DIXON *vs.* WATKINS ET AL.

It is well settled that where a party is sued for an act done under color of process, if the process be void, the action should be trespass *vi et armis;* if voidable, trespass on the case.

An officer may justify under final process, regular upon its face, issued from a court having jurisdiction of the subject matter without showing the judgment on which it is founded, but the plaintiff in the process, or a stranger, must show a regular judgment.

As to the distinction between *void* and *voidable* process, and authorities on that subject reviewed.

An execution issued upon a judgment of the circuit court, from which an appeal has been taken to this court, and recognizance entered into to stay execution, is *voidable,* and may be superseded, but is not absolutely *void.*

Appeal from the Pulaski Circuit Court.

This was an action of trespass *vi et armis* brought by Wiley Dixon against George C. Watkins, James M. Curran, Ebenezer Cummins and Gordon N. Peay, and determined in the Pulaski circuit court in June, 1846, before E. H. ENGLISH, as special judge.

The declaration alleged that the defendants, on the 5th of March, 1846, with force and arms, seized, took and led away a negro man slave named *Jack,* the property of plaintiff, and converted and disposed of said slave to their own use, &c.

Defendants Watkins, Curran and Cummins filed three joint pleas, first, not guilty, second and third, special pleas of justification, in substance the same. These pleas allege, that in a certain action of replevin, before then pending in the circuit court of Pulaski county, wherein said Dixon was plaintiff and Thatcher's heirs were defendants, for the recovery of said slave *Jack,* the bond given by Dixon to the sheriff to obtain the execution of the writ of replevin having been adjudged by said court insufficient, and Dixon having failed to comply with a rule requiring him to file a sufficient bond, it was for that reason (on the 15th January, 1845,) adjudged by the court that

said action of replevin be discontinued according to the statute, &c., and that defendants in said action should have a return of said slave theretofore replevied by said plaintiff, and that a writ of *retorno habendo* should issue forthwith for that purpose: that on the 25th February, 1846, the said judgment being in full force and unexecuted, said Watkins, Curran and Cummins, being the attorneys of record of the defendants in said replevin suit, as such attorneys, caused to be issued out of the office of the clerk of said court a writ of *retorno habendo,* to the sheriff of Pulaski county, on said judgment, commanding him to cause said slave, *Jack,* to be returned to the defendants in said action of replevin; that they the said Watkins, Curran and Cummins, as such attorneys, delivered said writ to said sheriff, before the return day thereof, &c., and by virtue thereof said sheriff delivered said slave to said defendants in said replevin suit, which were said supposed trespasses complained of by plaintiff, &c.

Defendant Peay filed three pleas also, the first, not guilty, and the other two, pleas of justification, the same as those filed by the other defendants, except that he alleged that he issued said writ of *retorno habendo* as clerk of said circuit court, by the direction of the other defendants, who were the attorneys in the said replevin suit.

To the two joint pleas of justification filed by Watkins, Curran and Cummins, and to the two separate pleas of justification filed by Peay, Dixon's counsel filed one replication, alleging, in substance, that he ought not to be precluded, &c., because in said judgment of discontinuance and for return of the said slave, it was also adjudged that the defendants in said replevin suit should recover against Dixon their damages sustained, and a writ of inquiry awarded to assess them; that Dixon at the time excepted to such judgment of discontinuance; that the entire judgment was indivisible and was interlocutory only; that afterwards, at the same term, such damages were assessed by a jury at $201, and final judgment rendered, from which judgment Dixon appealed, and having entered into recognizance according to law, with sufficient security, the execution

of that judgment was thereby, in all respects, stayed and suspended; and that the same recognizance was still in full force, and the execution of such judgment still stayed thereby; and therefore the said Peay as clerk, and the other defendants, as attorneys, issued, and caused to be issued, &c., said writ of *retorno habendo* in their own wrong, &c.

To this replication defendants demurred, and assigned for causes of demurrer:

1st, That as there was no replevin bond in said replevin suit, the said appeal and recognizance did not stay the issuance or execution of the said writ *de retorno habendo.*

2d, If they did, the writ was not void, but merely voidable, consequently *case* and not trespass was the proper action.

3d, That the recognizance mentioned in said replication, was not such as, in law, would restrain the issuance of an execution for a return of the slave.

4th, There is no provision of law authorizing the court to take a recognizance for staying execution for a return of property in replevin, nor will an ordinary recognizance do so.

5th, The replication does not set forth any such recognizance as required by law to stay execution.

6th, That in replevin a recognizance and appeal only stays execution for damages and costs.

The court sustained the demurrer, the plaintiff refused to answer over, and final judgment was rendered for defendants, from which plaintiff appealed.

