McLAIN SURV. *vs.* TAYLOR ET AL.

A judgment on a forfeited delivery bond, taken on motion, without notice to defendants, actual or constructive, is no bar to an action of debt on the same bond.

The sheriff may justify under process issued on such judgment, the court having jurisdiction of the subject matter, but not so with the plaintiff therein.

A demurrer having been sustained to the plea of former recovery in such case, the record of the first judgment cannot be introduced as evidence under other issues to which it is not applicable.

In such action, under a plea of payment, the sheriff may prove that he collected money by virtue of an execution issued upon the first judgment, and paid it to plaintiff.

In an action on a penal bond, where the breaches assigned are answered by pleas, and issues taken thereto, swearing the jury to *try the issues joined*, is equivalent to swearing them to try the *truth of the breaches*: they must also be sworn, however, to assess the damages. (*Digest, chap.* 120, *sec.* 5, 6.)

But, in such action, where judgment is taken on demurrer, by confession or default, it is indispensable to swear them to inquire into the truth of the breaches, and assess the damages. *Ib.* 5, 7.

Writ of Error to Pulaski Circuit Court.

This was an action of debt on a forfeited delivery bond, brought by Wm. F. Taylor, Albert Lee, and Lucius D. Pratt, against Allen McLain and Patrick Flanakin, in the Pulaski circuit court, and determined at the October term, 1846, before the Hon. WM. H. FEILD, judge.

The declaration describes the bond sued on as having been executed by the defendants to the plaintiffs, on the 11th February, 1840, in the penal sum of $400, conditioned, in substance, as follows: reciting that said plaintiffs had sued out an execution for $144.27, including debt, damages and costs on a judgment obtained by them against David Wright, in the Pulaski circuit court, at the September term, 1839, which execution had been placed in the hands of Lawson, sheriff, and was made returnable to the March term of said court, 1840; that Lawson had levied the execution on a slave, named Susan, the property of said Wright, and conditioned that the bond was to be void if Wright should deliver the slave to the sheriff at the courthouse on the first day of the term to which the execution was returnable. The said slave is alleged to be of the value of $150, and breaches assigned, that the slave was not delivered to the sheriff according to the condition of the bond, the bond returned forfeited, the execution unsatisfied; and the penalty of the bond not paid.

The defendant filed three pleas: 1st, a former recovery upon the bond by motion, setting out the judgment; 2d, performance of the condition of the bond; 3d, payment. The plaintiffs demurred to the first plea, on the grounds that the judgment of former recovery therein pleaded, was void, for want of notice, actual or constructive, to defendants, which demurrer the court sustained. To the other two pleas, plaintiffs took issue. Then

follows a record entry thus: "Came the parties, &c., and on motion, it is ordered that a jury come to try the issues joined in this case, and thereupon comes a jury, *to wit:* Benjamin F. Hershey, &c. &c., twelve good and lawful men of the county, who were duly empanneled and sworn, well and truly to try the issues joined in this case, and a true verdict to render according to the evidence, and after hearing the evidence adduced, and argument, the jurors aforesaid returned the following verdict, *to wit:* 'We, the jury, find the breach assigned in the within declaration to be true, and find for the said plaintiffs on the issues joined, and assess their damages at one hundred and forty-three dollars and eighty cents.'" Judgment was rendered accordingly.

During the trial, the defendants took a bill of exceptions, from which it appears:

On the trial, plaintiffs offered to introduce as evidence, the judgment set up in their first plea, as a former recovery, and an execution which issued thereon, together with the sheriff's return, showing a levy and sale of property of Wright, the principal in the delivery bond upon which the judgment was taken, which the court excluded, and defendants excepted.

Defendants then offered to prove by Lawson, sheriff, that an alias execution issued to him on the judgment set up in the first plea, returnable to the March term, 1842, of said court, by virtue of which he levied upon, and sold, property of defendants to the value of $120, which sum he held in his hands for the plaintiffs, subject to their order; which the court refused, but permitted the sheriff, Lawson, to be sworn, and instructed him not to give any evidence to the jury of any money arising from the sales of property of defendants levied upon and sold by virtue of any of the aforesaid executions issued upon said judgment—that said judgment was null and void, and that plaintiffs would not be bound by any levy and sale of property made by him as sheriff by virtue of said executions—but to testify as to any payment made to plaintiffs, or their attorneys, by said defendants. The witness then stated that $39.25 had been received by plain-

tiffs' attorney, towards the satisfaction of the debt in the declaration mentioned, in accordance with the statement made in his return on the first execution, to which decision of the court defendants excepted.

