; *Bond v. Ward*, 7 Mass 123, 5 AD 28; *Shumway v. Rutter*, 8 Pick. (Mass) 443, 19 AD 340; *Moore v. Bowman*, 47 NH 494.

26. *LaSociete Francaise v. McHenry*, 49 Cal 351, affirmed 95 US 58, 24 L ed 370.

27. *U. S. v. Vestal*, 12 F 59, 4 Hughes 467.

was made during his official term.<sup>28</sup> The sale should be held at the place designated in the notices; otherwise such sale is void.<sup>29</sup> Also the fact that the writ of execution has expired, if the property has been seized before the return date of the execution, does not prevent the seizing officer, after such expiration of the writ, from proceeding with the sale of the property.<sup>30</sup>

§ 467. **For Valid Levy Sheriff Must Be a Trespasser but for His Process; Acts Constituting Valid Levy.**—For there to be a valid levy by virtue of a writ of execution, generally speaking, the officer should so act to bring home to those in possession of the property the fact that he is taking control of property upon which he is levying.<sup>31</sup> This gives rise to the expression, that the officer in order for there to be a valid levy must do some act if not protected by the writ that would make him a trespasser.<sup>32</sup> In other words, a valid levy of execution results where an officer does something which is equivalent to a claim of dominion over property, coupled with a power to enforce it. He must perform some act which not only indicates an intention to seize the property, but he must reduce it to his possession, actual or constructive, or at least bring it within his immediate control.<sup>33</sup> Where the officer levies upon property, the levy should be open and without any suggestion of concealment. It must be so unequivocal as to not have any misunderstanding of what the officer may be doing.<sup>34</sup> To the completion of a levy, seizure, either actual or constructive, is absolutely indispensable. Actual seizure is accomplished by a manual seizing of the thing intended to be seized. A constructive seizure is accomplished by the actual reduction by

28. *Kent v. Roberts*, 14 F. Cases # 7715, 2 Story 591; *Vroman v. Thompson*, 16 NW 808, 51 Mich 452; *Holmes v. Crooks*, 76 NW 1073, 66 Neb 466; *Union Dime Saving Inst. v. Anderson*, 83 NY 174.

29. *Johnston County v. Smith*, 165 S E 707, 203 NC 255.

30. *A. Baldwin & Co. v. LeLong*, 142 So (La App) 879.

31. *In re Brinn*, 262 F 527; *C. T. C. Investment Co. v. Daniel Boone Coal Corp.*, 58 F(2d) 305; *Peppers v. Harris*, 124 NW 625, 146 Iowa 635; *Nelson v. Van Gazelle Valve Manfg Co.*, 17 Atl 943, 45 NJE 594; *Haggerty v. Wilber & Barnet*, 16 Johns. (NY) 287, 8 Am Dec 321; *Beekman v. Lansing*, 3 Wend (NY) 446, 20 Am Dec 707; *Stonebridge v. Perkins*, 21 NYS 628, 438

2 Misc Rep 162, 50 NY St 221, 35 NE 980, 141 NY 1.

32. *In re Brinn*, supra; *C. T. C. Investment Co. v. Daniel Boone Coal Corp.*, supra; *Nelson v. Van Gazelle Valve Manfg Co.*, supra; *Peppers v. Harris*, supra; *Stonebridge v. Perkins*, supra.

33. *C. T. C. Investment Co. v. Daniel Boone, Coal Corp.*, supra.

34. *Crittenden v. Rogers*, 42 Ill 100; *Crisfield v. Neal*, 13 P 272, 36 Kan 278; holding an endorsement on the writ in the presence of the debtor and the property without any announcement or exercising dominion over the property is insufficient. *Barker v. Binninger*, 14 NY 270; *Portis v. Parker*, 8 Tex 23, 58 AD 95.

the officer of the property intended to be seized to his own control. He must have brought such property so far under his subjection that he could exercise control over it. He must exercise or assume to exercise dominion over it by virtue of his writ. He must do some act for which he could be successfully prosecuted as a trespasser if it were not for the protection afforded him by the writ.<sup>34a</sup> A mere "pen and ink" or "paper" levy will not suffice.<sup>34b</sup> In this country it is not necessary to remove the property levied upon from the place of levy, and the levy is not necessarily rendered invalid by leaving it in the possession of the defendant.<sup>34c</sup> A contrary rule prevails in England.<sup>34d</sup> The generally accepted rule is that the officer must have the property in view at the time of making the levy.<sup>34e</sup> But a contrary view is not without support, especially in so far as the execution debtor is concerned.<sup>34f</sup> A levy on goods in a building, without entering it, cannot be made by proclaiming and endorsing the purported levy on the writ, nor by placing a guard at the building.<sup>34g</sup> The nailing of the

34a. *Higdon v. Warrant Warehouse Co.*, 63 So 938, 10 Ala App 406; *Meyer v. Missouri Glass Co.*, 45 SW 1062, 66 Ark 286, 67 Am St Rep 927; *Hereford v. Benton*, 80 P 499, 20 Colo App 500; *Jones v. Howard*, 27 SE 765, 99 Ga 461, 59 Am St Rep 231; *Quackenbush v. Henry*, 3 NW 262, 42 Mich 75; *C. T. C. Investment Co. v. Daniel Boone Coal Corp.*, supra.

34b. *Kennedy v. Clayton*, 29 Ark 270; *Yomans v. Bird*, 6 SE 179, 81 Ga 340; *Mulheisen v. Lane*, 82 Ill 117; *Larsen v. Ditto*, 90 Ill App 384; *Rix v. Silknitter*, 10 NW 653, 57 Iowa 262; *Crisfield v. Neal*, 13 P 272, 36 Kan 278; *Horsev v. Knowles*, 22 Atl 1104, 74 Md 602.

34c. *McCullough v. McClintock*, 7 So 149, 88 Ala 567; *Tucker v. Bond*, 23 Ark 268; *Myers v. Lee*, 95 SE 475, 22 Ga App 20; *Trimble v. Hunt*, 169 Ill App 259; *Horgan v. Lyons*, 60 NW 1099, 59 Minn 217; *Sawyer v. Bray*, 8 SE 885, 102 NC 79, 11 Am St Rep 713; *Bland v. Whitfield*, 46 NC 122; *Nelson v. Van Gazelle Valve Mfg. Co.* 17 Atl 943, 45 NJE 594; *Wohle v. Conner*, 83 NY 231; *Roth v. Wells*, 20 NY 471, 41 Barb 270; *Acton v. Knowles*, 14 Ohio State 18; *Stuckert v. Keller*, 105 Pa 386; *Nighbert v. Hornsby*, 42 SW 1060, 100 Tenn 82, 66 Am St Rep 736; *Tyler v. Dunton*, 1

Tenn Ch 361; *Hopping v. Hicks*, 190 SW (Tex Civ App) 1119; *Burch v. Mounts*, 185 SW (Tex Civ App) 889.

34d. *Rice v. Serjeant*, 7 Mod 37, 97 Eng Reprint 1078; *Blades v. Arundale*, 1 M & S 711, 105 Eng Reprint 265; *Bradley v. Wyndham*, 1 Wils K B 44, 96 Eng Reprint 483.

34e. *Taffits v. Manlove*, 14 Cal 47, 73 Am Dec 610; *Minor v. Herriford*, 25 Ill 344; *Rix v. Silknitter*, 10 NW 653, 57 Iowa 262; *Banks v. Evans*, 18 Miss 35, 48 Am Dec 734; *Perry v. Hardison*, 5 SE 230, 99 N. 21; *Bond v. Willett*, 31 NY 102, 1 Abb Dec 165, 1 Keyes 377, 29 How Pr 47; *Murphy v. Swadener*, 33 Ohio State 85; *Carey v. Bright*, 58 Pa 70; *Brian v. Strait*, 23 SCL (Dud) 19; *Ballard v. Dibrell*, 28 SW 1087, 94 Tenn 229; *Lynch v. Payne*, 49 SW (Tex Civ App) 408; *Keniston v. Stevens*, 29 Atl 312, 66 Vt 351; *Horsev v. Knowles*, supra; *Tyler v. Dunton*, supra.

34f. *McGirr v. Hunter*, 13 Ill App 195; *Jayne v. Dillon*, 28 Miss 283; *Dean v. Thatcher*, 32 NJL 470; *Fox v. Croonan*, 2 Atl 444, 47 NJL 493, 4 Atl 314, 54 Am Rep 190; *Dresser v. Ainsworth*, 9 Barb (NY) 619; *Rhame v. McRoy*, 41 (7 Rich Law) SCL 37.

34g. *Taffits v. Manlove*, 14 Cal 47, 73 Am Dec 610; *Hibbard v. Zenor*, 39 NW 714, 75 Iowa 471, 9 Am St Rep

doors to a building without entering it is not a sufficient levy on its contents.<sup>34h</sup> The rule is different with respect to levying on a safe or strong box. Even though it is locked and the officer is uninformed as to its contents, a levy on the safe or box includes the contents.<sup>34i</sup> Similarly, it has been held in Canada, a levy upon a building as personalty is valid even though it is locked.<sup>34j</sup> It would seem to follow, that a levy on a building as personalty even though locked, would embrace its contents. No good reason is readily apparent that the rule applicable to a safe should not control in these circumstances. As between the officer and the execution defendant, the invalidity or insufficiency of a levy may be waived or the debtor may be estopped to question it and this is the result where the debtor gives a redelivery or forthcoming bond.<sup>34k</sup> The rules enunciated and discussed hereinbefore with respect to levies would doubtless find equal application to writs of attachment.

§ 468. *Special Execution.*—Where it is provided by statute, it may be directed in the writ itself that certain special property be levied upon.<sup>35</sup> Where it is not provided by statute in regard to designation of property in the writ, such designation should not be made and no particular property should be specified.<sup>36</sup> Where the property is designated in the writ to be levied upon it should be described with such particularity so as to enable the sheriff to know what property is to be levied upon.<sup>37</sup> Where a general writ is issued by mistake when a special writ should have issued but the only property levied upon is that which should have been levied upon and which should have been indicated in the writ, such

497; *Haggerty v. Wilber*, 16 Johns. (NY) 287, 8 Am Dec 321; *Bradley v. Kesse*, 5 Cold (Tenn) 223, 94 Am Dec 246; *Nelson v. Van Gazelle Valve Mfg. Co.*, supra; *Banks v. Evans*, supra.

34h. *Lynch v. Payne*, supra, see also *Meye v. Missouri Glass Co.* supra.

34i. *Smith v. Clark*, 69 NW 1011, 100 Iowa 605; *Elliott v. Bowman*, 17 Mo App 693.

34j. *Dixon v. Mackay*, 22 Canada L T O'ce Notes, 374.

34k. *Cawthorn v. McCraw*, 9 Ala 619; *Roebuck v. Thornton*, 19 Ga 149; *Walker v. Shotwell*, 20 Miss 544; *Ballard v. Dibrell*, 28 SW 1087, 94 Tenn 229; *Freeman on Executions*, Sec. 200. It would seem that this would be the

result where such bond were given and the property therein described even though no levy were made or attempted.

35. *McClelland v. Devilbiss*, 1 Pa Co 613.

36. *Covell v. Heyman*, 4 S Ct 355, 111 US 176, 28 L ed 390; *Clonts v. Ritch*, 12 Fla 633, 95 AD 345; *Brown v. Duncan*, 23 NE 1126, 132 Ill 413, 22 ASR 545; *Koepke v. Dyer*, 45 NW 143, 80 Mich 311; *Bower v. Holladay*, 22 P 553, 18 Ore 491.

37. *Jones v. McKinney*, 68 SE 788, 135 Ga 60; *State v. Stout*, 11 NJL 362; *Smith v. Dwight*, 148 P 477, 80 Ore 1, AC 1918D 563.

levy is not void.<sup>38</sup> However, where a special writ is issued and there is no authority for such a writ, it is void.<sup>39</sup>

§ 469. **Liability for Failure to Levy.**—Where there is delivered to the sheriff or constable an execution and there is a failure to execute the writ, the officer becomes liable for such breach of duty.<sup>40</sup> The officer is liable for failure to enforce an execution even though he may honestly believe that all of the property of the debtor was exempt, and therefore not subject to execution.<sup>41</sup> If the process delivered to the sheriff is not void even though it may be irregular it does not relieve the officer from liability for failure to levy the writ.<sup>42</sup> The Supreme Court of Washington held that in order for the execution plaintiff to recover from the sheriff because of the failure to make levy, the judgment creditor must show that the debtor had property which could have been levied upon, the value of such property, that the sheriff did not act promptly or at all, and that property had not been secured in satisfaction of the judgment.<sup>43</sup> But it is submitted that the plaintiff, under the sounder and better reasoned adjudications, is not required to do more than offer and to sustain by proofs that debtor was possessed, during the life of execution, of non-exempt property.<sup>43a</sup> The rule in Texas seems to be that the burden is on the officer to show that he was unable to collect on the execution.<sup>43b</sup> It goes without saying that where the writ of execution is void no liability attaches.

§ 470. **Presumption of Levy in Due Season.**—The presumption of law is that an officer does his duty. Where an officer sells property at an execution sale it is presumed that he has theretofore made a valid levy on such property.<sup>44</sup>

38. *Stotts v. Brookfield*, 18 SW 179, 55 Ark 307; *Cabell v. Grubbs*, 48 Mo 353.

39. *Midkiff v. Bedell*, 127 SW (Tex Civ App) 271.

40. *Abbott v. Gillespy*, 75 Ala 180; *McKinney v. Blakely*, 112 SW 976, 87 Ark 405; *Freeland v. Akers*, 25 NYS 986, 5 Misc 528, 58 NY St Rep 101; *Tubiola v. Baker*, 233 NYS 373, 225 App Div 420; *Habersham v. Sears*, 5 P 208, 11 Ore 431, 50 AR 491; *Blanscet v. Palo Duro Furniture Co.*, 68 SW (2d) (Tex Civ App) 527.

41. *Goodrich Lumber Co. v. Valley Plumbing Co.*, 267 SW (Tex Civ App) 1036; *Harston v. Langston*, 292 SW

(Tex Civ App) 648.

42. *Couch v. Atkinson*, 32 Ala 633; *Com. v. O'Cull*, 7 J J Marsh. (Ky) 149, 23 AD 393.

43. *Wilcox v. Bear*, 248 P 58, 140 Wash 39.

43a. *Haws v. Fracaro*, 27 F(2d) 74; *Houston v. Howell*, 136 SE 474, 36 Ga App 330; *Conway v. Magill*, 73 NW 702, 53 Neb 370.

43b. *Webb v. First Texas Chem. Co.*, 86 SW(2d) (Tex Civ App) 818; *Holtzman v. Coffall*, 79 SW(2d) (Tex Civ App) 178; *Harston v. Langston*, supra.

44. *Hamblen v. Hamblen*, 33 Miss 455, 69 AD 358; *McCombs v. Becker*, 3 Hun(NY) 342, 5 Thomp & C 560; *West*

§ 471. **Title Which Passes by Sheriff's Sale.**—When a sheriff sells property under an execution, he sells not the absolute title thereto but merely the property of the execution defendant therein. This principle often comes up for consideration of the courts when actions are instituted by third persons drawing into question the title derived from an execution sale. And this rule further is that the title acquired by the purchaser is such as the execution defendant had at the time of the levy or seizure under execution. Differently stated, the purchaser merely obtains a quit claim from the sheriff at an execution sale of the debtor's title without any warranty on the part of the officer making the sale, or the parties to the action, and the rule is the same whether the property sold is realty or personalty.<sup>45</sup> The rule is that the purchaser at an execution sale takes whatever right, title and interest the execution defendant had in and to the property sold, and this is true even though the property sold is realty and is erroneously described. The operation of this rule is such, that if a greater or smaller interest than the execution defendant possessed is attempted to be sold by the officer under the execution nevertheless the actual interest passes to the purchaser at the sale.<sup>46</sup> If the execution defendant has no

*v. Loeb*, 42 SW 612, 16 Tex Civ App 399. After a lapse of time it will be presumed that there was a valid levy upon land which was sold at an execution sale where the docket merely shows the issuance of the execution and the sheriff's deed reciting the levy and sale. *West v. Loeb*, supra.

45. *Galveston H. & H. Ry. Co. v. Cowdrey*, 11 Wall. (US) 459, 20 L ed 199; *Cotton v. Carlisle*, 4 So 670, 85 Ala 175, 7 ASR 29; *Hendrix v. Southern Ry. Co.*, 30 So 596, 130 Ala 205, 89 ASR 27; *Lang's Heirs v. Waring*, 25 Ala 625, 60 AD 533; *Stotts v. Brookfield*, 18 SW 179, 55 Ark 307; *Boogs v. Fowler*, 16 Cal 559, 76 AD 561; *Riley v. Nance*, 31 P 1126, 97 Cal 203, 32 P 315; *Bartholomew v. Warner*, 32 Conn 98, 85 AD 251; *Bridger v. Exchange Bank*, 56 SE 97, 126 Ga 821, 8 LRANS 463, 115 ASR 118; *Hutson v. Wood*, 105 NE 343, 263 Ill 376, AC 1915C 587; *Luken v. Fickle*, 84 NE 561, 42 Ind App 445; *Lewark v. Carter*, 20 NE 119, 117 Ind 208, 3 LRA 440, 10 ASR 40; *Hamant v. Creamer*, 63 Atl 736, 101 Me 222, 8 AC 165; *Ben-*

*son v. Smith*, 42 Me 414, 66 AD 285; *Perkins v. Meighan*, 49 SW 498, 147 Mo 617, 71 ASR 586; *Brown v. Timmons*, 266 P 176, 79 Mont 246, 57 ALR 1122; *Pope v. Benster*, 60 NW 561, 42 Neb 304, 47 ASR 703; *Butler v. Fitzgerald*, 61 NW 640, 43 Neb 192, 27 LRA 252, 47 ASR 741; *Zubler v. Porter*, 120 Atl 194, 98 NJL 444, 27 ALR 822; *Gilman v. Tucker*, 28 NE 1040, 128 NY 190, 13 LRA 304, 26 ASR 464; *Sutcliffe v. Dohrman*, 18 Ohio 181, 51 AD 450; *Taylor v. Fowler*, 18 Ohio 567, 51 AD 469; *Callen v. Ellison*, 13 Ohio State 446, 82 AD 448; *Smith v. Seaton*, 11 Atl 661, 117 Pa 382, 2 Am St Rep 668; *Gonce v. McCoy*, 49 SW 764, 101 Tenn 587, 70 ASR 714; *Parker v. Swan*, 1 Humph (Tenn) 80, 34 AD 619.

46. *Buxton v. Penn. Lumber Co.*, 221 F 718; *Figh v. Taber*, 82 So 495, 203 Ala 253; *Costello v. Friedman*, 71 P 935, 8 Ariz 215; *Dawson v. Parham*, 18 SW 46, 55 Ark 286; *Widenmann v. Weniger*, 130 P 421, 164 Cal 667; *Dodge v. Walley*, 22 Cal 224, 83 AD 61; *Los Angeles Bank v. Raynor*, 61

title, then the purchaser takes none.<sup>46a</sup> It should be noted however, that a title to the property acquired by the execution defendant after the levy and before the sale will generally pass to the purchaser.<sup>47</sup> The rule is also generally recognized to the effect that a title to the property acquired by the execution defendant after the sale will not pass to the execution purchaser.<sup>48</sup> The last mentioned rule however is inapplicable to the perfection of an inchoate title held by the judgment debtor at the time of levy or seizure and is thereafter by him perfected. In these circumstances it seems that the title inures to the benefit of the purchaser and the date of perfection of the title does not seem to be material.<sup>49</sup> But this could not apply to lands acquired under general homestead statutes as well as stock raising homestead law, for the reason that lands acquired under these federal statutes are not subject to be taken for debts contracted before the issuance of patent. They are exempt from debts contracted after the issuance of the land office receiver's final certificate or receipt and before the actual issuance of the patent itself. So, if the lands cannot be levied upon except for debts contracted after the patent has been issued, there can be no title subject to an execution to be perfected, because the inchoate title is exempt from levy as to any debt that could be contracted in advance of the date of the issuance of the patent.<sup>49a</sup> The rule of caveat emptor generally is applied to execution sales.<sup>50</sup>

Cal 145; *Blood v. Light*, 38 Cal 649, 99 Am Dec 441; *Hamant v. Creamer*, supra.

46a. *Milner v. DeLoach Mill Mfg. Co.*, 36 So 765, 139 Ala 645, 101 Am St Rep 63; *Hendrix v. Southern R. Co.*, 30 So 596, 130 Ala 205, 89 Am St Rep 27; *Tallman v. Huff*, 173 P 869, 65 Colo 128, LRA1918F 399; *Ohio etc. Smelting etc. Co. v. Barr*, 144 P 552, 58 Colo 116; *Comrie v. Kleman*, 147 NYS 589, 162 App Div 510, 13 Mills 121, 118 NE 1055, 222 NY 558; *Gross v. Washington*, 39 SW (Tenn Ch) 442; *Morrison v. Thomas*, 48 SW 500, 92 Tex 329; *Costello v. Friedman*, supra.

47. *King v. King*, 93 Atl 20, 247 Pa 89; *Willis v. Pounds*, 25 SW 715, 6 Tex Civ App 512.

48. *Murphy v. Green*, 22 So 112, 120 Ala 112; *Montgomery v. Whiting*, 40 Cal 294; *Kenyon v. Quinn*, 41 Cal 325; *Emerson v. Sansome*, 41 Cal 552; *McArthur v. Oliver*, 27 NW 689, 60 Mich

605; *Westheimer v. Reed*, 19 NW 626, 15 Neb 662; *Gentry v. Callahan*, 4 SE 535, 98 NC 448; *Rosenthal v. Mdunts*, 130 SW (Tex Civ App) 192.

49. *Kingman v. Holthaus*, 59 F 305; *Massey v. Papin*, 24 How (US) 362, 16 L ed 734; *Callahan v. Davis*, 2 SW 216, 90 Mo 78.

49a. *Ruddy v. Rossi*, 39 S Ct 46, 248 US 104, 63 L ed 148, 8 ALR 943; 43 USCA Sec. 175, 291 et seq.; *Ash v. Eriksson*, 132 NW 997, 115 Minn 478, holding same as *Sprinkle v. West*, 114 P 430, 62 Wash 587, 34 LRA(NS) 404, AC 1912D 281, holding judgment for a debt contracted before patent issues is not a lien on the land; *Citizens Nat'l Bank v. Ruley*, 226 P 416, 29 NM 662; *Wallowa Nat'l Bank v. Riley*, 45 P 708, 29 Ore 289, 54 Am St Rep 794; *Schultz v. Levy*, 54 P 184, 33 Ore 373.

