Case No. 7,131.

JACKSON v. BANK OF THE UNITED STATES et al.

{5 Cranch, C. C. 1.}[1]

Circuit Court, District of Columbia. Dec. 1, 1836.

JUDGMENT—LIEN ON SUBSEQUENTLY ACQUIRED LAND—REVIVAL—SCIRE FACIAS—NOTICE—RECORD—PURCHASER.

1. A judgment binds lands subsequently acquired.

2. If the judgment be revived between the original parties, it is not necessary to issue a scire facias against the terre-tenants who purchased more than a year after the judgment, and before its revival; nor is it necessary, during the life of the original defendant, to issue any scire facias to his vendees who purchased after the judgment; nor to bring in all the terre-tenants; nor is it material that the debtor was solvent for a long time after the judgment; for purchasers are bound to take notice of judgments on record.

3. It is no objection that the judgment is of twelve years' standing, if it has been revived within the twelve years, and twelve years have not elapsed since its revival.

4. It seems that a purchaser of lands bound by a judgment against the vendor, may move to quash the execution upon its return, or may have an audita querela.

Bill for injunction to stay execution levied upon land sold by the debtor after judgment, and while it was dead or sleeping. There was also a motion at law to quash the return of the fieri facias.

The bill states that the complainant {Rachel Jackson} is owner of lot No. 9, in Threlkeld's addition to Georgetown, on which the marshal recently levied a fieri facias, issued upon a judgment in favor of Jeremiah Bronaugh against John W. Bronaugh and Henry Suttle, rendered in June term, 1811, and recently entered for the use of the Bank of the United States. That on the 18th of September, 1816, the lot was conveyed to John W. Bronaugh. That on the 23d of January, 1819, he conveyed it to Thomas G. Moncure, in trust to pay certain judgments rendered against the said John W. Bronaugh at June term, 1818. That on the 14th of June, 1819, Joseph Jackson, the complainant's husband, purchased the lot at the sale under that deed of trust, and died seized on the 21st of May, 1831. That he purchased it bona fide, for valuable consideration, without notice of the judgment of 1811, and in full confidence that it was sold for the satisfaction, as far as it would go, of all the judgments which bound it. That it was devised, in fee, to the complainant, by her husband; that she immediately took possession of it, and has held it ever since. That on the 4th of August, 1831, the execution was levied upon it. That on the 10th of June, 1811, the judgment was rendered upon which the execution was issued for eighty-six dollars, with interest from the 24th of October, 1809, and costs, $18.69. That on the 20th of November, 1820, the said John W. Bronaugh was discharged under the insolvent act; and that Jeremiah Bronaugh, the plaintiff in that judgment, was appointed

his trustee, and issued a scire facias against the said John W. Bronaugh and Henry Suttle, returnable to April term, 1821, to revive the judgment, and on the 9th of April, 1821, execution was thereupon awarded against them, but not issued; and no scire facias was issued against the said Joseph Jackson or any other terre-tenant; and the judgment was suffered again to expire; and that it thus remained until the 19th of March, 1829, when the said Jeremiah Bronaugh, having purchased other lots bound by the same judgment, and being indebted to the Bank of the United States, caused the judgment to be entered for the use of that bank, on the docket, but that it still remained dead and barred, and "above 12 years' standing," and no longer "good and pleadable," or capable of being given in evidence, until the 11th of February, 1830, when another scire facias to revive the judgment was issued against the said John W. Bronaugh and Henry Suttle only, to show cause why execution should not issue against them, their lands, tenements, goods, and chattels; and neither the said Joseph Jackson, the tenant in possession, nor any other terre-tenant had notice. That

