ANTHONY *vs.* HUMPHRIES ADR. USE, &C.

By moving for a new trial, a party abandons previous exceptions, unless they are made the grounds of the motion, and reserved in the bill of exceptions to the decision of the court overruling the motion, as held in *Danley vs. Robins' heirs*, 3 *Ark.*, and *Ashley vs. Hyde & Goodrich*, 2 *English* R.

Where the sheriff serves a *sci. fa.* upon the defendant in the writ, and also upon persons not named therein as defendants, this does not impair the writ or return.

The levy of an execution upon sufficient real estate to satisfy the judgment, undisposed of, is a satisfaction, as held in *Anderson vs. Fowler*, 3 *English R.*, which case is approved.

A *scire facias* was issued and attested by the clerk of the *circuit court*, and recited a judgment in the *circuit court*, but commanded the sheriff to summon the defendant to appear before the *probate court* and show cause, &c. Held that the error was clerical, and that the writ was not void but amendable.

Where the original judgment is not void, the defendant cannot take advantage of mere errors and irregularities on *scire facias* to revive it.

Writ of Error to Pulaski Circuit Court.

Scire facias to revive and continue the lien of a judgment recovered by Joel Johnson, for the use of Ashley & Watkins, against James C. Anthony, and afterwards revived in the name of John Humphries as administrator of Johnson; determined in the Pulaski circuit court, in June, 1846, before E. H. ENGLISH, as special judge.

The facts are stated in the opinion of this court.

RINGO & TRAPNALL, for plaintiff. The first plea filed by the defendant below, to which a demurrer was sustained, presents distinctly the question, whether a judgment and execution creditor, who has caused lands of the defendant to be levied upon, admitted to be subject to levy and sufficient to satisfy the judgment, can, while such levy remains, have his judgment revived, its lien continued against other lands, and proceed regardless of such levy to resort to other property, real, personal or mixed, and satisfy his judgment thereout? If he can disregard such

levy—or the fact of such levy existing has no legal operation whatever; and neither binds the plaintiff to look to the property so levied for the satisfaction of his judgment; separates it from the mass or residue of the property of the defendant, subject to levy for the satisfaction of the judgment, and appropriates it to this specific object; nor, during its existence, suspends the right of the creditor to resort to other property of the debtor for a satisfaction of his debt; nor exempts the other property of the debtor from execution and levy for the satisfaction of the same judgment by virtue of another execution to be issued thereon, then the judgment on said demurrer is right—otherwise it is erroneous. In short, the levy of real estate has some legal operation, affecting the rights of the parties, or it has none. The plaintiff insists that it has a definite and specific legal operation, and amounts to an appropriation, by law and the act of the officer and the plaintiff in execution, of the lands levied specially to the satisfaction of the judgment and execution; and separates the same from the residue of the defendant's property not levied; and for the time being releases the latter from all incumbrances or liability to the plaintiff's judgment and execution; and obliges the plaintiff to cause all the property so levied to be legally sold, before he can in any manner proceed against the defendant, or any other of his property—that it confines the plaintiff to look alone to the property so levied for the satisfaction of his debt—suspends or divests all rights of the defendant therein until the plaintiff's demand is satisfied, when, if any portion remains, it reverts to him—and if the judgment is not satisfied thereout, when the same has all been legally sold, the plaintiff is remitted to his right to resort anew to the defendant, and any other property then owned by him, for a satisfaction of the residue of the judgment.

That such is the legal consequences of a levy of personal property will not, we suppose, be controverted. *Clerk vs. Wethers,* 1 *Salk.* 322. *Qviat vs. Viner, Ib.* 318. *Green et al. vs. Allen,* 2 *Wash. C. C. R.* 280. *Hoyt vs. Johnson,* 12 *John. R.* 208. *Ladd vs. Blunt,* 4 *Mass. R.* 403. *Reed vs.* —— *& Staats,* 7 *John.*

428. *Woods vs. Torry,* 6 *Wend. R.* 562. *Camp vs. Laird,* 6 *Yerger,* 246. *Carroll, Gov. use, &c. vs. Fields et al., Ib.* 305. *Verton vs. Perkins et al., Martin & Yerger,* 367. 3 *Yerger,* 297. *Conrad vs. The Atlantic Ins. Comp.,* 1 *Peters,* 434. 4 *Cowan,* 417. 7 *Cowan,* 21.

Where lands are levied, no other execution can issue, until the lands are sold, or the levy otherwise lawfully disposed of. *Hopkins vs. Chambers,* 7 *Monroe,* 262. 1 *Ohio R.,* 206. 5 *Cowan,* 417. 8 *Ala. Rep.,* 764.