50. *Buxton v. Pennsylvania Lumber Co.*, 221 F 718; *Nigh v. Taber*, 82 So 495, 203 Ala 253; *McGuigan v. Rix*,

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If the officer who levies upon goods as the property of the execution defendant and at the same time has in his hands an execution against a third party claimant thereof, and proceeds to sell the property under the levy thus made, the sale thereunder conducted does not operate to pass the title of the third party claimant, and the execution in the hands of the officer will not serve to justify a title as against such claimant.<sup>51</sup>

§ 472. *Rights of Sheriff under Execution.*—The right of a sheriff to receive payment of an execution is based, not upon the lien created by the execution but, upon the power it confers upon him to levy and sell. While that power continues, he has the right to receive payment; when that power ceases, his right to receive payment is terminated. If, without having made a levy, he receives payment after the return day of the execution, he may be liable individually to the party entitled to the money, if he fails to account, but his official liability does not extend to such a case. Such receipt of money by the sheriff does not bind the plaintiff in the execution nor incur liability of the officer's official bondsmen. The reason the plaintiff is not bound by such payment is that the sheriff's authority to act for the plaintiff was in the officer's official—not individual—capacity, and ended when the process expired; and where a debtor makes payment to an officer after process has expired this makes the officer his agent.<sup>52</sup> In other words, in order for payment to a sheriff or constable to be an effectual discharge of the judgment debt or obligation, there must be in the hands of the officer a live execution at the time of such payment.<sup>53</sup> But undoubtedly, if the officer were authorized by the creditor to receive payment, he could do so, and such payment would discharge the debt, but it would be in a purely private capacity and not as an officer. This rule applies whether payment is made to the officer before he receives an execution or after the return date thereof and a payment made at a time when the officer does not hold a live execution is not binding and does not

215 SW 811, 140 Ark 418; *Widenmann v. Weniger*, 130 P 421, 164 Cal 607; *Ohio etc. Smelting Co. v. Barr*, 144 P 652, 58 Colo 116; *Gracy v. Fielding*, 70 So 625, 71 Fla 1; *Thompson v. Selcer*, 83 SE 965, 142 Ga 809; *Brewer v. Warner*, 182 F 411, 105 Kan 168, 5 ALR 385, 185 P 889, 105 Kan 591; *Burrows v. Parker*, 48 P 1100, 31 Ore 57, 65 ASR 812.

51. *Davis v. Calloway*, 72 NC 479.

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52. *Edwards v. Ingraham*, 31 Miss 272; *Grandstaff v. Ridgely*, 30 Grat (Va) 1.

53. *Chapman v. Cowles*, 41 Ala 103, 91 AD 508; *Irwin v. McKee*, 25 Ga 646; *Turner v. Belew*, 3 JJ Marsh. (Ky) 50; *Craig v. Graves*, 4 JJ Marsh. (Ky) 603; *Crane v. Bedwell*, 25 Miss 507; *Corlies v. Waddell*, 1 Barb (NY) 355.



operate as a payment unless it can be proven that the judgment plaintiff actually received the money,<sup>54</sup> or unless the plaintiff authorizes the officer in his private capacity as plaintiff's agent to accept payment.

If a sheriff or constable during the currency of the execution levies the same upon property, he may proceed to a sale thereof without further process, even after the return day named in the execution and as an illative consequence of this rule, the principle of law becomes readily apparent that the officer may receive the money during such period of time he may legally and effectively make a sale.<sup>55</sup> It hardly need be added that a sale made on the return day is valid.<sup>56</sup> It is not material that the levy is not made until the return day in so far as the officer's right to sell thereafter is concerned.<sup>57</sup>

§ 473. To Whom the Sheriff May Pay Over Proceeds.—The sheriff should obey the execution in the payment of the proceeds arising from an execution sale, but as a general rule he may pay the same to the judgment plaintiff or his attorney of record after, of course, deducting his lawful fees and charges for making said sale.<sup>58</sup> Of course if there are any conditions imposed upon the right of the plaintiff to receive the money it is the duty of the sheriff to see to it that such conditions are complied with.<sup>59</sup> However, if there are conflicting claims to the funds arising from the sale of which the sheriff has notice, he is liable if he distributes the money to the wrong person.<sup>60</sup> If the sheriff is in doubt as to the claimant lawfully en-

54. *Stephens v. Boswell*, 2 JJ Marsh. (Ky) 29; *Rothschild v. Ramsay*, 2 La 277; *Wyer v. Andrews*, 14 Me 168, 29 AD 497; *Edwards v. Ingraham*, 31 Miss 272.

55. *Mason v. Bennett*, 52 F 343; *Wheaton v. Sexton's Lessee*, 4 Wheat. (US) 503, 4 L ed 626; *Dennis v. Chapman*, 19 Ala 29, 54 AD 186; *Southern Calif. Lumber Co. v. Ocean Beach Hotel Co.*, 29 P 627, 94 Cal 217, 28 ASR 115; *Ollis v. Kirkpatrick*, 28 P 435, 3 Idaho 247; *Cox v. Currier*, 17 NW 767, 62 Iowa 551; *Ireland v. Linn County Bank*, 176 P 103, 103 Kan 618, 2 ALR 184; *Karnes v. Alexander*, 4 SW 518, 92 Mo 660; *J. E. Linde Paper Co. v. Gevert*, 105 Atl 447, 92 NJL 280; *Ansonia Brass etc. Co. v. Conner*, 9 NE 238, 103 NY 502, 11 NY Civ Proc 371, 67 How 157, 8 NY Civ Proc

R 173, 11 Valy 326; *Hensen v. Peter*, 164 P 512, 95 Wash 628, LRA1918F 652, 186 P 1119, 97 Wash 702; *Grandstaff v. Ridgely*, supra.

56. *Taylor v. Gaskins*, 12 NC 295.

57. *United States v. Hogg*, 111 F 292, aff 112 F 909, 50 CCA 608.

58. *Brockett v. Bradford*, 53 Ga 274; *Peoria Savings etc. Co. v. Elder*, 45 NE 1083, 165 Ill 55, 65 Ill App 587; *Schoonover v. Osborne*, 90 NW 344, 117 Iowa 427; *McCahill v. Maguire*, 44 Atl 499, 103 Pa 428; *Riley v. Ogden*, 40 Atl 76, 185 Pa 506; *Adams v. Nat'l Bank of Commerce*, 70 P 105, 30 Wash 20.

59. *Tift v. Goode*, 47 Ga 507.

60. *John Spry Lumber Co. v. ChapPELL*, 50 NE 704, 184 Ill 639, 85 Ill App 223.

titled to the money in his hands arising as the proceeds of the sale, he should apply to the court for orders with respect thereto or bring an action of interpleader or an action for a declaratory judgment under the modern practice.<sup>61</sup> If the execution directs the officer to return the money into court he should comply with such direction and the court will, in a proper case, compel the compliance therewith and in any case he may exonerate himself in so doing.<sup>62</sup> Where the defendant directs the sheriff not to distribute the money arising from the sale, the sheriff seems to have his election, at least in Pennsylvania, to retain the money until he is sued therefor, or apply to the court for directions.<sup>63</sup> Where an officer receives money from an execution defendant, and promises to return it in case he fails to apply it upon the execution, and fails to so apply or return it, the execution defendant cannot maintain an action to recover the money back, as the misapplication is a question between the officer and execution plaintiff.<sup>63a</sup> It seems however that if the sheriff requires an indemnifying bond he may not thereafter apply to the court for directions with respect to the distribution of the money arising from an execution sale.<sup>64</sup>

§ 474. Rule as to Application of Money on Execution against Execution Creditor.—As to whether or not an officer having an execution in his hands against the execution creditor for whom he collects the money, may apply the money on the execution against the execution creditor, the authorities are in conflict. In some jurisdictions this can be done,<sup>65</sup> while in others the right is denied.<sup>66</sup> Probably the safer practice would be for an application to be made to the court out of which the original execution issued for authority to apply the money arising therefrom upon an execution against the

61. *Leonard v. Johnson*, 43 Ala 596; *Millikan v. Fox*, 84 NC 107; *Fox v. Kline*, 85 NC 173; *Woodruff v. Chapin*, 23 NJL 566, 57 AD 416; *Phillips v. Wheeler*, 67 NY 104, 2 Hun 603, 6 Thomp & C 306; *Weltner's Appeal*, 63 Pa 302.

62. *Wortman v. Conyngham*, 30 F Cas. # 18056, Pet CC 241; *Thompson v. Daniel*, 17 So 830, 47 La Ann 1401; *State v. Taylor*, 56 Mo 492; *Gifford v. McGuinness*, 53 Atl 87, 63 N.E. 834. 92 ASR 686; *McDonald v. Allen*, 37 Wis 108, 19 AR 754; *Woodruff v. Chapin*, supra.

63. *O'Donnell v. Rorer*, 4 Pa Dist 146; *McCanna etc. Co. v. Continental* 446

*Hotel Co.*, 97 Atl 700, 252 Pa 482.

63a. *Henry v. Rich*, 64 NC 379.

64. *Ramsour v. Young*, 26 NC 133.

65. *Columbus Factory v. Herndon*, 54 Ga 209; *Ex parte Fearle*, 13 Mo 467, 53 AD 155; *Maddox v. Kennedy*, 31 SCL (2 Rich Law) 102; *Dolby v. Mullins*, 3 Humph (Tenn) 437, 39 AD 180; *Branseum v. Reese*, 219 SW (Tex Civ App) 871; *Mann v. Kelsey*, 12 SW 43, 71 Tex 609, 10 ASR 800.

66. *Reno v. Wilson*, F. Cas # 11700A, *Hempstead* 91; *Campbell v. Hasbrook*, 24 Ill 243; *Hardy v. Tilton*, 68 Me 195, 28 AR 34; *Smith v. McMillan*, 84 NC 583; *Crane v. Freese*, 16 NJL 305.

execution creditor therein.<sup>67</sup> This of course could not be done if the equities of third parties had legally intervened by assignment or otherwise.<sup>68</sup>

It should be noted that, "No arrangement or understanding can be made between the plaintiff in execution and the sheriff, in anticipation of money coming into his hands, under an execution which he holds in favor of the debtor against another party by which such application can be made in advance of the receipt of the money by the sheriff; or any preference in favor of the plaintiff in execution be made to attach to it. The judgment in favor of such debtor is subject to his control, and he may deal with, and dispose of it in any legitimate way, and for any lawful or proper purpose to which he may see fit to apply it, so long as it is in fieri, unless some one has invoked the aid of judicial process to stay or prevent it. If his creditors are entitled and desire to do so, they may, of course, by a proper proceeding for this purpose previous to its collection or appropriation by the debtor, have the money, to which he is entitled under the judgment, applied to the payment of their debts. But unquestionably this cannot be done by merely placing an execution in the hands of the sheriff in anticipation of his collection of money under a judgment in favor of the debtor against another party."<sup>69</sup>

**§ 475. Money in Sheriff's Hands on Judgments Apportioned How.**—In the absence of statutory provision to the contrary, money in the sheriff's hands on judgments is apportioned according to priority of rights as fixed by liens, and it is immaterial whether the money in the sheriff's hands is paid to him or arises from a sale.<sup>70</sup> As to the right of priority, the character of property from which the proceeds to be distributed are derived must be taken into consideration. The judgment is, as a rule, a lien on real estate from the time of its rendition or from its docketing, while a lien only attaches to personal property in some jurisdictions from the teste of the execution or in others as of the date that the same is received by the

67. *Reid v. Ramey*, 2 Rich. (SCL) 4; *Ex parte Fearle*, supra.

68. *Ex parte Fearle*, supra.

69. *McClane v. Rogers*, 42 Tex 214.

70. *Tripod Paint Co. v. Hamilton*, 35 SE 696, 111 Ga 823; *Macon Savings Bank v. Carter*, 33 SE 679, 107 Ga 778; *Ragan v. Coley*, 61 SE 862, 4 Ga App 421; *Brown v. Davis Bros. Lumber Co.*, 62 So 670, 133 La 262;

*Reed v. Haviland*, 39 Miss 323; *Penland v. Leatherwood*, 8 SE 234, 101 NC 509, 9 ASR 38; *Crane Iron Works v. Wilkes*, 45 Atl 1033, 64 NJL 193; *Wotkyns v. Dempsey-Gabriels Brick Co.*, 116 NYS 265, 62 Misc 65; *In re Jacoby's Appeal*, 67 Pa 434; *Finch v. Park*, 89 NW 654, 15 SD 339; *Sheboygan v. Trilling*, 43 NW 830, 75 Wis 163.

sheriff.<sup>71</sup> It would seem to behoove an officer to avoid incurring the risk of determining, at his peril, the priority of payment of proceeds raised by an execution sale but notwithstanding the hazard of the decision it is his right, and under some circumstances may be his duty, to so decide.<sup>72</sup> After an officer has acted under an execution and recognized the legality thereof, he is not in a position to thereafter question the same.<sup>73</sup> The rule governing priority of payment of money raised on an execution sale is not changed by reason of the fact that some of the judgments are rendered in the state court and some in the federal court where the sheriff or constable and United States marshal are acting in conjunction.<sup>74</sup> Where property is levied upon on the same date, and at the same time, the money arising from a sale of the property should be prorated among the different executions.<sup>75</sup>

**§ 476. Process Equivalent to a Writ of Fieri Facias.**—The process under which a sheriff or constable may take goods in execution need not necessarily be in any particular form, nor need the usual form of fieri facias or execution be resorted to, but it is sufficient if it issues from a court having jurisdiction and it shows that fact upon its face and contains enough to show what is required of the officer to whom it is directed, as a fee bill legal upon its face,

71. *Gay v. Hudson River Electric Power Co.*, 182 F 904; *In re Tupper*, 163 F 766; *Reardon v. Rock Island Plow Co.*, 168 F 654, 94 CCA 118, aff. 32 S Ct 164, 222 US 354, 56 L ed 231; *Beloate v. New England Securities Co.*, 193 SW 795, 128 Ark 215; *Martinovich v. Marsicano*, 70 P 459, 137 Cal 354; *McMann v. San Francisco Sup Ct.*, 15 P 448, 74 Cal 106; *Barroilhet v. Hathaway*, 31 Cal 395, 89 AD 193; *Wolfe v. Langford*, 112 P 203, 14 Cal App 359; *Citizens Loan Ass'n v. Martin*, 40 At: 1108, 15 Del (1 Marv) 213, 1 Hardesty 145; *O'Connor v. Georgia R. Bank*, 48 SE 716, 121 Ga 88; *Wimberly v. Ocmulgee Guano Co.*, 94 SE 288, 21 Ga App 270; *Wehrheim v. Smith*, 80 NE 908, 226 Ill 346; *Johnson v. Schloesser*, 45 NE 702, 146 Ind 509, 68 ASR 367, 36 LRA 59; *Crane v. Richardson*, 18 So 542, 73 Miss 254; *Sklower v. Abbott*, 47 P 901, 19 Mont 228; *Riley v. Carter*, 81 SE 414, 165 NC 334; *Hulbert v. Hulbert*, 111 NE 70, 216 NY 430, LRA1916D 601, 448

161 NYS 221, 165 App Div 858, 149 NYS 668, 86 Misc Rep 662, AC 1917D 180; *Holland v. Grote*, 86 NE 30, 193 NY 262, 109 NYS 787, 125 App Div 413, 107 NYS 667, 56 Misc 370; *Alexander v. Munroe*, 101 P 903, 54 Ore 500, 103 P 514, 135 ASR 840; *Massachusetts Mutual Life Ins. Co. v. Taylor Implement etc. Co.*, 195 SW 762, 138 Tenn 28; *Edwards v. Thompson*, 4 SW 913, 85 Tenn 720, 4 ASR 807.

72. *Stebbins v. Walker*, 14 NJL 90, 25 AD 499; *Hopkins v. Fcrayth*, 14 Pa 34, 53 AD 513; *De la Garza v. Booth*, 28 Tex 478, 91 Ad 328; *Freeman, Executions*, 3rd ed., p. 2381, Sec. 446.

73. *McComb v. Reed*, 28 Cal 281, 87 AD 115; *State v. Hicks*, 2 Blackf (Ind) 336, 20 AD 118.

74. *Leopold v. Godfrey*, 50 F 145; *The Daniel Kaine*, 35 F 785; *Hagan v. Lucas*, 10 Pet (US) 400, 9 L ed 470; *Ex parte Voorhies*, 24 SE 170, 46 SC 114.

75. *Lawrence v. Wofford*, 17 SC 686.

authority issuing the same, or an injunction is issued against it.<sup>87</sup> Where an officer is under necessity of justifying under an execution as against a stranger to the judgment, the officer must show the execution was supported by a valid unsatisfied judgment. In addition he must also show his official character at all times necessary to make legal his seizure.<sup>88</sup> But in an action by the execution defendant against an officer for taking his property, the execution, if legal on its face, is sufficient without proof of a judgment and this would seem to be true regardless of how illegally it was issued or if it was issued without any judgment having been rendered. So long as the officer can show an execution legal on its face, that is sufficient to justify against the execution defendant.<sup>89</sup> The officer may justify his right to property seized under an execution by producing such execution, fair on its face, against the execution defendant in an action by the latter, although the officer knew the judgment was affected with defects or irregularities rendering it voidable, but the converse is true where the officer knows his execution is supported by a void judgment.<sup>89a</sup>

§ 482. **Sheriff Responsible for His Own Negligence.**—It is no defense to a sheriff, or constable when sued for negligently failing to serve process to show that the plaintiff's attorney was also negligent; so where plaintiff's attorney examined such process but failed to discover that it had not been served will avail the officer nothing when sued for failure to serve such process.<sup>90</sup>

§ 483. **What Constitutes Negligence in Levying an Execution.**—A sheriff must use due diligence to collect the money on a judgment creditor's execution and for a negligent failure so to do he will be liable.<sup>91</sup> A sheriff under instructions to collect money on an execution, who fails for six months to make a levy is prima facie negligent,<sup>92</sup> but a delay for fourteen days, unless he is given notice of

the urgency of the matter, will not work his liability.<sup>93</sup> In the absence of anything to the contrary, the officer may presume he has the full time allowed by law for the return of the writ.<sup>93a</sup> Where an officer has an execution in his hands and the defendant owns property, subject thereto, but by reason of unfounded threats of the execution defendant the officer is deterred from levying thereon until he can procure from the plaintiff in execution an indemnity bond, and by reason of this delay the plaintiff is damaged, the officer is liable since this situation presents no defense.<sup>94</sup> In other words, the demand for an indemnity bond must be grounded on reason and cannot be based upon caprice as where there will be no liability incurred.<sup>94a</sup> It has been held that where an execution defendant possesses property, nothing else appearing, and the officer having no information indicating other ownership, that the officer must seize same under process in his hands without any indemnity being given.<sup>94b</sup>

However, cases are not wanting, exacting of an officer greater diligence than a failure to levy for fourteen days; so where a sheriff received an execution in the afternoon and saw an officer of the defendant the same evening and was told by him that the directors would meet the next morning to arrange to pay the execution, but did nothing about it for four days thereafter, and in the meantime the execution defendant made an assignment for the benefit of creditors, resulting in a loss to the plaintiff, it further appearing that during said four days there was ample opportunity to have collected the execution, the officer is liable. In connection with this case the court laid down the rule, "On receipt of the execution, in the absence of specific instructions, the officer must proceed with reasonable celerity to seize the property of the debtor, if he knows, or by reasonable efforts can ascertain, that such debtor has property in his bailiwick liable to execution. The officer must do this as soon after the process comes to his hands, as the nature of the case will admit. If he fails to execute process within an apparently reasonable time, the burden is on him to show, by averment and proof, that the delay was not in fact unreasonable. Failing in this,

87. *Averett v. Thompson*, 15 Ala 673; *Norcross v. Nunan*, 61 Cal 640; *Baker v. Sheehan*, 12 NW 704, 20 Minn 235.

88. *Paige v. O'Neal*, 12 Cal 483; *Wyatt v. Freeman*, 4 Colo 14; *Thatcher v. Maack*, 7 Ill App 635; *Shue v. Ingle*, 87 Ill App 522; *Larsen v. Ditto*, 90 Ill App 384; *Hoover v. Jones*, 121 NW 975, 84 Neb 662, 133 Am St Rep 647, 18 AC 1126; *Densmore Comm. Co. v. Shong*, 74 NW 114, 98 Wis 380.

89. *Gott v. Mitchell*, 7 Blackf (Ind)

270; *Mower v. Stickney*, 5 Minn 397; *Hamner v. Ballantyne*, 44 P 704, 13 Utah 324, 57 ASR 736.

89a. *Hamner v. Ballantyne*, 44 P 704, 13 Utah 324, 57 Am St Rep 736, and note.

90. *Ivey v. Colquitt*, 63 Ga 509.

91. *Davis v. Griffin*, 150 So 326, 227 Ala 390; *Hale v. Lange*, 8 SW(2d) (Tex Civ App) 1046.

92. *French v. Kemp*, 64 Ga 749.

93. *State v. Blanch*, 70 Ind 204.

93a. *Dayton v. Lynes*, 31 Conn 578.

94. *Planters Chemical & Oil Co. v. Daniel*, 96 So 424, 209 Ala 303; *Howe v. White*, 49 Cal 658; *Levy v. Shockley*, 29 Ga 710.

94a. *Planters Chemical etc. Co. v. Daniel*, supra; *Pitcher v. Hickman*, 31 454

So 460, 132 Ala 574, 90 Am St Rep 930; *Mayfield Woolen Mills v. Lewis*, 117 SW 658, 89 Ark 488, 16 AC 1041; *Adair v. McDaniel*, 17 SCL (1 Bailey) 158, 19 Am Dec 664; *Evans v. Graham*, 17 SE 200, 37 W Va 657.