on the 6th of December, 1830, Suttle's death was suggested, and execution was awarded against John W. Bronaugh alone, as survivor of the said Henry Suttle, and not of the lands of which he was seized at the time of the judgment, &c. That on the 1st of August, 1831, the first execution was issued on the original judgment commanding the debt and costs to be made "of the goods and chattels, lands and tenements of the said John W. Bronaugh," under which execution the complainant's lot was seized, &c. That Jackson's purchase under the deed of trust from John W. Bronaugh, was known to his brother, the said Jeremiah Bronaugh, at the time; and that he knew of that deed of trust and the sale under it. That it was irregular to issue the scire facias after the judgment had been standing more than eighteen years, without the previous leave of the court, or even after twelve years, without scire facias to the tenant in possession. That the said Jackson had a valid defence at law against the said judgment, which the said parties well knew, but of which he was deprived by their omission to make him a party to the scire facias; namely, the presumption of payment arising from all the circumstances of the case, as well as the statute of limitations. That there are other landsequally bound by the judgment namely, lots 100 and 110 in Threlkeld's addition to Georgetown, now owned by the Bank of the United States, &c., &c., stating many other lots. That the complainant is entitled to call the said Jeremiah Bronaugh to account for the property of John W. Bronaugh, assigned to him as trustee, under the insolvent act, before he can enforce his judgment against John W. Bronaugh, or his property in the hands of the complainant. The bill then prays that the levy of the fieri facias on the complainant's property may be quashed; or that the "fiat" may be opened, and the complainant and other terre-tenants made parties; or a perpetual injunction, that the account of Jeremiah Bronaugh, as trustee of J. W. Bronaugh, may be exhibited and settled; that the terre-tenants named in the bill may be brought in to contribute, and for general relief. An injunction was granted by the chief judge on the 26th of August 1831. To this bill the Bank of the United States demurred for want of equity, and moved to dissolve the injunction. The cause was set for hearing upon this motion and upon the demurrer, at March term, 1836, and was heard in the absence of THRUSTON, Circuit Judge.

R. S. Coxe, for defendants, contended:

1st. That the judgment bound lands subsequently acquired.

2d. That in no case is it necessary to issue scire facias against terre-tenants in the lifetime of the original debtor. The purchasers whose lands are sold under the fieri facias, must look to the debtor for indemnity, and cannot compel other purchasers to contribute.

3d. That, therefore, it is immaterial whether there were other terre-tenants of other lands bound by the same judgment.

4th. That it was immaterial that the debtor remained solvent for a long time after the judgment. That fact did not invalidate the lien created by the judgment.

5th. That the plea of purchase, without notice of the judgment, cannot be sustained, because every purchaser is bound to take notice of a judgment of record.

6th. That the plea of limitation, as to the judgment being of "12 years' standing," could not be supported, for the judgment was revived before the twelve years had elapsed, and it is to be considered as a new judgment when revived, as this court decided in the case of Digges v. Eliason [Case No. 3,904], at November term, 1835, and twelve years had not elapsed since the revival, before the execution was issued.

Mr. Redin, contra.

This case differs from that of Digges v. Eliason [supra]. There it was against the original parties; there was no terre-tenant. But here there is a terre-tenant; a bona fide purchaser without notice. This point was not decided by the court in that case. If the land be aliened after judgment, there must be a scire facias against the alienee before his land can be seized and sold under a fi. fa. Arnott v. Nicholls, 1 Har. & J. 471, 474. The note to that case, in p. 474, is not true to the extent stated. That case was not overruled by the case of McElderry v. Smith, in 2 Har. & J. 72. This latter case only decided that a scire facias to the terre-tenant is not necessary if the alienation is made pending the scire facias, to revive the judgment against the original debtor. In the present case, the revival in 1821 was a nullity, because not proceeded upon by execution. 6 Bac. Abr. (Wilson Ed.) 114; Vanderheyden v. Gardenier, 9 Johns. 79.

Jeremiah Bronaugh, the plaintiff in the judgment, was trustee of his brother, John W. Bronaugh, under the insolvent act and had funds applicable to this debt, and there has been no settlement of his trusteeship. This court decided in Law's Case [Case No. 8,128] that the judgment creditor cannot enforce his judgment lien by execution, but may have priority of payment out of the proceeds. Jeremiah Bronaugh purchased some of the other lots equally liable to this judgment. All who purchased lands of the debtor after the judgment are equally liable, and must bear their proportion.

