but will compel you to go before the jury; where facts disclosed, not pertinent to the issue, might make an improper impression?

Cushing, J.—Do you admit, that the defendant might have given in evidence, under the general issue, the facts stated in the plea offered?

Lee.—It is sufficient for us, if it was a matter of doubt. In such a case, a cautious practitioner will always take the safest method, and plead the facts specially.

*There is no doubt, but the court had a right to make rules of practice for itself. But not having made such a rule in this case, its discretion ought to have been guided by the practice of the Virginia courts. We, therefore, hope, that this court will correct the indiscreet exercise of the power of the court below in this case. [*117

The Court.—It is true, that the courts in Virginia have been very liberal in admitting any plea, at the next term after an office-judgment, which was necessary to bring forward the substantial merits of the case, whether it was strictly an issuable plea, or not.[1] But at a subsequent term, it is a matter of mere discretion with the court, whether they will admit any special plea at all.

In the present case, the facts stated in the plea offered, might have been given in evidence on the general issue; the court exercised their discretion soundly in rejecting the plea.

Judgment affirmed.

Turner *v.* Fendall.

Execution.—Proceedings against sheriff.—Evidence.

A sheriff makes the money upon a *fi. fa.* at the suit of A. *v.* B., and afterwards a *fi. fa.* against A. is put into his hands, he cannot levy it upon the money of A., made by the *fi. fa.* of A. *v.* B., for it does not become the goods and chattels of A., until it is paid over to him; and by the command of the writ, the sheriff is, in strictness, bound to bring the money into court, there to be paid to the plaintiff.

Money may be taken in execution, if in the possession of the defendant.

On a motion, in Virginia, against a sheriff, for not paying over moneys by him collected on execution, it is not necessary that the judgment against the sheriff should be rendered at the term next succeeding that to which the execution has been returned.

Proceedings before magistrates, in cases of insolvent debtors, are matters *en pais*, and may be proved by parol testimony.

It is not error in the court below, to reject, as incompetent, admissible testimony, tending to prove a fact not relevant to the case before the court.

Fendall *v.* Turner, 1 Cr. C. C. 35, affirmed.

This was a writ of error to reverse a judgment of the Circuit Court of the district of Columbia, sitting at Alexandria, rendered on a motion by Fendall against Turner, late serjeant of the corporate town of Alexandria, for the amount of money received by him on a *fieri facias* issued on a judgment in favor of Fendall against one Towers. (Reported below, 1 Cr. C. C. 35.)

This motion was grounded on an act of assembly of Virginia (Rev. Code, p. 317, § 51), by which it is enacted, that "if any sheriff, under-sheriff or

[1] See Mechanics' Bank of Alexandria *v.* Withers, 6 Wheat. 106.

other officer shall make return upon any writ of *fieri facias* or *venditioni exponas*, that he hath levied the debt, damages or costs, as in such writ is required, or any part thereof, and shall not immediately pay the same to the party, to whom the same is payable, or his attorney," "it shall and may be *118] lawful for the creditor at *whose suit such writ of *fieri facias*, &c., shall issue, upon a motion made in the next succeeding general court, or other court from whence such writ shall issue, to demand judgment against such sheriff, officer or under-sheriff, or securities of such under-sheriff, for the money or tobacco mentioned in such writ, or so much thereof as shall be returned levied on such writ of *fieri facias*, &c., with interest thereon at the rate of fifteen per centum per annum, from the return-day of the execution, until the judgment shall be discharged; and such court is hereby authorized and required to give judgment accordingly, and to award execution thereon; provided, such sheriff or officer have ten days' previous notice of such motion."

Fendall had recovered judgment against Towers, in the court of hustings, in the town of Alexandria, for $627.52 damages, and $4.91 costs, on which judgment, a *fieri facias* issued, directed to the serjeant of the court of hustings, dated the 13th of December 1800, returnable to the said court of hustings, on the first Monday of February then next. Upon this writ, was the following return, viz.:

"Serjeant returns, executed on one large copper boiler and sundry casks, and sold for the sum of $703.98, including serjeant's commissions, on which money, I have levied a writ of *fieri facias*, issued from the clerk's office of the court of Fairfax county, on a judgment obtained by William Deneale against Robert Young and Philip R. Fendall, merchants, trading under the firm of Robert Young & Co.

CHARLES TURNER, T. S."

Before the next succeeding term of the court of hustings, after the return of the execution, the act of congress of 27th of February 1801, concerning the district of Columbia, intervened, by which, the laws of Virginia, as they then existed, were declared to be and continue in force in that part of the district of Columbia which was ceded by that state to the United States, and by them accepted for the permanent seat of government; and all suits, process, &c., depending in the court of hustings for the town of Alexandria, were transferred to the circuit court of the district of Columbia estab- *119] lished by that *act; and the first session of the circuit court, in Alexandria, was by law held on the second Monday of April 1801.

