LAWSON ET AL. *vs.* THE STATE, USE &C.

In obedience to the command of a *fi. fa.* a sheriff should, without delay, levy on property sufficient to satisfy the debt and costs.

In determining what is a sufficient levy, he is left to exercise his own judgment, free from the restraint or control of either plaintiff or defendant, and is accountable to the plaintiff if he fails to levy on as much as a reasonable, prudent man would deem sufficient (if to be found in his bailiwick,) and to the defendant, for an unreasonable and unnecessary levy.

It is true, the plaintiff may point out property to be levied on, but this imposes on the officer no obligation to levy on that particular property to the exclusion of, or in preference to other property.

Hence, to an action against a sheriff for failing to levy a *fi. fa.* on a particular lot of land pointed out to him by the plaintiff, a plea that he levied on other lands of the defendant sufficient to satisfy the *fi. fa.* is good.

Where a sheriff levies on sufficient property to satisfy an execution, but before he can sell the same, by reason of casualties over which he has no control, the property depreciates in value, and fails to sell for enough to satisfy the *fi. fa.*, he is not responsible for the deficit.

Where, in such case, the sheriff alleges in his plea that he levied on property of sufficient value to satisfy the *fi. fa.*, with the additional allegation that the defendant claimed the benefit of the appraisment act, and the appraisers valued the property levied on at a sum sufficient to satisfy the execution, such allegation adds no strength to the plea, and is surplusage—the valuation of the appraisers, being for a different purpose, is not conclusive.

Where two pleas substantially set up the same defence, plaintiff may compel defendant to elect to rest on one of them, and have the other stricken out, but the objection cannot be reached on demurrer.

Where a sheriff is sued for failing to levy a *fi. fa.* on a particular lot of land, which plaintiff has directed him to levy upon, a plea that defendant had mortgaged the lot for more than its value, and that his interest in it would have sold for nothing, is bad on demurrer.

In such case, a plea that after the execution which plaintiff directed the sheriff to levy on the particular lot, had been returned, plaintiff sued out another *fi. fa.* on the same judgment, placed it in the hands of the sheriff, and directed him to levy on other property, which he accordingly did, held bad, on demurrer, because no disposition of the levy was alleged.

Writ of Error to the Circuit Court of Pulaski County.

DEBT by the State of Arkansas, use of Ashley & Watkins, upon the official bond of Lawson, as sheriff of Pulaski county, against him, Anthony, DeBaun and Thorn as his securities in the bond. The declaration assigned as a special breach of the bond, that Ashley & Watkins, on the 8th day of June, 1842, sued out a *fieri facias* upon a judgment which they had previously obtained in the Pulaski Circuit Court against G. W. Whitaker, and placed it in the hands of Lawson for execution. That they directed him to seize and levy upon a certain lot of ground, situated in the city of Little Rock, as the property of Whitaker, and that he neglected and refused to do so. The cause was determined in May, 1844, on demurrer to defendants' plea; writ of error by plaintiff, the cause reversed by this court, and remanded. *See* 1 *English's Rep.* 269.

After the case was remanded, it was again determined in April, 1847, before the HON. WM. H. SUTTON, then one of the Circuit Judges.

Defendants filed two pleas. 1st, That no such *fi. fa.* ever came to the hands of Lawson as such sheriff, &c.

2d. That said Ashley & Watkins never did instruct or request the said Lawson to levy said *fi. fa.* on lot, &c.

Issues were taken to these pleas, the case submitted to a jury, verdict for defendants, and a new trial granted. Defendants then on showing cause, obtained leave of the court to file four additional pleas (numbered 3, 4, 5, 6,) as follows, in substance:

3*d plea.* That said real estate named in the breach assigned in the declaration, which said Ashley & Watkins directed said Lawson to levy on by virtue of said *fi. fa.* as alleged, &c., was, before the obtaining of the judgment named in said breach, on the 31st day of March, 1842, by said Whitaker, by his deed of that date, duly executed, acknowledged, recorded, &c., *bona fide* given, mortgaged, and conveyed to one Goodrich, as a security for the payment of the sum of $300, then owing from said Whitaker to one Johnston, payable twelve months thereafter, &c.

with a power of sale on the failure of payment thereof. And upon condition that if the same should be paid by said Whitaker when due, said conveyance should be void, otherwise said Goodrich should, upon such failure to pay, &c., have full power to sell said real estate, and satisfy Johnston's demand, &c. And that when said *fi. fa.* came to the hands of said Lawson, as such sheriff, to be by him executed, &c., and from thence until, and after the return day thereof, said real estate was not worth, and never could have been sold for the said sum of $300 for the security of which it had been mortgaged, &c., as aforesaid; and the right, interest, and equity of redemption therein of which said Whitaker was then seized and possessed, was of no value, and no part of the debt, damages &c., in said *fi. fa.* mentioned, &c. could be levied thereon, &c. And this, &c., wherefore, &c.