And such levy concentrates and fixes the lien of the judgment, and limits and confines it, until the levy is disposed of, to the lands levied. *Miller vs. Estell,* 8 *Yerger,* 460. *Conrad vs. Atlantic Ins. Comp.,* 1 *Pet.* 443.

The lien created by the levy continues until the land is sold, in all cases where the delay to sell is not regarded as a fraud upon the rights of other creditors, or of purchasers. *Pennock vs. McKesson,* 13 *Sergt. & Rawle,* 144. *Young vs. Taylor,* 2 *Binney,* 227-8-9. *Gilpin,* 55.

Can lands be sold on execution without a previous levy? If so, the levy is a useless and nugatory act. But if useless, why does the law require lands to be levied on prior to sale? *Rev. Stat. chap.* 60, *sec.* 23, 28, 34, 35, 59, 60, 73. *Ib. chap.* 61, *sec.* 8. Would the legislature require a nugatory act? See also, *Tidd's Pr.,* 1190, 1091, 1102 to 1107—1130 to 1132. 2 *Saund. R., p.* 6, *note* 1 *and* 2. *Ib. p.* 71, *note* 4.

To such action, a plea that the debt or damages were levied on a *fi. fa.,* or the defendant's lands extended for them upon an eligit, is a good bar. 2 *Tidd Pr.,* 1130.

Lands are well levied by the officer noting officially on the execution by any sufficient description, what lands in particular he has seized or levied for its satisfaction, or in any other manner distinctly indicating the same; as showing or describing to appraisers, &c., or publishing a notice that he has levied and will sell them to satisfy the execution, by receiving a description list thereof from the debtor, containing his direction to the officer to levy the same, &c. Such is all the seizure required by law;

and all that thing is susceptible of; and upon either ground constitutes a valid levy. See *Whipple vs. Foot*, 2 *John. R.* 422.

Against these principles and authorities, and the express requirements of our statutes, is to be found an isolated dictum of BRONSON, judge, that no levy of land is necessary in the State of New York under their statute. We think there is no other.

WATKINS & CURRAN, contra.

SCOTT, J. This was a proceeding to revive a judgment and continue its lien on land. The defendant in error sued out process of sci. fa. against the plaintiff in error, returnable into the Pulaski circuit court, at the October term, 1845, which was returned by the sheriff of that county as executed, not only upon the plaintiff in error, but also upon John Brown and David Skelton, his terretenants. During the return term, the plaintiff in error filed his motion "to set aside the sheriff's return on the *sci. fa.*," which motion was pending and undetermined when the defendants in error moved to amend the writ of *sci. fa.*, "by striking out that portion commanding the sheriff to summon the terretenants," and immediately afterwards, on the same day, the plaintiff in error filed his motion or demurrer, seeking "to quash and set aside" the writ of *sci. fa.* for misjoinder of parties: whereupon the court "sustained the motion to amend" and "overruled the demurrer." To which decision of the court in sustaining the motion to amend and in overruling the demurrer the plaintiff in error excepted at the time, and his bill of exceptions sets out a literal copy of the *sci. fa.* and of the sheriff's return thereon prior to the amendment, by which it appears that the *sci. fa.*, prior to its amendment, run not only against the plaintiff in error, but also against his terretenants, and that the amendment allowed removed the objection taken by the demurrer, and that the court then adjudged the *sci. fa.* and the return thereon sufficient in law and overruled the demurrer: whereupon, by the leave of the court, the plaintiff in error filed three pleas in bar: The 1st, setting up a levy on real

estate of the plaintiff in error subject to sale for the satisfaction of the judgment, of value more than sufficient to satisfy the judgment, which levy had never been, in any manner, disposed of or discharged by sale or otherwise howsoever. (*a*) 2d, Payment of the judgment in full. 3d, Nul tiel record of such judgment as is mentioned in the writ.

(*a*) NOTE BY THE REPORTER. It having been decided by this court that a levy upon lands, undisposed of, is a satisfaction, pleas of this kind may become frequent; and as this plea was drawn by DANIEL RINGO, Esq., an able and accurate pleader, and as this court have held it good on demurrer, it may be useful to the bar to print it here.