FOWLER, for the appellant. The ground assumed by the defendants that there was no replevin bond in the suit, and therefore the appeal, recognizance, &c., did not stay or suspend the issuing of the writ of *retorno habendo* must surely be erroneous; because—

1st, Because the very gist of the judgment appealed from is that the court below adjudged the replevin bond bad—that is the foundation of the whole error complained of.

2d, The statute authorizing appeals and the stay of execution

thereon, upon entering into recognizance, applies to and covers expressly every civil case, and replevin is surely a civil case. *Rev. Stat. p.* 638, *sec.* 141 *et seq.*

3d, The statute is express, that upon entering into recognizance, as was done in this case, and on the court making an order allowing the appeal, "such allowance thereof shall stay the execution," &c. *Rev. Stat. p.* 638, *sec.* 143.

4th, The writ of retorno habendo is embraced in the term "execution" used in the statute above referred to. *Rev. Stat. p.* 638, 639, *p.* 665, *sec.* 40 *et seq.*

5th, On a judgment in replevin "the execution to be issued shall be for the damages, costs, &c., and also to replevy the goods," &c., where it passes against the defendant, &c. *Rev. Stat. p.* 665, *secs.* 40, 41.

6th, On judgment against the plaintiff, the writ of return is by the statute called an execution. *Rev. Stat. p.* 667, *sec.* 51.

7th, In replevin, the *retorno habendo* is the common law writ of execution. 14 *Petersdorf C. L.* 280, 3 *Bl. Com. ch.* 26, *p.* 413, title *Execution.*

8th, Execution is obtaining actual possession of the thing recovered by the judgment, and is called the life of the law. 2 *Bac. Abr.* 328, title *Execution A.* 9 *Pet. Rep.* 28, *U. States vs. Nourse.*

9th, An *execution* is the end of the law; it gives the party the fruits of his judgment, and a *distress warrant,* under the act of Congress is a most efficient *execution.* 9 *Pet. Rep.* 28, *U. S. vs. Nourse.*

And the assumed ground in the demurrer, that the recognizance was not sufficient in law to prevent the issuing of the writ of retorno, &c., could only be made effectual, if true, by rejoinder, as the replication avers a sufficient recognizance and stay of execution, &c. And it must be taken as sufficient as the court so received it, until its order is set aside. And the position that in replevin, the recognizance, allowance of the appeal, &c., stays only the execution for the damages and costs,

and not the issuing of the writ of retorno habendo, will not bear the test of legal scrutiny: because

1st, As we have shown, the action of replevin is not an exception to the general rule concerning appeals, but is embraced in it; the retorno habendo is an execution; and on recognizance and allowance of the appeal, not only the simple process of execution is stayed, but the execution of the judgment itself, in any and every form whatever, is stayed. *Rev. Stat. p.* 638, *sec.* 141, 142, 143.

2d, The award of the return of the property is a part of the judgment, which is an entire thing; and the judgment being stayed, the return must necessarily be stayed with it.

3d, The statute directs that where the plaintiff does not file the new bond, judgment of discontinuance shall be rendered against him, and such judgment as the nature of the case may require, in order to restore the property and to compensate defendant for damages. *Rev. Stat.* 663, *sec.* 26.

4th, On such discontinuance, the judgment for the defendant shall be that he have return of the goods, &c., and also that he recover the damages, &c., which damages shall be assessed by a writ of enquiry as in other cases. *Rev. Stat. p.* 666, *sec.* 43 *et seq.*

5th, These statutes, as well as every principle of law, settle the fact that the judgment is an entirety and the award of a return a part of it: and that the interlocutory and final judgment are one and the same judgment, and that neither can be effectual without the other. And that the allowance of the appeal necessarily suspends the whole.

6th, In replevin a judgment de retorno habendo and an order for a writ of inquiry to assess damages is not a final judgment. 4 *Arkansas Rep.* 591, *Bailey vs. Ralph.*

Therefore the judgment is not ready for execution until the damages are assessed and judgment made final; and the appeal necessarily stays the whole proceeding.

Again, the defendants insist by their demurrer, that it is shown by the pleas and replication that the action was misconceived;

and instead of trespass should have been case, because, as alleged, the process was not void, but only voidable. The following principles, as tests, it is believed, show conclusively the unstable foundation of this pillar of the defence:

1st, Trespass lies for an injury done with violence, either actual or constructive. *Steph. Pl.* 15. 1 *Chit. Pl.* 122, 123.

2d, The law will imply violence, though none is used, where the injury is direct and immediate. *Steph. Pl.* 399. *Marsh.* 186, *Tyson vs. Ewing.*

3d, An implied trespass, though wrongful in law, may be peaceful. *Steph. Pl.* 15.

