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REQUIREMENTS FOR IMPEACHMENT OF SHERIFF RETURNS AS GOOD EXCUSE WHEN SETTING ASIDE DOMESTIC DEFAULT JUDGMENTS

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The impeachment of sheriff returns in Texas has enjoyed a uniformity of judicial determination rarely experienced by other segments of the state's jurisprudence. This stability is attributed to the establishment of precise requirements, strictly enforced by the courts. The primary purpose of this arrangement is to place significant official functions of tribunals beyond the reach of meritless attack. A major objective of the courts has been to maintain lay discipline and respect for lawful judicial orders. Allowing the public to become insensitive to these solemn acts would render our judicial system chaotic.

In order to establish a compelling obligation to appear upon service of process in civil cases, the courts have armed themselves with the formidable weapon of default judgment. Such a forfeiture serves two purposes. It penalizes a litigant who does not appear by granting relief to the party who was conscientious in appearing for trial, and prevents useless consummation of time. The burden of granting endless continuances and hearings for unmeritorious failures to appear for trial would seriously hinder the effectiveness of the courts by overcrowding their dockets.

Despite this disciplinary mechanism and concern for the efficient operation of the courts, a sense of fairness has been primordial throughout the administration of the law in Texas. Courts are not deaf to legitimate grievances challenging a default judgment and have afforded adequate redress to the blameless casualties of its system of default. Consequently, an improper default judgment can be vacated if the complainant shows "good cause" why the verdict should be set aside and a reassessment of the merits entertained. The impeachment of a sheriff's return has often provided the impetus for such a remedy. This comment will consider the position occupied by the impeachment of sheriff returns within the good cause doctrine in setting aside personal default judgments,[1] the stringent requirements to suc-

1. The text will deal solely with impeachment of regular service by private citizens. Impeachment of service upon amended returns, foreign judgments, domestic or foreign corporations, or returns containing insignificant defects will not be dealt with. In all these areas of impeachment of officers' returns, the burden of rebutting the return is still the same as to personal judgments with the exception of some prior steps which must be taken. For example, in reference to amended returns, it is provided that any mistake or informality in a return may be corrected by the officer

cessfully challenge the integrity of the return, and recent developments demanding a reappraisal of this long-sanctioned and effective system.

IMPEACHMENT OF THE RETURN: ITS RELATIONSHIP TO GOOD CAUSE FOR VACATING DEFAULT JUDGMENTS

A brief analysis of good cause and its underlying principles is appropriate in order to better understand the role played by impeachment of sheriff returns when setting aside default judgments. Good cause is a broad requirement only partially fulfilled by successful impeachment. Rebutting the recitals of the return which indicate that service of citation was in fact accomplished is not an omnipotent and independent act, invulnerable to other conditions or obligations.

Although the procedure for vacation of default judgments has been provided in rules promulgated by the Texas Supreme Court,[2] the establishment of the good cause requirements has been developed by a case by case approach. Good cause must be shown when employing the two methods most often used in setting aside judgments—motion for new trial and bill of review.[3] Through the long and irregular judicial development of good cause,

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at any time under the direction of the court. TEX. R. CIV. P. 118. The right of amending returns is unlimited in time and the amended return, when made, relates back to the date when citation was filed. Lafleaur v. Switzer, 109 S.W.2d 239, 241 (Tex. Civ. App.—Beaumont 1937, no writ); Employer's Reinsurance Corp. v. Brock, 74 S.W.2d 435, 438 (Tex. Civ. App.—Eastland 1934, writ dism'd). Consequently, once a return has been corrected by amendment, the burden of impeachment is as onerous as if the return had originally been proper.

Impeachment of sheriff returns in foreign judgments receives similar treatment as in domestic judgments. The Texas Supreme Court has provided that evidence may be received showing that the defendant was not served in a foreign judgment, notwithstanding the fact that the record says he was served or appeared. Norwood v. Cobb, 24 Tex. 551, 555 (1859). *See also*, Reed v. State, 148 Tex. Crim. 409, 187 S.W.2d 660 (1944); *In re* Keen's Estate, 77 S.W.2d 588 (Tex. Civ. App.—Beaumont 1934, no writ). For service on foreign and domestic corporations, see TEX. REV. CIV. STAT. ANN. art. 2029 (1964); TEX. BUS. CORP. ACT. ANN. arts. 2.11, 8.10 (1956).

Cases treating defects not invalidating the sheriff's return are numerous. *E.g.*, Pugh v. Texas Co., 437 S.W.2d 55, 57 (Tex. Civ. App.—Dallas 1969, no writ) (omission of the word "sheriff" after the officer's signature); Johnson v. Cole, 138 S.W.2d 910, 912 (Tex. Civ. App.—Austin 1940, writ ref'd) (failure to cross out a digit on a printed form resulting with the year 19120); Schneider v. Reidel, 128 S.W.2d 416 (Tex. Civ. App.—Galveston 1939, writ dism'd) (the return was made by a deputy other than the officer who actually served the citation); Tankersley v. Martin-Reo Sales Co., 242 S.W. 328 (Tex. Civ. App.—Austin 1922, no writ) (omission of the abbreviation "Mrs."); Miller v. Davis, 180 S.W. 1140, 1141 (Tex. Civ. App.—Ft. Worth 1915, no writ) (insertion of "July" instead of "June" in the sheriff's return).

2. TEX. R. CIV. P. 320, 329(a), 566.

3. Motion for new trial and bill of review are both direct attacks in the court that rendered the default judgment. Two other methods for attacking default judgments are appeal and writ of error. See McEwen v. Harrison, 162 Tex. 125, 345 S.W.2d 706, 710-11 (1961) for an analysis of how these attacks relate to motion for new trial and bill of review.

two indispensable requirements have come to be recognized. They are commonly known as good excuse and meritorious defense.[4] Guidelines for vacating default judgments by a motion for new trial were established in *Craddock v. Sunshine Bus Lines, Inc.*[5] where it was declared:

> A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided the motion for a new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.[6]

Stated in other terms, a manifestation of events which prevented a person from appearing for trial through no fault of his own is considered good excuse.[7] Meritorious defense is defined as a showing of facts which in law would constitute a defense, provided they are supported by affidavits or evidence proving prima facie that such a meritorious defense exists.[8] Similar requirements for attacking a default judgment by bill of review have been interpreted as more onerous than those for a motion for new trial.[9]

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4. The building of the good excuse-meritorious defense "good cause" principle can be observed chronologically in Wright v. Thomas, 6 Tex. 420, 424 (1851), where the court saw "nothing in the case to excuse the plaintiff from the necessity of appearing . . . ." Other noteworthy cases are Cochrane v. Middleton, 13 Tex. 275, 277 (1855) where a meritorious defense was in effect established by not "letting in inequitable defenses" and Foster v. Martin, 20 Tex. 119, 123 (1857) where the court, for the first time, joined both requirements in one opinion and using *Wright* and *Cochrane* as authority, concluded that the defendant's case "states no sufficient excuse for his failure to make his defense . . . nor does it disclose merits." In Dowell v. Winters, 20 Tex. 794, 797 (1858) it was urged that such principles (good excuse and meritorious defense) be followed for the sake of uniformity. Although some courts disregarded the *Dowell* plea, the matter was finally settled in Smith v. Ferrell, 44 S.W.2d 962, 963 (Tex. Comm'n App. 1932, holding approved) on a bill of review and Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 133 S.W.2d 124, 126 (Tex. Comm'n App. 1939, opinion adopted) on a motion for new trial.

