Statement of the case.

RANSOM *v.* WILLIAMS.

Under the statute of Illinois which authorizes execution to issue against the lands of a deceased debtor, *provided* that the plaintiff in the execution shall give notice to the executor or administrator, *if there be any*, of the decedent,—a sale without either such notice or *scire facias*, as at the common law (or proof that there were no executors?), is void. On a question of title, *under this statute*, the burden of proving that his purchase was after due notice rests with the purchaser; the record of execution and sale not of itself raising a presumption that notice was given.

RANSOM brought ejectment against Williams, in the Circuit Court for the Northern District of Illinois. Both parties claimed title from Galbraith. The plaintiff relied upon a sheriff's deed, made pursuant to a sale under an execution upon a judgment against Galbraith and others, obtained in the State court of Ogle County, on the 27th of March, 1841. The execution was issued on the 25th of November, 1847; the sale made on the 25th of November, 1848, and the deed executed on the 24th of July, 1849. The defendants claimed under a deed from Galbraith and wife, dated on the 31st of May, 1842. This deed contained a special covenant against the "claims of all persons claiming, or to claim, by, through, or under him." Galbraith died in 1843, and letters of administration upon his estate were issued on the 25th of February in that year.

A statute of the State of Illinois, it is here necessary to say, authorizes execution to issue against the lands and tenements of a deceased judgment debtor, "*provided, however*, the plaintiff or plaintiffs in execution, or his or their attorney, shall give to the executor or administrator, if there be any, of said deceased person or persons, at least three months' notice in writing, of the existence of said judgment before the issuing of execution." There was no proof that such notice had been given to the legal representatives of Galbraith; but it was proved by the plaintiff that the premises in controversy had been sold under a prior execution, and that, on the motion of the judgment creditor, the court

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to which the execution was returned had set the sale aside, quashed the execution, and ordered that another execution should issue. This order was made on the 24th of September, 1847.

The court below charged the jury, that the want of proof of due notice to the legal representatives of Galbraith, before the issuing of the execution, under which the sale was made, was fatal to the plaintiff's case.

The jury found accordingly, and the plaintiff excepted. The correctness of the charge was the point on error here.

Mr. E. S. Smith, in support of the sheriff's sale: The only thing made necessary by the proviso, before execution can issue, is notice to the executors, or administrators, *if there be any*, of the existence of the judgment. The statute dispenses with the common law proceedings, and in cases only *where there are administrators or executors appointed*, is it necessary to give notice. If there be no executors or administrators, execution can issue and sale be made, after the death of the defendant, without notice, and this sale can be defeated only by showing that administrators had been appointed at the time the execution issued, and that no notice of sale was given to them. The design of the statute was to give to the creditor a cheap mode in which to enforce the lien of his judgment. The lien once attached, it will operate until the judgment is satisfied.

The record is regular on its face. It is just as it ought to be, supposing notice to have been given. Even if notice had been given, that fact would not appear on *it*. Herein, a sale, under the Illinois statute, would differ from a common law proceeding, where the *sci. fa.* to revive would be a part of the record proper. The present record thus affords presumptive evidence that notice had been given; and it placed the burden of proof on the defendants to show want of notice, if there was such want. The defendants could have called the administrators to show this want, if it really existed.

The defendants claim title from Galbraith, by deed, dated

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May 31st, 1842, which shows, so far as the rights of the plaintiff are concerned, that there was no notice required to the administrators or heirs. The deceased had, long prior to his death, conveyed all his right in the property to Williams, the defendant, and, of course, it was subject to the judgment lien. It would be folly to require of the plaintiff proof that notice had been given to a party who had no interest in the property. After showing title in themselves, the defendants are estopped from showing irregularity in the execution from want of notice. They do not stand in the shoes of the heirs. The only question is, who had the first lien?

But, in addition, it appears that the execution on which the land was first sold was set aside, and a second execution ordered. It is thus plain that the court was even more than commonly advised. It is to be presumed in law—it cannot be doubted as fact—that the court had satisfactory notice that the administrators of Galbraith had received notice. At any rate, the proceedings cannot be attacked collaterally. These doctrines have been declared with great strength by this court in more cases than one.* But, in these cases, the court did no more than enforce settled principles of English common law. *Prigg* v. *Adams*, reported by Serjeant Salkeld, A.D. 1692,† affords foundation for all since iterated here. In that case, which was trespass and false imprisonment, the defendant justified, as an officer, under a *ca. sa.* on a judgment in the Court of Common Pleas, upon a verdict of five shillings for a cause of action in Bristol. The plaintiff replied, and set forth a private act of Parliament, erecting the court of conscience in Bristol, wherein was a clause that, if any person bring such action in any of the courts of Westminster, and it appeared upon trial to be under forty shillings, that no judgment shall be entered for the plaintiff, and if it be entered, *that it shall be void.* Upon demurrer, the question was, whether the judgment was so far void, that a party shall take advantage of it, in this colla-

* See *supra*, Florentine *v.* Barton, p. 210, also Tyler v. Harvey, *infra*, p. 328, and cases cited.

† 2 Salkeld, 674.

teral action. And the court held that it was not; and construed the statute to mean, that *it should be void only at the instance of the defendant, in direct proceedings taken by him to vacate or set aside the judgment on that ground.* Apply the principle in that case to the one under consideration, and treat the statute as declaring, that if an execution issue against the lands and tenements of a deceased defendant, without the record showing that notice was given to the administrator, it shall be void; and then, we say, that the defendants in this suit cannot take advantage of the objection in this way. None but the representatives of the deceased defendant, or the heirs, could make the objection; and they only by motion to set aside, or other proceedings to vacate the order.