4th, All persons who direct or assist are trespassers, though not benefited by the act. 1 *Ch. Pl.* 67. 2 *Saund. Pl. & Ev.* 863.

5th, And where several are concerned, it is not material whether they assent to the trespass, before or after it was committed. *Steph. Pl.* 15. 1 *Salk. Rep.* 409. 2 *Cowp. Rep.* 478, *Badkin vs. Powell.*

6th, Where the plaintiff in an execution, or a stranger requests a wrongful levy on goods, &c., even he who so requests is a trespasser. 1 *Salk. Rep.* 409, *Britton vs. Cole.* 2 *Saund. Pl. & Ev.* 516.

7th, A plaintiff or a stranger cannot justify for an alleged wrong done under an execution, without showing a judgment as well as an execution, because the judgment might be reversed, and it would be at their peril, if they take out execution afterwards. 1 *Salk. Rep.* 409, *Britton vs. Cole.* 2 *Saund. Pl. & Ev.* 516, 792. 1 *N. Car. Rep.* 340, *Cryer & Moore ads. Weaver.*

Where the judgment is stayed by appeal, is not the reason the same, and the peril the same? And does it not apply more forcibly where the pleadings admit that they sued out the execution unlawfully, on a suspended judgment?

8th, If the injury be forcible and occasioned immediately by the act of the defendant, trespass is the proper remedy; but if it is not in legal contemplation forcible, or not direct and immediate on the act done,, but only a consequence of the act, case is proper. 1 *Ch. Pl.* 122, 125, 133.

9th, The degree of violence is not material in order to sustain trespass: even a log put down on a man's foot, in the most quiet way, is a trespass. 1 *Ch. Pl.* 124.

10th, Chitty lays down the rule also, that where the injury done is under regular process, as in the case of a malicious arrest, or malicious prosecution, though it were immediate and forcible, the remedy should be case. 1 *Ch. Pl.* 129, 136, 169. (In this, however, he is not sustained in the cases to which he refers.)

11th, And that where the process or proceeding were irregular, the remedy is trespass. 1 *Ch. Pl.* 137. 2 *Term Rep.* 225, 231, *Morgan vs. Hughes.* 2 *Wils. Rep.* 385, *Perkins vs. Proctor.* 1 *N. Car. Rep.* 340, *Weaver vs. Cryer.*

12th, In case of an error by a ministerial officer of a court, (as the clerk in this case,) trespass is the proper remedy, if the injury is one of force and immediate. 1 *Ch. Pl.* 183. 2 *Saund. Pl. & Ev.* 691.

13th, And where the court has jurisdiction (as the court in this case had before appeal, but not afterwards,) but the proceeding is irregular or void, trespass is the proper form of action against the plaintiff's attorney as well as the plaintiff. 1 *Ch. Pl.* 184.

14th, Trespass is also the proper remedy, where an inferior court has jurisdiction over the subject matter, but is bound to adopt certain forms in its proceedings, from which it deviates, and whereby the proceedings were rendered coram non judice. (In this case the court lost jurisdiction by granting the appeal and staying execution.) 1 *Ch. Pl.* 184.

15th, An execution issued after the expiration of a year and a day (where none had been previously issued) is irregular, and as to the plaintiff and his attorney is void. 4 *Litt. Rep.* 311, *Hoskins vs. Helm.*

And for a much stronger reason is an execution issued after it is stayed and forbidden by an appeal, irregular and void as to the plaintiff or his attorney.

16th, Another distinction between trespass and case is this.

that where the immediate act of imprisonment or other force, proceeds from the defendant himself, the action must be trespass and trespass only; but where it is done by one person in consequence of information from another, case is proper. 2 *Term Rep.* 231, *Morgan vs. Hughes.* 7 *Blackf. Rep.* 296, *Glover vs. Horton.*

17th, In case of an erroneous judgment, although execution be issued on it, the party is protected because it is the fault of the court; but where the execution is irregular (as it clearly was in this case) it is the fault of the party, and as to him it is void, and is no protection to him for a wrongful act. 1 *Cow. Rep.* 734, 735 *et seq., Woodcock vs. Bennett.* 2 *Tidd's Pr.* 936. 2 *Wils. Rep.* 385, *Roe vs. Milton.* 7 *Blackf. Rep.* 296, *Glover vs. Horton.*

18th, And erroneous proceeding or process on an erroneous judgment stands good until reversed, but irregular process is a nullity. 1 *Cowen's Rep.* 735, *Woodcock vs. Bennett.*

19th, The substantial distinction between erroneous and irregular, or voidable and void process is this, that where a party may avoid it, it is merely erroneous, but where the act of issuing is not warranted by law (as in this case it clearly was not) the process is irregular and void as to the party, &c. 1 *Cowen* 739, *same case.* 7 *Blackf. Rep.* 296.

