Whitelsey, Charles C. v. Brohammer, Lorenz et al | 1860 | St. Louis | 439/8

Old Box 608/11

31
98

receiver poss. of lot
Valentine Funck (dec)
↓
- widow Johanna, wife of Philip Mueller

Aff/Mot for Rehearing Overruled
Scott
M 60
F 58

Case Re: Bond
26 Mo 483

Funck & others were security for
13,000 for Jacob Mueller (adm. of
Catherine Mueller)
Suit on bond in name of state to use
of Adolph Kehr (adm. de bonis non
de CM) against Johanna as heir
Lot was levied upon and sold against Jh.
& sold to W
JF conveyed to Joseph Brohammer →
Lorenz B in trust for Johanna Luis
(daughter)
to defraud so W wants
them set aside & pass.

O= debt on bond against
heir can't be maintained
unless under peculiar circum.
judg. won't affect sales
before rendition

LC= W has no title b/c exec. did
not follow judg.
Monroe

Page 1

State of Missouri }
County of Saint Louis } Be it remembered that on the eighth ~~21st~~ day of April in the year of our lord one thousand eight hundred and fifty seven there was filed in the office of the clerk of the St. Louis Land Court. A petition which is in the words and figures following to wit

Petition

Saint Louis County } ss Saint Louis Land Court
Charles C Whittelsey October Term 1857.

vs

Lorenz Brohammer
Anthony Luis & his wife
Johanna Luis
Joseph Brohammer
Phillip Mueller and
Johanna Finck his wife
& Louis Heim. Defendants

Plaintiff states that Valentine Finck formerly of the county of Saint Louis died seised in fee of the following described lot of ground in block No fifty six of the city of St. Louis beginning at a point on the West line of second street sixty five feet eight inches south of Myrtle street thence running north on the west line of second street Twenty two (22) feet, thence running West parallel with Myrtle street Eighty feet thence North parallel with second forty three feet eight inches (43' 8"), thence west on the south line of Myrtle, forty Eight feet nine inches (48' 9"), Thence South parallel with second street sixty five feet eight inches (65' 8"), thence East parallel with Myrtle street to the place of beginning being the same lot sold to said Valentine Finch by D. A. January and wife by deed dated May 1st 1847

That said Valentine died seised leaving no heirs in the United States capable of inheriting said real Estate save his widow the defendant Johanna Finck now the wife of the defendant Phillip Mueller upon whom said Estate descended for want of direct heirs

That prior to his death on the twenty second day of June Eighteen hundred and fifty at St. Louis the said Valentine Finch with other persons made to the state of Missouri his bond of that date in the penal sum of Thirteen thousand dollars, and by said bond did bind himself his heirs executors and administrators in said penal sum upon certain conditions in said bond expressed, among others, that Jacob Mueller administrator of Catherine Mueller deceased, should faithfully administer the estate of said Catherine Mueller account for pay and deliver all money and property of said Estate &c &c. After the execution of which said bond the said Valentine Finck died and his lands descended to the said Johanna Finck

25 2,

and there having been afterwards a breach in the condition of said bond suit was brought upon the same in the St. Louis Court of Common Pleas in the name of the state of Missouri to the use of Adolphe Voth administrator de bonis non of said Catherine Mueller against the said Johanna Finck as heir of the said Valentine Finck deceased and on the sixteenth day of August A. D. 1855 process was served upon the said Johanna Finck who duly appeared and defended said suit, and admitted that the lot above described descended to her as assetts of the said Valentine Finck deceased and on the sixth day of January eighteen hundred and fifty seven judgment was rendered by said court in favor of the Plaintiff in said suit and against the said Johanna Finck as heir of the said Valentine Finck deceased in the sum of Thirteen Thousand dollars, all which will appear by a certified transcript of the Record in the St. Louis Court of Common Pleas herewith filed Marked A. upon which judgment execution issued according to law by virtue of which for want of sufficient goods and chattels of said Valentine Finck deceased the real Estate above described was levied upon by the sheriff, and on the nineth day of March Eighteen hundred and fifty-seven was sold to the Plaintiff, and the said sheriff made to the plaintiff a deed for said land as the real Estate of said Valentine Finck at the time of his death, All of which will more fully appear by reference to said Sheriffs deed herewith filed and which said sale and deed passed to the Plaintiff all the right title interest and estate in said land which said Valentine Finck had at the time of his death, said exhibit is marked "B". Plaintiff further says that on the eight day of March eighteen hundred and fifty six by deed of that date the said Johanna Finck for the nominal consideration of nine thousand dollars did purport to sell and convey with warranty to Joseph Brahammer the said lot taking a deed of trust to secure the payment of three notes one for three thousand dollars at two years after date, one for three thousand dollars payable four years after date and one for twenty eight hundred dollars payable six years after date, said notes bearing interest at six per cent, satisfaction of which deed of trust was acknowledged upon the margin of the Record August 15th 1856 all which will appear by copies of said deeds herewith filed Marked C. & D. and on the twenty eight day of May eighteen hundred & fifty six the said Joseph Brahammer for the nominal consideration of nine thousand dollars did grant bargain and sell said lot to Lorenz Brahammer in trust for Johanna Luis of the city of New Orleans in the state of Louisianna the wife of Anthony Luis of said city to hold

25 3.

for the separate use of said Johanna Luis, and to sell lease and convey as she should direct. as appears by copy of said deed herewith filed marked E.

And plaintiff in fact says that the said deeds of the said Johanna Finch to Joseph Brahammer and of Joseph to Lorenz Brahammer as trustee of Johanna Luis (who is a daughter of said Johanna Finch as plaintiff is informed) were made with the express intent to hinder and defraud the plaintiff in the suit aforesaid of his lawful action debt and demand and to prevent the plaintiff in said suit from obtaining satisfaction of said debt and judgment. Plaintiff believes and so charges the fact to be, that the consideration mentioned in said deeds was never actually paid in cash but that said sums were mentioned in said deeds for the purpose of deceit and fraud and that said deeds are fraudulent and void as against the plaintiff. The plaintiff further states, that said defendant Lorenz Brahammer is in possession of said premises upon which are valuable improvements by his tenants the defendants Louis Keim, and Phillip Mueller the husband of said Johanna Finch and that said premises are worth a rent of ninety dollars per month, and plaintiff avers that the said Johanna Luis cestui-qui-trust in said deed as aforesaid resides with her husband Anthony Luis in the city of New Orleans and state of Louisianna and that the said Lorenz collects and pays said rents to the said Johanna Luis or her order, and inasmuch as the said Johanna Luis is a married woman, not residing in this state, nor subject to the process of this court, plaintiff is afraid that the rents of said premises may be lost to him, unless the said Lorenz be restrained by the order of this court from paying said rents to the said Johanna Luis; Plaintiff is informed and believes, and so charges that the said Lorenz Brahammer has but small means, and plaintiff fears that he may lose said rents if the same are retained by said Lorenz pending this litigation, Plaintiff has demanded of the parties the possession of the premises above mentioned

Plaintiff therefore prays that the defendants Lorenz and his tenants the said Phillip Mueller and Louis Keim, be decreed to deliver to plaintiff the possession of said premises and that they account to him for the rents received since the 9th day of March last, and that the said deeds of Johanna Finch to Joseph Brahammer and of said Joseph to Lorenz Brahammer above described be set aside as fraudulent and void, and that he may have such other and further relief as to the court may seem meet &c &c

And he further prays that the said Lorenz Brahammer enjoined from paying said rents to the said Johanna Luis or her order while this suit is pending

20 4.

and that he further be required to pay into court the said rents as collected monthly by him to abide the result of this suit, and that in default thereof a receiver be appointed to collect said rents pending these proceedings to the intent that said rents be not wasted and lost &c &c

Charles C. Whittelsey Plff

County of St. Louis } being sworn says that he believes the above petition and the matter therein stated to be true that as far as the said matters are stated of his own Knowledge they are true and as far as they are stated upon information of others he believes them to be true

Sworn to and subscribed this 7th day of April 1857 before me

Charles A Manty Clerk. } Charles C. Whittelsey

County of St. Louis ss.

The State of Missouri

To the sheriff of St. Louis County, Greeting. We command you to summon, Lorenz Brohammer Joseph Brohammer. Phillip Mueller, and Johanna Finck his wife and Louis K in to appear before the judge of our Saint Louis Land Court, and the first day of the next term, hereof to be held in the city of St. Louis within and for the county of St. Louis, on the second Monday of October next, then and there to answer the complaint of Charles C. Whittelsey, as set forth in the annexed petition and have you then and there this writ

Summons

Seal

Witness Charles a Manty, clerk of our said Court with the seal thereof hereto affixed at office in the City of St Louis this Eight day of April in the year of our lord eighteen hundred and fifty seven

Charles A. Manty Clerk

Executed this writ in the county of St. Louis on the 9th day of April 1857 by delivering to the within named Lorenz Brohammer a copy of the within writ and petition as furnished by the clerk and further executed this writ on the 10th day of April 1857 by delivering a copy of the within writ as furnished by the clerk and by reading the petition to the within named Joseph Brohammer - James Castello Sheriff

Sheffs return

by H. J. Kaspkesser Deputy

Further April 9th 1857 by offering to deliver a copy of this writ to Phillip Mueller and Johanna Finch his wife two of the defendants which they refused to take

James Castello, Sheriff

by Thos L. Chadbourne Deputy

Executed this writ in the county of St. Louis on the 4th day of May

5, 1857 by delivering a copy of the within writ as furnished by the clerk and by reading the petition to Leopold Keil James Castello sheriff
by H. J. Kapperson Depy

And afterwards the following further proceedings were had in this cause to wit

Saturday December 12th 1857. October Term 57

Charles C. Whittelsey vs Lorenz Brohammer Anthony Luis and his wife Johanna Luis. Joseph Brohammer Phillip Mueller and Johanna Finch his wife and Louis Keim } Answer filed in this cause

Ans filed

Which answer in the words & figures as follows to wit

Charles C. Whittelsey vs Lorenz Brohammer et al } Amended Answer

Amended Answer

The defendants answering admit that Valentine Finck died seized in fee simple of the lot of ground and premises in the petition of the Plaintiff mentioned and described leaving no heirs in the United States capable of inheriting the said property whereby the same descended to his widow the said Johanna as in the said petition stated and these defendants further admit the execution of the bond by the said Valentine and that suit therein was instituted in the St. Louis Court of Common Pleas, but these defendants do not admit but deny that the said suit and the proceedings therein are correctly stated on the Plaintiffs petition and they beg leave to refer to the same when produced by the Plaintiff and they admit that the said Johanna is the wife of the defendant Mueller having married him during the pendency of the said suit and before the rendition of the judgment therein And these defendants are advised and insist that the execution issued upon the said judgment was irregular and void and that the sale by the sheriff and deed to the plaintiff were nullities & that under the same the plaintiff acquired no right or interest whatever as against these defendants or either of them in or to the said property and these defendants admit the execution of the two deeds mentioned in the

petition of the plaintiff but they deny the statement in the said petition that the same were made with the intent to hinder and defraud the plaintiff in the said suit from obtaining satisfaction of said debt and judgment and they say that neither of them was made with such fraudulent intent and they insist that the said deeds are valid and operative against the plaintiff in this suit
And these defendants deny that the monthly value of the said premises is or was what the plaintiffstates in his petition

State of Missouri } Gareschè & Hamilton. atty of Defts
County of St. Louis } Lorenz Brohammer an of the above named defts being duly sworn on his oath says that the above answer and the matters as therein stated he believes to be true

Seal

Sworn to and subscribed before me this 18th day of January 1858. } L. Brohammer

John F Lourney Notary Public

And afterwards the following further proceedings were had in this cause to wit

March Term 1858

Charles C. Whittelsey

vs

Lorenz Brohammer. Anthony Luis and his wife Johanna Luis Joseph Brohammer. Phillip Mueller and Johanna Finch his wife & Louis Keim

Saturday May 15th 1858

Trial Begun

Trial begun agreement at the trial filed in this cause
Now at this day come said plaintiff in his own proper person and also come said defendants Lorenz Brohammer Joseph Brohammer Phillip Mueller and Johanna Finch his wife and Louis Keim by their attorneys said defendants Anthony Luis and his wife Johanna Luis being heretofore in default and no jury being required by either party. this cause is submitted to the Court upon the petition (amended answer) evidence and proofs aduced and the court having heard and not being fully advised of an concerning the premises. takes time to consider thereon

for agreement see bill of Exceptions for page 8

15 7.

