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 Stockton et al. v. Bishop.
 

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LUCIUS W. STOCKTON AND DANIEL MOORE, PLAINTIFFS IN  
ERROR, v. HARRIET BISHOP, DEFENDANT.

An execution, issued in the court below, after a writ of error has been sued out, a bond given, and a citation issued, all in due time, may be quashed either in the court below or this court—these things operating as a stay of execution.<sup>1</sup>

IN the Circuit Court of the United States for the western district of Pennsylvania, Harriet Bishop, the defendant in error and a citizen of the state of Ohio, obtained a judgment against Stockton and Moore for \$6500 damages and costs, on the 7th of December, 1843.

On the 15th of December, 1843, Stockton and Moore entered into a bond with Hugh Campbell as surety, for the prosecution of a writ of error to this court, which was approved by the judge, and, on the same day, a writ of error and citation was sued out. On the 16th of December, 1843, the citation was returned served on R. Biddle, Esq., attorney of defendant in error.

On the 11th of January, 1844, the plaintiff below sued out a writ of *fiery facias* and placed it in the hands of the marshal, returnable on the 20th of May.

Coxe moved to quash the writ of *fiery facias*, as having been irregularly issued.

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\*Mr. Justice STORY delivered the opinion of the court.

Upon the facts stated in the application, there is no doubt that the writ of error, bond, and citation, having been given in due season according to law, operated as a stay of execu-

<sup>1</sup> DISTINGUISHED. *Hogan v. Ross*, 11 How., 296. FOLLOWED. *Slaughterhouse cases*, 10 Wall., 273, 292. CITED. *French v. Shoemaker*, 12 Wall., 100. S. P. *United States ex rel. v. Addison*, 22 How., 174.

Where an appeal was taken in a common law case instead of a writ of error, and after the lapse of ten days the plaintiff issued an execution upon his judgment, and the defendant then sued out a writ of error, the writ was sued out too late to stay execution and the court below erred in quashing the execution. *Saltmarsh v. Tuthill*, 12 How., 387.

Where the writ is not sealed until eleven days after rendition of judgment, there is no stay, and the same

is true where the citation is not served before the return day of the writ. *City of Washington v. Dennison*, 6 Wall., 495. So, also, where a copy of the writ is not lodged for the adverse party within ten days, Sundays exclusive, after judgment or decree. *Railroad Co. v. Harris*, 7 Wall., 574; *O'Dowd v. Russell*, 14 Id., 402.

But under the act of June 1st, 1872, § 11, it is not necessary, in order to make the writ a *supersedeas*, that it be served within ten days, the *supersedeas* bond may be filed and the writ served at any time within sixty days after the rendition of judgment. *Telegraph Co. v. Eyser*, 19 Wall., 419. And see *Doyle v. Wisconsin*, 4 Otto, 50.

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tion, and that a *supersedeas* to the *feri facias* ought to issue from this court, to supercede and quash the same, as prayed for in the motion. Indeed, the issuing of the execution was wholly irregular, and it might have been quashed by an application to the court below. But it is equally competent for this court to do the same thing in furtherance of the purposes of justice. The motion is therefore, granted and a *supersedeas* will be issued accordingly.

## ORDER.

UNITED STATES OF AMERICA, ss.:

*The President of the United States of America*

To the Honorable the Judges of the Circuit Court of the United States for the western district of Pennsylvania, and to the Marshal of the United States for the said district, greeting:

WHEREAS, lately in the said Circuit Court, —— before you, or some of you, in a cause between Harriet Bishop, plaintiff, and Lucius W. Stockton and Daniel Moore, defendants, judgment was rendered by the said Circuit Court on the 7th of December, 1843, in favor of the said plaintiff and against the said defendants, for the sum of \$6500 and costs of suit, and on the 15th December, 1843, the aforesaid defendants, with sufficient security, filed their bond in error, which was approved by the judge of the District Court, so as to operate as a *supersedeas*, the defendants having sued out a writ of error in due form and time, and a citation having been regularly taken out, served upon the defendant in error and duly returned, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States, by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord one thousand eight hundred and forty-four, it is made to appear on affidavit to the said Supreme Court of the United States, that, notwithstanding the premises, the aforesaid plaintiff in the said Circuit Court caused a writ of *feri facias* to be issued on the 11th day of January, 1844, upon the judgment obtained in said cause, and to be placed in the hands of the aforesaid marshal for service and satisfaction thereof: \*On consideration where- [\*76 of, it is now here ordered by this court that a writ of *supersedeas* be, and the same is hereby awarded to be directed to the aforesaid marshal, commanding and enjoining him and his



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 Porterfield v. Clark et al.
 

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deputies, to stay every and all proceedings upon the said writ of *fieri facias*, and that he return the said execution with the writ of *supersedeas* to the said Circuit Court, and that the judges of the said Circuit Court do cause the said writ of execution to be quashed, the same having been unjustly, improvidently, and erroneously issued out of the said court, at the instance of the said plaintiff. You, therefore, the marshal of the United States for the western district of Pennsylvania, are hereby commanded that, from every and all proceedings on the said *fieri facias* or in any wise molesting the said defendants on the account aforesaid, you entirely surcease, as being superseded, and that you do forthwith return the said *fieri facias*, together with this *supersedeas* to the said Circuit Court, as you will answer the contrary at your peril. And you the judges of the said Circuit Court are hereby commanded that such further proceedings be had in the premises, in conformity to the order of this court, and as according to right and justice, and the laws of the United States ought to be had, the said execution notwithstanding.

WITNESS the Honorable Roger B. Taney, Chief Justice of the said Supreme Court, the 13th day of March, in the year of our Lord, one thousand eight hundred and forty-four.

WM. THOS. CARROLL,  
Clerk of the Supreme Court of the United States.

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WILLIAM KINNEY AND JAMES J. MECHIE, EXECUTORS AND TRUSTEES OF ROBERT PORTERFIELD, DECEASED, v. MERIWETHER L. CLARK, WILLIAM P. CLARK, GEORGE R. H. CLARK, AND JEFFERSON R. CLARK, A MINOR BY THE AFORESAID GEORGE R. H. CLARK, HIS GUARDIAN, HEIRS AND DEVEISEES OF WILLIAM CLARK, DECEASED, AND ROBERT O., ANN C., GEORGE W., AND FRANCIS JANE WOOLFOLK, HEIRS OF GEORGE WOOLFOLK, DECEASED, AND OTHERS.

An act of the legislature of Virginia, passed in May, 1779, "establishing a land-office, and ascertaining the terms and manner of granting waste and \*77] unappropriated lands," contained, amongst other exceptions, the following, viz. : \*no entry or location of land shall be admitted within the country and limits of the Cherokee Indians.

The tract of country lying on the west of the Tennessee river, was not then the country of the Cherokee Indians, and, of course, not within the exception.

A title may be tried in Virginia, Kentucky, and Tennessee, as effectually upon