4th plea. That said Lawson, as such sheriff, after said *fi. fa.* came to his hands, and before its return day, and before he was directed by Ashley & Watkins to levy on the real estate mentioned in the breach assigned in the declaration, *to wit:* on the 14th June, 1842, by virtue of said *fi. fa.* levied and seized certain real estate, lands and tenements, the property of said Whitaker, situated, &c., for the satisfaction of the debt, &c., in said *fi. fa.* mentioned, *to wit:* the undivided half of block 89, in the city of Little Rock; and defendants aver that said real estate lands and tenements so levied by said Lawson as aforesaid, by virtue of said *fi. fa.*, were, when he levied the same, and thence until, and after the return day of said writ continued to be of value more than sufficient to satisfy the said debt, &c., in said *fi. fa.* mentioned, &c., and from the time of said levy until the return day of said *fi. fa.* could have been sold by him, and the debt, &c. satisfied thereout; but after the levy thereof, and before the return day of the writ, and before said Lawson, by virtue of said *fi. fa.* and levy thereof aforesaid could sell the same, *to wit:* on the 2d Sept. 1842, the said Whitaker, according to the Statute, &c., required of said Lawson an appraisement of said real estate, lands and tenements; whereupon said Lawson caused the same to be appraised as the Statute directs, and the appraisers valued the

same at $600; that said Lawson then duly advertised said real estate for sale, offered it for sale at public vendue according to law, and no person would bid two-thirds of the appraised value thereof, so that said Lawson could not sell the same to satisfy said *fi. fa.* &c., but was forced to return said writ without sale of said real estate for want of bidders, &c., and said debt, &c., wholly unsatisfied; and before the same could be sold by him thereafter, as such sheriff, the market value of said real estate, land and tenements, by casualties and the mere change of circumstances and condition of the country, over which he could exercise no control, so depreciated that he could never afterwards sell the same for a sum sufficient to satisfy the debt, &c., aforesaid, until he was forced and compelled, by writ of *ven. ex.*, sued out, &c., by said Ashley & Watkins on the judgment, execution, and return aforesaid, addressed, &c., and delivered to him, &c., *to wit:* on the 25th March, 1843, to sell the same, *to wit:* on the 29th May, 1843, at &c., and did then and there sell the same, according to law, when by the casualties, &c., aforesaid he could ouly obtain therefor the sum of $65, and this, &c., wherefore, &c.

5*th Plea.* That after said *fi. fa.* came to the hands of said Lawson as such sheriff, &c., and before the return day thereof, *to wit:* on the 14th day of June, 1842, for the satisfaction thereof, &c., the said Lawson seized, levied and took into execution certain lands and tenements, the property of said Whitaker, situated, &c. *to wit:* the undivided half of block 89 in the city of Little Rock, of great value, *to wit:* of the value of $600; an appraisement whereof was then and there demanded by said Whitaker of said Lawson; whereupon said Lawson, according to the Statute, &c., afterwards, *to wit:* on the 2d day of Sept. 1842, caused the same to be appraised, &c.; and the appraisers valued the same at $600, and therefore, said Lawson, as such Sheriff, having seized, levied and taken on, and by virtue of said *fi. fa.* property of said Whitaker ascertained in manner aforesaid, and then believed by him to be of valué more than sufficient to satisfy the debt, &c., in said *fi. fa.* mentioned, &c., desisted from making any further or other

levy of the property of said Whitaker thereupon, as he was by law bound to do: and this, &c., &c.

6th Plea. That Ashley & Watkins, after said *fi. fa.* in the breach mentioned, was issued, and came to the hands of Lawson, after he was directed to levy the same as alleged, &c., and after the return thereof, and before the institution of this suit, to wit: on the 16th Oct., 1843, sued out another *fi. fa.* upon the judgment named in said breach, &c., and directed, &c., commanding, &c., and placed it in the hands of said Lawson, as such sheriff, &c., to be executed, &c., and directed him, by endorsement thereon, to levy said execution on lots ten, eleven and twelve, in block 20, in Little Rock; whereupon said Lawson did on, &c., levy the lots last mentioned for the satisfaction of said debt, &c., according to the direction of said Ashley & Watkins aforesaid: and this, &c.

The Court sustained a demurrer to the above four additional pleas, and defendants declined to plead over. The issues to the first and second pleas were submitted to the Court sitting as a jury; verdict against defendants for $247.32, and judgment accordingly.

Defendants brought error.

