HUTCHINSON ET AL. *vs.* KELLY.

By the Court.—In ejectment, a certificate of entry, or sheriff's deed, describing a different tract of land from that claimed in the declaration, is incompetent evidence of plaintiff's title.

By Johnson, C. J.—Where plaintiff relies upon a sheriff's deed he must produce the judgment and execution under which he purchased.

By Scott, J.—A sheriff's deed is prima facie evidence of the truth of its recitals, and may be read in evidence without the production of the judgment and execution. *(a.)*

By the Court.—Where a sheriff's deed has been acknowledged, and recorded, the clerk's certificate of the acknowledgment may be appended to it at the time it is offered in evidence.

By the Court.—The execution of a sheriff's deed may be proven by a subscribing witness at the time it is offered in evidence.

By the Court.—Where the plaintiff in ejectment relies for title upon a sheriff's deed, the defendant may introduce the judgment under which the sale was made, and show that it is void.

Appeal from the Carroll Circuit Court.

Ejectment determined in the Carroll Circuit Court, November term, 1847, before SNEED, J.

The action was brought by Hardy Kelly against Joseph Hutchinson and Thomas Hutchinson, for the recovery of the west half of the north *west* quarter of section No. twenty-six, in township No. eighteen north, of range No. twenty west, containing eighty acres, with appurtenances, &c.—as alleged in the declaration.

The cause was submitted to a jury, on the plea of not guilty, and verdict for plaintiff.—Judgment "that plaintiff have and recover of and from said defendants the west half of the north *east* quarter of section No. 26, in township No. 18 north, of range No. 20 west, containing 80 acres" &c.

Note (a). On this point the Chief Justice, and Justice *Scott* differed; Justice *Walker* did not sit in the case, having been of counsel below, and consequently the point remains unsettled. REPORTER.

Pending the trial, defendants took three bills of exceptions to decisions of the court, on the following points:

Plaintiff offered to read as evidence to the jury a certified copy of an entry in the books of the Register of the Land Office at Fayetteville, Ark., as follows:

"17th March, 1841—No. 4453—Lewis Hutchinson entered the west half of the north *east* quarter of section twenty-six in township No. eighteen north, of range twenty west, containing eighty acres: in the United States Land Office at Fayetteville, Ark's."

Which was authenticated by the certificate of the Register of said Land Office. The court permitted it to be introduced, against the objection of the defendant.

Plaintiff then offered in evidence a sheriff's deed, made to him, 5th May, 1846, reciting a sale of the land described in the foregoing certificate of entry, under a judgment and execution against Lewis Hutchinson, together with the proof of its execution and acknowledgment stated in the opinion of this court. Defendants objected to the parol proof of its execution, also to the introduction of the clerk's certificates of its acknowledgment, and to the introduction of the deed without the production of the judgment and execution under which the land was sold, and the deed executed; but the court overruled the objections.

After plaintiff had closed his evidence, defendants offered to read in evidence the record of the judgment recited in the sheriff's deed, and to prove by the record that it was void, to the introduction of which plaintiff objected, and the court sustained the objection.

The defendants asked the court to instruct the jury that if they believed from the evidence that defendants came peaceably into possession of the land in question, plaintiff could not recover unless he had proved a demand and refusal to deliver &c., before suit brought, which the court refused.

Defendants brought error.

Fowler, for the plaintiffs. The copy of the entry was not ad-

missible in evidence, as it was for a different tract of land from that claimed in the declaration: and there was no showing why the book of entries was not produced.

The sheriff's deed was not admissible, 1st. Because it was for a different tract of land from that claimed and described—the *allegata et probata* must correspond (10 *Ohio Reps.* 44. 1 *Stark. Ev.* 404. 2 *ib.* 308.) 2. Because the deed had not been legally acknowledged and recorded. (*Dig. ch.* 67 *sec.* 62, 63, 64. 1 Ham. Ohio Rep. 281.) And no showing was made to authorize proof by the subscribing witness. 3. A sheriff's deed is no evidence of title unless the judgment and execution on which it is based, are also produced to sustain it. *Stevens. vs. Robertson, &c.* 3 *Mon. Rep.* 99. *Locke & Fleming vs. Coleman,* 4 *Monroe Rep.* 320. 12 *John. Rep.* 213. *Buller's N. P.* 104. *Wright's Ohio Rep.* 51. *ib.* 223. 2 *J. R.* 281. 1 *Mo. Rep.* 287. 1 *Salk.* 409. 4 *Smedes & Marsh* 622. *Doe Ex. dem. Starke vs. Gildart & Morris,* 4 *How.* (*Miss.*) *Rep.* 271. 7 *Mon.* 386. 8 *J. R.* 365. 1 *Nott & McCord's Rep.* 408. 3 *Yerg.* 309. *Pet. C. C. R.* 64, 545. 4 *Wash. C. C. R.* 513. 5 *Litt.* 293. 2 *Nott & McCord's Rep.* 418. 2 *Har. Rep.* 475. 5 *Yerg.* 317. *Woodcock vs. Bennett,* 1 *Cow. Rep.* 756. 4 *Mon.* 545.

The opposite party has a right to go behind the execution and show that there was no authority to issue it—that the judgment was void. *Martin vs. England,* 5 *Yerg. Rep.* 317.

