

## Court of Errors and Appeals.

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HENRY B. KEMBLE and EWAN  
MERRITT, Administrators of  
Charles S. Kemble, late Sheriff,  
&c., Plaintiffs in Error,

vs.

PHEBE HARRIS, Defendant in  
Error.

### WRIT OF ERROR.

[Filed June 18, 1872.]

New Jersey, *to wit*:—The State of New Jersey to the Jus-  
[L. s.] tices of our Supreme Court of Judicature of  
the State of New Jersey, *greeting*:

Forasmuch as in the records and proceedings, and also in  
the giving of judgment, in a certain matter before you,  
amercing Charles S. Kemble, Sheriff of the county of Bur-  
lington, in the value of the damages and costs due on a cer-  
tain execution issued out of the Supreme Court of Judica- 10  
ture, against Alexander Kirkpatrick, in favor of Phebe  
Harris, for the use of the said Phebe Harris, manifest error  
hath intervened, to the great damage of the said Charles S.

Kemble, as by his complaint we are informed: we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then, without delay, you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things concerning the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes of law and equity, at Trenton, on the third Tuesday  
 10 of June next, together with this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right and according to law ought to be done.

Witness the Honorable Abraham O. Zabriskie, Chancellor of the State of New Jersey, at Trenton, the thirteenth day of March, in the year of our Lord eighteen hundred and seventy-two.

HENRY C. KELSEY, *Clerk.*

EWAN MERRITT, *Attorney.*

20 The answer of the Justices of the Supreme Court of New Jersey, within named.

The record and proceedings, whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals in a certain schedule to this writ annexed, as within commanded.

M. BEASLEY, *Chief Justice.* [L. S.]

### JUDGMENT ON AMERCEMENT.

As yet of the term of November, A. D. eighteen hundred and sixty-nine.

30 Witness, M. BEASLEY, ESQ., *Chief Justice.*  
 CHAS. P. SMITH, *Clerk.*

New Jersey, ss.—Phebe Harris puts in her place F. F. Westcott, her attorney, against Charles S. Kemble, late

Sheriff of Burlington county, in a plea of trespass on the case on amercement.

It appearing to the court that due notice hath been given to Charles S. Kemble, Esquire, late Sheriff of the county of Burlington, of the present application to amerce him in the amount due the plaintiff upon an execution issued out of this court in favor of said plaintiff, against Alexander Kirkpatrick, on account of neglect in the discharge of his duty as Sheriff as aforesaid, on said execution; and the court being satisfied that the said Sheriff hath been guilty of such neglect, do order him amerced accordingly; and the court having ascertained the amount due the plaintiff as aforesaid on said execution, at the sum of four hundred and thirty dollars and ten cents—

It is ordered that judgment of amercement in favor of the said plaintiff, be entered against the said Charles S. Kemble, late Sheriff as aforesaid, for the said sum, with costs to be taxed; therefore it is considered that the said Phebe Harris do recover against the said Charles S. Kemble, late Sheriff of Burlington county as aforesaid, her said damages, in form aforesaid assessed to four hundred and thirty dollars and ten cents, and also thirty dollars and thirty-six cents for her costs and charges aforesaid, by the court now here adjudged to the said plaintiff, and with her assent, which said damages, costs, and charges, in the whole, amount to four hundred and sixty dollars and forty-six cents.

Judgment signed the twenty-ninth day of February, A. D. eighteen hundred and seventy-two.

M. BEASLEY, *Chief Justice.*

I, Charles P. Smith, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment in the above-stated cause, as the same remains of record in my office.

In testimony whereof, I have hereto set my hand and the [L. S.] seal of said court, at Trenton, this thirteenth day of June, A. D. eighteen hundred and seventy-two.

CHAS. P. SMITH, *Clerk.*

*RULE TO REVIVE.*

It appearing to the court that since the writ of error was issued in this cause, Charles S. Kemble, Esq., late Sheriff of the county of Burlington, the plaintiff in error, hath died intestate, and that letters of administration upon his estate have been duly granted unto Henry B. Kemble and Ewan Merritt, it is ordered that this suit be revived, and that the same do proceed in the names of said administrators as plaintiffs in error herein.