RINGO & TRAPNALL for the plaintiffs. The statute, *(Dig. ch.* 67. *Secs.* 31, 50,) gives the defendant the right to select what property shall be levied on, and to point out the order in which it shall be sold; but no right is given to the plaintiff in execution to direct the sheriff upon what property to levy; and he is not, therefore, bound to obey the instructions of the plaintiff in making the levy.

The plaintiffs can only recover the actual damages sustained: a plea, showing that the plaintiffs sustained no damage by the failure of the sheriff to levy according to directions, is a good bar.

The sheriff is bound to levy upon property sufficient at the time to satisfy the demand: the sufficiency is not left to the discretion of the sheriff, but must be ascertained by appraisers: and the sheriff cannot be held responsible either for a mistake in the estimate of the appraisers or for a decrease in the value of the property.

A part of the debt being made on another execution issued after the breach laid in the declaration, the sheriff is entitled to a credit therefor if judgment be given against him. *Bruce vs. Dial,* 5 *Mon.* 128.

WATKINS & CURRAN, *contra.* The sheriff is bound to levy upon the defendant's property liable to execution, whether it be of value or not; and a plea that the property was worth nothing is not a good plea in bar.

The appraisement law was designed as a protection to the debtor and not to the sheriff, he therefore cannot shield himself under an appraisement made under it, for failing to levy on sufficient property. The creditor had a right to a sufficient levy, and it was the duty of the sheriff, at his peril, to make a sufficient levy. The test of value is what the property will bring when fairly exposed to sale.

The issuance of another execution is no waiver of the cause of action against the sheriff for failing to levy: nor does it affect his liability, though he is entitled to credit for the money made. *Bruce vs. Dial,* 5 *Mon.* 128. A creditor may proceed against the sheriff for breach of duty and on the original judgment. *Jackson vs. Bartlett,* 8 *John.* 361. 18 *Eng. Com. Law Rep.* 375. It is no defence that the goods of a co-defendant have been taken in execution; nor that the debtor's goods have been, when pleaded by the garnishee. *(Walker vs. Bradley,* 2 *Ark.* 578 *and cases cited,) a fortiori* nothing but actual satisfaction would avail the sheriff.

MR. JUSTICE WALKER, delivered the opinion of the court.

This suit is brought against Lawson and his securities on his official bond as sheriff. The breach of official duty is that he refused to levy an execution on property when directed by the plaintiff in execution so to do. The defendants filed four special pleas, numbered 3, 4, 5, 6; to each of which a demurrer was sustained.

As the whole question in this case is dependent upon a proper construction of the duty and responsibility of the sheriff, who re-

ceives an execution to be levied, we will proceed at once to lay down what we understand to be his duties and responsibilities in such cases.

In obedience to the command of the writ he should, without delay, levy on property sufficient to satisfy the debt and costs. In determining what is a sufficient levy for that purpose, he is left to exercise his own judgment, free from the restraint or control of either the plaintiff or defendant; and is accountable to the plaintiff, on the one hand, if he fails to levy on as much as a reasonable, prudent man would deem sufficient for that purpose, (if so much is to be found within his legal grasp); and on the other, to the defendant for an unreasonable and unnecessary levy on his property. It is true that the plaintiff may point out property to be levied on: this is merely in aid of the officer in identifying the property as the defendant's, and imposes no obligation on the officer to levy on that particular property to the exclusion of or in preference to other property. To permit this is, in effect, to allow the plaintiff to select the property upon which the levy is to be made, power which belongs exclusively to the officer until by Statute the defendant was allowed to select such property as he could most conveniently part with, or to which he attached less value; but even this statutory provision, extending as it does only to discriminate in favor of the defendant's selection, where he has more than sufficient property to satisfy the process, has nothing whatever to do with the amount of property to be taken; this the sheriff takes upon his official responsibilities to the parties. We are not to be understood as asserting that the sheriff is bound to take exactly enough, and no more; this would be unreasonable if not impossible. It is only where the estimate is so far from that which a prudent discreet man would make as to render him accountable from a presumption of negligence or design to wrong or injure the party aggrieved.

