BYRD *vs.* CLENDENIN ET AL.

Judgment by confession under a power of attorney in the circuit court; no entry of record showing that the execution of the power of attorney was proven before the judgment was rendered: execution issued on the judgment, and defendant's property sold; action of trespass by the defendant against the plaintiffs, their attorney, the judge, and the sheriff, who justified under the judgment so confessed &c. HELD, under the principles settled in *Borden et al. vs. State, use &c., ante,* that the judgment was not void, and the defendants were not trespassers &c. [*See that case.*]

Writ of Error to Pulaski Circuit Court.

This was an action of trespass brought by Richard C. Byrd against John J. Clendenin, James Lawson, Samuel Brown, Samuel Robb and Frederick W. Trapnall, and determined in the Pulaski circuit court at the December term, 1849, before the Hon. WILLIAM H. FEILD, Judge.

The declaration alleged that on the 2d day of April, 1845, at &c., the said defendants, with force and arms seized, took and detained the goods and chattles, *to-wit:* twenty negro slaves for life of him the said Richard C. Byrd, then and there found of great value, to-wit, of the value of fifteen thousand dollars, and carried away the same, and converted and disposed thereof to their own use, and other wrongs &c., &c.

Defendants plead first, not guilty. 2d, And for a further plea in this behalf as to the seizing and taking the said negro slaves of the said plaintiff in said declaration mentioned, and taking and carrying away the same, and converting and disposing of the same to their own use, as in said declaration mentioned, the defendants by leave &c., say actionem non &c., because they say that before the said time when, &c., in the Hon. the circuit court of the county of Pulaski in the State of Arkansas, held at the court house in the city of Little Rock in said county, at the term of said court which began and was there holden on the first Monday of September, in the year of our Lord one thousand eight hundred and forty, within the jurisdiction of that court, on a day of said term, *to-wit:* on the seventh day of November, A. D. 1840, before the said defendant John J. Clendenin, who then and there, and from thence until the time of the committing of the said alleged trespasses, was judge of said court, and of the Fifth Judicial Circuit of the State of Arkansas, of which said county was a part, duly elected, commissioned, qualified as such, the said defendants Samuel Brown and Samuel Robb, in a certain action, suit and proceedings of trespass on the case on promises, then there in that court prosecuted, instituted and carried

on by them, by their attorney the said Frederick W. Trapnall (who then was duly admitted and licensed to practice in that court, and in the supreme court of Arkansas as attorney and counsellor at law) which suit was instituted and commenced in that court by declaration filed and warrant of attorney, by the consideration and judgment of said circuit court recovered against Richard C. Byrd in their said action, suit and proceeding, the sum of two thousand six hundred and sixty dollars and seven cents for their damages therein assessed, and also all their costs by them in that suit in that behalf expended, which costs were afterwards taxed at, and found to amount to the sum of five dollars, seventeen and a half cents, whereof the said Richard C. Byrd was convict, as by the record of the proceedings therein in this Hon. court here still remaining will more fully and at large appear, which judgment is still in full force, strength and effect, in no wise reversed, vacated, annulled, set aside or satisfied, except as hereinafter stated.

And the said defendants further say that the said defendants Samuel Brown and Samuel Robb, by their said attorney, the defendant Frederick W. Trapnall, who was still, and thence up to the time of committing the alleged trespasses, continued to be an attorney of said court duly licensed and practicing as such, afterwards, *to wit:* on the eighth day of December, A. D. 1840, sued and prosecuted out of the said court a certain writ of the State of Arkansas, called a writ of *fieri facias*, under the seal of said court, signed and tested by the clerk of said court, and running in the name of the State of Arkansas, upon the said judgment, which writ was by the said John J. Clendenin, still being and as such judge as aforesaid, allowed and directed to issue against the said plaintiff, directed to the sheriff of the said county of Pulaski—Greeting, whereby, reciting the said judgment the said sheriff was commanded that of the goods and chattles, lands and tenements of said Richard C. Byrd found in his county, he should levy and cause to be made the said sum of money so adjudged to the said Samuel Brown and Samuel Robb for damages, and costs so that he might have the same before that court

on the second day of March, A. D. 1841, which writ afterwards and before the return thereof, and before the said time when &c., *to-wit:* on the ninth day of December, A. D. 1840, at and within said county of Pulaski, and at and within the jurisdiction of said court, was delivered to and came to the hands of the said defendant James Lawson, who then and from thence until and at and after the return of said writ was the sheriff of said county of Pulaski, duly elected, commissioned, qualified and acting as such, to be executed in due form of law, according to the exigency of said writ, and was to him delivered by the said Samuel Brown and Samuel Robb, by their said attorney Frederick W. Trapnall aforesaid, by virtue of which writ he the said James Lawson, so being sheriff as aforesaid, afterwards and before the return of said writ, *to-wit:* on the 19th day of December, A. D. 1840, at the county aforesaid and within the jurisdiction of this court, in execution of said writ, did necessarily and unavoidably seize, take and carry away the said negro slaves in the said declaration mentioned, being then and there found within said county, and take and keep possession of the same until the said second day of March, A. D. 1841, it being the first day of the term of that court in that month by law required to be held and then actually held, by the said John J. Clendenin as judge thereof, after due advertisement thereof in a newspaper published in Little Rock, more than twenty days previous, and notification by such advertisement that the said negroes would be sold under said writ, and to satisfy the same, on the first day of that term between the hours and at the place prescribed by law, the said James Lawson as such sheriff did, by the order and direction of said writ, and of Samuel Brown, Samuel Robb, and Frederick W. Trapnall, between the hours of 9 A. M. and 3 P. M. of said first day of said term, offer and expose to sale and sell at public vendue, to the last and highest bidder for cash in hand, at the court house door of said court, in said city and county, publicly, and in every respect as required by law, under and by virtue of said writ, to satisfy said judgment the said twenty negroes in the declaration mentioned, so as aforesaid taken and seized, and

