so well informed as to the reasons which impelled the enactment.[24] A statute otherwise valid should not be stricken down though the policy upon which it rests in a vicious one.[25] Even though it be doubtfully assumed that a desirable result was obtained in the instant case, it is submitted that the short-cut by which the court reached its objective affords little satisfaction to the proponents of the act and those injuriously affected by its fall.

PROCEDURE

CONCLUSIVENESS OF SHERIFF'S RETURN

In a recent case the Indiana Appellate Court held:
(1) that an alleged non-resident defendant in an action in personam (to recover an unpaid loan) properly raised the question of jurisdiction over his person, where the sheriff had returned that the defendant had been served by leaving a copy at his last and usual place of residence, by an answer in abatement rather than by a motion to quash;
(2) that the taking of a deposition to be used on the trial of the issues raised by the answer in abatement did not constitute a general appearance in the action; and
(3) that because the fact as to the residence of the defandant was not presumptively within the knowledge of the sheriff, the defendant was not bound by the usual conclusive presumption as to the correctness of a sheriff's return. Donnelley v. Thorne, —— Ind. App. ——, 51 N.E. (2d) 873 (1943).

The first two propositions decided are unquestionably correct and find uniform support in the previous Indiana cases. The motion to quash is properly used only where the issue sought to be raised is one which can be decided on the record itself and which, therefore, does not require the proof of extrinsic facts for its decision. The issue raised was as to the residence of the defendant in the state and clearly the proper procedure for raising the question is by answer in abatement and not by a motion to quash. Aetna Ins. Co. v. Black, 80 Ind. 513 (1881). In view of that fact that the taking of a desposition on the merits of a case is not a general appearance, Coplinger v. The David Gibson, 14 Ind. 480 (1860), it follows that the taking of a deposition on an answer in abatement is not a general appearance. The fact that the evidence adduced on the taking of the deposition may be related in part to the merits of the case would not alter the result.

The third point decided goes beyond any previous Indiana case on this subject so far as the language of the opinion is concerned although obviously the result reached is quite proper, and indeed necessary.

The Supreme Court cases on this subject have held that in the

24. Vandalia R.R. v. Stillwell, 181 Ind. 267, 104 N.E. 289 (1914); Pittsburgh, C.C. & St. L. Ry. v. State, 180 Ind. 245, 102 N.E. 25 (1913); State v. Barrett, 172 Ind. 169, 87 N.E. 7 (1909).
25. Mount, Trustee, v. State ex rel. Richey, 90 Ind. 29 (1883).

absence of collusion between the plaintiff and the sheriff, the sheriff's return is conclusive and not subject to attack either directly or collaterally. Miedreich v. Lauenstein, 172 Ind. 140, 86 N.E. 963, aff'd, 232 U.S. 236 (1913); Johnston Harvester Co. v. Bartley, 81 Ind. 406 (1882) (and cases cited); see also, Groff v. Warner, 44 Ind. App. 544, 89 N.E. 609 (1909). In the Bartley case by direct attack on special appearance the defendant sought to raise the question that the return that an agent of the defendant had been served at his residence was false. It was held that the return was conclusive. On the other hand the Supreme Court has held that under the excusable neglect statute the presumption may be controverted. Nietert v. Trentman, 104 Ind. 390, 4 N.E. 306 (1885), reaffirming Smith v. Noe, 30 Ind. 117 (1868).

It is conceded in the cases that if the defendant is a non-resident of the state he is not bound by the principal doctrine on the general theory that a state may not exercise a jurisdiction by means of a conclusive presumption which it does not have as a matter of constitutional law or under the conflict of laws. Miedreich v. Lauenstein, supra; Cavanaugh v. Smith, 84 Ind. 380 (1882). The instant case comes squarely within this admitted exception and it was a complete answer to the plaintiff's contention to say that the defendant must as a matter of constitutional law be permitted to show directly (or on the collateral attack of a default judgment) that the state had no jurisdiction as such over his person. The matter of fraud is immaterial. This result had previously been reached in the case of Ramsey v. Rule, 98 Ind. App. 205, 188 N.E. 792 (1934), and it would necessarily follow from the proposition that a default judgment would be subject to collateral attack. Cavanaugh v. Smith, supra.

The opinion, however, relies upon the previous cases of State of New Jersey v. Shirk, 75 Ind. App. 275, 127 N.E. 861 (1921), and Papuschak v. Burich, 97 Ind. App. 100, 185 N.E. 876 (1935). In the first case the State of New Jersey had sued, in the State of Indiana, a New Jersey corporation for delinquent taxes and had recovered a default judgment based upon a sheriff's return to the effect that the sheriff had served AB, its president. The plaintiff then sued the original defendant and its officers and stockholders on the original judgment. The defendants filed a cross-complaint (but the facts do not disclose whether or not it could be sustained under the time limit of the excusable neglect statute), and the Appellate Court held that the defendants should be permitted to show that AB was not the president of the corporation. The decision, however, was on the ground that because the plaintiff had directed the sheriff to serve AB as president that the sheriff's return was "fraudulent" and the judgment therefore was "void." There was no showing that the plaintiff had made other than an honest mistake. The Appellate Court, in language, avoided the Bartley case and brought the case in line with the accepted doctrine to the effect that a fraudulent return may be attacked although the fraud was of a constructive nature.