20th, And such irregularity may be either in the process itself, or in the mode of issuing it. 1 *Cowen* 739, *same case.*

21st, If the state of facts existing at the time the process is issued, be such as to render it unlawful, it is irregular. 1 *Cow. Rep.* 739, *same case.*

22d, A judgment which is appealed from is not a final judgment: it is suspended or nullified by the appeal, (consequently no execution could be lawfully issued on it.) 1 *Haywood's Rep.* 364, *Davidson vs. Mull.* 4 *Dana's Rep.* 598, *Runyon et al. vs. Bennett.* 2 *Bos. & Puller* 443, *Dixon vs. Dixon.* 1 *Cond. Rep.* 33, *Penhallon et al. vs. Doane's adr.* 2 *Cond. Rep.* 257, *Yeaton et al. vs. United States.* 5 *Mass. Rep.* 377 *et seq.* 1 *Tenn. Rep.* 2, *Suggs vs. Suggs exr.* 5 *Mass. Rep.* 378.

23d, And on such judgment there cannot afterwards be any proceeding whatever, Ib. 2 *Cond. Rep.* 257. 5 *Mass. Rep.* 378, *Campbell vs. Howard.*

24th, After a change of venue granted the case is no longer within the jurisdiction of the court awarding it, (and is not the principle on appeals the same?) 4 *Ark. Rep.* 163, *Frazier & Tunstall vs. Fortenbury.*

25th, If the writ of execution, &c., be irregular, the party injured may move the court to set it aside and restore the property, or may sue the sheriff, or others liable to suit. 2 *Tidd's Pr.* 935.

26th, Those acts are void which are contrary to law, at the time of doing them, (as the act of issuing the retorno, &c., in this case.) 1 *Hammond's Ohio Rep.*. 458, *Arnold vs. Fuller's heirs.* 5 *Bac. Abr.* title "Void and Voidable," letter A.

27th, In general, all acts done by ministers of justice without authority, are void, (as clerk and attorneys in this case.) 5 Bac. Abr., title "Void and Voidable," B.

Again, as to the recognizance, were it the subject of inspection in this court, it is by law sufficient if it substantially covers the provision in the statute, by securing to the appellee all that the law designed to be secured for him. The language of the statute need not be adopted. 4 *Smedes & Marsh. Rep.* 748. *Coleman vs. Rowe et al.* See also, decision of this court at last term in case of *Fitzgerald vs. Beebe,* on error and motion to quash recognizance overruled.

An execution issued after writ of error, bond filed and citation issued, all in due time, is wholly irregular. 2 *How.* (*Sup. Ct. U. States*) *Rep.* 75, *Stockton et al. vs. Bishop.* The case is conceived to be precisely in point.

CUMMINS and WATKINS & CURRAN, contra. 1st, The appeal and recognizance did not have the effect to stay the writ of *retorno habendo.* Neither the property nor the value thereof was secured by the recognizance. The statute requires the recognizance to be in a penalty sufficient to secure and conditioned to

pay whatever of debt, damages and costs have been recovered. No breach of the condition of this recognizance would authorize a recovery against the securities for the value of the slave. This recognizance might operate as a stay of execution in any ordinary action of replevin for the reason that, in such case, the replevin bond is deemed sufficient security for the property, but in this case the replevin bond had been adjudged insufficient and set aside. It certainly was never the intention of the law to permit a party to prosecute an action of replevin and retain possession of the property after his replevin bond is adjudged insufficient. The remedy by action of replevin is a harsh proceeding and the plaintiff's right should be strictly pursued.

In *Boren vs. Chisholm,* (3 *Ala. Rep.* 573) under a staute providing "that when an appeal or writ of error is taken to the supreme court from the decree of a chancellor, all further proceedings on such shall be thereby suspended: provided, the appellant give bond with sufficient security as in cases of error to courts of law," it was held that the prosecution of a writ of error from the decree of a chancellor, dismissing a bill by which a judgment had been enjoined, does not reinstate the injunction and supersede the issuance of an execution upon the judgment, although a bond be given for the prosecution of the writ in double the amount of the judgment at law. The same principle was ruled in *Hoyt vs. Geltson,* 13 *John. Rep.* 139, and in *Garron vs. Carpenter & Hanriet,* 4 *Stew. & Porter Rep.* 336.