5. 134 Tex. 388, 133 S.W.2d 124 (Tex. Comm'n App. 1939, opinion adopted).

6. *Id.* at 393, 133 S.W.2d at 126; *accord*, Ivy v. Carrell, 407 S.W.2d 212, 213 (Tex. Sup. 1966); Republic Bankers Life Ins. Co. v. Dixon, 469 S.W.2d 646, 648 (Tex. Civ. App.—Tyler 1971, no writ); Grammar v. Hobby, 276 S.W.2d 311, 312 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.); Meading v. Meading, 155 S.W.2d 991, 993 (Tex. Civ. App.—Galveston 1941, no writ); Yellow Transit Co. v. Klaff, 145 S.W.2d 264, 266 (Tex. Civ. App.—Galveston 1940, no writ).

7. A demonstration of events which would justify failure to appear to most reasonable men seems to be the test and each case depends on its own particular facts. *See, e.g.*, Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (Tex. Comm'n App. 1939, opinion adopted) where, due to a recent storm, the employees of the insurer were so overworked that it was reasonable to assume that the citation had been accidentally misplaced by one of the employees; Houston & T.C. Ry. v. Burke, 55 Tex. 323 (1881) where the agent of the railway company mistakenly forwarded the citation to the wrong location; Dowell v. Winters, 20 Tex. 794 (1858) where the lawyer had a mistaken understanding of the law with respect to filing an answer.

8. Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. Sup. 1966).

9. *Id.* at 214; Woods v. Gamboa, 229 S.W.2d 1021, 1023-24 (Tex. Civ. App.—

The requirements of good excuse and meritorious defense must be shown simultaneously when moving to set aside a default judgment;[10] one alone will not suffice to vacate the judgment.[11] For example, if a good excuse is not shown, a default judgment will not be nullified regardless of the merit in any alleged defense.[12] The impotence of a meritorious defense standing alone stresses the significance of having a good excuse available.

Failure to appear due to lack of service, one of the many factors which

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Dallas 1950, writ ref'd n.r.e.); Dorsey v. Cutbirth, 178 S.W.2d 749, 750 (Tex. Civ. App.—Galveston 1944, writ ref'd w.o.m.). On a motion for new trial, the movant need only "set up" a meritorious defense, whereas in a bill of review the court tries good excuse and the merits in one "full blown trial." Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. Sup. 1966). Analyzing or contrasting the requirements for good excuse between a motion for new trial and bill of review, however, is unnecessary since the quantum of proof for good excuse when alleging lack of service, seems to be the same for both motion for new trial and bill of review. Although the landmark decision on impeachment of sheriff returns in Texas, Randall v. Collins, 58 Tex. 231, 232 (1881), which was a bill of review, drew a distinction between cases requiring "clear and satisfactory" evidence and those which require only a preponderance of the evidence," the courts of Texas have clearly adopted the "clear and satisfactory" test for both motion for new trial and bill of review when impeaching a sheriff's return. *See* Wood v. City of Galveston, 76 Tex. 126, 130, 13 S.W. 227, 228 (1890); Gatlin v. Dibrell, 74 Tex. 36, 38, 11 S.W. 908, 909 (1889); *See* Leibowitz v. San Juan State Bank, 409 S.W.2d 586, 589 (Tex. Civ. App.—Corpus Christi 1966, no writ); Sanders v. Harder, 223 S.W.2d 61, 62 (Tex. Civ. App.—Texarkana 1949), *rev'd on other grounds*, 148 Tex. 593, 227 S.W.2d 206 (1950); Johnson v. Cole, 138 S.W.2d 910, 912 (Tex. Civ. App.—Austin 1940, writ ref'd); Panhandle Const. Co. v. Casey, 66 S.W.2d 705, 706 (Tex. Civ. App.—Amarillo 1933, writ ref'd); San Antonio Paper Co. v. Morgan, 53 S.W.2d 651, 653 (Tex. Civ. App.—Austin 1932, writ dism'd); Harrison v. Sharpe, 210 S.W. 731 (Tex. Civ. App.—Amarillo 1919, writ ref'd); Godshalk v. Martin, 200 S.W. 535, 536 (Tex. Civ. App.—Amarillo 1918, no writ); Swearingen v. Swearingen, 193 S.W. 442 (Tex. Civ. App.—San Antonio 1917, writ ref'd); Pierce-Fordyce Oil Assoc. v. Staley, 190 S.W. 814 (Tex. Civ. App.—Amarillo 1917, no writ); Kempner v. Jordan, 26 S.W. 870 (Tex. Civ. App. 1894, writ ref'd). *See also* Muniz v. Rosales, 483 S.W.2d 861, 863 (Tex. Civ. App.—San Antonio 1972, no writ).

The impeachment of a sheriff's return fulfills the good excuse requirement both in a motion for new trial and a bill of review. In Gatlin v. Dibrell, 74 Tex. 36, 11 S.W. 908 (1889), an appeal from a refusal to grant a new trial, the defendant had to impeach the return and show a meritorious defense. Another appeal stemming from a motion for new trial indicates that impeachment satisfied the good excuse requirement under the *Craddock* rule. Leibowitz v. San Juan State Bank, 409 S.W.2d 586 (Tex. Civ. App.—Corpus Christi 1966, no writ). Sanders v. Harder, 148 Tex. 593, 227 S.W.2d 206 (1950) clearly demonstrated that impeachment of a sheriff's return amounts to good excuse in a bill of review, however, meritorious defense must still be shown to overturn the default judgment.

10. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 133 S.W.2d 124, 126 (Tex. Comm'n App. 1939, opinion adopted); Smith v. Ferrell, 44 S.W.2d 962, 963 (Tex. Comm'n App. 1932, holding approved).

11. Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. Sup. 1966); Sanders v. Harder, 144 Tex. 593, 599, 227 S.W.2d 206, 210 (1950).

