

**JOHN LYON v. LEVI FISH**  
**Supreme Court of Ohio**  
**20 OHIO 100**  
**December, 1851 (Term)**

ERROR to the court of common pleas of Cuyahoga county. Reserved by the Supreme Court in that county for decision here.

Lyon, the plaintiff below (and plaintiff in error), sued in trespass, and complained of Fish, "constable of the township of Brooklyn, in Cuyahoga county, for that on October 20, 1846, at Brooklyn, in the county of Cuyahoga, etc., the said defendant, being a constable of the township of Brooklyn, etc., and assuming to act as such constable, without lawful authority, with force and arms, took and carried away "the plaintiff's goods and chattels, to wit: One two-horse lumber wagon, of the value of \$ 80; eight tons of hay, of the value, etc.; and the corn grown on six acres of land," etc.

The second count charges a trespass and taking by defendant as said constable of the same property, at the same time, at Parma, in said county.

Defendant filed a plea of the general issue and two special pleas.

The first special plea avers that as to the wagon, the plaintiff ought not to have his action, etc. That on October 20, 1846, Wm. J. Case, caused an execution to be issued in his favor by Benjamin Sawtell, a justice of the peace in Brooklyn township, against said Lyon for \$ 40 debt and costs, which, by the judgment of said justice, Case had previously recovered against Lyon; that the execution was on October 20, 1846, delivered to defendant as constable of Brooklyn township, to whom it was directed, and on the same day was returned 'no goods or chattels found whereon to levy,' but with a suggestion indorsed thereon 'that Lyon had goods in Parma township;' that on October 24, 1846, said justice issued an execution on said judgment, directed 'to any constable of Brooklyn or Parma townships,' which came to the hands of said Fish as constable, and that on the 26th October, he levied said execution on said wagon, advertised and sold it at Parma to Case, the judgment creditor, and made due return of the writ; that it did not satisfy the writ; and the plea concludes:

"Whereupon he prays judgment as to so much of the cause of action in said declaration mentioned, as relates to said wagon, if the said plaintiff his action aforesaid against him ought to have or maintain," etc.

The second special plea is substantially the same, and after reciting the facts, and a sale of the property on the execution at Parma, concludes thus:

"Afterward, before the expiration of thirty days from the date of said last-mentioned writ, made due return thereof with his doings thereon, to the said justice, according to the precept thereof, etc., and as to all the other matters alleged against him in said declaration, he says he is not guilty thereof in manner and form, as the said plaintiff hath therein alleged against him, etc.

"JOSEPH ADAMS,  
"Defendant's Attorney."

"P. S. Let it be supposed that the last special plea has a verification in the place of

the, 'etc.,' in the fourth line from the bottom, and in place of the last 'etc.,' that the plea concludes to the country or any other form to accommodate the replication.  
"Yours truly, J. A."

To these two special pleas, the plaintiff filed a general demurrer.

There was no averment in either of the pleas, as to the residence of any of the parties to the judgment before the justice.

The court of common pleas overruled the demurrer, and sustained the special pleas, and entered judgment "that the said Levi Fish go hence without day and recover of the said John Lyon his costs," etc.

The principal errors assigned are:

*First.* That said special pleas do not answer the whole declaration.

*Second.* That there is no proper form of conclusion to said special pleas.

*Third.* That the court of common pleas erred in sustaining the defendant's justification, as set up in his special plea above pleaded.

*Fourth.* That the court of common pleas erred in sustaining the second writ of execution issued by the justice, and set out in said defendant's special pleas, it having a double direction; being directed to Brooklyn and Parma townships, when, in fact, the statute only authorizes magistrates to issue writs of execution directed to one township at a time.

**DISPOSITION:** The judgment will therefore be affirmed.

**SYLLABUS:** A defect in the conclusion of a plea can not be reached by general demurrer.

Where a return has been made on an execution issued by a justice of the peace, of "no goods in the township" where the justice resides, with a suggestion that "there are goods of the judgment debtor" in another township of the same county, an execution issued to any constable of either of the two townships, although not strictly in accordance with the statute, is not therefore void. n1

- - - - - Footnotes - - - - -

n1 See sections 90, 91 of the act of March 14, 1831, of justices of the peace and constables, defining the powers and duties in civil cases. Swan's Stat. 522.

