

STATE USE TRAPNALL & COCKE vs. HAMMETT ET AL.

In an action upon a sheriff's bond, a breach averring that an execution issued from the circuit court of Pulaski county, returnable on the first day of March 1841, came to the hands of the sheriff of Jefferson county on the 18th day of Dec'r 1840, that he levied the same upon certain lands, slaves &c., but did not sell the property, nor have the money on the return day of the writ, held insufficient; as there was no term of the Jefferson circuit court after the writ came to the hands of the sheriff and before the return day. The sheriff can sell lands and slaves only on the first day of the circuit court; and this court is bound to take notice of the terms of the courts.

The breach must set forth all the facts necessary to show that the officer was guilty of an omission of duty: as when the defendant is entitled to retain possession of the property by giving a delivery bond, the breach should negative the fact.

When an execution has been issued, levied, and the property not sold, a *venditioni exponas* is the proper process to enforce a sale; and not an *alias fi. fa.* A memorandum endorsed upon an *alias fi. fa.* (showing the previous levy &c.) cannot change the character of the writ.

Each breach must be sufficient of itself, and cannot be made so by reference to the facts stated in others.

Writ of Error to the Circuit Court of Jefferson County.

DEBT, by the State, use of Trapnall & Cocke, partners &c., against Hammett and his securities, upon his official bond as sheriff of Jefferson county, determined in the Jefferson circuit court, at the October term 1845, before the Hon. Wm. H. Sutton, judge.

The declaration sets out the sheriff's bond in the usual form, and assigned breaches as follows:

1st, "For breach whereof, according to the statute in such cases made and provided, the plaintiff for the use aforesaid, says that whereas the said Trapnall & Cocke, on the 12th day of November A. D. 1840, by the consideration and judgment of the Pulaski circuit court, recovered against a certain Townsend Dickerson, the sum of \$1477.92, and interest on \$1446, of said amount at ten per cent. per annum from the 13th day of August 1839 until paid, which were adjudged to the said Trapnall & Cocke for their damages by them sustained by reason of the non-performance by the said Dick-

erson of certain promises and undertakings before then made by the said Dickerson unto the said Trapnall & Cocke, as well as the costs of suit, amounting to a large sum of money, to-wit: the sum of \$5.42; and the said plaintiff sayeth that the said judgment being in full force, and the said damages remaining unpaid and unsatisfied, the said Trapnall & Cocke sued out of the said Pulaski circuit court a writ of fieri facias, directed to the sheriff of Jefferson county aforesaid, by which said writ, the State of Arkansas commanded the said sheriff, out of the goods and chattels, lands and tenements of the said Townsend Dickerson, he cause to be made the aforesaid damages, with the costs aforesaid, and have the said damages and costs before the said circuit court on the *second day of March* 1841, and then and there certify how he had executed the said writ; which said writ came to the hands of said Hammett, as such sheriff as aforesaid, on the 18th day of December A. D. 1840, at half-past 9 o'clock A. M., to be executed according to law; and the said Hammett continued to be the sheriff of said county from that time to the return day of said writ. By virtue of said writ, the said Hammett, as such sheriff as aforesaid, before the return day thereof, levied, seized and took in execution, within his bailiwick aforesaid, the following slaves and lands [here the slaves and lands were enumerated] and the following personal property, to-wit: [described] the property of the said Dickerson. Yet the said Hammett, so being sheriff as aforesaid, had not the said damages and costs, or any part thereof before the said court at the return of said writ according to the exigency thereof, but wholly failed and made default, and did not sell said lands, slaves, or horses, oxen or cattle.