12. *See, e.g.*, San Antonio Paper Co. v. Morgan, 53 S.W.2d 651, 653 (Tex. Civ. App.—Austin 1932, no writ).

qualify as good excuse for not appearing,[13] is often alleged.[14] Although want of service can be used effectively in satisfying the good excuse requirement, it must be categorized separately from other grounds of good excuse since it is fundamentally dissimilar from other defenses for not appearing. One significant difference arises in situations where lack of service will successfully overturn default judgments without the support of a meritorious defense. This occurs when the lack of service appears on the face of the judgment record. Under these circumstances, want of process alone is sufficient to nullify the judgment.[15] A different situation exists, however, if the recitals in the record indicate proper service. When this occurs, demonstrating a want of service will not be sufficient to vacate a judgment in the absence of a meritorious defense.[16] This raises another essential dissimilarity between lack of service and other variations of good excuse. If the judgment recites proper service, the party moving to vacate the judgment must successfully impeach the sheriff's return in order to legitimately argue want of service as good excuse.[17] This added burden is not imposed upon other excuses for not appearing. For example, a showing of mistake or accident, other than lack of service, will frequently be accepted because the court is in no position to effectively contest the veracity of the excuse.[18]

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13. *E.g.*, Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (Tex. Comm'n App. 1939, opinion adopted) (citation misplaced by the insurer's employees); Republic Bankers Life Ins. Co. v. Dixon, 469 S.W.2d 646 (Tex. Civ. App.—Tyler 1971, no writ) (oversight of counsel's secretary); Maeding v. Maeding, 155 S.W.2d 991 (Tex. Civ. App.—Galveston 1941, no writ) (unavoidable absence of attorney); Yellow Transit Co. v. Klaff, 145 S.W.2d 264 (Tex. Civ. App.—Galveston 1940, no writ) (loss in the mails of a motion for a continuance).

14. *See, e.g.*, Ward v. Nava, 488 S.W.2d 736 (Tex. Sup. 1972); Pugh v. Texas Co., 437 S.W.2d 55 (Tex. Civ. App.—Dallas 1969, no writ); Leibowitz v. San Juan State Bank, 409 S.W.2d 586 (Tex. Civ. App.—Corpus Christi 1966, no writ).

15. August Kern Barber Supply Co. v. Freeze, 96 Tex. 513, 517, 74 S.W. 303, 304 (1903).

16. The rule is that once a default judgment has been rendered that is proper on its face, alleging violation of the fundamental right of due process is not sufficient to set the judgment aside. It has been said that a judgment rendered upon defective or illegal service of process is no exception to the general rule requiring a meritorious defense. Sharp v. Schmidt & Ziegler, 62 Tex. 263, 265 (1884). *See also* Sanders v. Harder, 148 Tex. 593, 599, 227 S.W.2d 206, 210 (1950). This additional burden, in contrast to void judgments showing invalid service in the record, is due to the principle that "[c]ourts ought not in such cases set aside [default] judgments rendered except upon a showing which if true and unexplained would change the result on a subsequent trial." Holliday v. Holliday, 72 Tex. 581, 585, 10 S.W. 690, 692 (1889).

17. *E.g.*, Leibowitz v. San Juan State Bank, 409 S.W.2d 586, 591 (Tex. Civ. App.—Corpus Christi 1966, no writ).

18. *See* Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. Sup. 1966); Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (Tex. Comm'n App. 1939, opinion adopted) and the cases cited therein. The facts in these cases show that even a "slight excuse" will suffice. Dowell v. Winters, 20 Tex. 794, 797 (1858). In contrast, a proper sheriff's return confirms that the arm of the court, through service of process, has reached out and obtained jurisdiction of the party. Such a return requires "clear and convincing" evidence for rebuttal. Martin v. Ventura, 493 S.W.2d 336,

Where valid service has been accomplished, the position the court assumes in relation to the defendant's contentions is considerably different. The party seeking relief has to overcome the sheriff's declaration that he was properly served. The return of the sheriff is clothed with absolute verity in such circumstances[19] and a rebuttable presumption favors its recitals.[20]

REQUIREMENTS FOR IMPEACHMENT

The origin and early development of the requisites for successful impeachment of sheriff returns in Texas was sudden and uncomplicated. Although early cases presented the opportunity,[21] the courts failed to define specific requirements for the impeachment of officers' returns. For example, even though the 1859 decision of *Norwood v. Cobb*[22] dealt with the impeachment of service on a foreign judgment, the court could have established guidelines since the methods of challenging the jurisdiction of both foreign and domestic courts are identical.[23] Overlooking this opportunity, the court simply held:

> [I]n order to show the want of jurisdiction of the court rendering the judgment, *evidence may be received,* to prove that no process was served upon the defendant, and that he did not appear in person, or by attorney, notwithstanding it is stated in the record, that the defendant appeared.[24]

The court in *Norwood* recognized that impeachment of service could be effected, but failed to provide measures for its accomplishment.

The area of impeachment of sheriff returns was not significantly recognized until 1881 when the Supreme Court of Texas rendered the landmark decision of *Randall v. Collins*.[25] The decision established the nature and quality of evidence required to effectively overturn an officer's return.

> [I]f equity will allow one who has been guilty of no fault or negligence to contradict the sheriff's return by parol evidence for the purpose of having an unjust judgment by default set aside, we are of opinion that it should require the evidence to be *clear and satisfactory*. It is not like

339 (Tex. Civ. App.—Tyler 1973, no writ); Leibowitz v. San Juan State Bank, 409 S.W.2d 586, 589 (Tex. Civ. App.—Corpus Christi 1966, no writ).

19. Gatlin v. Dibrell, 74 Tex. 36, 37, 11 S.W. 908, 909 (1889).

20. Muniz v. Rosales, 483 S.W.2d 861, 863 (Tex. Civ. App.—San Antonio 1972, no writ); McDonald v. Brown, 36 S.W.2d 774 (Tex. Civ. App.—San Antonio 1931, writ dism'd).

21. *See, e.g.*, Roberts v. Stockslager, 4 Tex. 307 (1849), vacating default judgment because of defective service; Merrit v. Clow, 2 Tex. 582, 589 (1847), setting aside a judgment agreed to by an attorney not authorized or without the knowledge of a defendant who was not served with process.

22. 24 Tex. 551 (1859).

23. Mendlovitz v. Samuels Shoe Co., 5 S.W.2d 559, 560 (Tex. Civ. App.—San Antonio 1928, no writ).

24. Norwood v. Cobb, 24 Tex. 551, 555 (1859) (emphasis added).

25. 58 Tex. 231, 232 (1881).

> an ordinary issue of fact, to be determined by a mere preponderance of testimony.[26]

Compelled to more clearly define the specificity of requirements, the court in *Randall* quoted from a Tennessee chancery decision:

> Nor will one witness alone suffice to successfully impeach the return, for that would be oath against oath. In analogy to the denials or averments of a sworn answer upon the defendant's knowledge, *there should be two witnesses, or one witness with strong corroborating circumstances.* And without reference to this rule, upon general principles, it would seem essential to the peace and quiet of society that these solemn official acts should not be set aside with the same ease as an ordinary act in pais.[27]

Eight years later, the Texas Supreme Court clearly demonstrated that it intended to make *Randall* the standard for the impeachment of sheriff returns on motions for new trial in Texas. In *Gatlin v. Dibrell*[28] a defaulting party attempted to overturn a valid officer's return through the uncorroborated testimony of a co-defendant. In a brief opinion denying impeachment, the court re-emphasized the *Randall* decision by holding that the parol evidence should be "clear and satisfactory" and that the evidence should come from "two witnesses, or one witness with strong corroborating circumstances."[29]

The strict requirements established in *Randall* and followed in *Gatlin* have been conscientiously and vigorously enforced.[30] Many forfeiting parties have challenged them, but very few have succeeded.[31] Although the standards for impeachment of a sheriff's return were clearly denominated, considerable litigation has nevertheless resulted. The central difficulty encountered in application of the requisites for impeachment has arisen in relation to the corroboration required by one witness, while the alternate requirement of two witnesses has been relatively unchallenged.