The result of the whole is, that the plaintiff below should have had judgment.

Mr. Hitchcock, contra: Under the laws of Illinois, the judgment should have been revived by *scire facias*, or by a notice in writing to the administrators of the deceased, of the existence of the judgment before issuing the execution. The first is a common law proceeding, and the second is authorized by the statute quoted. This notice is provided as a protection to heirs against dormant judgments, and is a substitute for *scire facias*. No evidence was offered of revivor in either mode. For want of notice the execution is void. This is a rule of property in Illinois. In New Hampshire, Pennsylvania, Mississippi, and elsewhere, courts may have decided that an execution issued after the death of a defendant is voidable only, and cannot be attacked collaterally. Such, however, we think, is not the rule in the courts of Illinois *under this statute.* Every maxim of the law imposes the burden of proof, in this respect, upon the plaintiff. He claims a statutory benefit, and must aver and prove himself to be within the terms of it. He holds the affirmative in asserting title under the statute. The fact that notice was given is peculiarly within his knowledge, and the means of proof within his control. The statute makes it his duty to give the

notice, and he is presumed to preserve the evidence of a fact so essential. The defendant is a stranger to the judgment, to the notice, and to the administrators. A party will be held to prove a negative, if the means of such proof are specially within his control. *A fortiori* is the burden upon him, if he asserts a title upon an affirmative proposition, with the means of proof specially within his power. A different rule would impose on the defendant the burden of proving a negative.

The question is, moreover, settled by authority.*

Mr. Justice SWAYNE delivered the opinion of the court.

By the common law, the death of either party arrested all further proceedings in the case. If the death occurred before judgment, the suit abated. If there was but one defendant, and he died after judgment, no execution could issue unless it was tested before the death occurred. In such case it was necessary to revive the judgment by *scire facias*. The statute of Westminster 2d (13 Edward I) first gave a remedy against the lands of judgment debtors. The same rules applied to a writ of elegit sued out under that statute. If there was more than one defendant, and one of them died, execution might issue against all, though it could be executed only as to the survivors. It was so issued, because it was necessary that it should conform to the record of the judgment.†

The notice under the statute is cumulative. The plaintiff may give it, or resort to the common law remedy by *scire facias*. Executions in Illinois are required to bear test on the day they are issued.‡ When a defendant dies after judgment, and an execution is subsequently issued without the notice required by the statute having been given, or the

* Laflin *v.* Herrington, 16 Illinois, 301; Finch et al. *v.* Martin et al., 19 Id. 105.

† Woodcock *v.* Bennet, 1 Cowen, 711; Stymets *v.* Brooks, 10 Wendell, 207; Erwin's Lessee *v.* Dundas et al., 4 Howard, 77; Brown *v.* Parker, 15 Illinois, 307.

‡ Brown *v.* Parker, 15 Illinois, 309.

judgment revived by *scire facias*, the execution is a nullity, and all proceedings under it are void.*

The order of the court of Ogle County, that another execution should issue, does not in our judgment affect the case. Upon the death of Galbraith, the jurisdiction of the court as to him terminated. He was no longer before the court. When the order was made he had been dead more than four years. It does not appear that his legal representatives were present, or had any knowledge of the proceedings. The order was proper, and the execution was valid as to the surviving defendants. As to them, the process might have been executed. We cannot understand from the order, that the court intended to affect the estate of Galbraith, or those claiming under him. If such were the intention, the order having been made against parties not shown to have been actually or constructively before the court, was, so far as they are concerned, clearly void.

The authorities which require the fact of competent jurisdiction to be presumed in certain cases have no application here. The statute is in contravention of the common law, and hence to be construed strictly. The notice is a substitute, and the only one permitted for the proceeding, otherwise indispensable, by *scire facias*. The provision is plain and imperative in its language, and it is the duty of a court called upon to administer it, not lightly to interpolate a qualification which the statute does not contain.

The deed from Galbraith contains a special covenant against the "claims of all persons, claiming, or to claim, by, through, or under him." If the premises in controversy should be lost to the defendants, his estate would be liable in damages; and his legal representatives were entitled to all the time which the statute allowed them after notice, to show, if they could, that the collection of the judgment ought not to be enforced.

It is contended that it was incumbent on the defendants

* Picket *v.* Hartsock, 15 Illinois, 279; Brown *v.* Parker, Id. 307; Finch et al. *v.* Martin et al., 19 Id. 111.

to show that the proper notice had not been given. We cannot take that view of the subject. The judgment survived only for the preservation of its liens, and as the basis of future action. The statutory notice, or its alternative—a *scire facias*—was necessary to give it vitality for any other purpose. Upon the death of the defendant being shown, any execution issued upon it was, as to him, *primâ facie* void. This presumption could be overcome only by showing, either that no legal representative had been appointed, or that the notice required by the statute had been given. The plaintiff asserted a title, and it was for him to show everything necessary to maintain it. The rule on this subject is thus laid down by Chief Justice Marshall:* "It is a general principle, that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends upon an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which its vitality might depend. It forms a part of his title: it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title." We understand the Supreme Court of Illinois to have ruled this point in the same way.†

The instructions given in the Circuit Court were, in our opinion, correct, and the

JUDGMENT IS AFFIRMED WITH COSTS.

* Williams *v.* Peyton, 4 Wheaton, 79; see, also, Thatcher *v.* Powell, 6 Id. 127.

† Finch et al. *v.* Martin et al., 19 Illinois, 110.