

Syllabus.

a stay of execution until the validity of the patent should be judicially ascertained.

The second case was a petitory action, brought by Sewall and Hudson, claimants under Goodbee, having for its object the vacation of the patent, the annulment of the above judgment against Sewall, then pending on appeal in the Supreme Court of the State, the recovery of damages, and the obtaining of an injunction. No judgment was passed upon the merits of any matter alleged. The petition was dismissed for want of jurisdiction and the absence of proper parties, so far as it related to the special relief sought by this suit—the vacation and surrender of the patent—and it was dismissed generally on the ground that it was “defective, uncertain, and insufficient in the statement of the cause of action.”

It requires no argument to show that judgments like these are no bar to the present suit. In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.*

JUDGMENT AFFIRMED.

[See, as to the second point of the syllabus, *United States v. Stone*, 2 Wallace, 525.—REP.]

MITCHELL v. ST. MAXENT'S LESSEE.

1 A writ of *feri facias*, tested and issued after the death of the party against whom the judgment is recovered, is void, and confers no power on the ministerial officer to execute it.

* *Walden v. Bodley*, 14 Peters, 156; 1 Greenleaf's Ev., §§ 529 and 530, and authorities there cited.

Argument for the plaintiff in error.

2. The rule applies where the proceedings are commenced by seizing property under a writ of attachment, under the laws of Florida, as at the common law.

ERROR to the District Court of the Northern District of Florida. The case was thus:

On a proceeding on foreign attachment, judgment had been obtained in Florida, November 12th, 1825, against St. Maxent, a non-resident, but who owned certain lands in Escambia County there. St. Maxent died on the 25th day of November, 1825. On the 26th day of November a *fiere facias* was issued. The sheriff returned it December 1st, 1825, "levied on the land" in question. Then followed a *venditioni exponas*, but all proceedings were stayed by injunction. Then, on the 21st of December, 1826, a writ of *fiere facias* against the said St. Maxent was issued, directed to the marshal of the district, and under this the land was sold and conveyed to J. K. Mitchell, or to persons from whom he derived title. The heir of St. Maxent having brought ejectment against Mitchell, the court, on the above state of facts, gave judgment for the heir.

In this court several questions were raised, among them, whether the sale to Mitchell, under the circumstances above stated, was valid.

Mr. Reverdy Johnson, for Mitchell, plaintiff in error:

At common law, if the execution be tested in the lifetime, it may be taken out and executed after death, for the execution related to the judgment, and might be tested immediately after it was rendered.

The doctrine of relation is carried still further; for if defendant die in vacation, judgment might still be entered after his death, and execution issued as of the preceding term.

This rule was limited by the statute of 29 Car. II, to the parties themselves, and *bonâ fide* purchasers were protected from its operation.

In the eye of the law, therefore, it is the judgment which conclusively settles the rights of the parties on the day of its

Argument for the plaintiff in error.

rendition, and a fiction is resorted to, to prevent a subsequent disability from interfering with its enforcement.

To the like effect is the act of 27th June, 1823, of the Legislative Council, Territory of Florida:* "The service of attachment on lands, &c., shall bind the property attached, and a judgment obtained therein shall have relation to the time of the service of attachment, and the plaintiff shall have priority of payment out of the property attached, except as to valid subsisting liens," &c.

In this case the plaintiff in attachment had a right to an execution, tested the day after the judgment, and it is clear that if it had been so tested, the death could not have vitiated it.

The parties, therefore, have nothing to complain of, and if this irregularity could be taken advantage of at all, as against a *bonâ fide* purchaser at a judicial sale, it must be by a direct proceeding, and not collaterally.

Voorhees v. Jackson,† is in many respects parallel to this. The plaintiff in ejectment relied upon his purchase under an attachment suit, which was resisted on the ground that none of the prerequisites required by statute to vest the jurisdiction had been complied with, and defendant had never appeared. The court held, that while the judgment remained in force it was itself evidence of the right to the thing adjudged, and that errors, however apparent, can only be examined by the appellate power. That it would be a well-merited reproach to jurisprudence if an innocent purchaser, who had paid his money on the faith of an order of the court, should not have the same protection under an erroneous proceeding as the party who derived the benefit accruing from it. The purchaser under judicial proceedings pays the plaintiff his demand on the property sold; to the extent of this, he discharges the defendant from his adjudged obligation.