And afterwards the following further proceedings were had in this cause to wit

March Term 1858

Friday June 4th 1858

Charles C. Whittelsey

Non suit

Lorenz Brohammer Anthony Luis and his wife Johanna Luis Joseph Brohammer, Phillip Mueller and Johanna Finck his wife & Louis Heim

vs.

Non Suit

Now at this day come again said parties by their respective attorneys and this cause having been heretofore submitted to the court and the court being now fully advised of and concerning the premises, The plaintiff under the instruction given by the court takes a non suit with leave to move to set the same aside. It is therefore ordered and adjudged by the court that the Plaintiff take nothing by his suit but that the defendants go hence without day and recover of said Plaintiff their costs and charges herein expended and have execution therefor, and the said defendants hereby waiving all claims of damages. It is further ordered by the Court that the temporary Injunction granted in this cause, be and the same is hereby dissolved, and that the defendants recover of said Plaintiff their costs and charges herein expended and have execution therefor. Instructions filed in this cause

And afterwards the following further proceedings were had in this cause to wit

March Term 1858, Friday June 4th 1858

Charles C. Whittelsey

Mo set aside Non suit overuled

vs

Lorenz Brohammer Anthony Luis and his wife Johanna Luis Joseph Brohammer Phillip Mueller and Johanna Finck his wife & Luis Heim

Now at this day come said Plaintiff and files herein a motion to set aside non suit and the court being fully advised of and concerning the premises doth overrule and adjudge that said motion be overuled & it is further ordered that the receiver herein, exhibit and file his accounts within five days, in this cause

And afterwards the following further proceedings were had in this cause to wit

March Term 1858. Saturday June 5th 1858.

Charles C. Whittelsey

vs

Lorenz Brohammer. Anthony Luis

Now at this day comes Robert L. Voor his receiver in this cause and files herein his account and six Vouchers in this cause

15 8

Bill of except filed

and his wife
Johanna Luis Joseph Brohammer
vs
Phillip Mueller and Johanna Finck his wife and Louis Keim

Bill of exception Filed in this cause

Which bill of Exception in the words and figures as follows to wit

Charles C Whittelsey
vs
Lorenz Brohammer & ols

Be it remembered that this cause came on for trial before the Saint Louis Land court on the 3ed June 1858, upon the petition and amended answer, and thereupon the plaintiff preceded the record of the St Louis Common Pleas referred to in the petition of the following to wit (Insert it)

And also read the sheriffs deed and the execution attached thereto of the tenor following (Insert it)

And also read the deed from Johanna Finch to J. Brohammer of tenor following (Insert it)

Also the deed from Joseph Brohammer to Joanna Luis trustee (Insert it)

And also the deed from Joseph Brohammer to Johanna Finch trustee (Insert it)

The parties also agreed as follows

In the St Louis Land Court.

March Term 1858

agtt of parties at Trial

Charles C. Whittelsey
vs
Brohammer & ol

Agreement of parties at the trial

It is agreed that the plaintiff was the attorney of Record for the plaintiff in the suit in the court of common Pleas and as such procured the judgment therein and caused the execution to be issued directing it to be issued in its present form, That the value of the property in question at the time of the purchase by the Plaintiff in this suit was not less than $ 400, That Johanna Finck the widow of Valentine Finck was married to her present husband Mueller during

9. the pending of the suit in the Common Pleas and before Judgment therein that the said Valentine died in the premises in question having resided there ~~at there~~ at the time of his death and that said Johanna lived with him as his wife there at the time of his diceased and continued to reside there afterwards up to the time of the conveyance by herself to Brohammer that Johanna Luis is the Daughter of said Johanna Finck and her only child and that she resides with her husband at New Orleans, La. It is agreed also ~~agreed~~ that the statement in the Sheriff's deed ~~and~~ "for want of sufficient goods and chattels whereon to levy" was interlined in the hand writing of the present plaintiff before the execution of said deed. For convenience, the sheriff's deed and copy of execution may be read in evidence with the right to Defts, to make all legal points and objections ~~thereto~~ to said execution and deed afterward and with the same effect as if made before the reading thereof. should the Court find for the Plaintiff, the only question reserved will be that of future rents

May 13th 1858 Hamilton & Garesché for Defts

Charles C Whittelsey for Plff

Bill of Exc Defts prayed the following instruction which was overuled and Defts excepted

Defts Instruc Defendants instructions

No 1) The execution under which the sale to the Plff was made, so far as it relates to Johanna Finck and directs a levy of the goods and chattels and real Estate which were of Valentine Finck, deceased, not being in conformity with, nor warranted by, the judgment read in evidence, and the Plaintiff in this suit having been the attorney of the record in the said cause and as such procured the said judgment and also directed the clerk to issue the said execution in its present form, he is not entitled to judgment in this suit against the Defendants

No 2) The direction to the sheriff in the general terms of the Execution to make the debt" of the goods and chattels and real Estate of the said Leonard Bedlingmain, Jacob Reinhardt and which were of said

10 Valentine Finck, at the time of his death," so far as it relates to Johanna Finck, was not in conformity with, nor warranted by, the statute which prescribes the only kind of process to be issued against a person as Heir, and requires that the sheriff shall be commanded to the effect that he resort to the reality ~~to the reality~~ descended only in the events of an insufficiency of goods and chattels of the ancestors subject to execution; and the Plaintiff having caused the said Execution to be issued in its present form, acquired no title to the land in question under the sheriff's sale and deed

No 3.) Even if said Judgment authorised an execution to be issued against said Leonard Bedlingmaier, Jacob Reinhard and Johanna Finck as Heir the command in the execution read in evidence to make the debt of "the goods chattels and real Estate of the said Leonard Bedling maier Jacob Reinhardt and which were of said Valentine Finck at the time of his death" rendered said writ null and void, because it restricted the levy to be made only of the estate of the intestate Valentine Finck; and the Plaintiff having caused the said execution to be issued cannot recover in this suit

No 4) The statement in the sheriff's deed (interlined in the handwriting of the Plaintiff,) "that the levy on the land in controversy was made" for want of sufficient goods and chattels whereon to levy," is not evidence because not responsive ~~assigned~~ to any command in the ~~suit~~ writ; and there is not any competent evidence in this cause that the said levy was lawfully made or for the reason assigned in the sheriff's deed; and the plaintiff having caused said execution to be issued cannot recover in this suit

Bill of Exc The plaintiff then prayed the court to declare the law as follows

Whittelsey vs Brohammer

Pltffs Instct Plaintiff prays the court to declare the law to be as follows

It being charged in the petition and not denied in the answer that the deeds from Johanna Finck to Joseph Brohammer and from Joseph Brohammer to Lorenz Brohammer trustee of Johanna Luis the daughter of Johanna Finck were made without any valuable consideration, then said deeds were voluntary and fraudulent as against the Plaintiff a

11. purchaser under the judgment and execution mentioned in the Sheriff's deed and petition in this suit

Upon the pleading and evidence in this cause the plaintiff is entitled to the relief prayed for in the petition

Which the court refused to do and plaintiff thereto excepted but decided upon the whole evidence submitted in this case the plaintiff cannot recover

Bill of Exc The Court holding that the execution and sheriffs sale and deed passed no title to the plaintiff as the execution did not follow the judgment to which declaration of the law and the refusal of the court to declare the law as prayed by the Plaintiff, plaintiff excepted and took a non suit with leave to move to set the same aside and on the same day filed his motion to set the same aside as follows

Plaintiff moves the court to set aside the judgment of nonsuit entered in this cause because the erred in refusing to declare the law as prayed by the plaintiff and also in the declaration of the law made by the Court which motion the court on the same day overuled to which ~~deed~~ decision plaintiff excepted at the time

Plaintiff prays that this bill of exceptions be signed and made part of the record which is done

It is agreed that the exhibits and deeds above refered to may be used in the Supreme Court, without being copied into the bill of Exceptions

C. B. Lord

And afterwards the following further proceedings were had in this cause to wit March Term 1858. Monday June 28th 1858.

Charles C. Whittelsey vs Lorenz Brohammer Anthony Luis and his wife Johanna Luis Joseph Brohammer, Phillip Mueller and Johanna Finck his wife & Louis Keim

Appeal granted

Appeal to the Supreme Court

Now at this day comes the plaintiff in his proper person and files herein an affidavit for appeal, and on his motion and appeal to the supreme court is granted him from the decision herein rendered

12. Which affidavit in the words and figures as follows to-

Charles C. Whittelsey
vs
Loreng Brohammer et al

Saint Louis Land Court
March ~~April~~ Term 1858

Affdt for appeal

Charles C. Whittelsey plaintiff being sworn says that his appeal is not made for ~~Execution~~ Vexation or delay, but because he believes himself aggrieved by the judgment and decision of the court

Charles C. Whittelsey

Sworn to and subscribed this 28 June 1858 before me

Charles A. Mantz
Clk.

State of Missouri }
County of St. Louis } S.S.

I, Charles A. Mantz clerk of the Saint Louis Land court within and for said county certify the foregoing transcript to be a true and correct copy of the record and proceedings had (as required) in the case of Charles C. Whittelsey as plaintiff and Loreng Brohammer et al defendants as fully as the same remains of record in my office

In testimony whereof I have hereto set my hand and affixed the seal of our said Court at office in the city of St. Louis this 17th day of August A.D. 1858

Charles A. Mantz, Clk.

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4500 words 6.75
cert .50
7.25

No. 11
March Term 1860
(11)

Charles C. Whittelsey
Appellant
Pltff

vs.

Lo[illegible]z Brohammer
Respondent.

Land Court.

C. C. Whittelsey for Pltff
Hamilton & Garesche for Deft

Filed 17 September 1858.
Wm S Glanville Ck.

This Transcript $7.25 Pd by Pltff

Appeal error / joiner / Whittelsey printed stat & buff res. buff /
Affirmed 15 Dec. 1860, C. p. 103 /

C. C. Whittelsey Appt

" Appeal from Land Court

L. Brohammer & als Respt.

Appellant comes and says that the St Louis Land Court erred

1. In declaring the law for the defendants
2. In not declaring the law as prayed by the plaintiff.
3. In refusing the motion for rehearing.

Whittelsey p. se.

Respondents allege that there is no error as above alleged.

Hamilton
for Respts.

Filed 21 March 1887
W L Hammond
Ck

No. 11

C. C. Whittelsey Apt,

v

S. Brohammer & al
Resp.

Assignment of Errors
Whittelsey p.s.

Filed 22 Oct. 1858,
W. S. Glanville Ch.

Clerk Sup. Ct.
No 11

SUPREME COURT,

MARCH TERM, 1859.

CHARLES C. WHITTELSEY, *Appel't*,
vs.
LORENZ BROHAMMER, and others, *Respondents.*
} On Appeal from St. Louis Land Court.