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26. *Id.* at 232-33 (emphasis added).
27. *Id.* at 491 (emphasis added), *quoting* Driver v. Cobb, 1 Tenn. Ch. 490 (1873).
28. 74 Tex. 36, 11 S.W. 908 (1889).
29. *Id.* at 38, 11 S.W. at 909.
30. *See, e.g.*, Wood v. City of Galveston, 76 Tex. 126, 13 S.W. 227 (1890); Cortimiglia v. Miller, 236 S.W.2d 278 (Tex. Civ. App.—Houston 1959, no writ); Sgitcovich v. Oldfield, 220 S.W.2d 724 (Tex. Civ. App.—Galveston 1949, writ ref'd); Johnson v. Cole, 138 S.W.2d 910 (Tex. Civ. App.—Austin 1940, writ ref'd); Crawford v. Gibson, 203 S.W. 375 (Tex. Civ. App.—Dallas 1918, writ ref'd); Swearingen v. Swearingen, 193 S.W. 442 (Tex. Civ. App.—San Antonio 1917, writ ref'd); Pierce-Fordyce Assoc. v. Staley, 190 S.W. 814 (Tex. Civ. App.—Amarillo 1917, no writ).
31. Sanders v. Harder, 148 Tex. 593, 227 S.W.2d 206 (1950); Muniz v. Rosales, 483 S.W.2d 861 (Tex. Civ. App.—San Antonio 1972, no writ); Leibowitz v. San Juan State Bank, 409 S.W.2d 586 (Tex. Civ. App.—Corpus Christi 1966, no writ); Wright v. Austin, 175 S.W.2d 281 (Tex. Civ. App.—Ft. Worth 1943, writ ref'd w.o.m.); Panhandle Const. Co. v. Casey, 66 S.W.2d 705 (Tex. Civ. App.—Amarillo 1933, writ ref'd); West v. Dugger, 278 S.W. 241 (Tex. Civ. App.—Waco 1925, writ dism'd); Harrison v. Sharpe, 210 S.W. 731 (Tex. Civ. App.—Amarillo 1919, writ ref'd); Kempner v. Jordan, 26 S.W. 870 (Tex. Civ. App. 1894, writ ref'd).

Impeachment by Two or More Witnesses

The two-witness requirement has not been challenged significantly in the appellate courts.[32] This is probably due to the fact that testimony by two or more credible witnesses, providing clear and satisfactory evidence of lack of service, usually settles the matter promptly in favor of the party seeking to vacate the judgment if a meritorious defense is also alleged. The paucity of two-witness litigation in the higher courts clearly demonstrates that a plaintiff, divested of a favorable default judgment, is not willing to incur the expense and hardship of appeal against the apparent acceptability of two-witness testimony. Several reported cases, however, have involved multiple witnesses supplying corroborating evidence.[33] Although they have been classified as coming under the requirement calling for strong corroborating circumstances, they do contain facts and dictum which may shed some light on what the two-witness requirement actually entails.

Before discussing these cases, however, the vague opinion of *Kempner v. Jordan*[34] merits attention in illustrating that the aftermath of *Randall* and *Gatlin* was not necessarily uniform. Although the court in *Kempner* deals with the two-witness principle, the decision is of little benefit in establishing its definition. The court held that the testimony of a husband and wife, co-defendants in a foreclosure case, was sufficient to overturn a sheriff's return showing proper service.[35] Since the case presents few strong corroborating circumstances,[36] it is reasonable to assume that the court was approaching the appeal using the two-witness requirement. In discussing the requirements for impeachment the court stated:

> It is contended that the evidence was not of that clear and satisfactory nature that would make it sufficient to support the finding of the court below, impeaching the return of the sheriff. As positive and directly to the issue, it was clear and satisfactory as it could be, but it was conflicting. [The sheriff] testified positively one way, and Jordan and his wife positively the other. . . . The rule is that there must be something more than an oath against an oath; that the testimony of the officer must be met by the oath of two witnesses, or of at least one, with

32. One exception is Kempner v. Jordan, 26 S.W. 870 (Tex. Civ. App. 1894, writ ref'd) which relied heavily on the testimony of the two co-defendants.

33. *E.g.*, Muniz v. Rosales, 483 S.W.2d 861 (Tex. Civ. App.—San Antonio 1972, no writ); McBride v. Kaulbach, 207 S.W. 576 (Tex. Civ. App.—Beaumont 1918, writ ref'd).

34. 26 S.W. 870 (Tex. Civ. App. 1894, writ ref'd).

35. *Id.* at 871. The court cited "a conflict of authority as to whether or not the return of the sheriff, showing service on a party who is apparently bound by a judgment, may be impeached by such party." Buttressed by such conflict, the court allowed the two co-defendants allegedly served to impeach the sheriff's return through their own testimony.

36. The court merely found that the property had been the defendants' homestead for 20 years and that the wife had never signed the deed of trust resulting in the foreclosure sale. *Id.* at 871.

> strong corroborating circumstances. We see no reason to reverse the finding of the trial judge resolving the conflict of evidence.[37]

Under the *Kempner* rationale, where the testimony of any two witnesses contradicts the sheriff's return, the trial court is entitled to resolve the conflict of evidence. It seems unlikely, however, that the supreme court in *Randall* intended the two-witness test to be met by the two people who were supposed to be served. The rejection of an oath against oath should still apply regardless of the number of co-defendants, particularly where the defendants are married and the possibility of collusion is likely.

It is possible that the *Kempner* opinion did not supply enough facts and was actually based upon the one-witness corroborating circumstances rule. *Kempner*, however, would still be questionable in light of a statement made by a later court in *McBride v. Kaulbach*,[38] that "neither will uncertain and unsatisfactory circumstances *raising a doubt or suspicion* be sufficient to corroborate a witness who contradicts the officer's return."[39] *McBride* treated multiple witnesses as corroborating evidence to the one-witness rule. Three adult children sought to corroborate their aged father's denial of service following the rendering of a default judgment against him. They testified that they had a general knowledge of their father's business and read papers for him at times. Although they admitted that at various times they were not with him, they claimed they had no recollection or knowledge of service on their father.[40] The court in *McBride* found this insufficient for impeachment purposes and stated that:

> [I]n order for negative testimony of this character to be given any probative force, it is necessary, in connection therewith, to offer positive facts showing that had the service been made the witnesses would *necessarily* have known it, and in our judgment it is not sufficient that they might have known of it, or that they would probably have known it.[41]

Another court was recently faced with a similar situation of multiple witnesses and as in *McBride*, treated the other witnesses' testimony as corroborative. In *Muniz v. Rosales*,[42] the defaulting plaintiff's daughter, son, and son-in-law testified that they were living with him at the time of the alleged service. All three claimed they never saw anyone serve him nor did they ever notice any "papers" in the house. To the contrary, the officer's return showed proper and valid service in 1959. The record further showed that the defaulting party did not move to set aside the judgment until 1967. A series of appeals and remands followed and the issue of the validity of serv-