To that term (April 1801), Fendall gave Turner notice, in the usual form, that on the first day of the court, he should move for judgment against him for the amount of the execution, with interest thereon, according to law; which notice was signed "Philip Richard Fendall, for the trustees of Philip Richard Fendall," and was duly served. Turner not having appeared, the motion was continued to the next term (July 1801), when he appeared and admitted the regularity of the delivery and continuance of the notice; and the court, upon argument, gave judgment for the plaintiff, Fendall; to reverse which judgment, Turner sued out the present writ of error.

The record which came up contained three bills of exceptions. The first stated that the defendant, Turner, to prove that Fendall had taken the oath

of an insolvent debtor, and was thereupon discharged out of custody, produced the following writing, viz.:

"*Fairfax*, ss. Whereas, Philip Richard Fendall, a prisoner confined in the jail of Fairfax county, under execution at the suit of Samuel Love, issued from the district court of Dumfries, and it appearing that legal notice had been given, and a warrant issued, for bringing before us, for the purpose of taking the oath of an insolvent debtor, and the said Philip Richard Fendall having this day, in the court-house of the said county, delivered in a schedule of his estate and effects, and taken the oath prescribed by law; these are, therefore, in the name of the commonwealth, to command you to discharge the said Philip Richard Fendall out of your jail and custody, and for so doing, this shall be your sufficient warrant. Given under our hands and seals, this 21st day of March, eighteen hundred.

WILLIAM HERBERT, [Seal.]
R. WEST. [Seal.]

"To the sheriff or keeper of the jail of Fairfax county."

And offered to prove the handwriting of the said William Herbert and Roger West; and also to prove by oral testimony, that the said Philip Richard Fendall did take the *oath of an insolvent debtor, before the William Herbert and Roger West, whose names are subscribed to the said writing, and also to prove by oral testimony, that the said William Herbert and Roger West were magistrates of the county of Fairfax, on the 21st of March 1800, and had acted as such for many years before; but the court gave it as their opinion, that the said writing and oral testimony were not legal evidence to be admitted to prove the above-mentioned facts. [*120

The 2d bill of exceptions stated, that the defendant Turner offered to show to the court, that the trustees of Fendall were not entitled to the money levied on the execution of *Fendall* v. *Towers*, but the court refused to suffer him to go into that inquiry.

The 3d bill of exceptions stated, that the defendant Turner produced a copy of an execution issued on a judgment obtained by William Deneale against Robert Young and Philip Richard Fendall (the plaintiff in motion below), and a copy of the return, which return was in these words:

"Executed on the sum of $682.43, money in my hands, being the amount of the sum received by me for the sale of certain property taken by virtue of a *fieri facias*, issued from the clerk's office of the court of hustings of Alexandria, on a judgment obtained by the within named Philip R. Fendall against John Towers. CHARLES TURNER, T. S."

And alleged, that he had a right, and was bound, to levy that execution on the money of the said Fendall, which he had levied by virtue of the execution of *Fendall* v. *Towers*, and which was in his hands, separate and distinct from any other money, at the time the execution of *Deneale* v. *Young and Fendall* was delivered to him, but the court gave it as their opinion that he had not a right, and was not bound so to do.

The case was now argued by *Simms*, for the plaintiff in error, and by *C. Lee* and *Swann*, for the defendant.

For the *plaintiff* in error, it was contended: *1st. That the court below was not authorized to render judgment at any other term than [*121

that next succeeding the return of the execution. 2d. That the testimony offered to prove the insolvency of Fendall, was competent for that purpose, and ought not to have been rejected. 3d. That the defendant below ought to have been permitted to prove the trustees of Fendall not entitled to receive the money on the execution of *Fendall* v. *Towers*. 4th. That Turner had a right to levy the execution of *Deneale* v. *Young and Fendall*, on the money of Fendall in his hands.

I. The act of assembly giving this remedy against sheriffs ought to be construed strictly, because it is a penal law, inasmuch as it subjects the officer to a penalty of fifteen per cent. per annum, for not paying over the money levied upon an execution; and because this summary process by motion is in derogation of the common-law proceedings. The words of the act are, that "upon a motion made to the next succeeding general court, or other court from whence such writ shall issue," "such court is hereby authorized and required to give judgment accordingly;" that is, "such next succeeding court." The court in April was the next succeeding court; but the court in July, at which this judgment was rendered, had no jurisdiction of the cause. And although consent will take away error, yet it will not give jurisdiction.

