ANDERSON *vs.* FOWLER

A *fi. fa.* upon a judgment of the Probate Court becomes a general lien upon all the property of defendant within the county, real and personal, from the time it goes into the sheriff's hands, to be executed.

But when the sheriff levies upon a sufficiency of defendant's estate to satisfy the execution, the general lien is merged into a special lien upon the specific estate seized.

The balance is relieved from the encumbrance; and no further levy can be made by the same writ, nor can another *fi. fa.* legally issue whilst the levy remains undisposed of.

A levy is presumed to be sufficient to satisfy the judgment.

These principles apply to a levy upon real as well as personal property.

Motion to set aside and quash a Supersedeas.

This was a motion filed in this court, at the January term, 1847, to set aside and quash a supersedeas which had been previously granted to an execution in the hands of the sheriff of Pulaski county, by Chief Justice Johnson, in vacation. The facts appear in the opinion of the court.

WATKINS & CURRAN, for the motion. The supersedeas was granted in this case upon the erroneous supposition that a levy upon land or personal property is a satisfaction. No principle is clearer, both upon reason and authority, than that a levy upon real estate is not a satisfaction. *Shepherd* v. *Rowe,* 14 *Wend. Rep.* 160. *Reynolds* v. *ex'r of Rodgers,* 5 *Ohio Rep.* 173. *Hogshead* v. *Caruther's ex'r,* 5 *Yerger Rep.* 227. *Ladd* v. *Blunt,* 4 *Mass. Rep.* 403. 1 *Penn. Rep.* 426. *Patterson* v. *Swan,* 9 *Serg. & Rawle* 16.

In *Shepherd* v. *Rowe,* the court said that a levy upon sufficient personal property was a satisfaction; and that the reason assigned was that "by means of the levy the debtor was deprived of the possession of his property. It is not the case of a levy upon real estate. The debtor, notwithstanding the levy, holds the title and possession, and is in the enjoyment of the land. There is no satisfaction until sale."

In *Walker* v. *Bradley,* 2 *Ark. Rep.* 578, this court said, "The true rule is, that where a levy under execution is made upon personal property of sufficient value to satisfy the execution, and the property so seized does not again come to the possession of the debtor, the levy is a satisfaction as to that debtor and him only. But if the debtor again receive the goods, there is no satisfaction.

The reason and only reason of the rule, that a levy upon personal property is a satisfaction, is thus shown to be that the debtor is deprived of the use and possession of his property. The reason, therefore, not being applicable, of course the rule itself could not possibly apply to real estate. That our Statute requires real estate should be levied upon does not change the rule, for the reason, that the debtor

is not thereby dispossessed or deprived of his property. If a levy on land is a satisfaction, the lien of a judgment would have the same effect. Land is as much *in custodia legis,* by virtue of the lien of the judgment, as by the levy. The reason why a levy upon goods is a satisfaction, is because the debtor is deprived of the possession of property sufficient to pay the debt, but such is not and cannot be the effect of a levy upon lands.

Every case, except such as have since been overruled, holding a levy on land to be a satisfaction, will be found to be in those States where a judgment is not *per se* a lien, or where the ancient common law prevails, so that upon execution the lands of the debtor are extended and set apart to the creditor—the sheriff takes actual possession by the act of levying, ousts the debtor and gives possession to the creditor.

Arnold v. *Fuller's heirs* (*Ohio Cond. Rep.* 202) was decided on other points, but the dictum, without reason, that a levy on land is a satisfaction is based upon *Clerk* v. *Withers*—the leading case in relation to a levy on goods. *Cass* v. *Adams,* (3 *Hamm. Ohio Rep.* 223), was a levy on goods, and the dictum in that case in relation to the effect of a levy on land was subsequently ridiculed, repudiated and expressly denied by the court, in *Reynolds* v. *Rodgers' ex'r* (5 *Hamm. Ohio Rep.* 173), which last case has ever since been adhered to in that State. A judgment is not *per se* a lien either in Kentucky or Mississippi, 4 *Kent's Com.* 435, and in *Hopkins* v. *Chambers,* (7 *Mon. Rep.* 262), the court merely state the general proposition without assigning any reason, or designing to cite any authority to sustain it.