37. *Id.* at 872.
38. 207 S.W. 576 (Tex. Civ. App.—Beaumont 1918, writ ref'd).
39. *Id.* at 579 (emphasis added).
40. *Id.* at 577.
41. *Id.* at 579 (emphasis added).
42. 483 S.W.2d 861 (Tex. Civ. App.—San Antonio 1972, no writ).

ice was not put to rest until 12 years after the alleged date of service. In holding for the defaulting party, Justice Cadena admits that "[u]nfortunately, 'it is hard to determine and enunciate just what quantum of proof' is required."[43] Under the particular facts of the *Muniz* case, however, more weight should be given to the warning in *McBride* against circumstances raising "doubt and suspicion," particularly where close family members are corroborating events which occurred 12 years earlier. Nevertheless, the court concluded that "[t]he testimony of plaintiff's daughter, son, and son-in-law constitute strong enough corroborating evidence of plaintiff's testimony concerning lack of service."[44]

The critical difference between *McBride* and *Muniz* is the status of the witnesses in relation to the defendant at the time that service allegedly occurred. Unlike in *McBride*, the witnesses in *Muniz* permanently resided with the individual contesting the return. These two cases, however, are valuable in another respect. They provide considerable guidance as to what position witnesses should assume to qualify under the two-witness test. The witnesses in *McBride* were not living with the defendant and their testimony was logically regarded as only corroborating evidence. The test was even more narrowly applied in *Muniz* where the witnesses lived permanently with the defendant and the daughter stated that she rarely left his side.[45] In spite of these changed circumstances, the *Muniz* opinion still deemed the testimony as not falling within the two-witness category, but merely corroborative.[46]

It is clear that to qualify under the two-witness test, in light of *McBride* and *Muniz*, the witnesses must be present at the precise moment that service is alleged to have occurred. Living with the defendant or being in his presence the great majority of the time is not alone sufficient. A hypothetical situation that would likely satisfy *McBride* and *Muniz* would be that of two witnesses claiming, through clear and convincing evidence, that they were with the defendant many miles away from the alleged point of service at the time service was alleged to have taken place.

One Witness with Strong Corroborating Circumstances

The majority of litigation in appellate courts concerning impeachment of sheriff returns has involved determination of what constitutes clear and satisfactory evidence supporting the testimony of one witness who claims he was not served. Even though each case depends largely on its own par-

43. *Id.* at 863; *accord*, Pierce-Fordyce Oil Assoc. v. Staley, 190 S.W. 814, 815 (Tex. Civ. App.—Amarillo 1916, no writ).

44. Muniz v. Rosales, 483 S.W.2d 861, 863 (Tex. Civ. App.—San Antonio 1972, no writ).

45. *Id.* at 863.

46. *Id.* at 863.

ticular facts, distinct principles have been developed regarding what constitutes strong and convincing corroborative evidence. Since the basic standard was first enunciated in *Randall* and *Gatlin*, both cases where there was one witness who attempted to establish strong corroborative evidence, there have been many imaginative attempts to fulfill the requirement of corroborating circumstances sufficient to overturn the sheriff's return. A sworn affidavit by the defaulting party alone is insufficient,[47] as is loss of records,[48] or merely alleging that recitation of service was obtained by forgery.[49] A number of other circumstances and arguments have likewise proved futile,[50] but examination of such cases would cast little light on the corroboration question. For purposes of determining what constitutes corroboration, it will be more helpful to analyze the cases where the evidence was held sufficient to overturn a valid sheriff's return.

Wondering, as other courts have,[51] what quantum of proof is required, the court in *Wright v. Austin*[52] appropriately asked:

> Certainly the words "strongly corroborated" mean a degree of corroboration exceeding what might be in ordinary terms called corroboration by any testimony of probative value. It is equally true that the word "strong", which denotes strength, is susceptible to degrees of comparison; language may be "strong", yet other expressions may be stronger; and other language may be the strongest of all. Then, we may ask how strong should the corroboration be to support an impeachment of the officer's return . . . and to whom shall it be "clear and satisfactory"?[53]

In seeking an answer, the court in *Wright* relied on *Harrison v. Sharpe*,[54]

47. Wood v. City of Galveston, 76 Tex. 126, 130, 13 S.W. 227, 228 (1890).

48. East Texas Land & Improv. Co. v. Graham, 60 S.W. 472 (Tex. Civ. App. 1900, no writ).

49. Steves v. Smith, 107 S.W. 141, 146 (Tex. Civ. App. 1908, writ ref'd).

50. Pugh v. Texas Co., 437 S.W.2d 55 (Tex. Civ. App.—Dallas 1969, no writ); Cortimiglia v. Miller, 326 S.W.2d 278 (Tex. Civ. App.—Houston 1959, no writ); Sgitcovich v. Oldfield, 220 S.W.2d 724 (Tex. Civ. App.—Galveston 1949, writ ref'd); McCulloch v. Woodward, 220 S.W.2d 729 (Tex. Civ. App.—Texarkana 1949, no writ); Johnson v. Cole, 138 S.W.2d 910 (Tex. Civ. App.—Austin 1940, writ ref'd); San Antonio Paper Co. v. Morgan, 53 S.W.2d 651 (Tex. Civ. App.—Austin 1932, no writ); Barkate v. Allen, 282 S.W. 670 (Tex. Civ. App.—Beaumont 1926, no writ); Joseph v. Kiber, 260 S.W. 269 (Tex. Civ. App.—Beaumont 1924, no writ); Becker v. Becker, 218 S.W. 542 (Tex. Civ. App.—San Antonio 1920, no writ); McBride v. Kaulbach, 207 S.W. 576 (Tex. Civ. App.—Beaumont 1918, writ ref'd); Crawford v. Gibson, 203 S.W. 375 (Tex. Civ. App.—Dallas 1918, writ ref'd); Godshalk v. Martin, 200 S.W. 535 (Tex. Civ. App.—Amarillo 1918, no writ; Swearingen v. Swearingen, 193 S.W. 442 (Tex. Civ. App.—San Antonio 1917, writ ref'd); Pierce-Fordyce Oil Assoc. v. Staley, 190 S.W. 814 (Tex. Civ. App.—Amarillo 1916, no writ); Gallagher v. Teuscher & Co., 186 S.W. 409 (Tex. Civ. App.—Beaumont 1916, no writ).

51. *E.g.*, Muniz v. Rosales, 483 S.W.2d 861, 863 (Tex. Civ. App.—San Antonio 1972, no writ); Pierce-Fordyce Oil Assoc. v. Staley, 190 S.W. 814, 815 (Tex. Civ. App.—Amarillo 1916, no writ).

52. 175 S.W.2d 281 (Tex. Civ. App.—Ft. Worth 1943, writ ref'd w.o.m.).

53. *Id.* at 283-84.