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On motion of

E. MERRITT,

*Att'y of Plaintiffs in Error.**ASSIGNMENT OF ERRORS.*

[Filed July 25, 1872.]

Afterwards, that is to say, on the third Tuesday in June, in the year of our Lord eighteen hundred and seventy-two, before the said Court of Errors and Appeals, come the said plaintiffs in error, by Ewan Merritt, their attorney, and say, that in the giving of judgment of amercement aforesaid, 20 against the said Charles S. Kemble, late Sheriff of the county of Burlington, there is manifest error in this: that the judgment aforesaid, by the record aforesaid, appears to have been given for the said defendant in error, against the said Charles S. Kemble; whereas, by the law of the land, the said judgment ought to have been given for the said Charles S. Kemble, against the said defendant in error. And the plaintiffs pray that the said judgment, for the errors aforesaid, and for other errors in the said record and proceedings being, may 30 that they may be restored in all things which they have lost by occasion of said judgment, &c.

EWAN MERRITT,

*Att'y of Plaintiffs in Error.*

Burlington county, ss.—Henry B. Kemble and Ewan Merritt, administrators, &c., of the estate of Charles S. Kemble, late Sheriff of the county of Burlington, deceased, put in their place Ewan Merritt, their attorney, against Phebe Harris, in matter of judgment of amercement.

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*JOINDER IN ERROR.*

[Filed August 15, 1872.]

And the said Phebe Harris, by Franklin F. Westcott, her attorney, also comes and says that there is no error in giving the judgment of amercement aforesaid, and therefore she prays that the judgment aforesaid, in form aforesaid given, may, by the court here, be in all things affirmed.

FRANKLIN F. WESTCOTT,

*Att'y of Defendant in Error.*

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*DEPOSITIONS.*

[Filed March 9, 1872.]

Depositions of witnesses, taken in the above-stated case, before Franklin B. Levis, one of the Supreme Court Commissioners of the State of New Jersey, at the office of said F. B. Levis, at Mount Holly, on Tuesday, the 31st day of October, A. D. 1871, pursuant to agreement between counsel to that effect.

*Henry Moffat*, of the city of Burlington, a witness produced on part of the defendant, being duly sworn according to law, on his oath saith—

I am one of the practicing attorneys of this court; I am acquainted with Dr. Alexander Kirkpatrick; I have had claims against him for collection; I never brought any suit against him; I did not bring suit, because I did not think I

could get anything out of him; he lives near my office—  
 about a square; I have investigated whether he has or has  
 not property, and ascertained that the house and lot where  
 he lives is in his wife's name, and that his wife claimed all  
 the personal property; I think that Dr. Smith, whose claim  
 I had, stated to me that he was satisfied that Kirkpatrick  
 had no property, and therefore did not think it worth while  
 for me to bring suit; I think I had other claims, but don't  
 recollect the parties' names, but returned them; my reason  
 10 for returning them was, because I am satisfied that I could  
 not make the money.

Being cross-examined.

I don't recollect what other claims I had against him; I  
 looked this morning to see what other claims I had, but  
 could not find any memorandum of them; Dr. Kirkpatrick  
 lives in a large, double, rough-cast, brick house; the lot is  
 about fifty feet front by two hundred feet deep—no barn on  
 it; he has one horse, but do not know whether he has any  
 more or not; don't know that I ever saw him drive two  
 20 horses.

[The whole examination-in-chief is objected to by Mr.  
 Westcott, and the cross-examination is made subject thereto.]

H. MOFFETT.

Sworn and subscribed, this 31st day of October, A. D. 1871,  
 before me.

F. B. LEVIS, *Sup. Ct. Com.*

*Dr. Alexander Kirkpatrick*, being duly sworn according to  
 law, on his oath saith—

I have paid a part of this execution since the Sheriff had  
 30 it; I have paid \$50; I paid it to Sarah Haines, for Phebe  
 Harris; on the 20th day of September, 1870, I paid \$30; on  
 the 25th day of October, A. D. 1870, I paid \$20, which two  
 payments made the \$50.

ALEX. KIRKPATRICK.