CRANCH, Chief Judge, said: I think the plaintiff at law, Jeremiah Bronaugh, cannot enforce his lien upon the land in the possession and seizin of Mrs. Jackson, by fieri facias, without a previous scire facias against her. The case of Arnott v. Nicholls, 1 Har. & J. 471, is not overruled by that of McElderry v. Smith, 2 Har. & J. 72, so far as the former case establishes the general

rule that the plaintiff shall not charge the lands in the seisin of a bona fide alienee, without scire facias. The case of McElderry v. Smith, establishes an exception only where the alienation is made pending the scire facias against the debtor to revive the judgment. In the case of Morton v. Croghan, 20 Johns. 120, it was held, that "where the judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person, having a fee in the land, a party to the proceeding." The equity of the case is, that Mrs. Jackson has no remedy at law; for, not being a party to the original judgment, she cannot have an audita querela, nor a motion to quash the return. I think, therefore, that the demurrer and motion should be overruled, and the injunction should stand until Mr. Bronaugh, or the bank, to whom it is said the judgment is assigned, shall, upon a scire facias against Mrs. Jackson, establish his or their right to levy the fieri facias on her land.

MORSELL, Circuit Judge, did not concur, and THRUSTON, Circuit Judge, not having heard the argument, the case was continued to this term for further argument.

The case was argued again on Tuesday and Wednesday, November 29 and 30, 1836.

R. S. Coxe, for defendant, contended that the only case in which, in England, a scire facias to terre-tenants is necessary, is where an elegit has been issued, and the debtor is returned, "dead;" and that no scire facias can be issued against the terre-tenants in the life of the debtor. Fitzh. Nat. Brev. p. 597, fol. 267, D; also, Id. p. 595, fol. 266, C, note a; 2 W. Saund. 6, note 1; 6 Com. Dig. 519; 2 Tidd, Prac. 1030; Jackson v. Shaffer, 11 Johns. 516; Young v. Taylor, 2 Bin. 218.

Mr. Redin, contra, contended that the rule is, that where the land of a bona fide purchaser is to be charged by a judgment against the vendor, there must be a scire facias to such purchaser as terre-tenant, to come in and show cause why the plaintiff should not have execution of his lands; and he stated that such had always been his practice. In Arnott v. Nicholls, 1 Har. & J. 471, this rule is recognized by the court; and although the reporter has stated that it was overruled in McElderry v. Smith, 2 Har. & J. 72, yet in the latter case, the court only decided that a scire facias is not necessary when the alienation is made pending the scire facias to revive the judgment against the debtor. In Webster v. Saunders, 4 Har. & J. 287, the scire facias was against the terre-tenant, although it does not appear that either party to the original judgment was dead. So in Ridgely v. Gartrell, 3 Har. & McH. 449. In Hammond v. Gaither's Heir, 3 Har. & McH. 218, the devisee had aliened the land before the suit was brought, for valuable consideration, and that fact was pleaded; to which the plaintiff demurred. A doubt was suggested, whether the plaintiff could have execution against the land without a scire facias to the vendee; but the answer was, that the devise itself was void by the statute of devises, 3 & 4 W. & M. c. 14, as to creditors, so that there was no alienation of the land, but it descended to the heir. In 2 Harris' Entries, 763, is the form of a scire facias against the original defendant and his

terre-tenants, in the lifetime of the original parties, and, in a note, he says, the scire facias ought to issue against the original defendant and terre-tenants jointly; and he cites Carth. 107, and 3 Coke, 11. So in Tully v. Marwood, Comb. 318, the court refused to render judgment against the conusees of a fine without scire facias to the terre-tenants. So also in Pembroke's Case, Skin. 273, 274. In Morton v. Croghan, 20 Johns. 106, Judge Spencer, in delivering the opinion of the court, after saying that the law applicable to the case was laid down with entire precision by Sergeant Williams in his 4th note to 2 Saund. 51, a, and referring to Harbert's Case, 3 Coke, 11, and several other cases, says: "I apprehend the law to be well settled, that since the statute of 2 Westm., where a judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person having a fee in the land a party to the proceeding." It is true that in a preceding case, Jackson v. Shaffer, 11 Johns. 516, cited by Mr. Coxe, Mr. Justice Van Ness, in delivering the opinion of the court, said, "It is in the case of the death of the original defendant that the terre-tenants are to be made parties, and not where the original defendant is living;" but he is not supported by the authorities which he cited, namely, Tidd, Prac. 1021, 1023; 2 Saund. 7, note 4. The case of Young v. Taylor, cited by Mr. Coxe from 2 Bin. 228, is not applicable to the present case, for the decision was upon the peculiar statute of Pennsylvania of 1705, making lands liable to be sold under a fieri facias.