54. 210 S.W. 731 (Tex. Civ. App.—Amarillo 1919, writ ref'd).

the first decision where the facts were held to meet the strong corroborating evidence requirement. *Harrison* involved the judicial sale of the defaulting plaintiff's land in order to pay $7.61 of taxes due on the property. Judgment was in 1910, but the plaintiff lived on the premises undisturbed until 1916 when she became aware of the judgment and sale. The return of the sheriff was proper and valid on its face, but the court held that the corroborating evidence was strong enough to sustain impeachment, stating:

> The fact that they paid all taxes for previous and subsequent years, that they put valuable improvements on this property about the time of or after the sale, the utter disproportion in the amount of the taxes and the value of the property, with no reasonable expectation of finally ridding the property of the menace of such proceedings, without the expenditure of sums of money so largely in excess of the small amounts that would have been required to have been paid in the first stages of the proceedings—all these facts tend, we think, to corroborate the testimony of the mother and son that they knew nothing of this suit until it was discovered in the manner detailed by them.[55]

In reaching its decision, the court in *Harrison* made several observations which subsequent courts have relied on.[56] The court's first determination was that the corroborating evidence must come from sources other than the witness who requires the corroboration.[57] In *Harrison*, this test was met by tax records, valuable improvements, long and undisturbed occupancy after the default judgment—all circumstances which the court could have determined in the absence of the plaintiff's testimony. The court further stated that although corroborating evidence can be direct and positive, it can also be circumstantial.[58] Relying on a criminal case,[59] the court in *Harrison* concluded:

> If the independent facts and circumstances, taken all together, are, "in the opinion of both the court and the jury, strong that is, cogent, powerful, forcible, calculated to make a deep or effectual impression upon the mind", then the direct testimony may be said to be "strongly corroborated."[60]

Several decisions since *Harrison* have held the corroborating circumstances sufficient to overturn a sheriff's return. With the exception of two cases, however, the corroborating circumstances arose out of defects or ir-

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55. *Id.* at 733.

56. Sanders v. Harder, 148 Tex. 593, 597, 227 S.W.2d 206, 209 (1950); Wright v. Austin, 175 S.W.2d 281, 284 (Tex. Civ. App.—Ft. Worth 1943, writ ref'd w.o.m.).

57. Harrison v. Sharpe, 210 S.W. 731, 733 (Tex. Civ. App.—Amarillo 1919, writ ref'd). It is interesting to note that the court in *Harrison* relied on several criminal cases in reaching its decision as to corroborating evidence. *E.g.*, Gabrielsky v. State, 13 Tex. Ct. App. 428, 440 (1883).

58. Harrison v. Sharpe, 210 S.W. 731, 733 (Tex. Civ. App.—Amarillo 1919, writ ref'd); *accord*, Wright v. State, 31 Tex. Crim. 354, 359, 20 S.W. 756, 758 (1892).

59. Hernandez v. State, 18 Tex. Ct. App. 134, 150 (1885).

60. Harrison v. Sharpe, 210 S.W. 731, 733 (Tex. Civ. App.—Amarillo 1919, writ ref'd).

regularities in the returns.[61] Although the defects were not fatal, the inconsistencies tended to support the defendants' assertions that they were not served. For example, tampering with the mileage covered in serving the citation,[62] irregular or confusing dating of the return,[63] and allowing service by an unauthorized person[64] have all been considered as strongly corroborative circumstances. Consequently, since the returns were not proper, the corroborative evidence offered by the witness was not as critical as in other cases where the return was regular on its face.

A decision since *Harrison* which has treated the corroboration problem, unjaundiced by return irregularities, is *Sanders v. Harder*.[65] This decision is of consequence because it is the only supreme court case where corroborative evidence was sufficient to overturn a proper sheriff's return. The facts state that a tract of property had been a homestead for many years, but the property was awarded to the respondent upon an execution sale resulting from a default judgment. The plaintiffs continued living on their homestead unaware of any judgment divesting them of their property. Their undisturbed occupancy continued for 7 years, until the respondent brought an action of trespass to try title. In reversing the trial court's refusal to set aside the default judgment, the supreme court found strong corroborating circumstances to support the couple's impeachment of service. The court said that ignoring a suit divesting the couple of their homestead would be "most unnatural."[66] It was also found that the husband had made valuable improvements after the date of default.[67] As in *Harrison*, the court found corroborating circumstances in addition to the testimony of the defendants.[68] Although granting judgment for the defendants, the court remarked:

> Were the denials of service by petitioners the only evidence before the court, then no issue should have been submitted to the jury, for, as held

61. Wright v. Austin, 175 S.W.2d 281 (Tex. Civ. App.—Ft. Worth 1943, writ ref'd w.o.m.); Panhandle Const. Co. v. Casey, 66 S.W.2d 705 (Tex. Civ. App.—Amarillo 1933, writ ref'd); West v. Dugger, 278 S.W. 241 (Tex. Civ. App.—Waco 1925, writ dism'd).

62. Wright v. Austin, 175 S.W.2d 281, 285 (Tex. Civ. App.—Ft. Worth 1943, writ ref'd w.o.m.).

63. Panhandle Const. Co. v. Casey, 66 S.W.2d 705, 707 (Tex. Civ. App.—Amarillo 1933, writ ref'd).

64. West v. Dugger, 278 S.W. 241 (Tex. Civ. App.—Waco 1925, writ dism'd).

65. 148 Tex. 593, 227 S.W.2d 206 (1950).

66. *Id.* at 598, 227 S.W.2d at 209.

67. *Id.* at 598, 227 S.W.2d at 209.

68. *Id.* at 597-98, 227 S.W.2d at 209. As stated in the opinion:

> An examination of the record has convinced us that there are corroborating circumstances in this case. Jim Sanders bought this property in 1925 and moved upon it in 1926. He married Jessie Sanders in 1933, and the property has been occupied by them as a homestead since that date. . . . After the default judgment was rendered in 1941 their possession was not disturbed until a writ of scire facias was served upon them in this case approximately seven years later.

Id. at 597-98, 227 S.W.2d at 209.

> by the Court of Civil Appeals, the return of a sheriff on a citation may not be impeached by the uncorroborated testimony of the party or parties shown by the return to have been served.[69]

Having previously refused error for *Harrison* and again citing its sound reasoning, the supreme court in *Sanders* clearly supports the principle that the corroborating evidence must be from other sources than from the witness who requires corroboration.[70] The supreme court in *Sanders* strictly applied the corroborating evidence standard used by other courts. It can thus be seen that although each case depends largely on its own particular facts, the corroboration must be strong and substantial.

WARD V. NAVA

Circumvention of the Requirements

It is unfortunate that the law controlling the impeachment of sheriff returns which has been with us for many years has been confused by *Ward v. Nava.*[71] This recent case, decided by the Texas Supreme Court, raises some serious questions.