THE PLEA.—"And the said defendant, by his attorney, comes and defends, &c., and says that the said judgment in said *scire facias* mentioned ought not to be revived, and execution thereof had against him, nor the lien thereof continued as to the real estate owned by him at the time of the rendition of said judgment, or at any time subsequently thereto; because he says that after the recovery of said judgment as in said *scire facias* mentioned, *to wit*: on the 30th day of October, 1843, the said plaintiff, for the obtaining satisfaction of said judgment, sued out, and caused to be issued thereon, from the office of the clerk of said circuit court, a certain *alias* writ of *fieri facias*, signed by H. Haralson, then clerk of said court, by J. A. Hutchings, his deputy in said office, sealed with the seal of said court, and bearing date the day and year last aforesaid, which said writ run in the name of the State of Arkansas, was addressed to the sheriff of the county of Pulaski, and after reciting that 'whereas Joel Johnson, who sued for the use of Chester Ashley and George C. Watkins, on the 10th day of November, in the year of our Lord, 1840, at our circuit court, recovered against James C. Anthony the sum of eight hundred dollars, debt, and the further sum of forty dollars damages, besides costs, which costs amount to the sum of twelve dollars and seventeen and a half cents; and whereas the said Joel Johnson hath had no execution of satisfaction upon his said judgment; and whereas since the rendition of the judgment in this case, the said Joel Johnson hath departed this life, and letters of administration have, in due form of law, been granted by the probate court of Pulaski county to John Humphries on said estate; and whereas, on the 28th September, 1842, at our circuit court aforesaid, it was ordered and considered by said circuit court, that said judgment be and the same was revived in favor of the said John Humphries as such administrator, for the use of the said Chester Ashley and George C. Watkins against the said defendant, James C. Anthony, and that said administrator for use as aforesaid, should have execution thereof against said Anthony for the debt, interest, damages, and twenty-nine dollars and seventy-five cents for his costs in the *scire facias* to revive said original judgment,' commanded the said sheriff, as he had theretofore been commanded, that of the goods and chattels, lands, and tenements of the said James C. Anthony, he should cause to be made the debt, damages and costs aforesaid, so that he should have the debt, damages and costs aforesaid before our said circuit court, on the 28th day of November, A. D. 1843, and should

To the first plea, defendant in error filed his demurrer; to the second plea, he filed his replication denying the payment; and to the third plea, his replication affirming the existence of the record. To the demurrer to the first plea, plaintiff in error joined, and after argument it was submitted, and by the court taken under advisement; to the second and third pleas, issues of fact were joined, both of which were tried by the court and found for the defendants in error; on which finding judgment final was rendered by the court that the original judgment be revived and the lien thereof continued and that execution issue. The plaintiff in error then filed his motion for a new trial, which was overruled. To which opinion of the court overruling the motion for a new trial, plaintiff in error excepted, and by his

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then and there certify how he had executed said writ: which said writ afterwards, and before the return day thereof, *to wit*: on the day and year last aforesaid, in the county of Pulaski aforesaid, was placed in, and came to the hands of James Lawson, Jr., then sheriff of the county of Pulaski aforesaid, to be by him executed according to law: and the said defendant avers that afterwards, and before the return day of said writ, *to wit*: on the first day of November, in the year last aforesaid, in the county of Pulaski aforesaid, the said James Lawson, Jr., as sheriff of the county of Pulaski aforesaid, levied and seized, on and by virtue of said writ, for the satisfaction of the debt, damages and costs aforesaid, certain real estate, lands, situated in the county of Pulaski aforesaid, the property of the said defendant, of great value, *to wit*: of the value of two thousand dollars, sufficient to pay and satisfy to the said plaintiff for the use, &c., as aforesaid, the debt, damages and costs aforesaid together with all the legal costs and charges of making the sale thereof and paying over to said plaintiff, for the use aforesaid, the debt damages, and costs aforesaid, to wit: the west half &c., [*here the lands levied upon are described,*] which levy and seizure of the lands aforesaid, for the purpose aforesaid, was by said James Lawson, Jr., as such sheriff as aforesaid, on the day and year last aforesaid, endorsed in writing on the back of the writ of execution aforesaid: which said lands so levied and seized as aforesaid, have not as yet been sold by said James Lawson, Jr., for the satisfaction of the debt, damages and costs aforesaid, nor hath any part or portion thereof ever been sold for that purpose, nor have they been in any manner released or discharged from said seizure and levy for the purpose aforesaid; and this the said defendant is ready to verify; wherefore he prays judgment, whether the said judgment in said writ of *scire facias* mentioned, or the lien thereof on the real estate of said defendant ought to be revived, and said plaintiff, for the use aforesaid, have any other or further execution thereof against the said defendant or his real estate owned by him at the time of the rendition of said judgment or at any time subsequent thereto, &c."

RINGO & TRAPNALL, Attorneys for defendant.

bill of exceptions all the evidence adduced on the trial of the issue joined on the plea of nul tiel record is set out, which consisted of a judgment entry (read from the record book in which the proceedings and judgment of the circuit court of Pulaski county had and pronounced at the September term, A. D. 1840, are entered and recorded) of the original judgment, which is the foundation of these proceedings, entered there as by default, and also the judgment entry (read from the record book in which the proceedings and judgments of the circuit court of Pulaski county had and pronounced at the September term, A. D. 1842, are entered and recorded) of the revival of said original judgment, in the name of Humphries, as administrator, also entered there as by default. To the reading of all which said plaintiff in error, on the trial of the issue formed on the plea of *nul tiel* record objected, and his objection was overruled.