Mr. Redin also contended that the decision of this court in Digges v. Eliason [supra], that a revival by scire facias makes it a new judgment, cannot apply to the case of a purchaser without notice; or if it can, the new judgment is subsequent to the purchase, and therefore cannot bind the land. That under the circumstances of the case there was a strong presumption that the judgment had been satisfied (Mayor of Kingston v. Homer, Cowp. 109; Phil. Ev. 114), and that Mrs. Jackson ought to have a day in court, either at law or in equity, to show it. She has a right to call upon the other terre-tenants for contribution. At the time of Jackson's purchase in 1819, there were lots in Georgetown unincumbered, and in possession of the debtor, and equity will restrain the plaintiff to unincumbered property.

Clowes v. Dickenson, 5 Johns. Ch. 236; Shepard v. Shepard, 7 Johns. Ch. 62.

R. S. Coxe, in reply, contended that, if the court should decide that a scire facias to the terre-tenant is necessary in the lifetime of the original debtor, it would disturb many titles in this county. If the proceeding is erroneous at law, the remedy is not in equity; but the party grieved by an execution may have an audita querela, although he was no party to the judgment. Michel v. Croft, Cro. Jac. 506. Harris, in a note to the precedent of a scire facias, vol. 2, p. 763, refers to Panton v. Terre-Tenants of Hall, in Carth. 107, and to Pembroke's Case, in Skin. 273, which was a scire facias to hear errors upon a common recovery, and therefore not applicable to the present case. In the case of Ridgely v. Gartrell, 3 Har. & J. 449, it does not appear that Burgess was alive at the time of the scire facias. The case of Arnott v. Nicholls, was upon a motion to quash, not a bill in equity, but it was reversed by the case of McElderry v. Smith. In the case of Tayloe v. Thompson's Lessee, 5 Pet. [30 U. S.] 358, the execution against Glover was levied on land sold by him after the judgment without making the terre-tenant a party by scire facias.

(Mr. Redin, there no scire facias had been necessary to revive the judgment.)

THE COURT dissolved the injunction for want of equity in the bill, saying that the complainant might move to quash the return of the fieri facias, or might have an audita querela. CRANCH, Chief Judge, gave no opinion, not having had time to consider the case since this argument, and not being satisfied that his former opinion was not correct.

In 2 Saund. 6, note 1, in the case of Jeffreson v. Morton, Sergeant Williams says, "Though the plaintiff should die within the year after judgment, his personal representative cannot have execution against the defendant without scire facias. Fitz. Ex'n, 243; 15 Hen. VII. 16b; 1 Rolle, Abr. 900, P, pl. 1, 2. Nor, in case of the death of the defendant, within that period, can the plaintiff have an elegit under the statute of 2 Westm. c. 18, against his lands in the hands of his heir or terre-tenants; or generally any other execution, without a scire facias against his heir and terre-tenants, or personal representatives"—"the rule being that where a new person, who was not party to a judgment or recognizance, derives a benefit by, or becomes chargeable to, the execution, there must be a scire facias to make him party to the judgment or recognizance. Penoyer v. Brace, 1 Ld. Raym. 245, 1 Salk. 319, 320; Reg. v. Ford, 2 Ld. Raym. 768; 2 Inst. 471." In Isams's Case, Moore, 367, it is said, "If two recover and one die, a scire facias shall issue against the defendant before execution shall issue, because he may have a release of the dead one to plead. Quod fuit concessum."