94b. *Kickham v. Kane*, 135 Ill App 628.

he must respond in damages to the party injured by his negligence."<sup>95</sup>

So, where an execution was delivered by plaintiff to the sheriff about four o'clock in the afternoon to be levied upon goods of the execution defendant at a point about five miles distant and the officer was told that it was very important that the levy be made that afternoon, the reasons therefor being imparted to the officer who promised that the levy would be made as the execution plaintiff wished. However, the officer was engaged in other official duties and delivered the writ to a deputy but the latter was too late for the train which he expected to take because of the change in the time table of the railroad, but there was another train which he might have taken that same evening and also he could have gone by private conveyance. Under these circumstances even a delay until ten o'clock the next forenoon to make the levy was unreasonable and held to be negligent.<sup>96</sup> It should be noted however that as a general rule in the absence of instructions to the contrary, the sheriff or constable has until the return day in which to make levy thereunder, but on the other hand if special circumstances exist, as hereinbefore indicated, for a levy at a sooner time of which the officer is informed, no delay is permissible.<sup>97</sup>

Illness of the officer will not excuse his failure to levy an execution.<sup>98</sup> Neither is it a defense for the officer to show that he failed to make a levy because of false representations of the defendant, that a stay bond had been filed, or an appeal had been taken from the judgment.<sup>99</sup> It would seem, however, that if the execution defendant informed the sheriff or constable that the officer had been enjoined from making the levy, that under these circumstances the officer would be warranted in refraining from seizing the defendant's property. This is true by reason of the fact that any person having actual knowledge clearly informing him that he is enjoined from levying, he is duty bound to desist.<sup>1</sup> However, it is not suf-

ficient as a defense for the officer to show that notice of an application by an execution defendant seeking an injunction to restrain the collection of such judgment had been served.<sup>2</sup> Neither is it any defense that the officer was informed by the original plaintiff in the action that the matter was settled, where the record showed and of which the officer had knowledge that the judgment and execution had been assigned to another.<sup>3</sup>

There is a presumption indulged that an officer has performed his official duties, and this will not be overcome by proof that the defendant had real property which might have been levied upon where the title thereto is not disclosed of record, and there is no showing that the execution defendant was in actual possession thereof, in the absence of any showing that reasonable diligence would have disclosed such ownership.<sup>4</sup> The officer is not required, it seems, to search the county records to ascertain the ownership of real property by the execution defendant and his failure so to do will not support a charge of negligence.<sup>5</sup> Where, however, a sheriff knew a defendant against whom he had an execution, would be at a particular place on a certain day on his way out of the state, and the officer fails to show any reason for not going to find him, this constitutes negligence.<sup>6</sup> In short, the rule seems to be that in executing process, which is applicable to executions, a sheriff or constable need only make reasonable efforts, and it is not exacted of him that he use the utmost diligence, but if he uses such skill and diligence as a reasonable and prudent man under the same circumstances would employ, then he has satisfied the requirements of the law.<sup>7</sup> What is reasonable diligence depends upon the particular facts and circumstances of each case and is a question for the

91 Ark 527, 134 ASR 88; Golden Gate Cons. Hydraulic Mining Co. v. Yuba County Superior Court, 3 P 628, 65 Cal 187; Buffandeau v. Edmondson, 17 Cal 436, 79 AD 139; Anderson v. Hall, 58 SE 43, 128 Ga 525; Cape May etc. R. Co. v. Johnson, 35 NJE 422; People ex rel. Stearns v. Marr, 74 NE 431, 181 NY 463, 106 ASR 562, 84 NY S 965, 88 App Div 422, 3 AC 25; Farnsworth v. Fowler, 1 Swan (Tenn) 1, 55 AD 718; Ex parte Young, 129 SW 599, 103 Tex 470; State v. Erickson, 120 P 104, 66 Wash 639, aff. 34 S Ct 717, 234 US 103, 58 L ed 1237.

2. Steele v. Crabtree, supra, see also Dawson v. Merchants' & Planters' Bank, 30 Ga 664, where the defendant informed the officer of his intention to seek an injunction which was held to be an insufficient defense.

3. Gregory v. Waters, 19 Ga 71.

4. Force v. Gardner, 43 NJL 417.

5. Bacon v. Leonard, 4 Pick (Mass) 227; Start v. Sherwin, 1 Pick (Mass) 521.

6. Jenkins v. Troutman, 7 Jones (N C) 169, 75 AD 459.

7. Crosby v. Hungerford, 12 NW 582, 59 Iowa 712; Com. v. Gill, 14 B Mon (Ky) 20.

95. Elmore v. Hill, 8 NW 240, 51 Wis 365, see also 46 Wis 618.

96. Guiterman v. Sharvy, 48 NW 780, 40 Minn 183, 24 ASR 218.

97. Whitney v. Butterfield, 13 Cal 335, 73 AD 584; Karnes v. Alexander, 4 SW 518, 92 Mo 600; State v. Leland, 82 Mo 260; Henry v. Com., 107 Pa St 361; Trigg v. McDonald, 2 Humph (Tenn) 386.

98. Freudenstein v. McNeir, 81 Ill 208.

99. Steele v. Crabtree, 58 NW 1022, 40 Neb 420.

1. In re Rice, 181 F 217; Aaron v. United States, 155 F 833, 84 CCA 67; In re Lady Bryan Min. Co., 14 F. Cas. # 7980, 6 NBR 252; Ulman v. Ritter, 72 F 1000; Dowaginc Man'f Co. v. Minnesota Moline Plow Co., 124 F 738, 129 F 1005, 64 CCA 122; Ex parte Lennon, 17 S Ct 658, 166 US 548, 41 L ed 1110, 64 F 320, 12 CCA 134; Pitcock v. State, 121 SW 742, 455

and showing jurisdiction in the court issuing it.<sup>76</sup> In the absence of a controlling statute the form of an execution may follow the general usage or practice in respect thereto.<sup>76a</sup> On many judgments the creditor has an option as to the form of writ he may employ, as a common law writ of fieri facias, or a statutory execution, but a writ prescribed by statute does not take away the right to resort to the common law writ.<sup>77</sup> Plaintiff in a judgment may even issue a number of writs, looking to the collection of his judgment, at the same time.<sup>77a</sup> The form of the writ of execution is often prescribed by statute which should be consulted and followed, but a substantial compliance therewith is sufficient.<sup>77b</sup> The mere fact that an execution is written on two separate sheets of paper and they are pinned together and not otherwise fastened, does not invalidate it.<sup>77c</sup>

§ 477. Rule as to Ferreting Out Property.—It is not the duty of plaintiff, or his counsel, to point out property for the sheriff to levy upon under an execution but if such property is pointed out, such levy constitutes the officer's action.<sup>78</sup> On the other hand, if the plaintiff or his counsel withhold from the officer knowledge of property which belongs to the defendant and is liable to the process, and the sheriff fails to levy thereon because he does not have the knowledge with respect thereto, he will not be held liable for such property.<sup>79</sup> An officer cannot, of course, be held liable for failure to levy upon property pointed out by the execution plaintiff where the plaintiff suffers no damages by reason of the fact that the officer makes a levy upon other property sufficient to satisfy the writ.<sup>79a</sup>

76. *Miller v. Weida*, 41 Ind 199; *Gott v. Mitchell*, 7 Blackf (Ind) 270, wherein it was said: "The law is, that a writ, having these characteristics, (a legal fee bill) however irregularly issued, even though there be no judgment on which to found it, is a justification to an officer acting under it." *Henderson v. Overton*, 2 Yerg (Tenn) 394, 24 AD 492; *Kentzler v. Chicago etc. R. Co.*, 3 NW 369, 47 Wis 641.

76a. *Field v. Parker*, 4 Hun (NY) 342; *Harlan v. Harlan*, 14 Lea (Tenn) 107; *Collin County Nat'l Bank v. Satterwhite*, 184 SW (Tex Civ App) 338.

77. *Dobbin v. Allegheny*, 7 F Cas # 3941, 2 Pittsb 120, 3 West Law Month 74, 7 Pittsb LJ 282; *Autry v. Walters*, 48 Ala 476; *Garcy v. Hines*, [1 Anderson on Sheriffs]—29

8 Ala 837; *Seawell's Lessee v. Williams*, 2 Overt (Tenn) 273.

77a. *Dobbin v. Allegheny*, supra.

77b. *McMahan v. Colclough*, 2 Ala 68; *Johnson v. Price*, 36 So 1031, 47 Fla 265; *Sidwell v. Schumacher*, 99 Ill 426; *Hernandez v. Drake*, 81 Ill 34; *Ensley v. McCorkle*, 74 Ind 240; *Buis v. Cooper*, 63 Mo App 196; *Park v. Church*, 5 How Pr (NY) 381; *Pederson v. Lease*, 93 P 439, 48 Wash 253, 125 Am St Rep 922.

77c. *Glover v. Bass*, 50 So 125, 162 Ala 267, 136 Am St Rep 22.

78. *Ansonia Brass etc. Co. v. Babbitt*, 74 NY 395, 8 Hun 157; *Batte v. Chandler*, 53 Tex 613.

79. *Batte v. Chandler*, supra, see also *Palmer v. Gallup*, 16 Conn 555.

79a. *Lawson v. State*, 10 Ark 28, 50 Am Dec 238.

In any event it seems that it must be made to appear that the debtor possessed property legally subject to levy and that the officer had knowledge thereof, or in the exercise of reasonable diligence could have located same; and if the officer is in possession of facts that are sufficient to actuate a reasonably diligent person to make inquiry, then the officer is charged with the information such inquiry would have disclosed.<sup>79b</sup> The next question arises: what is a sufficient pointing out of property by the creditor, to be levied upon? It is not necessary that the plaintiff go with the sheriff or constable and literally point to the property for the officer to seize; but it is sufficient to put the officer in default if the plaintiff, his attorney, or other agent, informs him of the property and its location, or agree to go with the officer to the property, if the officer will come to a designated place, at the officer's reasonable convenience.<sup>79c</sup>

§ 478. Duty of Sheriff to Give Legal Notice of Sale in Due Season.—An officer having seized property by virtue of an execution and thereafter adjourning the sale from the advertised date becomes a trespasser ab initio if he fails to give notice thereof. It is generally necessary, under statutory enactments, that not only due notice shall be given of the time and place of the first proposed sale, but also of the time and place of the second at which the property is actually disposed of. The required publicity cannot otherwise be given and the interests of the creditor and debtor are equally jeopardized.<sup>80</sup> The difference arising is as to the method of giving notice of such postponement. Sometimes it is required by statute to merely announce such adjournment at the time and place where the sale has been advertised. Others require the same notice or advertisement as required for sales under process generally and others require public verbal announcement at the time and place where the sale is advertised, followed by advertisement as in case of other sales.<sup>80a</sup> In most jurisdictions there are statutes in exist-

79b. *Newcomb Bros. Wall Paper Co. v. Wiggins*, 78 S 905, 201 Ala 551; *Governor v. Campbell*, 17 Ala 656; *Higdon v. Fields*, 67 So 58, 3 Ala App 322; *Marshall v. Simpson*, 13 La Ann 437; *Taylor v. Wimer*, 30 Mo 126; *Wilcox v. Bear*, 248 P 58, 140 Wash 39; *Hutchings v. Ruttan*, 6 UCCP(Ont) 452; *Palmer v. Gallup*, supra; *Batte v. Chandler*, supra.

79c. *Benson v. Ela*, 35 NH 402; *Mar-*  
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*shall v. Simpson*, supra.

80. *Ollis v. Kirkpatrick*, 28 P 435, 3 Idaho 247; *Hayes v. Buzzell*, 60 Me 205.

80a. *Osgood v. Blackmore*, 59 Ill 261; *Patten v. Stewart*, 26 Ind 395; *Fraaman v. Fraaman*, 90 NW 245, 64 Neb 472, 97 Am St Rep 650; *Weatherby v. Slape*, 43 Atl 898, 58 NJE 550, 78 Am St Rep 627; *Horton v. Bassett*, 16 Atl 715, 16 RI 410.

[1 Anderson on Sheriffs]

ence governing sales and adjournments, and they should be consulted and followed.

§ 479. **Illegal Levy; Civil Wrong but Not a Criminal Offense.**—A wrongful or illegal levy constitutes a trespass against the owner of property levied upon and a cause of action accrues in favor of such owner, but it is not, unless made such by statute, a criminal offense.<sup>81</sup> But where there is a statute making it a penal offense to levy upon exempt property, then a sheriff or constable may be subject to a criminal prosecution if he levies thereon. In some states, an excessive levy is a penal offense. A coroner levying process on property exempt or making an excessive levy is subject to a prosecution, in the same manner as a sheriff or constable.<sup>81a</sup> And where property is levied upon under a number of executions, some of which are invalid, then no protection is afforded to the officer in making the levy under those that are valid; the valid ones cannot be used as a defense. However, there is no liability for levying under a valid process.<sup>82</sup>

The wrongful levy may be predicated upon various grounds and by way of illustration it may be stated where an execution is issued upon a judgment, void upon its face, or where it has been issued in violation of an agreement or various other grounds. In other words, a levy is wrongful if an execution has been illegally issued or where subsequent to the issuance, for some reason then arising, it would be illegal or improper to levy thereunder.<sup>83</sup> But it must not be supposed that an officer is liable for any illegality or infirmity, if the process is regular on its face and issued out of a court having jurisdiction of the subject matter.<sup>83a</sup> A charge of illegal levy of course may grow out of the manner in which such levy is made as well as some defect inhering in the execution itself. It is in cases where a wrong is committed in the manner of levying the execution that makes an officer liable.<sup>84</sup> While a sheriff or constable may be liable

81. *Wurms v. Stone*, 40 P 993, 1 Kan App 131; *State v. Tatom*, 69 NC 35; *Graham v. Lane*, 3 Brevet (Pa) 92; *James v. Graham*, 78 SE 82, 114 SC 107; *State v. White*, 5 Sneed (Tenn) 620; *Moore v. Duke*, 80 Atl 104, 84 Vt 401.

81a. *Pippin v. State*, 36 Tex 606.

82. *Boyd v. Merriam*, 53 Ga 581.

83. *Plant v. Holtzman*, 19 F Cas # 11208, 4 Cranch CC 441; *Inos v. Winspear*, 18 Cal 397; *Duff & Repp Furniture Co. v. Read*, 88 P 263, 74

*Kan* 730; *Davis v. Maloney*, 8 Atl 350, 79 Me 110; *Gunz v. Hefner*, 22 NW 380, 33 Minn 215; *Standard Oil Co. v. Goodman Drug Co.*, 95 NW 607, 1 Neb (Unoff.) 443; *Breck v. Blanchard*, 20 NH 323, 51 AD 222; *Main Electric Co. v. Cohen*, 129 NYS 60, 72 Misc 30; *Bilby v. Jones*, 136 P 414, 39 Okla 613; *Boyd v. Merriam*, supra.

83a. See Sec. 88, supra.

84. *McKnight v. U. S.*, 130 F 659, 85 CCA 37; *Adamson v. Noble*, 35 So 139, 137 Ala 608; *Albie v. Jones*, 102

for an illegal or unlawful levy upon property, as in cases where the property belongs to a third party, but the liability in such cases is confined to a civil action for damages. A criminal prosecution against the officer will not lie therefor.<sup>85</sup> An execution or attachment is no justification for levying upon exempt property<sup>85a</sup> nor with respect to property for any reason that is not subject to seizure to satisfy a judgment.<sup>85b</sup>

§ 480. **Levy on Crop Growing upon Land Fraudulently Conveyed.**—A sheriff may levy upon a growing crop upon land that has been conveyed prior to the levy and justify his seizure upon the ground that the conveyance of the land was fraudulent and void. He is justified in levying upon the crop upon the same ground that he would be warranted in levying upon the land itself. But where it is necessary, in order, for the sheriff to justify under an execution, to attack a sale as fraudulent he must prove a valid judgment, as a rule, upon which the execution issued.<sup>86</sup>

§ 481. **Sheriff Cannot Take Notice of Fraud or Irregularities in Obtaining Judgment.**—The fact that a judgment is obtained fraudulently or is tainted with illegality or irregularity in its rendition is no concern of the sheriff holding an execution issued upon it. It is his duty to execute the process unless the judgment upon which it is issued is reversed, or the execution is stayed by the court, or

SW 222, 82 Ark 414, 12 Ann Cas 433; *Old Settlers' Inv. Co. v. White*, 110 P 922, 158 Cal 236; *Fennemore v. Armstrong*, 96 Atl 204, 29 Del (6 Boyce) 36; *Archbold v. Huntington*, 201 P 1041, 34 Idaho 558; *Ilg v. Burbank*, 59 Ill App 291; *Gallegos v. Sandoval*, 106 P 373, 15 NM 216; *Moseby v. Fleck*, 68 Atl 940, 242 Pa 154; *Hillman v. Edwards*, 74 SW (Tex) Civ App 787.

85. *McDowell v. McCormick*, 90 F 393; *White v. Hogland*, 98 So 625, 209 Ala 537; *Hill v. Elmore*, 79 So 148, 16 Ala App 474; *Montgomery v. Kirksey*, 233 P 588, 27 Ariz 356; *Brink's Chicago City Express Co. v. Hunter*, 156 Ill App 537; *Duff & Repp Furniture Co. v. Read*, 88 P 263, 74 Kan 730; *Tregre & Shexnayder v. Carter Packet Co.*, 61 So 379, 132 La 293, 45 LRA(NS) 189; *State v. Tatom*, 69 NC 35; *Quackenbush v. Shively*, 167 NW 387, 39 ND 452

156; *Sabin v. Chrisman*, 175 P 622, 90 Ore 85.

85a. *Wilson v. Lowry*, 52 P 777, 5 Ariz 335; *Blewett v. Miller*, 63 P 167, 131 Cal 149; *Smith v. Pueblo Merc. etc. Ass'n*, 260 P 109, 82 Colo 364; *Amend v. Murphy*, 69 Ill 337; *Eisenhauer v. Dill*, 33 NE 220, 6 Ind App 188; *Buck v. Ball*, 58 SW 468, 22 Ky L 614; *Martin v. Barnett*, 138 SW 538, 158 Mo App 375; *Castile v. Ford*, 73 NW 945, 53 Neb 507; *Ahearn v. Connell*, 56 Atl 189, 72 NH 238.

85b. See Sec. 237, chapter XIV beginning with Sec. 329 et seq.

86. *Paige v. O'Neal*, 12 Cal 483, see also *Bridges v. Paige*, 640, see Sec. 481 infra; *Johnson v. Holloway*, 82 Ill 334; *Pierce v. Hill*, 35 Mich 194, 24 AR 641; *Ford v. McMaster*, 11 P 669, 6 Mont 240; *Bean v. Loftus*, 4 NW 334, 48 Wis 371.

jury.<sup>8</sup> Where, however, a sheriff is sued for failure to levy upon personal property in the possession of the execution defendant, the onus is thrown upon him to show that the property was exempt or some other legal reason why he was excused from making the levy.<sup>9</sup>

§ 484. **Right of Officer to Change, Restrict, or Abandon His Levy.**—The general rule is apparent upon the most cursory examination that the officer has a right to change, restrict, or abandon his levy if the same was erroneously, illegally, or unlawfully made. Having made an error, the law does not demand that he persevere in it. An application of this principle is found in a case where an officer levies upon chattels as the property of the execution defendant but before filing the writ he may change the levy and return to restrict the levy to the defendant's interest therein.<sup>10</sup> So long as the process is in the hands of the officer he may change his return by amendment without the leave of court.<sup>10a</sup>

§ 485. **Effect of Withdrawing or Abandoning Levy.**—If an officer of the law makes a levy upon the property of the execution defendant and thereafter withdraws or abandons the same, this operates absolutely to discharge the property from the lien of the levy and this is true although such act on the part of the officer is illegal and improper.<sup>11</sup> An abandonment of a levy can not be effected and a new levy made on other property without notice to the debtor or with his consent.<sup>11a</sup> Ordinarily it is a question for the jury whether a levy has been abandoned.<sup>11b</sup>

8. *Whitney v. Butterfield*, 13 Cal 335, 73 AD 584.

9. *Second Nat'l Bank v. Gilbert*, 51 NE 584, 174 Ill 485, 66 ASR 306, 70 Ill App 251; *Bonnell v. Bowman*, 53 Ill 460.

10. *Dixon v. White S. M. Co.*, 18 At: 502, 128 Pa St 397, 5 LRA 659, 15 Am St Rep 683, 24 WNC 433, 46 Phila Leg Int 507; *Patterson v. Anderson*, 40 Pa St 359, 80 AD 579.

10a. *Manley v. McKenzie*, 57 SE 705, 128 Ga 347; *Nelson v. Cook*, 19 Ill 440; *Vickers v. Hawkins*, 36 SE 463,

111 Ga 119. If the return appears to have been altered, it will be presumed to have been made lawfully and at a time when the officer had legal authority to do so.

11. *Com. v. Contner*, 18 Pa St 439. 11a. *Trapnall v. Richardson*, 13 Ark 543, 58 Am Dec 338; *Smith v. Hughes*, 24 Ill 270, *Hunt v. Breeding*, 12 Serg & R (Pa) 37, 14 Am Dec 665; *Walker v. Com.* 18 Gratt (59 Va) 13, 98 Am Dec 631.

11b. *Vanosdall v. Hamilton*, 77 NW 9, 118 Mich 533.

## CHAPTER XVIII

## EXECUTION—INDEMNITY OF SHERIFF

## SECS.

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§ 486. **Indemnity of Sheriff—Sheriff's Jury in England.**—Sometimes there are classes of property which are not in the possession of the defendant but in that of other persons which in reality belong to the execution defendant, and are subject to process against him. In these circumstances a question confronts the sheriff with respect to such property. If he takes such property in performance of his general duty to seize all goods and chattels of the defendant, an officer may become liable if the property and goods in reality do belong to a third party. In these circumstances a writ of execution will not serve as a justification for a seizure. Still, if such property turns out in fact to be that of the execution defendant, the execution plaintiff may proceed against the officer for failure to seize the same. The general rule at common law, and still in many jurisdictions, is that the sheriff must act at his peril. He is



bound to take the goods of the defendant. He is not justified in taking goods of the third party. In England, in a case, where he doubted the goods were in reality property of the defendant he was entitled to summon a jury to try the issue and satisfy himself on the subject. It was at one time held to be the law that a verdict of the jury that the defendant had no goods within the officer's bailwick justified the officer in so returning.<sup>1</sup>

The rule seemed to be, under this holding, that where it appeared upon the inquisition of the jury that the goods did not belong to the defendant, the jury's verdict was conclusive upon the plaintiff. On the other hand, it had no effect on a third party. He could still sue in trespass if the sheriff took his goods, notwithstanding a verdict of the sheriff's jury that the goods belonged to the defendant. But, since the jury's verdict was no evidence in favor of the sheriff in an action against the sheriff, except to possibly show that he did not act maliciously, it was readily concluded to be of no real benefit to hold an inquest in such cases.<sup>2</sup> It seems that under the former practice when such inquisitions could lawfully be held by the sheriff, he could apply to the court for further time within which to make return so that during the interval the question of the ownership of the property could be settled, or for an order that one or the other of the interested parties be required to indemnify the officer in proceeding with the levy or in making nulla bona return. As to whether or not the court would intervene was left to its discretion.<sup>3</sup> The practice of impaneling a sheriff's jury formerly obtained in a number of jurisdictions in America, but has now been largely discarded. The indemnity of the officer in serving an execution is largely provided for by statute in the various American states, and should be consulted with respect to any question arising in the particular jurisdiction.