- - - - - End Footnotes - - - - -

COUNSEL: LYNDE & CASTLE, for plaintiff:

The defendant, in his special pleas, does not pretend to answer the declaration, only as to the wagon, and is silent as to any of the other property charged to have been taken.

In the second place, the defendant has adopted the old and long exploded course of pleading; *in short*, for a conclusion to his plea: "Let it be supposed that the last special plea has a verification in the place of the 'etc.,' and that it conclude to the country or any other form to accommodate the replication," which form we conceive is wholly insufficient for a special plea.

The *third* and *fourth* exceptions depend upon the construction of sections 90 and 91 of Swan's Revised Statutes, page 522. Section 90, we conceive, gives a construction to be followed by the cases supposed in both sections, and that section distinctly expresses it to be the duty of the magistrate to issue his writ of execution, to any constable of his own township, or to any constable of the township where the defendant resides, in the same county. Now this does not authorize a magistrate to issue an execution with a double direction to one or the other township, but should be directed to one alone, nor do we conceive that an execution with such double direction would be anything but utterly void.

JOSEPH ADAMS, for defendant.

No argument came to the hands of the reporter.

JUDGES: CALDWELL, J.

**OPINION BY: CALDWELL**

The declaration charges the defendant with forcibly seizing upon, and appropriating to his own use, certain personal property belonging to the plaintiff; viz: one wagon, eight tons of hay, and six acres of corn standing on the ground. The defendant plead the general issue, and also two special pleas, the substance of which two special pleas is the same, *namely*, that so far as the wagon, in the declaration mentioned, is concerned, that he, defendant, levied upon it, and sold it, as a constable of Brooklyn township, Cuyahoga county, by virtue of an execution issued by Benjamin Sawtell, a justice of the peace of said township, on a judgment rendered by said justice, in favor of one William J. Case, against Lyon, the plaintiff; that an execution had been previously issued on this judgment, and returned 'no goods of the judgment debtor, in Brooklyn township,' with a suggestion that he had personal property in Parma township; and that thereupon an execution was issued to any constable of Brooklyn or Parma townships, which execution was placed in defendant's hands, by virtue of which he levied upon and sold the wagon, and applied the proceeds on the judgment. To these pleas there was a general demurrer. The court of common pleas overruled the demurrer, and gave judgment for the defendant. And the only question raised in the case is as to the sufficiency of these pleas. It is said that the special pleas do not answer the whole declaration. This is only true of the first plea; the second plea, after answering specially as to the wagon, traverses generally the trespass to the other property mentioned in the declaration. The demurrer being general to both pleas, it is sufficient if either be good. The next objection is that there is no proper conclusion to the pleas. The second special plea, in place of the verification or averment, has simply the term 'etc.' The plea is clearly defective, wanting a proper conclusion, but the defect, being merely of form, can only be taken advantage of by special demurrer. See Swan's Stat. 687, sec. 5. Another objection urged against the special pleas is, that the writ of execution, under which the defendant justifies, is directed to any constable of Brooklyn or Parma townships. It is said that the justice should have confined the process to any constable in one or other of the townships; but that he could not give

it the double direction, to any constable of either township, and that, being so directed, it was therefore void. The section of the statute making provision for a case such as the present, provides (Swan's Stat. 522, sec. 91): "When the constable shall make return that sufficient goods and chattels can not be found in the township where the justice resides, who issued the execution, and it shall be suggested to the justice, that the party against whom the same issued, has goods and chattels within any other township in the same county, it shall be lawful for the justice to issue execution to any constable of the township in which the justice resides, or of the township where such goods and chattels may be found," etc.

Now we suppose that the direction of the statute, when strictly applied, is that the process shall be directed to the officers of one or the other of the townships. The defendant, however, who was a constable of Brooklyn township, was one of the persons to whom, in contemplation of the statute, the process might be directed. He was embraced within its direction, it came into his hands, he executed it, and the object of the law and the requisitions of the process were fully complied with, and the execution, we think, was as valid as if directed to him alone. The defect in the writ (if such it could be called) was merely formal, which will never be allowed to render process void. We see no error, whatever, in the proceedings of the court of common pleas.

The judgment will therefore be affirmed. 