Numerous supposed errors by the court below are assigned in this court by the plaintiff. The first and second assignments will be considered together, as they both relate to the motion to set aside the return of the sheriff to the *sci. fa.*, to the motion or demurrer to quash that writ, and to the granting of the motion to amend.

In the cases of *James Danley vs. Robins' heirs*, reported in 3 *Ark.*, and of *Ashley vs. Hyde & Goodrich*, reported in 2 *English*, 92, the legal effect of a motion for a new trial is clearly declared: and the doctrine of these cases, when applied to this, cuts out from the record, and takes from the view of this court, the first bill of exceptions taken by the plaintiff in error, which, until that motion was made, presented the facts upon which these two assignments are based. And as the supposed misjoinder of parties does not, otherwise, appear than by this bill of exceptions, thus taken from the view of this court, inasmuch as the *sci. fa.*, as contained in the record now before the court, is against the plaintiff in error alone, the demurrer for the supposed misjoinder of parties must be considered as having been properly overruled. The fact that the sheriff executed a *sci. fa.*, running against the plaintiff alone, upon the plaintiff in error,

and also upon two other persons, against whom the process did not run, cannot impair either the writ or return; at most, it was but supererogation on the part of the sheriff, without legal effect. And as there is nothing in the record now before this court, upon which the leave given by the court below to amend, could have operated, the granting of that motion must be considered as having been inoperative.

The third assignment is predicated upon the action of the court below upon the first plea of the plaintiff in error. To this plea there was a demurrer and joinder, and after argument it was submitted and taken under advisement. And although the record does not otherwise disclose the holding of the court below on this question of law thus presented, the subsequent final judgment of the court in favor of the defendant in error and against the plaintiff in error after the trial of the two issues of fact, necessarily shows that the matter set up in this plea was taken and held by the court below to be insufficient to bar the action. The question, then, presented by this assignment, is the sufficiency of this first plea. And this question was directly determined in the affirmative at the January term, A. D. 1848, of this court in the case of *Anderson vs. Fowler,* the doctrine of which case we are not disposed to disturb. Therefore in holding the matters set up in this first plea of the plaintiff in error to have been insufficient to bar the action of the defendant in error, there was manifest error in the court below.

The other assignments will be considered together, as they all, subsequently, call in question the evidence adduced on the trial of the issue of fact formed on the plea of *nul tiel record.* The judgments read in evidence were clearly not void; and the error on the face of the *sci. fa.,* which preceded the second one, irregularly brought to the knowledge of the court below—manifestly a clerical misprision, which could have in truth neither injured or deceived any one—was clearly amendable in the court below, and in this court would be considered as amended. (*a*)

(*a*) NOTE BY THE REPORTER. The writ of *scire facias* referred to by the court, as copied in the bill of exceptions, is as follows: "State of Arkansas, County of Pulaski: SS.

But, however erroneous might have been these judgments in point of law, nevertheless, while they stood unreversed and not in any manner vacated, they could not in point of fact be questioned in this collateral way on the plea of nul tiel record, but were clearly admissible in evidence to prove the issue formed on this plea.

But, for the error of the court below in holding the first plea of the plaintiff in error insufficient to bar the action of the defendant in error, the judgment must be reversed.

The State of Arkansas, to the Sheriff of Pulaski County—Greeting: Whereas Joel Johnson, who sued for the use of Chester Ashley and Geo. C. Watkins, plaintiff, on the 10th day of November, A. D. 1840, in our Pulaski circuit court, recovered against James C. Anthony, defendant, the sum of eight hundred dollars debt, and also the sum of forty dollars damages which were adjudged to him, as well as all the costs in and about that suit expended; and since the rendition of said judgment the said plaintiff, Joel Johnson, has departed this life, and letters of administration of all and singular the goods and chattels, rights and credits of the said Joel Johnson, deceased, were afterwards, in due form of law, granted to John Humphries, of said county of Pulaski: Now, therefore, you are hereby commanded to summon the said James C. Anthony, defendant, as aforesaid, to appear before our Pulaski *Probate Court,* on the first day of the next term thereof, to be held at the court house in the county of Pulaski on the first Monday of March next, it being the 7th day of March, A. D. 1842, to show cause, if any he can, why the judgment above recited should not be revived and execution issue thereon, in the name of the said John Humphries, as administrator, as aforesaid, against him, the said James C. Anthony; and then and there make due return of this *scire facias*: herein fail not.

In testimony whereof, I have hereto set my hand and affixed the seal of office, as clerk of said circuit court, this tenth day of February. A. D. 1842. LEMUEL R. LINCOLN, *Clk.*"

{L. S.}