2d, Even if the recognizance operated to stay the issuance of the writ of retorno habendo, we insist, that the plaintiff has misconceived his action. If the defendants are liable in any form of action, it should have been *case* and not *trespass.* Where a party is sued for an act done under color of legal process, if the process is absolutely void, the action must be trespass, but if it is merely erroneous and voidable, the action must be *case:* this is the invariable distinction and criterion in determining the form of action to be adopted. *Omer vs. Starr,* 2 *Litt. Rep.* 230. 2 *Dev. Rep.* 370. 2 *Term Rep.* 231. 2 *Wilson* 341. 2 *W. Black. Rep.* 845. 11 *Gill & John. Rep.* 86. 3 *Term Rep.* 185.

1 *Ch. Pl.* 152. 19 *J. R.* 375. 3 *Hawks Rep.* 535. 3 *Conn. Rep.* 270. 1 *Peterd. Ab.* 194. At common law, no execution can issue after a year and a day, but if issued, it is not absolutely void, but merely erroneous and voidable. 16 *John. Rep.* 537. 1 *Cowen* 736. 5 *How.* (*Miss.*) *Rep.* 548. 2 *Howard* (*Miss.*) *Rep.* 607. 2 *Saund. Rep. p.* 7, *No.* 6. *Patrick vs. Johnson,* 3 *Lev.* 404. *Howard vs. Pitt,* 1 *Salk. Rep.* 261. We conceive an execution at common law, issued after a year and a day to be precisely analogous to the process now under consideration. In this case, if the recognizance operated as a supersedeas, it was merely a legal prohibition that the writ should not issue until the appeal was determined, and so in the case of an execution after a year and a day, the legal inhibition is equally as express that an execution shall not issue without a sci fa. If the effect of the appeal was to set aside and vacate the judgment, of course the process being without any judgment upon which it could be based, would be absolutely void: but such is not the effect of the appeal; the judgment is still in esse, and its execution is merely suspended.

Shaver vs. White & Dougherty, (6 *Munf. Rep.* 110) was trespass for seizing property under an attachment, upon a debt which the defendants had been perpetually enjoined from collecting, and in which the injunction was still in force: held that *case,* and not trespass, was the proper remedy.

In *George ex dem. Bradley vs. Wisdom,* (2 *Burr. Rep.* 756,) it was held that an execution sued out after supersedeas was not void, but merely voidable.

SCOTT, J. The only legitimate question presented by this record is, whether or not the appellant, who was the plaintiff below adopted the proper form of action.

It seems well settled by the most respectable authorities, that where a party is sued for an act done under color of legal process, if the process be void, the injury in that case being direct, the form of the action must be *trespass vi et armis.* And on the other hand, if the process be voidable merely, in that case the

injury being consequential, the form of the action must be *trespass on the case.* It is also well settled, although this question is but incidentally involved in the decision of the one before us, that although a ministerial officer, who executes final judicial process in all respects regular on its face, whether issued from a court of limited or of general jurisdiction, having jurisdiction of the subject matter, may justify under such process when regularly executed and returned, without showing the judgment on which it was founded; nevertheless the plaintiff in such proceeding or a stranger, for justification, must in addition to such process, also show a regular judgment. A distinction well founded, as we conceive, not only in consideration of sound policy, but of justice and fair dealing to this class of officers; who being bound to execute all such process, without looking further than to the process itself, it is but even-handed justice that its execution should be at the peril of those who caused it to be issued.

To lay down any general rule applicable to all cases, by which the partition line between writs of execution void, and writs of execution voidable merely, could be distinctly drawn, would be extremely difficult, if not altogether impracticable, and we have not found in the books that this has ever been avowedly attempted, or if attempted successfully achieved. It cannot be true, as a general rule, that in every case where a record itself presents upon its face a legal obstacle to the issuance of an execution, that in such case the writ of execution is void, because that rule will embrace the case, where more than a year and a day has elapsed after judgment and before execution, where, according to the almost uniform current of numerous decisions, both English and American, the writ of execution when issued under such circumstances has been held voidable merely. Nor can it be true, as a general rule, that in every case, where a legal obstacle to such issuance is "dehors" the record, that the writ of execution would be void as that would embrace the cases, adjudged to the contrary, of privileged persons, certified bankrupts and others. *Cameron vs. Lightfoot,* 2 *Black.* 1190.

