

HAMMETT ET AL. vs. STATE, USE LINDSAY.

In an action against a sheriff for failing to take the body of a defendant in execution, under a writ commanding him to levy the judgment specified therein of the goods and chattels, lands and tenements of the defendants, and in default thereof to arrest his body, the declaration should allege that the defendant had not sufficient goods and chattels and real estate of which to levy the judgment.

It should also allege that the sheriff failed to have the money before the court on the return day of the writ.

Appeal from the Circuit Court of Jefferson County.

DEBT, by the State, use of Lindsay, against Hammett as sheriff of Jefferson, and securities, upon his official bond, determined

in the circuit court of said county in October 1844, before the Hon. Isaac Baker then one of the circuit judges.

The declaration sets out the bond, and assigns for a breach thereof, in substance: that Lindsay, for whose use the suit was brought, obtained a judgment against Joseph Hopkins in the circuit court of Jefferson, on the second Monday in October 1840, for \$1204.25 debt, damages \$50.54 and for costs. On the 13th January 1841 Lindsay sued out an execution upon the judgment against the estate and body of Hopkins, directed to Hammett as such sheriff, and commanding "that of the goods and chattels, lands and tenements of said Hopkins he should cause to be made the debt, damages and costs in said judgment specified; and that for want of sufficient goods and chattels and real estate whereon to levy and make the debt, damages and costs, he the said sheriff should take the said Joseph Hopkins, if found within his county, and him safely keep, so that the said sheriff should have the body of the said Joseph Hopkins before said circuit court of Jefferson county on the 10th day of April 1841, to satisfy the said debt, damages and costs aforesaid, and that said sheriff should then and there certify how he had executed said writ." That on the day it was issued Lindsay delivered the said writ to Hammett as such sheriff to be by him executed. "And afterwards before the return of said writ, to-wit: on the day and year last aforesaid, and on divers other days and times between the day last aforesaid, and the return day of said writ, at the county aforesaid, the said Hopkins was in the presence of the said Hammett, such sheriff as aforesaid, and might then and there have been easily taken and arrested by the said Hammett as such sheriff according to the command of said writ: yet the said Hammett, as such sheriff as aforesaid, in no wise regarding the duty of his said office, but intending to deprive said Lindsay of his proper remedy to obtain satisfaction and payment of said debt, damages and costs in said execution and judgment specified, did then and there wholly refuse and neglect to take the body of the said Hopkins, or otherwise in any manner execute said writ according to the command thereof, though the said Hammett as such sheriff might then and there easily have taken and arrested said Hopkins. Nor has the

said Hammett as sheriff aforesaid at any time since taken or arrested the said Hopkins upon said writ of execution; or otherwise in any manner executed said writ according to the command and precept thereof; or in anywise satisfied the said Lindsay for the sums of money in said execution and judgment specified; nor have any of the said defendants, or any other person or persons for him the said Hammett: and the said Hopkins has ever since the day of return of said writ of execution absconded into parts unknown, so that said Lindsay has by means of said Hammett's wilful neglect of his duty aforesaid, as such sheriff, totally lost all benefit of the judgment and execution aforesaid: whereby the said Hammett then and there became liable to pay said several sums of money in the said judgment and execution specified, which said judgment remains in full force &c., in no wise reversed, vacated, discharged, satisfied, or paid off by the said Hopkins, or the said Hammett, or by any other of the said defendants, or all or either of them. By means whereof," &c. At the Oct. term 1843, Hammett filed five separate pleas in bar, to which plaintiff demurred, and the cause was continued. At the April term 1844, the other defendants offered to file pleas, but the court refused them leave. The demurrer to Hammett's pleas was sustained, a writ of inquiry executed, and final judgment for plaintiff.

Defendants appealed, and assign for error that plaintiff's declaration was bad, and should have been so adjudged by the court below on the demurrer to Hammett's pleas, &c.

PIKE & BALDWIN; for the appellant. The sheriff was commanded that of the goods and chattels, lands and tenements, he cause to be made the debt &c., and for want of sufficiency thereof to take the body. Declaration, without showing any want of property, charges the sheriff for not arresting the body; and is therefore clearly bad. *Rev. Stat. p. 374, s. 3, 6.*

By the constitution, *Article VII sec. 11*, imprisonment for debt is abolished under certain limitations and restrictions, and before a party can be arrested on civil process a clear case against him must be made out. Until a want of sufficient property is shown no right

to arrest the body can exist under our constitution and laws; and it is necessary for a party alleging a breach, to set forth clearly and distinctly in what manner he has been damaged by the failure of the officer to perform his duty. *State, use Bennett vs. Engles*, 5 Ark. 26 And in *Haynes vs. Tunstall*, 5 Ark. 680, this court held that where a party shows that an execution has come to the hands of the sheriff, and that the defendant had property at the time, he must levy or show good cause why he did not. It seems then that under a *fi. fa.* the party must show that the defendant had property before any liability attaches: and by statute, under a *ca. sa.* no arrest can be made but for want of property.

HEMPSTEAD & JOHNSON, contra. The action is debt, and the gravamen of it, the entire failure and refusal of the officer to execute the process final, in any manner whatever, which is substantially and sufficiently alleged as a breach of the bond, and the declaration is in conformity with the best precedents. 2 *Chitty's Pl.* 740. *Backus on Sheriffs*, 443. If there is no cause of action alleged, there can be no recovery; but if the right is only defectively stated, the declaration, in the present shape of the proceeding, will be held good. Lindsay could not have been required to prove the negative fact that Hopkins had no property, and it is a general rule in pleading that matter which does not need proof, need not be alleged. The sheriff, by failing to execute the writ of execution, became liable for the whole debt, and for this reason the demurrer to the fifth plea was properly sustained. *Rev. Stat. ch. 60 sec. 60. The Governor vs. Pleasants*, 4 Ark. 193. *Jones vs. Pope*, 1 *Saund. R.* 37, note 2. *Bonafus vs. Walker*, 2 *Ten. R.* 126. *Hawkins vs. Plomer*, 2 *Bl. R.* 1048.

OLDHAM, J. The declaration in this case is most clearly insufficient. The writ of execution recited in the breach, commanded the sheriff to levy the judgment specified therein of the goods and chattels, lands and tenements of the defendant in the execution, and for want of sufficient goods and chattels and real estate then to arrest the body of the defendant. The sheriff was not authoriz-

ed nor required to arrest the body, only in case of an insufficiency of effects of the defendant to make the money. It must therefore be made to appear by the declaration that there was not a sufficiency of goods and chattels and real estate of which to levy the judgment, before the sheriff can be held liable for not arresting the body of the defendant in the execution.

The declaration is further defective in not averring that the sheriff failed to have the money before the court on the return day of the execution. *State, use &c. vs. Engles*, 5 Ark. Rep. 26. Let the judgment be reversed and the cause remanded.