Defendants brought error. Flanakin's death was suggested, and the cause proceeded in the name of McLain, survivor.

JORDAN and RINGO & TRAPNALL, for the plaintiffs. The first amended plea sets forth a former recovery upon the same forfeited delivery bond, taken at the term at which the bond was forfeited on the motion of the plaintiffs in the court below; and though the judgment was voidable, the plaintiffs were entitled to process to execute it, and the court erred in sustaining the demurrer to the plea. If the court had jurisdiction of the subject matter and the parties, the judgment is binding until reversed. *Defour vs. Camfrouc,* 11 *M. R.* 607. 2 *N. S.* 292. 2 *J. R.* 590. 6 *J. R.* 377. 7 *J. R.* 224. 3 *Scam. Rep.* 106. 3 *Bibb.* 339. 4 *Scam. Rep.* 371. 2 *Peters,* 169. An irregularity in the judgment could be taken advantage of only by the party injured. 8 *J. R.* 361. 10 *J. R.* 381. 8 *J. R.* 333.

The sheriff was bound to levy the execution issued on the judgment upon the property of the defendants, (1 *Eng. Rep.* 236. 18 *John. Rep.* 49. 5 *Cow.* 176,) and they were entitled to have the money made on a sale of such property applied in discharge of the bond, whether the money was paid over or not. The court therefore erred in excluding the evidence offered on the trial. 4 *Ark.* 229. *Ladd vs. Blunt,* 4 *Mass. Rep.* 402.

The jury was neither summoned nor sworn to inquire into the truth of the breaches, but simply to try the issues, when, according to the statute, and the adjudications under it, (*Digest, chap.* 120, *sec.* 6, 7. *Adams et al. vs. State, use Wallace,* 1 *Eng.* 505. 2 *Ark. Rep.* 391. *Outlaw et al. vs. Yell, Governor, use Conant & Co.* 3 *Eng.* 345,) they should have been sworn as well to try the truth of the breaches as the issues joined, or damages sustained by the defendants.

FOWLER, contra. The evidence offered was properly excluded because the first plea, that of a former recovery, having been adjudged bad on the demurrer, there was no issue to which such evidence could apply. The demurrer was rightly sustained because the plea disclosed a judgment void on its face, according to the unbroken decisions of this court.

JOHNSON, C. J. The demurrer to the first amended plea of the defendant below, was correctly sustained. The plea alleged a former recovery upon the same cause of action and in a suit between the same parties. The document described in the plea, and relied upon as a former recovery, is not authorized by law, and is consequently void to all intents and purposes. The supposed judgment does not disclose such facts as to affect the defendants below with notice of the pendency of the motion upon which it was based, and, as a necessary consequence, they are not legally bound by it. This case is completely within the rule laid down by this court in the case of *McKnight vs. Smith*, 5 *Ark. Rep.* 410. The judgment set up as a former recovery, wholly fails to state either the condition of the bond, or facts which amounted to a forfeiture of it. Had these facts, which, by the statute are necessary to affect the party with notice, been stated with sufficient certainty so as to warrant the court in entaining jurisdiction of the parties, we would then presume in favor of the regularity of the judgment as being based upon sufficient facts to support it, unless the contrary affirmatively appeared. The doctrine laid down in the case of *McKnight vs. Smith*, was not altogether satisfactory to the profession at the time the decision was made, and from this circumstance we have been induced to review the grounds upon which it is based; and the result of our investigation is, that the more we examine it and reflect upon it, the more thoroughly we are convinced of its entire soundness and correctness. The proceeding by motion is clearly in derogation of the common law, and consequently must receive a strict construction.

It is urged that, inasmuch as the sheriff was protected in the

execution of the judgment, therefore the plaintiffs below should have proceeded under the first judgment to collect the money, and should not have harrassed the defendants with another suit. It is conceded that the sheriff would not have subjected himself tc an action of trespass by enforcing the execution, as it appears from the record that the court had jurisdiction of the subject matter; yet this by no means proves that the plaintiff would be entitled to similar protection.