§ 487. Results of Legislation on Indemnity in General.—The tendency of American legislation has been to depart from the rigor of the old rule that in all cases the sheriff acted at his own peril. And the modern view is to exact from a sheriff or constable only reasonable service.<sup>4</sup>

1. Gilbert on Executions, 21; Farr v. Newman, 4 Term 633; Roberts v. Thomas, 6 Term 88; Thurston v. Thurston, 1 Taunt 120.

2. Murfree on Sheriffs, Sec. 580; Watson on Sheriffs, Sec. 198.

3. Wells v. Pickman, 7 Terr: 174; Barr v. Freethy, 1 Bing 71, 7 JB Moore 368; King v. Bridges, 1 JB Moore 43, 7 Taunt 294; Thurston v. Thurston, supra.

4. Murfree on Sheriffs, Sec. 611.

§ 488. Effect of Accepting Indemnity.—The law does not require an officer to levy upon property he has good grounds to believe belongs to a third party unless he is indemnified against loss. Such bond is for the officer's protection. An indemnity bond adds nothing to the officer's powers. The mere tendering of indemnity does not enlarge his duties to plaintiff unless accepted.<sup>5</sup> When an officer has accepted an indemnifying bond from the plaintiff in an execution, he is thereby bound to sell the chattels seized, whether they are the property of the defendant or not, and if a levy has not been made at the time of giving the indemnity, then he is bound to make the levy. It is readily apparent that if he were not so bound, it would be a useless and idle ceremony to supply him with an indemnifying bond.<sup>6</sup>

It will not serve the officer in any effectual stead, after he has accepted an indemnifying bond to point to the fact that the property which he was indemnified against in selling, was covered by a mortgage or was in fact not the property of the defendant. Neither of these contentions can be sustained as a defense for failing to proceed after he has once been indemnified.<sup>7</sup> There are cases, however, that hold that in the absence of an imperative statutory provision, the officer may decline to assume the risk in proceeding with the sale or proceeding to seize property under an execution even though indemnified, and that he may justify his course of conduct by showing the property was not in fact that of the execution defendant.<sup>8</sup> But when the sheriff thus declines to seize or sell property after he has accepted indemnity, he must assume the onus of making out a case in justification of such refusal.<sup>9</sup> It has been held, but of highly doubtful soundness, that an indemnity bond imposes no duty upon the sheriff to sell exempt property.<sup>10</sup>

5. James v. Thompson, 12 La Anno 174; Hutchinson v. Lull, 17 Vt 133.

6. Alley v. Daniel, 75 Ala 403; Von Der Kuhlen v. Cline, 176 P 883, 38 Cal App 545; Smith v. Graham, 164 P 354, 30 Idaho 132, 136 P 801, 25 Idaho 174; Reinbeck Bank v. Brown, 39 NW 524, 76 Iowa 696; Evans v. Thurston, 4 NW 895, 53 Iowa 122; Cox v. Currier, 17 NW 767, 62 Iowa 551; Hamberger v. Seavey, 43 NE 297, 165 Mass 505; Adams v. Disston, 44 NJL 662; Harrison v. Allen, 40 NJL 558; Connelly v. Walker, 45 Pa 449; Jewett v. Sundback, 58 NW 20, 5 SD 111; Stone v. Pointer, 5 Munf (Va) 480

287; Johnson v. Nelson, 263 P 949, 146 Wash 500, 56 ALR 1035.

7. Jewett v. Sundback, supra; Smith v. Graham, supra; Evans v. Thurston, supra.

8. Wadsworth & Co. v. Walliker, 45 Iowa 395, 24 AR 788; Phelps etc. Co. v. Skinner, 65 P 667, 63 Kan 364; James v. Thompson, 12 La Anno 174; Coville v. Bentley, 42 NW 1116, 76 Mich 248, 15 ASR 312; Com. v. Vandyke, 57 Pa 34; Freiberg v. Johnson, 9 SW 455, 71 Tex 558.

9. Wadsworth & Co. v. Walliker, supra; Freiberg v. Johnson, supra; Coville v. Bentley, supra.

10. State v. Thomas, 7 Mo App 205,

§ 489. **Duty of Sheriff to Accept Indemnity and Proceed.**—It is the general rule under applicatory statutes that an officer may require of the plaintiff an indemnifying bond before proceeding to the seizure of property or a sale thereof, if levied upon, where he has reasonable cause to believe that the property is not that of the execution defendant, or where the property is in the possession of another than such defendant or where he is notified that the property is claimed as exempt or where he has substantial doubts as to the leviability upon any ground, of such property or where a claim is asserted thereto apparently in good faith by a third party.<sup>11</sup>

The rights of the sheriff in this regard may not however be expanded to embrace authority on his part to demand indemnity when there is no reason therefor, or when he would incur no liability in the performance of the mandates of the writ in his hands.<sup>12</sup> It would seem to follow that if an officer demanded indemnity under circumstances unauthorized by law that he might be compelled by mandamus or other appropriate remedy to perform his duty, or he might be sued for damages for such default, or the question could be determined in a declaratory judgment action. It is an intriguing question to consider whether or not a sheriff is duty bound to accept an indemnity bond when tendered and proceed with the execution of the process. Mr. Murfree seems to incline to the view that no such duty is imposed upon the sheriff or constable.<sup>13</sup> But the sounder rule would seem to be that if he refuses to take indemnity and sell the property after being tendered an indemnifying bond, the sheriff takes the risk and responsibility upon himself of dis-

but see *Mayberry v. Whittier*, 78 P 16, 144 Cal 322; *Bank of Gulfport v. O'Neal*, 38 So 630, 86 Miss 45.

11. *Norris v. McCanna*, 29 F 757; *Lavretta v. Holcombe*, 12 So 789, 98 Ala 503; *Mayfield Woolen Mills v. Lewis*, 117 SW 558, 89 Ark 488, 16 AC 1041; *Harris v. Harrison*, 40 Ark 50; *Mayberry v. Whittier*, 78 P 16, 144 Cal 322; *Wallace v. Holly*, 13 Ga 389, 58 AD 518; *Smith v. Graham*, 136 P 801, 25 Idaho 174, 164 P 354, 30 Idaho 132; *Roth v. Duvall*, 1 Idaho 149; *Baker v. Duddleson*, 125 Ill App 483; *Whitney v. Gammon*, 67 NW (Iowa) 405; *Reinbeck Bank v. Brown*, 39 NW 524, 76 Iowa 696; *Crane v. Crane*, 105 SW 370, 32 Ky L 82; *Connell v. David Bernhardt Paint Co.*, 112 So 495, 163 La 586, 6 La App

862; *Bank of Gulfport v. O'Neal*, 38 So 630, 86 Miss 45; *Omaha Nat'l Bank v. Robinson*, 77 NW 73, 56 Neb 590; *Howard W. Middleton Co. v. Souder*, 64 Atl 975, 74 NJL 87; *Chamberlain v. Beller*, 18 NY 115; *Trainer v. Saunders*, 113 Atl 681, 270 Pa 451, 19 ALR 861; *Matheson v. F. W. Johnson Co.*, 92 NW 1083, 16 SD 347; *Head v. Carlin*, 240 SW (Tex Civ App) 1051; *Craven v. Buchanan*, 248 SW (Tex Civ App) 89; *Carpenter v. Barry*, 66 P 393, 26 Wash 255; *Brolton v. Lunkeley*, 40 P 140, 11 Wash 581.

12. *Planters Chemical & Oil Co. v. Daniel*, 96 So 424, 209 Ala 363; *Mayfield Woolen Mills v. Lewis*, 117 SW 558, 89 Ark 488, 16 AC 1041.

13. *Murfree on Sheriffs*, Sec. 614.

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charging the onus if sued by the plaintiff thereafter that the property did not belong to the defendant named in the execution, or the establishment of some other substantial ground showing his justification in failing to seize and sell the property covered by the tendered indemnifying bond.<sup>14</sup>

Cases are not wanting however to sustain the contention that the proffering of an indemnifying bond by an execution plaintiff which is refused by the sheriff does not operate to impose upon him the duty of selling the property of a third person.<sup>15</sup> Where a judgment creditor, it is held under some statutes, has given the officer an indemnifying bond, he is entitled to have the levy carried out, and if the officer voluntarily releases the property to a claimant thereof the officer will be liable therefor, and cannot excuse himself by showing that the execution debtor had no title.<sup>16a</sup>

§ 490. **Indemnity Is for the Protection of the Officer; Not of the Claimant.**—The giving of an indemnity bond to the sheriff or constable is in general for the protection of the officer, to save him harmless by reason of a claim made by a third party, and is not intended as protection of such claimant in the absence of statute so providing.<sup>16</sup> It should be noted that sometimes these bonds are under statutes regarded as having a twofold purpose: first, for the protection of the officer and secondly, for the benefit of the claimant; but it seems under such statute the liability of the officer is not lessened in any manner.<sup>17</sup>

It is provided by statute however in some jurisdictions that the giving of the bond is a substitute for the action which the claimant to the property might have for the trespass the officer commits against his property, such statutes providing that the giving of the bond bars any action against the officer, and relieves him of all legal responsibility for an unlawful levy.<sup>18</sup> In order however, under the statutes last mentioned for the giving of the bond to be a bar to any action against the offending officer in regard to the levy, the

14. *Dornan v. McCandless*, 23 Atl 245, 146 Pa St 344, 28 AR 798.

15. *Wadsworth v. Walliker*, 45 Iowa 395, 24 AR 788; *Adair v. McDaniel*, 1 Bailey's Law (SC) 158, 19 AD 664.

16a. *Evans v. Thurston*, 4 NW 895, 53 Iowa 122.

16. *Manning v. Keenan*, 73 NY 45; *Dunn v. Nat'l Surety Co.*, 80 App Div 605, 80 NYS 744, aff. 70 NE 1098, 178 NY 552; *Armour Packing Co. v. Or-*

*rick*, 46 P 573, 4 Okl 661; *Vickery v. Crawford*, 57 SW (Tex Civ App) 326; *Van de Vanter v. Davis*, 63 P 555, 23 Wash 693.

17. *Howard v. Conde*, 30 P 454, 22 Ore 581.

18. *Harris v. Harrison*, 40 Ark 50; *Wadsworth v. Walliker*, 45 Iowa 395, 24 AR 788; *Chisholm v. Gooch*, 79 Ky 468, 3 Ky L 247; *Marshall v. Stewart*, 7 So 284, 67 Miss 494.

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statute providing for the bond must be strictly complied with.<sup>19</sup>

A statute providing that "the claimant or purchaser of any property for the seizure or sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer levying on the property if the surety in (on) the bond was good when it was taken. Any such claimant or purchaser may maintain an action upon the bond, and recover damages as he may be entitled to" was held that in so far as it deprived the claimant of property levied upon by an officer under the contingency therein provided from bringing an action against an officer for the specific recovery of the property was unconstitutional and void.<sup>20</sup> Also, it has been held that statutes providing that in an action against a sheriff to recover property which he has seized under process, the party in whose favor the process issued may be substituted as defendant, and the sheriff discharged from all liability are unconstitutional as depriving the party whose property has been wrongfully seized of due process; since the officer and his bondsmen are freed of liability although the plaintiff in the original action may be insolvent or a nonresident of the state.<sup>20a</sup> However, a converse conclusion has been maintained.<sup>20b</sup>

§ 491. Priority as between Co-creditors Where Part Furnish Indemnity.—Where there are several execution plaintiffs and demand is made upon them by the sheriff for indemnity before the levying of executions or proceeding to sell under a levy already made and part refuse to give such indemnity, the officer may proceed to levy and sell under the execution of those who furnish him indemnity.<sup>21</sup> The effect of the failure or refusal of such execution plaintiffs to

19. *Curry v. Ball*, 58 SW 534, 22 Ky L 592; *Harrison v. Shanks*, 13 Bush (Ky) 620.

20. *Towle v. Mann*, 3 NW 814, 53 Iowa 42, but see *Craig v. Fowler*, 13 NW 116, 59 Iowa 200.

20a. *Sunberg v. Babcock*, 16 NW 716, 61 Iowa 601.

20b. *Cory v. Cooper*, 4 P(2d) 581, 117 Cal App 495; *Rowland v. Bruton*, 14 P(2d) 116, 125 Cal App 697.

21. *Pickard v. Peters*, 3 Ala 493; *Davidson v. Dallas*, 8 Cal 227, see 15 Cal 75; *Baker v. Duddleson*, 125 Ill App 483; *Townsend v. Henry*, 26 Miss 203; *Smith v. Osgood*, 46 NH 178. In Pennsylvania it has been held that the refusal of a senior execution creditor

to give indemnity to the sheriff and where there is furnished such indemnity by a junior execution creditor, nevertheless the senior execution creditor would take ahead of such junior writ. This holding seems to be essentially unsound in that if there is any liability attached to the seizing of property the junior execution creditor would be the one to suffer and the senior creditor would run no risk at all. It would seem in such an instance that the law would give effect to the maxim that the advantage goes to the vigilant. *Girard Bank v. Philadelphia etc. R. R. Co.*, 2 Miles (Pa) 447, see also *Watmough v. Francis*, 7 Pa St 206.

give such indemnity will operate to postpone the lien of such execution to one junior thereto in point of time upon which a levy has been made and upon which the indemnity demanded by the sheriff has been given.<sup>22</sup> If all of the money realized is paid to the senior execution creditor, and the junior execution creditor does not receive anything because of the insufficiency of the proceeds of the sale, then he and his sureties on his indemnity bond are not liable, even though a judgment is rendered against the officer, and, the fact that the senior execution creditor gave no indemnity does not change the operation of this rule, if the money arising from the sale is paid to him.<sup>22a</sup> A single indemnity bond may cover a number of executions even though the creditors therein severally sued and obtained separate judgments.<sup>22b</sup>

§ 492. How Lien Affected by Refusal to Give Indemnity.—As has heretofore been seen, the lien of an execution at common law, and under statutes in different jurisdictions, dates from the date it is issued or its teste day or its delivery to the sheriff. So it would seem theoretically that where there is a refusal to give indemnity and there is a release of property levied upon, such release would not destroy any lien of the execution that had attached prior to levy, but for practical purposes the lien is destroyed since the officer is under duty to proceed to enforce junior process when he is given a bond so to do.<sup>23</sup>

The question of the effect on an execution lien where the execution plaintiff refuses to give an indemnity bond is a most perplexing one; if the execution is a lien before levy, as it is in many jurisdictions, then how the lien is destroyed or postponed by failure to give an indemnifying bond is not easy to see; how the plaintiff in the execution may lose rights he already had before the levy is not readily apparent, but on the other hand, how he may retain those rights and bar other creditors from reaching the property and still refuse to give bond is equally hard to understand. Where, however, the execution is not a lien until levied, or at least until it reaches the hand of the officer, the situation presents less difficulties. If the execution is a lien before levy or before reaching the officer, it is submitted, it is not destroyed by a failure to indemnify the officer; but the execution plaintiff would be estopped if he took

22. *Pickard v. Peters*, supra; *Baker v. Duddleson*, supra.

22a. *Fury v. White*, 23 P 535, 2 Idaho 662; *Davidson v. Dallas*, 8 Cal 227.

22b. *Baxter v. Ray*, 17 NW 576, 62 464

Iowa 336; *Davis v. Davis*, 2 Gratt (43 Va) 363.

23. *Lummis v. Kasson*, 43 Barb (N Y) 373, see Secs. 360, 491, supra; *Cotten v. Thompson*, 26 Ala 671; *Otey v. Moore*, 17 Ala 280, 52 AD 173.

no steps to enforce that lien to the detriment of other junior execution lien holders. Probably the quickest and safest course to pursue would be for the officer or some other interested party to bring an action for a declaratory judgment to determine rights of all parties—joining all interested persons as parties to the action. Likewise where property has been attached, the dissolution of such attachment does not destroy the lien created by the execution on such attached property.<sup>24</sup>

§ 493. **What Is a Proper Case for Indemnity.**—It is generally held under statutes that where the sheriff has reasonable cause to believe that he will be subject to liability by levying an execution upon property or by sale of property which has already been levied upon, and that some controversy may be reasonably anticipated in regard thereto, he has the right to require indemnity.<sup>25</sup> Indemnity cannot be demanded upon any whim or figment of his imagination, but reason for such demand must exist because of substantial apprehensions as to defendant's title or for some other reason that he may become liable by such levy.<sup>26</sup> In other words, there must exist a reasonable doubt as to whether or not the goods belong to the execution debtor or are subject to levy, in order to justify the demand for an indemnity bond.<sup>27</sup>

§ 494. **When Sheriff's Right to Demand Indemnity Is Absolute.**—Where it is provided by statute or held by virtue thereof that the sheriff or constable may require indemnity before the execution of the writ, where he feels that he may become subject to liability by reason of the execution of such writ, the officer is entitled to demand indemnity of the execution creditor.<sup>28</sup> Where such local statutes exist, the sheriff or constable, if he believes he will be endangered by the execution of such process, or where some third

24. *Dunbar v. Kelly*, 75 NE 740, 189 Mass 390, and authorities therein cited.

25. *Lavretta v. Holcombe*, 12 So 789, 98 Ala 503; *Bond v. Ward*, 7 Mass 123, 5 AD 28; *Bank of Gulfport v. O'Neal*, 38 So 630, 86 Miss 45; *Omaha Nat'l Bank v. Robinson*, 77 NW 73, 56 Neb 590; *Head v. Carlin*, 240 SW (Tex Civ App) 1051.

26. *Planters Chemical & Oil Co. v. Daniel*, 96 So 424, 209 Ala 363; *Mayfield Woolen Mills v. Lewis*, 117 SW 558, 89 Ark 488, 16 AC 1041.

27. *Planters Chemical & Oil Co. v. Daniel*, supra.

*Daniel*, supra.

28. *Keith v. Drainage Dist. No. 7 of Poinsett County*, 38 SW(2d) 755, 183 Ark 786; *Endicott-Johnson Corp. v. Davis*, 56 SW(2d) 178, 186 Ark 788; *Duncan v. Sup. Ct.*, 285 P 732, 104 Cal App 218; *Sunset Realty Co. v. Dadmun*, 88 P(2d) 947, 34 Cal App (2d) 733; *Frothingham v. Maxim*, 141 Atl 99, 127 Me 58; *Kelly v. Baird*, 252 NW 70, 64 ND 346; *Simou v. Bailey*, 14 NYS (2d) 822, 172 Misc 186; *B. Altman & Co. v. Broad Park Plaza Corp.*, 271 N YS 317, 241 App Div 836.

party claims title to the property upon which there has been a levy or the officer is about to levy, in accordance with such statutes, the officer may demand indemnity before he can be compelled to proceed under the writ.<sup>29</sup> However, where there is no statute providing for indemnity to the sheriff, the officer is not entitled to demand or receive it.<sup>30</sup>

§ 495. **When a Sheriff Has a Cause of Action against an Indemnifying Creditor.**—Where an officer has suffered damage by reason of the wrongful levy of an execution on which he has been indemnified he may recover from such indemnitors for such loss.<sup>31</sup> Where an officer is sued for the wrongful levy under a writ of execution it is not necessary that he should notify his indemnitors that he has been so sued, nor is it necessary for him to notify them that he has paid the judgment in order for him to recover against such indemnitors.<sup>32</sup> If, after levy of an execution, the judgment is set aside and the execution thereby recalled, but before the judgment is vacated and the execution annulled, an indemnity bond is legally given the officer levying the execution during the period of its efficacy, he has a right to look to indemnity bond for any damages sustained by him by reason of the before mentioned levy; and the officer's right to hold the sureties on the indemnity bond is not impaired by reason of the conditions of the bond that the sureties are to become liable if the possession of the property levied upon is retained, advertised, and sold under the execution by the officer.<sup>32a</sup>

An obligation of indemnity may arise by implication, as where the execution creditor directs the officer to levy upon certain designated property. In these circumstances the execution plaintiff impliedly agrees he will indemnify the officer against loss by way of damages for carrying out such instructions or directions. The same rule

29. *Lavretta v. Holcombe*, 12 So 789, 98 Ala 503; *Wallace v. Holly*, 13 Ga 389, 58 AD 518; *Smith v. Graham*, 136 P 801, 25 Idaho 174; *Whitney v. Gammon*, 67 NW (Iowa) 405; *Omaha Nat'l Bank v. Robinson*, 77 NW 73, 56 Neb 590.

30. *Allwein v. Sprinkle*, 87 Ind 240; *State v. Fontenot*, 94 So 441, 152 La 912; *Good v. Sleeth*, 160 SW 1, 176 Mo App 619; *Duncan v. Johnson*, 146 SW (Tex Civ App) 686. But see Sec. 499 infra.

31. *Trammel v. Kirk*, 278 SW (Mo App) 739; *Weir v. Hum Tong*, 46 P 466

(2d) 45, 100 Mont 1; *Teague v. Collins*, 45 SE 1035, 134 NC 62; *Agricultural Bond & Credit Corp. v. Sheperd*, 69 SW(2d) (Tex Civ App) 213; *Evans v. Graham*, 17 SE 200, 37 W Va 657.

32. *Whinnery v. Wiley*, 88 P 171, 38 Colo 203; *Topliff v. Hayes*, 20 Vt 302. It has been held that under the terms of the bond, the officer is entitled to recover in addition to all of the costs, charges, and damages in the suit, attorneys' fees incurred by him therein.