II. The testimony offered to prove the insolvency of Fendall, ought to have been admitted. By the act of assembly respecting insolvent debtors (Rev. Code, p. 314, 315, §§ 40, 41), upon the debtor's delivering his schedule, and taking the oath, all his estate becomes vested, by act of law, in the sheriff of the county, and debts due to him are to be recovered in the name of the sheriff. This money was either the money of Fendall, and so vested in the sheriff as part of the estate in possession, or else it was a *chose in action*, and then the *sheriff is the only person entitled to recover it. *122]
In either case, by showing the insolvency of Fendall, we show that the title is out of him, so that he cannot support this motion. The act of assembly does not make the act of the magistrates, in administering the oath, and granting the warrant of discharge of an insolvent debtor, a matter of record. Third persons have no means of proving the fact of insolvency, but by parol testimony: it must be proved like any other matter *en pais*. We offered the best evidence which the nature of the case will admit: we offered the original warrant of discharge, under the hands and seals of the magistrates, and parol proof that they were magistrates at the time, and had acted as such for many years before, together with evidence of their handwriting. General reputation has always been considered as sufficient proof of the official character of a magistrate.

III. The defendant below ought to have been permitted to show that the trustees of Fendall were not entitled to the money. The notice in this case was given by Fendall for his trustees. Turner could not know whose claims he had to oppose, whether those of Fendall alone, or those of his trustees. It was necessary for him, therefore, to show that neither the one nor the others were entitled to recover upon this motion; and he came prepared to do this, but the court would not suffer him to do it. Fendall, by reason of his insolvency, and the consequent operation of law in transferring all his rights to the sheriff, could not recover in his own name, for his own use and benefit; but still, as courts of law will protect trusts and equitable rights, where they are made to appear, and as the transfer of the estate and

effects of an insolvent debtor, which takes place by the operation of law, does not transfer those things which the insolvent has merely as trustee, and as the name of Fendall might, therefore, still be used for the benefit of the trustees, it was competent and proper for the defendant below, to show that the trustees had not that equitable right which the law will protect.

IV. The fourth point seems to divide itself into two parts. 1st. Can money be taken upon a *fieri facias* in any case? *2d. Can the officer levy a *fieri facias* on money in his own hands which he has collected for the use of the debtor? [*123

1. It is a general principle, that all goods and chattels, the property of the debtor, may be taken in execution, and when an officer has it in his power to satisfy an execution to him directed, it is his duty to do it, and he is liable to the creditor, if he fails so to do. The money of a debtor is a part of his goods and chattels; it follows, that it is liable to an execution: there is no possible reason why it should not be so. It is said, there are some old authorities to the contrary, and that the reason given is, that money cannot be sold. (*Armistead* v. *Philpot*, Doug. 219.) But the reason of selling the goods taken on execution is, that money may be raised, and surely, the execution may as well be satisfied, by taking money itself, as by taking goods which must be sold to raise the money. In *Rex* v. *Webb*, 2 Show. 166, it is said, that by a *levari facias* "the sheriff may take ready money." And in this respect, there is no difference between a *levari facias* and a *fieri facias*. The law is expressly laid down in Dalt. Sheriff, 145, 543, that money may be taken on a *fieri facias*.

2. If money in the possession of the debtor may be taken, does the money being in the hands of the sheriff make any difference? In the case of *Rex* v. *Bird*, 2 Show. 87, "it was resolved by the court, on motion, that on a *fieri facias*, the sheriff may sell the goods, and if he pay the money to the party, it is good, and the court will allow of such return, because the plaintiff is thereby satisfied; although the writ run, "*ita quod habeat coram nobis*," &c. The same doctrine is held in *Hoe's Case*, 5 Co. 70 *a*.

If, then, the sheriff might have paid this money to Fendall, and had so paid it, he would have been bound to seize it again, instantly, to satisfy the execution of Deneale. If he might have done this, and if it was his duty to satisfy the execution of Deneale, where was the necessity of his *going through the ceremony of a payment of the money to Fendall. [*124 Here, it is stated by the officer, that he kept the money of Fendall distinct and separate from all other money, and that he levied the execution of Deneale on that identical money. This is, in substance, the same thing as if the money had been paid over to Fendall, and afterwards seized by the officer.

On the part of the *defendant* in error, it was said, in reply—1. As to the power of the court to give judgment at a term subsequent to the term next after the return of the execution, that although the act of assembly may be penal, and although the remedy may be in derogation of the common-law proceedings, yet, like all other statutes, it must have a reasonable construction. It could never be supposed to intend, that if the court did not give the judgment at the first term, the jurisdiction which they once had should cease.