Sworn and subscribed, this 31st day of October, A. D. 1871,  
 before me.

F. B. LEVIS, *Sup. Ct. Com.*

*Charles S. Kemble*, a witness on the part of the defendant, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed according to law, on his affirmation saith—

I received the execution in this case from Mr. Westcott on February 22d, 1870; I received it by mail; the writ was returnable the February Term; I went to Burlington and made a levy upon the goods that I found in Dr. Kirkpatrick's house, by virtue of said writ; Dr. was not there; I also levied upon his horse and carriage; I made an inventory of those goods and attached it to the writ; I had some correspondence with Mr. Westcott, the attorney, about this writ; I cannot now find his letters; I kept them for some time—presume I threw them among the waste paper; the letters were written by my deputy, Mr. Slack; the letters written by Mr. Slack were written generally by my direction; after taking this inventory, the goods were claimed by his wife, his daughter, and his brother; we had a difficulty in making the levy, as Mrs. Kirkpatrick would not show us anything; we had to go in the house ourselves; Mr. Slack was with me; I informed Mr. Westcott that these goods were so claimed, by letter; Dr. Kirkpatrick brought his daughter to be sworn as to her ownership of part of the goods; I think he brought some papers showing something about the horse and wagon belonging to his brother; I don't think Dr. Kirkpatrick claimed to be the owner of any of the goods; he claimed a clock; I cannot tell when I returned this writ; we keep no record of the time we return writs; we do when we receive them; I don't know whether I returned it before the next June Term or not; I did not keep copies of any of the letters I sent Mr. Westcott; from what I could learn, I am satisfied that nothing could be made of the goods of Kirkpatrick. [Objected to.]

I remember receiving a letter from Mr. Westcott, directing me to make an appraisalment of Dr. Kirkpatrick's goods; I did not do so, for the reason that I was satisfied that the goods did not belong to Dr. Kirkpatrick, and because I had done no such thing since I was Sheriff; I am not certain or not whether I wrote Mr. Westcott that I would make the appraisalment and sale if he would indemnify me; the letters

were written and signed by Mr. Slack for me, he signing my name; Mr. Slack put the writs in envelopes and returned them to the Clerk; I was perfectly satisfied that Dr. Kirkpatrick had not \$200 worth of goods in his own right. [Objected to.]

Being cross-examined.

Mr. Slack is my deputy; I cannot say where Dr. Kirkpatrick's daughter lived; I suppose she lived with the Dr.; I think the claim of his brother to the goods was in writing; 10 his daughter's and wife's were verbal; I am not satisfied but what his wife's was in writing; I have not got the written claims; I am not positive that the wife sent a written claim; I know the daughter did not—the brother did; I don't know where the written claim of the brother is; I don't know whether Kirkpatrick's daughter was married or not—don't know her name; she was a small girl, about fifteen years old.

CHAS. S. KEMBLE.

Affirmed and subscribed, this 31st day of October, 1871.

F. B. LEVIS, *Sup. Ct. Com.*

20 *Richard J. B. Slack*, a witness produced on part of defendant, being duly sworn according to law, on his oath saith—  
I am the deputy of the Sheriff, the witness last sworn; I remember the receiving of this writ of execution of Harris against Kirkpatrick; I also remember the letter accompanying it; in that letter, my impression is that there was an offer from Mr. Westcott to give the Sheriff extra compensation if he would make the money; I have access to, and read the letters sent to the Sheriff on business—answer them for the Sheriff, signing his name; the letters are written by 30 me, by his direction and under his supervision—that is, most of them; I think there was a letter received from Mr. Westcott, directing a levy of the goods and an appraisement to be made; we replied to that letter; my impression is, that the Sheriff directed me to state that Dr. Kirkpatrick owned no property, or words to that effect, and my impression is, that I wrote further, that if he would indemnify him, or secure him in some way, the Sheriff would proceed; some-

times I get the mail matter from the post-office for the Sheriff—generally do—and I take the mail matter to the post-office; letters are not answered before they are seen and read by the Sheriff; sometimes I open his letters—sometimes I do not; generally I open them when they are directed to him officially; we generally get the Philadelphia and West Jersey matter in the evening. [Objected to.]