32a. *W. F. Main Co. v. Morrow*, 57 P 916, 8 Wyo 323.

obtains where the officer is directed to serve any process in a particular manner and thereby incurs liability. And, it seems that it is immaterial whether or not the officer knew he was incurring liability.<sup>32b</sup> Some authorities withhold the protection afforded by an implied indemnity in the circumstances, if the officer knowingly acts illegally or unlawfully.<sup>32c</sup> There must be specific directions issued to an officer by the execution plaintiff before an indemnity by implication can be raised; the direction cannot be implied and then indemnity implied from the implied directions, as where the execution plaintiff is present and bids at the sale and receives the money arising from such sale. In these circumstances no implied indemnity can be asserted or relied upon.<sup>32d</sup>

§ 496. **Effect of Verdict of Sheriff's Jury.**—Where under a writ of execution the sheriff has levied upon property, and there is a claim made by a third person to the property, the sheriff may impanel a jury, in some jurisdictions, to pass upon such claim and the ownership of the property which the sheriff has levied upon by virtue of such writ.<sup>33</sup> The effect of the verdict of such jury is merely advisory and is binding upon neither the sheriff nor the claimant.<sup>34</sup> By virtue of such verdict, however, the officer is entitled to demand an indemnity bond of the execution creditor if the jury's verdict is in favor of the claimant.<sup>35</sup> If the jury's verdict is in favor of the claimant and the execution creditor refuses to furnish the indemnity bond, the sheriff is justified in delivering the property to the third party claimant.<sup>36</sup>

Where a sheriff's jury determines that such claimant is not entitled to the property, such verdict is not binding upon a third party claimant and he may bring any appropriate action to litigate the

32b. *Standley v. Marsh*, 20 P 592, 1 Wash 512; *Gower v. Emery*, 18 Me 79; *Nelson v. Cook*, 17 Ill 443; *Bond v. Ward*, 7 Mass 123, 5 Am Dec 28; *Ranlett v. Blodgett*, 17 NH 298, 43 Am Dec 603; *Selz v. Guthman*, 62 Ill App 624; *Weir v. Hum Tong*, 46 P (2d) 45, 100 Mont 1; *Arnold v. Fowler*, 51 Atl 299, 94 Md 497, 89 Am St Rep 444; *Freeman on Executions* (3d ed) Sec. 275a.

32c. *Weir v. Hum Tong*, supra; *Standley v. Marsh*, supra.

32d. *Russell v. Walker*, 23 NE 383, 150 Mass 531, 15 Am St Rep 230, but however, see *Duperron v. VanWickle*, 4 Rob (La) 39, 39 Am Dec 509. See

also *White v. Stribling*, 9 SW 81, 71 Tex 108, 10 Am St Rep 732, which is rather in harmony with *Russell v. Walker*, supra, this note.

33. *Pierce v. Kingsbury*, 63 Mo 259; *Cohen v. Climax Cycle Co.*, 46 NYS 4, 19 App Div 158, 4 NY Ann Cas 332; *Vulcan Iron Works v. Edwards*, 36 P 22, 27 Ore 563, 39 P 403.

34. *Smith v. Graham*, 136 P 801, 25 Idaho 174.

35. *Pfeifer v. Hatton*, 115 NW 191, 17 ND 99, 138 ASR 698; *Cohen v. Climax Cycle Co.*, supra; *Smith v. Graham*, supra.

36. *Pfeifer v. Hatton*, supra.

issue.<sup>37</sup> In some jurisdictions, however, the verdict is binding upon the claimant, but if the verdict of a sheriff's jury were in favor of the third party claimant, then if the execution plaintiff indemnified the sheriff, he is, both under statute and at common law, under a duty to proceed with the sale.<sup>38</sup> Even at common law, if the sheriff had any doubt, however acquired, respecting the title to property levied upon, he could, for his own protection and on his own motion, summon a jury to inquire into it; and a verdict in favor of the claimant, it was held, would justify him in returning the execution nulla bona, and would be a complete defense to an action for a false return.<sup>38a</sup> This is the law in our time where not changed by statute.

§ 497. **Rule of Procedure before Sheriff's Jury.**—The procedure as to the taking of evidence before the sheriff's jury to determine the title of property as supplied by the rules of evidence, is much the same as those which are applicable in courts of record.<sup>39</sup> It is the duty of the sheriff in such actions to exclude any evidence that has no bearing on the issue, or which constitutes illegal testimony, or is inadmissible. In some jurisdictions rulings in such matters are reviewable by appellate courts.<sup>40</sup> A claim tried before a jury is, in some jurisdictions, conclusive in so far as the officer is concerned, and if the jury's verdict is against the claimant, his only remedy is against the plaintiff in the original action.<sup>40a</sup> But, in other jurisdictions, no such effect attaches to the jury's verdict and the only effect is to require the plaintiff in the original action to give bond to indemnify the officer.<sup>40b</sup>

37. *Sheldon v. Loomis*, 28 Cal 122; *Cohen v. Climax Cycle Co.*, supra; *Pfeifer v. Hatton*, supra.

38. *Vulcan Iron Works v. Edwards*, 36 P 22, 27 Ore 563, 39 P 403; *Bayley v. Bates*, 8 Johns. (NY) 185; *Remdall v. Swackhamer*, 8 Ore 502; *Capital Lumbering Co. v. Hall*, 9 Ore 93; *Van Cleef v. Fleet*, 15 Johns. (NY) 147.

38a. *Vulcan Iron Works v. Edwards*, supra; *Farr v. Newman*, 4 Term 633.

39. *Obart v. Letson*, 2 Har 78, 17 NJL 78, 34 AD 182.

40. *Rowe v. Bowen*, 28 Ill 116; *Obart v. Letson*, supra.

40a. *Philips v. Harris*, 3 JJ Marsh. (Ky) 122, 19 Am Dec 166; *Schroeder* 468

*v. Clark*, 18 Mo 184; *Vulcan Iron Works v. Edwards*, 36 P 22, 27 Ore 563, 39 P 403.

40b. *Smith v. Graham*, 136 P 801, 25 Idaho 174, the statute in Idaho providing for a jury in such cases has been repealed. *Cohen v. Climax Cycle Co.*, 46 NYS 4, 19 App Div 158; *Townsend v. Phillips*, 10 Johns. (NY) 798; *Pfeifer v. Hatton*, 115 NW 191, 17 ND 99, 138 Am St Rep 698; *Matheson v. F. W. Johnson Co.*, 92 NW 1083, 16 SD 347; 2 *Freeman on Executions* (3rd ed.) Sec. 277, wherein the learned author concludes that "the importance of the proceedings is that it justifies the officer in delivering possession to

§ 498. **Abatement of Action against Indemnitors.**—An action against an indemnitor of a sheriff for damages for taking and carrying away plaintiff's goods under process of a competent court directed against a stranger, survives and continues after the death of such indemnitor, and on appropriate proceedings therefor, a pending action may be revived against the executor or administrator of the decedent.<sup>41</sup> It may be stated as a general rule, in most jurisdictions under statutory enactments, that this class of action does not abate.

§ 499. **Effect of Actions on Indemnity by Sheriff.**—In many jurisdictions it is provided by statute that where indemnity is furnished to the sheriff upon his demand arising from a levy of an execution on property, which the sheriff believes may belong to someone, other than the execution defendant, once he demands such bond and receives it, he must proceed with levy or sale in case a levy has already been made.<sup>42</sup> Under these statutes after accepting such indemnity, he cannot refuse to execute the writ even by showing that the title to the property in question was in another than the execution defendant.<sup>43</sup> Where there is no statute in regard to the accepting of indemnity by the sheriff, where the property to be levied upon is claimed by a third person, the sheriff may refuse to take indemnity and proceed with the levy, but he has the burden of showing that the property in fact belongs to a third party claimant and if he fails in so doing then such failure will result in consequent liability being visited upon him for failing in his official duty.<sup>44</sup>

§ 500. **Relationship between Sheriff and Indemnitors.**—Where the sheriff has received a contract of indemnity by reason of a

the claimant, if the verdict or judgment is in his favor, and no bond of indemnity is tendered to the officer."

41. *Heinmuller v. Gray*, 35 NY Super 196, 13 Abb Pr(NS) 299, 44 How Pr (NY) 260.

42. *Reinbeck Bank v. Brown*, 39 N W 524, 76 Iowa 696; *Hamberger v. Seavey*, 43 NE 297, 165 Mass 505; *Jewett v. Sundback*, 58 NW 20, 5 SD 111; *Johnson v. Nelson*, 263 P 949, 146 Wash 500, 56 ALR 1035.

43. *Rowland v. Bruton*, 14 P(2d) 116, 125 Cal App 097; *Smith v. Graham*, 136 P 801, 26 Idaho 174;

*Evans v. Thurston*, 4 NW 895, 53 Iowa 122.

44. *Hutchinson v. Lull*, 17 Vt 133; *Wadsworth v. Walliker*, 45 Iowa 395, 24 Am Rep 788; *Mathis v. Carpenter*, 10 So 341, 95 Ala 156, 36 Am St Rep 187; *Dornan v. McCandless*, 23 Atl 245, 146 Pa St 344, 28 ASR 798; *Phelps. Dodge & Palmer Co. v. Skinner*, 65 P 667, 63 Kan 364; see above case for evidence admissible under general denial. *James v. Thompson*, 12 La Ann 174; *Coville v. Bentley*, 42 NW 1110, 76 Mich 249, 15 Am St Rep 312; *Freiberg v. Johnson*, 9 SW 455, 71 Tex 558. But see Sec. 494 supra.

writ of execution, the relationship existing between the sheriff and such indemnitors is a contractual one and is limited to the terms imposed by such contract.<sup>45</sup> In the construction of such contracts of indemnity they will be construed to include all things done within its terms.<sup>46</sup> However, such indemnitors are not liable for acts of the officer which are so unreasonable and so unwarranted as to be without the terms of the contract of indemnity.<sup>47</sup> Even in the absence of a written bond, as has been seen already, it has been held that where the officer executes a writ in accordance with the directions of the execution creditor, an implied promise of indemnity arises in the absence of such indemnity bond or express contract to indemnify the officer and where the officer acts in accordance with such instructions and his actions are neither unlawful or illegal, he may recover indemnity from such execution creditor for the damages paid by such officer for the wrongful seizure of property.<sup>48</sup>

§ 501. **When Sheriff's Right to Sue on Indemnity Bond Is Complete.**—In regard to the general indemnity bond, the cause of action against the indemnitors on such bond arises upon a judgment being rendered against the officer and such liability is complete even though the amount of such judgment has not been paid.<sup>49</sup> However, the accrual of such liability is limited by the terms of the bond itself. If the bond undertakes to save the officer harmless from damage or expense, it is held that by reason of such terms of the bond such officer does not have cause of action against the indemnitors until he has paid the judgment or has suffered some loss that comes within the terms of the bond.<sup>50</sup> Where the contract of indemnity is an implied one, then it seems that in order for the offi-

45. *Fury v. White*, 23 P 535, 2 Idaho 662; *Gast v. Goldenberg*, 163 NE 257, 281 Mass 214; *Leshner v. Getman*, 15 NW 309, 30 Minn 321; *Sanger v. Baumberger*, 8 NW 421, 51 Wis 592.

46. *Gaudette v. Roeder*, 13 Nev 341; *Ebenreiter v. Dahlman*, 42 NYS 867, 19 Misc 9; *Van de Vanter v. Davis*, 63 P 555, 23 Wash 693.

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*derson*, 86 SW 961, 39 Tex Civ App 89; *Gast v. Goldenberg*, supra.

48. *Weir v. Hum Tong*, 46 P(2d) 45, 100 Mont 1, see Sec. 495, supra.

49. *Moore v. McSleeper*, 36 P 593, 102 Cal 277; *Briggs v. McDonald*, 43 NE 1003, 166 Mass 37; *Armour Packing Co. v. Orrick*, 46 P 573, 4 Okl 661; *Wheeler v. Sweet*, 33 NE 483, 137 NY 435, 16 NYS 836, 43 NY St Rep 225.

50. *Tunstead v. Nixdorf*, 22 P 472, 80 Cal 647; *Cousins v. Paxton*, 98 NW 277, 122 Iowa 465; *Gardner v. Cooper*, 58 P 230, 9 Kan App 587, 60 P 540; *Howard v. Conde*, 30 P 454, 22 Ore 581.

cer to recover thereon he must show more damage than an unsatisfied judgment against him.<sup>51</sup> Where an indemnity bond recites that an execution had been levied, and that if the sheriff retained, advertised, and sold the property under the execution, the sureties on the indemnity bond would indemnify him; that thereafter the judgment upon which the execution issued was set aside and the property released, it was held under these circumstances the officer had a cause of action on the bond for indemnification notwithstanding the above mentioned provisions of the bond.<sup>51a</sup>

§ 502. **When Indemnitors Primarily Liable to Claimant.**—As a general rule the claimant has no right of action that he can assert against the indemnitors upon the bond itself, but his cause of action against the officer for which he has been indemnified is in no way destroyed or even lessened. It is only in those cases where he is named as an obligee in the contract of indemnity that he may assert liability directly against the indemnitors. And, it seems further, that his name may not be inserted in the bond as an obligee unless in virtue of statutory enactment.<sup>52</sup> Of course if there is a statute authorizing suit against the officer's indemnitors by the injured claimant, then of course he would have such right of action.

When an indemnity bond is authorized by law, and where the law provides, it is the officer's duty to proceed when the bond is given; still, if the officer is prevented from performing the acts covered by the indemnity he will be held blameless where he is so prevented by legal process.<sup>53</sup> It ought not to be overlooked that an indemnitor may be held liable for trespass as a joint wrongdoer, that is, he is treated as jointly liable with the officer for the commission of the tort by reason of his having encouraged the same by signing the bond of indemnity.<sup>54</sup> It sometimes happens that dif-

51. *Williams v. Mercer*, 29 NE 540, 139 Mass 141. The nature of implied contract of indemnity is discussed in Sec. 495, supra. *Weir v. Hum Tong*, 40 P(2d) 45, 100 Mont 1.

51a. *W. F. Main Co. v. Morrow*, 57 P 915, 8 Wyo 323.

52. *Harris v. Harrison*, 40 Ark 50; *Magee v. Frazer*, 40 SW 452, 20 Ky L 1467; *Trammel v. Kirk*, 278 SW (Mo App) 739; *Whipps v. Lowney*, 113 P 750, 42 Mont 546.

53. *Swain v. Alcorn*, 50 Miss 320; *Irion v. Hume*, 50 Miss 419; *Edson v. Weston*, 7 Cow (NY) 278.

54. *Nisbet v. Federal Title etc. Co.*, 229 F 644, 144 CCA 54, 36 Sup Ct 553, 241 US 669, 60 L ed 1229; *Lovejoy v. Murray*, 3 Wall.(US) 1, 18 L ed 129; *Parrish v. Danford*, 18 F. Cas. # 10770, 1 Bond 345; *Sparkman v. Swift*, 8 So 160, 81 Ala 233; *March v. Barnet*, 53 P 933, 121 Cal 419, 68 Am St Rep 44, 51 P 20, 5 Cal (Unrep Cas) 863; *Lewis v. Johns*, 34 Cal 629; *Rice v. Wood*, 33 SW 638, 61 Ark 442, 31 LRA 609; *Woodworth v. Gorsline*, 69 P 705, 30 Colo 136, 58 LRA 417; *Lesher v. Getman*, 15 NW 309, 30 Minn 321; *Allred v. Bray*, 41 Mo 484, 97 AD

ferent indemnities are given to an officer and in such cases the signers thereon, where they are separate and distinct, are not jointly liable along with the officer.<sup>55</sup>

§ 503. **Indemnitors Liable to Claimant before Sheriff under Statute.**—Under pertinent statutory provision it appeared that the officer had levied under several writs upon property not belonging to the defendant therein, and that the true owner asserted his title to the property, thereupon the plaintiffs in the writs indemnified the sheriff who then commenced proceedings for sale and the owner commenced an action in trover, the officer had a right to have the obligors brought in as defendants in the action against him, to enable him to enforce their liability under the indemnity, and that the obligors in the indemnity bond are liable before the officer in such case.<sup>56</sup> It may not be amiss to here remark, independently of statute, that the indemnitors would, upon notice, be obliged to assume the burden of the defense of the action against the officer, and they are concluded by the judgment, in an action against them because answerable over to the officer.<sup>56a</sup> In some states the same result is reached in a summary way, after judgment against the officer, by a motion for judgment against the indemnitors for the amount recovered and costs.<sup>56b</sup>

§ 504. **Limitations of Indemnitor's Liability.**—The liability of the indemnitors is measured by the exact ambit of their contractual obligation; it is no more and no less. Their liability is limited to the precise sum stated therein, and by the obligations and stipulations inserted in the contract of undertaking.<sup>57</sup> The obligors are

263; *Martin v. Buffaloe*, 38 SE 902, 128 NC 305, 83 ASR 679; *Dyett v. Hyman*, 29 NE 261, 129 NY 351, 26 ASR 533, 13 NYS 895, 37 NY St Rep 251; *Cabell v. Hamilton etc. Shoe Co.*, 16 SW 811, 81 Tex 104; *W. F. Main Co. v. Morrow*, 57 P 915, 8 Wyo 323.

55. *Sparkman v. Swift*, supra, see Sec. 491, supra.

56. *Dutil v. Pacheco*, 21 Cal 438, 82 Am Dec 749; *Richardson v. McLaughlin*, 57 NW 210, 65 Minn 489, holding that it is unnecessary after the obligors in the indemnity are brought in for the plaintiff to amend his pleadings, but the duty is on the officer to set up in his answer the facts with respect to his indemnification. *Lesher v. Getman*, 15 NW 309, 30 Minn 321.

56a. *Lesher v. Getman*, supra; *Westfield v. Mayo*, 122 Mass 109, 23 A Rep 292; *Richardson v. McLaughlin*, supra; *Moore v. McSleeper*, 36 P 693, 102 Cal 277; *Sullivan v. California R. Co.*, 75 P 767, 142 Cal 201.

56b. *Richardson v. McLaughlin*, supra; *Cal. Code of Civ. Proc.*, 1055; *Deering's Cal. Code of Civ. Proc.*, 1055; *Kerr's Cal. Code of Civ. Proc.*, 1055. See also 13 Cal. Jur., 1005.

57. *Fury v. White*, 23 P 535, 2 Idaho 602; *White v. French*, 15 Gray(Mass) 339; *Lesher v. Getman*, 15 NW 309, 30 Minn 321; *Omaha Carpet Co. v. Clapp*, 89 NW 246, 2 Neb (unof.) 406; *Stevens v. Wolf*, 14 SW 29, 77 Tex 215.



liable in addition to the penalty of the bond in a proper case for interest to be computed from the time the cause of action accrues.<sup>58</sup> The liability may also include such sums as the officer incurred for counsel fees and expenses in defense of the action brought against him,<sup>59</sup> and in some circumstances they may even be liable for the amount of a compromise effected by the officer after they have refused to defend the principal action.<sup>60</sup> Where an indemnity bond is given to an officer to hold him harmless and to pay any judgment that may be rendered against him by reason of his seizure of certain property, the insolvency of the officer is immaterial in an action on such indemnity undertaking.<sup>61</sup> Their liability does not extend to expenses in connection with the keeping of the property originally seized, such as a keeper's wages, or insurance premiums.<sup>62</sup> The obligors on the indemnity bond are not liable for attorneys' fees in an action thereon unless the bond so provides.<sup>63</sup>

In construing the indemnity bond, its terms are influenced and controlled by the existence of any statutory enactment found within the jurisdiction wherein it is given.<sup>64</sup> The indemnitors may be held for all acts that can reasonably be said to come within the terms of the bond.<sup>65</sup> An application of the rule of the construction of the indemnity bond is found in those cases wherein it is held that if, by its terms, the indemnity is limited to save harmless the officer for levy on property of a third party it does not cover his acts in levying on exempt property of the defendant. In other words, the liability of a surety on the undertakings we have under consideration is strictissimi juris<sup>66</sup> but they are not, it seems, construed with the strictness with which an official bond of an officer is construed.<sup>66a</sup> It seems, an officer having a number of indemnity

58. *White v. French*, supra; *Omaha Carpet Co. v. Clapp*, supra.

59. *Moore v. McSleeper*, 36 P 593, 102 Cal 277; *Graves v. Moore*, 58 Cal 435; *Stark v. Raney*, 18 Cal 622; *Newell v. McDonald*, 212 P 389, 60 Cal App 202; *McKnight v. Ballif*, 100 P 433, 45 Colo 138; *Cousins v. Paxton*, 98 NW 277, 122 Iowa 465; *Ireland v. Linn County Bank*, 176 P 103, 103 Kan 618, 2 ALR 184; *Lindsey v. Parker*, 8 NE 745, 142 Mass 582; *Tuttle v. Hardenberg*, 38 P 1070, 15 Mont 219; *Benson v. Caulfield*, 89 NW 664, 64 Neb 101; *Dunn v. Nat'l Surety Co.*, 80 NYS 744, 80 App Div 605, 70 NE 1098, 178 NY 552.

60. *Dunn v. Nat'l Surety Co.*, supra.

61. *White v. Fratt*, 13 Cal 521.  
62. *Brabb's Appeal*, 42 Leg Int (Pa) 28; *Smith v. Scott*, 261 SW (Tex Civ App) 1089.

63. *Tunstead v. Nixdorf*, 22 P 472, 80 Cal 647.

64. *Sanger v. Baumberger*, 8 NW 421, 51 Wis 592.

65. *State v. Finke*, 66 Mo App 238.

66. *Evans v. Collar*, 42 NW 957, 75 Mich 433; *Winters v. Judd*, 12 NYS 411, 59 Hun 32, 35 NY St R 182.

66a. *Maxwell-Clark Drug Co. v. Singley*, infra, note 69.

bonds in his possession covering the same act may resort to any one he desires.<sup>67</sup> But, in brief, it may be said that the obligors on the indemnity are liable only for the acts of the sheriff specified or clearly embraced within the import of the language employed in the written bond of their undertaking.<sup>68</sup> In order to hold the indemnitors liable, it is immaterial whether the property is thereafter sold in the particular action in which the indemnity is given or not, since the cause of action accrues when the levy is made.<sup>69</sup>

§ 505. **Duty of Sheriff to Defend Action Brought against Him.**—It becomes the duty of the sheriff, when sued in an action wherein he has taken a bond of indemnity, to notify the obligors to defend the same, and on their failure so to do, to carry on the defense himself, and if he fails in the duties thus imposed upon him it would seem to follow that he would have liability visited upon him without recourse for reimbursement as against indemnitors. This is of necessity true, in the absence of an applicatory controlling statute, because the indemnitors can bring forward any defense in the officer's action against them that he could have relied upon in the original action.<sup>70</sup>

§ 506. **Indemnity Not Liable as Joint Trespass When.**—We have already seen that the indemnitors may be liable as joint trespassers or tortfeasors but this is not the case where the indemnity is given after the seizure of the goods. In these circumstances the indemnitors, including the plaintiff, in the original action, are not liable as joint trespassers.<sup>71</sup>

§ 507. **In Absence of Statute, Indemnity Is Common Law Obligation.**—In the absence of statutory regulation, indemnities are treated as a common law obligation.<sup>72</sup>

§ 508. **Taking Indemnity as Not Affecting Rights of Injured Party.**—The fact that an officer takes an indemnity bond does not in any way lessen or affect the rights of the injured party to proceed against the officer.<sup>73</sup> And, where the indemnitors are sued along with the officer, under some statutes, the claimant must proceed

67. *Findlay v. Hutzell*, 29 Pa 337.

