STATE, USE OF GIBSON *vs.* SADLER ET AL.

To an action on a sheriff's bond for failing to return an execution, a plea that, *after* the institution of the suit, and *subsequent* to the *return day* of the execution, at the instance and request of the plaintiff, he returned it to a different county from the one to which it was returnable on its face, is no defence to the action, and bad on demurrer.

It is the duty of a sheriff to execute and return an execution according to its mandate, and if he fail to do so, the plaintiff in the execution thereby acquires a right of action against him and securities, upon his bond, which is not released or discharged by a return of the execution, at the request of the plaintiff, subsequently to the institution of the suit.

A plea which does not traverse any allegation in the declaration, nor confess and avoid the action by the introduction of new matter, is bad.

Thus, to an action against a sheriff for failing to levy and return an execution, a plea that the execution was not issued in conformity with the judgment, without showing in what respect it differs from the judgment, is bad on demurrer.

If an execution is regular upon its face, it is the duty of the sheriff to execute it, and it is no defence that it varied from the judgment, the variance being amendable.

To an action against a sheriff for failing to execute a *fi. fa.*, a plea denying the existence of such a judgment as the one upon which it is alleged in the declaration the execution issued, is a sufficient defence to the action, and good on demurrer.

A sheriff is not bound to execute a *fi. fa.* issued without any judgment, though, if it be regular upon its face, he will be protected in doing so.

A plea of *nul tiel record,* concluding to the *country,* instead of with a *verification* and prayer of judgment, is good on general demurrer, the conclusion of the plea being matter of form and not of substance.

Appeal from the circuit court of Yell county.

THIS was an action of debt on the official bond of the sheriff of Yell county, determined in the Yell circuit court, at the February term, 1844, before the Hon. R. C. S. BROWN, judge.

The suit was brought (25th August, 1842,) by Joseph Gibson, in the name of the State for his use, against T. P. Sadler, the sheriff and principal in the bond, and A. S. Heck *et al.,* his securities.

After setting out the bond, the declaration alleged, in substance, the following breach: That Gibson obtained a judgment in the circuit court of Scott county,, on the 31st day of March, 1840, against Reece and Clark, for $277.22 debt, $15.20 damages, and for costs. That on the 22nd May, 1841, he sued out a writ of *fieri facias* upon the judgment, directed to the sheriff of Yell county, commanding him to make of the goods and chattels, lands and tenements of Reece and Clark the amount of the judgment, and to return the execution to Scott court on the 27th day of October, 1841. That on the day of its issuance, it was delivered to Sadler as sheriff of Yell county for execution, and that he did not levy it upon the goods and chattels, lands and tenements of Reece and Clark, although they had sufficient goods and chattels in the county of Yell to have satisfied the execution, and that he made no return of the writ, &c., by reason of which the judgment remained unsatisfied, &c.

Sadler filed four pleas, in substance, as follows:

1st, "That after the said supposed writ of *fieri facias,* in the declaration specified, had been delivered to him, and before the return day thereof, to wit, on the *third* day of *October,* 1843, in, &c., he returned the same to the office of the clerk of the circuit court of said *county of Yell* at the instance and request of said Joseph Gibson, and this he is ready to verify, wherefore, &c.

2d, "That the said Reece and Clark did not have, nor did either of them have, any goods or chattels, lands or tenements within said county of Yell, at any time between the issuance of said writ of *fi. fa.* and the return day thereof, whereon to levy the same, or of which he could cause to be made the debt, damages, and costs specified in the writ, or any part thereof"—concluding to the country.

3d, "That the said writ of *fi. fa.* was not issued out of the office of said circuit court of Scott county, in conformity with a judgment rendered in that court, in manner and form as alleged in the declaration, and of this he *puts himself on the country.*"

4th, "That the said Joseph Gibson did not recover judgment against the said Reece and Clark in the circuit court of Scott county for the sum of $277.22 for his debt, $15.22 for his damages, and for his costs, in manner and form as alleged in the declaration, *and of this he puts himself upon the country.*"

Heck filed a separate plea, the same as Sadler's third.

The plaintiff replied to the second plea of Sadler, and demurred to all the other pleas; the court overruled the demurrer, and gave judgment for Sadler and Heck; the other defendants did not appear, and judgment went against them by default. The plaintiff appealed.

BATSON and BLACKBURN, for the appellant. The first plea of Sadler, if true, is no bar to the action, to wit: That on the 3d of October, 1843, he (Sadler) returned the writ to the clerk's office of the county of Yell, at the request of the plaintiff, which concludes with a verification. The suit was commenced before the alleged

request, and the request could not discharge, or release the cause of action.

The 3d plea is special *nul tiel record,* and concludes to the country, and the same plea as that pleaded by Heck; 1st, it admits as true, in the descriptive parts of the plea, what is denied in the negative part, and is not "certain to a common intent in general." See 1 *Chit. Pleadings,* 236, 237. 2d, The conclusion is wrong; a verification is necessary where the plea is a negative *nul tiel record.* 1 *Chit. Pl.* 537. 2 *Chit. Pl.* 603. *Lit. Ent.* 182, 404, 473.

The 4th plea of Sadler amounts to the general issue, and is therefore bad. *Com. Dig. Pleader,* (*E.* 13), *and* (*E.* 14). *Co. Lit.* 303, *b.* 3 *Mod.* 166.