In Fitzh. Nat. Brev. p. 597, fol. 267, D, he says, "If a man be bound in a recognizance in chancery, or other court of record, and afterwards the recognizee dieth, his executors may sue forth an elegit to have execution of the lands of the recognizor; and if the sheriff return that the recognizor is dead, then the executors shall have a special scire facias against the heir of the recognizor, and against those who are tenants of the lands which

he had at the day of the recognizance made;" and after giving the form of the writ be says, "and thereby appeareth that if a man be bounden in a recognizance, &c., although the recognizee dieth, yet his executors cannot sue forth an elegit to have execution of the recognizance, within a year after the day of payment, without suing forth a scire facias against the recognizor, &c. But against the heir of the recognizor, or the terre-tenants, the recognizee or his executors ought to sue forth a scire facias &c., otherwise, if they be ousted, &c., by such execution of their lands, they shall have an assize of novel disseisin," &c. And in page 595, fol. 266, C, Fitzherbert says, "And after the year and day of payment passed of the recognizance, the recognizee ought for to sue a scire facias against the recognizor to show what he can say why the recognizee should not have execution; and if he be returned upon that writ warned by the sheriff, if he do not appear, or if he do appear and cannot say anything wherefore he should not have execution, then the recognizee may sue forth the writ of elegit to have execution of all his goods, and of the moiety of his lands; and if the sheriff return the elegit, that the recognizor hath made a feoffment in fee of part of the lands, to divers tenants, &c., and that he hath enfeoffed the king of the residue; then, upon that return, the lands, whereof the king is seized by that feoffment, are discharged. But he may sue a scire facias to warn the other tenants to appear at a certain day to show cause wherefore the said lands should not be delivered in execution; and if they be warned and do not appear, or if they come and cannot say any thing, &c., to bar the execution, then the recognizee shall have execution against them of those lands, by writ of elegit, &c. But he shall have the elegit before that he sueth the scire facias against those tenants." That is, as I understand him, the recognizee shall first have an elegit against the recognizor, and if the sheriff returns that the recognizor has aliened his lands to divers tenants, the recognizee may then have his scire facias against those tenants. Here, then, it appears that if the recognizor aliens his lands, the recognizee may have a scire facias against the terre-tenants of the recognizor in his lifetime. The rule to be derived from these two passages of Fitzherbert, is, that if the sheriff return upon the elegit or the levari facias, (which were the only writs of execution

which could affect the lands in England,) that the debtor is dead, or has aliened his lands to divers tenants, the plaintiff must sue a scire facias to the terre-tenants before he can take their lands in execution; and there is as much reason for a scire facias against the terre-tenants in case of alienation, as there is in case of the death of the debtor. They are "not parties to the judgment;" they are "new persons," (according to the rule laid down by Sergeant Williams in his note to Saunders,) "chargeable to the execution," and, therefore, must have a day in court to show cause why their lands should not be liable to the execution. There are many things which may be pleaded in bar of the execution, such as satisfaction; or a release; or that the debtor was not seized on the day of the judgment, nor at any time since; or that there are other tenants not named; or non-tenure of the freehold, &c. Nothing can be more just than that they should have an opportunity to show these things, which they cannot do without a scire facias. Being no parties to the record, they have no standing in court; nor can they, of right, make any motion in the cause. A fieri facias is said to be not a returnable writ; it gives no day in court, even to the parties.