A year ago, this evening mail reached here at 6.10, and was distributed at 6.30 P. M.; answers received then would be answered the next morning. [Objected to.] 10

I think at that time the mails for Trenton left here at 8.30 A. M., and 2 P. M.; I remember the fact of returning this writ, but cannot say when; I assisted Sheriff in making an inventory to this writ; my impression is, it was returned with it.

[*Exhibits Nos. 6 and 7 on part of plaintiff shown witness, he says*]—I wrote *Exhibit No. 7*; I cannot say exactly when I received *Exhibit No. 6*; from the tenor of my letter, *Exhibit No. 7*, I presume we received *Exhibit No. 6* by the last mail on May 27th, 1870. 20

[*Exhibit No. 8, exparte plaintiff, shown witness, he says*]—The endorsement, "Charles P. Smith," is in my handwriting; I cannot tell, from the envelope itself, what it contained; when I wrote *Exhibit No. 7*, I had, previously thereto, returned the writ in this case.

Being cross-examined.

There were, at the time of the correspondence between Mr. Westcott and the Sheriff, two daily mails from Philadelphia—one distributed at 8.30 A. M., and the other at 6.30 P. M.; we sometimes received mail matter by the 8.30 A. M. 30 mail—sometimes received Camden matter.

In chief.

When I go for mail matter in the evening, I very often take mail matter to send away. [Objected to.]

R. J. B. SLACK.

Sworn and subscribed, this 31st day of October, A. D. 1871, before me.

F. B. LEVIS, *Sup. Ct. Com.*

*John D. Clevenger*, being duly sworn, says—

I am the Post-master at Mount Holly, and was in 1870; letters dropped in the post-office after the mail closes for the place where they are directed, they are post-marked the day following; letters directed to Trenton, and put in the office after the time for closing the mail for that place, would be post-marked as of the next day.

Being cross-examined.

The post-office is kept open till 8.15 in the evening, on all  
10 evenings, and on Saturday evening until 9 o'clock; letters  
put in the office after 8.15 would be post-marked as of the  
next day; there is a drop box; the last mail closes at 7  
o'clock, and after that time the letters are stamped as of the  
following day; there is a mail for Trenton, and was a year  
ago, leaving Mount Holly at 7.40 P. M., closing at 7 o'clock  
in the evening; we have three daily mails to Trenton; at  
8.15 P. M., when we close the office, the mail matter which  
has accumulated for transmittal the next day is post-marked  
as of next day; all mail matter received after the last mail  
20 closes is post-marked as of the next day; we change our  
stamp as soon as the mail leaves; mails arrive from Camden  
and Philadelphia at 8 A. M., 6.30 P. M.; we only have two  
daily mails from below.

JOHN D. CLEVINGER.

Sworn and subscribed this 31st day of October, A. D. 1871,  
before me.

F. B. LEVIS, *Sup. Ct. Com.*

## DEPOSITIONS TAKEN BEFORE JAMES R. HOAGLAND, COM'R.

*Franklin F. Westcott*, sworn.

In behalf of the plaintiff in the above case, I obtained judgment against defendant in Supreme Court, in the month of February, 1870, and execution was issued thereon, directed to the Sheriff of Burlington, which I mailed to him February 19th, 1870. [Plaintiff will offer in evidence at hearing record of judgment and execution in said cause.] I kept no copy of my letter mailed to the Sheriff accompanying execution; Sheriff Kemble has told me that he has made search for all 10 the letters which I wrote him respecting this matter, and cannot find them; my recollection is, that in that letter I specially requested the Sheriff to use diligence in the execution of the writ; I received a letter from the Sheriff, dated February 23d, 1870, acknowledging receipt of writ. [*Exhibit 1 ex parte plaintiff.*] A few days afterwards I received a second letter from the Sheriff, dated February 28th, which is marked *Exhibit 2, ex parte plaintiff*; I replied to this March 2d, 1870; I kept a copy of that letter, offered. [*Exhibit 3, ex parte plaintiff.*] I heard nothing from the Sheriff after send- 20 ing this letter, for some time; on March 21st, 1870, I commenced to foreclose a mortgage in Chancery, and sent a subpoena in that suit to Sheriff Kemble, to be served; in the letter which I sent him relative to that suit, I made inquiries respecting the progress he was making on the Phebe Harris execution; I received a reply from the Sheriff to that communication, dated March 28th, 1870; this last letter of Sheriff Kemble's. [*Offered Exhibit 4, ex parte plaintiff.*] I received no further communication from the Sheriff till May 24th, 1870; not hearing anything from the Sheriff, I wrote to him 30 and received letter in reply, May 24th, 1870. [*Exhibit No. 5, ex parte plaintiff.*] Sheriff was fully satisfied defendant had nothing; I did not keep a copy of the letter, to which the above letter is a response, but think that in this letter I again demanded that he should proceed with the execution, as I had before done; he states in this letter that he had never made the appraisement that I had requested; all the letters which I wrote to Sheriff Kemble were urgent and