Tarleton vs. Fisher, Douglass 671. Much less can it be true, as a general rule, that in every case where "the state of the facts existing at the time that the process issued, are such as to render the issuance of the process unlawful," the writ of execution would be void, as this rule would embrace both classes of cases just noticed, as well as almost every other case of voidable writs of execution. In view then of the intrinsic difficulty, if not the utter impracticability of fixing upon any known principle of law that may serve for a general rule on this question, we shall not attempt the enunciation of any such, but after briefly noticing some authorities, from which we think some light is shed, proceed at once to present our views upon the case before us and announce our conclusion.

Early after the organization of this court, it was correctly declared, as we conceive, in this case of *Pope, Governor, to use of Reed vs. Latham et al.*, reported in 1 *Ark.* 66, in laying down a rule of practice to be applicable to all cases coming up here, whether by appeal or by writ or error, "That there was no difference between the two classes of cases, and that they stood on the same footing, and must be governed by the same rules of proceedings," which declaration, it was then said, was founded upon "principles conclusively settled upon reason and authority," and "in unison with the uniform rules of practice in all supreme or appellate courts, and in strict conformity to our statutory provisions." Then appropriate adjudged cases in other appellate tribunals taken there by writs of error will reflect light on the question before us of no less dubious character than those which have been taken up to such courts by appeals, where such appeals have been authorized and regulated by statutory provisions substantially similar to our own.

To sustain the main question taken by the appellant that the appeal so radically affected the judgment below, that after the execution of the recognizance provided in such cases by statute, any process of execution issued upon it would be absolutely void, various authorities are cited, all of which we have ex-

amined and we will proceed to comment upon those that seem most relied upon.

The case of *Davidson vs. Mull,* reported in 1st *Haywood's Rep.* 364, was an appeal from the county court to the superior court of North Carolina, and was taken to that court under statutory regulations very similar to those which authorize and regulate appeals in Arkansas from justices of the peace to the circuit court, therefore although the court of North Carolina, in that case, say "As to the judgment of the county court which has been rendered in this case, that was not a final judgment as it was suspended, or rather nullified by the appeal, so much so that there can never afterwards be any proceedings on such judgment after it is appealed from," the case can have no bearing on the question before us.

The case of *Penhallon et al. vs. Doane ad.* cited from 1 *Cond. R.* 58, was a case in a prize court, and was expressly decided upon the opinion of DOMAT as to the effect of an appeal in the civil law. The case of *Zeaton et al. vs. U. States,* cited from 2 *Cond. R.* 256, was also a case in a prize court. In that case C. J. MARSHALL, in delivering the opinion of the court, says, "The majority of the court is clearly of opinion that in admiralty cases, an appeal suspends the sentence altogether, and it is not *res-adjudicata* until the final sentence of the appellate court be pronounced. The case in the appellate court is to be heard *de novo* as if no sentence had been passed." Neither of these cases, then, can have any direct application to the question before us, inasmuch as, besides being governed by the civil law, they were heard in the appellate court *de novo* on their merits. And this seems to be the uniform practice on appeals, both from the prize court and the instance courts.

The case of *Stockton et al. vs. Bishop,* 2 *Howard* (*U. S.*) *Rep.* 75, at first glance, would seem to have some application, but upon being subjected to scrutiny, falls far short of sustaining the position insisted on. In this case, after the suing out of a writ of error from the supreme court of the United States, the execution of a bond, which operated as a supersedeas, and the

service of a citation in due form and in apt time, the plaintiff sued out of the circuit court for Pennsylvania a writ of execution on the judgment thus superseded; and the motion in the supreme court of the United States, was to "Quash the fi. fa. as having been irregularly issued." The entire opinion of the court is as follows, to wit: "Upon the facts stated in the application, there is no doubt that the writ of error, bond and citation having been given in due season according to law, operated as a stay of execution, and that a supersedeas ought to be issued from this court to supersede and quash the same as prayed for in this motion. Indeed the issuing of the execution was wholly irregular, and it might have been quashed by an application to the court below; but it is equally competent for this court to do the same thing in furtherance of justice. The motion is therefore granted and a supersedeas will be issued accordingly." It will be perceived that the question now before us was not raised, neither was it necessarily involved, and the motion would doubtless have been granted, whether the court had regarded the process void or voidable merely. And the only indication that the process was looked upon as void is from the use of the word "irregular" in the opinion, which word, although in some of the cases it is used synonymously with "void," is by no means uniformly used by the courts in this sense, as will abundantly appear by a scrutiny of the cases; and even this dubious indication may be considered as fully repelled by the face of the process, that was issued in this case, which recites the writ of execution ordered to be superseded as having been "unjustly, improvidently and erroneously issued."