the same and every of them were then and there so sold, and by divers persons purchased, under and by virtue of said writ, and by said James Lawson as such sheriff then forthwith delivered to such purchasers, as it was lawful for the said James Lawson to do for the cause aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath complained against the said defendants; as by the said writ and return thereon in the said court of record remaining will more fully and at large appear; and this they are ready to verify; wherefore they pray judgment, &c.

RINGO, TRAPNALL & PIKE.

Plaintiff replied:

"And as to the said second plea of the said defendants, as to the said several trespasses in the introductory part of said plea mentioned, and therein attempted to be justified, said plaintiff says *pre cludi non* &c., because he says, that the said pretended judgment in said plea named was rendered in this court by the said John J. Clendenin judge of said court on &c., at &c., without any process ever having been issued in said proceedings, or service of process therein on said plaintiff, or any notice whatever actual or constructive to him, the said plaintiff, of said suit or proceedings, or any appearance whatever by him said plaintiff therein, or any waiver by him of such process or notice; but was taken and rendered therein by virtue of what purported to be a power of attorney from said plaintiff authorizing to take, acknowledge and confess judgment for the demand therein recovered against said plaintiff, when in fact said plaintiff avers that the record thereof wholly fails to show, and does not show that said power of attorney was proven before or at the time of the taking said judgment before said court or otherwise, or that any evidence ever was given or offered to prove or establish that the same was executed or delivered by said plaintiff; without this that there is any record of said supposed judgment in said Pulaski circuit court remaining &c., as in said plea is alleged; and this &c., wherefore &c."

E. CUMMINS.

To this replication Clendenin demurred, on the ground that though said judgment by him rendered might be void, still he was protected by his judicial character &c.

Lawson demurred, on the ground that though said judgment might be void, yet the process issued thereon out of a court of general jurisdiction was sufficient warrant for him to act thereunder, and protects him &c.

Brown, Robb and Trapnall demurred on the ground, 1st, that said replication does not show said judgment to be void: 2d, that if void, still being a judgment of a court of general jurisdiction they were protected by it &c.

The court sustained said demurrers, and plaintiff rested, suffered final judgment to go against him, and brought error.

CUMMINS, for the plaintiff.

The replication showed that the judgment under which the defendants justified was void, (*Rapley et al. vs. Price, Newlin & Co.* 4 *Eng.* 428) and therefore no justification for any act done under it, nor would a sale under it divest defendant of title. *Danley vs. Rector,* 5 *Eng.* 211.

As the judgment was void, a mere nullity, the court having no jurisdiction, neither the sheriff nor the parties were justified; but would be responsible in an action of trespass. (*Perken vs. Proctor and Green,* 3 *Wils.* 382. *Smith vs. Bouchier et al.* 2 *Str.* 993. *The case of the Marshalsea,* 10 *Co. Rep.* 76. 1 *Str.* 509. 15 *J. R.* 152. 6 *Munf.* 27. 19 *John. Rep.* 39): that the judge is not responsible where he acts as judge and the matter was within his cognizance. (*Bushnell's case,* 10 *Mod.* 119. 2 *Mod.* 218. 1 *Ld. Raym.* 454. *Leemly vs. Quarre,* 2 *Ld. Raym.* 767); otherwise if he has no jurisdiction of the subject matter and the person. (2 *Wils.* 385. *Welsh vs. Lloyd,* 5 *Ark.* 368.) That the attorneys are liable. *Goodwin vs. Gibbons,* 4 *Burr.* 2108.

Mr. Justice SCOTT delivered the opinion of the Court.

The doctrine settled in the case of *William B. Borden et al. vs. The State of Arkansas, use &c.,* decided during the present term,

is conclusive as to all the questions presented by the record. There was no error in the judgment of the court below. Let it be affirmed.

Mr. Justice WALKER:

I concur in the opinion delivered in this case, but not in the reasons and principles upon which it is founded.

Parol evidence was admissible to prove the execution of the power of attorney upon which the confession of judgment was made; and although the record is silent upon the subject it is but fair to presume that such proof was made. This is but a reasonable presumption in favor of the court, and is not weakened by a failure to show that such proof was made by an entry to that effect on the record. There is a marked difference between an omission of this kind and the presumptions in support of proceedings where they do not affirmatively appear and in others which are indispensable to the commencement of an action in ordinary practice; as where there is no writ, for instance, and nothing of record tending to show that any ever issued. There in order to reach the person so as to affect him with notice, it would be necessary to presume that there was a writ, and then, still another presumption upon it, that the writ had been served: this practice of presuming upon a presumption is never allowable.