pressing ; I immediately replied to letter of May 24th, by letter of mine dated May 26th, 1870 ; I retained a copy of this last letter. [Offered, *Exhibit No. 6, ex parte plaintiff.*] I received a reply to this letter from Sheriff Kemble, dated May 28th, 1870. [Offered in evidence and marked *Exhibit 7, ex parte plaintiff.* Envelope annexed offered in evidence, also marked *Exhibit 7, ex parte plaintiff.*] On the 31st of May, 1870, being in Trenton, I went to the office of the Clerk of the Supreme Court for purpose of seeing the execution and inventory, which the Sheriff had informed me by his letter of the 28th that he had returned to the Clerk on or before the 27th ; one of the clerks in the office made search for the execution, and was not able to find it upon the files ; he then went to one of the tables and found it among the mail matter, recently brought into the office ; he also handed me the envelope in which the execution had been enclosed. [Objected to as hearsay.] I at once recognized the handwriting and envelope, as being the same as that used in the letters which I had received from Sheriff

20 Kemble ; this envelope is post-marked Mt. Holly, May 28th, 1870, as is also the envelope covering his letter to me of May 28th, in which he states that previously thereto he had returned the execution to Clerk's Office ; he states in letter of May 28th, that my letter of 26th was received by him on 27th, and that before receiving it he had returned execution to Clerk's Office. [Envelope marked May 28th, directed to C. P. Smith, Esq., offered in evidence, marked *Exhibit No. 8, ex parte plaintiff.*] [Objected to as not proved.]

And being cross-examined by Ewan Merritt, counsel for

30 defendant, witness saith—

The execution was returnable to February Term, 1870—the fourth Tuesday of February ; I think he made levy before return day ; I found *Exhibit No. 8,* (or rather the clerk in the office who was waiting on me, found it,) in the waste paper basket, which was standing by the table in the office, from which he took the execution and handed it to me ; I am under the impression that there was a return upon the execution similar to that set forth by Sheriff in *Exhibit No. 7* ; I found an inventory attached to the execution ; in letter

40 to Sheriff Kemble of March 2d, *Exhibit No. 3,* I gave Sheriff

directions in these words: "Levy on everything that he has, down to the medicines in his medicine-box, if such he have;" I found that there was an inventory of goods and chattels annexed to writ, which was in some particulars quite minute; have copy. [Copy shown, dated February 25th, 1870.] I have not put in evidence all the letters sent to Sheriff Kemble; I did not retain copies of all letters I sent to Sheriff Kemble; I know that in all my letters I urged vigor in prosecuting writ. [Objected to as not responsive.] I believe I have put in evidence every letter I ever received 10 from Sheriff Kemble on this subject.

*Quest.* Had you not heard from other sources than the Sheriff, that Dr. Kirkpatrick had no property in his right?

*Ans.* When I sent the execution to Sheriff Kemble, I had been informed that he was practicing as a physician in Burlington, and that he was living in handsome style as if he were a person of large means; I have heard he had plenty to pay with.