2. And whereas also, on the 8th day of March A. D. 1841, the said damages being unpaid and unsatisfied, the said judgment being in full force, and the said execution having been returned with the levy aforesaid, the said Trapnall & Cocke sued out of the said circuit court an *alias fieri facias*, directed to said Hammett as such sheriff of Jefferson county aforesaid, by which said writ the State of Arkansas commanded the said sheriff, that of the goods and chattels, lands and tenements of the said Townsend Dickerson, he cause to be made the damages and interest aforesaid, together with the

sum of \$977 their costs sustained in said suit, and have the said damages, interest and costs before the said circuit court on the 7th day of September 1841, and that he then and there certify how he had executed said writ; which came to the hands of the said Hammett, as such sheriff, on the 18th of March 1841, at nine o'clock: upon which writ of fieri facias was the following endorsement, made by the clerk of the said circuit court, viz: 'whereas the original execution in this case was levied on the following property, to-wit: [here the property was described] the said property not having been sold because there was no circuit court at which to sell until after the return day of said execution, you are therefore commanded to sell said property to satisfy the within execution, and have the proceeds of sale as therein commanded, witness my hand and seal in the within execution—LEMUEL R. LINCOLN, clerk;' and the said Hammett continued from the delivery of said last mentioned execution to him, as aforesaid, up to the time of the return of said execution to be the sheriff of Jefferson county as aforesaid; and the said execution was delivered to the said sheriff to be executed in due form of law; yet the said Hammett, so being sheriff as aforesaid, had not the said damages, interest and costs, or any part thereof, before the said court, at the return of said writ, according to the exigency thereof, and of the said endorsement so made thereon as aforesaid, but therein wholly made default.

3d, And whereas also, on the 8th day of March 1841, aforesaid, the said judgment being in full force, the said first execution or fieri facias having been returned with the levy aforesaid, and the said damages, interest and costs remaining wholly unpaid, and unsatisfied, the said Trapnall & Cocke sued out of the said circuit court an *alias fieri facias* as aforesaid, with the endorsement as aforesaid; which came as aforesaid to the hands of the said Hammett as such sheriff as aforesaid, on the day aforesaid, to be executed in due form of law; yet the plaintiff says that the said Hammett, who continued to be sheriff as aforesaid until the return day of said writ, wholly failed to sell said property as therein commanded, or to have the said damages, interest, and costs as aforesaid, or any part thereof before the said circuit court on the return day of said writ.

4th. And whereas, on the 8th day of March 1841, aforesaid, the said judgment being in full force, the said first mentioned writ of *feri facias* having been levied and returned as aforesaid, and the said damages, interest and costs remaining unpaid and unsatisfied as aforesaid, the said Trapnall & Cocke sued out of the said circuit court an alias writ of *feri facias* as aforesaid, with the endorsement thereon as aforesaid which came as aforesaid to the said Hammett, sheriff as aforesaid, on the day aforesaid to be executed in due form of law: yet the plaintiff says that the said Hammett, who continued as aforesaid to be sheriff of said county of Jefferson until the return day of the said last mentioned writ, had not the moneys so levied as aforesaid, or any part thereof, before the said circuit court, on the return day of said writ, according to the exigency thereof, and of the endorsement thereon as aforesaid—And before the return of said writ, to-wit: the 30th day of August 1841, the said Hammett falsely and deceitfully returned to the said court on the said writ, that “the lands, negroes, horses and other personal property levied on by virtue of the original *feri facias* have been sold on older writs of *feri facias* and the proceeds applied to said older writs of *feri facias*, and I know of no other property of the defendant in my county to levy this *feri facias* on—this *feri facias* not satisfied for want of property.”

5th, And whereas also, on the 8th day of March 1841, aforesaid, the said judgment being in full force, the said first mentioned writ of *feri facias* having been levied and returned as aforesaid, and the said damages, interest and costs remaining unpaid and unsatisfied as aforesaid, the said Trapnall & Cocke, sued out of the said circuit court an *alias* writ of *feri facias* as aforesaid, with the endorsement thereon as aforesaid, which came as aforesaid into the hands of the said Hammett as such sheriff as aforesaid on the day aforesaid to be executed in due form of law; yet the plaintiff saith that the said Hammett, who continued as sheriff as aforesaid until the return day of said writ last mentioned, had not the moneys so levied as aforesaid, or any part thereof, before the said circuit court, on the return day of said writ according to the exigency thereof and of the endorsement thereon as aforesaid; and on the 30th day of August

1841, the said Hammett as such sheriff as aforesaid falsely and deceitfully returned to the said court on the said writ that "this *alias fieri facias* not satisfied for want of property."