The case of *Runyon et al. vs. Bennett,* reported in 4 *Dana Ky. Rep.* 598, goes to this extent and no further—being the only question involved—that is to say: that in case an *habere facias* upon a judgment in ejectment should be issued, and executed after a certificate of supersedeas from the clerk of the supreme court had been filed with the clerk in whose office the judgment in ejectment remained of record, and the plaintiff had notice of the supersedeas, before the issuance of the *habere facias,* that in

such case the *habere facias* should be quashed for irregularity and abuse of the power and process of the court, and restitution should be awarded; but whether the process so issued was void or voidable, was not raised or decided.

In the case of *Samuel Campbell vs. Amaziah Howard,* reported in 5 *Mass.* 376, it is held that the effect of an appeal under the statutes of that State, is to make the judgment appealed from "wholly inoperative," and that "when an appeal is allowed, the judgment no longer, in legal construction, remains in force, and cannot be the foundation of an action of debt. That this construction is not new. The question has frequently been before the court when a judgment appealed from, and not affirmed has been pleaded in bar to another action for the same cause, and it has been considered as no bar, as a judgment inoperative and not in force after the appeal allowed." The doctrine of this case is unquestionably based upon the statutory provisions on this subject, regulating appeals in that State, which differ from ours in several particulars, as, while ours, upon the allowance of the appeal and the execution of the recognizance "stays the execution," the statute of Massachusetts enacts that "no execution shall be issued by the common pleas on the judgment appealed from."

In the case of *Dixon vs. Dixon,* reported in 2 *Bos. & Pul.* 444, process of execution had been issued after writ of error and after the execution of the recognizance provided for stay of execution in such cases by *St.* 3 *Jac.* 1, *Ch.* 8, which statute provides that "No execution shall be stayed upon any writ of error for the recovery of any judgment given upon any obligation with condition for the payment of money only, unless such person or persons in whose name such writ of error shall be brought with two securities, such as the court shall allow of, shall first before such stay made, be bound unto the party for whom such judgment shall be given by recognizance in double the sum adjudged to be recovered by such judgment, to prosecute such writ of error with effect, and also satisfy and pay the debt, damages and costs adjudged upon the said judgment, and

all costs and damages to be recovered for the same delaying of execution." And the causes, shown by the plaintiff against making a rule *nisi* absolute to set this execution aside because it had been irregularly issued, that is to say, 1st, that the party himself, who had sued out the writ of error had not, as well as two securities entered into the recognizance, the two securities only having done so; and 2dly, that the amount of the recognizance was double the amount of the judgment appealed from without the addition of the interest accrued, were both adjudged insufficient and the rule was made absolute. But there is nothing in the case or in the opinion of the court to indicate in any degree that the objection that the process was void, was either made or entertained; on the contrary, the inference is strong that it was regarded only as erroneous process.

We conceive then, that none of the authorities relied upon by the plaintiff in error sustains his position.

Among the authorities cited on the other side, the case of *Bradley et al. vs. Wisdom,* decided in 1759 by the court of King's Bench, and reported in 2 Burrow, 756, seems most in point, but by no means directly so. This was an action in ejectment, which was not within the statute, 3 Jac. 1, chap. 8. The defendant, Wisdom (the landlord) had, upon the tenant's refusing to appear, made himself a defendant in the place of the casual ejector against whom judgment was signed for want of appearance, and the plaintiff having obtained judgment against Wisdom (the landlord) had afterwards on leave, no cause having been shown to the contrary, taken out execution against the casual ejector, and under it, had obtained possession of the premises. But Wisdom had, before the motion for leave was filed, sued out a writ of error. The remedy sought in the King's Bench, where Wisdom's writ of error was pending, was to have this writ of *habere facias possessionem* set aside and the possession of the premises restored. But although it was agreed on all hands that the writ of error could not have been sued out in the name of the casual ejector, and could only have been sued out, as it was, in the name of Wisdom, the new defendant, and

although the writ of error, in this wise sued out, had been held in *Edwards vs. Edwards,* and was still regarded by the court as sufficient cause against the plaintiff's application for leave to sue out the *habere facias,* still, forasmuch as Wisdom had failed to appear and show his writ of error for cause against the plaintiff's application for leave, the court refused the motion. This decision evidently turned upon the pure technicality, that although the writ of error operated to stay execution against Wisdom (the landlord) who had, after judgment by default against the casual ejector, been substituted in his place, yet it did not operate to stay the execution of the judgment against the casual ejector rendered in the same court, until it was shown as cause against the application for leave to sue out execution on that judgment. Here, like the case above remarked upon, reported in *Dana's Rep.* the court refused to set aside the process of execution, and restore the possession, and for the same reason, that is to say, although the writs in both instances were issued after supersedeas, they were issued before notice—that is, in the case from Dana, before notice filed with the clerk, and in this case before technical notice as to the judgment against the casual ejector, although this judgment was a part of the suit, the other judgment in which was actually staid by the writ of error—an extremely refined technicality

