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Process-Judgment-Conclusiveness of Sheriff's Return

PROCESS—JUDGMENT—CONCLUSIVENESS OF SHERIFF'S RETURN—In a suit to quiet title to certain real estate, appellee and her husband were defaulted and judgment was rendered quieting title to said real estate in appellant. Appellee filed suit to set aside this judgment, and the court ordered a summons be served on appellant. The sheriff's return on the summons stated that it was served on appellant by leaving a copy at his last and usual place of residence, 1595 Cleveland Street, Hammond, Indiana. Appellant did not live at 1595 Cleveland Street, but lived in Gary, Indiana. Appellant was defaulted, and the first judgment in favor of appellant was set aside. Appellee filed an answer in that suit, praying that title to said real estate be quieted in her. The case was tried in appellant's absence and without his knowledge. Judgment was rendered in favor of appellee, quieting title in her. Thereafter appellee conveyed the land to a third party. Appellant brought a second suit to quiet title against appellee and her remote grantee. From a judgment in favor of appellee, appellant appealed. Held, the trial court could not set aside the judgment which quieted title in appellant, he not having received notice of the pendency of said cause "as in an original action," as provided in Section 423, Burns, 1926.[1]

Appellant's second suit to quiet title constituted a collateral attack on the previous judgment against him, since it was an attempt to avoid or correct that judgment in a proceeding not provided by law for that purpose.[2] In the principal case, the Indiana Appellate Court nevertheless held that the sheriff's return was not conclusive as to matters which are not presumptively within his personal knowledge: e. g., the usual place of residence of the person served. The case therefore holds in effect that a sheriff's return is not conclusive against collateral attack as to matters not presumptively within his personal knowledge. The only authority cited for this holding is State of New Jersey v. Shirk.[3] In that case the judgment was attacked by a cross-action. The court first held that the cross-action constituted a direct attack on the judgment, and then decided that the sheriff's return was not conclusive as to matters not presumptively within his knowl-

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454, 35 N. E. 711; Bedford Quarries Co. v. Turner (1906), 38 Ind. App. 552, 77 N. E. 58.

[1] Baltimore Ry. Co. v. Hunsacker (1903), 33 Ind. App. 27, 70 N. E. 556.

[1] Papuschak v. Burich, 185 N. E. 876 (Ind.).

[2] Spencer v. Spencer (1903), 31 Ind. App. 321, 67 N. E. 1018.

[3] 75 Ind. App. 275, 127 N. E. 861.

edge. This case does not seem to be authority for holding a return not conclusive against collateral attack.

At common law the invariable rule was that the sheriff's return was absolutely conclusive as between parties and privies, and the remedy of a party injured by a false return was against the sheriff on his official bond.[4] This is the English rule today.[5]

In Indiana a long line of decisions has affirmed the proposition that, in the absence of fraud or collusion,[6] a sheriff's return is conclusive as against collateral attack.[7] The United States Supreme Court has held that this rule is due process of law.[8] A proceeding under the Indiana statute allowing relief from a judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect[9] is a direct attack, and in such action a return showing service may be contradicted.[10]

In other states, by the overwhelming weight of authority, the sheriff's return is conclusive against collateral attack.[11]

What is the policy underlying the English and American decisions holding the return conclusive? The reason stated in most cases is that the sheriff is a sworn officer, to whom the law gives credit.[12] The real reason might be found in the reluctance of the common law to give an additional remedy where one already existed. "The existence of one remedy was considered sufficient reason for refusing another. One remedy was available for a false return—an action against the sheriff. One remedy was enough. Hence no attack on the truth of the return was permitted."[13]

The chief argument against precluding inquiry into the truth of the sheriff's return is that such proceeding is a "violation of the fundamental doctrine that every man is entitled to his day in court—that is, due process of law under the United States Constitution."[14] This argument has been answered by the United States Supreme Court in the Indiana case of Miedrich v. Lauenstein.[15]

The better view seems to be that since the sheriff is a sworn and bonded officer, the court has a right to presume that his return is true. To permit a judgment entered on such return to be set aside afterwards on mere oral testimony would open the door to fraud and render judgments far less secure than the law regards them.[16]

The doctrine set forth in the principal case was adversely criticized in

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[4] Comyns, Dig. Tit. Retorn G.; Barr v. Sachwell (1728), 2 Strange 813, 93 Eng. Rep. 865.