STATEMENT OF CASE.

This was an action brought by the plaintiff to recover the possession of a lot of ground in the city of St. Louis. The petition is substantially as follows: That Valentine Finck, formerly of St. Louis county, died seized in fee-simple of the premises described in the petition, leaving no heirs in the United States capable of inheriting the same, save his widow, the defendant Johanna Finck, now the wife of the defendant Philip Mueller, upon whom said estate descended for want of direct heirs. That Valentine Finck, with other persons, executed a bond to the State of Missouri in the penal sum of $13,000, as security for Jacob Mueller as administrator of the estate of Catherine Mueller, deceased; and there having been a breach of the condition in the said bond, after the decease of Valentine Finck suit was brought upon the same in the St. Louis Court of Common Pleas, in the name of the State of Missouri, to the use of Adolph Kehr, administrator *de bonis non* of said Catherine Mueller, against said Johanna Finck as *heir of said Valentine;* that said Johanna appeared and defended the suit, and admitted that the lot described in the petition descended to her as assets of said Valentine, and that on the 6th day of January, 1857, judgment was render-

Filed 12 April 1859.
Wm. L. Learning Cl.

ed in said suit in favor of the plaintiff therein, against Johanna Finck, *as heir of said Valentine Finck*, deceased, in the sum of $13,000, upon which judgment execution issued *according to law*, by virtue of which, *for want af sufficient goods and chattels* of said Valentine Finck, the said real estate was levied upon by the sheriff, and on March 9, 1857, was sold to the plaintiff, in this suit; and the sheriff made to him a deed for said land, as the real estate of said Valentine at the time of his death, which said sale and sheriff's deed plaintiff claimed passed to him all the right, title, interest and estate in said land which Valentine Finck had at the time of his death. That during the pendency of said suit Johanna Finck conveyed said property to Joseph Brohammer, who subsequently conveyed it to Lorenz Brohammer, who holds it in trust for Johanna, wife of Anthony Luis and daughter of Johanna Finck. That said deeds were made upon a merely nominal consideration, and with the express intent of defrauding the plaintiff in said suit, and that no consideration was actually paid for said deeds. Prayer that said deeds be set aside and for possession, &c. The defendants all answer and admit that the said premises descended to Johanna Finck, as the widow of Valentine; admit the execution of the bond and suit thereon, but deny that the said suit, and the proceedings therein, are correctly stated by the plaintiff, and beg leave to refer to the same when produced; admit that Johanna is the wife of the defendant Mueller, and state that she married him during the pendency of the suit in the Common Pleas, and before the rendition of the judgment therein; state and insist that the execution issued upon said judgment was irregular and void, and that the sale by the sheriff and deed to the plaintiff were nullities, and that under the same the plaintiff acquired no right or interest whatever, as against the defendants, or either of them, in the said premises; admit the execution of the two deeds mentioned in the petition, but deny that they were made with any fraudulent intent, and insist that they are valid and operative against the plaintiff in this suit.

The cause was tried before the court upon the petition and the amended answer, the exhibits referred to in the petition, and the following agreements:

"It is agreed that the plaintiff *was the attorney of record for the plaintiff in the suit in the Court of Common Pleas, and as such procured the judgment therein, and caused the execution to be issued, directing it to be issued in its present form.* That the value of the property in question, at the time of the purchase by the plaintiff in this suit, was not less than $9000. That Johanna Finck, the widow of Valentine Finck, was married to her present husband Mueller during the pendency of the suit in the Common Pleas, and before judgment therein. That said

Valentine died in the premises in question, having resided there at the time of his death, and that said Johanna lived with him as his wife there at the time of his decease, and continued to reside there afterward up to the time of the conveyance by heraelf to Brohammer. That Johanna Luis is the daughter of said Johanna Finck, and her only child, and that she resides with her husband at New Orleans, La. It is agreed also that the statement in the sheriff's deed, "*for want of sufficient goods and chattels whereon to levy*," was interlined in the handwriting of the present plaintiff before the execution of said deed. For convenience, the sheriff's deed and copy of execution may be read in evidence, with the right to defendants to make all legal points or objections to said execution and deed afterward, and with the same effect, as if made before the reading thereof. Should the court find for the plaintiff, the only question reserved will be that of future rents.

There was no oral evidence, the sole question turning upon the plaintiff's own title.

The suit in the Common Pleas, as appears by the record read in evidence, was against Leonard Bedlingmaier, Jacob Reinhardt and Johanna Finck, upon the bond executed by the two first named and Valentine Finck. The defendant Reinhardt did not appear. Bedlingmaier answered, and Johanna Finck demurred successfully to the original petition; but her counsel having withdrawn from the cause, after the filing of the amended petition, judgment by default was entered against her and Reinhardt, at the time of the trial of the issues raised by Bedlingmaier. The only averment in the petition in said suit, in the Common Pleas, in relation to Johanna Finck, is as follows: "Since the making of said bond the said Valentine Finck has died; the administration upon his estate by his widow, the said Johanna Finck, has been closed; and from failure of heirs in this country, ascending, descending and collateral, his real estate descended upon his widow, who thereby has assets real by descent sufficient to answer this demand; the real estate thus descended to the said Johanna Finck being described," &c. (Here follows a description of this property.) The prayer was: "Plaintiff therefore asks judgment against said Bedlingmaier and Reinhardt for the said sum of $10,449 35, with interest from 21st March, A. D. 1855, less credit of thirty per cent. paid by the estate of said Jacob Mueller since the filing of the original petition, and for judgment for the same amount against the said Johanna Finck, with execution special against the assets descended to her, and for such other and further relief as to the court may seem meet," &c.

The judgment in said suit is as follows:

"October Term, 1856, Tuesday, Jan. 6th, 1857.

Petition on Bond.—Now at this day comes the plaintiff by its attorney, and the defendants Jacob Reinhardt and Johanna Finck having failed to file their answer herein, it is ordered that the plaintiff's petition be taken against them as confessed; whereupon the defendant Leonard Bedlingmaier also comes by his attorney, and with said plaintiff waving a jury, submits this cause to the court; and the court, being fully advised in the premises, doth find that the said defendants Leonard Bedlingmaier, Jacob Reinhardt and Johanna Frinck are indebted to said plaintiff in the sum of thirteen thousand dollars, the penalty in the bond set forth in the petition herein, and doth assess its damages by reason of the breaches therein mentioned at the sum of $8,194 91. It is therefore considered by the court that the plaintiff *recover of said defendants* the debt and damages aforesaid, in form aforesaid, as found and assessed, and that it *have execution for said damages*, viz, $8.194 91, and also for its costs and charges herein expended."

The execution issued under this judgment recites a judgment recovered against "Leonard Bedlingmaier, Jacob Reinhardt and Johanna Finck, *heir of Valentine Finck*," for said sum and costs of suit, and commands the sheriff to make the same "*of the goods and chattels and real estate of the said Leonard Bedlingmaier, Jacob Reinhardt, and which were of said Valentine Finck at the time of his death.*"

The sheriff's deed contains the statement, (interlined in the handwriting of the plaintiff in the present suit), that, "*for want of sufficient goods and chattels whereon to levy*," he did levy upon and seize the said real estate, describing it as the real estate of said Valentine. The property was sold by the sheriff to plaintiff for $211. The defendants asked the following instructions:

1. The execution under which the sale to the plaintiff was made (so far as it relates to Johanna Finck and directs a levy of the goods and chattels and real estate which were of Valentine Finck, deceased) not being in conformity with, nor warranted by, the judgment read in evidence, and the plaintiff in this suit having been the attorney of record in said cause, and as such procured the said judgment, and also directed the clerk to issue the said execution in its present form, he is not entitled to judgment in this suit against the defendants.

2. The direction to the sheriff, in the general terms of the execution, to make the debt "of the goods and chattels and real estate of the said Leonard Bedlingmaier, Jacob Reinhardt, and which were of said Valentine Finck at the time of his death," so

far as it relates to Johanna Finck, was not in conformity with, nor warranted by the statute, which prescribes the only kind of process to be issued against a person as heir, and requires that the sheriff shall be commanded to the effect that he resort to the realty descended only in the event of an insufficiency of goods and chattels of the ancestor subject to execution; and the plaintiff, having caused the said execution to be issued in its present form, acquired no title to the land in question under the sheriff's sale and deed.

3. Even if said judgment authorized an execution to be issued against said Leonard Bedlingmaier, Jacob Reinhardt and Johanna Finck, as heir, the command in the execution read in evidence to make the debt of "the goods and chattels and real estate of the said Leonard Bedlingmaier, Jacob Reinhardt, and which were of said Valentine Finck at the time of his death," rendered said writ null and void, because it restricted the levy to be made only of the estate of the intestate, Valentine Finck; and the plaintiff, having caused the said execution to be issued, can not recover in this suit.

4. The statement in the sheriff's deed, (interlined in the handwriting of the plaintiff,) that the levy on the land in controversy was made "for want of sufficient goods and chattels whereon to levy," is not evidence, because not responsive to any command in the writ; and there is not any competent evidence in this cause that the said levy was lawfully made, or for the reason assigned in the sheriff's deed; and the plaintiff, having caused said execution to be issued, can not recover in this suit.

All which instructions the court refused, and defendants excepted.

The plaintiff prayed the following instructions:

Which instructions the court refused, "but decided that, upon the whole of the evidence in this cause, the plaintiff can not recover. The court holding, that the execution and sheriff's sale and deed passed no title to the plaintiff, as the execution did not follow the judgment." To which declaration of law, and the re-

fusal of the court to declare the law as prayed by the plaintiff, the plaintiff excepted and took a non-suit, with leave to move to set the same aside; and on the same day plaintiff moved the court to set aside the said judgment of non-suit, because the court erred in refusing to declare the law as prayed by the plaintiff, and also in the declaration of the law made by the court, which motion the court overruled. Plaintiff excepted and appealed.

POINTS AND AUTHORITIES.

I. The court erred in declaring that the sheriff's sale passed no interest in the land sued for, on account of the variance between the judgment and the execution offered in evidence.

1. At the common law, where the heir pleaded *riens per descent*, and the issue was found against him, or upon a judgment by default, the judgment against the heir was general for the debt and damages, (Bul. N. P. 175, 176; 1 Sel. N. P. 600; 2 Saund, 7, *a. n.* 4,) and the execution against him was general as if for his own debt. He might, by the later practice, apply to the court to have the execution special against the assets upon motion.

In the present case, the defendant appeared to the suit and demurred; the demurrer was sustained, because the *assets real* descended were not set forth in the petition. The petition was amended setting forth the *assets real* descended, and the defendant Finck, heir, &c., failed to answer, and the petition was taken as confessed for want of an answer. (As an excuse for the variance, it may be stated, that the attorney gave the clerk the form of the entry of judgment against the defendant as heir, but the execution was issued in accordance with the statute before the entry was made in the record book; and the court, differing in opinion with the counsel, directed the clerk to enter the judgment general against the heir as upon a default.) The court entered up a general judgment against the heir for want of answer.

The Statute of Executions, Sec. 4, R. C. 736, directs that when execution shall be issued against any person as heir, the officer shall be commanded that, &c., that were of the ancestor at the time of his death, "he cause to be made the debt and damages,"&c. It does not say, when the *judgment* is against a person as heir, but when the *execution* shall be issued requiring the

clerk to issue his writ, so that the heir need not suffer for his mispleading, or default. It was for the benefit of the heir that the writ was thus directed, and she should not complain of that which spared her own property, and took only the assets descended to her as heir.