68. *Chapman v. Douglas*, 5 Daly (N Y) 244.

69. *Maxwell-Clark Drug Co. v. Singley*, 152 SW (Tex Civ App) 827.

70. *Stewart v. Thomas*, 45 Mo 42; *Maxwell-Clark Drug Co. v. Singley*, 152

SW (Tex Civ App) 827.

71. *Longcope v. Bruce*, 44 Tex 434, see Sec. 600, supra.

72. *Allwein v. Sprinkle*, 87 Ind 240; *Bosley v. Farquar*, 2 Blackf (Ind)

61; *State v. Sandlin*, 44 Ind 504.

73. *Lewis v. Mansfield*, 78 Ky 460.

against the indemnitors first, but in the absence of statute it seems that he may proceed against either the indemnitors or the sheriff.<sup>74</sup>

§ 509. **Indemnity against Illegal Acts Void.**—An officer of the law should exercise caution to the end that he does not take an indemnifying bond to secure him against a known violation of duty, the consequences of an intentional trespass, commission of crime, or perpetration of wrong, since such indemnifying bond is void, and if an officer proceeds with the execution of the desires of the one supplying him indemnity he may find himself without remedy or ability to proceed against the obligors on the indemnifying bond.<sup>75</sup>

§ 510. **Acceptance of Indemnity Does Not Prejudice Sheriff's Defenses.**—The acceptance of an indemnity and proceeding to levy upon goods does not in any way operate against the right of the sheriff to show that the seized goods were not in fact those of the defendant, or that they belonged to a stranger to whom he had released them when he is called to account for official misconduct in connection therewith.<sup>76</sup>

74. *Screws v. Watson*, 48 Ala 628; *Lewis v. Johns*, 34 Cal 629; *Knight v. Nelson*, 117 Mass 458; *Leshner v. Getman*, 15 NW 309, 30 Minn 321; *Davis v. Newkirk*, 5 Denio (NY) 92.

75. *Frothingham v. Maxim*, 141 Atl 99, 127 Me 58; *Hodsdon v. Wilkins*, 7 Greenl (Me) 113, 20 AD 347; *Ayer v.*

*Hutchins*, 4 Mass 370, 3 AD 232; *Webbers v. Blunt*, 19 Wend (NY) 188, 32 AD 445; *Griffiths v. Hardenbergh*, 41 NY 464, see also *Marshall v. Wheeler*, 128 Atl 692, 124 Me 324; 2 *Freeman on Law of Execution*, Sec. 275a.

76. *Freiberg v. Johnson*, 9 SW 465, 71 Tex 568.

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## CHAPTER XIX

### BETWEEN LEVY AND SALE—NOTICE

SECS.

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- 535. Imperfect Advertisement; When It Will Vitiating Sale.
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§ 511. **Delivery Bonds and Forthcoming Bonds.**—The forthcoming bond is a bond given to the sheriff or constable to gain possession of the property pending further proceedings and conditioned to the effect that the property or the appraised value in money shall be forthcoming to satisfy any judgment that may be, or that has already been recovered when said property be lawfully demanded.<sup>1</sup>

1. *Perry v. Tacoma Mill Co.*, 152 F 115, 119, 120; 81 CCA 333. Loss by fire during the time said property is held by the principal of the forthcoming

ing bond falls upon him and his sureties. *Omaha Hotel Co. v. Kountze*, 2 S Ct 911, 107 US 378, 27 L ed 609; *Nichols v. Chittenden*, 59 P 954,

There is no difference between a forthcoming or redelivery bond—redelivery bond being merely another name for forthcoming bond.<sup>2</sup> As has heretofore been seen, where property is levied upon by the sheriff and is left in the hands of the execution debtor or attachment debtor, such fact does not destroy the lien created by virtue of such execution or attachment. However, as has been stated, a bona fide purchaser for value may take priority over such execution creditor where the property is left in the hands of the debtor. Of course, if there is any fraud in the matter, such possession will destroy or prevent a lien from attaching.<sup>3</sup> As has also been heretofore stated, if the property is left in the hands of the execution debtor by the direction of the creditor, the lien of the execution will be lost.<sup>4</sup>

§ 512. **Redelivery of Goods to Defendant Fatal to Levy.**—As has been stated in another section, the defendant may keep the custody of the goods for the sheriff and such case will become the sheriff's bailee. However, where the sheriff takes possession of the goods himself and subsequently they are returned to the execution defendant with the intent that such execution defendant should treat the goods as his own, the rights of the sheriff are lost.<sup>5</sup> Where the redelivery is made, however, if it is the intention that the defendant should act as the bailee of the sheriff, then the lien is not released.<sup>6</sup> It may be stated as a general rule that there can be no conditional release of a levy, as where it is attempted so to do, and still maintain the lien created thereby.<sup>7</sup> In general, if the property is released from the levy then the lien of such levy is lost, and if this is done wrongfully by the sheriff he is liable.<sup>8</sup>

§ 513. **Forthcoming or Delivery Bonds Generally Regulated by**

966, 14 Colo App 49; Hinkle v. Holmes, 85 Ind 405; Mahlman v. Wilhams, 12 SW 335, 89 Ky 282, 11 Ky L R 503; Burnham-Munger-Root Dry Goods Co. v. Strahl, 166 NW 266, 102 Neb 142.

2. Ballantyne's Law Dictionary, page 354.

3. See Sections 443 supra, 512, infra.

4. In re Ferguson, 95 F 429, aff 102 F 1002, 43 CCA 89; U. S. v. Conyng-ham, 25 F. Cas. # 14850, 4 Dall 358, 1 L ed 865; Davidson v. Waldrom, 31 Ill 120, 83 AD 206; McConnell v. Denham, 34 NW 298, 72 Iowa 494; Quackenbush

v. Henry, 3 NW 262, 42 Mich 75; Wunsach v. McGraw, 20 P 832, 4 Wash 72, see Secs. 443 supra, 512 infra.

5. Murfree on Sheriffs, Sec. 643.

6. Murfree on Sheriffs, Sec. 642.

7. McConnell v. Denham, 34 NW 298, 72 Iowa 494.

8. Lowenburg v. Jefferies, 74 F 385; Duty v. Jones, 184 SW 419, 123 Ark 46; Cowsert v. Stewart, 236 P 940, 72 Cal App 255; Bishop v. Poundstone, 52 P 222, 11 Colo App 73; Hunter v. Garmany, 136 SE 465, 36 Ga App 275; Kelley v. Tarbox, 66 Atl 9, 102 Me 119.

**Statute.**—For the convenience of the execution defendant it is provided by statute in many states that such defendant may give a forthcoming or a delivery bond. In other states, individuals are put in possession of the property and a receipt is taken from him by the officer for such property and they are called "receptors." Where such is done a "receptor" may be any person that the sheriff may consider competent, including the execution defendant.<sup>9a</sup>

§ 514. **Object and Effect of Delivery Bond.**—The object of the delivery bond is to enable the execution debtor whose property has been taken, to retain such property in his possession until such time as the sheriff requires it for sale.<sup>9</sup> Such forthcoming or delivery bond is given by the execution debtor, or in his behalf, to the sheriff upon the condition that such property will be produced when the sheriff demands it for sale.<sup>10</sup> The terms of the bond are governed by statute; the whole proceeding is purely statutory.<sup>11</sup>

§ 515. **Validity of Delivery Bonds Essential.**—It is generally provided that the person upon whose property there has been a levy may only furnish such bond.<sup>12</sup> However, the substantial form and conditions of these bonds are regulated by statute and the statutes of a particular jurisdiction which controls a question ought to be consulted. If pending the execution of such forthcoming bond, the execution debtor die, his executor or administrator may furnish such bond for the estate of the debtor.<sup>13</sup> Where there are several execution co-debtors, and part of them refuse to join in the execution of such forthcoming bond, one of such debtors may execute and furnish the bond.<sup>14</sup> On the contrary, however, it has been held that all of the co-debtors must join in the execution of such bond, and that where they fail to do so, upon the objection of the judgment creditor, the property would be retaken by the sheriff.<sup>15</sup>

Some courts are critical in their holdings with respect to these bonds, and it is held to be absolutely essential that the bond follow the requirements of the statute,<sup>16</sup> while, on the other hand, it has

9a. Murfree on Sheriffs, Sec. 643.

9. Skinner v. Jayne, 24 Miss 567.

10. Nichols v. Chittenden, 59 P 954, 14 Colo App 49.

11. United States Bank v. Patton, 5 How (Miss) 200, 35 AD 428.

12. Fwing v. Union Central Bank, 72 SW(2d) 4, 254 Ky 623; Nabours & Owens v. Cocke, 24 Miss 44; Harris v. Shackelford, 6 Tex 133.

13. Thompson v. Ross, 26 Miss 198; Jones v. Stanton, 7 How (Miss) 601.

14. Sheppard v. Melloy, 12 Ala 561; Head v. Beaty, 5 How (Miss) 480.

15. Kouns v. Bank of Kentucky, 2 B Mon (Ky) 303.

16. Eslinger v. Land, 163 SE 522, 45 Ga App 96, but see Mount v. Wall, infra, note 22 this Sec.

been held that such bond is sufficient even though not closely following the language of the statute;<sup>17</sup> the principle of such holding being in regard to such bonds that the court would discard all surplusage and supply by implication any deficiency.<sup>18</sup> This holding is more in accord with a proper construction of such bonds, since it is well settled that all classes of judicial bonds are to be construed by the laws under which they are executed, rejecting surplusage and supplying omissions.<sup>18a</sup> Where the statute does not prescribe any particular form, then a bond conditioned substantially in the language of the statute will be sufficient to answer its requirements.<sup>19</sup> However, it has been held that if a material part of such a bond is left blank, then it will be void.<sup>20</sup> The converse is true if it is an immaterial part of the bond that is left blank or if it can be supplied by construction.<sup>21</sup> Even though such bonds fail to measure up to the required provisions of the local statutes, still they may be good as common law obligations.<sup>22</sup> Finally, it may be safely said, that in any event, if the bond complies substantially with the statute regulating it, the law is satisfied.<sup>22a</sup>

§ 516. Cumulative Remedy.—Where there has been a breach of a forthcoming bond and a summary proceeding is provided by statute against the signers of such bond, this remedy is merely cumulative and does not prevent the sheriff from availing himself of his common law remedies.<sup>23</sup>

§ 517. Necessary Provisions in Forthcoming Bond.—The bond usually requires the obligor to undertake to return the property

17. *Cutrer v. Smith*, 142 So (La App) 170.

18. *Cutrer v. Smith*, supra.

18a. *Speyrer v. Miller*, 32 So 524, 108 La 204, 61 LRA 781; *St. Charles St. R. R. Co. v. Fidelity & Dep. Co.*, 33 So 574, 109 La 491; *Soaler v. Alstrom*, 38 La Ann 907; *Macready v. Schenck*, 6 So 517, 41 La Ann 456; *Cutrer v. Smith*, supra.

19. *Grant v. Brotherton*, 7 Mo 458; the word "dollars" supplied after penalty of bond; *Cutrer v. Smith*, supra.

20. *Williams v. Crutcher*, 5 How (Miss) 71, 35 AD 422; *Long v. U. S. Bank, Freem. Ch.* (Miss) 375.

21. *Beale v. Wilson*, 4 Munf (Va)

380, see also note 18a supra, this section.

22. *Mobile Branch Bank v. Darrington*, 14 Ala 192; *Mount v. Wall*, 56 SE 298, 127 Ga 211; *Turner v. Armstrong*, 9 Ill App 24; *Drake v. Moore*, 1 Bibb (Ky) 351; *Handley v. Rankins*, 4 TB Mon (Ky) 554; *Waterman v. Frank*, 21 Mo 108; *Lynchburg Trust etc. Bank v. Elliott*, 27 SE 467, 94 Va 700; *Kunst v. Findley*, 80 SE 136, 73 W Va 152.

22a. *Hefner v. Hesse*, 29 La Ann 149; *Selmes v. Smith*, 21 Mo 526; *D. M. Sechler Carriage Co. v. Hymes*, 87 Mo App 193; *Ring v. Gibbs*, 26 Wend (N Y) 502. See note 18a supra, this section.

23. *Fossett v. Turnage*, 9 Humph (Tenn) 686.

to the executing officer at the time and place fixed for the sale.<sup>24</sup> The bond may provide, in some jurisdictions, a particular day on which the property is to be redelivered.<sup>25</sup> If the bond sets forth a day when the property is to be redelivered which day has already passed such bond is voidable, but would probably be sustained as a common law bond.<sup>26</sup> The property which is the object of the forthcoming bond should be described with sufficient particularity to enable one to identify it.<sup>27</sup> But this is unnecessary where no specific property has been pointed out and designated by the execution creditor to be seized.<sup>27a</sup> A slight inaccuracy of description will not work a vitiation of the bond.<sup>27b</sup>

Likewise, the bond should specify the owner of the property.<sup>28</sup> The bond should contain the name of the obligee, and in this respect the statutes should be followed in order to constitute the bond a statutory one.<sup>29</sup> But if a partnership is the proper obligee, the name thereof will suffice—being unnecessary to set out the names of the partners.<sup>29a</sup> Failure to correctly state the obligee would not prevent the bond from being a common law obligation.<sup>30</sup> The bond should set forth the facts with reference to the execution and describe such execution with common certainty.<sup>31</sup> Such reference to the execution should contain the amount for which the execution is issued,<sup>32</sup> and should likewise state the name of the execution debtor.<sup>33</sup> Where the description in the bond of the writ of execution varies from the actual description thereof, such variance is fatal to the bond.<sup>34</sup> A bond of indemnity is treated as a continuation of the proceedings on the execution, and in the light of this line of authority it has been held that it is unnecessary to set out the execution or go into minute details of proceedings thereunder, and im-

24. *Grady v. Threadgill*, 35 NC 228.

25. *Irvin, Galt & Co. v. Eldridge*, 1 Wash (Va) 161; *Grady v. Threadgill*, supra.

26. *Jenkins v. McNeese*, 34 Tex 190; *Adler v. Green*, 18 W Va 201.

27. *Hubbard v. Taylor*, 1 Wash (Va) 259, but see *Sharp v. Morgan*, 192 SW (Tex Civ App) 599; *Smith v. Rogers*, 40 SW 1150, 191 Mo 334, 73 SW 243, 99 Mo App 252; *Central Land Co. v. Calhoun*, 16 W Va 361.

27a. *Smith v. Rogers*, supra, see also *Sharp v. Morgan*, supra.

27b. *Smith v. Rogers*, supra.

28. *Jones v. Miles*, 1 How (Miss)

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29. *Thompson v. Wilson*, 1 Blackf (Ind) 358.

29a. *Davis v. Davis*, 2 Gratt (43 Va) 365.

30. *Salmon v. Lynn*, 85 SE 203, 16 Ga App 298.

31. *Ambler v. McMechen*, 1 F. Cas. # 273, 1 Cranch CC 320; *Midland Ry. Co. v. Eller*, 33 NE 265, 7 Ind App 216.

32. *Meredith v. Richardson*, 10 Ala 828; *Holt v. Lynch*, 18 W Va 567.

33. *Nicolson v. Burke*, 15 Ala 353; *Lewis v. Thompson*, 2 Hen & M (Va) 100.

34. *Russell v. Locke*, 57 Ala 420; *Holt v. Lynch*, supra.

perfections in this regard do not work an invalidation of the bond of indemnity.<sup>34a</sup>

§ 518. **Forthcoming Bond for the Benefit of Plaintiff.**—It is generally true that a delivery bond is not authorized for the convenience or benefit of the officer or the plaintiff. However, a suit thereon may be brought in the name of the officer for the use and benefit of the judgment creditor,<sup>35</sup> although it has been held that a suit can be successfully brought, in some circumstances, in the name of the plaintiff in the original action.<sup>36</sup> An action in the name of the officer without his consent cannot be maintained unless he is indemnified against costs. In any event, the rights and liabilities on a redelivery or forthcoming bond are determined by the conditions and provisions thereof. It has also been adjudicated that it rests in the officer's discretion as to whether or not he will sue thereon, but in the case of his refusal he would be liable to the judgment creditor for damages sustained.<sup>37</sup>

Where the officer sues upon the bond, he should charge in his pleading that the action was brought for the use and benefit of the judgment creditor.<sup>38</sup> Under some statutes the bond should be made to the judgment creditor as the obligee.<sup>39</sup> Irregularities in the bond, if accepted and relied upon, do not operate to vitiate it.<sup>40</sup> In harmony with the rule sustained by the adjudications that informalities will not operate to avoid the bond is the rule that, although the statute requires the bond to be payable to the levying officer but through error it is made to the execution creditor, still an action thereon will be sustained when brought in the name of the officer for use of the plaintiff on the theory the bond was a common law one.<sup>41</sup> Where a forthcoming bond names a sher-

34a. *Gatzweiler v. Morgner*, 51 Mo 47; *Davis v. Davis*, supra.

35. *Turner v. Camp*, 36 SE 76, 110 Ga 631; *Clark v. Horn*, 25 SE 203, 99 Ga 165; *Reinbeck Bank v. Brown*, 39 NW 524, 76 Iowa 696; *Lewis v. Mansfield*, 78 Ky 460; *Cincinnati Cooperage Co. v. Woodyard*, 54 SW 831, 21 Ky L 1221; *Howard v. Conde*, 30 P 454, 22 Ore 581.

36. *Bowman v. Kidd*, 79 SE 167, 12 Ga App 351; *Sheppard v. Collins*, 12 Iowa 570; *Walker v. Howell*, 1 Cold (Tenn) 238.

37. *Dezell v. Odell*, 3 Hill (NY) 216, 38 AD 628.

38. *Hatton v. Brown*, 57 SE 1044, 1 [1 Anderson on Sheriffs]—31

Ga App 747; *Turner v. Camp*, supra.

39. *Wortzman v. Wade*, 77 Ga 651, 4 ASR 102; *Cole v. Robertson*, 6 Tex 356, 55 AD 784.

40. *Fidelity & Deposit Co. v. Bowen*, 98 NW 897, 123 Iowa 356, 6 LRA(NS) 1021; *Sievers v. Samuel*, 136 So 33, 172 La 1005, 131 So 485, 18 La App 37; *Walker v. McDowell*, 4 Smedes & M (Miss) 118, 43 AD 476; *Coffee v. The Planters' Bank*, 11 Smedes & M (Miss) 458, 49 AD 68.

41. *Stroud v. Hancock*, 42 SE 496, 116 Ga 332; *Wall v. Mount*, 49 SE 778, 121 Ga 831; *Gelders v. Mathews*, 64 SE 576, 6 Ga App 144; *Salmon v.*

iff or constable as the obligee he may sue thereon in his name—it being immaterial that the bond was executed for the benefit of a deputy.<sup>41a</sup> Where a bond is given for the protection of an officer, and this appears from the bond, he may sue thereon even though other obligees are named therein, and in these circumstances it is not required that there be an assignment from the superfluous obligee to the officer.<sup>41b</sup> The rulings in the several jurisdictions are various and inharmonious, and it would be necessary to consult the statutes and adjudications in any particular jurisdiction where a question arising with respect thereto is involved before reliable advice could be given in respect to rights and liabilities in regard to the bonds we have under discussion.

§ 519. **Sheriff or Constable Not an Insurer of Redelivery Bonds or a Guarantor of Its Obligors.**—A sheriff or constable is often confronted with the duty of accepting or rejecting redelivery or forthcoming bonds in the discharge of the functions of his office. The law exacts no more of him than due diligence, to the end that the beneficiary of such bonds be protected, and if he exercises his best judgment in this respect he cannot be held liable for an honest mistake of judgment.<sup>42</sup> It may be stated however, that the matter of redelivery or forthcoming bonds is regulated by statute in the various jurisdictions and does not exist, independent of statutory enactment.<sup>43</sup> Where the statute allows the defendant the right to give a redelivery or forthcoming bond, the sheriff is clearly within his rights to release the property upon the giving of the bond, but it is incumbent upon him to see that a sufficient bond be given, and if he releases the property on a bond appearing to be invalid upon its face, then he incurs liability.<sup>44</sup>

Where the bond, under the terms of the statute in the particular jurisdiction, is required to be executed by both the principal and sureties, and the sheriff accepts a bond with the sureties only signing thereon, he is liable.<sup>45</sup> Also, where it is necessary, before the

*Lynn*, 85 SE 203, 16 Ga App 298; *Jones v. Hays*, 27 Tex 1.

41a. *Frothingham v. Maxim*, 141 Atl 99, 127 Me 58.

41b. *Stillwell v. Hurlbert*, 18 NY 374; *Maxwell-Clark Drug Co. v. Singley*, 152 SW (Tex Civ App) 827.

42. *United Glass Co. v. Chamlee*, 68 SE 796, 135 Ga 162; *People v. Robinson*, 89 Ill 159.

43. *Harris v. Stewart*, 47 SW 634, 65 Ark 566; *Fountain v. Napier*, 34 SE 482

351, 109 Ga 225; *Snyder v. Powell*, 133 Ill App 393; *Hubbard v. Security Trust Co.*, 78 NE 79, 38 Ind App 156; *U. S. Bank v. Patton*, 6 How (Miss) 200, 35 Am Dec 428; *Webb v. Caldwell*, 112 SW (Tex Civ App) 97; *United Glass Co. v. Chamlee*, supra.

44. *Yampert v. Johnson*, 15 SW 363, 64 Ark 165; *Nagle v. Lumpkin*, 48 Ga 521; *Bowditch v. Harmon*, 67 NE 333, 183 Mass 290.

45. *Bowditch v. Harmon*, supra. [1 Anderson on Sheriffs]

property can be released, that an order of court therefor be obtained, and if the sheriff assumes to release it without such order, he is liable.<sup>46</sup> If the plaintiff in the executory process consents to a release of the property on the giving of bond by the defendant debtor, the sheriff, of course, is within his rights in accepting such bond.<sup>47</sup> It seems that an action by the plaintiff upon the bond that we have under consideration amounts to a ratification of the act of the officer in accepting it.<sup>48</sup> Where a sheriff is liable for acts for which he is entitled to be indemnified under the terms of a redelivery or forthcoming bond, it is generally held that he must have been held liable to the plaintiff in the principal action before he, the officer, can maintain an action for recovery on the bond.<sup>49</sup> But it does seem that it is unnecessary for the officer, in order to maintain an action on the bond we have under consideration, to have actually paid the judgment against him.<sup>50</sup>

§ 520. What Amounts to a Forfeiture of Redelivery or Forthcoming Bond.—A forfeiture of a redelivery or forthcoming bond results from failure to deliver the property at the time and place required by terms and conditions of the bond, but if the failure is the result of acts or misfortune, unmixed with neglect, it does not operate as a breach of the bond.<sup>51</sup> Some authorities, however, go so far as to hold that only an act of God or the taking possession of the property by some one with a superior right, or by some act authorized by law will excuse the non-delivery of the property.<sup>52</sup> But an illegal failure to deliver the property is not repelled by the mere circumstance that goods were taken away by another, without its appearing that removal was accompanied with such force or fraud that it did not leave it in the power of the party charged with the possession and duty to deliver same.<sup>53</sup> Neither may the fact that such property was exempt from seizure be urged as a sufficient excuse for failure to redeliver. It seems that the furnishing of

46. *Fernandez v. McVittie*, 2 Rob (La) 239.