In the second case, in an action to set aside a previous default judgment, the sheriff had returned that the defendant had been

served at his last and usual place of residence. He was defaulted and the original judgment was vacated. It was held that he should be permitted to prove that the summons had not been left at his residence but had been left at an address in an adjoining city. The case was decided on the authority of the Shirk case because it was proved that the plaintiff, in the action to set aside the original judgment, had instructed the sheriff to serve the defendant at an address which turned out to be the wrong address. Again there was no proof of anything other than an honest mistake. Neither case is authority for the proposition that of itself a sheriff's return as to the fact of agency or residence is open to attack. They extend the concept of a fraudulent or collusive return to the case where a plaintiff innocently induces a mistaken return.

No case decided by the Supreme Court has been found which departs from the general proposition that even on direct attack, where the defendant is subject to the jurisdiction of the state, the correctness of the sheriff's reutrn cannot be questioned. The recent cases on the subject have all been decided by the Appellate Court, and the distinctions made find no sanction in the decisions of the Supreme Court. Due to the fact that an Appellate Court decision is not a precedent in the Supreme Court, Fletcher Ave. S. & L. Assn. v. Zeller, —— Ind. ——, 27 N.E. (2d) 351 (1940), the Indiana law on this subject is still unsettled.

It is certainly doubtful, as a matter of policy, whether the Appellate Court decisions can be sustained. It is difficult, if not impossible, to sustain the proposition that there is a distinction between a sheriff's return as to the identity of an individual and the place of his residence. The rule in question has never been based upon the theory that the sheriff's return was not subject to attack because he was presumed to know that the person served was the person intended. Indeed, a sheriff can be mistaken about the identity of a person as frequently as he can be mistaken concerning his agency or the place of his residence. The rule rests not upon a presumption as to the sheriff's knowledge or lack of knowledge, but upon the public policy against litigating in all default cases the correctness of the sheriff's return except under the excusable neglect statute and within the time limits fixed by that statute. The time limit would not be applicable if actual fraud could be shown, as the statute has been held not to preclude an attack upon a judgment for this reason. Cory v. Howard, 88 Ind. App. 503, 164 N.E. 639 (1929). Indeed, fraud which goes to the exercise of jurisdiction renders a judgment subject to collateral attack. Glansman v. Ledbetter, 190 Ind. 505, 130 N.E. 230 (1921).

In a default case as against a defendant who is subject to the jurisdiction of the state, it would seem that the decision in the Lauenstein case should be followed. Certainly also in a case where a defendant by an answer in abatement challenges the state's jurisdiction (as such) over him, a conclusive presumption as to the correctness of the sheriff's return cannot be used to create a jurisdiction which the state does not possess as a matter of constitutional

law. In any other case where the defendant undertakes to raise the question as to the correctness of the sheriff's return by an answer in abatement it would seem that sound policy requires that the Bartley case be followed.

It is open to the defendant to persuade the sheriff that he has made a mistake, in which instance the sheriff would be privileged to file an amended return which would dispose of the question. Walker v. Shelbyville & R. T. Co., 80 Ind. 452 (1882). In view of the fact that he is liable to the defendant for a "false" return, even although onestly made, Diedreich v. Lauenstein, supra, this procedure normally would be effective.

The real difficulty in the cases involving a false return as to a service at the defendant's last and usual place of residence arises out of the Indiana provision on this subject which frequently results in an unconstitutional service of process. Acts 1881 (Spec. Sess.), c. 38, Sec. 56, Ind. Stat. Ann. (Burns, 1933) Sec. 2-803 provides simply that service of summons on a defendant may be had ". . . by leaving a copy thereof at his usual or last place of residence." While it is settled that service at the last and usual place of residence is a constitutional substitute for personal service, Sturgis v. Fay, 16 Ind. 429 (1861), it is likewise settled that service of this character is invalid if in its application it cannot reasonably be expected to give actual notice to the defendant. This, the simple leaving of a summons at the home of a defendant from which he and his family are temporarily absent is not due process of law, and a default judgment based upon such service is subject to collateral attack on federal constitutional grounds. Earle v. McVeigh, 91 U.S. 503 (1895); McDonald v. Mabee, 243 U.S. 90 (1916). (The latter case involved service by publication, but the language of the opinion supports the proposition that any substitute for personal service can only be sustained when it is the best available under the circumstances, and only when it reasonably calculated to bring actual notice to the defendant). A valid provision on this subject necessarily involves the acceptance of the Federal Rule, Fed. Rules Civ. Proc., Rule 4(d), and requires that the summons be left ". . . with some person of suitable age and discretion then residing therein . . .", thus prohibiting the leaving of the summons at the residence when it is in fact unoccupied.

WORKMEN'S COMPENSATION

WAS MIDDLEMAN AN AGENT OR AN INDEPENDENT CONTRACTOR?

Appellant sawmill operator brought this appeal from an industrial board order awarding compensation to appellee timber cutter under the Indiana Workmen's Compensation Act.[1] Held, reversed. Appellee was not an employee of the appellant for purposes of workmen's compensation, although he was hired by a timber scalper

1. Acts 1929, c. 172, § 1 et seq., Ind. Stat. Ann. (Burns, 1933) § 40-1201 et seq.