



1926

The Rights and Powers of an Officer in Serving a Process

Woodson D. Scott

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Law Enforcement and Corrections Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Scott, Woodson D. (1926) "The Rights and Powers of an Officer in Serving a Process," *Kentucky Law Journal*: Vol. 14 : Iss. 4 , Article 7.
Available at: <https://uknowledge.uky.edu/klj/vol14/iss4/7>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Co., and *Dotes v. Hilton*¹ hold that an infant who is not shown to be capable of transacting his own business cannot have his disabilities removed, even by a court order made pursuant to legislative authority, on the ground that the statute providing for judicial emancipation should be construed as applicable only to infants who are capable of adult conduct.

EUGENE B. COCHRAN.

THE RIGHTS AND POWERS OF AN OFFICER IN SERVING A PROCESS.

A process, in the sense the term is employed in this article, is the means or method used by the court to acquire jurisdiction of a person and compel him to appear in court after suing out the original writ in civil cases and after indictment in criminal cases. The Kentucky Code defines the word "process" as a writ or summons issued in the course of judicial proceedings.¹

A process, in order to give the court jurisdiction of a party, must be served by the proper officer. Ordinarily the sheriff is the proper officer to execute all writs returnable to court. His power is defined in this state by statute: "Each sheriff, by himself or deputies, shall execute and make due return of . . . all processes which come to, and may be lawfully executed by him, against any person . . . in his county, . . ." ² In Kentucky a process may also be served by a constable, coroner, elisor or jailer. The power of a constable to execute a process is thus defined: "Constables may execute bench warrants, warrants of arrest, distress or other warrants, summons, subpoenas, attachments, notices, rules and all orders of courts in all criminal, penal and civil cases, and shall return all such processes, noting the time of execution on them, to the courts or persons issuing them."³ The statute also provides that a process may be served by a coroner: "A coroner may execute process in criminal, penal and civil cases, and when so acting, the laws in regard to sheriffs shall apply to and govern him."⁴ The power

¹ *Dalton v. Bradley Lumber Co.*, 135 Ark. 392, 205 S. W. 695; *Dotes v. Hilton*, 48 Ark. 305, 3 S. W. 193.

² Section 732, sub. 26, Ky. Civ. Code.

³ Section 4565, Ky. Stat.

⁴ Section 436, Ky. Stat.

⁵ Section 536, Ky. Stat.

conferred upon an elisor " . . . to perform all acts and duties which are by law devolved upon sheriffs . . . " ⁵ confers upon him the power to serve any kind of process. Also by statute a process may be executed by a jailer and his power is thus defined: "Process from any court may, in a civil, criminal or penal case, be executed by the jailer of the county, and in all such cases the law applicable to the sheriff shall govern the jailer." ⁶ Also, the court may appoint a person to execute a process. This is provided for in the Code: "The court, for good cause, may appoint a person to serve a particular process or order, and he shall have the same power to execute it which a sheriff has . . . " ⁷ Thus it is seen that in Kentucky, although the sheriff is usually the proper officer to serve any kind of a process, a constable, coroner, elisor, jailer or person appointed by the court may also perform this duty under certain circumstances.

There are in general two methods of serving process: The one actual and the other constructive service. In the case of actual service of process, the execution is effected either by reading the original process to the person or by delivering a copy of it to him. Constructive service of process, which is a substituted form of service, is made either by leaving a copy of the process at the person's residence when he is absent or by posting or publishing notice of the issuance of the process and mailing a copy of the notice posted or published to the person, if his address is known. ⁸ Each state is at liberty to determine for itself the procedure to be followed by the courts to acquire jurisdiction of its citizens, but its regulations can not operate extraterritorially. ⁹ Kentucky has provided that non-residents doing business in this state who are required to execute bonds must have agents on whom process may be served. ¹⁰

An officer in executing a process must serve it at the proper time, otherwise it is not effective. Service should always be made as expeditiously as the circumstances of the particular case permit, but in no case can it be made before the commencement

⁵ Section 1597, Ky. Stat.

⁶ Section 2234, Ky. Stat.

⁷ Section 668, Ky. Civ. Code.

⁸ *Nelson v. Chicago, B. & O. R. Co.*, 235 Ill. 197, 80 N. E. 109.