The writ varies from the 4th section by following the form given in the 3d section, commanding the sheriff, that of, &c., that were of V. F., deceased, you cause, &c., and omits to say " that if sufficient goods," &c., " can not be found in his county, then that of the real estate that were of the deceased, &c., he cause to be made.

The sheriff's deed relates that for want of sufficient goods and chattels, &c., he levied upon the real estate. In the original suit, Johanna Finck was sued on account of assets real descended, for the personal assets would not have descended to her as widow, but would have passed to heirs out of the United States.

There was no error, therefore, in the writ in its direction to the sheriff, to make the debt out of the real estate descended.

2. The error or defect complained of could not be taken advantage of in this collateral action. For an error in the writ could have been amended by the court from which the writ issued, or the party might have applied to the court to set aside the sale and order a new writ; but after the sale and deed, the writ can not be attached collaterally.

The writ was not void, if even voidable, on proper motion made.

Sale of land under execution after defendant's death, was held not void, but at most voidable; and this upon direct application to set aside the sale and deed, the plaintiff in the execution having been the purchaser. (Munday's adm'r. vs. Bryan, 18 Mo. R., 29, and cases cited.) So, where plaintiff had died before judgment. (Coleman vs. McAnulty, 16 Mo. R. 173, 176.) In this case the court says: "It is a general rule, that wheresoever an officer can justify under a writ, he can pass a title by a sale under it, if all other pre-requisites to a sale have been complied with." So, too, Justice Baldwin (in Bald. C. C. R., 246, 291) lays down the rule, that irregularities must be corrected by the court issuing the process; and that in Penn. the acknowledgment of the deed by the sheriff in open court, cures all defects which the court had power to remedy by order. (See McFee v. Harris, 25 Penn. 102; Childs v. Shannon, 16 Mo. R. 331—case of

irregular judgment, held voidable only, and not to be attacked collaterally; Perpetual Ins. Co. v. Rogers, 11 Mo. R., 295.) Irregular process of a court will justify an officer or party until it is set aside on motion, citing Barker v. Braham, 3 Wils. R. 368; Draper v. Bryson, 17 Mo. R. 71. Variance between judgment and execution not fatal. (Collier v. Easton, 1 Mo. R., 469; Bissell v. Kepp, 5 J. R. 92; Bushe's case, Cro. El. 188; Burton v. Eyre, Cro. J. 289, 2; Mackaley's Case, Cro. J. 280.) Execution issued within a period forbidden by law, is not void but only voidable. (Carson v. Walker, 16 Mo. R. 68, 85; Blaine v. Charles Carter, 4 Cranch R. 333.) So where writ was made wrongly returnable, it was not void. (Milburn v. State, 11 Mo. R. 188; Wilson v. Watson, 4 Bibb. R. 332; Campbell v. Cramer, 2 Bur. 1187.)

McNair v. Biddle, 8 Mo. R. 257, 264—judgment not void although erroneous, and sale good. (Voorhees v. Bank U. States, 10 Pet. R. 472; Landes v. Perkins, 12 Mo. 238, 260.)

Irregularities can only be taken advantage of in a direct proceeding. (Reed v. Austin, 9 Mo. R. 722.)

In ejectment by purchaser, the irregularity can not be questioned. (Jackson v. Bartlett, 8 J. R. 361.)

Not void because writ not signed. Nor because writ was against the executors personally, when judgment *de bonis testatoris* — (McCormick v. Meason, 1. Serg. & R. 92.) *Fi. fa.* to another county not void. (Cox. v. Nelson, 1 Mon. R. 94; McConnell v. Brown, 5 Mon. R. 478; Wilson v. Huston, 4 Bibb. 432.)

On questions of variance between judgment and execution, see as follows: Jackson v. Robinson, 4 Wend. R. 436; Jackson v. Streeter, 5 Con. R. 529.

Although writ and levy withdrawn, deed good. (Jackson v. Vanderkeyden, 17 J. R. 167; Jackson v. Robbins, 16 J. R. 537, 575; Jackson v. Bartlett, 8 John R. 361; Jackson v. Carman, 13 J. R. 97.) In this case the judgment was general, as of his own debt against the heir the execution described the defendants as "heirs and devisees," but the error did not affect the sale. The description of the land was defective, and avoided the deed. Jackson v. Delancey, 13 J. R. 536, 550—an execution against the heir, upon scire facias, when the reality was devised to another not served with the scire facias, yet the sale held good, and the rule was applied that errors and irregularities can not be taken advantage of collaterally.

An execution reciting a judgment vs. B. adm'r of A., and directing a levy of the goods, &c., of the debtor, is against B., but is not void. (Keniston v. Little, 10 Foster, N. H., 318.) Sale valid unless proceedings void. (2 Swann, Tenn., 156.) Sale under execution tested after death of defendant not void but

voidable, and valid until set aside by direct proceedings. (Hodge v. Mitchell, 27 Miss. R. 5 Cush., 560; Shelton v. Hamilton, 23 Miss. R. 496.) Sale held valid where the name of one of the defendants was entirely omitted in the execution. (Wilson v. Nance, 11 Humph. R. 189.) Defendant in execution may waive errors, and if he does not procure the process to be set aside, he will be presumed to have waived them, and the process should not be set aside even on motion. (Mace v. Dutton, 2 Carter, Ind., 309; Adamson v. Cummins, 5 Eng. R. 541; Hinds v. Scott, 11 Penn. St. R. 19.) Execution not void for variance from judgment upon which it issued, but may be amended. (McCullum v. Hubbart, 13 Ala. R. 282.)

The rule should be uniform, that the sale is valid in all collateral cases, unless the proceedings be absolutely void for want of power in the court or officers, and that, at last, is the true issue, the question of *power*. If the power exists, the sale is valid, no matter how defective the process.

An error is the mistake in the judieial action of the court; an irregularity is the mistake in the action of the officer, as of the clerk or sheriff. A void proceeding is an act done without jurisdiction of the parties or subject matter, or in direct violation of the positive commands of the law; a voidable proceeding is the mistaken action of the court, or officer, acting within the sphere of authority, but against the mere directory commands of the law.

Consent will not give jurisdiction of the subject matter, it will of the parties. Errors of the court will be corrected on appeal or writ of error; mistakes or errors of the officers will be corrected on application to the court on motion; they are amendable on application of the proper party. But the presumption of law being, that all official action is rightly done until the contrary appears, and that errors not objected to are errors waived, (jurisdiction alone excepted,) courts will presume assent of the party who did not complain.

(Pierce v. Alsop, 3 Bar. Ch. R. 184; Berry v. Riley, 2 Barb. Sup. Ct. R. 307; Ingram v. Bell, 2 Strob. R. 207; Mace v. Dutton, 2 Carter, Ind., R. 309.) An execution voidable, may be set aside on motion of defendant, but if not set aside all acts done under it are valid, as well in regard to execution plaintiff as to strangers. Defendant will be presumed to waive errors if he procure not process to be set aside; and if he waive them,

the process should not be set aside on motion. In this case, the attorney of plaintiff in the execution was the purchaser. The point presented is well argued in the opinion of the court.

3. The defendants in this suit, who hold by conveyances fraudulently made, are not entitled to object to the variance between the judgment and execution; if that variance is erroneous, the defendant in the original suit might have had the execution corrected.

4. The fact that the purchaser at the sheriff's sale was the attorney in the original suit will not affect the validity of the sale, unless it appear that he was guilty of some act *in pais* that made the purchase fraudulent as to the judgment debtor; and no reliable cause can be found contravening this principle.

The plaintiff in the execution is protected, in absence of fraud, except upon direct motion to set aside proceedings. (Munday's Adm'r. v. Bryan, 18 Mo. R. 29; Draper v. Bryson, 17 Mo. R. 71; Ingram v. Belt, 2 Strob v. R. 207; Mace v. Dutton, 2 Carter, 309.) When the motion is made to set aside proceedings, it will be shown that the defendants appeared at the sale, gave notice of their title under the deeds in the petition mentioned, forbad the sale, and employed a bidder to bid the property in for themselves. The attorney in binding, was bidding at his risk—buying a law suit—as the defendants themselves gave notice; buying something, nothing, as he should be able to prove the deeds under which the defendants claimed to be fraudulent in fact, for they were all made before judgment rendered.

5. The actual value of the land sold, with the possession and title undisputed, compared with the amount bid at the sale, can have nothing to do with the question in this collateral issue.

The chances were that the purchaser was throwing away his money, as the lower court declared that he had done, for under its decision he got no title; and if the defendants committed a fraud, they must take the consequences of their own evil act, and should not complain. (Rankin v. Hamer, 23 Mo. R. 579, 586.)

II. The court erred in refusing to declare, as prayed in plaintiff's first instruction, that by the pleadings it appeared that the deeds from Johanna Finck to Joseph Brohammer, and of Joseph Brohammer to Lorenz B., trustee of Johanna Luis, who was a daughter of the said Johanna Finck, were made without valuable consideration, and were fraudulent as against the plaintiff as a purchaser under the judgment and execution.

It was expressly charged that said deeds were made without any valuable consideration, and that they were made with intent to defraud the plaintiff in the original suit. The facts were not denied, but the intent was. This was not sufficient. (R. C. '55, p. 1232, sec. 12; p. 1238, sec. 48.)

If fraudulent, the plaintiff was entitled to the relief prayed, provided the sheriff's deed passed the title.

III. The court erred in refusing, upon the pleadings and evidence, to give judgment for the plaintiff. The deed from Johanna Finck to Joseph Brohammer having been made after suit brought, and made without consideration, the land therein conveyed was still liable to the execution of the judgment.

(2 Saund. R. 7 e.; Morris' Lessee v. Smith, 1 Yeates R. 238; Covel v. Weston, 20 J. R. 414, 419; Den v. Jacques, 5 Halst. R. 259, 264; 4 Bac. Ab. Heir & Ancestor, F. p. 165; Griswold v. Bigelow, 6 Conn. R. 258; Watkins v. Holman, 16 Pet. R. 25, 63, Story, J. *arg;* Rous v. Gooch, 5 Coke, 60.)

The counsel for respondents and the court below having based their argument and decision upon the defect in the plaintiff's title on account of the variance between the judgment and the execution, the argument upon this point is not extended by the appellant.

WHITTELSEY, i. p. p.

Mr Jones
(See written.)

MISSOURI SUPREME COURT.

MARCH TERM, 1860.

CHARLES C. WHITTLESEY, *Appellant*,
vs.
BROHAMMER, AND OTHERS, *Respondents.*

POINTS AND ARGUMENT FOR RESPONDENTS.

I. It is agreed that the judgment has been reversed. The Appellant may contend that the reversal was as to Bedlingmaier only, because he alone prosecuted the writ of error, in his own name; but instead of moving to quash the writ for the nonjoinder of the other parties, there was a joinder in error, and the judgment is in terms a reversal *in toto*, and upon a ground common alike to all parties; nor has there been any motion in this Court to set aside or modify it. It was necessarily a reversal as to all, Bacon's Abr. Error. M. 1; Carth. 235; 2 Tucker's Com., 325; 19 Mo. 441; 24 ib. 78; 25 ib. 411. Since then there has been a trial in the Court below, where the plaintiff dismissed as to Bedlingmaier, and the result was a recovery of nominal damages of only one cent. The cause is now pending in this Court on appeal by the plaintiff; (see No. 263, March Term, 1859). This Court can look, at its own records, and independently of the agreement filed, would not send the cause back for the purpose of having the fact of reversal, thus attested by its own records, introduced into it. — At all events, by their agreement the parties now raise the question as to the effect of the reversal upon the Appellant's title, he having been the attorney of record, and having procured the judgment, and by his immediate direction caused the execution to issue in its present shape.