*Quest.* From whom had you heard he had plenty to pay with? 20

*Ans.* Miss Sarah S. Harris, daughter of plaintiff, had told me that she was in the neighborhood of Burlington before suit was brought, and that Dr. Kirkpatrick was living there in good style; I wrote to Doctor before commencing suit; he answered my note; I have his reply. [Produced on call, marked *Exhibit No. 1*, defendant.] I wrote to Sheriff Kemble after note of May 28th; I think only once; in this letter I threatened to amerce him, and also stated to him what I had ascertained at Clerk's office in regard to his treatment of the writ, after receiving my letter of May 26th. 30

*Quest.* Why did you wait from June Term to November, 1871, before proceeding against the Sheriff? [Objected to.]

*Ans.* In the same letter that I stated to Sheriff that I intended to amerce him, I also stated to him that I hoped Dr. Kirkpatrick would step forward and relieve him from the liability to which he had exposed himself; I did not wish to proceed against the Sheriff, until a sufficient time had passed to show that there was no probability of Dr. Kirkpatrick relieving him; I kept a copy of letter. [Produced on call, and marked *Exhibit 2, ex parte* defendant, dated June 7th, 1870.] 40

*Quest.* Did you ever write a letter charging that Dr. Kirkpatrick had paid the Sheriff for evading duty on this execution, either to the Sheriff or any other person? [Objected to.]

*Ans.* I think I wrote a letter to Frederick Voorhees, Esq., making some inquiries as to whether Sheriff Kemble was a reliable person in the execution of his office; I don't recollect when this letter to Mr. Voorhees was written, if written at all; I have an indistinct recollection of writing some such  
10 letter, and think to Voorhees; I had been unable by any request or instructions that I had written to Sheriff Kemble, to make him execute the writ; his conduct was so extraordinary that, having no acquaintance with Sheriff Kemble, I think that I wrote the letter inquiring about him; I don't know that I have any letter of response to that letter of inquiry; the letter which I have from Voorhees is dated August 26th, 1869, before suit was brought.

*Quest.* Does not Mr. Voorhees state in that letter that the dwelling that Dr. Kirkpatrick resided in was conveyed to  
20 his wife? [Objected to.]

*Ans.* He does. [Witness offered; defendant declined to receive it, and now put in on part of plaintiff, marked *Exhibit 9, ex parte plaintiff.*]

Sworn, &c.

The defendant upon his part then produced the following testimony:

*Alexander Kirkpatrick, sworn.*

I live in Burlington; am a physician; I formerly, years  
ago, resided in Bridgeton; I there became embarrassed; I was  
30 sold out by the Sheriff; I was in Burlington when the execution was in the hands of the Sheriff; I had very little property then; I had not \$200 worth of personal property; have not had since; had no real estate; have not now; my wife owned the property in which I resided; my wife owns almost all the personal property; she obtained this personal property from her uncle, and bought some with her own property; my wife owned the carriage and horse; it was given to her by her brother; I have some evidence in writing;

she has a certificate dated June 29th, 1864. [*Exhibit 3, ex parte* defendant, shown.] I am acquainted with signature of Jos. N. Price—that is his signature attached to certificate; Joseph N. Price is a brother to my wife; that certificate was made at the time it bears date; I have a clock that was father's, and a small walnut table; no other furniture; medicine in office; from time of my failure in Bridgeton till now, I have had no property in my own right. [All the above testimony as to Dr. Kirkpatrick's financial standing objected to.] 10

Cross-examined.

Commenced practice in Burlington in 1866; I use one horse in practice; had no other horse; I had at one time; have had the horse I am now using four years; I was in Beverly practicing before going to Burlington; I had not the horse I now use, at Beverly; I traded the one I had at Beverly for the one I now have, with my wife's consent; I do not know the name of the man I bought the horse of, which I used at Beverly; I only owned one horse at Beverly; I owned a different horse when I first went to Beverly; was 20 five years at Beverly; I only owned two horses at Beverly; I have owned two horses since I have been in Burlington; I have had a carriage in my possession two years; bought it of Mr. Birch; I sold the one I had and bought the one I now have; the carriage I sold belonged to my wife; I sold to pay for the one I bought of Birch.

In chief.

The carriage I spoke of having sold was my wife's; the horse mentioned in paper I traded for one I have now, with wife's consent; the harness I have in my possession now. 30

Cross-examined.