Nava brought suit against Ward for injuries resulting from an auto-pedestrian accident and a default judgment was rendered against the defendant. Ward filed a timely motion for new trial which included an affidavit attempting to set up a meritorious defense and alleged lack of service as good excuse for not filing an answer. The trial court overruled Ward's motion for new trial and on appeal the court of civil appeals affirmed the trial court's judgment holding that the affidavit was factually insufficient to impeach the sheriff's return because the defendant attempted to supply the necessary corroborating evidence through his own testimony.[72] The Texas Supreme Court reversed the trial court and held that although the defendant had been duly served, he had nevertheless shown a good excuse and a meritorious defense and therefore, set the default judgment aside.[73]

For purposes of analyzing the rationale of the *Ward* decision in reconciling valid service and excuse for not appearing, excuses under the good cause doctrine may be considered as falling into two distinct categories. The first class of cases contain alleged lack of service as good excuse for not appearing.[74] In such instances, since a presumption of valid service runs in favor of a proper sheriff's return, the defendant must come forth with clear and satisfactory evidence impeaching the officer's return.[75] In the second type

69. *Id.* at 597, 227 S.W.2d at 209.
70. *Id.* at 597, 227 S.W.2d at 209.
71. 488 S.W.2d 736 (Tex. Sup. 1972).
72. Ward v. Nava, 483 S.W.2d 510 (Tex. Civ. App.—Houston [14th Dist.] 1972).
73. Ward v. Nava, 488 S.W.2d 736, 738 (Tex. Sup. 1972).
74. *See, e.g.*, Leibowitz v. San Juan State Bank, 409 S.W.2d 586 (Tex. Civ. App.—Corpus Christi 1966, no writ).
75. Gatlin v. Dibrell, 74 Tex. 36, 38, 11 S.W. 908, 909 (1889); Leibowitz v.

of good excuse cases, service of process is not contested, but an act or event independent of service of process is presented as the reason for not being present at trial.[76] It will be seen that the supreme court considered both categories in reaching its decision in *Ward*.

Where the defendant in the first class of cases alleges lack of service, the impeachment of the sheriff's return can be accomplished only through clear and satisfactory evidence from at least two witnesses, or one witness with strong corroborating circumstances.[77] Where only one witness offers evidence to impeach the return, the corroborating evidence must come from sources other than the witness whose testimony requires the corroboration.[78] Impeachment cannot be effected by the movant's testimony alone.[79] Despite these well-established principles, the only evidence offered by Ward to support his contention that he was not served was contained in his affidavit filed in connection with the motion for new trial. The instrument provided in part:

> I further understand that the citation indicats [sic] that I was served personally on or about October 21, 1971. This is not true. No sheriff or constable has ever served any papers of any kind on me personally in this case. I first learned that there was a lawsuit when someone called me on Friday, November 19, 1971, and asked about the lawsuit. I do not remember the person's name who made this call. That weekend I looked to see if there were any suit papers at my house and on Sunday I found a petition. I do not known how this petition got in my house. I asked my wife and she had never been served with it and I am certain that I was not served with it. Most likely, it was left in my mailbox and my kids brought the petition with the mail and no one ever showed it to me.
>
> I intended to take it to my insurance agent on November 22, but forgot and left it at home and finally took it to him on November 23, 1971.[80]

The court recognized that "the testimony of the moving party alone, without corroborating facts or circumstances, is not sufficient to overcome the

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San Juan State Bank, 409 S.W.2d 586, 589 (Tex. Civ. App.—Corpus Christi 1966, no writ); San Antonio Paper Co. v. Morgan, 53 S.W.2d 651, 653 (Tex. Civ. App.—Austin 1932, no writ).

76. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 390, 133 S.W.2d 124, 125 (Tex. Comm'n App. 1939, opinion adopted); Texas Iron & Metal Co. v. Utility Supply Co., 493 S.W.2d 545, 546 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ); Cadena v. Dicker, 383 S.W.2d 73, 74 (Tex. Civ. App.—Dallas 1964, no writ).

77. Gatlin v. Dibrell, 74 Tex. 36, 38, 11 S.W. 908, 909 (1889); Randall v. Collins, 58 Tex. 231, 233 (1881).

78. Harrison v. Sharpe, 210 S.W. 731, 733 (Tex. Civ. App.—Amarillo 1919, writ ref'd).

79. Wright v. Austin, 175 S.W.2d 281, 283 (Tex. Civ. App.—Ft. Worth 1943, writ ref'd w.o.m.); Johnson v. Cole, 138 S.W.2d 910, 912 (Tex. Civ. App.—Austin 1940, writ ref'd).

80. Ward v. Nava, 488 S.W.2d 736, 739 (Tex. Sup. 1972) (affidavit restated in dissenting opinion).

presumption that the officer's return on the citation was correct."[81] Consequently, the court did not disturb the trial court's finding that the affidavit alone did not establish lack of service[82] and in this respect, they were clearly correct. Although it was determined that the defendant did not qualify under the first class of cases which requires impeachment of the sheriff's return, the court proceeded to find that the facts alleged by Ward established a good excuse as defined by the second category of cases where service of process is acknowledged and other causes are alleged that constitute the good excuse for not appearing.

In the cases where service is not contested, good excuse is determined under the rule established in *Craddock v. Sunshine Bus Lines, Inc.*[83] Under such circumstances, the burden of proof is less onerous since the sheriff's return is not the subject of controversy. It is incumbent upon the defendant to show that his failure to appear was due to accident or mistake or other circumstances beyond his control; that an event totally unrelated to service of process has prevented him from appearing and the defendant did not intend to avoid appearance nor was he guilty of conscious indifference.[84] In applying this rule to *Ward*, the defendant had to show that an event or accident occurred between the date of service and the date of default preventing his appearance. The majority of the court regarded the personal service upon Ward as established. What then, was the reason set up for his inaction following the service? The court in *Ward* looked to the defendant's conduct subsequent to the telephone call informing him of the litigation, since a showing of diligence upon discovery of a default judgment is the most persuasive method for rebutting the suspicion of intentional disregard or conscious indifference when alleging a good faith excuse.[85] Thus, the weekend search for the citation, the fact that he would have appeared had he been aware of service, and the delivery of the citation one day later to his insurance agent, were all considered important acts of diligence by the supreme court.[86] The court gave considerable weight to Ward's allegation that had he been aware of the citation, he would have filed an answer.[87]

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81. *Id.* at 738.
82. *Id.* at 738.
83. 134 Tex. 388, 133 S.W.2d 124 (Tex. Comm'n App. 1939, opinion adopted).
84. *Id.* at 393, 133 S.W.2d at 126. In *Craddock*, for example, service of process was admitted. The excuse for not appearing was the loss of citation in the insurer's offices.
85. Diligence by a defaulting defendant is usually exemplified in moving quickly to set aside the default judgment as soon as it is discovered. *See, e.g.*, Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (Tex. Comm'n App. 1939, opinion adopted).
86. Ward v. Nava, 488 S.W.2d 736, 738 (Tex. Sup. 1972).
87. *Id.* at 738. In discussing the defendant's actions, the court noted:

> As a result of the search, he found the papers. He was unaware of having seen them prior to this time. He did not intend to ignore the citation nor neglect to file an answer. *If he had been aware* that he had been served, he would have

The supreme court, however, did not consider Ward's actions in relation to the period of time immediately following service of process. Since Ward was unsuccessful in impeaching the sheriff's return, valid service was an established fact. Consequently, the good intentions alleged in Ward's affidavit could not have existed. A telephone call could have done no more than *remind* Ward of the suit, rather than inform him about it for the first time since that was already accomplished by the service of process. And why should a weekend search be necessary for an important document had in hand from the beginning? Ward's argument that he "did not intend to ignore the citation nor neglect to file an answer" is irreconcilable with the fact of valid service. Ward, in the absence of an intervening excuse, could have only intentionally ignored or neglected appearance.[88] Since no independent act or event transpired between the date of service and the default to give him a good excuse, Ward's allegations were merely attempts to complement an excuse which had already been found to be without merit.

