HUMPHRIES *vs.* LAWSON, No. 1.

The circuit court cannot compel a sheriff to amend his return to a writ; nor to return any particular state of facts. He has the privilege of amending, and is responsible for a false return.

Writ of Error to the Circuit Court of Pulaski County.

ON the 8th of May 1845, Humphries filed in the circuit court of Pulaski county the following motion:

"John Humphries comes and represents and shows to the court here that on the 7th day of May 1842, one Pleasant McCraw, by the consideration and judgment of this court recovered against him the sum of $311.14 damages, with costs, &c. That on the ——day of——, 1843, said McCraw sued out a writ of *fieri facias* upon said judgment directed to the sheriff of Pulaski county, returnable to the May term of this court in the year 1843. That said writ came to the hands of James Lawson, who then, and from

thence until the return day thereof, was sheriff of said county; and that said Lawson as such sheriff, under and by virtue of said writ, on the——day of——, 1843, received the sum of $219.75, which he wholly failed and neglected to credit or indorse upon said writ, and that no part of said sum of $219.75 has as yet been credited on said execution, or upon said judgment.

Said Humphries therefore moves the court for a rule on said Lawson requiring him to apply said money towards the payment of said judgment on or before a day certain, or show cause to the contrary." The motion was verified by affidavit.

The court made a rule that Lawson show cause, on the next morning, but on his application he was given further time, and finally on the 28th October 1845, filed the following response:

"Said James Lawson comes, and, in response to said rule, states that the writ of execution mentioned in said motion was not executed personally by respondent, but was placed in the hands of Wm. B. Borden as his deputy, and he is informed by said Borden, and believes the same to be true, that he never received a single cent of money upon said execution; and this respondent therefore denies that he received upon said execution the said sum $219.75, as mentioned in said motion, or any other sum of money whatever. And this respondent denies that said Humphries has any legal right to proceed against respondent by motion, as he has done in the premises, and objects thereto; and moves that said motion be dismissed, and said rule discharged with costs, &c." The response was sworn to.

The court dismissed the motion, and rendered judgment against Humphries for costs, he excepted, and took a bill of exceptions, showing that he offered to introduce the execution referred to in the motion, and to prove that Borden, the deputy of Lawson, sold property under it in which Humphries had a partnership interest for the sum alleged in the motion, but the court refused to hear any evidence whatever, and discharged the rule, &c.

WATKINS & CURRAN, for the plaintiff. The only question presented is whether the circuit court possesses the power to enforce

the execution of its process. If the court possesses this power it must follow that it has the right to investigate and ascertain whether or not an officer entrusted with the execution thereof is in contempt; but how could a court punish unless it could investigate and determine whether the facts constituted a contempt? One would be nugatory and absurd without the other. The position taken that the authority of the court over the subject ceases simply because the officer denies the facts is certainly novel. By the evidence offered it is shown that the sheriff had made $219.75, which he had failed to apply: now the question is will his denial protect him? We do not contend that the court could compel the sheriff to make a particular return, but inasmuch as the writ commands him to certify to the court how he had executed the process, and as he has failed to certify or endorse any return whatever upon the writ, that he is in contempt and that the court should interpose to protect the rights of the debtor. Humphries cannot sue the sheriff for the money, because he is not entitled to receive it, and as McCraw does not think proper to do so, the amount made by a sacrifice of property will be a total loss to Humphries. If money is paid to the sheriff upon an execution, it is a satisfaction whether the sheriff returns the fact or not; consequently, if Humphries should sue the sheriff and prove these facts, it could be said the execution was satisfied, and that therefore he was not damnified by the default of the sheriff. Now if he cannot have satisfaction entered upon the record by what proceeding can he obtain redress?

FOWLER, contra. It is contended in behalf of Lawson that on his denial of the allegation, on his showing sufficient cause &c. that the rule must necessarily be discharged: that in such case no issue can be legally made to try disputed facts on a motion, unless such proceeding be specially authorized by some statute. No such statute existing the court below could have legally given no other judgment than to discharge the rule &c. See 1 *Tidd's Pr.* 454 *et seq.* *Hardin's R.* 255. *Price vs. Shelby Circuit Court.*

A disputed fact cannot be determined on motion. *Hardin's R.* 256. Same case.

A motion to try an issue must be authorized by the express letter, or manifest intention of the statute. *Hard. R.* 254. Same case. *Tull vs. Geshagen,* 3 *J. J. Marshall R.* 378.

No such motion as this is authorized by any statute; it must therefore be governed by the established rules of the common law: which is, to discharge the rule, when the facts alleged are denied. See above authorities referred to.

If originally sustainable as a motion at all it must be considered as a motion for the sheriff to amend his return; and when he has refused to do so, a party aggrieved has a remedy by an ordinary suit for a false return, but not by motion.

The evidence offered by the plaintiff was properly excluded; as the court had no legal right to try, nor was it then trying an issue between the parties, to which any evidence could legally be received.

OLDHAM, J. We are not aware of any law authorizing the circuit court to compel a sheriff to amend, or make a particular return. It is the privilege of the sheriff to amend if he should desire to do so, but he cannot be compelled to return a particular state of facts; especially when he denies that those facts exist. If he make a false return the law affords the injured party a remedy, by which he may obtain ample redress. Judgment affirmed.