Why should we suppose that the case of *Shepherd* v. *Rowe* was influenced by the Statute of New York authorizing the creditor to redeem, when the Statute is not only referred to, but a reason entirely different and independent was assigned by the court for their decision? The case of *Green* v. *Burke,* 23 *Wend.* 490, does not overrule the case in 14 *Wend.* 160. That was a levy on goods, and so far from overruling the latter case, the judge cites it with approbation, and re-affirms the case establishing a distinction between a levy on goods and on land.

The Indiana cases are all based upon the original cases of *Lasselle* v. *Moore,* 1 *Blackf. Rep.* 226, which was a levy on goods, and decided upon *Clerk* v. *Withers.* This is the only State in the Union where the rule has been deliberately established and adhered to.

All the cases show that a levy even upon goods, to be a satisfaction, must be of sufficient value. How will the court, in this case, ascertain that the land levied upon is sufficient? No value is placed upon them by the sheriff in his return; but the case would not be changed even if he had done so; because the value of the goods and extent of the satisfaction is ascertained only by the amount for which they are afterwards sold. 7 *Law Lib.* 144, *and cases there cited.* We are not aware of any rule of law authorizing a court, in the absence of evidence, to presume that every levy made by a sheriff is sufficient, or that it is of the property of the debtor. No person, other than the party whose goods are taken, can avail himself of the defence. 7 *Law. Lib.* 138.

After all that has been said, we are at this day destitute of any adjudication that the levy alone, even on goods, absolutely satisfies or extinguishes a judgment, as a payment of the money would do; the seizure is, *per se,* neither payment nor satisfaction, but only *sub modo.* Yet from *Clerk* v. *Withers* come a progeny of *dicta* couched in the same general language. Judges have not been sufficiently guarded in the statement of the rule. In the later cases, however, they speak in more qualified terms; such as, that the goods must be of sufficient value to satisfy the debt; and again, if the goods come to the possession of the debtor, or he eloigne them, the levy is not a satisfaction. In *Green* v. *Burke,* COWAN, J., in remarking upon this satisfaction by levy, says, that it behooves courts to look into the rule now urged upon us as working, by a kind of magic, to cut a man off from his debt without the show or pretence of satisfaction—sometimes goods are so covered up by previous liens that it does no good to sell them, for none will buy.

The reason for the distinction between a levy on goods and land is so obvious that it seems needless to cite authority. An unreasonable rule should never be adhered to, unless fortified by the weight of

authority—whereas the position urged to sustain this supersedeas is not only unreasonable, but is borne down by the weight of authority —the decision of all respectable courts being against it.

FOWLER, contra. It is a well settled principle of law that a levy on personal property, sufficient to satisfy the judgment (and this sufficiency will be presumed unless the contrary is shown), is deemed a satisfaction of the judgment, whilst the levy is undisposed of, and no other fieri facias can legally be issued on such judgment, whilst the levy is in force. 4 *Smedes & Marsh. Rep.* 133, *Walker* v. *McDowell.* 1 *Wash. (Va.) Rep.* 95, *Taylor* v. *Dundass.* 1 *Salk. Rep.* 323., *Clerk* v. *Withers.* 4 *Mass. Rep.* 402, *Ladd* v. *Blunt.* 2 *Pick. Rep.* 586, *Bailey* v. *French.* 2 *Saund. Rep.* 47, *a, in note* 1, *and* 344, 345, *Mildmay* v. *Smith et al.* 15 *Mass. Rep.* 137, *McClellan* v. *Whitney.* 1 *Blackf. Rep.* 227, *Lasselle* v. *Moore.* 1 *How. (Miss.) Rep.* 42, *Burney* v. *Boyett.* 7 *Cowen's Rep.* 21, *Johnson* v. *Bower.* 3 *How. (Miss.) Rep.* 60, *Witherspoon* v. *Spring.* 3 *Hammond's Ohio Rep.* 223, *Carr* v. *Adams et al.* 12 *Johns. Rep.* 207, *Hoyt* v. *Hudson.* 4 *Ark. Rep.* 233, 235, *Cummins* v. *Webb. Mart. & Yerger's Rep.* 373, *Overton* v. *Perkins et al.*

Is there any valid reason why a levy upon lands should not have the same effect? And even if not, as in case of personal estates, a quasi satisfaction, does it not attach specifically as a lien upon the lands levied on, which, justice, law, and common right require to be disposed of before a party shall be harrassed with an additional levy on other property? *Mart. & Yerger R.* 374.