2. The fact of Fendall's insolvency was not material to the question

before the court, because any person who was equitably entitled to the money, would not be precluded from his claim by this judgment; and by the act of assembly, no one but the creditor in whose name the judgment was rendered, is entitled to this summary process against the officer who refuses to pay the money levied upon the execution; and if any other person was in equity entitled to the money, he must still use the name of Fendall. The name of the nominal creditor must be used, or the remedy given by the statute would be wholly lost. He is the only person who could acknowledge a satisfaction upon record, and it ought not to be in the power of the officer, to allege an equitable claim in another person, to support his own improper act. (*Benson* v. *Flower*, Cro. Car. 166, 176.) In that case, the creditor had become bankrupt, after the money was made upon the execution, and before the return; and upon the return, the assignees contended, that they had the right to receive the money, but the court ordered it to be paid to the bankrupt, because the assignees were no parties to the suit, and the bankrupt was the only person who could acknowledge satisfaction upon the record; and the money being levied by the sheriff, before the
*125] assignment, was to be considered *as *in custodia legis*, and so not assignable. It was not the money of the bankrupt, at the time of the bankruptcy, because it did not become his money until he received it.

But if the insolvency of Fendall were material, still, the evidence adduced was not conclusive of the fact, nor even competent to prove it. It was not the best evidence which the nature of the case admitted. If the act of the magistrates was a simple act *en pais*, yet they themselves were the most competent witnesses to prove the fact, and their testimony would be better evidence than a paper purporting to be signed by W. Herbert and R. West, who do not style themselves magistrates, even if their handwriting should be proved. It does not appear, that they were dead, or that their testimony could not be obtained. And as to common report being evidence of their being magistrates, it certainly was not the best evidence, because their commissions, and the certificate of their taking the requisite oaths of office, were matters of record. Esp. N. P. 741. When the acts of magistrates are questioned, in the county in which they are said to be justices, common report may be sufficient, because all persons are supposed to be obliged to take notice of the officers of their county.[1] But in this case, they were alleged to be justices of a foreign county. The county of Fairfax is no part of the district of Columbia. But this was not a trial by jury, and it is very questionable, whether, in such a case, a rejection of admissible evidence can be assigned for error, with any more propriety than an admission of incompetent testimony.

3. It is contended, that Turner ought to have been permitted to show, that the trustees of Fendall had no right to receive the money. The answer to that is, that the court were not trying the right of the trustees, and could not look into their equitable claims. The court were sitting as a court of law, and not as a court of chancery. If the trustees had an equitable right, they were not precluded from asserting it, in a proper manner; if they had not, it did not affect the present question. If they had a legal right, they would not be barred by the judgment in this case. In whatever light the

[1] See Hibbs *v.* Blair, 14 Penn. St. 413; Kilpatrick *v.* Commonwealth, 31 Id. 198.

subject is viewed, it appears to be perfectly immaterial to the present question.

*4. But the fourth point includes the real merits of this controversy. Had the officer a right to satisfy the execution of *Deneale* v. *Young and Fendall*, out of the money in his hands levied by virtue of the execution of *Fendall* v. *Towers?* [*126

1st. Money cannot, in any case, be taken by the officer, upon an execution. It is a general principle, that on a *fieri facias*, the goods taken cannot be delivered to the creditor, in satisfaction of the debt, but must be sold; and the books give this as a reason why money cannot be taken: another reason may be, that money cannot be identified. But the law is different in Virginia from the English law, in respect to the proceedings on executions.

By the act of assembly respecting executions (Rev. Code, p. 309, § 12, 13), the officer, on all executions, having published notice of the time and place of sale, ten days before such sale, "shall proceed to sell, by auction, the goods and chattels so taken, or so much thereof as shall be sufficient to satisfy the judgment or decree, for the best price that can be got for the same." Here, it is evident, that the legislature did not contemplate the case of money itself being liable to be taken on execution; for they have made it the duty of the officer, in all cases of execution, to advertise and sell the goods taken. But the next section is still stronger, for it provides, "that if the owner of such goods and chattels shall give sufficient security to such sheriff or officer, to have the same goods and chattels forthcoming at the day of sale, it shall be lawful for the sheriff or officer to take a bond from such debtor and securities, payable to the creditor, reciting the service of such execution, and the amount of money or tobacco due thereon, and with condition to have the goods or chattels forthcoming at the day of sale appointed by such sheriff or officer, and shall, thereupon, suffer the said goods and chattels to remain in the possession, and at the risk of the debtor, until that time." It would be absurd, to suppose an officer obliged to appoint a day of sale for selling money; yet the giving of a forthcoming bond is a right which the debtor has by law; he is entitled to the delay on giving the security required. But the bond cannot be taken, unless a day of sale is appointed, because there can be no other day on which the *bond can become forfeited. Hence, then, it is clear, that the legislature went upon the ground that money could not be taken on an execution, or they would have excepted such a case from the general words of the law. But if money was liable to be taken on a *fieri facias*, it was a case which must have often happened, and could not have escaped the recollection of every member of the legislature. A strong argument arises from the want of adjudged cases on this point, and the total deficiency of precedent in practice, within our own knowledge. [*127

In the case of *Armistead* v. *Philpot*, cited from Doug. 219, Lord Mansfield confesses that there are old cases which say that money cannot be taken in execution, even though found in the defendant's scrutoire, and does not cite any cases to the contrary. It is true, he says the reason given is a quaint one, but he does not say it was not good. In that case, the money levied for the debtor was ordered to be paid by the sheriff to the creditor who had an execution, but there was no opposition, except as to the attor-

ney's fees on the first execution, which were compromised, and the court and bar agreed that the motion was of the first impression.