* § 6 Pamphlet Acts, 39. Mr. McPherson, of opposite counsel, remarked that this provision had been repealed; referring to acts of the Territory of Florida, 1824, p. 195.

† 10 Peters, 449.

Argument for the plaintiff in error.

The land lying in Florida was under its sovereignty and jurisdiction, without regard to the citizenship of the owner, and the jurisdiction of its courts was ample.

The proceeding was by attachment, and by its levy the plaintiff acquired a right in the specific property consummated by the judgment. It thus became sequestered in the hands of the law, and was held for his benefit as fully as if it had been levied on by a *fi. fa.* The levy of a writ, or a levy of a *fi. fa.*, stand under the same sanctions. Both are solemn judicial orders, executed by the officer of the law, under his official responsibilities; and if this be true, the case of *Doe v. Taylor** is conclusive of the question. On the objection to the title in ejectment, that the *venditioni exponas* under which the land was sold was tested subsequent to the death, the court held, that as the judgment operated as a lien on the land, and a prior execution attached "specifically upon the subject of its operation," that "the rights of the parties to the subject-matter were determined, and all controversy closed. The law had taken the subject entirely to itself, to be applied by its own authority and its own rules."

Here the party has his levy and a judgment, which the court in this case regarded as conclusive, and closing all controversy. He may have issued a mere "venditioni;" all he wanted was an order of sale. That he sued out a *fi. fi.*, instead of this, cannot vary the rights of the parties, which were fixed by the levy and judgment.†

An attachment is a proceeding *in rem*. Notice is served upon the thing itself. This is necessarily constructive notice to all who have any interest, or can assert any title. Every such person is considered as a party to the proceeding, and the suit does not abate by death. As soon as such process is commenced, and the arrest of the property is made, it is in the custody of the law. For it is a general rule in proceeding *in rem*, that the custody of the thing in

* 13 Howard, 293.

† *Randolph v. Carleton*, 8 Alabama, 616; *Garey v. Hines*, Id. 829.

Argument against the plaintiff in error.

controversy belongs to the court in which the suit is pending.*

The judgment of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of property; and no court of co-ordinate jurisdiction can examine into it. If an erroneous judgment binds the property on which it acts, it will not bind the less because its error is apparent. Of this error advantage can only be taken in a court capable of correcting it.†

In *Thompson v. Tolmie*,‡ the language of the court was, "When there is a fair sale, and the decree executed by a conveyance, the purchaser will not be bound to look beyond the decree, if the facts necessary to give jurisdiction appear upon the record."

Upon these settled principles, this court held, in the case of *Whiting v. Bank of the United States*,§ that the death of the mortgagor, after the decree of foreclosure and sale, but before the sale was made, constituted no ground for a bill of review.

The case now before the court appeals more strongly to its sense of justice. *There*, the application was to a court of equity, which, in affording relief, always compels the party to do equity. *Here*, there is an action at common law, where, if the party succeed, he recovers the land while retaining the purchase-money for which it was sold.

Messrs. Carlisle and McPherson, contra:

"That no individual or public officer can sell and convey a good title to the land of another, unless authorized to do so by express law, is one of those self-evident propositions," said Marshall, C. J., in *Thatcher v. Powell*,|| "to which the mind assents without hesitation, and that the person invested with such a power must pursue with precision the course prescribed by law or his act is invalid, is a principle which has been repeatedly recognized in this court." St. Maxent,

* *Burke v. Trewit*, 1 Mason, 100.

† *Williams v. Amroyd*, 7 Cranch, 423; *Elliot v. Pearsal*, 1 Peters, 340.

‡ 2 Peters, 169.

§ 13 Id. 13.

|| 6 Wheaton, 125.

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the defendant in the attachment, having died on the 25th of November, the writ of *feri facias*, issued and tested on the 21st of December following, without any *scire facias* against his heirs or *terre tenants*, was necessarily void.* This being a principle of the common law, was introduced into Florida by the act of the Legislative Council, passed June 29, 1823, § 1.†

Mr. Justice DAVIS delivered the opinion of the court.