The state of case before us requires that we should extend our inquires farther, and raises the question whether a sheriff, who has made a levy on property sufficient to satisfy the debt and costs, is responsible that it should remain so until sale, and if af-

ter a lapse of time and delay over which he had no control, the property decreases in value and fails to sell for a sum sufficient to satisfy the plaintiff's demand, whether he can be held responsible for the deficit. If so, it amounts to an absolute guarantee for the sufficiency of the levy, and that the property shall sell for money sufficient to pay the debt. To the correctness of this proposition we cannot subscribe, and that we may show more clearly its incorrectness we will suppose that the levy be made on flour of value amply sufficient to pay the debt, but on account of delay, not the fault of the officer, and unusually damp and wet weather, the flour is damaged, and sells for half its former value and fails to satisfy the debt, is the sheriff responsible for this? Again, suppose he goes to a warehouse and levies on bales of cotton sufficient, at the cash price in hand, to pay the debt, and before the day of sale cotton falls to half its price, shall the sheriff make up the deficit? But if this rule is sound and just, let us apply it on the other side. We have said that the sheriff is responsible to the defendant for an excessive levy. Suppose the sheriff levies on property sufficient in value at the time of the levy to pay the debt; (for this the defendant has no cause of complaint,) but on the day of sale, the property has so increased in value that it sells for double the amount of the debt, could it be contended that the sheriff was accountable for an excessive levy? We think not: and yet there is as much reason in the one case as in the other, both departing from the value of the property at the time of the levy, and resorting to the amount for which it sells as the criterion by which to determine the accountability of the officer. We are fortified and sustained in our opinions on this point by authority analogous at least in principle.

In a case where a sheriff had taken a replevin bond with insufficient securities, it was held that if the securities were apparently responsible persons, the sheriff was not responsible, although they are not actually so. 3 *Stark. Ev.* 1351. In New York it has been held that a sheriff is not liable for property levied upon which is stolen, or for robbery, fire or other accident unless connected with his own negligence. 5 *Hill* 588. And

such, we say, is the law in cases where he levies on sufficient property at the time of levy, but which, by accident or delay or change in the value of property, does not sell for enough to pay the debt.

Having pursued this inquiry as far as we deem it necessary to a proper understanding of the principles involved in this case, we will first apply them to the 4th and 5th pleas; each of which interpose the defence that although the sheriff did not obey the command of the plaintiff by levying on the particular tract pointed out, he was not bound to do so forasmuch as he levied on property of value sufficient to satisfy the plaintiff's entire demand: which property, by lapse of time, not caused by defendant, and the change in the value of property between the days of levy and sale, did not sell for as much as the debt. Now, if the rule, which we have laid down be correct (and we think it is)—that a sheriff is not bound by the directions of the plaintiff to levy on any particular property, and is only required to levy on property of sufficient value to pay the plaintiff's demand—if he does not levy on property of sufficient value for that purpose, he may plead it in bar of an action against him for failing to levy on sufficient property.

We are therefore of opinion that the 4th and 5th pleas set up a legal defence to the action if well pleaded. There is no very substantial difference between them, and had a motion been made to strike one of them from the files, the plaintiff should have been required to select which plea he would rely on, and the other should have been stricken out: but, coming before us on demurrer, we are limited to an inquiry into the sufficiency of the pleas. An attempt is made by counsel so to frame one of them as to make the valuation by appraisers under the Statute conclusive as to the value of the property levied on, and the correctness of this position has been argued at some length. We are, however, of a different opinion. The valuation of appraisers under the Statute has nothing whatever to do with the levy: it in no respect lessens or increases the responsibility of the sheriff. That act was intended to prevent a sacrifice of the

defendant's property: it belongs to a class of legislative acts familiarly known as Relief Laws, which come up to the very verge of constitutional prohibition. The defendants can gain nothing by the valuation: it was *ex parte* and could not be admitted to establish the value of the property at the time the levy was made: such averments are immaterial and may be treated as surplusage.

The 3d plea admits that the legal title to the property on which a levy was directed, was at the time in the defendant in execution and was of considerable value, but sets up as a defence that it was encumbered by mortgage beyond its value. The facts disclosed are far from sustaining this conclusion: indeed, they all depend upon contingencies beyond the knowledge of the defendant, and upon those which may or may not arise in future, he mainly predicates his defence that the property was valueless. True, if there is a valid mortgage sufficient to cover the whole value of the land, and that mortgage has not been paid otherwise and should not in future be paid by the mortgager out of other means, the mortgagee may enforce his lien and render the levy worthless; but because these things may possibly happen, does it follow that the land was of no present value? We think not: and it furnishes no excuse to the sheriff for refusing to levy.

The 6th plea is, that the plaintiff in execution, subsequently to the levy of the first, sued out an alias execution, which was levied on other property; but the plea fails to show what disposition was made of the property. Left thus in doubt by the plea, we must apply to it the rule, "That every thing shall be taken most strongly against the party pleading, upon the presumption that the party states his case as favorably to himself as possible." (1 *Ch. Pl.* 237,) under which rule we must infer that the property was sold or the levy set aside. The demurrer was therefore properly sustained.

But because the Circuit Court improperly sustained the demurrer to the 4th and 5th pleas, the judgment is reversed and the cause remanded.