The case of *Shaver vs. White & Dougherty,* cited from 6 *Mun. Rep.* 110, although not bearing upon the particular question we have been investigating, throws some light on another part of the case before us. This was an action of *trespass vi et armis* brought because the defendant had, by false pretences and iniquitously sued out an attachment against the plaintiff, and had levied it upon three hundred head of cattle. The judgment obtained in this attachment was afterwards perpetually enjoined by the court of errors of Tennessee. The court of appeals of Virginia held that, for redress of this injury, *case* and not *trespass* was the proper remedy, and, in delivering their opinion, say, "The act complained of was unaccompanied with force—the defendant was only seeking redress of an injury by

the regular forms of law. If he has gone out of his proper sphere and has endeavored to make the forms of law subservient to the malignity of his views, if he has instituted the action or proceeded with malice and without probable cause, then indeed is he responsible for his conduct, but not in *trespass.* The action adapted to such a state of things is a special *action on the case."*

Then none of these authorities determine the question before us, although it may be deduced from most of them that the courts are slow to determine as absolutely void any process of execution that is founded on a regular subsisting judgment of a court of competent jurisdiction of the subject matter, though it may have been issued over some legal obstacle existing either upon the face, or which may exist *de hors* the record, but seems rather to prefer, as far as may be practicable and consistent with the well established forms of justice, to hold all such as voidable merely. And if this be the true exposition of the law, as we take it to be, it cannot be doubted that its foundations are laid in principles of sound public policy, in view of the frailty and imperfections of our nature, and of the mischief that must flow into the community from a too stringent rule on this subject, in an age of the world when multifarious and complex pecuniary operations, in such rapid succession transpire. And especially when it is remembered that the ministers of justice, under our constitution and laws, are so amply armed, not only with all the time-worn writs of the common law, but with many other devices, to which the exigencies of modern times have given birth, all ready to do the high behests of the law in sustaining and perpetuating formal and substantial justice.

After looking at the case before us, in the light of the authorities examined, and applying the principles we have recognized, derived from the authorities cited on both sides and others not cited, including the case of *Ex parte Caldwell,* reported in 5 *Ark.* 390, we hold that the legal effect of the appeal and of the execution of the recognizance provided in such case by the statute, is, in the language of the statute, "to stay the execution; that upon the circuit court and its judgment it is identically the

same, in effect, as would be the suing out of a writ of error accompanied by the recognizance provided in such case; that in neither case is the judgment itself affected by the stay of its execution; but in both cases a legal prohibition rests upon the circuit court from executing the judgment appealed from until such time as that prohibition may be removed either by operation of law or by the judgment of the supreme court. The former would occur when neither the appellant or the appellee appeared in the supreme court at any time during the proper return term of the appeal; and the latter, when the supreme court shall dismiss the appeal or writ of error, or affirm the judgment below. But in each of these cases the judgment itself of the court below would remain regular, valid and unimpaired, and consequently operate as a lien on real estate, as is provided by the statute, up to the day when it might be reversed by the supreme court. And in case of reversal, such reversal would not operate as by continuing and perpetuating this legal prohibition resting on the court below, but by its utter destruction and annihilation of the judgment itself. And if at any time, after appeal and recognizance and before reversal and before the death of the defendant, or any one of them (if there be more than one) process of execution should be sued out, it would be competent either for the supreme court, in furtherance of justice or the circuit court, in which the record of the judgment appealed from remains, to supersede such process of execution. And the party causing it to be sued out, would expose himself to be punished by the circuit court as for a contempt in abusing the power and process of that court, and also subject himself to an action on the case at the suit of the party injured by such process. But the process itself would not be void, because it was issued upon a regular judgment *in esse,* the parties to which had not been changed, and against a party, *in esse,* competent to raise the question of irregularity. On the contrary, should such execution be issued on a judgment against two or more defendants, after one of them should die, it would be void absolutely, because being void as to one material part,

it could not be upheld and supported as valid as to the residue; and besides, it might be levied upon land which might be held by persons strangers to the judgment, and this would invade one of the great principles upon which our security depends, under a government of laws, that no person shall be put out of his freehold or lose his goods and chattels unless he be first duly brought to answer, or be prejudged of the same by due course of law. In support of which principle, the courts have ever held a decided and unequivocal language.

Therefore, as the process of execution, under color of which the supposed trespass was committed, was voidable merely and not void, *case* and not *trespass,* was the proper remedy; wherefore, as there is no error in the judgment below, let it be affirmed.