HUBBARD *vs.* BOLLS ET AL.

A *scire facias* to revive a judgment is an action, to which the defendant may plead.

Such *scire facias* may be issued as well after as before the expiration of the lien of the judgment: and against the representatives of a deceased defendant.

Writ of Error to the Circuit Court of Hempstead County.

THIS was a *scire facias* issued by the clerk of the circuit court of Hempstead county on the 27th day of August 1847, against the representatives of William Bolls deceased, to revive a judgment rendered in said court on the 18th day of October 1839 against said William Bolls and others, and to continue the judgment lien on certain real estate of said Bolls. The writ, after reciting the judgment, describing the lands upon which the lien rested, and setting forth the death of Bolls and the names of his representatives, commanded the sheriff to summon said representatives to appear &c. "to show cause why the judgment lien of the said Thomas Hubbard upon the above described lands and tenements should not be revived and continued."

Certain of the defendants appeared and demurred: 1st, because the *scire facias* was not sued out to revive the judgment lien before the expiration of the time of the judgment; 2d, because the *scire facias* was not sued out within three years after the rendition of the judgment; 3d, because the *scire facias* seeks to revive a judgment lien which did not exist against William Bolls at the time of his death. Others of the defendants made default. The court sustained the demurrer and rendered final judgment in favor of the demurrants; also in favor of those making default.

The plaintiff has brought the case into this court by writ of error.

S. H. HEMPSTEAD, for the plaintiff. The writ of scire facias is in proper form and contains all the requisites belonging to such a writ. 2 *Harris' Entries* 464 to 480. The judgment lien had

expired, but the statute expressly authorizes a scire facias to be sued out after the "judgment or decree shall have expired" but in that event the judgment of revival is only a lien from the time of the rendition of the judgment, and not from the time of suing out the process. *Rev. Stat. chap.* 84, *page* 477, *title* "judgments and decrees."

The demurrer appears to have been sustained on the ground that the scire facias was not sued out in three years after the date of the judgment. That the court misapprehended a very plain provision of the law cannot be doubted, and that the decision was in the face of the statute no one will dispute. It would be strange indeed if a judgment could not be revived so as to become a lien after the lapse of three years.

JOHNSON, C. J. This was a scire facias issued by the plaintiff in error against the defendant to revive a judgment therein described. It is contended that the scire facias is demurrable upon the ground that it seeks to revive a judgment lien, when it is shown upon its face that the lien of the original judgment had already expired. One distinction taken seems to be between a judgment lien and the judgment itself. A *sci. fa.* whether considered as an original or judicial writ is an action and such as the defendant may plead to; and therefore it is held that a release of all actions is a good bar to a sci. fa. A man may plead in bar or abatement to a sci. fa. as well as to other actions. *Lucas* 113. *Yelv.* 218. The 3d section of chapter 84 of the Revised Statutes provides that "Liens shall commence on the day of the rendition of the judgment, and shall continue for three years, subject to be revived as hereinafter provided." The 11th section of the same act further provides that, "If a scire facias be sued out before the termination of the lien of any judgment or decree, the lien of the judgment revived shall have relation to the day on which the scire facias issued; but if the lien of any judgment or decree shall have expired before suing out the scire facias, the judgment of revival shall only be a lien from the time of the rendition of such judgment." The defendants in their argument lay great stress upon the particular phraseology used in the writ, by which

they are required to show cause why the judgment lien of the plaintiff should not be revived and continued. It is insisted that inasmuch as the lien of the original judgment had expired before the issuance of the sci. fa., that therefore the lien of that judgment could not be revived, but that the judgment alone could be revived, and that the lien created by it only operate from the date of such revival. The statute is explicit that where the lien has expired before the issuance of the sci. fa. the new lien can only attach from the day of the rendition of such judgment of revival, yet we can perceive no good reason why that circumstance should require the adoption of a different expression in the writ. In either case the object is to revive the original judgment, and as a necessary consequence the lien of that judgment. It is not true as contended that because the lien has expired it cannot be revived. The only difference is that in the one case the judgment of revival sustains the lien of the original judgment and continues it without intermission, but in the other it is only revived to take effect from the time of the rendition of such judgment of revival. Nothing can be more clear than that a party may sue out a scire facias to revive a judgment after the expiration of the lien, but in that case the lien can only operate from the date of such revivor. Among other causes of demurrer it was also urged that one of the defendants in the original judgment was not living at the time of the issuance of the sci. fa. and that therefore the circuit court had no jurisdiction. This objection is fully answered by the 16th section of the act already referred to, which enacts that "such judgment or decree may be revived against the representatives of any deceased defendant by scire facias in the name of the surviving plaintiff and the representatives of such as are deceased." Upon a close and critical examination of the sci. fa. issued in this case, we have not been able to discover any valid objection to it. We think it clear therefore that the circuit court erred in sustaining the demurrers of those who appeared in obedience to the mandate of the writ.

The error is equally apparent as to those who made default as they were called upon in the identical language of the statute, and seem to have been duly and legally notified of the pendency of the

proceeding. From every point of this case we think there can be no doubt but that the circuit court erred both in sustaining the demurrers and also in refusing to revive against those who made default. Judgment reversed.