The appellant cannot claim the protection allowed to a stranger or a bona fide purchaser coming in under a judgment which has been reversed. As the attorney of record he had notice of all errors and irregularities, and was as much a party to them as the plaintiff in the suit, and is entitled to no greater favor than would be extended to him. There must be a subsisting title. Bac. Abr. Error M. 3; Execution 2; Tidd's Pr. 1187; 12 Barbour, 83; 11 Ills.

524; 13 ib. 486; 8 Ohio, 120; 2 Hill, N. Y., 633; 1 Gray, (Mass.) 67; 1 Gilman, 441; 5 ib. 444; 6 Peters, 16; 8 Humphreys, 410; 11 ib. 189; 7 Ala., 484; 18 ib., 405; 21 ib., 341; Caine's R. 61; 2 Binney, 85, 92; 1 Har. & J., 405; C. & H. & Edward's notes to Philipps on Ev. vol. 2, p. 139; 20 Ills., 276; 29 Pa., 349; 9 California, 479; 36 N. H., 436; Yelv. 179; Dyer, 363; Cro. Eliz. 178; Cro. Jac., 246; 8 Co., 96; Bibb, 518.; 25 Miss. 456; 2 Up. Can. 389.

EXTRACTS FROM THE PRINCIPAL OF THESE AUTHORITIES.

12. *Bar. N. Y.*, 83. — "The restitution to which a party is entitled upon the reversal of an erroneous judgment is everything which is still in possession of his adversary."

13 *Ills.*, 486.—"The rights of third parties acquired under an erroneous judgment are not divested by the reversal of such judgment. — The law is well settled, that if the judgment is reversed the parties are to be restored to their original rights, so far as it can be done without prejudice to third persons. If the plaintiff has derived any benefit from the judgment, he must make as full restitution to the defendant, as the circumstances of the case will permit. If he has received payment in money from the defendant, the latter can recover it back in an action of indebtitatus assumpsit. If he has obtained money by the sale of the property of the defendant, the latter may recover it as so much money had and received to his use. If he has purchased in property under the judgment, and still retains the ownership, the defendant may recover the specific property in the appropriate remedy or action. If he has aliened the property, he is responsible to the defendant for its value. But the rights of third parties are not affected. Their title to property acquired under an erroneous judgment, is not divested by its reversal. In such cases the defendant must look to the plaintiff for redress. These principles are too well established by authority to require further discussion," citing 6 Peters, 8; 6 Cowen, 297; 1 Harris & J. 405; 11 Ills., 519; Pennington's R., 120; 8 Ohio, 120.

8 *Ohio*, 120. "The judgment creditor is a party to the errors, and if he purchases and the judgment is reversed while he continues to be the owner, the reversal restores the land to the defendant. Otherwise if the purchase be by a stranger."

2 *Hill, N. Y.*, 633. "A man recovers land in a real action and takes possession under an execution, or he acquires title to land by extent, or to goods by sale under execution, and the judgment is afterwards reversed. So far as he is concerned, his title

is at an end, and the thing shall be restored in specie, not merely the value for which it was extended or purchased, but the thing itself. The only exception is, where the sale is to a stranger bona fide, or where a third person has bona fide acquired some collateral right from the party before reversal," citing Bacon's Abr. M. 3; Yelv. 179; Cro. J., 246.

1 *Gray*, 67. "When a judgment on which an execution was regularly issued is reversed, or when a satisfied execution which was only erroneous and voidable is set aside, the property which was taken from the judgment debtor, is not restored to him, but restoration is made to him of the amount of money for which the property sold. There is an exception to this rule, where property is delivered to the judgment creditor himself, on a writ of elegit. In that case the property is restored to the judgment debtor upon a reversal of the judgment. And when an outlawry is reversed the goods which may have been sold on a *Capias utlagatum* are restored," citing Yelv., 179; Bacon's Abr. M. 3; Execution 2; Tidd's Pr. 1137, 1138. In this case the Court do not approve of the rule laid down in Jeans vs. Wilkins, 1 Ves. sen. 195, that the sale is good if the sheriff could justify under the writ, but say: "it does not follow that because a sheriff in an action of trespass against him, may justify his act in selling property on an execution, therefore the sale conveys to the purchaser a title to the property sold. If that were a legal inference all sales under void process, if not void on its face, would be as valid as sales under process that is voidable only."

1 *Har. & Johns.*, 405; 7 *Ala.*, 485; 18 *ib.*, 405. In these cases it is declared that "a judgment reversed becomes mere *waste paper*, and the rights of the parties immediately on the reversal are restored to the same situation in which they were prior to the pronouncing of the judgment so reversed." This is but a repetition of the emphatic language of Ashurst, J. (7 T. R., 264) as to the effect of a reversal of an outlawry. He says, "the instant this outlawry was reversed, the judgment of outlawry became mere *waste paper*, and the rights of all the parties were restored to the same situation as if no outlawry had taken place."

9 *California*, 479. Plaintiffs in execution purchasing at sheriff's sale, and claiming under sheriff's deed, are chargeable with notice of defects in the judgment upon which the execution issued.

1 *Gilman*, 441. "The purchaser *being the attorney of record* in the cause, will therefore be deemed to have had notice of the irregularity and will be allowed no other protection than the plaintiff in the execution."

Simonds vs. Catlin, 2 C. R. 61. "An attorney for plaintiff in a suit purchasing under an execution in it, is a purchaser with notice of all irregularities."

Cowen & Hill & Edward's notes to Philips on Evidence, Vol. 2, p. 139. "But in these, and the like cases, if there was original or acquired jurisdiction in the course of the proceeding though it may be reversible directly, (by which is meant in error, appeal, &c.) yet for all other purposes it shall be valid till reversed, in respect to every body. And even after it is reversed, persons *not parties or agents in carrying forward* the erroneous proceedings shall be protected by way of defence from prosecution, and often in the title which they may have acquired. See Voorhees vs. The Bank of the United States; 10 Peters, 449. See ante, note 292. This is what the cases mean when they say that such proceedings shall not be questioned collaterally." See note 286 as to the cases in which a direct reversal will not subvert acts and titles, sometimes not even as to the party.

20 *Ills.*, 276. No distinction in this respect, between attorney and party to suit. And 8 Humphreys, 410; 2 Binney, 85, 92; 25 Miss. 456; 2 U. Can. 389; already cited.

The only American authorities which the Appellant cites, are the decisions in Kentucky, and a single case in North Carolina.

Coleman vs. Trabue, 2 Bibb, 518, was in principle Manning's case. The plaintiff in the suit, was also the plaintiff in the judgment, but he derived his title through Henderson, a third party, who purchased at the sheriff's sale; and the principal question was, whether the reversal of the judgment affected the title thus acquired by Henderson. The Court say, when a sheriff sells to a *stranger* under a fi. fa. issued on a judgment which is afterward reversed, the defendant shall not be restored to the property sold, but to the money for which it was sold, citing 2 Ba. Abr., 740; Manning's case, 8 Co., 96; and Goodyere vs. Ince, Cro. J. 246.

In Parker's heirs vs. Anderson's heirs, 5 Monroe, 452, the same Court observed that they had met with no case either at law or in equity, excepting parties and privies from the rule of protection given to purchasers, where there has been a reversal of the judgment. No authorities are referred to, and Coleman vs. Trabue seems to have escaped the notice of the Court.

In Williams vs. Cummins' Adm'r., 4 J. J. Marshall, 437, the Court say in substance, that it is a mistake to suppose that any stress was intended to be placed upon the word "stranger," in Coleman ve. Trabue. Now in that case the Court did not refer

to the fact that Coleman was the plaintiff in the execution, but resting upon the authorities cited, put the decision distinctly and expressly upon the ground that Henderson, a third party, was the purchaser at the sheriff's sale. The only authority given for the decision in this case of Williams vs. Cummins' Adm., is the obiter saying of the Court in Parker's heirs vs. Anderson's heirs. The Kentucky cases were cited to the Court in Illinois, (11 Ills., 524,) but without effect.

Bickerstaff vs. Dellinger, (1 Murphy, 272,) was an attempt on the part of the plaintiff in error to recover the property from a subsequent purchaser, who had acquired it from the plaintiff in the execution years before the reversal. The plaintiff failed. The Court was of opinion that no distinction could be drawn between the plaintiff in the orginal suit and a third party purchasing from him, as to the consequences of a reversal, but that if the property purchased, while in the hands of the former was subject to the right of restitution, it must be equally so in those of his vendee. The only case cited is Goodyere vs. Ince, of which an exposition is attempted. It is conceded by the Court, that that case does not go so far as to declare that a sale by fieri facias to the party himself shall deprive the plaintiff in error of restitution, but it is said, neither is it intimated that he is entitled to restitution because the sale was made to his adversary; and the conclusion, (which is but a misapplication of the reasoning of the Court in the ~~principal~~ case as to the difference between an elegit and a fieri facias,) is, that as the sheriff in a fi. fa. is authorized to sell, the plaintiff in error is to be restored by his adversary to what he lost by the writ, and not by the judgment. Now two conclusions may be drawn from the case reviewed, Goodyere vs. Ince; the first is, that *a party, purchasing under an erroneous writ, which has been set aside*, must restore the property itself, and the second is, that a stranger, purchasing and paying his money, under an erroneous fieri facias, is unaffected by its reversal. Clearly the Court viewed the question before them as leading to a consideration of the comparative rights of parties and strangers purchasing under erroneous process, subsequently set aside.—We quote, more at large, the language of the decision in 2 Hill, N. Y., 633: "A man recovers land in a real action, and takes possession under an execution, or he acquires title to land by extent, or to goods by sale under execution, and the judgment is afterward reversed. So far as he is concerned, his title is at an end, and the thing shall be restored in specie, not merely the value for which it was extended or purchased, but the thing itself. The

ONLY EXCEPTION IS, WHEN THE SALE IS TO A STRANGER BONA FIDE, OR WHERE A THIRD PERSON HAS BONA FIDE ACQUIRED SOME COLLATERAL RIGHT FROM THE PARTY BEFORE REVERSAL. The cases to this doctrine are collected in Ba. Abr. title error, M. 3. In Goodyere vs. Ince, (Cro. Jac. 246; Yelv. 179, S. C. *nom.* Goodyere vs. Junce,) the plaintiff had an extent of a term under an elegit, *which was set aside as erroneous;* and the Court held that the possession should be specifically restored to the defendant (though according to Croke, the plaintiff had sold his right). The Court said there was a difference between this case and where the sheriff has sold goods to a stranger under a fi. fa."—The same authorities are cited as in Coleman vs. Trabue.

The principal English cases are:

Dyer, 363.—A term sold to a third party, the proceeds of the sale paid to the plaintiff, and judgment afterward reversed. The Court refused to restore the term, because it was legally sold through default of the party himself, and it was held that restitution should be of the money only.

Cro. Eliz. 278.—If a termor for years is outlawed, he shall be restored to the term, on reversal of the outlawry, though it has been sold by the king, to whom it was forfeited. But the sheriff sells by authority of law, to levy the money; and there, if the judgment be reversed, the party shall be restored only to the money, and not to the term; for he lost it not by the judgment.

Cro. Jac. 246.—"There is a difference between *the sale and delivery upon an elegit to the party himself, and a sale to a stranger upon a fieri facias;* for the fieri facias gives authority to the sheriff to sell, *and to bring the money into court; wherefore, when he sells a term to a stranger*, although the execution be reversed, yet he shall not by virtue thereof be restored to the term, but to the monies, because he comes duly thereto by act in law. But the sale and delivery of the lease to the party himself upon an elegit is no sale by force of the writ delivered in extent, which being reversed, the party shall be restored to the term itself."