Lord Coke, in 2 Inst. 471, says, "One that is not a party to the record, recognizance, fine, or judgment, as the heir, executor, or administrator, though they be privy, and though it be within the year, shall have no writ of execution, but are to have a scire facias to enable themselves to the suit; and so likewise of the tenant's or defendant's part, for the alteration of the person altereth the process; otherwise it is of a statute staple or merchant, &c., because the process is given by other acts of parliament." By the statutes which gave the statute merchant, the statute staple, and the recognizance in the nature of a statute staple, the creditor may, at any time after forfeiture, without scire facias, have execution of the lands which his debtor had at the time of the recognizance acknowledged, in whose hands soever they may have come, either by feoffment or otherwise; but the provisions of those statutes do not apply to recognizances and judgments at law, taken or rendered in the court of chancery or in the courts of common law. See 11 Eliz. I. St. De Mercatoribus; 13 Eliz. I. St. 3; 27 Eliz. III. St. 2, c. 9, and 23 Hen. VIII. c. 6. In 4 Inst. 396, Lord Coke says, "Upon the equal construction of these words" (medietatem terrae suae) "if the conusor be seized of black-acre, white-acre, and green-acre, and after judgment given or recognizance knowledged, enfeoffeth A. of white-acre, and B. of black-acre, and retains green-acre to himself; in this case he" (the conusee) "may have the moiety of green-acre, and never intermeddle with the rest; but he cannot extend the moiety of the acre in the hand of any purchaser, except he extend also a moiety of all the land subject to the judgment or recognizance; and if he omit any, the extent shall be avoided in an audita querela; for where it is said in books that each purchaser shall have contribution in that case, the meaning is that such extent of part shall be avoided, and all the land extended and equally charged." "So likewise, if there be two or more conusors, the lands of them all must be extended; and hereof you may read at large in Harbert's Case; all

which are just and righteous expositions." In Harbert's Case, 3 Coke, 12, b, he says, the heir, in general, shall not have contribution against the terre-tenants, because he is "pars patris," "alter ipse;" but if the land descend to two parceners, "who make partition in this case, if one only be charged, she shall have contribution; for as one purchaser shall have contribution against another, and against the heir of the conusor also, so one heir shall have contribution against another, for they are "in aequali jure." And in folio 14, a, he says, "For in executions which concern the realty, and charge the lands, the sheriff cannot do execution on the land of one only." And again in folio 14, b, he says, "So it appears by these cases, that when land shall be charged by any lien, the charge ought to be equal, and one alone shall not bear all the burden; and the law, in this point, is founded on great equity. But in all the cases at the common law, if the party who should be charged (as the heir, &c.,) had aliened the land bona fide, before any action brought, the land, in the hands of the purchaser, was not subject to any charge or execution, and this was the reason why the judges and sages of the law, in the construction of the said statutes, although the lands of purchasers, after the judgment recognizance or statute were subject to execution, yet gave greater privileges to them than to the conusor himself, or to his heir. And the reason why the conusor himself, at the will of the conusee may be only charged, is because he himself is the person who was the debtor, and who was bound, and therefore he is subject to execution; and it is but reasonable that he may be only charged; the same law for his heir, for the reasons before rehearsed. Note, reader; when it is said before, and often in our books, that if one purchaser be only extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him any thing by way of contribution; but it ought to be intended that the party who is only extended for the whole, may, by audita querela, or scire facias, as the case requires, defeat the execution, and thereby he shall be restored to all the mean profits, and compel the conusee to sue execution of the whole land; so in this manner every one shall be contributory—hoc est, the land of every terre-tenant