47. *Hand v. Brown*, 80 SE 1080, 144 Ga 272.

48. *Hunter v. Garmany*, 136 SE 465, 36 Ga App 275; *Hand v. Brown*, supra.

49. *Staats v. Herbert*, 4 Del Ch 509; *Walker v. Howell*, 1 Cold (Tenn) 238.

50. *Grady v. Threadgill*, 35 NC 28.

51. *Phillipi v. Capell*, 38 Ala 575; *Haralson v. Walker*, 23 Ark 416; *Stephens v. Vaughan*, 4 JJ Marsh. (Ky)

206, 20 Am Dec 216; *Wright v. Dawson*, 18 NE 1, 147 Mass 394, 9 ASR 724; *George v. Hewlette*, 12 So 855, 70 Miss 1, 35 ASR 620; *Browning v. Hanford*, 5 Hill (NY) 583, 40 Am Dec 369.

52. *Stephens v. Vaughan*, supra, see also *Cleveland C. C. & St. L. R. Co. v. Moline Plow Co.*, 41 NE 480, 13 Ind App 225.

53. *Sutherland J. in Lockwood v. Bull*, 1 Cow (NY) 322, 13 Am Dec 539.

redelivery bond amounted to a waiver of the right to assert the exempt character of the property. The rule is different where the bond was obtained by coercion to prevent a levy on exempt property.<sup>54</sup> It is a sufficient defense for failure to redeliver the property that the judgment in the principal action was void, as where there was no service of summons, or that a levy under execution issued thereon possessed no validity, as where no dominion over the property was ever exercised by the officer; it seems there must be a valid levy before a valid redelivery bond can be given for the purpose releasing property from a levy.<sup>55</sup> Where an officer extorts from a debtor a forthcoming or delivery bond for exempt property, such is regarded as void and no recovery could be had thereon.<sup>56</sup> It is no defense that the bond, even though provided for by statute, is not approved by the officer taking the same where it is taken pursuant to the stipulation of the parties.<sup>57</sup>

§ 521. Duty of Sheriff to Claimant When Redelivery or Forthcoming Bond Has Been Given.—Where a claim to property which has been seized under process, and for which a redelivery bond has been given, has been interposed by a third party and, upon a trial of the right thereto, the claim of the third party is upheld, the sheriff or constable is under no duty to take the property from the defendant and deliver to the claimant, but he may simply leave it where he found it. The duty of such officer is only to vacate the delivery bond.<sup>58</sup> Under a statute requiring an officer who has levied upon and removed chattels to "surrender" them on a bond being given, he is not required to return them to the place from whence he removed them when the levy was made.<sup>59a</sup>

§ 522. Receptor of Property.—It is within the power of a sheriff or constable, after he has levied upon property under executory process, to deliver the property to a third person and take his receipt therefor.<sup>60</sup> In some jurisdictions, the officer may even make

54. *Stephens v. Vaughan*, supra, see note 56 infra, this section.

55. *Ex parte Cheatham*, 1 Eng (Ark) 531, 44 Am Dec 625, see also *Jones v. Baxter*, 41 So 781, 146 Ala 620, 110 Am St Rep 54; *Peeples v. Garrison*, 81 SE 116, 141 Ga 411, 51 LRA (NS) 635 and note; *McDowell v. Coleman*, 2 Ky L 369; *Buckingham v. Bailey*, 4 Smedes & M (Miss) 538; *Bradley & Dortch v. Kesse*, 5 Cold (Tenn) 223, 94 Am Dec 246.

56. *Robards v. Samuel*, 17 Mo 555, see note 54 supra, this section.

57. *Fidelity & Deposit Co. v. Bowen*, 98 NW 897, 123 Iowa 356, 6 LRA (NS) 1021.

58. *Phillips v. Saunders*, 16 Ga 518, 43 Cent. Digest, page 3479, sec. 135.

59a. *Clark v. Wilson*, 14 RI 13.

60. *Easley v. Walker*, 10 Ala 671; *James v. Pepper*, 73 SE 407, 10 Ga App 286; *Ames v. Taylor*, 49 Me 381; *Horgan v. Lyons*, 60 NW 1099, 59 Minn

the defendant in the process his receptor.<sup>60</sup> Of course, such an arrangement would be illegal if the defendant with whom the property was left as receptor were granted power to dispose of same.<sup>61</sup> The right to leave the property with execution defendant as the receptor bailee is unqualifiedly denied in some jurisdictions and, it is thought that this is the sounder rule. The same rule applies where the property is left with any other adverse claimant.<sup>62</sup> When an officer takes a receipt for property which he has levied on under executory process, he merely makes the custodian a bailee thereof for the officer's benefit, and it is still subject to the lien impressed thereon by the levy of the executory process and is regarded as still in the officer's possession.<sup>63</sup> The receptor, being a mere bailee of the officer, is compelled to surrender the property to the sheriff or constable upon demand, and if the levy is made under an attachment, whether there has been a judgment rendered in the attachment action, is no concern of his, but if a judgment has been rendered, he cannot be heard to say that it was invalid, fraudulent, or irregular as, in any case, he is compelled to deliver up the property to his bailor, the officer.<sup>64</sup>

§ 523. Receipts and Receptors.—Where it is not prohibited by statute, an officer who levies upon personal property may leave such property, or deliver possession of it to one known as a receptor.<sup>65</sup> This practice is said to have begun and to have existed from the time of the development of attachments of property.<sup>66</sup> The one to whom the property is delivered by the officer takes such property as bailee for the sheriff until the subject matter is demanded by the

217; Talbot v. Magee, 59 Mo App 347; Meyer v. Michaels, 95 NW 63, 69 Neb 138, 97 NW 817; Ray v. Harcourt, 19 Wend(NY) 495; Sabin v. Chrisman, 175 P 622, 90 Ore 85.

60. McCullough v. McClintock, 7 So 140, 88 Ala 567; Myers v. Lee, 95 SE 475, 22 Ga App 20; Sawyer v. Bray, 8 SE 885, 102 NC 79, 11 ASR 713; Horsley v. Knowles, 22 Atl 1104, 74 Md 602; Nelson v. Van Gazelle Valve Man'f Co., 17 Atl 943, 45 NJE 594; Erie R. Co. v. Ackerson, 33 N.JL 33; Wehle v. Conner, 83 NY 231; Nighbert v. Hornsby, 42 SW 1060, 100 Tenn 82, 66 ASR 736; Hopping v. Hicks, 190 SW (Tex Civ App) 1119; Horgan v. Lyons, supra.

61. Wunderlich v. Roberts, 67 Ind

421.

62. Satterwhite v. Melzer, 24 P 184, 3 Ariz 162; Dutertre v. Driard, 7 Cal 549; Field v. Fletcher, 78 NE 107, 191 Mass 404.

63. James v. Pepper, 73 SE 407, 10 Ga App 266; Sabin v. Chrisman, supra.

64. Bangs v. Beacham, 68 Me 425; Drew v. Livermore, 40 Me 266; Brown v. Atwell, 31 Me 351; Clifford v. Plumer, 45 NH 269.

65. Dayton v. Merritt, 33 Conn 184; Savage v. Robinson, 44 Atl 920, 93 Me 202; Guttentag v. Huntley, 139 NE 501, 245 Mass 212; McDonald v. Loewen, 130 SW 52, 145 Mo App 49.

66. Phelps v. Gilchrist, 28 NH 266.

officer.<sup>67</sup> The receptor enters into a contract derived from the terms of the receipt to deliver property at the particular time required.<sup>68</sup> Under this arrangement it is sometimes provided that the receptor is to keep the property, or it may be delivered to or left with the defendant or sold or used up by the defendant.<sup>69</sup> The taking of a receipt by an officer is his own voluntary act and only for the officer's protection.<sup>70</sup> The officer may select any person he sees fit to hold the property as a receptor as long as the individual is sui juris.<sup>71</sup> The receptor may be the defendant, plaintiff, or any indifferent person, or even a third party, who claims title to the property.<sup>72</sup> The possession of one who gives a receipt to the officer for the property to be left in the receptor's hands is regarded as that of the officer.<sup>73</sup> The relationship between the officer and the receptor is generally determined by the terms of the receipt and the law in regard to the bailment of property.<sup>74</sup> The officer may at any time terminate the receptor's possession for any reason deemed sufficient by the officer. The valuation of the property set out in the receipt is conclusive on both parties, that is, the officer and receptor, in any litigation thereafter arising.<sup>74a</sup>

§ 524. Usual Character and Terms of a Receipt.—It is not necessary, where an officer delivers property to one known as a receptor, that there be any particular agreement entered into between them where it is not expressly provided for by statute, and it is not necessary that there be any writing.<sup>75</sup> The usual form of receipt contains an admission of the receipt of the property with enumeration thereof, and that the same property is to be redelivered

67. Foster v. Clark, 19 Pick (Mass) 329; McDermott v. Jaquith, 92 Atl 230, 88 Vt 240; McDonald v. Loewen, supra; Phelps v. Gilchrist, supra.

68. Robinson v. Besarick, 30 NE 553, 156 Mass 141; Guttentag v. Huntley, supra; Phelps v. Gilchrist, supra.

69. McDermott v. Jaquith, supra.

70. Jordan v. Gallup, 16 Conn 536; Moulton v. Chadborne, 31 Me 152; Batchelder v. Frank, 49 Vt 90.

71. Tomlinson v. Collins, 20 Conn 364; Gallun v. Weil, 92 NW 1091, 116 Wis 236.

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72. Carr v. Farley, 12 Me 328, where a debtor held possession of the property. Kingsbury v. Sargent et al, 22 Atl 105, 83 Me 230, where a third party claimant was made receptor. Tomlinson v. Collins, supra, where the plaintiff held possession of the property.

73. McDermott v. Jaquith, supra.

74. Waterman v. Treat, 49 Me 309, 77 Am Dec 261; Mason v. Aldrich, 30 NW 854, 36 Minn 283.

74a. McDermott v. Jaquith, 92 Atl 230, 88 Vt 240.

75. Phelps v. Gilchrist, 28 NH 266.



to the officer upon demand.<sup>76</sup> Of course, such receipt may contain any agreement between the officer and receptor entered into at the time.<sup>77</sup> It has been held that delivery of the property to the receptor is sufficient consideration for the contract of bailment between the officer and the receptor.<sup>78</sup> The receptor acquires no interest in the property under this arrangement.<sup>78a</sup>

§ 525. **Receptor, Bailee for Sheriff.**—The receptor of property received from the sheriff assumes the relationship of bailee toward the officer and the possession of the receptor is that of the sheriff.<sup>79</sup> Where the receptor takes possession of the property, this does not have any effect on the attachment lien whatsoever, and the goods are regarded as still being in the possession of the officer.<sup>80</sup> It has been held, and in line with the law of bailments, that the receptor has the right to maintain an action to recover property which has been delivered to him as receptor, or for trover, or conversion of such property, but otherwise he has no interest in the property.<sup>81</sup> In those instances where the property has been left with the execution defendant as receptor of the sheriff, it has been held that such person constitutes merely the servant or agent of the officer, and that such execution debtor cannot maintain an action of trover or

76. *Dayton v. Merritt*, 33 Conn 184; *Durgin v. Gage*, 40 NH 302; *Phelps v. Gilchrist*, supra.

77. *Phelps v. Gilchrist*, supra.

78. *Savage v. Robinson*, 44 Atl 926, 93 Me 262. For a form of receipt which is held to be good, see *Ross v. Libby et al.*, 42 Atl 230, 92 Me 34. The following is a sample of the receipt: "Accountable Receipt

Received of the said (sheriff) the goods and chattels above mentioned. (those levied on) which I promise to deliver to him at any time he shall demand the same, or, in default thereof, I do hereby agree with him to pay him the amount of the above-mentioned debt (amount called for by the writ) as the same is above specified, together with costs, fees, and interest thereon." Although the court held this particular receipt constituted only the relationship of bailment, and that the receptor was not liable on the receipt if he could

show that the property belonged to someone other than the debtor. *Mason v. Aldrich*, 30 NW 884, 36 Minn 283.

78a. *McDermott v. Jaquith*, 92 Atl 230, 88 Vt 240.

79. *Chicago Trust Co. v. Daniel Boone Coal Corp.* 58 F(2d) 305; *McDermott v. Jaquith*, 92 Atl 230, 88 Vt 210.

80. *Sweeney v. Haggerty*, 177 Atl 294, 87 NH 232; form of receipt set out in the opinion, but was unquestioned. In *Sweeney v. Haggerty*, the court held that the receipt affects merely the custody of the attached goods. The attachment remains in force for the protection of the attaching officer and the attaching creditor. *Sweeney v. Haggerty*, supra; *Buzzell v. Hardy*, 58 NH 331; *Myers v. Walker*, 24 P (2d) 97, 173 Wash 592.

81. *Burk v. Webb*, 32 Mich 173, see Sec. 524, supra; *Browning v. Skillman*, 24 NJL 351.

other action for injury to the property of which he is entrusted with possession.<sup>82</sup>

However, it is submitted that, under the law of bailments, there is no question that a bailee can maintain any action for injury to, or conversion of, property that the owner could maintain.<sup>83</sup>

§ 526. **Action against Receptor.**—On a failure of the receptor to deliver the property on the demand of the officer, the latter is authorized to commence an action against such receptor therefor.<sup>84</sup> Where a deputy makes a levy and places the property in the hands of a receptor, who subsequently refuses to deliver up the property, it seems the deputy may bring an appropriate action therefor.<sup>85</sup> However, it would seem to be the better practice that the action be brought in the name of the deputy's principal.<sup>86</sup> In this regard, the officer may likewise sue in his own name for the benefit of the execution plaintiff or defendant.<sup>87</sup> An attaching creditor has no such interest in the property as to give him a cause of action against the defaulting receptor.<sup>88</sup> As has heretofore been pointed out, the proper remedy for such creditor is to sue in the name of the officer who placed the property with the receptor.<sup>89</sup> The receptor cannot impose conditions on the right of the officer to have the property delivered up; and it seems his only defense for failure to deliver the property to the officer on demand is by showing that the officer has been absolved from all liability in connection with property, and this is an affirmative defense; the burden of proof with respect thereto is on the receptor.<sup>90</sup>

§ 527. **Form of Action by Officer for Property Received for.**—The liability of the receptor to the officer for the conversion of the property received for follows, in general, the law of bailments. Where the receptor has converted the property which he has been placed in charge of, or refuses to deliver it when required to do so.

82. *Smith v. Reeves*, 33 How (NY) 183.

83. *United States v. Atlantic Coast Line R. Co.* 206 F 190, aff. 215 F 66, 131 CCA 364, LRA1915A 374; *Marietta Ice & Coal Co. v. Western & A. R. Co.* 102 SE 182, 24 Ga App 725.

84. *Smith v. Wadleigh*, 18 Me 95; *Parker v. Warren*, 2 Allen (Mass) 187; *Maxfield v. Scott*, 17 Vt 634.

85. *Bradbury v. Taylor*, 8 Greenl (Me) 130.

86. *Baker v. Fuller*, 21 Pick. (Mass) 318; *Smith v. Wadleigh*, supra.

87. *Hapgood v. Fisher*, 30 Me 502; *Moore v. Fargo*, 112 Mass 254.

88. *Meshew v. Gould*, 30 La Ann 163.

89. *Hapgood v. Fisher*, supra.

90. *Finn v. Holden*, 176 Atl 231, 108 Vt 513. See Sec. 670A infra.

the officer can maintain an action either in trover or assumpsit for such default in duty on the part of the receptor.<sup>91</sup>

It has been held however, that trover will not lie against the receptor where the receipted property has been damaged through the negligence of such receptor, it being held that such negligence is not sufficient to constitute a conversion.<sup>92</sup> Where the receptor holds property from the attaching officer and refuses to deliver it on the officer's demand, an action of replevin can be maintained against the receptor.<sup>93</sup> An action on the case has been recognized as a proper action by an officer against his receptor.<sup>94</sup> It would seem in accordance with general rules of law respecting bailments that where the receptor injures the property through his negligence, he would be liable for the damage thereto.<sup>95</sup>

§ 528. **Duty of the Receptor upon the Demand of the Officer for Property.**—As has heretofore been seen, the relationship arising between the officer and receptor is fixed by the terms of the receipt or undertaking. It would thus be apparent that before the officer could maintain an action against the receptor for failure to deliver the property, such failure must constitute a breach of the receipt or agreement and that the officer, before being entitled to sue, must come within the terms of the agreement or receipt; but if the receipt provides that the property is to be delivered upon demand then, before a cause of action would accrue against the receptor, the officer must make a demand and there must be a refusal on the part of the receptor.<sup>96</sup> Where the demand, however, would be a useless procedure as, where the receptor has disposed of the property and, in accordance with the rule that the law does not require a useless act, a demand before bringing suit is unnecessary.<sup>97</sup> Where the agreement between the officer and the receptor is that the property will be delivered within a specified time and the period expires, in that situation it is not necessary that the officer make a demand upon the receptor for the property.<sup>98</sup> Where the terms of the receipt are such that there must be a demand made before liability

91. *Stevens v. Eames*, 22 NH 568; *Tinker v. Morrill*, 39 Vt 477, 94 Am Dec 345.

92. *Tinker v. Morrill*, supra.

93. *Robinson v. Besarick*, 30 NE 553, 156 Mass 141.

94. *Baker v. Fuller*, 21 Pick. (Mass) 318.

95. *Whitlock v. Barham & Duncan*, 288 SW 4, 172 Ark 198; *Jones v. Great*

*Northern R. Co.* 217 P 673, 68 Mont 231, 37 ALR 754.

96. *Finn v. Holden*, 175 Atl 231, 106 Vt 513; *McDermott v. Jaquith*, 92 Atl 230, 88 Vt 240.

97. *Webster v. Coffin*, 14 Mass 196; *Parker v. Warren*, 2 Allen (Mass) 187.

98. *Hunter v. Peaks*, 74 Me 363; *Parker v. Warren*, supra.

accrues and where there is a failure of such demand, no action can be maintained against such receptor.<sup>99</sup> The demand may be made by any authorized person acting for the officer.<sup>1</sup> Where a receipt is given by the receptor providing for a return of the property to the officer "or his order," and the officer delivers this receipt to the plaintiff in the action, unindorsed, and the plaintiff in turn delivered the receipt and an execution to another officer, such officer is entitled to the property and an action could be maintained in these circumstances for the property by the plaintiff in the original action in the name of the officer to whom the receipt is given.<sup>2</sup> Especially is it true where an officer, armed with an execution to which the property is subject, exhibits the receipt.<sup>3</sup> The demand for the redelivery of the property from the receptor should be made before the lien created by the levy has been extinguished. If the lien is legally extinguished, the officer loses the right to demand the property from the receptor.<sup>4</sup> Where such is the case and the receptor turns the property over to the attachment defendant, he has a good defense against the officer's action therefor.<sup>5</sup> In general, the demand should be made on the receptor or party entering into the agreement to redeliver the property on the demand of the officer.<sup>6</sup> It has been held sufficient, however, that where the receptor is absent from the state, a demand made on his wife is sufficient to sustain an action against the receptor.<sup>7</sup> Where the receptor dies before the property is redelivered, it has been held that the demand should be made upon his personal representative.<sup>8</sup> Where there is more than one receptor, it will suffice if demand is made on one of the joint receptors before action is brought.<sup>9</sup> The demand for the return of the property may be made at any place where the receptor is found, but if it is made away from the location of the property, the receptor would, of course, have reasonable time to comply with the demand.<sup>10</sup>

§ 529. **Public Notice of Sale Duty of Sheriff.**—Where property has been levied upon by virtue of a writ of execution, in order that the property might be sold to the best advantage, it is required that

99. *Shepherd v. Hall*, 1 Atl 606, 77 Me 569.

1. *Foss v. Norris*, 70 Me 117.

2. *Moore v. Fargo*, 112 Mass 254. See also *Davis v. Maloney*, 8 Atl 350, 79 Me 110. See also *Phelps v. Gilchrist*, 28 NH 266.

3. *Phelps v. Gilchrist*, supra.

4. *Knap v. Sprague*, 9 Mass 258, 6 Am Dec 64.

5. *Knap v. Sprague*, supra.

6. *Sanborn v. Buswell*, 51 NH 573.

7. *Mason v. Briggs*, 16 Mass 453.

8. *Carpenter v. Snell's Estate*, 37 Vt 255.

9. *Griewold v. Plumb*, 13 Mass 298.

10. *Gillmore v. McNeil*, 46 Me 532.

general publicity be given the sale by the officer.<sup>11</sup> The manner in which the notice is given, and the extent of such notice is regulated by statute and varies from jurisdiction to jurisdiction. The statutes generally require that a notice of sale under execution shall be given.<sup>12</sup>

It is generally held under the various statutes that a failure to give the required statutory notice of execution sale will not vitiate such sale, such statutes being held to be directory, and the party who is aggrieved by such lack of notice has his remedy against the officer. This rule is founded in justice and public policy. The fact that the statute prescribing the giving of notice of an execution sale provides that it "must be given" instead of that it "shall be given" works no change in respect of the statutory requirement as to notice being directory or not mandatory.<sup>13</sup> It is likewise generally held that it is not necessary that the defendant or his attorney be given notice of such sale.<sup>14</sup> Under some statutes however, it is required that notice be given to the execution debtor of such sale.<sup>15</sup> It is suggested that the statute of a jurisdiction wherein the question may arise be consulted. In regard to the notice of the sale as required by statute, substantial compliance with such statutes is generally held to be sufficient.<sup>16</sup>

**§ 530. Presumption in Favor of Officer as to Notice and Sale.**—It is generally presumed that every officer does his duty. Based upon this principle, it will generally be presumed that where an officer makes a sale by virtue of a writ of execution, the statutes ap-

11. *Gibbs v. Neely*, 7 Watts (Pa) 305; *Arnold v. Dinsmore*, 3 Cold (Tenn) 235.