Manning's case, 8 Co., 96.—A sale to a stranger. — "A sale by the sheriff, by force of the fieri facias, shall stand, although the judgment is afterward reversed; and the plaintiff in the writ of error be restored to the value; for the sheriff who made the sale, had lawful authority to sell, and by the sale the vendee acquired an absolute property in the term. And although the judgment, which was the warrant of the fieri facias be afterward reversed, yet the sale, which was a collateral act done by the sheriff, by the force

of the fieri facias, shall not be avoided; for the judgment was that the plaintiff should recover his debt, and the fieri facias is to levy it of the defendant's goods and chattels, by force of which the sheriff sold the term of the defendant, as he well might, *and the vendee paid money to the value of it.* And if the sale of the term should be avoided, *the vendee would lose his term and his money too*, and thereupon great inconvenience would flow, that none would buy of the sheriff goods or chattels in such cases, and so execution of judgments, (which is the life of the law,) would not be done."

Suppose a familiar case. — A procures a judgment against B, for a sum of money. The defendant, unable it may be, to procure a supersedeas, his property is sold to the plaintiff for a trifling sum, as compared either with its actual value or the amount of the recovery. The Supreme Court reverse the case, and proceeding to do what the court below ought to have done, render judgment for the defendant. Shall the plaintiff hold the property? If so, upon what principle? It is said because he has been allowed to take a step in advance of the judgment, having enforced it through the process of the court. But the result of the proceedings in error proves that to be the chief grievance; for the only substantial object of the execution being to put the plaintiff into the actual possession of what is awarded him by the court, if the judgment is reversed it is very clear that, (although not to be treated as a trespasser,) he is not entitled to what was thus acquired, and restitution is the necessary consequence,—restitution of what was received, and not of something else. In the case supposed no money enters into the transaction, none therefore can be restored. The only consideration upon which the transfer of the property is made to rest, is the partial extinguishment of a debt ascertained not to have been valid, or at best a mere right of action against the plaintiff for the amount of the bid; a liability worked out through the avoidance of the very judgment upon which the authority to the sheriff is founded.—When the purchase is by a stranger widely different considerations arise. He pays his money, and is only required to look to the power of the sheriff to sell. If that exist, he is safe. To hold otherwise, as was said in Manning's case, would be to deprive him of both money and property. All other questions are between the parties. But when the plaintiff or his attorney purchases, whatever is acquired by virtue of the judgment is held subject to the condition that he shall litigate successfully with the defendant every question affecting the validity of the judgment. If that be reversed there is an end to his title.

II. The judgment in the original suit was general against all the defendants personally, not naming Johanna Finck in her representative capacity, and was without discrimination as between her and the other parties as to the mode of its enforcement. Surviving securities being joined as co-defendants, a separate judgment against her as heir, would have been necessary to reach the assets descended. (3 Abbotts Pr., 308). The judgment as thus entered up was not the result of mere clerical omission or misprision, but the court proceeded upon the theory of the common-law liability of the heir, charging her personally with the debt, as the suit was undefended by her. (Bacon's Abr., Heir and Ancestor, H. 1; Tidd's Pr., 938.) Thus much is conceded by the appellant. To amend the judgment now, as proposed by him, so as to make it conform to the execution, would be but to substitute another for that which was given. Besides, the judgment having been reversed by this court, all control over it has ceased.—Then comes the direct question, how was this judgment to be executed? It is clear that a common *fi. fa.* against the property of the several defendants alike, was the only writ to which the plaintiff was entitled; and that the mandate of the execution, filled up under the dictation of the appellant, directing the debt to be made out of the estate of the intestate, *then in the hands of the principal defendants in this suit*, was wholly unauthorized and inoperative. As well might it have been directed against the property of any other third person. In this state the rule that the execution must be in conformity with, and be warranted by the judgment, does not rest upon mere practice, but is founded upon legislative enactment. It is only when the judgment of the court is against the heir, as such, that the fourth section of the execution law is applicable. If not so entered, the ordinary fi. fa. is the only and adequate final process. Whether the judgment was erroneous or not, is of no moment here; for until reversed it was as binding upon the plaintiff as upon the defendants in the suit. As it was given and acquiesced in, so it should have been executed. The execution therefore differed in legal effect from the judgment.

The explanation offered by the appellant in the brief heretofore filed, does not avail him. It is to the effect that he gave the clerk the form of a judgment against the heir, as such, and issued execution in conformity therewith before its entry of record, but that "the court differing in opinion with counsel," directed a *general* judgment to be entered. This only amounts to a confession of the illegality of the course pursued, and should of itself be decisive against the appellant's pretensions, unless indeed his views should

be adopted, that he had the right nevertheless to take the law into his own hands. Why did he not withdraw or suppress the writ when he discovered that the judgment was not such as he supposed had been given? Its enforcement afterward, in the form issued, was acting in the very teeth of the court.

Beyond doubt Johanna Finck's own estate could have been levied upon under this judgment. That could only be because it was against her personally. It could not be both general and special, or either, at the election of the plaintiff in the suit. Yet this is what the appellant maintains, when he says, the right to have execution against a party, as heir, in conformity with the fourth section of the statute, does not depend upon the *judgment* itself, but upon the *mere requisition of the party upon the clerk*, so to issue it. The argument amounts to this, that instead of it being the province of the court, by its judgment, to determine in what capacity a defendant shall be subjected to it, that matter may be delegated to the party, or be left to the caprice or discretion of his attorney or the clerk.

The suggestion that the plaintiff, in restricting the execution to the estate descended, took only that to which he was entitled, assumes the whole difficulty. It certainly was not founded upon any act of the court, but was an assumption of judicial power on the part of the attorney and clerk, the effect of which was to convert a general judgment into a special one, the latter having already been refused. Why produce the judgment in any such case except for the purpose of ascertaining whether the execution as issued has the sanction of the court?

The general tenor of the argument of the appellant is that the debt was a lien upon this land, and that the suit having been brought to subject it specifically to the lien, the alienation by the heir during its pendency was fraudulent. Now without pretending that the heir can withdraw the assets from the claims of creditors, or that the alienee by voluntary conveyance can avail himself of a title thus acquired to defeat those claims, we insist that at the death of the ancestor intestate, the heir becomes the owner of the lands by the same right which the ancestor himself had when living, and that his title can only be defeated in one of two modes, that is, either by an order for the sale of the lands, under the administration law, or by proceedings instituted against him by a creditor of the intestate, resulting in a judgment or decree, subjecting them to the payment of the debts. That in fact no such suit can be had against the heir until administration closed, when he holds the realty upon terms even more advantageous than the

intestate; for not until the personalty is exhausted can they then be reached. It is only in a loose and qualified sense then, that debts can be considered as constituting a lien. They may be made such by proper proceedings. As an incident to his ownership, the heir has a disposing power over the lands, of which the mere pendency of a suit does not deprive him, and his deed, although voluntary, is so far effectual as to pass them, and to entitle the alienee to the possession as against himself and third persons; and in his hands they are liable only to the same contingency, that at a future day his title may be defeated by either of the measures suggested. But if it were conceded, that this contingent liability of the property to debts is substantially a lien, and further than this, that the original action in this instance, as commenced, took the form of a proceeding *in rem*, it would not advance the appellant a step. For it is the judgment which determines whether the proceedings are *in rem* or *in personam*. He would not therefore be entitled to satisfaction *ex re*, as the suit, with his consent, finally became a proceeding *in personam*, with the same consequences precisely as if originally founded upon a simple liability of the heir herself, the plaintiff having failed to keep his lien on foot, or to procure such a judgment as entitled him to pursue the assets, but in lieu thereof having accepted a lien upon the property owned by, and remaining in the hands of the heir, at the time of the judgment. The fallacy consists in failing to distinguish between a judgment which attaches the supposed lien upon, and places within its grasp, the estate of the intestate, and one which is merely personal.

This it will be observed is not the case of a judgment creditor seeking to discover and subject assets to the payment of the debt. As already suggested, the original suit did not result in a condemnation and appropriation of this land to the satisfaction of the judgment, nor was the property levied upon as belonging to Johanna Finck. For aught that either appears or is averred, there was no necessity for resorting to it. Her own estate may have been sufficient for the purpose. In giving this property then to her daughter, it does not appear that she thereby interfered with any right of the plaintiff in the original suit, or that she deprived him of the benefit of the judgment obtained; and the appellant, a purchaser at sheriff's sale, is not in the position to impeach the transaction.

It seems to be assumed that the question here presented shrinks into a mere point of practice, that the right to issue execution directed against the assets in the hands of a third party, as was

done in this case, *attaches as an incident to a general judgment*, and this position is made to rest upon a supposed analogy derived from the obligation of the heir, and the forms and proceedings for its enforcement, at the common law. What alone is sufficient to subvert all argument from that source is, that no such judgment can legally be entered up against an heir in this state. He is no longer liable personally, as under the codes of '25 and '35, for omitting to plead. At the common law he was liable upon a two-fold principle, as being bound by the deed, and as having assets by descent. This theory had its influence in shaping the course of practice, for where no defence was made, the presumption was that he had assets to satisfy the debt, and the plaintiff was entitled to a general judgment against him, and to sue out the like execution as on a judgment for his own debt. Here his liability does not depend upon his being named in the obligation, and when bound at all, it is as well for debts by simple contract, as for those by specialty. Nor are these the only differences. By our law the personalty is assets, the realty may become such. Both are placed under due course of administration, and as already stated, not until that is closed can he be sued for the debts of the intestate. An alienation bona fide by the heir before suit, even though not a sale, was a defence at the common law, but here he who deals with the heir, whether for value or not, and whether suit pending or not, takes with a knowledge of the liability of the lands for the debts, and holds subject to them if pursued within a reasonable time. The fourth section of the statute of executions is in itself a decided departure from the common law, for not only does it impose a limit to the rights of the creditor by confining him to the assets, but it recognises a right of action against devisees as well as heirs:—nor do the books contain any precedent for an award of execution *si non* against the heir. Hence the utter impracticability of attempting to adjust either the liability of the heir or the mode of its enforcement to a standard differing in both respects so widely from our own.

But a brief examination of the point will serve to show that the argument from the common law is against rather than in favor of the appellant. Coke lays it down that if the alienation by the heir was made during the pendency of the action, the lands *were chargeable, and might be taken in execution under the judgment against the heir*, because the action was brought against him in respect of the land. Co., Lit. 102, b. (2. vol., Thomas Coke, b., p. 246.) — Precisely so; but the question still recurs, how is the land charged, under what kind of judgment? When the

judgment was intended to bind the lands descended, it expressly directed the debt to be "levied of the lands and tenements which "were of the intestate, in fee-simple, at the time of his death, "and which came to and are now in the hands of the said C. D. "by hereditary descent." Tidd's Forms, p. 339, sec. 18., and see the form of the judgment in the case of Denn vs. Jacques, 5 Halstead, 246, cited by the appellant. But a general judgment did not operate by way of relation to the original, except where there had been a covinous conveyance by the heir, but bound only as in common cases from the time of the judgment given. Bacon's Abr., Heir and Ancestor, F. See especially 2 Show., 186; 14 Viner's Abr., p. 246, D, 3, and notes. See also Roberts on Fraud. Con. 602—609.; 2 Powell on Mortgages, 601. So that when the suit was undefended by the heir, if the plaintiff thought it more advantageous to resort to the assets in preference to the heir's own estate, as was the case where the heir had no lands except by descent or had alienated any of them *pendente lite*, he might waive the general judgment, and by electing to suggest assets specially take judgment against them by name, *in which case the whole of the lands descended, and in his seizin at the inception of the suit, could be seized.* And it seems, that even where the judgment was general, the course was still open to the plaintiff to make the same suggestion of assets special by descent, *and by procuring an award of execution in nature of a judgment*, subject them to the satisfaction of the debt. Bac. Abr., Heir and Ancestor, H. 1; Tidd's Pr. 1089; 2 Saunders 7, n. 4; Bingham on Judgments and Executions, 72. Now why resort to such a measure, if this right was already secured by a general judgment? For the forms of a judgment general and special, see Tidd's Forms, 440, 441, ss. 28, 29, 30. Here was an unsuccessful attempt at conformity to this course, there being a special suggestion of assets, with a prayer for execution against them, which was refused. Now it is apparent that our statute furnishes a remedy to creditors as full, simple and efficacious as that at the common law, leaving nothing to be desired in that respect. All that can be said of the latter is, that by the appropriate proceeding, that is to say, by a special judgment against the assets by name, or by virtually converting the general judgment into a special one, under the sanction of the Court, the whole of the assets descended, and in the hands of the heir at the commencement of the suit could be seized; so under our statute the same result can be accomplished by taking the proper judgment against the heir in his representative capacity. In whatever aspect viewed, this case

presents the novel experiment of an effort to change the operation of a judgment from the proper estate of the defendant in the suit to the land descended from the intestate, then in the hands of third parties, not only without leave of the Court, but in known opposition to its declared views. Nothing either ancient or modern gives countenance to such an anomaly in judicial proceedings.