[5] 21 R. C. L. 1321.

[6] Cavanaugh v. Smith (1882), 84 Ind. 380.

[7] Splahn v. Gillespie (1874), 48 Ind. 397; Tyler v. Davis (1905), 37 Ind. App. 557, 75 N. E. 3; Birch v. Franz (1881), 77 Ind. 199.

[8] Miedrich v. Lauenstein (1913), 232 U. S. 236, 58 L. Ed. 584.

[9] Burns (1926), Sec. 423.

[10] Nietert v. Trentman (1885), 104 Ind. 390, 4 N. E. 306; Cully v. Shirk, Ex'r. (1891), 131 Ind. 76, 30 N. E. 882; Groff v. Warner (1909), 44 Ind. App. 544, 89 N. E. 609.

[11] 50 C. J. 576 and cases there cited.

[12] Splahn v. Gillespie (1874), 48 Ind. 397.

[13] Sunderland, The Sheriff's Return (1922), 16 Col. L. Rev. 281.

[14] (1916) 9 Va. L. Rev. 451.

[15] (1913) 232 U. S. 236, 58 L. Ed. 584.

[16] Lile, On Equity Pleading and Practice, p. 35.

the Colorado case of DuBois v. Clark.[17] The court said, "Whether the officer made personal service or not is said to be within his own knowledge; but whether the place where the writ was left was in fact the usual place of abode of the party . . . was something to be ascertained by inquiry and therefore not necessarily within his knowledge. But either mode of service is good, and if the defendant fails to appear, authorizes default and judgment against him. Why a defendant who is ignorant of the proceedings of the sheriff should be compelled to submit to the hardship of being concluded by the judgment in one case and not in the other, is, we confess, not obvious to us."

The court in the principal case evidently assumed that if the return had showed personal service on appellant it would have been conclusive. Quaere, why should the identity of defendant be considered presumptively within the personal knowledge of the sheriff, and the usual place of residence of defendant be not so considered, when the sheriff must rely on inquiry in both cases?

The opinion in the principal case seems to have little support either in reason or authority. S. F. S.

WATERS AND WATER COURSES—NATURAL LAKES AND PONDS—NATURE AND EXTENT OF RIPARIAN RIGHTS—John Sanders, Jr., plaintiff, was owner of certain real estate, approximately twenty acres of which was covered with a nonnavigable body of fresh water. Practically all of said lake was on the land of the plaintiff except a very small portion thereof which extended across plaintiff's east line onto land owned by one Artie D. Fast. The plaintiff averred that the part of his land so covered by water was very valuable and profitable as a pleasure and recreation resort for rowing, fishing and other pastimes, and that he so used and derived profit therefrom. The plaintiff brought this action against the defendant, a licensee of Artie D. Fast, to enjoin the defendant from entering upon land of plaintiff (covered by the lake) and boating and fishing thereon, and anchoring his boat to the soil covering plaintiff's land over plaintiff's objection. Defendant demurred to this complaint for want of sufficient facts, and the demurrer was sustained. Held, where there are several riparian owners on a nonnavigable lake, proprietors and their lessees and licensees may use surface of whole lake for boating and fishing, if not interfering with the reasonable use of waters by other riparian owners.[1]

The precise holding of the above case would seem, from the statement of the court, to represent a well settled, undisputed statement of the law. However, a search of the very few authorities on the point involved has not proved this to be so.

The court, in its opinion, based part of its reasoning on State v. Lowder,[2] the only Indiana case touching, either directly or indirectly, upon the issue involved. In this case, Lowder and others were prosecuted for having unlawful possession of a seine and for taking fish therewith, in violation of the statute. The Supreme Court, in passing on the correctness of several instructions given in that case, among which was one that told the

[17] (1898) 12 Colo. App. 220, 55 Pac. 750.

[1] Sanders v. De Rose (1933), 186 N. E. 388.

[2] (1926), 198 Ind. 234, 153 N. E. 399, 401.