We assume the response in the affirmative, and refer to the following adjudicated cases to sustain it:

1. A levy and condemnation, under an execution, keep alive a judgment, and preserve its lien without a scire facias. *Gilpins C. C. Rep.* 54, *United States* v. *Mechanics Bank. Martin & Yerger, Tennessee Rep.* 374, *Overton* v. *Perkins et al.*

2. There is a difference between the general lien of the judgment on all the debtor's lands, and a special and fixed lien by virtue of a

levy, which levy is the inception of a right to satisfaction, that cannot be defeated, save by the acts of the creditor himself. 8 *Yerger Rep.* 460, *Miller* v. *Estill. Mart. & Yerg. Rep.* 374.

3. Even at common law, where plaintiff sues out an elegit against the goods and chattels and moiety of the lands of the defendant, and seizes but an acre of the land in execution, yet it is a satisfaction of the debt. 2 *Bac. Abr.* 353, 354, *title "Execution," D.*

4. In Mississippi, where a judgment is a lien upon *slaves* (as it is here on lands), yet a levy there on slaves fixing specifically the lien, and, undisposed of, is decided to be a satisfaction of the judgment. 4 *Smedes & Marsh. Rep.* 133, *Walker* v. *McDowell.*

5. Where a fieri facias has been levied on land and returned without a sale, or without a release of the levy, no other fieri facias can issue on the judgment, until that levy is disposed of. 7 *Monroe's Rep.* 262, *Hopkins* v. *Chambers.* 15 *Mass. Rep.* 137, *McClellan* v. *Whitney.* 1 *Blackford's Rep.* 227, *Lasselle* v. *Moore.* 1 *Hammond's Ohio Rep.* 458, *Arnold* v. *Fuller's heirs.* 3 *Hammond's Ohio Rep.* 223, *Cass* v. *Adams et al.* 7 *Blackf. Rep.* 30, *Miller* v. *Ashton. Ib.* 350, *Macey* v. *Hollingsworth.*

6th. A mere levy on land, on common law principles, preserves the lien upon that levied on, but no other, without a *scire facias* to revive. 1 *Baldw. Cir. C. Rep.* 276, *in note a. Mart. & Yerg. Rep.* 374. 8 *Sergt. & Rawle Rep.* 378, *Pennock et al.* v. *Hart et al.* 13 *Serg. & Rawle Rep.* 146, *The Commonwealth, &c.* v. *McKisson.*

7. An execution is an entire thing, and when it is once commenced, it must be ended. *Mart. & Yerger's Rep.* 373, *Overton* v. *Perkins et al.* 1 *Burr. Rep,* 34, *Cooper et al.* v. *Chitty et al.* 1 *Salk. Rep.* 322, *Clerk* v. *Withers.* 2 *Binn. Rep.* 230, *Young* v. *Taylor.*

At common law, when a plaintiff had execution of the lands of the defendant, he could not have any new execution, for the execution of the lands was valuable and accounted in law for a satisfaction. 3 *Co. Rep. part* 5, *p.* 87. *Blumfield's case.* And there is a good difference between execution not valuable (as of the defendant's body), and execution valuable, (as of land.) 3 *Co. Rep. same case.*

The general lien of the judgment on land is only consummated by levy on the land itself. 1 *Pet. Rep.* 442, 443, *Conard* v. *The Atlantic Ins. Co.*

A judgment in Pennsylvania is a general lien, yet it is there decided that the lien of the execution levied on land, is specific. 13 *Serg. & R. Rep.* 146, *The Commonwealth, &c.* v. *McKisson et al.* And that after execution has been levied on lands, a *venditioni exponas* may issue for selling them, though all the parties to the suit be dead, and without calling in their representatives. 13 *Serg. & R. Rep.* 147, *same case.*

And that it is irregular for the plaintiff, after he has taken his debtor in execution on a *ca. sa* and before he is finally discharged therefrom, to sue out a *fieri facias.* 2 *Binney's Rep.* 231, *Young v. Taylor.*

All the authorities then, or at any rate, an immense preponderance of them, show that a levy on land is an essential requisite and preliminary to a sale; and if so, it must operate as a specific lien upon the land seized, which should be disposed of before the party can be allowed to seize other property, and encumber it with a lien. The levy must be something; if not, why make it at all? It would be an idle act. And our statutes throughout, pre-suppose that a levy must be made on land, and an actual seizure under the execution. *Rev. Stat. p.* 377, *sec.* 23; 378, *sec.* 28; 379, *sec.* 34, 35; 381, *sec.* 47, 48; 383, *sec.* 59, 60. And the order or judgment of the Probate Court, is not a lien upon the land. The lien specifically begins with the levy.