No doubt, Johanna Finck on summary application to the Court could have procured the quashal of the writ, but these defendants not having been parties to the suit could not have resorted to such a measure. (4 Wash., 59; 5 Barbour's Chy., 185.) The objection here made amounts to a want of power to sell, and these defendants, as alienees of Johanna Finck, may raise it whenever the title acquired at the sheriff's sale is asserted against them. 2 Cushing, 38, 39; 11 Ills., 524; 2 Green's Chy., 143; 7 Halstead, 186.

There is a clear distinction between an act done without authority, and an authority informally executed. 3 A. K. Marshall, 619.

The question, whether a sale of land under an execution was void or valid, may be made on the trial of an ejectment for the land, although the sale has never been previously impeached. 5 Dana, 278.

We beg to remind the Court that we are not attacking the regularity of the sheriff's proceeding, that this is not the case of a mere misdescription of the judgment, or of a verbal or slight variance between the judgment and the execution, or other clerical mistake.—We are not dealing with an innocent purchaser, but with the party himself who caused the illegal writ to be issued. We are not complaining of an erroneous award of execution, (that complaint comes from the other side,) nor is this the case of the irregular enforcement of a judgment, (as by an execution issued after a year and a day without a revival,) *but the naked case is presented of the execution of another judgment than that rendered,—the judgment, in other words, not of the Court, but of the purchaser himself.* None of the cases, therefore, which have been cited by the appellant, are to the purpose. Two only seem to bear any resemblance to this; but it will be seen that they are easily distinguishable, and instead of favoring the appellant, furnish at least a negative support to the position we have taken. The first is Jackson vs. Carman, 13 Johns., 97. This was a case of mere misdescription, the judgment being general, whereas it was recited in the execution as being against the defendants as "Heirs and Devisees." The mandate of the writ directed the debt to be levied *in conformity with the judgment*, that is to say, *de bonis propriis* of the defendants, and it was so levied. It was

admitted by the Court that the plea of *non est factum* of the ancestor, though found against the heir, was not such false pleading as authorized a general judgment, and that the judgment should have been such as rendered the lands descended only liable to execution. But it was decided that although erroneous, the judgment was not void, and third parties could not be affected by the error. One of the objections taken to the title acquired at the sheriff's sale was, "that the proceedings being against the defendants as heirs and devisees, their own proper estate could not be taken." The case went off upon the insufficiency of the sheriff's deed to convey the premises.

The second case is McCormick vs. Meason. 1 S. & R., 92. Here the judgment was against the executors as such, and was *de bonis*. The Court held that this clearly implied *testatoris*, and that the execution, which was against the testator's estate, was warranted by the judgment.

More to the purpose are the following cases: — A judgment against the assets of the ancestor, in the hands of the heirs, does not warrant an execution *de bonis propriis* of the heirs, and a sale under such writ passes no title to the purchaser. 7 Iredell, 1.

A judgment against the personal representative by name will not of itself bind the estate of the intestate. 12 Georgia, 290; 2 Conn., 462; 4 McCord, 132. Nor will a judgment against a party as administrator, who is both administrator and heir, support an execution against the property of the ancestor in the hands of an alienee of the heir. 2 Barr., 112.

And so in relation to an execution.—Under an execution to sell lands *descended* from A to B, the sheriff has no authority to sell lands *devised* by A to B, and such sale is void. 10 Iredell, 466.

The purchaser must show the sale was had under the kind of execution which the statute prescribes. 1 Blackford, 210.

III. But if it be possible to regard this as a judgment against Johanna Finck, as heir, we then urge that the execution was not in conformity with the statute, and was void on its face. Section fourth is express and imperative as to the form of the writ in such cases, and requires that the sheriff shall be commanded to the effect that he resort to the realty descended *only* in the event of an insufficiency of goods and chattels of the ancestor subject to execution. With the view of preserving uninfringed the rights of the heir in the realty descended so long as there is personal property of the intestate ancestor to answer the debt, and to avoid the delay and expense of two separate writs, one against the personalty,

and (that proving insufficient,) another against the realty, the two are consolidated, but with the same effect in this respect — the realty cannot be subjected to process until it is duly ascertained, that there is a deficiency of personalty. But here the direction to the sheriff was in the general terms of an ordinary *fi. fa.* to make the debt "*of the goods and chattels and real estate* of the said "Leonard Bedlingmaier, Jacob Reinhardt, and which were of the "said Valentine Finck at the time of his death." Under this process the sheriff was authorized to levy at once upon the realty, without resorting to the personalty. It was regarded by the appellant as so indispensable that it should be made to appear that the sale of this land was made for want of sufficient personalty, that it is not only so averred in the petition in this suit, but he took the precaution also by an interlineation with his own hand to affirm the fact in the sheriff's deed. But the statement in the deed that the levy was made "for want of sufficient goods and chattels whereon to levy," while it failed to show that there was no such property of *Valentine Finck*, subject to execution, (there being two other defendants named in the writ,) was not evidence, because not responsive to any command in the writ. 15 B. Monroe, 447. There was therefore no competent evidence in the suit, nor could there be, that this land was levied in execution for the sole reason sanctioned by the law, and as stated by the appellant — a deficiency of personal assets.—The point admits of a typograhical illustration. This important feature in the appellant's title is suspended upon a mere caret, taking the form of an interlineation in the sheriff's deed, which although adopted by that officer, is in the handwriting of the appellant himself. Not having been charged with the duty of first pursuing the personalty, the return of the sheriff in that particular was a mere afterthought, done under the prompting of the party interested, and was of no more effect than would have been the certificate of the appellant.

It is said that there was no defect in the writ in its direction to make the debt out of the realty; that Johanna Finck was sued only on account of assets real descended, because the personal estate could not descend to her, but would pass to heirs out of the United States. It ought to be a sufficient answer to this, that the record does not show that there were such other parties. But in finally settling down thus in the position that the original suit was substantially a proceeding *in rem* against the realty, the appellant not only encounters the objection already made, that he failed to secure such a judgment or decree as authorized the appropriation of those assets to the debt, but also raises a question as to the

jurisdiction of the Court below. We have shown what were the proceedings at law to reach the estate of the intestate. In equity it would have been ordered to be sold for the payment of the debt. Seton's Decrees, 84.

A. HAMILTON,
for Respondents.

In the Missouri Supreme Court.

Whittlesey
vs.
Brohammer et al. } Agreement.

It is agreed between the counsel for the parties, that the judgment in the original suit in the Common Pleas, was in the form set forth on the fourth page of the printed statement of the case, it appearing from the said statement that the same was rendered against the three defendants in said suit, Jacob Reinhardt having made no defence, Johanna Finck having demurred successfully, and the petition having been amended, the said Bidlingmaier alone having answered the amended petition; That said Bidlingmaier alone sued out a writ of error to this Court, and prosecuted the same, and that the judgment was reversed, the decision being found in 26th Mo. 483. Said judgment was reversed after the commencement of the present suit, and the trial in the Land Court.

It is agreed also, that the Defendants, by their attorney, appeared at the Sheriff's sale, gave notice of their title under the deeds mentioned in the petition, exhibited said deeds, and forbade the sale, and bid upon said property at said sale.

It is agreed between the counsel, that the Supreme Court, in deciding this case, may take into consideration the effect of the facts above stated, in connection with the record, the same as if properly set forth in the pleadings, and appearing in the cause.

Aug. 10. 1859.

Whittelsey p. p.
Hamilton & A. J. P. Garesché
for Respondents

No 11

Whittlesey
vs.
Brohammer, et al.

Agreement.

Filed 16 Dec. 1859.
Wm S. Granville Cl.

Even taking the matter as made by the petition for a rehearing that the consideration of the deed was the ~~matter~~ point in issue yet we do not see that the case is helped: If the deed was voluntary it does not follow that it was fraudulent in law: The ~~pet~~ judgment was a general one: It does not appear ~~but~~ that the defendant was in embarrassed circumstances or that she had not other property sufficient to satisfy the execution none of these facts are stated in the case.

When a party is endeavoring to obtain an estate worth ~~&~~ not less than nine thousand dollars for the sum of two hundred & eleven dollars, and makes a slip in his proceedings the cause of justice is not subserved in permitting him to mend his hold.

Motion for rehearing overruled

The other judges concur. W. Scott

11.

Whittelsey
vs
Brohammer

Opinion

Filed 22d Dec. 1860
Wm Glanville
Cl

Charles C. Whittelsey
-vs-
Lorens Brokammer } Appeal from the St. Louis Land Court.

This was an action brought by the plaintiff to recover the possession of a lot of ground in St. Louis and to set aside certain deeds alleged to be fraudulent. Valentine Finck and others as securities for Jacob Mueller admr of the estate of Katharine Mueller deceased executed to the State of Missouri a bond in the penalty of $13.000 conditioned in pursuance to law: After the execution of the bond & before a breach of the condition thereof Valentine Finck died leaving as his heir at law Johanna Finck to whom the lot in controversy descended. A breach of the condition of the bond being afterwards made a suit was brought upon it in the name of the State of Missouri to the use of A. Kehr admr de bonis non of Katharine Mueller, against the other securities as well as the said Johanna Finck as the heir of the said Valentine Finck. There was a judgment by default taken against the said Johanna which was afterwards made final. This was a general judgment for the damages assessed & there was an award of execution for the damages. This judgment was afterwards reversed

in this court and is reported in the 26 vol Mo Rep 283. Pending the suit on the bond Johanna Finck conveyed the lot in dispute to Joseph Brohammer who conveyed it in trust to Lorens Brohammer for the benefit of a daughter of Johanna Finck. These deeds are alleged to be fraudulent & to have been made without any consideration & there is a prayer to have them set aside; On the judgment obtained against Johanna Finck as heir, the lot in controversy was sold under an execution to the plaintiff who received a deed therefor which is the foundation of his title

There was no oral evidence in the case and the court rejecting all the instructions asked by both parties rendered a judgment for the defendant.

