STATE USE BROWNING *vs.* LAWSON.

In an action against the sheriff, on his official bond, for the loss and waste of property, seized under legal process, the plaintiff is not bound to read the return of the sheriff to the writ under which he acted; but may show *aliunde* what property was seized by the sheriff.

The plaintiff may read the record of the case in which the writ was issued, including the writ itself, without reading the return of the sheriff.

The return of the sheriff to the writ under which he acted is conclusive against him, when read by his adversary: but is only *prima facia* evidence in his favor.

Writ of Error to the Circuit Court of Pulaski county.

This was a suit instituted by the State of Arkansas, for the use of Isaac Browning, against James Lawson, on his official bond as sheriff of Pulaski county; and determined in the Circuit Court of said county, at the October term, 1846, before the Hon. WILLIAM H. FEILD, Judge.

The declaration sets out the bond and condition; and assigns two breaches of the condition. The first, in substance, that Chester Ashley brought suit, by attachment, against Isaac Browning; that the writ of attachment came to the hands of Lawson, who seized and took, by virtue thereof, certain goods and chattels, the property of Browning, of great value; "but hath not safely and securely kept the same, but, on the contrary thereof, hath suffered the same to be used by others, and wholly wasted and destroyed, so that by his mere negligence and carelessness, the same have become and are wholly lost to said Browning;" and that Ashley, who recovered two hundred dol-

lars in the attachment suit against Browning, hath not been paid, out of said goods, &c. The second, sets out the attachment suit and recovery thereon, the issuance of the writ of attachment and the seizin of certain goods and chattels, to the value of one thousand dollars, and that Lawson "hath so negligently and carelessly conducted himself in the premises, that, by and through the mere negligence and carelessness of him, the said James Lawson, jr., his deputies and agents, the said goods and chattels, so levied, seized, and taken by him as aforesaid, have been injured, wasted, and destroyed," so that the same are not sufficient to pay Ashley; and that, though of sufficient value to pay Ashley his damages, interest and costs, and leave a large surplus, to wit: eight hundred dollars, which "ought to have remained, and but for the carelessness and negligence aforesaid, of said Lawson, his deputies and agents, would have remained to said Isaac Browning; the same has thereby become, and is wholly lost to him." Several pleas, demurrers, and replications were filed, which it is unnecessary to notice here.

The case was submitted to a jury; and the plaintiff, to support the issue on his part, read in evidence the declaration, affidavit, writ, and endorsements thereon, in the attachment suit, set out in the declaration, but omitted to read the return of the sheriff to the writ of attachment. He then offered to prove, by parol evidence of witnesses, what property was attached, levied, seized, and taken by said defendant, as sheriff of the county of Pulaski, under and by virtue of the writ of attachment aforesaid; whereupon, said defendant exhibited to the court his return of said writ of attachment, and objected to the plaintiff proving, by the parol evidence of witnesses, what property had been attached, &c., and the court sustained the objection, and the plaintiff excepted. The verdict and judgment being for the defendant, the plaintiff moved for a new trial, and the court overruling his motion, he excepted; and has brought the case into this court by writ of error.

RINGO & TRAPNALL, for the plaintiff. The sole question to be decided is, whether the plaintiff, in a suit against a sheriff, for an alleged dereliction of duty or illegal conduct, done under color of legal

authority, is restricted by law to prove the facts charged, by the official return of the officer.

To allow the statements of the defendant, however made, whether under oath or without oath, officially or otherwise, to be given in evidence at his instance and for his benefit, which is the legitimate consequence, and necessary effect of the decision in this case, is to make him a witness for himself, which is directly opposed to every principle of reason, and of the law of evidence, with this aggravation and wrong superadded, that no testimony, other than that furnished by himself, shall be adduced or heard against him. 3 *Starkie's Ev.* 1061. *ib.* 1342. *Adey* v. *Bridges et al.,* 2 *Starkie's Rep.* 189. 3 *Eng. Common Law Rep.* 307.

To refuse the plaintiff liberty to show the truth of the facts, by confining his testimony to the official return of the defendant, is not only to make the defendant the sole witness in regard to acts for which he is responsible to the plaintiff, who, if his allegations are true, has illegally suffered serious injury therefrom, but to make the testimony of this interested party operate in his favor as an estoppel; a consequence not given by law to any ordinary record, not pleaded and relied upon as an estoppel, but merely offered as an instrument of evidence to verify facts controverted. Here, if the defendant's return was conclusive evidence for him, of the facts as stated in it, the defendant, in his 3d and 5th pleas, instead of denying the seizure as alleged, and referring the decision of the facts to the jury, ought to have set out his return, and concluded his plea with a prayer that the plaintiff be thereby estopped and precluded from showing any thing contrary thereto. 1 *Chitty's Pl.* 635, 592. 1 *Saund. R.* 325, *a. n.* 4. 1 *Starkie's Ev.* 303, 304, 206, 207. *Edwards* v. *McConnell, Cooke's Rep.* 305.

The plaintiff admits that the sheriff's return is conclusive evidence against himself; that it is *prima facia* evidence of the facts stated as between third persons; that it is conclusive between the parties in the particular suit wherein the process issued; and that it is in some cases *prima facia* evidence for the sheriff in a suit against him when offered by himself; but they deny that it ever has been, or, consistently with the fundamental principles of the law, ever can be, adjudged

to be an estoppel against the plaintiff in a suit directly against the sheriff, so as to conclude his rights and preclude him from establishing the truth by any other testimony.