CONWAY B, J. In 1836, Spencer Anderson obtained an allowance in the Probate Court, against Absalom Fowler, as administrator of Crittenden, and in 1840, an order of payment. Fowler failed to obey the order, and in 1843 a writ of fieri facias issued against him properly for the amount he was ordered to pay as administrator. By direction of Anderson's attorney, the sheriff levied the fi. fa. on certain lands of Fowler, and afterwards, by order of said attorney, returned the writ without selling the lands. In 1846, another fieri facias issued on the same order of payment, and was levied on certain per-

sonal estate of Fowler. He then made application to the Chief Justice for a supersedeas of this second fi. fa. It was awarded, and Anderson now moves that it be recalled and set aside.

The statute gives judgments and decrees of the Supreme and Circuit Courts liens on lands, but no such lien is given to orders, judgments or decrees of the Probate Court. A writ of fieri facias, however, issued on such order, judgment or decree, has the same force as a lien, as if issued on a judgment or decree of the Supreme or Circuit Court, and consequently from its delivery to the officer to be executed, a general lien is cast on all of defendant's real and personal estate in the officer's bailiwick. *Rev. Stat.* 372-4, *and* 378, *and* 477. But when the officer makes a levy on a sufficiency of defendant's estate to satisfy the execution, the general lien is merged or transmuted into a special lien on the specific estate seized. The balance is entirely relieved from the incumbrance, and no farther levy can be made by virtue of the same writ; nor can another fieri facias legally issue whilst the levy remains undisposed of. A levy is presumed to be a sufficient one, and it would be unjust and oppressive to authorize more to be taken when there is already enough in custody of the law to satisfy the judgment. *McIntosh* v. *Chew,* 1 *Blackford's R.* 289. *Miller* v. *Ashton,* 7 *Blackford's R.* 29. *McGehe* v. *Handley et al.,* 5 *How. Miss. R.* 625; and *Green* v. *Burke,* 23 *Wen. R.* 501.

When real estate is levied on it is thereby as completely in custody of the law as personal estate would be. It is by virtue of the levy that the law takes hold of the estate. The officer's dispossessing the defendant of it and carrying it away, does not strengthen the grasp of the law upon it. If left in defendant's possession the levy would be just as binding; the manual or personal possession of the officer giving no additional force or efficacy. But the transitory character of personal property makes it expedient that the officer, when he levies on it, should take it into his possession. This he does for safety, and surely having it forthcoming on the day of sale.

Land is left in the posssession of the defendant for convenience, and because it cannot be eloigned or removed from the dominion of the law. If the defendant sell it, the purchaser takes it subject to the le-

vy. It is fully as safe and as well preserved in defendant's possession as if in the actual keeping of the officer, and his interest will as effectly pass when the officer makes sale. The levy gives but a lien on the estate seized for the satisfaction of the execution. It does not absolutely divest the property of the defendant either in personal or real estate; though, by virtue of it, both are placed in custody of the law, yet in neither case is the property absolutely divested until the sale. Then defendant's interest, either in land or personalty, passes to the purchaser. The personalty being in possession of the officer, is delivered by him on consummation of the purchase. The real estate being kept in possession of defendant—if he refuse to surrender it, possession may be summarily obtained by an order of the Circuit Court for that purpose. *Rev. Stat,* 385, *sec.* 68.