The solution of one question presented by the record is decisive of this case. Does the writ of *feri facias*, tested and issued after the death of the party against whom the judgment is rendered, confer power on the ministerial officer to execute it? That St. Maxent was the owner of the lands in controversy at the time of his death, and the plaintiffs below are his heirs-at-law, is admitted; but it is claimed that the title was divested by certain proceedings in attachment against him in the courts of Florida, which ripened into a judgment while he was alive. It is a well-settled principle of law, which has often received the sanction of this court, that the decree or judgment of a court, having jurisdiction, is binding until reversed, and cannot be collaterally attacked. But the defect in this case occurs after the judgment, and is fatal to Mitchell's title, for purchasers at a judicial sale are not protected, if the execution on which the sale was made was void. Void process confers no right on the officer to sell, and all acts done under it are absolute nullities.

The writ of *feri facias* on which Mitchell rests his title, was tested after the death of St. Maxent; and, according to a familiar rule of the common law, it was therefore void. The death of a defendant, before the test of an execution, compels the plaintiff to sue out a writ of *scire facias*, "for the alteration of the person altereth the process."‡ The heirs, devisees, and terre-tenants of the deceased must have

* Erwin's Lessee v. Dundas, 4 Howard, 58; Woodcock v. Bennett, 1 Cowan, 738.

† Acts, &c., p. 136.

‡ Bacon's Abridgment, Title "Scire Facias."

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notice before an execution can regularly issue, for they are the parties in interest, and should have an opportunity to interpose a defence, if any they have, to the enforcement of the judgment. *Erwin's Lessee v. Dundas** is an authority in point, and it is unnecessary to refer to any other.

But it is contended that the doctrines of that case have been overturned by the decision of *Taylor v. Doe*, reported in 13th Howard. This is an erroneous view of that decision. The court held, in that case, that it is not necessary to revive a judgment by *scire facias*, where an execution regularly issued during the life of the defendant had been levied on land, but that the officer who had made the levy could proceed to sell, under a *venditioni exponas*. That writ was regarded as a completion of the previous execution, by which the property had been appropriated, and not as an original or independent proceeding.

It was in the power of the legislature of Florida to have changed the rule on the subject of the test of process; but, having failed to do it, and having adopted the common law of England, the question in issue must be decided by the rules of the common law.†

But it is insisted that the rules of the common law only attach to suits prosecuted in the ordinary way, and do not apply where the proceedings are commenced by seizing property under a writ of attachment. This is a novel view, for the law of attachment, being in derogation of the common law, courts are not inclined to extend its provisions beyond the requirements of the statute authorizing it. In Florida the service of the writ of attachment binds the property, and retains it in custody of the law, for the benefit of the attaching creditor, if he obtains a judgment and execution, and the property is to be disposed of as in other cases of property levied upon and taken in execution.‡

As an execution is required, and the law is silent about the manner of its issue, it follows that it is to be tested and

* 4 Howard, 58.

† Id. 1823, p. 40

‡ Laws of Florida, 1822 to 1825, p. 136.

Statement of the case.

issued as writs of *feri facias* are on judgments obtained through the usual methods of the common law.

The judgment of the court below is

AFFIRMED WITH COSTS.

PEOPLE v. THE COMMISSIONERS.

1. Shares in banks, whether State banks or those organized under the act of June 3d, 1864, "to provide a national currency," &c., are liable to taxation by the State under certain limitations (set forth in section forty-first of the act), without regard to the fact that the capital of such banks is invested in bonds of the United States, declared, by statutes creating them, to be exempted from taxation by or under State authority. *Van Allen v. The Assessors*,* affirmed.
2. If the rate of taxation by the State on such shares is the same as, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation; that is to say, if no greater proportion or percentage of tax on the valuation of the shares is levied than upon other moneyed taxable capital in the hands of its citizens, the shares are taxed in conformity with that proviso of the forty-first section, which says that they may be assessed, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

THESE were two cases which arose upon a *certiorari*, prosecuted, the one by Denning Duer, as relator, the other by Ralph Mead, in the same way, out of the Supreme Court of the State of New York, and directed to the Commissioners of Taxes and Assessments for the City and County of New York, the defendants in error. The relator in the first case was a holder of certain shares of stock in the National Bank of Commerce in New York, a banking association organized under the National Bank Law. The relator in the second case held certain shares in the Corn Exchange Bank, in the city of New York, incorporated under the laws of the State. These shares, in both banks, had been assessed in the year 1866, for the purposes of taxation under the

* 3 Wallace, 573.