2d. But secondly, this was not the money of Fendall, until it was paid to him; and therefore, if the law be, as is contended, that money of the debtor may be taken in execution, yet the principle does not apply to this case. By the receipt of the money by the sheriff, Fendall did not become entitled to the individual pieces of coin. The remedy against the officer was not detinue or trover, but an action of debt, or on the case. The officer became the debtor of Fendall for so much money, and there is no reason why it should be more liable to an execution, in the hands of the serjeant, than in those of any other individual; it was neither the goods nor chattels of Fendall, but a mere *chose in action.* Fendall could not compel the officer to pay it before the return-day of the execution. If, in the meantime, the money had been lost or destroyed by robbery, fire, enemies, lightning or tempest, it must have been the loss of the officer, and not of Fendall. The
*128] command of the writ of *fieri facias*, according to its form as *prescribed by the act of assembly (Rev. Code, p. 306), is, "that you have the said sum of money before the judges of our said court, the ——— day of ———, to render to the said (creditor) of the debt and damages aforesaid." And the form of the return contained in the same act (p. 307), is, "by virtue of this writ to me directed, I have caused to be made the within-mentioned sum of ——— of the goods and chattels of the within-named A. B., which said sum of ———, before the judges within mentioned, at the day and place within contained, I have ready, as that writ requires."

The form of the writ and return is the best possible evidence of the duty of the officer. He is obliged to have the money in court, to be there paid to the creditors; and nothing will excuse him from an exact compliance with the command of the writ, but payment to the person named as creditor in the execution; and even this, not as a matter of right, but of favor. In the case of *Rex* v. *Bird*, cited from 2 Shower, 87, it is only said, that a payment to the party will be allowed by the court, and the reason given, is, because the plaintiff is thereby satisfied. "But this is only by permission of the court, and not by force of the law." 2 Bac. Abr. 352. Now, if the plaintiff is not satisfied, the reason fails, and consequently, the rule does not hold good. In 2 Bac. Abr. 352, it is said, "in strictness, the money is to be brought into court."

In the case of *Canon* v. *Smallwood*, 3 Lev. 203–4, it is said, that the payment of the money to the plaintiff was by permission of the court, not *ex rigore juris;* and the court often orders the sheriff to bring the money into court, and does not permit the plaintiff to have it; of which power the court would by this means be deprived.

In the case of *Benson* v. *Flower*, before cited from Cro. Car. 166, 176, it is expressly stated, that the money, at the time of the bankruptcy, being *in custodia legis*, that is, in the hands of the sheriff, was not the property of the bankrupt, and did not become so, until he received it. And in the case of *Armistead* v. *Philpot*, the money was first brought into court, and there ordered by the court to be paid to the second creditor, on affidavit that other goods and chattels could not be found. This case shows, as strongly as pos-
*129] sible, *the necessity of the sheriff's obeying the command of the writ, in bringing the money into court, instead of paying it over to the

creditor, out of court, because otherwise the act of the sheriff would deprive the court of the power of making such an order, and might, in many cases, deprive the debtor of the opportunity of obtaining speedy justice, on a motion to quash the execution for irregularity, or any other cause. Besides, the sheriff might go on and levy for one creditor after another, until the whole sum should be swallowed up in his commissions.

No case can be found, in which it has been permitted to be done, at the discretion of the sheriff, and yet it is a case which must happen in every day's practice if it could be done.

The CHIEF JUSTICE delivered the opinion of the court.—This was a motion made by the defendant in error against the now plaintiff, in the circuit court at Alexandria, under an act of the Virginia assembly, which declares that "if any sheriff, under-sheriff or other officer, shall make return on any writ of *fieri facias* or *venditioni exponas*, that he hath levied the debt, damages or costs, as in such writ is required, or any part thereof, and shall not immediately pay the same to the party to whom the same is payable, or his attorney," "it shall and may be lawful for the creditor at whose suit such writ of *fieri facias* or *venditioni exponas* shall issue, upon a motion made at the next succeeding general court, or other court from whence such writ shall issue, to demand judgment against such sheriff, officer or under-sheriff, or securities of such under-sheriff, for the money or tobacco mentioned in such writ, or so much as shall be returned levied on such writs," "with interest thereon at the rate of fifteen per centum per annum from the return-day of the execution, until the judgment shall be discharged; and such court is hereby authorized and required to give judgment accordingly, and to award execution thereon; provided, such sheriff or officer have ten days' previous notice of such motion." That Turner had been serjeant of the town of Alexandria, and had returned on a writ of *fieri facias*, issued on a judgment rendered by the court of hustings for that corporation, [*130
*in favor of Philip Richard Fendall, that he had made the debt, and had levied thereon a writ of *fieri facias* issued on a judgment obtained by William Deneale against Robert Young and Philip R. Fendall, merchants, trading under the firm of Robert Young & Co.