That production of personal property on the day of sale is the object of the officer's taking it in possession when levied on, is proven by the statutory provision allowing the defendant to retain its possession until the day of sale, on giving bond with security for its delivery to the officer at the time and place of sale. *Rev. Stat.* 386, *sec.* 37. In New York, it seems, they have a statute by which the defendant has fifteen months after sale of his real estate for its redemption. Such a provision might make a difference in the effect of a levy on real and personal estate. The rule there might well be that a levy on real estate was not a satisfaction of the judgment or preclusion of another fi. fa. Indeed under their statute it might not be necessary to levy on real estate at all, when it was bound by the judgment, upon which process of execution issued. In such case, however, execution is not to be considered a general execution against the whole estate of defendant, but simply a process to enforce the lien of the judgment, and therefore no levy would be necessary. A simple designation and description of the lands intended to be sold to satisfy the lien would be sufficient. There is a marked difference between a general execution against a man's whole estate and merely a process to enforce the lien of the judgment. If plaintiff take out a general execution against all of defendant's estate (as he has the right to do) he cannot be considered as proceeding specifically for the enforcement of his judgment lien, but for the time as having waived

or postponed it and elected to seek satisfaction of his judgment as though he had no lien, or as if the real estate of defendant was insufficient for its satisfaction. In such case the land on which the judgment is a lien is just as subject to the execution as the personalty, and if a portion of it be levied on, the residue is not thereby released from the lien of the judgment, but is from the lien of the execution, as is all of defendant's other estate, and it is by virtue and authority of the levy that the officer sells and conveys the estate to the purchaser and not by virtue of the judgment lien. If the levy be made on personal estate it is pro tem. a waiver or suspension of the judgment lien, if not an extinguishment of the judgment. *Lawrence, ex parte,* 4 *Cowen* 417, *and cases there cited.*

All the books agree that when sufficient personal property to satisfy the execution is seized by virtue of the fi. fa., it is a satisfaction, at least, until the levy is legally disposed of. If a sale be made and there proves a deficit of proceeds, it is but a satisfaction *pro tanto* and another *fieri facias* may issue for the residue of the judgment. There is some confliction in the cases, however, as it respects the legal effects and consequences of a levy on real estate—some drawing a distinction between such levies and those on personal estate, on the ground that by a levy on personalty the debtor is deprived of his property and the debt satisfied, which is said not to be the effect of a levy on land. These are the reasons given in the pointed case of *Shepard* v. *Rowe,* 14 *Wend. R.* 260, to which learned counsel have referred us. But it is impossible for us to know how far the court were influenced in that case by the peculiar statute before referred to. However, that decision was given in 1835, and in 1840, the same court, after reviewing all the cases, in effect overruled it. The court say "a levy on land is more than a levy on goods, for the lien of the judgment conspires with that of the execution. In neither case is the debtor's property absolutely divested till a sale; but in both it is partially displaced, though the sheriff acquire no interest in the land." Again they say "a levy may operate as a satisfaction and must be fairly tried, but if it fail in whole or in part, without any fault of plaintiff, he may go to his farther execution. He must fairly exhaust the first; and while that is going on, he can neither sue on the judg-

ment nor have another fi fa., nor a casa., nor can he redeem lands sold on another judgment. *Green* v. *Burke,* 23 *Wen. R.* 490.

And a decided majority of the cases place levies on the same footing, whether made upon real or personal estate. The levy of an execution on goods or land is a satisfaction whilst the levy is in force and undisposed of. *Arnold* v. *Fuller's heirs,* 1, 2, 3 and 4 of Ohio Condensed Reports 202, and *Cass* v. *Adams et al. same,* 545. If the plaintiff levy execution on lands, he elects to take that specific property as a pledge for the satisfaction of his whole debt, and while held for that purpose it is for the time presumed to be a satisfaction, and plaintiff having elected that remedy, is barred from any other until that which he has chosen is clearly and legally shown to be insufficient. *McIntosh* v. *Chew,* 1 *Blackford's Rep.* 289, and the cases there cited. When an execution is levied on land, no other execution can regularly issue to take other estate of defendant's whilst the land seized under the first remains undisposed of and not released from the execution. *Hopkins* v. *Chambers,* 7 *Mon. R.* 262. Where a fieri facias is levied on land, a second writ of the same character cannot issue on the same judgment until the property levied on is disposed of, until it clearly appear that the property will not pay the judgment. *Macy* v. *Hollingsworth,* 7 *Blackford's R.* 349. The motion is refused.

OLDHAM, J., dissented.