⁹ *Bimeter v. Dawson*, 4 Scammon (Ill.) 536, 39 Am. Dec. 430.

¹⁰ Section 3270d, Ky. Stat.

of the suit.¹¹ It can not be served after return day because its vitality is thereafter lost, unless the time in which service may be made is specifically extended by the laws of the state where the service is being made.¹² Service may be made at night as well as in the daytime, but not ordinarily on Sunday or a legal holiday. In Kentucky it is provided by statute that, "A writ of habeas corpus, or process on a charge of treason, felony, or for riot or breach of the peace, or upon an escape out of custody, may be executed on Sunday."¹³

There are several classes of persons who are privileged or exempt from being served with process at certain times or during the course of certain events. It is very important that an officer should be correctly informed in regard to each of these classes of persons and that the privileges and exemptions to which each has a right to be given the proper consideration on his part. The most important of these classes of persons are the legislative officers,¹⁴ judges and attorneys at law,¹⁵ and persons in the military service.¹⁶ It is a serious malfeasance for any officer to abuse any of this class of immunities for all are based on reasons of public policy. In this state it is provided by statute that members of the General Assembly shall not be arrested during the existence of their constitutional privilege except on process for treason, felony, breach of the peace or misdemeanor.¹⁷

One of the most difficult problems presented in connection with the service of process is the amount of force an officer may use. On this point there is an essential difference between the rights of an officer executing a civil process and those of an officer executing a criminal process, and the limitations on his power are much less in the latter type of case.

It is a well settled principle of the common law that a man's house is his castle and that within the limits of its walls he is safe from all disturbance. But it is not disputed that an officer in serving a criminal process may break into a house if he has been refused admittance thereto or the warrant cannot other-

¹¹ *Wyer v. Andrews*, 13 Me. 168, 29 Am. Dec. 497.

¹² *Cox v. Strickland*, 120 Ga. 104, 47 S. E. 912.

¹³ Section 4567, Ky. Stat.

¹⁴ *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792, 45 A. L. R. 563.

¹⁵ *Cameron v. Roberts*, 87 Wis. 291, 58 N. W. 376.

¹⁶ *Davidson v. Barclay*, 63 Pa. St. 406, 76 Am. St. Rep. 535.

¹⁷ Section 1981, Ky. Stat.

wise be served.¹⁸ Thus, the sheriff has a right to break doors to execute a warrant.¹⁹ It can readily be seen that the rule could not be otherwise without allowing a man to defy the law and to be entitled to the protection of the law in so doing. The reason for the rule in the case of criminal process is perfectly clear. This rule has been codified in Kentucky by statute: "In executing a writ of habeas corpus or any criminal or penal process requiring an actual arrest, the sheriff or other officer may break open the outer door or any other door of the dwellings or other house of the defendant, or any other person, if it be necessary to enable him to make the arrest."²⁰ Also, the Criminal Code provides that: "To make an arrest, an officer may break open the door of a house in which the defendant may be, after having demanded admittance and explained the purpose for which admittance is desired."²¹ The Kentucky decisions give these provisions of the Statutes and Code full force and effect, but do not extend their application beyond the strict letter of the provisions. Accordingly, it was held in the case of *Hawkins v. Commonwealth*,²² where the sheriff in making an arrest broke the doors of the house of a third party, that, although the sheriff, in order to make an arrest, has a right to break the outer or inner doors, yet he cannot break the house of a third party to arrest a criminal who does not dwell in that house unless the person to be arrested be actually in the house at the time of the entrance. This strict construction of the statutory provisions makes it necessary for an officer to proceed with a great deal more caution in breaking the house of a third person to serve a criminal process than in breaking the house of the person on whom the process is to be served. It will readily be seen that, according to the statutory provisions and the cases decided in construing these provisions, the rights of an officer in serving a criminal process in Kentucky are comparatively extensive.

But an entirely different situation is presented in the case of a civil process. It is a uniformly recognized rule of the common law that no officer has the legal authority to break an outer

¹⁸ 14 B. Monroe (Ky.) 365, 65 Am. Dec. 147.

¹⁹ *Com. v. Irvin*, 1 Allen (Mass.) 587.

²⁰ Section 4583, Ky. Stat.

²¹ Section 40, Crim. Code.