The court decided correctly in excluding the record, as, after the demurrer had been sustained to the first plea, there was nothing left to which that evidence could properly apply. The sheriff was properly permitted to testify as to any moneys that he had received and paid over to the defendants in error. It was not material whether the sheriff acted under a process based upon a void judgment or not, in case the money was actua'ly paid over to the party entitled to receive it. Under the plea of payment, it was perfectly legitimate to show that the money claimed had been paid, and it was wholly immaterial through what channel the payment was made.

The last objection urged to the judgment and proceedings of the court below is, that the jury were not expressly sworn to inquire into the truth of the breaches and assess the damages sustained. The *5th, 6th* and *7th sections of chapter* 120, *Digest*, provide that "when an action shall be prosecuted in any court of law upon any bond for the breach of any condition, other than for payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff in his declaration shall assign the specific breaches for which the action is brought": that "upon the trial of such action, if the jury find that any assignment of such breaches is true, they shall assess the damages occasioned by the breach in addition to their finding"; and that "if, in such action, the plaintiff shall obtain judgment upon demurrer, by confession, or default, the court shall make an order therein that the truth of the breaches assigned be inquired into, and the damages sustained thereby assessed at the same or next term, and the court

shall proceed thereon in the same manner as in other cases of inquiry of damages." This statute clearly contemplates two distinct classes of cases: the one where the breaches have been denied by plea and issue taken thereupon, and the other where the breaches are wholly undefended, as in cases where the defendant stands upon his demurrer, or confesses, or makes default. In the former case, in the event that the jury shall find any assignment of the breaches to be true, they are also required to assess the damages in addition to their finding: whereas, in the latter, the court is required to make an order, not only that the truth of the breaches be inquired into, but also that the damages sustained thereby be assessed. The record in this case shows that the jury were sworn well and truly to try the issues joined and a true verdict to render according to the evidence. The verdict is in the following language, to wit: "We, the jury, find the breach assigned in the within declaration to be true, and find for the said plaintiffs on the issues joined, and assess their damages at one hundred and forty-three dollars and eighty cents." The finding is in strict compliance with the law, but the question is whether it is responsive to the swearing. The jury, it is true, were not sworn, in so many words, to try the truth of the breaches, yet the oath which they took was substantially to that effect. They were expressly sworn to try the issues joined, and it was utterly impracticable to pass upon the issues presented by the pleading, without, at the same time, testing the truth or falsity of the breaches assigned in the declaration. The swearing, therefore, so far as the breaches were concerned, was fully sufficient, but it was radically defective in not embracing the assessment of damages. This construction is perfectly in unison with the cases of *Phillips & Martin vs. The Governor, &c.*, 2 *Ark. Rep.* 387, and *Adams et al. vs. The State, use of Wallace,* 1 *Eng. Rep.* 503. In both these cases there was an entire failure to swear the jury to try the truth of the breaches, or any thing of like effect, but simply, well, and truly to try & inquire into and assess the damages. In the case of *Outlaw et al. vs. Yell, Gov., &c., use of Conant & Co.,* 3 *Eng. Rep.* 353, this

court said "the three pleas upon which issues were formed were, in effect, but pleas of *nul tiel* record. The court was correct in finding the issues for the plaintiffs, but erred in assessing damages and in giving judgment. As demurrers had been sustained to all the other pleas, and plaintiff's cause of action left wholly undefended, the court, in finding the issues for the plaintiff, ought to have rendered an interlocutory judgment against defendants, and ordered a jury to be impanneled to inquire into the truth of the breaches and assess the damages." Where the action is wholly undefended, there being no issues made up involving the truth of the breaches, it would clearly be insufficient to require the jury to pass upon the issues joined, and nothing short of an oath to try the truth of the breaches, in terms, would satisfy the law.

The conclusion to which we have arrived then, is, that in cases where a defence has been interposed and issue taken upon it, it is all sufficient to swear the jury, either to try the issue, or to try the truth of the breach, and assess the damages; but that, where the judgment shall have been obtained upon demurrer, by confession or default, it is indispensable to require them to inquire into the truth of the breaches, and also to assess the damages.

We are, therefore, of opinion that the swearing them in this case is defective in not requiring the jury to assess the damages, and for that error the judgment ought to be reversed. The judgment is therefore reversed.