The suit out of which this action has arisen is the first instance that has fallen under our observation in which an action has been brought on the bond of the ancestor against his heir. Under the common law system of administering decedents' estates, this was no uncommon thing. But our mode of administration is so different from that prevailing at the common law, that an action of debt on a bond against the heir cannot be maintained if at all, but on other peculiar circumstances. The provisions in our code of laws which ———————————

seem to contemplate the existence of the right to maintain such an action, were taken ~~from~~ through inadvertence from the laws of States whose system of administration conformed more nearly to the common law. These observations are made not with a view to found any objection to the plaintiffs title on the fact that an action was brought on the bond of the ancestor against his heir & that the premises in controversy were sold under a judgment obtained in such action: but to show that the remedy adopted is an obsolete one and is entitled to no special favor of the Courts as there is no necessity for it and as it is inapplicable to most cases that may arise: So little has this matter been in the mind of our legislators that they have failed to adopt any of the English legislation in relation to it: The Statute of the 3 & 4 of W. & Mary has never been enacted in this State, so that in actions of this kind we are left entirely for our guidance to the ancient common law. By that law if the heir aliened in good faith before suit brought, the creditor could not subject the land aliened to the payment of his debt. Lord Coke says if an action of debt be brought against the heir, and he alieneth, hanging the writ, yet shall the land which he had at the time of the original purchase, be charged for that the action was brought against the

heir in respect of the land. fol 102 b. But we conceive that this would depend on the nature of the judgment obtained against the heir: If the judgment was a special one against the land descended, an alienation of it pending the writ would not defeat the execution of the creditor. But where the judgment was a general one such as was rendered on the action against the heir, such judgment will not operate here by way of relation to the original, but binds only in common cases from the time of the judgment given: Gree vs Oliver Car. Thew's Rep. 245. 6.

There was something said about fraud in the conveyances made by the Lords to those under whom the defendant claims: The petition alledged that the conveyances were made without any consideration & with an intent to defraud the plaintiff: The defendant denied that the deeds were made with any such intent & insisted that they were valid & operative against the plaintiff: The plaintiff offered no evidence in support of the allegations of her petition in relation to fraud & the want of a consideration; but on the pleadings I asked the court to declare, that fraud & the want of consideration stood confessed: The answer though not so for

oral nor so full as it might have been, was sufficient to let the plaintiff know that his allegations in relation to fraud were not admitted: There is nothing in the pleadings which shows that the answer was studiously evasive or that it was intended to be so: Standing as the answer did it would have operated as a surprise to the defendant after the evidence had been closed for the court to have declared that it was no denial of the plaintiffs allegations. If the plaintiff relied on the pleadings for proof he ought to have called upon the court before the evidence was closed, that the defendant might have amended or introduced his proof: Surely his denial of the fraud was sufficient to let in proof that the deed was made in good faith & was valid: ~~The allegations in the answer are broader than those contained in the petition~~ aff'd. The other Judges concur

W. Scott

C. C. Whittelsey

vs.

Lorenz Brohammer

Opinion

Affirmed

Filed 15 Decr. 1860.

Wm L Glanville Clk.

X Wink

Supreme Court

Charles C. Whittelsey
v
Lorenz Brohammer & als

Oct. 5/60

And now comes the plaintiff and moves the Supreme Court to grant him a rehearing of the above cause and that said cause be remanded for farther proceedings to the St Louis Land Court and in support of said motion, plaintiff assigns reasons as follows.

The Land court decided the cause upon the ground, that the plaintiff took no title whatever, under the judgment and Sheriffs deed, as the execution did not follow the judgment. Consequently the question as to the fraud in the deeds under which defendants claim, was not considered by that court. The Supreme Court in its opinion, while allowing that ~~all~~ the title of Johanna Finch at the date of the judgment passed by the Sheriffs sale and deed, yet holds the judgment to be correct, as the plaintiff produced no evidence as to the fraud, and the answer denied the fraud.

This decision upon this point is to the plaintiff a great surprise, as he believed that the facts constituting fraud in law are shown by the pleadings and agreements of counsel, and there was an express under-

standing between himself and Alex. Hamilton the counsel of defendants, that the consideration mentioned in the deeds described in plaintiffs petition as made by Johanna Finch to Joseph Brhammer and by Joseph to Lorenz Brhammer as trustee of Johanna Lues, never was paid, and that the especial charges of the petition were not especially denied in the answer because they could not be denied with truth, and that the answer was only designed to deny the fraudulent intent of the acts. As both counsel agreed as to the facts, that by the pleadings the deeds were charged to be without valuable consideration, and that was not denied in the answer, and was therefore admitted, upon this mutual understanding the agreed statement of the evidence was made, and the cause submitted. The decision of the court, has the same effect, as if the plaintiff had been [illegible] by defendants counsel.

And plaintiff refers to his affidavit, here to attached as showing said understanding and the reasons of it.

The deposition of Johanna Finch, had been taken by the plaintiff, showing that no consideration had been actually paid out of $9000. except $200, and that had been paid back again, in fact, that the whole transaction was a voluntary conveyance from Johanna Finch to her daughter Johanna Lues's trustee. The taking of said deposition had been attended by said Hamilton

as the counsel of defendants.

Plaintiff calls attention to the specific character of the charges as made in the petition, and the nature of the denial.

After setting out the title and the proceedings by which it was claimed, it proceeds.

"That on the 8th March 1856", (and this was after suit brought, which was returnable to the Oct. T. 1855) "by deed of that date, the said Johanna Finck for the nominal consideration of $9.000 did purport to sell and convey with warranty said lot to Joseph Brohammer, taking a deed of trust to secure the payment of 3 notes, one for $3000 payable at 2 years, one for $3000. at 4 years, and one for $2.808 at 6. years from date, said notes bearing interest at 6 pr ct. — That satisfaction of said deed of trust was entered upon the margin of the record August 15. 1856, as shown by Exhibits."

"That on May 28. 1856, said Joseph Brohammer for the nominal consideration of $9000. did grant bargain and sell said lot to Lorenz Brohammer in trust to hold for Johanna Luis wife of Anthony Luis of New Orleans & "to her separate use"

"Plaintiff in fact says, that the deeds of Johana Finck to Joseph Brohammer and of Joseph Brohammer to Lorenz Brohammer trustee of Johanna Luis who is a daughter of said Johanna Finck, were made with express intent

to hinder the plaintiff in the suit aforesaid from obtaining satisfaction of his debt."

"Plaintiff believes and charges the fact to be, that the consideration mentioned in said deeds was never actually paid in cash, but that said sums were mentioned in said deeds for the purpose of deceit and fraud, and that said deeds are fraudulent and void as against the plaintiff."

See Record page 2 & 3

The answer traverses the above special allegations, as follows.

"And these defendants admit the execution of the two deeds mentioned in the petition of the plaintiff, but they deny the charge of said petition that the same were made with intent to hinder and defraud the plaintiff in said suit from obtaining satisfaction of said debt and judgment, and they say that neither of them was made with such fraudulent intent, and they insist that said deeds are valid and operative as against the plaintiff in this suit." 4th

See Record page 5 & 6.

It will thus be seen, that the traverse is put on the intent alone, and not on the facts charged, that said deeds were made without valuable consideration; in fact

were but the form of a voluntary conveyance from a mother in debt to her daughter living in another state.

In a sale of property for $9000. only $200. is nominally received in cash from Joseph Brohammer, while notes secured by deed of trust for $8,800. are taken running over 2. 4 & 6 years. In a little over two months from this transaction Joseph Brohammer conveys to Henry Brohammer in trust for Johanna Lenis the daughter of the defendant in the suit then pending, for the named sum of $9000, the same premises, and on Aug 15, about three months after, these notes having 2. 4 & 6 years to run, are entered satisfied on the margin of the record. Now the charge is specific, that this sum of $9000 never was paid, and, the answer drawn by Judge Hamilton, does not assert that said deeds were made for consideration valuable in law, but simply denies intent to defraud.

If therefore there be any surprise, it is on the part of the plaintiff, in being required to prove facts stated in the petition and not denied in the answer, when the defense below was based upon a question of law denying the title of plaintiff and his right to question the deeds made by defendants, for the answer sets up that the Sheriffs sale and deed were nulli-

ties". The plaintiff considered the statement that there was no valuable consideration, as a material allegation as to a matter of fact, R.C. 1332. s. 12., and as the answer traversed only the intent, and not the fact, he considered the facts as admitted, as provided R.C. p 1238, the "allegation was" not specifically controverted in the answer." and he asked an instruction to that effect in the court below, which was refused on the ground, that he had no title upon which to attack the deeds.

He says, that if this court will reverse this cause and remand the same for a new trial, he can prove by the testimony of the parties to said deeds that no money was paid and that said deeds were made under the advice of counsel, that until judgment was obtained said Johanna Finck could convey as she pleased.

He therefore prays a rehearing, and that said cause be reversed and remanded for a new trial, that the question of fraud be tried.

Chas. C. Whittelsey

C

Charles C. Whittelsey on his oath says, that Alexander Hamilton was the

counsel who prepared the answer of defendants and the agreement as to the evidence upon which the cause was tried in the St Louis Land Court. That previous to said trial the deposition of Johanna Finch had been attempted taken, showing that only $200 was paid by Joseph Buhanner. And this affiant is under the impression that she said the same money was paid back to him though she may have refused to say what became of it. She had also testified that Johanna Duis was her daughter, that the notes given by Joseph Buhanner were returned to him on his making the deed to Johanna Duis's trustee — That Judge Hamilton was present at this examination.

That when the case was called for trial Judge Hamilton, suggested to this plaintiff, that his defence was solely upon the question of plaintiffs title under the sheriffs sale and deed, and proposed to make an agreed statement of the evidence upon this point and to submit the case to the court. Plaintiff suggested, that the agreement should contain an admission that the deeds referred to were made without consideration, and thus the conveyance from mother to daughter was voluntary, to which Judge Hamilton replied, that it was admitted by the pleadings, that he

would had not allowed his clients to swear that the money was paid, that the conveyance was voluntary, and that as the answer denied only the intention to defraud but not the facts charged in the petition the facts were admitted.

This plaintiff taking the same view of the law as to the facts admitted by the pleadings signed the agreement without such admission as to nature of the defendants deeds, And he says that now he is surprised by this court construction of the pleadings contrary to the mutual understanding of the counsel, and he refers to the brief and argument of Judge Hamilton, to show that he never made the point upon which the court decide the cause, thus showing what was his understanding of the agreement.

As this is a bill to set aside deeds as fraudulent, or voluntary and therefore fraudulent, and the judgment will be final, plaintiff prays that the cause be remanded for a trial upon this question of fraud.

Sworn to and sub- Chas. C. Whiteley
scribed this 18 Dec 1860
Wm. Glanville Clk.

Charles C. Whittelsey

v

Lorenz Brokammer
+als

Motion for rehearing with reasons + affidavit in support thereof, by the plaintiff

Filed 7th Dec. 1868
W. Glanville Clk.

Whittelsey
vs
Brohamma

Mr Hamilton respectfully requests the Court to look at the printed statement of the case, containing the argument of Counsel, for a full answer to Mr Whittlesy's motion. It will be seen that the plaintiff's theory of the case was that a debt of the Intestate constitutes a lien, and that a Conveyance by the Heir, during the pendency of the suit is fraudulent in law. = The answer is quite as good as the petition. It is perhaps to be regretted that the Court did not give any opinion upon the point made by the defendants Counsel, as to the Essential departure of the Execution from the judgment. It is respectfully suggested that it is not too late for the Court to add its views upon that subject, as being important in point of practice. I have not Mr W's motion before me and do not therefore profess to answer it minutely, nor do I think it necessary to do so.

Respectfully
A. Hamilton.

Whittlesey
vs.
Bra Hamma,
&c.

Memo. from Mr. Hamilton,
in answer to Pfff. mo-
tion.

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