shall be equally extended." So also in the case of Mallory v. Jennings, 2 And. 160, Case No. 88, "it was said by all the judges in bank, that the execution did not bind the vendee, because the writ is not brought against the tenant of the land; and always, if the inheritance or freehold is to be charged by any suit, or by reason of any writ, the tenant of the freehold ought to be the party against whom the writ should be brought; which is not so in this case; for the vendee upon the matter, is tenant of the freehold, and not Sewster," who was the debtor, and who sold and conveyed the land after the recognizance acknowledged. Tidd, Prac. 1021, says, "it being a maxim, that a person not a party to the record, cannot be benefited or charged with the process without a scire facias." So in Penoyer v. Brace, 1 Salk. 319, 320, it is said, "where any new person is either to be better or worse by the execution, there must be a scire facias, (because he is a stranger,) to make him party to the judgment." Id. 1 Ld. Raym. 244. And in Morton v. Croghan, Mr. Justice Spencer, in delivering the opinion of the court, said: "I apprehend the law to be well settled, since the statute of 2 Westm that where a judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person having a fee in the land, a party to the proceeding; and in this case the judgment against Croghan being a lien on the real estate in the hands of the terre-tenants, the plaintiffs are required by law to make all the terre-tenants parties to the scire facias, to the end that they may be jointly contributory to the satisfaction and payment of the judgment. This has been shown to be the established principle under the statute of 2 Westm., which gave the creditor his remedy by the execution of elegit, under which he held a moiety of the debtor's lands, until he was satisfied his debt and damages. At common law the fieri facias went merely against the goods and chattels of the debtor; such an execution, therefore, related merely to the personalty; but under our statute, which subjects the lands and tenements of the debtor to be sold absolutely, for the satisfaction of the debt, it is ordinarily an execution partly in the personalty and partly in the realty; and in the present instance is entirely in the realty; for the goods and chattels of the terre-tenants cannot be affected by the judgment or any execution under it. The same principle which required the elegit to issue against all who ought to bear the burden, applies with much more force to the fieri facias against the lands; for in the former case they were not to be sold; but a moiety only held until the debt was paid; whereas in the latter case they are liable to be taken away forever from the debtor. Besides, the principle is most just and equitable. If the creditor, having the lien, can select a few, as in this case, to bear the whole burden, they may probably be crushed by its weight; but if he must render them all contributory, the individual burden may be borne without ruin." In Webster v. Saunders, 4 Har. & J. 287, and in Ridgely v. Gartrell, it does not appear that the original parties, or any of them, were dead. This shows what the practice has been in Maryland; and in Arnott v. Nicholls, 1 Har. & J. 471, 473, the court said, "The terre-tenant should

have an opportunity to relieve himself, and to bring in the other terre-tenants. Hence the necessity of a scire facias, that all the terre-tenants may be warned." But that case, it is contended, was overruled by McElderry v. Smith, 2 Har. & J. 72. The latter case, however, does not profess to overrule the former, and it only decides that a scire facias to the vendee is not necessary where the alienation is made pending the scire facias against the vendor to revive the judgment. In the case of Jackson v. Shaffer, 11 Johns. 516, Mr. Justice Van Ness, who delivered the opinion of the court, said: "It was not necessary to make the terre-tenants parties. Here the plaintiff, having laid by for more than a year and a day after he had obtained judgment, it became necessary to revive it against the original defendants, which, when revived, was of the same force and effect and, of course, liable to be proceeded upon, in the same manner as if the time within which an execution might have been legally issued, had not been suffered to elapse. It is in the case of the death of the original defendant that the terre-tenants are to be made parties; and not where the original defendant is living. Tidd, Prac. 1021, 1023; 2 Saund. 7, note 4." This is the only case in which it has been said that the terre-tenants are not to be cited in the lifetime of the debtor; and the authorities cited (Tidd and Williams' Saunders) do not support the decision. They only say that in case of the death of the debtor, the terre-tenants may, and must be cited before the plaintiff can have execution of their lands. But according to the law as laid down in the authorities before cited, namely, Fitzh. Nat. Brev. p. 595, fol. 266, E; 2 Saund. 6, note 1; 2 Inst. 471, 4 Inst. 396; Harbert's Case, 3 Coke, 12, b, and 14, a and b; Mallory v. Jennings, 2 And. 160; Tidd, Prac. 1021; Penoyer v. Brace, 1 Salk. 319, 320; Morton v. Croghan, 20 Johns. 121; Webster v. Saunders, 4 Har. & J. 287; Ridgely v. Gartrell, 3 Har. & McH. 449; Arnott v. Nicholls, 1 Har. & J. 471; 2 Har. Ent. 763; it seems to me that the doctrine so distinctly laid down by Mr. Justice Spencer in Morton v. Croghan, cannot be now controverted, that "where a judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person, having a fee in the land, a party to the proceeding." See, also, Co. Ent. fol. 623a; Dyer, 331, b, pl. 23,

and Id. 332a, pl. 24. I think the complainant was entitled to relief, but whether by bill in equity I doubt.

No relief, however, appears to have been given.

[1] {Reported by Hon. William Cranch, Chief Judge.}