12/136. Expld. in Dugan v. Fowler, 14/137.

HUMPHRIES, ADR., USE, &C., *vs.* ANTHONY.

To a *scire facias* to revive a judgment, where defendant pleads, as a satisfaction, a subsisting, undisposed-of levy on lands, a replication that the land levied upon is not the property of the defendant, is not of sufficient value to satisfy the debt, or has been discharged by a sale of the property since the commencement of the action, is not good.

The replication should traverse the fact as to whether there was or was not a subsisting levy at the time of the commencement of the action.

Writ of Error to Pulaski Circuit Court.

John Humphries, adr. of Joel Johnson, deceased, use Ashley & Watkins, sued out a writ of *scire facias* to revive a judgment against James C. Anthony, in the Pulaski Circuit Court.

Defendant filed three pleas, 1: That execution was issued upon the original judgment, levied upon lands of defendant of sufficient value to satisfy the judgment, which remained undisposed of; 2: *Nul tiel* record; and 3: Payment.

A demurrer was sustained to the first plea; and the case brought to this court and reversed. See *Anthony vs. Humphries, use, &c.,* (4 *Eng. R.,* 176,) where the plea is copied.

After the case was remanded, the 2d and 3d pleas were withdrawn, and plaintiff filed three replications to the first plea:

1. That the lands and tenements specified in said plea were not the property of said defendant in manner and form as in said plea is alleged—concluding to the country.

2. That the lands and tenements specified in said plea were not on, &c., at, &c., of sufficient value to satisfy or pay the debt, damages, and costs, mentioned in said judgment, in manner and form as in said plea is alleged—concluding with a verification.

3. That, for having execution of said judgment, and disposing of said levy, (he) the plaintiff caused an execution to be issued, bearing date the 15th day of August, 1848, directed to the sheriff of said county of Pulaski, whereby, after reciting said judgment and levy, said sheriff was commanded to expose for sale and sell the lands and tenements specified in said plea; which said execution was made returnable on the 2d day of the October term of this court, in the year 1848, and was duly attested by the clerk, and under the seal of this court; and the same afterwards, and before the return day thereof, came to the hands of said sheriff in due form of law to be executed; and said plaintiff avers that the said sheriff, after having advertised said lands and tenements for sale, at public auction, to the highest bidder, by virtue of said writ, offered and exposed the same for sale, at the court-house door of said county, on the 15th day of October, 1848, and one Frederick W. Trapnall, then and there being the last and highest bidder therefor, became the purchaser of the whole of the real estate specified in said plea, for the sum of *five cents,* and no more, and the said lands and tenements were then and there sold by said sheriff to said Trapnall, for the sum of five cents, and no more—concluding with a verification.

Defendant demurred to each of said replications.

To the first replication, he demurred on the following grounds:

1. That, in making the levy, as set forth in said plea, the sheriff acted as the agent of the plaintiff in said execution, and could not lawfully levy on any property other than that of the defendant named in said execution; nor can the plaintiff in execution deny that the property so levied is legally subject to such execution, without first affirmatively showing that it was claimed by and legally adjudged to some third party.

2. That said replication admits the levy on property sufficient

to satisfy said execution, and wholly fails to show that the same has ever been legally disposed of.

3. That a party, for whose benefit a levy is made under execution, cannot, without first showing an abandonment of said levy, and a subsequent restitution of said property, deny that said property was subject to said execution.

To the 2d replication, the defendant demurred, on the grounds that the facts set up in said replication tendered an issue foreign to the cause, and was no answer or avoidance of the plea.

To the third replication, defendant demurred on the following grounds:

That said defendant admits, in said replication, the levy under said execution; that the property so levied on belonged legally to the said defendant; that said property was sufficient to satisfy said execution, and that the said levy was not disposed of until long after the issuance of the said writ of *scire facias,* &c.

The court sustained the demurrer to all of the replications, and plaintiff suffered final judgment to go, and brought error.

WATKINS & CURRAN, for Plaintiff.

F. W. &. P. TRAPNALL, contra.

Mr. Justice WALKER delivered the opinion of the Court.

The replications in this case were clearly defective. The plea set forth a subsisting, undisposed-of levy on lands. A replication that the land levied upon is not the property of the defendant, is not of sufficient value to satisfy the debt, or has been discharged by a sale of the property since the commencement of the action, is not good. The replication should traverse the fact as to whether there was or was not a subsisting levy at the time of the commencement of the action. The principles upon which this case turns, will be found fully settled in the case of *Anderson vs. Fowler,* 3 *Eng. Anthony vs. Humphries, use, &c.,* 4 *Eng.* 176. *Whiting & Slark vs. Beebe et al.,* at the present term.

Let the judgment of the Circuit Court be, in all things, affirmed, with costs.