JOHNSON C. J. The certificate of entry was improperly admitted in evidence. It did not prove, nor did it conduce, in the slightest degree, to prove the issue made between the parties. It showed an entry of another and totally different tract of land from the one claimed in the declaration, and consequently did not correspond with the allegation. It will be conceded that the copy of the entry, in case it had been otherwise admissible, would have been evidence to the same extent as the original books, if they had been actually produced. (*See* 6 *sec. of chap.* 66 *of the Digest.*)

The paper purporting to be a sheriff's deed was also improp-

erly admitted. It was offered and permitted to be read to the jury, without the production of either the judgment or execution under which the sheriff is supposed to have acted in making the sale. This was clearly error. The High Court of Errors and Appeals of the State of Mississippi, in the case of *Doe ex. dem. Starke vs. Gilbert & Morris,* (4 *Howard Rep.* 271.) held it to be the settled law that a claimant under a sheriff's sale must produce the judgment and the execution. It was also held by the Supreme Court of New York, in the case of *Wilson & Gibbs vs. Conine,* 2 *John. Rep.* 281, that "The execution was also properly rejected as being no justification to the vendee in a sale under it without producing the judgment or decree warranting it." (*See also* 8 *Co.* 97. 1 *Blacks Reps.* 69. *Britton vs. Cole, Salk.* 408.) The deed was also subject to the same objection as the certificate of entry in failing to correspond with the allegation in the declaration.

It appears from the bill of exceptions that the plaintiff in the court below moved the court, at the trial, to permit the clerk to append his certificate to the deed, by which it is shown that the sheriff appeared in open court on the 5th of May, 1846 and acknowledged the deed, and that it was on the same day deposited for record and actually recorded. It likewise appears that the plaintiff was permitted to read the record as proof of the deed, and further to prove its execution and acknowledgment by one of the subscribing witnesses. The facts of the execution and acknowledgment seem to have transpired on the 5th of May, 1846, and more than a year before the trial, and all that was accomplished by the certificate was merely to exhibit the appropriate evidence of those facts. True it is that it might have subjected the defendants to some delay in the trial by suspending it until the clerk could furnish the certificates, yet this was a matter peculiarly and exclusively within the discretion of the Circuit Court, and inasmuch as the proper evidence of its execution and acknowledgment was supplied before the deed was actually read, the defendants have no just cause to complain.

The propriety of permitting the execution and acknowledgment of the deed to be established by one of the subscribing witnesses will necessarily depend upon the construction which shall be given to the statute. The 62d Sec. of Chap. 67 of the Digest declares that "Every officer executing any deed for land, tenements and hereditaments, sold under execution, shall acknowledge the same before the Circuit Court of the county in which the estate is situate: but if he die or leave the State, resign or be removed from office before making such acknowledgment, such deed may be proved before such court as other deeds."

The 63d and 64th sections of the same act further declare that "The clerk of such court shall endorse upon such deed a certificate of the acknowledgment or proof under the seal of the court, and shall make an entry in the minutes of such court of such acknowledgment with the names of the parties to the suit, and a description of the property thereby conveyed," and that "Every deed so executed, acknowledged or proved shall be recorded as other conveyances of land, and thereafter such deed or a copy thereof, or of the record certified by the recorder, shall be received in any court in this State without further proof of the execution thereof."

Though the language used in this act is imperative upon the officer, yet, as it was designed for the benefit of the purchaser, he is not bound to avail himself of its kind and salutary provisions; but, in a contest with the judgment debtor, or others who have actual notice of the existence of the deed, he is entitled to use it as evidence of his title, or of his right of possession upon proof of its execution and delivery. The act, in requiring the officer to acknowledge the deed before the circuit court of the county, did not intend to make the deed to depend upon such acknowledgment for its validity, but simply designed to confer it as a privilege upon the purchaser, in order that it might be placed in such a condition as to operate as constructive notice to the world of his title, and also save him from the loss that he might otherwise sustain by the death of his witnesses, or the loss of other testimony which might be necessary to establish the existence and delivery of the deed. When the deed is acknow-

ledged or proven and recorded, in accordance with the statute, it is ever after sufficient evidence of itself, and supersedes the necessity of any other proof of those essential facts. There would have been no error, therefore, in permitting the subscribing witness to prove the execution and acknowledgment of the deed, or in permitting it to be read to the jury had the official character of the sheriff also have been proven. The plaintiff having elected to introduce his deed without its being acknowledged or proven and recorded as authorized by the statute, the official character of the sheriff was not *prima facie* shown, but required proof *aliunde*.

The defendants, after the plaintiff had closed the evidence on his part, presented the record of the judgment upon which the execution was issued and under which the sale was made, and proposed to show that it was void, and that consequently it could confer no title upon the plaintiff. This the court refused, and assigned, as a reason, that no evidence could be received to question the validity of the judgment. This point has already been virtually decided and against the notion of the circuit court. The High Court of Errors and Appeals of Mississippi, in the case already referred to, further said that "a judgment necessarily imports verity. It is conclusive in its character, and admits of no question. An execution has none of these attributes: it is merely the authority or warrant for enforcing the judgment. Its force depends upon the existence of a judgment. Without a judgment to support it, it is void." If the purchaser under a sheriff's sale is required to produce the judgment and execution before he can be permitted to read the deed, and that he is cannot be denied, it is then manifest that, if the judgment itself is void, he cannot be allowed to read his deed acquired under it. It is clear from this view of the case that the circuit court erred in giving the judgment which it did, and that consequently the same ought to be remanded. Judgment reversed and cause remanded.

SCOTT, J. I concur in the conclusion at which the Chief Jus-

tice has arrived, that this judgment should be reversed; but I dissent from so much of the opinion as holds that the judgment and execution must be produced in order to admit the sheriff's deed in evidence: as it is my opinion that, when the deed shall have been proven as indicated by him, it may be read in evidence, and is then, without the judgment and execution out of which it sprung, *prima facie* evidence of title. *Sec.* 60 *and* 64, *chap.* 67, *Digest.*

Mr. Justice WALKER not sitting.