6th, And whereas also, on the 12th day of November 1840, by the consideration and judgment of the Pulaski circuit court, the said Trapnall & Cocke recovered judgment against said Townsend Dickerson for the sum of \$663.96, damages, and ten per cent. interest per annum on \$648, of said damages from the 26th day of July 1839 until paid, together with costs, to-wit: the sum of \$542 for their costs sustained in said suit; the said damages, interest and costs being unpaid and unsatisfied, and the said judgment remaining in full force, they sued out of said circuit court a writ of *feri facias*, directed to the said Hammett as such sheriff as aforesaid; wherein the said sheriff was commanded that he cause to be made out of the goods and chattels, lands and tenements of the said Townsend Dickerson the aforesaid damages and costs, and have the said damages and costs before the said circuit court on the second day of March 1841, and then and there certify how he had executed the said writ; which said writ came to the hands of said sheriff on the 18th day of December 1840, at half past 9 o'clock, A. M. to be executed in due form of law, and on the 28th day of January 1841, was levied on the aforesaid thirteen negroes, (slaves) horses, oxen, cattle and lands within his bailiwick as aforesaid; yet the said Hammett, so being such sheriff as aforesaid, did not have said damages and costs or any part thereof before the said court on the 2d day of March 1841, as aforesaid commanded; nor did he cause to be made the said damages and costs, or any part thereof, out of the lands, negroes, oxen, horses or cattle, or sell the same, or any part thereof, although he continued to be such sheriff as aforesaid, until the return day of said writ.

7th, And whereas also, on the 6th day of March 1841, the said damages and costs remaining unpaid and unsatisfied as aforesaid, and the said judgment still remaining in full force, the said Trapnall & Cocke sued out of said circuit court, an *alias* writ of *feri facias* directed to the said Hammett as being such sheriff as aforesaid, whereby he was commanded out of the goods and chattels, lands

and tenements of the said Townsend Dickerson he cause to be made the damages and costs aforesaid, which costs amounted to the sum of \$9.77, and have said damages and costs before the said circuit court on the seventh day of September 1841, upon which said last mentioned writ there was an endorsement such as mentioned in the 2d breach of this declaration; which said execution and endorsement as aforesaid came to the hands of the said Hammett so being such sheriff as aforesaid on the 18th day of March 1841, at 9 o'clock A. M. to be executed in due form of law, and the said Hammett continued to be the sheriff as aforesaid until the return day of said writ; yet the said Hammett, as sheriff as aforesaid did not have the said damages and costs or any part thereof before the said circuit court at the return day of said writ, according to the exigency thereof, and of the endorsement so made thereon as aforesaid, but therein wholly made default. And the said plaintiff says further that the said Hammett so being and continuing as such sheriff as aforesaid falsely and deceitfully returned to said court on the said execution last mentioned, "this *alias fieri facias* not satisfied for want of property."

8th, And the said plaintiff further says that the said Hammett, so being and continuing such such sheriff as aforesaid, falsely and deceitfully returned on the said last mentioned writ of *alias fieri facias* with the endorsement as aforesaid to the said court "that the lands, negroes and other personal property levied on by virtue of the original fieri facias have been sold on older writs of fieri facias, and the proceeds applied to said older writs of fieri facias, and I know of no other property of the said defendant in my county to levy this fieri facias on, I therefore return the same with the delivery bond taken on the original fieri facias—this fieri facias not satisfied for want of property, this 30th day of August, 1841."

9th, And whereas also, on the — day of April 1841, it being the first day of the Jefferson circuit court, the said judgments having been obtained as aforesaid, and remaining in full force as aforesaid, and a fieri facias having issued on each as aforesaid and directed as aforesaid, and having come to the hands of the said Hammett as such sheriff as aforesaid, and having been levied as aforesaid, and

returned as aforesaid, and a new writ of fieri facias having been issued on each as aforesaid, with endorsements on each as aforesaid, and having come into the hands of the said Hammett as such sheriff as aforesaid to be executed as aforesaid, [he the said Hammett] fraudulently offered for sale, under other pretended executions, claiming to be of an older date and levy, the whole of said property to-wit: the said negroes, horses oxen, cattle, and lands in bulk, without separating them into parcels or offering them singly and separately as he should have done by law, and cried them off for the sum of \$3000, being about one-fifth of their actual market value, without the consent of the said Trapnall & Cocke. By all of which they have been injured," &c. Concluding with the usual general breach.