The existence or truth of a record is not to be ascertained by a jury.

The 2d plea (of Sadler) to which there was an issue, admits what was denied by the 1st plea, and it is denied that both can stand good in the same case.

CUMMINS, for defendants. In many cases, a sheriff will not be justified in executing process placed in his hands, and he is bound at his peril to take notice of the law. For instance, if the court, out of which process issues, has no jurisdiction, the sheriff will not be justified in executing the writ. *Sewell's Law of Sheriffs,* 101. (*Vol.* 36, *Law Library.*) And where he cannot justify under a writ, he is not bound to execute it, *ib.* 101.

Where a process is void no action will lie against a sheriff for not executing it . 8 *Re.* 284.

An execution awarded upon a void judgment, is void, and a mere nullity. *Alhee vs. Ward,* 8 *Mass. Rep.* 79. It follows, of course, that an execution awarded upon no judgment at all, is void. This is the substance of the averments of Heck and Sadler's pleas: "That the execution did not issue in conformity with a judgment of the Scott circuit court." It is a mere informal plea of *nul tiel record.*

The objection that it amounts to the general issue, is matter only of special demurrer, at common law: and under our statute, is no cause of demurrer at all. *Chap.* 110, *Rev. Stat. sec.* 59, 60. *King vs. Johnson,* 6 *East.* 583. 1 *Saund. Rep.* 27, *n.* 6.

The objections to Sadler's 4th plea stand upon the same ground. The conclusion of the pleas may be informal, but this is a mere matter of form, and was rightly disregarded by the court.

OLDHAM, J., delivered the opinion of the court.

This was an action of debt, brought by Gibson, upon a sheriff's bond, against Sadler and his securities, for the failure of Sadler, as sheriff, to return an execution in favor of Gibson, which came to his hands. Sadler pleaded four several pleas: 1st, That, on the third day of October, 1843, he returned the execution to the office of the clerk of the circuit court of Yell county, at the instance and request of Gibson: 2d, That the defendants in the execution had no property in his county whereon to levy the execution: 3d, That the execution was not issued in conformity with a judgment &c., rendered in the circuit court of Scott county: and 4th, That Gibson did not recover judgment against Reece and Clark for the sum of two hundred and seventy-seven dollars and twenty-two cents for his debt, and fifteen dollars and twenty cents for his damages, and for his costs, &c., as alleged in the declaration. Heck filed a separate plea, the same as Sadler's third. The plaintiff demurred to all the pleas except Sadler's second plea, to which he replied. The demurrer was overruled and judgment given for the defendants, and the plaintiff appealed to this court.

The first plea is wholly insufficient. It alleges a return of the execution on the third day of October, 1843, to the clerk of the circuit court of Yell county, at the instance and request of Gibson. This suit was commenced in August, 1842, and was pending at the time, that the alleged return should have been made, the execution was issued from Scott county, May 22d, 1841, and was made returnable, upon its face, on the 27th October, 1841, and it was the duty of the sheriff to execute, and return it, to Scott county, according to the mandate of the writ, and having failed to do so, the plaintiff in the execution thereby acquired a right of action against him and his securities, upon his bond, which was not released or discharged by a return of the writ at the request of the plaintiff subsequently to the institution of the suit, to a county different

from the one to which it was made returnable upon its face. The duties of the sheriff in executing process, directed to him, are plain, simple, and positive, and by strictly observing and faithfully performing them, he is by law protected from all damage, but by refusing and neglecting to perform them, he becomes responsible to the injured party, to the amount of the damages sustained by him.

The third plea, which is the same as Heck's, is equally insufficient. It does not traverse any allegation whatever contained in the declaration; nor does it confess and avoid the action by the introduction of new matter. It does not show in what respect the execution failed to conform to the judgment. If the execution was regular upon its face, which is not questioned, it was the duty of the sheriff to have levied it, and it is no defence that it varied from the judgment: *Parmlee vs. Hitchcock,* 12 *Wend.* 96, the variance between the execution and the judgment being amendable. *Ten Eyck vs. Walker,* 4 *Wend.* 462. *Jackson vs. Anderson,* 4 *Wend.* 474. *Jackson ex dem. Hunter,* 4 *Wend.* 585.

The remaining question to be determined is, as to the sufficiency of Sadler's last plea; and that depends upon the fact whether the allegation in the declaration, traversed by the plea, is a material allegation. In 1 *Saund. Rep.* 38, the court held that it was necessary, in action of debt against a sheriff for an escape, for the plaintiff to set out his judgment, because if set out, the defendant might plead *nul tiel record* to the judgment; and the court further held that after the escape, and before the bringing of the action for the escape, if the judgment had been reversed, the action would have been gone. And further, if the execution had issued without any judgment, if regular upon its face, although the officer would have been protected in the execution of it, yet if he failed to execute it, or permitted an escape, the plaintiff could not bring an action, because there was no debt due to the plaintiff, nor duty to him. And it is equally necessary in this action. It is true that the plea is not in the technical form of a plea of *nul tiel record,* but it contains all the substantial requisites of such a plea, and denies, in the very language of the declaration, the existence of such a judgment as is alleged; nor does the plea conclude with a prayer of judgment,

but to the country. This, however, is matter of form, and not of substance. 2 *Saund.* 190, *n.* 5. We consider the plea substantially good, and an answer to the action. The judgment must therefore be affirmed.