

SMITH v. BURNHAM.

An action lies against a sheriff for refusing to levy an execution on property attached by him and in his possession, although his return on the writ erroneously stated that the attachment was subject to a prior attachment in another suit. The return in such case is not conclusive.

CASE, against a sheriff for the refusal of his deputy to levy an execution of the plaintiff upon property attached by the deputy. Plea, the general issue and the statute of limitations. Facts found by the court. The first attachment of the property was made on the plaintiff's writ against K. by the deputy, in whose possession the property still is; but his return stated that the attachment was subject to a prior attachment in a suit of S. against K.; and, being indemnified by S., he refused, though seasonably requested, to levy the plaintiff's execution upon the property. This suit was brought within six years of his refusal to levy the execution, but not within six years of his return on the writ.

Rand and *Albin*, for the plaintiff.

Mugridge, for the defendant.

CLARK, J. If the plaintiff's attachment was prior to that of S., it was the duty of the deputy to levy the plaintiff's execution, and the defendant is liable for the refusal of his deputy to perform that duty. If the deputy's return on the plaintiff's writ is conclusive in this case, the plaintiff's attachment, for the purposes of this case, was subject to that of S. The question is, whether that return is conclusive.

In many cases, an officer's return is conclusive. *Bolles v. Bowen*, 45 N. H. 124. But the right of action against the officer for a false return, shows that the return is not always conclusive in his favor, or against him. In some cases it may be contradicted. *Lewis v. Blair*, 1 N. H. 68. In any action to which the sheriff is a party, the return is *prima facie* evidence for or against him, subject to be impeached, contradicted, or varied like other *prima facie* evidence, by any parol testimony, or other competent proof. *Angier v. Ash*, 26 N. H. 99, 105. This action is against the sheriff, and the return is not conclusive in his favor. The plaintiff's attachment being prior to that of S., there must be

Judgment for the plaintiff.

STANLEY, J., did not sit.