Although the good excuse requirement is more relaxed on motions for new trial under the guidelines set out in *Craddock*, it is doubtful that the commission of appeals intended that allegations which directly conflict with valid service should suffice. The court in *Ward* has in effect allowed implied impeachment of a sheriff's return while at the same time stating that it could not be done directly in light of the evidence. Yet the evidence for both attacks came from the same source—Ward's uncorroborated affidavit.

Quantum of Proof

The ramifications of *Ward* are not limited to the indirect impeachment of sheriff returns. The *Ward* opinion indicated that a more lenient quantum of proof should be applied to motions for new trial instead of the "clear and satisfactory" rule. The court stated that "[a]s in any other fact issue, the burden was on Ward to establish his case by a preponderance of the evidence," and concluded that the trial court presumably found that the "affidavit did not establish lack of service by a preponderance of the evidence."[89] This language indicates a departure from the long-established burden of clear and satisfactory evidence on motions for new trial. Although the supreme court's first pronouncement of clear and satisfactory evidence for impeachment of sheriff returns was made in *Randall v. Col-*

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turned the papers over to the insurance company, and it was only through inadvertence and mistake that they were not turned over to the insurance company so that an answer could be filed.

Id. at 738 (emphasis added).

88. *See* San Antonio Paper Co. v. Morgan, 53 S.W.2d 651, 653 (Tex. Civ. App.—Austin 1932, no writ) (concluded that since service of process was established, the defendant was necessarily negligent).

89. Ward v. Nava, 488 S.W.2d 736, 738 (Tex. Sup. 1972).

lins,[90] a bill of review, the same test was later adopted by the high court on motions for new trial in *Gatlin v. Dibrell*.[91] In the aftermath of *Gatlin*, courts confronted with impeachment of officers' returns on motions for new trial have consistently required that the evidence be clear and satisfactory, as directed by the supreme court.[92]

The court in *Ward* cites only *Sanders v. Harder*[93] as authority for application of the preponderance of the evidence test to the impeachment of a sheriff's return. Unlike *Ward, Sanders* not only was a bill of review proceeding, but it was also a jury case in which the Texas Supreme Court was attempting to show the relationship of a jury to the "clear-satisfactory" and "preponderance of the evidence" rules. A careful reading of the *Sanders* decision and the citations therein clearly shows that the court in *Sanders* intended to maintain the clear and satisfactory requirement on impeachment of sheriff returns.[94] The court in *Sanders* pointed out that in cases where issues must be resolved by clear and convincing evidence, the jury is only charged regarding a preponderance of the evidence.[95] The clear and convincing rule is "but an admonition to the judge to exercise great caution in weighing the evidence" to satisfy himself that the impeaching evidence is sufficient.[96] The court in *Sanders* was not suggesting that preponderance of the evidence is the proper test as the court in *Ward* implies, but instead was reaffirming the proposition that a charge incorporating the rules regarding clear and satisfactory evidence would be an intimation to the jury of the weight to be given the testimony.[97]

Even though it is possible that the supreme court in *Ward* did not intend to change the quantum of proof required for the impeachment of sheriff returns, the decision will nonetheless cause confusion in the lower courts. Although its full impact cannot yet be ascertained, one court has dealt with the impeachment of a sheriff's return since *Ward*. The court of civil appeals in *Martin v. Ventura*[98] in effect avoided a direct confrontation with the problem created by *Ward*. Without noting that *Ward* discussed only the preponderance of the evidence rule, the court of civil appeals cited the supreme court decision as authority for the proposition that proof on impeachment of

90. 58 Tex. 231, 232 (1881).
91. 74 Tex. 36, 11 S.W. 908, 909 (1889).
92. Leibowitz v. San Juan State Bank, 409 S.W.2d 586, 589 (Tex. Civ. App.—Corpus Christi 1966, no writ); San Antonio Paper Co. v. Morgan, 53 S.W.2d 651, 653 (Tex. Civ. App.—Austin 1932, no writ); Grayce Oil Co. v. Varner, 260 S.W. 883, 884 (Tex. Civ. App.—Amarillo 1924, no writ).
93. 148 Tex. 593, 227 S.W.2d 206 (1950).
94. *Id.* at 598-99, 227 S.W.2d at 209-10.
95. *Id.* at 598, 227 S.W.2d at 209.
96. *Id.* at 598, 227 S.W.2d at 209.
97. *See also* Carl v. Settegast, 237 S.W. 238 (Tex. Comm'n App. 1922, holding approved).
98. 493 S.W.2d 336 (Tex. Civ. App.—Tyler 1973, no writ).

sheriff returns must be clear and satisfactory.[99] In order to reconcile the discrepancies in the case with the traditional clear and satisfactory requirement, the court in *Martin* interpreted *Ward* to require a defendant to establish his case by a preponderance of evidence[100] and to impeach the sheriff's return with clear, satisfactory and convincing proof of lack of service.[101] This demonstrated a possible concern by the court in *Martin* for maintaining the long-standing quantum of proof in impeachment of returns. In effect, the court of civil appeals suggested the result that *Ward* should have pronounced. The court, therefore, did not ignore a supreme court opinion directly on point and at the same time followed the previous standard of clear and satisfactory proof.

CONCLUSION

In the past, the requirements for impeachment of sheriff returns have been strictly enforced in all forms of attack upon default judgments, but *Ward* may herald new leniency in motions for new trial. *Ward* has demonstrated that the requisites for impeachment of official returns may be circumvented, making the official acts of the courts subordinate to the uncorroborated allegations of one witness. Allowing these statements to constitute good excuse after they are found insufficient to impeach a sheriff's return may lessen the significance of service of process and the corresponding obligation to appear. Additionally, the *Ward* decision may cause confusion in determining what quantum of proof is required to successfully impeach a sheriff's return. Depending on the interpretation given to the *Ward* opinion by other courts, a defaulting defendant may be able to impeach a sheriff's return by a mere preponderance of evidence rather than by the long-standing requisite of clear and satisfactory proof. The ramifications of *Ward* upon the established rules of impeachment of returns may be significant. *Ward* risks disorganizing a long-proven and effective system by endorsing circuitous tactics and confusing the quantum of proof required to impeach sheriff's returns on a motion for new trial.

99. *Id.* at 339.
100. *Id.* at 338.
101. *Id.* at 339.