SULLIVAN *vs.* PIERCE ET AL. (*a*)

To an action on a forfeited delivery bond, a plea alleging that, after the condition of the bond was broken, plaintiff sued out an alias *fi. fa.*. which was levied upon the property first seized, which was not sold but returned to defendant by order of plaintiff, held no defence to the action.

Defendants in such action are estopped from denying, by plea of *nul tiel* record, the existence of the *fi. fa.* recited in the condition of the bond.

Writ of Error to Union Circuit Court.

DEBT, by Franklin B. Pierce, against Lee Sullivan and William Lee, determined in the Union Circuit Court, at the October term, 1847, before the Hon. GEORGE CONWAY, then one of the Circuit Judges. The facts are stated in the opinion of the Court.

PIKE, for the plaintiffs, contended that the plea, though defective in form, was good in substance, as it showed an abandonment of remedy on the delivery bond; that the suing out a new execution and levying it on the same property, and the subsequent discharge of the property by the voluntary act of the plaintiffs in the Court below, released the securities in the delivery bond.

S. H. HEMPSTEAD, contra. The finding on *nul tiel record* was correct, as will be seen by calculation. (*Williams vs. Lyles*, 2 *Cranch* 9. 1 *Cond. Rep.* 335. *Alexander vs. Brown*, 1 *Pet.* 683.) However, it was an immaterial issue, because the record is not the foundation of the action, but at most mere inducement, and hence *nul tiel record* could not be plead at all. (1 *Chit. Pl.* 481. 1 *Saund.* 38. 2 *Saund.* 344. 1 *East* 372.) The suit was founded on the delivery bond, and the obligors were estopped from objecting to the execution or basing any plea upon it. (*Outlaw*

(*a*). This case was decided July term, 1849.

vs. Yell, gov., &c., 3 *Eng.* 346.) This is not an instance where a repleader can be awarded, and if the issue had been found for the other party, Pierce would have been entitled to a judgment *non obstante veredicto.* 1 *Chit. Pl.* 634.

Granting that the second plea is sufficiently formal to present an issue, it is no bar to the action. (1) It is not responsive to the breach in the declaration. (2) The levy on the alias execution did not effect the remedy on the delivery bond, because it did not amount to satisfaction. The rule is general that nothing short of payment will satisfy a judgment. A creditor must have what Lord Coke calls "a valuable execution which is the end and fruit of his suit." (*Blumfield's case,* 5 *Co. Rep.* 87. 2 *Tidd* 939-941. 9 *J. R.* 221. 1 *N. Hamp. R.* 289. 2 *N. Hamp. Rep.* 299. *Strange's Rep.* 226. *Drake vs. Mitchell,* 3 *East* 259.) It is clear law that where the debtor again receives the goods levied on, the judgment is not satisfied. *Morrow vs. Hart,* 1 *Marsh. R.* 292. *McGennis vs. Lillard's ex.*, 4 *Bibb.* 490. *Bucks vs. Bass,* 4 *Bibb.* 338. *Walker vs. Bradley,* 2 *Ark.* 594. *Caudle vs. Dare,* 2 *Eng.* 46. 7 *Mass.* 506. 2 *New Hamp. R.* 299.

A plaintiff who has several remedies, may pursue any one of them successfully until he obtains actual satisfaction. (*Ontario Bank vs. Hallet,* 8 *Cow.* 192. 3 *Har. & John.* 497. 4 *Har. & McH.* 533. 4 *Har. & John.* 200.) Obtaining one remedy does not destroy an other, because they are cumulative, and subsist until the creditor reaches that point at which the law declares the debt satisfied. (*Tayloe vs. Thompson,* 5 *Pet.* 369. 5 *Co.* 87.) A judgment in one Court is not extinguished by a judgment subsequently obtained on it in another Court. (*Andrews vs. Smith,* 9 *Wend.* 54.) The second must, in fact, be satisfied to extinguish the first. (11 *J. R.* 516. 1 *Cow.* 178. 5 *Cow.* 248.) In *Sasscer vs. Walker,* (5 *Gill & J.* 102,) it is held that taking property under a *fi. fa.* is not *per se* equivalent to payment, and does not satisfy the judgment, and that the plaintiff may cause property levied on to be restored to defendant without impairing his claim. 1 *Cow.* 501. *Allen on Sheriffs,* 180. 2 *Blackf.* 195.

5 *Blackf.* 270. 4 *Ala. R.* (*New Series*) 427. 5 *id.* 55. 8 *id.* 765. 9 *Porter* 201.

These principles and authorities conclusively show that the second plea cannot be sustained; and, on the whole, the judgment must be affirmed.

Mr. Justice WALKER delivered the opinion of the Court.

The assignment of errors in this case presents for our consideration the sufficiency of the second plea of defendant, to which a demurrer was sustained. The plaintiff declares upon a bond with condition for the delivery of a slave to be sold under execution on a given day; and alleges, for breach of the condition, that the slave was not delivered according to the terms of the condition, and that the debt remained unpaid. The plea admits the execution of the bond, and that the condition had been broken, but sets up, in bar, in substance, that, after the condition of the bond had been broken, the plaintiff sued out an alias execution which was levied on the same slave, which was not sold, but, by order of plaintiff, returned to defendant. These facts by the demurrer were admitted to be true, and the inquiry is, if true, and pleaded in apt form, (which was very far from the case in this instance,) do they constitute a good defence to the plaintiff's action.

The execution of the bond and its condition broken being admitted, the defence, to be a good one, must go to the discharge or satisfaction of the obligation. The mere suing out an alias execution, in our opinion, does not amount to either; nor does the levy on property, whether the same or other property, amount to satisfaction. The greatest extent to which the authorities have gone, has been that where the property is taken in execution and remains in the hands of the officer unsold, it may be considered as a temporary satisfaction to the extent that it must be disposed of before other estate can be taken in execution. But even that rule cannot come in aid of this plea, for it affirmatively appears, from the plea, that the property was restored. Without further examination into the sufficiency of the plea, or

pointing out its defects in structure, as we are of opinion that the facts in no form would amount to a legal defence, we are of opinion that the demurrer was well sustained.

Upon the second point, as to whether the issue of *nul tiel record* was properly determined, we are of opinion that it is wholly immaterial how it was determined. The plea should have been disregarded as forming an immaterial issue. The execution was not the foundation of the action; nor was it necessary to recite it in the declaration. It is disclosed in the condition of the bond, and the defendants are estopped by their own act from denying its existence. (3 *Marshall* 302. 3 *John. R.* 331. 2 *J. J. Marsh.* 280. 3 *ib.* 164.) And so, in a suit on an administrator's bond, the defendants are estopped from denying the grant of administration. (3 *Eng.* 346.) Not only was the defendant estopped from interposing this defence, but the defence itself tendered an issue wholly immaterial to the merits of the action: the bond, its condition and breach, its satisfaction and discharge, were the subjects of inquiry. This plea then confessed, but did not avoid the action. A repleader would not have been proper. Chitty says that "the distinction between a repleader and a judgment *non obstante veredicto* is that, that where the plea is good in form but not in fact, or, in other words, if it contain a defective title or ground of defence by which it is apparent to the Court, from the plaintiff's own showing, that in any way of putting it he can have no merits and the issue found for him, as the repleader could not mend the case, the Court, for the sake of the plaintiff will at once give judgment *non obstante veredicto.*" 1 *Chit. Pl.* 656.

But, suppose the issue material and well taken, we discover no error in the finding of the Court upon it. We are of opinion that there is no error in the record and proceedings in this case which can affect the validity of the judgment.

Judgment affirmed with costs.