Before the next succeeding term of the court of hustings would have arrived, that court was abolished, and all its powers and duties transferred to the circuit court of the district of Columbia for the county of Alexandria. To the first term of the circuit court, notice was given, that a judgment would be moved for, and the notice was signed "Philip Richard Fendall, for the trustees of the said Philip Richard Fendall."

The defendant did not appear to the notice, and it was continued to the succeeding term, when the parties appeared, and the defendant, to prove that P. R. Fendall had taken the oath of an insolvent debtor, and was thereupon discharged, offered in evidence a warrant, signed William Herbert and R. West, discharging the said Philip R. Fendall out of custody, as an insolvent debtor, and further offered to prove the handwriting of the said Herbert and West, and also to prove, by oral testimony, that the said Philip Richard Fendall did take the oath of an insolvent debtor, before the said William Herbert and Roger West, and that they were, on the 21st of March 1800, the time of administering the said oath and granting the said certificate,

magistrates for the county of Fairfax. This testimony was rejected by the court, as not being legal evidence to establish the fact, and to this opinion an exception was taken.

The defendant also offered to show, that the trustees of Philip R. Fendall were not entitled to the money levied by virtue of the execution mentioned in the notice, which testimony was likewise rejected by the court; and to this opinion also, a bill of exceptions was taken.

The defendant then produced the execution issued in favor of *Deneale* v. *Robert Young and Philip R. Fendall*, merchants, trading under the firm of Robert Young & Co., with the return thereon, showing that it had
*131] *been levied on the money of Philip R. Fendall, then in his hands, and alleged, that the officer had a right and was bound to levy the said execution on the said money, but the court was of opinion, that he had not a right so to do, and to this opinion also, an exception was taken. The court then proceeded to render judgment, on the notice, for the plaintiff; to which judgment a writ of error has been sued out of this court: and the errors assigned and relied on are:

1st. That the court for the county of Alexandria was not empowered to render judgment in this case, at any term subsequent to that next succeeding the return of the execution.

2d. That the testimony offered to the court to prove the insolvency of Philip R. Fendall, and rejected, was legal testimony to prove the fact for which it was adduced, and ought, therefore, to have been admitted.

3d. That the defendant in the court below ought to have been permitted to prove the trustees of Philip R. Fendall not entitled to receive the money, to recover which the notice was given: and—

4th. That the officer had a right to levy the execution of Deneale on the money of Philip R. Fendall in his hands.

To support the first error assigned, the words of the act of assembly giving the motion have been relied on, as only empowering the court to render judgment in this summary mode, at the term next succeeding that to which the execution has been returned. That is, that although the plaintiff has brought his case rightly into court, yet if, from any cause whatever, the court shall be unable to render judgment at the first term, the suit must be dismissed, and the plaintiff must lose his remedy. The words must be very plain indeed, which will force a court to put upon them so irrational a construction as this. On recurrence to the act relied on, it does not appear, that a restriction so unusual and so unjust in itself, has been imposed. The words "such court," on fair construction, refer to the court in which
*132] *the motion has been made, and not to the term to which notice was given. The difficulty, therefore, which would have presented itself, if the notice had been given to a term subsequent to that next succeeding the return of the execution, has no existence in this case.[1]

In considering the second error assigned, the court was satisfied that the proceedings before magistrates, in cases of insolvent debtors, are entirely matters *en pais*, and are, therefore, to be proved by parol and other testimony. The evidence offered was certainly legal evidence to establish the fact for which it was adduced. The court, however, is not satisfied of its

[1] See Sheppard's Case, 65 Penn. St. 20; Stevenson *v.* Lawrence, 1 Brewst. 126.

sufficiency; but without determining that question, and without determining whether, in a case where there is no jury, a judgment ought, for the rejection of testimony which was admissible in law, to be reversed in any state of things, or the cause should be considered as if the testimony had been received, it is the opinion of all the judges, that the party is bound to show the relevancy of the fact intended to be established, to the case before the court.

In the present cause, the fact to be established was the insolvency of Fendall, which insolvency is not shown to have been material in the case, since nothing appears in the record, to induce an opinion that the proceeding could have been in any other name than his. Although, then, the testimony rejected was proper and legal evidence towards establishing the fact, yet the court committed no error in rejecting that testimony, for which their judgment ought to be reversed, because the fact does not appear to have been relevant to the cause under their consideration.[1]

On the third error assigned, the opinion of the court is, that whoever might in equity be entitled to the money, or to the use of Fendall's name, the notice, as given, could only be sustained, by showing the legal right of Fendall to recover. A legal right in the trustees would have defeated the action, for it is instituted in the name of Philip R. Fendall, although it may be for the benefit of his trustees, and neither the reversal or affirmance of this judgment, would affect the right of the trustees to proceed in their own names.