Defendant demurred to the declaration, assigning for causes of demurrer objections to the several breaches noticed in the opinion of this court. The court sustained demurrer, and plaintiff brought error.

RINGO & TRAPNALL, for the plaintiff.

PIKE & BALDWIN, contra.

OLDHAM, J. This was an action of debt upon a sheriff's bond. The declaration contains nine breaches. The defendants demurred, and their demurrer being sustained the plaintiff has brought the case into this court by writ of error.

The first and sixth breaches assigned are insufficient. They aver executions came to the sheriff's hands on the 18th day of December 1840, and were returnable on the first day of March 1841, and that before the return day of the writs he seized and took into his possession, certain lands, thirteen slaves, three head of horses, two yoke of oxen and fourteen head of cattle, and that he did not sell the said land, slaves, horses, oxen or cattle, or have the damages or costs before the court on the return day of the writ. By law the sheriff was not authorized to sell the lands and slaves levied upon except on the first day of the circuit court of his county,

Rev. St. ch. 60, sec. 47. The time of holding the circuit court is fixed by a public law, of which this court will take judicial notice. The act of 13th December 1838, and which was in force at the time when the writs of execution specified in the declaration, came to the hands of the sheriff and continued in force until the return, required the circuit courts of Jefferson county to be holden on the second Mondays of April and October. There was consequently no court held in Jefferson county between the time when the executions came to the sheriff's hands and their return day, he was therefore not guilty of a breach of the condition of his bond. But had there been a court at which a sale could have been made still all the facts contained in the breaches may be true and the sheriff not be guilty of an omission of duty, in failing to sell the slaves and personal property. The law authorized him to re-deliver the property to the defendant in the execution and take from him a forthcoming delivery bond. If the sheriff did this he was not guilty of a breach of the condition of his bond. Courts will not presume against officers but in their favor, and hence it is a rule that every officer is presumed to have done his duty until the contrary is made to appear. The acts of commission or omission on the part of the sheriff should be so averred as clearly to show a positive failure of duty on his part, and a clear and palpable breach of the condition of his bond. In this respect, for the reasons already given we conceive that the breaches of the declaration under consideration are wholly insufficient.

The objection taken that the declaration does not show the date of the writs of execution is not well founded. That defect was amendable. The executions became a lien from the time they came into the sheriff's hands, and if there was no other objection it was his duty to have executed and returned them.

The second, third, fourth, fifth, seventh and eighth breaches are all insufficient. A venditioni exponas is the proper process to compel a sale upon an execution levied, and a second execution should not issue until it is seen whether the first levy will satisfy the judgment. *Hopkins vs. Chambers*, 7 *Wend. Rep.* 262. These breaches all show that levies had been made under the original exe-

cutions, and that the property had not been sold or otherwise disposed of and consequently an alias execution was not the proper process to authorize or compel the sheriff to make sale. The memorandums which appear to have been made by the clerk on the *alias fi. fa.* cannot be regarded as writs of *venditioni exponas*. They were merely intended as matters of information and not writs of process. There is no law giving to such memorandums or endorsements the force and effect of valid writs. The breaches under consideration are bad, as settled in the cases of *Lyon vs. Evans et al.* 1 *Ark.* 349 and *Phillips vs. Governor*, 2 *Ark. R.* 382, where it was held "that each breach must specially state the facts on which the right of those for whose use the suit is brought depends, with as much certainty and precision as is required in the counts of a declaration." Many of the essentials to constitute a good breach are omitted in these breaches, or other breaches are referred to as containing the facts which should be specifically averred in each.

The ninth breach is for this last reason also defective. Furthermore, although a sale made by the sheriff as is alleged was irregular, yet Trapnall & Cocke do not show themselves to have been in a situation to complain of the irregularity. This breach does not show that they were the judgment creditors, only by reference to other breaches in the declaration: they had no valid process in the hands of the sheriff and have no more right to complain than any other creditor. We think the declaration insufficient and affirm the judgment.