²² 14 B. Monroe 314.

door or other outside protection to an individual's dwelling house for the purpose of executing a civil process.²³ There is a statutory provision on this subject in Kentucky which provides: "If in levying a *feri facias*, the outer door of the dwelling house of the defendant, in which his property is, be fastened, the sheriff or other officer shall not break open the same to seize the property. . . ." ²⁴ The statutes also further provide: "The sheriff or other officer may break open the outer or any other door of the dwelling or other house of a third person in which the property of the defendant in the execution is fraudulently concealed or kept."²⁵ Another section of the statutes, which defines the power of an officer in serving other types of civil process, and which depends for its meaning on the two sections quoted, *supra*, provides as follows: "The sheriff or other officer shall have the same power to break and enter the dwelling and other houses of any person in executing any other civil process, which is given him to seize property under execution."²⁶ It was held in the case of *Jewell v. Mills*,²⁷ construing the statutory provisions quoted *supra*, that an officer had no right to force open an outer door or window which was closed and fastened, although he did not actually break the latch or catch in so doing. The Civil Code provides that: "A sheriff having an order of attachment, or for the delivery of property, may enter any building or inclosure containing the property, to take it; and if necessary for this purpose, may break the building or inclosure, having first publicly demanded the property."²⁸ Although this provision applies to property only, the statutes further provide²⁹ that an officer may have the same power in serving other kinds of civil process as is given him to seize property under execution. An officer can not break the outer door of a person's dwelling house to levy on property, but he may break the outer door of a third person's house in which the property of the defendant in the execution is fraudulently concealed or kept. Yet

²³ *Swan v. Mizner*, 8 Gray (Mass.) 182, 69 Am. Dec. 224; *Kelly v. Schuyler*, 20 R. I. 432, 39 Atl. 893; Note L. R. A. 1916D 282.

²⁴ Section 4580, Ky. Stat.

²⁵ Section 4581, Ky. Stat.

²⁶ Section 675, Ky. Civ. Code.

²⁷ 3 Bush 62.

²⁸ Section 4582, Ky. Stat.

²⁹ *Supra* (26).

there are essential differences in the service of a process directed to a person and one directed to property. This fact, it is submitted, necessarily presents many difficulties in interpreting the provisions of the Kentucky statutes and code in liberalizing the common law rule as to the force an officer may use in executing a civil process.

Thus it is evident that the common law, jealous of intrusion upon domestic peace and security, did not permit an officer to break open an outer door of a person's dwelling house in order to execute a civil process either upon the person or the property of the individual upon whom the process was to be served. Every man's house was deemed to be his castle, and an ordinary judicial writ did not authorize the breaking of the outer door. But Kentucky, wisely or unwisely as the case may be, has seen fit to make certain changes in the common law rule calculated to increase the authority of an officer of the law in executing a civil process. There are many good reasons which may be urged in favor of these changes as well as against them. In the first instance, it may be said that, if refused admission, an officer can not execute a process unless he employes force to gain entrance to the house wherein is the person on whom he is seeking to serve the process. If a person on whom the court has directed a process to be served refuses admission to the officer serving the process, he may properly be deemed guilty of contempt of court and as abusing his sanctuary by concealing himself within its closed walls. But analagous reasoning is inconclusive. The object of the legislature was clearly to supply what it deemed to be a defect in the common law. The purpose for causing process to issue is to get jurisdiction of the person or property of the defendant. And since the common law placed it in a person's power to frustrate, to a certain extent, this purpose, our legislature has seen fit to make certain changes and modifications by statute. These changes are merely calculated to reduce the control of a contumacious person over the power and majesty of the law.

It must be conceded, in the final analysis, that the question as to the amount of force an officer may use in serving a civil process is a problem involving a puzzling conflict of relative rights, as well as considerations of public policy. On the one

hand, the power and majesty of the law must be upheld by giving full force and effect to all processes issuing from the courts by immediate service thereof on the person of whom the court is seeking to acquire jurisdiction. This is very important. On the other hand, the law throws its protection around the home and attempts to preserve the fine influences embodied therein sacred and inviolate from all external disturbance. The common law doctrine on this subject is perhaps adequate to cover all situations that arise and all changes therefrom ought to be made with the greatest precaution and after an earnest consideration of the specific problems involved and of the evils that may come from the proposed changes as well as the advantages to be gained.

WOODSON DENNIE SCOTT.