*The fourth point is one of considerable importance and difficulty. In discussing it, two questions have been made at the bar. 1st. Can an execution be levied on money? 2d. Can it be levied on money in the hands of the officer? [*133

The principle that an execution cannot be levied on money has been argued to be maintainable, under the authority of adjudged cases, and under the letter and meaning of the act of the Virginia legislature on the subject of executions. Yet no such adjudged case has been adduced. Lord MANSFIELD, in the case cited from Doug. 219, said, "he believed there were old cases, where it had been held that the sheriff could not take money in execution, even though found in the defendant's scrutoire, and that a quaint reason was given for it, viz., that money could not be sold;" and it is believed, that there may be such cases, but certainly there are also cases in which the contrary doctrine has been held. In 2 Show. 166, it is laid down expressly, that money may be taken on a *levari facias*, and no difference in this respect is perceived between the two sorts of execution. In Dalton's Sheriff, 145, it is also stated in terms, that money may be taken in execution on a *fieri facias*. The court can perceive no reason, in the nature of the thing, why an execution should not be levied on money. That given in the books, viz., that it cannot be sold, seems not to be a good one. The reason

[1] Blackwell *v.* Patton, 7 Cr. 471; Campbell *v.* Pratt, 2 Pet. 354; Greenleaf *v.* Borth, 5 Id. 132; Boardman *v.* Reed, 6 Id. 328; Phillips *v.* Preston, 5 How. 278; McMechen *v.* Webb, 6 Id. 292; Randon *v.* Toby, 11 Id. 493; Thomas *v.* Lawson, 21 Id. 343; Chandler *v.* Van Roeder, 24 Id. 225; Thompson *v.* Roberts, Id. 233; The Water Witch, 1 Black 494; Blackburn *v* Crawford, 3 Wall. 175; Dewry *v.* Cray, 10 Id. 263; Brobst *v.* Brock, Id. 519; Gregg *v.* Moss, 14 Id. 564; Grand Chute *v.* Winegar, 15 Id. 355; New Orleans Ins. Co. *v.* Piaggio, 16 Id. 378; Decatur Bank *v.* St. Louis Bank, 21 Id. 294; Chambers County *v.* Clews, Id. 317.

of a sale is, that money only will satisfy the execution, and if anything else be taken, it must be turned into money; but surely, that the means of converting the thing into money need not be used, can be no adequate reason for refusing to take the very article to produce which is the sole object of the execution.

The act of assembly concerning executions has also been relied on as showing that only such articles can be taken as may be sold. But the provisions of the act can only be considered as regulating the sale of such arti-
*134] cles as in their nature require to be sold, and not as exempting *from execution such property as need not be sold. The object is, not the sale, but money, and if the money can be made, without a sale, it cannot be unlawful to do so. But in the case of an execution for tobacco, money may be sold, and therefore, may be executed, and it would be strange, if, by an execution ordering a sheriff to make money, money could not be taken, and yet might be taken on an execution ordering him to make some other article.

It is the opinion of the court, that money may be taken in execution, if in the possession of the defendant; but the question of greater difficulty is, whether it may be taken by the officer before it has been paid to the person entitled to receive it?

The general rule of law is, that all chattels, the property of the debtor, may be taken in execution, and whenever an officer has it in his power to satisfy an execution in his hands, it is his duty to do so, and if he omits to perform his duty, he must be accountable to those who may be injured by the omission. But has money, not yet paid to the creditor, become his property? That is, although his title to the sum levied may be complete, has he the actual legal ownership of the specific pieces of coin which the officer may have received? On principle, the court conceives that he has not this ownership. The judgment to be satisfied is for a certain sum, not for the specific pieces which constitute that sum, and the claim of the creditor on the sheriff seems to be of the same nature with his claim under the judgment, and one which may be satisfied in the same manner. No right would exist to pursue the specific pieces received by the officer, although they should even have an ear-mark; and an action of debt, not of detinue, may be brought against him, if he fails to pay over the sum received, or converts it to his own use. It seems to the court, that a right to specific pieces of money can only be acquired, by obtaining the legal or actual possession of them, and until this is done, there can be no such absolute ownership, as that an execution may be levied on them. A right to a sum of money in the hands of a sheriff, can no more be seized, than a right to a sum of money in the hands of any other person, and however wise or just it may be, to give such a remedy, the law does not ap-
*135] pear yet to have given it. The *dictum* of Judge BULLER, *in the case in *The King* v. *Egginton*, 1 T. R. 370, proves that the mere possession of money, as a trustee, does not give to the possessor, before a conversion, such a property in it, as to render it liable for his debts; but does not manifest an opinion that the person for whose use it was received, but to whose possession it has not come, is to be considered as the legal owner of the specific pieces themselves, so that they have become, in contemplation of law, his goods and chattels. Indeed, it is observable in that case, that if the money had been due to the parish, at the time the bankruptcy of the defendant, who was an overseer of the poor, took place, the parish would have

been in no better condition than other creditors, and would have possessed no exclusive property in the money claimed. Although the *dictum* of Judge BULLER may appear to militate somewhat against this position, yet the principle of the decision is in its favor, for the judgment of the court is declared to be founded on the fact, that the debt was not a debt, until after the bankruptcy.

