

## ANTHONY &amp; BRODIE vs. SHANNON.

Before a final *decree* can be rendered, all the necessary parties must be before the court, or due notice given them either by service of summons, or by publication: and a decree *pro confesso* entered against those who fail to appear and answer. If a judgment has been satisfied, or an execution thereon irregularly issued, the party aggrieved may apply to the court or justice to set it aside, or the execution may be superseded by a court or judge possessing jurisdiction. The remedy being complete at law, the party cannot apply to a court of equity for relief.

*Appeal from the Chancery side of Crawford Circuit Court.*

The facts are stated by the Court.

TURNER, for appellants. The decision in favor of the appellee is erroneous, for the following reasons:

The seizure of property in execution is no satisfaction when the property does not remain in the possession of the officer, but is re-delivered to the defendant on his giving a delivery bond. 7 *Mass. Rep.* 506. 4 *Bibb's Rep.* 409. 2 *Ark. Rep.* 578.

The Constable's return does not show that any money was ever realized from the sale of property, and in the absence of an answer from the Constable, who is a party to the bill, and without a decree *pro con-*

*fesso* against him, the conclusion that money was realized from a sale of property, is wholly unauthorized.

The appellee, by entering into recognizance for the stay of execution, made himself a principal debtor of record, and is not entitled to the favorable consideration usually extended to a surety in courts of equity, where there has been laches on the part of the principal. *Rev. Stat.* 508, 509.

The injunction was irregular in this, that it commands the appellants to desist from all further proceedings on the judgment rendered by the justice against Lewis; thereby restraining the appellants, not only from proceeding against the appellee, but also from proceeding against Lewis; yet Lewis is not a party to the bill, and the appellee does not even ask that an injunction and restraining order be granted as to him. It was irregular to grant the injunction in the first instance as to Lewis, and of course irregular to make it perpetual.

It does not appear that this case was ever set for final hearing. It is the practice in Courts of Chancery, first to set a case for final hearing, and this should appear of record, and then to try or hear the case. It is conceived that a valid decree cannot be rendered until a case is first set for final hearing.

It was erroneous to render a final decree against part of the defendants, before a decree *pro confesso*, as to every party served with process, who had not answered. Anthony, Harvey and Parker are all made defendants to the bill, neither of whom responded thereto, and against neither of whom was a decree taken *pro confesso*. 3 *Porter* 10. 3 *Munf.* 83.

WILCOX, *contra*.

OLDHAM, J. This was a bill for injunction filed in the Chancery side of the Circuit Court of Crawford county, by William G. Shannon, against Anthony & Brodie, John J. Harvey, and Wm. H. Parker.

The bill alleges in substance, that on the 24th day of April, 1841, Anthony & Brodie recovered judgment against Peyton Lewis for \$72.70 debt, damages, and costs, before a justice of the peace of

Crawford county; that Lewis took a stay upon the judgment for six months, giving complainant as security in the stay bond; that after the expiration of the stay, the justice issued execution against Lewis and complainant, to satisfy which, complainant designated a large amount of property, upon which the Constable levied. Lewis claimed the benefit of the appraisement act of 1840. The property was appraised at \$125, and failing to bring two-thirds of its appraised value, was reserved from sale by the Constable, and re-delivered to Lewis, upon his executing a bond with security for its delivery to the Constable, after the expiration of the stay under the appraisement act; that Anthony & Brodie failed to prosecute their lien upon said property, at the expiration of the stay, and still continue to fail. That upon the 5th day of July, 1845, Anthony and Brodie sued out an execution, and placed it in the hands of the defendant Parker, as Constable, requiring him to execute property to satisfy it, and that Parker had levied upon property of complainant, and offered it for sale for that purpose, when in law and in good conscience he should have proceeded against the defendant, Harvey, former Constable, or against Lewis and his security in the delivery bond. A transcript of the proceedings before the justice, &c. was exhibited. The bill prayed an injunction, &c. and for general relief. The court granted a temporary injunction against the judgment before the justice and a restraining order.

A subpoena was issued against the defendants, and the sheriff returned a personal service on Harvey and Parker, and a service upon Anthony and Brodie, by delivering true copies to Jesse Turner, their attorney. Brodie alone answered the bill, and upon the bill, exhibits, and Brodie's answer, the court rendered a final decree, perpetuating the injunction. From the decree, Anthony and Brodie appealed to this court.

The decree is erroneous, and must be reversed for several reasons.

1st. There was no notice actual or constructive to Anthony, no appearance by him, and no decree, *pro confesso*, against Parker and Harvey, who were served with notice, but had failed to answer. Before the court could have rendered a final decree in the cause, all the necessary parties should have been before the court, either by service of summons in due form, or by publication, and a decree *pro*

*confesso* should have first been taken against those who failed to answer. But a decree making an injunction perpetual, was pronounced by the court, in the absence of Anthony, one of the plaintiffs in the judgment enjoined, who had received no notice, either by subpoena, legally served, or by publication of the pendency of the bill against him.

2. The bill prays the court to enjoin the defendants from collecting or recovering from the complainant, selling or disposing of his property for the purpose of satisfying said judgment; but the decree perpetually enjoins the collection of the judgment, not only against the complainant, Shannon, but to refrain from all proceedings whatever upon the judgment.

3d. There is no equity in the bill. If the judgment was satisfied, or the execution improperly issued against Shannon, he had a right to apply to the justice who issued it, to set it aside, the justice possessing power to set the same aside; or upon motion, properly sustained, he could have had the execution superseded by a court or judge having jurisdiction. In that case his remedy was complete at law, and he had no right to apply to equity for relief. *Lansing vs. Eddy*, 1 *John. Ch. R.* 49. We do not, however, pretend to say that the execution improvidently issued against the complainant. For these errors, the decree must be reversed, and the cause remanded with directions, that Anthony be considered in court in consequence of having joined in the prosecution of the appeal, and that he have leave to plead, answer, or demur to the bill.