WATKINS & CURRAN, contra. This was an action against the defendant upon his bond as sheriff. The breaches assigned were in substance, that the defendant, as sheriff, had levied a writ of attachment in a certain case, wherein plff. was defendant, upon his goods and chattels, worth $1000, the attachment having been for a less amount, and that he kept the goods negligently, and wasted them, or suffered it to be done by others, so that he (the present plaintiff) has not received the surplus of the value of the goods, to which he was entitled, after satisfying the attachment, and that the judgment in the attachment suit remains unsatisfied. The plaintiff, in proceeding to make out his case, offered in evidence the record of the attachment suit in question, omitting, however, the return of the sheriff, which specified the articles attached, endorsed upon the writ of attachment, and proposed to prove by *parol,* what goods and chattels had been seized by the sheriff, under the writ, to which the plaintiff objected, and the objection being sustained, the plaintiff offered no further proof, and suffered judgment.

We understand that where a record is offered in evidence, the whole of it must be read or considered as read, and where in an action against a sheriff, for a false return, the return must be taken as true, until it is disproved. But the *gist* of this action was for wasting the goods that were attached, and in such case the return itself would impart absolute verity. If the object of the plaintiff had been to show that he was injured because the sheriff had in fact levied upon other or more goods than those enumerated in the return, his only remedy was to sue the sheriff for a false return, or, according to our analogous practice, to have set out that ground of complaint as a breach of the bond, and so made it the gravamen of the action. We think it clear that, in an action against a sheriff, for misfeasance, or malfeasance in office, *de hors,* his return, and not professing to question the truth of the return, its truth must be conceded, and as parcel

of the record offered, is the best and highest evidence on the part of the plaintiff, the nature of the case admits of.

JOHNSON, C. J. The plaintiff in error has raised but one single objection to the judgment of the court below. The ground of this objection is, that the court refused to permit him to prove, by parol evidence, what property had been levied upon and seized by the defendant, as sheriff of Pulaski county, under the writ of attachment issued at the suit of Chester Ashley. In order to fix the liability of the defendant, the plaintiff introduced a portion of the record and proceedings in the attachment suit, commencing with the declaration, and closing with the endorsement of the defendant, made upon the writ of attachment, stating the time when it came to his hands, but declined to read the return itself to the jury. To this course of proceeding the defendant objected at the time, and insisted that the return was a part of the record in the cause, and consequently it was the highest and best, and indeed the only legitimate, evidence of the facts sought to be established by the parol testimony. The court below sustained the objection, and this is the decision which is now sought to be reversed.

The substance of the breach is, that the defendant, as sheriff of Pulaski county, under and by virtue of a writ of attachment, sued out by Chester Ashley, against the plaintiff, levied upon, seized and took into his custody, certain goods and chattels, the property of the plaintiff, and that he did not safely and securely keep the same, but that, on the contrary, he kept them so carelessly and negligently that they were wholly lost and destroyed. The defendant expressly and positively denies that he levied upon, seized, or took into his possession any goods or chattels whatever, of the plaintiff, and also that he suffered the property to be used by others, or wasted and destroyed. These allegations being expressly denied, it most unquestionably devolved upon the plaintiff to support them by proof. In the case of *Avey* v. *Bridges* and *others*. 2 *Star. Rep. p.* 166, HOLROYD, J., was of opinion that the defendant was not entitled to have the return read as part of the document produced by the plaintiff. The action

was instituted, in that case, against the sheriff, for an escape, and, on his part, it was proposed to prove that he had returned that the party had been rescued, and it was contended that this return was binding in that action, since the return of a sheriff becomes a record of the court, which is not traversable, and if the return had been false, an action might have been brought for the false return. On the other hand, it was contended that the return made by the sheriff could not be evidence for himself. HOLROYD, J., was of opinion that the return was admissible, but that it could not be conclusive in that action, although in another action it would be so. It is clear, that the return made by the sheriff in that case, was not regarded as more than *prima facia* evidence of the facts that it contained, and consequently liable to be rebutted and overturned by proof aliunde. It will be readily conceded, that the return of a sheriff is conclusive against himself, and this is upon the principle that a party is always supposed to make the best possible case in his own favor, and it is equally true, that, when his adversary reads his return against him, he can then claim the benefit of it, and if he should only read a portion of it, that he would be entitled to the whole. But it is contended that, inasmuch as the plaintiff read a part of the record and proceedings in the attachment suit, therefore, he made the whole of it testimony, and that he was bound to read it. This position is incorrect. The writ and the return endorsed upon it are two separate and independent instruments. The plaintiff was not bound to read the sheriff's return, in order to make out his own case, but should have been permitted to establish the facts, and seizure and waste of the property, by the best evidence within his reach. If, after the plaintiff had rested his case, the defendant had seen proper to read his own return, he most assuredly would have been at liberty to do so, and then the weight of the testimony would have properly been a question for the determination of the jury, under the instruction of the court. We think, therefore, that there can be no doubt but that the Circuit Court erred in refusing permission to the plaintiff to introduce witnesses to show what property was seized and taken by the defendant under the writ of attachment. The judgment is, therefore, reversed.