The case cited from Cro. Car. 166, 176 (*Benson* v. *Flower*), expressly states the property of the money while in the hands of the sheriff, not to be in the creditor; and although the inference of the court from that principle does not appear to have been warranted, yet the principle itself is believed to be certainly correct.

In the case of *Armistead* v. *Philpot*, Doug. 219, the court directed the money of the debtor to be paid to the creditor, whose execution was in the hands of the sheriff holding that money also; but this direction would have been unnecessary, if the sheriff had possessed a previous right to make the appropriation.

It is stated in Barnes's Notes, 214, to have been adjudged in Trinity term, 32 & 33 of Geo. II., in the case of *Staple* v. *Bird*, where a sheriff had levied an execution on money in his hands, that he should, notwithstanding this execution, pay the money to the person entitled to the benefit of the first judgment. It is true, that in that case, the person in whose name the judgment was rendered, was not entitled to the money received under it, but the case is not stated to have been decided on that principle; and *the very frequency of such a state of things, furnishes an argument of no [*136 inconsiderable weight against the right to levy an execution on money so circumstanced. The equitable right of persons, whose names do not appear in the execution, ought to be preserved; and considerable injustice might result from imposing on the sheriff the duty of deciding at his peril on such rights.

Considering the case, then, either on principle or authority, it appears to the court, that the creditor has not such a legal property in the specific pieces of money levied for him, and in the hands of the sheriff, as to authorize that officer to take those pieces in execution, as the goods and chattels of such creditor.

But the money becomes liable to such execution, the instant it shall be paid into the hands of the creditor; and it then becomes the duty of the officer to seize it. It appears unreasonable, that the law should direct a payment under such circumstances. If the money shall be seized, the instant of its being received by the creditor, then the payment to him seems a vain and useless ceremony which might well be dispensed with; and if the money should, by being so paid, be withdrawn from the power of the officer, then his own act would put beyond his reach, property rendered by law liable to his execution, and which, of consequence, the law made it his duty to seize. The absurdity involved in such a construction led the court to a further consideration of the subject.

The mandate of a writ of *fieri facias*, as originally formed, is, that the officer have the money in court on the return-day, there to be paid to the creditor. Forms of writs furnish strong evidence of what was law when they were devised, and of the duty of the officer, to whom they are directed. Originally, it was regularly the duty of the officer, to have the money in court, and it has been held, that not even payment to the creditor himself, could

excuse the non-performance of this duty. The rigor of this rule has been considerably relaxed, but the form of the writ, as directed by a late act of the legislature of Virginia, yet is, that the money shall be in court on the return-day, and there appears no excuse for omitting this duty, unless *137] *it shall have been paid to the creditor. The sheriff may certainly make such payment out of court, if no circumstance occurs which legally obstructs or opposes it, such as an injunction from the court of chancery, in which case, by the law of Virginia, the money must be retained; or an execution against the goods and chattels of the person to whom the money in his hands shall be payable. In the latter case, it seems to the court, still to be the duty of the sheriff to obey the order of the writ, and to bring the money into court, there to be disposed of as the court may direct. This was done in the case of *Armistead* v. *Philpot*, and in that case, the court directed the money to be paid in satisfaction of the second execution. This ought to be done, whenever the legal and equitable right to the money is in the person whose goods and chattels are liable to such execution.

In the case of *Turner* v. *Fendall*, the sheriff not having brought the money into court, but having levied an execution on it, while in his hands, has not sufficiently justified the non-payment of it to the creditor; and therefore, the court committed no error in rendering judgment against him, on the motion of that creditor. If the payment of the damages should be against equity, that was not a subject for the consideration of the court of law which rendered the judgment.

Judgment affirmed.[1]

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[1] He cannot levy on money in his own hands, arising from an execution in favor of the defendant. Baker *v.* Kenworthy, 41 N. Y. 215; nor will the court order it to be paid to the plaintiff in the second execution. Williams *v.* Rogers, 5 Johns. 163. But, it seems, that the sheriff may levy on a surplus in his hands, arising from an execution *against* the debtor. Harris's Appeal, 29 Penn. St. 240. See Means *v.* Vance, 1 Bailey 39.