12. *Strange v. Graham*, 58 Ala 614; *Sheehy v. Graves*, 58 Cal 449; *Davis v. Eanks*, 82 SE 497, 142 Ga 93; *Van Camp v. Searle*, 41 NE 427, 147 NY 150, 79 Hun 134, 29 NYS 757, 24 NY Civ Proc R 16, 61 NY St Rep 349.

13. *Smith v. Randall*, 6 Cal 47, 65 Am Dec 475; *Frink v. Roe*, 11 P 820, 70 Cal 302, 7 P 481, 2 Cal Unrep Cas 491; *Sheehan v. All Persons*, 252 P 337, 80 Cal App 393; *Williams v. Reed*, 185 P 515, 43 Cal App 434; *Batini v. Ivancich*, 287 P 523, 105 Cal App 391; *Hill v. Kitchens*, 148 SE 754, 39 Ga App 789.

14. *Georgia Northern R. Co. v. Cone*, 88 SE 701, 17 Ga App 786; *Jeffries v. Bartlett*, 75 Ga 230, 10 S Ct 1089,

136 US 639, 34 L ed 549; *Johnson v. Reese*, 28 Ga 353, 73 Am Dec 757; *Conley v. Redwine*, 35 SE 92, 109 Ga 640, 77 Am St Rep 398; *Hill v. Kitchens*, 148 SE 754, 39 Ga App 789; *Brooks v. Rooney*, 11 Ga 423, 56 Am Dec 430; *Polk v. Holland Texas Hypotheek Bank*, 60 SW(2d) (Tex Civ App) 1112; *Hodges v. Com. Bank & Trust Co.* 44 SW(2d) (Tex Civ App) 400; *Rauer v. Hertweck*, 165 P 946, 175 Cal 278; *Johnson v. Johnson*, 119 P 22, 66 Wash 113.

15. *Ransom v. Williams*, 2 Wall. (US) 313, 17 L ed 803; *Holmes v. Jordan*, 39 NE 1005, 143 Mass 147; *Faucett v. Harris*, 7 Pa Dist 150.

16. *Continental Casualty Co. v. Bibb Chevrolet Co.* 176 SE 418, 49 Ga App 523; *Ebinger v. Wahrer*, 238 NW 587, 213 Iowa 84.

plicable thereto were complied with.<sup>17</sup> Where it is shown that a publication of a notice has been made, it will be presumed that the newspaper that made such publication was a legal one, as required by statute.<sup>18</sup> It is required, in other jurisdictions however, that the officer giving the notice must show that the required notice was given, where objection is made to the sale upon the ground that it was void for one of proper notice.<sup>19</sup> It has also been held that where one claims title to land by virtue of an execution sale, he is required to show that proper notice of such sale was given.<sup>20</sup> However, the rule exists in other states that the purchaser is only required to show those things that the law requires to be recorded, and that all other matters it will be presumed were legally performed. Where it has been shown that there was collusion between the officer making the sale and the purchaser, the court will disregard the presumption and look to see if the statutes have been complied with, and where they have not, the sale will be set aside by the court.<sup>21</sup>

**§ 531. Mode of Giving Notice of Sale by Placards; Where to Be Posted.**—It is generally provided by statutes in the various jurisdictions that the officer charged with the duty of serving a writ of execution shall post notifications of such levy and sale in three or more public places in the town, vicinity, or district where the sale is to be held.<sup>22</sup> Under such statutes it is not sufficient to post two notices in the same building, but in different places, as, where notices were posted in two different places in the city hall, it was held that such posting constituted only one posting in one public place.<sup>23</sup> Likewise, it has been held insufficient where all three notices were posted on three different doors of the courthouse.<sup>24</sup>

Where the notice of such sale was affixed to a shed, which was adjacent to a public road and a dwelling house, and where the sale took place at the same place, in front of the shed, the court held

17. *Soniat v. Miles*, 32 La Ann 164; *Hanson v. Barnes' Lessee*, 3 Gill & J. (Md) 359, 22 Am Dec 322; *Holmes v. Jordan*, 39 NE 1005, 163 Mass 147; *Grand Rapids Nat'l Bank v. Kritzer*, 75 NW 90, 116 Mich 688; *Evans v. Roberson*, 4 SW 941, 92 Mo 192, 1 ASR 701.

18. *Chandler v. Bailey*, 1 SW 745, 89 Mo 641.

19. *Roger v. Ocheltree*, 9 Del (4

Houst) 452; *Hazen v. Webb*, 74 P 1111, 68 Kan 308.

20. *Ransom v. Williams*, 2 Wall. (US) 313, 17 L ed 803.

21. *McMichael v. McDermott*, 17 Pa St 353, 55 AD 580.

22. See local statutes.

23. *Bowker v. Semple*, 162 Atl 604, 51 RI 142.

24. *McDaniel v. Wetzel*, 109 NE 257, 268 Ill 461, 106 NE 209, 264 Ill 212, LRA1916E 1140.

that this was a public place, within the meaning of the local statute.<sup>25</sup> The court held "a private dwelling, a barn, shed, or other out building, or even a rock, tree, or fountain," if such notice at such place would be likely to attract attention and become a matter of public knowledge in the neighborhood, would satisfy the requirements in posting the notice in a public place.<sup>26</sup>

§ 532. **Discretion and Diligence of Sheriff Where Advertising Sale.**—Where the method and procedure of sale is prescribed by statute it has been held that such statutes must be complied with, and where there is a failure to give notice as required by law, such defect will render the sale voidable.<sup>27</sup> In other jurisdictions however, where the officer does not comply with the statutes in regard to giving notices, such default of the officer renders the sale void instead of voidable.<sup>28</sup> But the great weight of authority appears to be that where there is a failure to give the proper notice, such failure does not affect the validity of such sale, but anyone who is injured thereby has his remedy against the officer who committed the default in regard to such matter.<sup>29</sup>

In accordance with the majority rule, it is provided in some jurisdictions by statute that a failure to give proper notice of sale will not invalidate the proceedings.<sup>30</sup> It is sometimes provided by statute that it is the duty of the officer to have published in some newspaper a proper notice of the sale under execution, and, under such statutes, he alone has the power to designate the paper in which such publication shall appear.<sup>31</sup> Where the statute designates what the notice of sale shall contain, and if the officer places in such notice all that is by statute required, that is sufficient.<sup>32</sup> And where

25. *Austin v. Soule*, 36 Vt 645.

26. *Cunningham v. Bright*, 117 NE 909, 228 Mass 385; *Cummins v. Little*, 16 NJE 48; *Austin v. Soule*, supra.

27. *Jensen v. Woodbury*, 16 Iowa 515, but see Sec. 529, supra; *Hazen v. Webb*, 74 P 1111, 63 Kan 308; *Hall v. Moore*, 11 So 655, 70 Miss 75; *Young v. Schofield*, 34 SW 497, 132 Mo 650.

28. *Ransom v. Williams*, 2 Wall. (US) 313, 17 L ed 803; *Wellman v. Lawrence*, 15 Mass 326; *Fisher v. Kellogg*, 258 NW 404, 128 Neb 248; *Delaware County Nat'l Bank v. Miller*, 154 Atl 19, 303 Pa 1.

29. *Batini v. Ivancich*, 287 P 523, 105 Cal App 391, see Sec. 529, note 14, su-

pra; *Hill v. Kitchens*, 148 SE 754, 39 Ga App 789.

30. *Bigelow v. Chatterton*, 51 F 614, 2 CCA 402; *Bowden v. Hadley*, 116 NW 689, 138 Iowa 711; *Wood v. Morehouse*, 45 NY 368.

31. Under a Georgia statute governing advertisements for sheriffs' sales, a federal marshal was held not bound in publishing a notice of an execution sale to use the newspapers used by the sheriff. *Champion Box Co. v. Manatee Crate Co.* 75 F(2d) (CCA Ga) 340; *Northern Counties Investment Trust Co. v. Cadman*, 35 P 557, 101 Cal 200; *Winton v. Wilson*, 24 P 91, 44 Kan 146.

32. *Brown Guano Co. v. Coker*, 70

there is matter in the notice of sale which is not required by law, such will be regarded as mere surplusage, and does not affect the sale.<sup>33</sup> The description of the property should be definite enough so that one would know with reasonable certainty what property is to be sold, and be as complete in the exercise of ordinary diligence as it is possible for the officer to give, taking into consideration the character of the property.<sup>34</sup>

It is the duty of the sheriff in giving such notice of sale to call attention to the good points of the property to be sold, as it is his duty to do everything within reason to increase the sale price.<sup>35</sup> It was held to be an adequate reason for setting aside a sale where the notice omitted reference to a garage on some of the real property to be sold.<sup>36</sup> However, the contrary has been held in *Petition of Seaford Hardware Company*, 132 Atl 737, 3 WW Har(Del) 146. Likewise, the time of the sale should be indicated so that it will enable those who would be purchasers at such sale to be present.<sup>37</sup> Where notice of sale provided "eleven o'clock in the forenoon, D. S. T. but the sale was actually held at ten o'clock in the forenoon, E. S. T.," such sale was held to be invalid.<sup>38</sup> The place of sale being the most vital, its absence in the notice will void the sale.<sup>39</sup>

§ 533. **When Statute Controlling Sale Is Imperative, Sheriff Must Comply with It or Lose His Lien.**—Under the common law procedure, it rested within the discretion of the officer to fix the time and place for selling property by virtue of a writ of execution.<sup>40</sup> In most jurisdictions now, however, such matters are controlled by statute, and the time provided for holding a sale within such statutes has been held to be mandatory.<sup>41</sup> A failure to comply with the statute respecting the time of holding the sale may avoid it.<sup>42</sup> A failure to hold the sale as directed by statute may operate as aban-

SE 582, 13 Ga App 614; *Citizens Nat'l Bank v. Interior Land etc. Co.* 37 SW 447, 14 Tex Civ App 301.

33. *Finch, Van Slycke & McConville v. Jackson*, 220 NW 130, 67 ND 17.

34. *Wallace v. Atlanta Medical College*, 52 Ga 164; *Cummins v. Little*, 16 NJE 48; *Petition of Seaford Hardware Co.*, 132 Atl 737, 3 WW Har (Del) 146.

35. *Wallace v. Atlanta Medical College*, supra.

36. *Delaware County Nat'l Bank v. Miller*, supra. But see Sec. 534, note 47, infra.

37. *Trustees of Schools v. Snell*, 19

Ill 156, 68 Am Dec 586; *Thayer v. Roberts*, 44 Me 247; *Matney v. Graham*, 50 Mo 559.

38. *Century Transit Co. v. Public Service Co-ordinated Transport*, 176 Atl 719, 117 NJE 520.

39. *Bornemann v. Norris*, 47 F 438; *Bottineau v. Aetna Life Ins. Co.* 16 NW 849, 31 Minn 125.

40. *Caldwell v. Eaton*, 5 Mass 399.

41. *Morey v. Hoyt*, 33 Atl 496, 65 Conn 516, see Sec. 529, note 14, supra.

42. *Pettit v. Johnson*, 15 Ark 55; *Howe v. Starkweather*, 17 Mass 240; *Loudermilk v. Corpening*, 8 SE 117, 101 NC 649; *Morey v. Hoyt*, supra.

donment of the levy and lien. Delay in holding a sale may, under the common law, work an abandonment of a levy.<sup>43</sup> If an execution lien is lost by delay the officer may proceed anew by a fresh levy.<sup>44</sup>

§ 534. **Imperfect Advertisement; When It Will Not Vitiating Sale.**—Where there is matter in the notice of sale which is not required by statute, such matter will be regarded as surplusage and will not affect the sale.<sup>45</sup> A failure to state the hour of the execution sale on printed notice given in such matter, was held a mere irregularity and did not affect the sale's validity where the hour was stated in the posted notice, especially where there was no statutory requirement that the hour of sale be stated.<sup>46</sup> A sale under judicial process advertised to take place between certain hours is sufficient.<sup>46a</sup>

Where there is a failure in the advertisement of sheriff's sale on a writ of *levari facias* to refer to orchards on the land, although held to be an irregularity, did not require the setting aside of sale for full value.<sup>47</sup> Where the sheriff failed to advertise the sale of the property more than twenty days, when the statute required twenty-one days, it is held not to invalidate the sale.<sup>48</sup> Where property was described by blocks instead of by lots, into which the blocks are subdivided, it was held that such did not affect the legality of the notice where it is not shown that the salability was lessened thereby.<sup>49</sup> It was likewise held that the omission of a section number of land, where no one was injured thereby, and the ones bidding at the sale knew of such omission, was harmless.<sup>50</sup> Where the improvements on land do not appear in the notice of sale, but the land is rightly described, and an adequate price is given for the

43. *In re Zeis*, 245 F 737, 158 CCA 139; *McMahan v. Green*, 12 Ala 71, 46 Am Dec 242; *Cook v. Clemens*, 9 SW 320, 37 Ky 566, 10 Ky L 604; *Bliss v. Slater*, 103 NW 86, 141 Mich 648; *Holland v. Nichols*, 162 NW 468, 136 Minn 354; *Schneider v. Schmitt*, 98 Atl 418, 80 NJE 366.

44. *Howe v. Starkweather*, supra.

45. *Finch, Van Slyke & McCouville v. Jackson*, 220 NW 130, 57 ND 17.

46. *Fox v. Curry*, 20 P(2d) 663, 98 Mont 212, see Sec. 529, note 14, supra; *Norma Min. Co. v. Mackay*, 258 F 914, 160 CCA 634, 258 F 991, 160 CCA 672, 40 S Ct 178, 251 US 556, 64 L ed 412.

46a. *Norma Min. Co. v. Mackay*, su-

pra; *Burr v. Borden*, 61 Ill 389; *Evans v. Robberson*, 4 SW 941, 92 Mo 192, 1 Am St R 701.

47. *Petition of Seaford Hardware Co.* 132 Atl 737, 3 WW Har (Del) 146. A writ of *levari facias* in American law is the process by which sale is had of mortgaged land. 2 *Bouvier's Law D.* (Rawle's 3rd ed.) 1937. But see Sec. 532, note 36, supra.

48. *Maddox v. Sullivan*, 2 Rich. E 4, 44 Am Dec 234.

49. *Citizens Nat'l Bank v. Interior Land etc. Co.* 37 SW 447, 14 Tex Civ App 301.

50. *Abshire v. Lege*, 62 So 667, 133 La 254.

property in general, such failure will not void the sale.<sup>51</sup> In any event the setting aside of an execution sale on the grounds of defects therein is discretionary with the court.<sup>51a</sup>

§ 535. **Imperfect Advertisement; When It Will Vitiating Sale.**—In some jurisdictions, a sale may be set aside for a defect in the publication of the notice of sale under a writ of execution. Where notice was given of the sale which stated that the sale would be held May 6, "19124," it was held invalid as against a direct attack on the judgment.<sup>52</sup> It has further been held for a sale to be valid, that the personal property described in the notice of sale must be specifically designated, and the number of shares must be stated when corporate stock is to be sold.<sup>53</sup> Where the judgment creditor did not have the necessary information to make a full and complete description of the shares of stock of the judgment debtor to be sold at the execution sale, it did not excuse the failure to give a sufficient description of the property on the part of the judgment creditor, since the creditor causing a levy to be made had the right to obtain all the necessary information by resort to supplemental proceedings.<sup>54</sup>

A sale under execution of lands not described in the notice of sale is illegal and will be set aside.<sup>55</sup> An advertisement on one tract of land is no basis for selling another.<sup>55a</sup> It was likewise held that where there was an open stone quarry on the premises to be sold, such facts should be mentioned in the sheriff's notice of sale.<sup>56</sup> Where there is an omission in two publications of the notice of sale of any description of the material improvements of city property, it cannot be supplied by a proper description in the third publication of such notice.<sup>57</sup> Where the law requires execution sales of land to be made at the courthouse door, an advertisement for sale under an execution at some other place is illegal.<sup>58</sup>

51. *Parker v. Lynch*, 13 Pa Co 86. But see Sec. 532, note 36, supra.

51a. *Petition of Seaford Hardware Co.* supra; *Prior v. Prior*, 41 Hun (NY) 613, 5 NY St Rep 249.

52. *McGlothlin v. Scott*, 6 SW(2d) (Tex Civ App) 120.

53. *Baar v. Smith*, 275 P 861, 97 Cal App 398.

54. *Baar v. Smith*, supra.

55. *Wheatley v. Terry*, 6 Kan 427; *Dauchite Lumber Co. v. Lane*, 28 So 232, 52 La Ann 1937.

55a. *Dauchite Lumber Co. v. Lane*, supra.

supra.

56. *Fidelity Ins. etc. Co. v. Wilson*, 13 Montg. Co. 184. See also Sec. 532, note 36, supra.

57. *Houghtaling v. Megahey*, 19 Pa Dist 371, 36 Pa Co 212.

58. *Bornemann v. Norris*, 47 F 438; *Lowden v. Graham*, 9 Atl (2d) 650, — Me —; *Koch v. Bridges*, 45 Miss 247; *Loudermilk v. Corpening*, 8 SE 117, 101 NC 649; *Sinclair v. Stanley*, 64 Tex 67; *Moody's Heirs v. Moeller*, 10 SW 727, 72 Tex 635, 13 Am St Rep 839.

Where the place of sale designated does not in fact exist, such notice is void.<sup>59</sup> Sales on executions issuing out of federal courts must conform to state laws of the state where the federal court is held.<sup>59a</sup>

It is sometimes required by statute that in execution sales of real estate the improvements thereon must be described, and in those jurisdictions where statutes of this character exist it is generally held a compliance therewith is necessary to a valid sale.<sup>59b</sup> A notice of sale may, it seems, make reference to a public record for a more particular description of the property to be sold.<sup>59c</sup> Omission from notice of the name of the county where land to be sold lies, or erroneously stating the name thereof as being another county than where the land is situated will not avoid the sale.<sup>59d</sup> As to what is a sufficient description of property to be sold under an execution necessary to be inserted in the notice thereof is generally a question for the jury.<sup>59e</sup>

§ 536. **Imperfect Advertisement Waiver of Defects.**—Where the notice of sale under an execution is regulated by statute, the requirements of such statute are for the benefit of the execution defendant, and being for his benefit, he may waive the same. The judgment debtor may waive the time that a notice should be published, and may stipulate to that fact.<sup>60</sup> Such waiver may likewise be either expressed or implied.<sup>61</sup> Where the defendant is present at the sale and assists the officer in making same, or indicates his willingness that the same shall go on, such acts on his part constitute a waiver of the defects in the notice.<sup>62</sup> Likewise, defects in the notice will be considered waived if an objection is not made within a reasonable time, ample opportunity therefor having been had, after knowledge thereof.<sup>63</sup> Where a judgment debtor nego-

59. *Bottineau v. Aetna Life Ins. Co.* 18 NW 849, 31 Minn 125.

59a. *Lowden v. Graham*, supra; *Bornemann v. Norris*, 47 F 438; *Smith v. Cockrill*, 6 Wall. (US) 756, 18 L ed 973.

59b. *Oldham v. Hossenger*, 10 Del (5 Houst) 434; *Karsner v. Bailey*, 10 Del 405; *Fidelity Ins. etc. Co. v. Wilson*, 13 Montg Co (Pa) 184, but see *Allen v. Cole*, 9 NJE 280, 59 Am Dec 416; *Parker v. Lynch*, 13 Pa 86.

59c. *Everts v. Will S. Fawcett Co.* 74 P(2d) 815, 24 Cal App(2d) 213.

59d. *Duncan v. Matney*, 29 Mo 368, 77 Am Dec 575; *Mitchell v. Alpha*

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*Hardware etc. Co.* 45 P(2d) 442, 7 Cal App (2d) 52.

59e. *Collier v. Vason*, 12 Ga 440, 58 Am Dec 481.

60. *United Shoe Repairing Mach. Co. v. Costa*, 7 La App 147.

61. *United Shoe Repairing Mach. Co. v. Costa*, supra; *Huffman v. Gaines*, 1 SW 100, 47 Ark 226; *Garnett-Carter Co. v. McLendon*, 90 SE 360, 18 Ga App 606; *Morris v. Hastings*, 7 SW 649, 70 Tex 20, 8 Am St R 570.

62. *Carney v. Carney*, 10 Yerg (Tenn) 491, 31 Am Dec 590.

63. *Morris v. Hastings*, supra.

tiated a sale of a portion of the judgment remaining unpaid, after a sheriff's sale, for the creditor, in order to release a judgment lien on his other land, he was held estopped from attacking the sheriff's sale theretofore held.<sup>64</sup> Where there are several joint owners of property which is to be sold under a writ of execution against all owners, a waiver by one of them of defects in a notice of sale does not bind the others.<sup>65</sup> Statutes in respect of giving notice of an execution sale are directory, and a failure to comply therewith does not affect the title of an innocent purchaser without notice.<sup>65a</sup>

§ 537. **Sunday Notice of Sale.**—Under statutes which forbid service of process on Sunday, it has been held that final process comes within the terms of such statute and may not be served or levied on Sunday.<sup>66</sup> It is generally held that publication of a notice of an execution sale in a newspaper published on Sunday is within the inhibition of a Sunday law and is invalid.<sup>67</sup> However, a sale may take place on a nonjudicial day, since such a sale is not a judicial act.<sup>68</sup> But under such statutes as we have heretofore discussed, an execution sale cannot take place on Sunday.<sup>69</sup>

64. *McGlothlin v. Scott*, 48 SW(2d) (Tex) 610, aff. 3C SW(2d) 511.

65. *Byrne v. Hooper*, 2 Rob (La) 229.

65a. *Huffman v. Gaines*, supra.

66. *Bland v. Whitfield*, 46 NC 122.

67. *Scammon v. Chicago*, 40 Ill 146; *Shaw v. Williams*, 87 Ind 158, 44 Am Rep 756.

68. *King v. Platt*, 37 NY 155, 35 How Pr 23, 3 Abb Pr NS 434; *Mc-498*

*Laughlin v. Houston-Hudson Lumber Co.* 120 P 659, 31 Okl 192, 38 LRA NS 248; *McKennon v. McGown*, 11 SW (Tex) 532.

69. In *Stern's Appeal*, 64 Pa 447, the court held that a sheriff could not even receive on Sunday an order from an execution plaintiff to make sale; *Rogers v. Cawood*, 1 Swan (Tenn) 142, 55 Am Dec 729; *Shaw v. Williams*, supra.

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