The horse I now have I got of Caleb Hendrickson, and traded to him the horse mentioned in this certificate.

*Franklin F. Westcott*, being re-examined, in rebuttal, on the part of the plaintiff, saith—

I never received from Sheriff Kemble, or from any person

acting or claiming to act in his behalf, nor from his Deputy, Mr. Slack, a notification that he would proceed to execute the writ of execution above referred to, provided he should be indemnified for so doing; no request for indemnity was ever made to me; I was never informed by the Sheriff who the parties were that claimed to own the property levied on, but was only informed by the Sheriff's letter that Kirkpatrick's wife alleged that it was not owned by him; I was never informed, until I heard the Sheriff's testimony, who the  
10 claimants were; neither was I ever informed that any claim in writing to the property, or any of it, had ever been made by any one.

FRANKLIN F. WESTCOTT

The above is, I believe, correct.

MERRITT.

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#### NOTICE OF MOTION TO AMERCE.

SIR:—Take notice that I shall move the Justices of the Supreme Court, at Trenton, on the first Tuesday of November next, at the hour of ten o'clock in the forenoon of that  
20 day, or as soon thereafter as counsel can be heard, to amerce you at the suit of the above named plaintiff, in the full amount of damages, interest and costs due the plaintiff from the above named defendant, on the judgment in this cause, for and by reason of your having neglected and refused to execute the writ of execution to you directed, and delivered to you, and which came into your hands in said cause, and for and by reason of your having neglected to file a just and true inventory of the goods and chattels, lands and tenements by you levied on, and taken in execution by virtue of  
30 the said writ of execution.

And further, take notice that affidavits upon the part of the said above named plaintiff, to be read and made use of at the hearing of the said motion, to be made as aforesaid, at said time and place, before said Justices, will be taken before James R. Hoagland, Esquire, one of the Commis-

missioners of the said Supreme Court, for taking bail and affidavits, at his office in the city of Bridgeton, in the county of Cumberland, in said State, on Monday, the 23d day of October instant, at the hour of eleven o'clock in the forenoon of said day.

Dated at Bridgeton, aforesaid, this 11th day of October, A. D. 1871.

Your obedient servant,

FRANKLIN F. WESTCOTT,

*Attorney of said plaintiff.* 10

TO CHARLES S. KEMBLE, ESQUIRE,  
*Sheriff of the county of Burlington.*

minutes of the said Supreme Court, for taking said and  
advised at his office in the city of Bridgeton, in the county  
of Cumberland, in said State, on Monday, the 23d day of  
October instant, at the hour of eleven o'clock in the fore-  
noon of said day.

Dated at Bridgeton, aforesaid, this 11th day of October,  
A. D. 1871.

Your obedient servant,

FRANKLIN T. WESTON,

Attorney of said plaintiff.

To GEORGE S. KANE, Esq.,

Sheriff of the county of Bridgeton.

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 EXHIBITS ON PART OF BOTH PARTIES.
 

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## Exhibit No. 1 on part of Plaintiff.

Shff's Office, Mt. Holly, Feb'y 23, '70.

F. F. Westcott, Esq., Counsellor at Law :

DEAR SIR :—Yours of the 21st duly rece'd, having enclosed an execution against Dr. Kirkpatrick, of Burlington. I shall use my best endeavors to collect the money for you.

Below is bill for ser. of the summons.

 F. F. Westcott, Esq., Counsellor at Law,  
 1869.

To Chas. S. Kemble, Shff., Dr. 10  
 Dec. To ser. summons, Harris vs. Alex. Kirkpatrick, \$2 40  
 Please remit, and oblige,

Yours truly,

 CHAS. S. KEMBLE.
 

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## Exhibit No. 2 on part of Plaintiff.

Sheriff's Office, Mt. Holly, Feb'y 28, 1870.

F. F. Westcott, Esq. :

DEAR SIR :—I went to Burlington on Thursday last, and made a levy upon the personal property that I found at the residence of Dr. Kirkpatrick. The wife protested against the making of the levy, stating that the property did not belong to the Dr. (he being absent at the time.) On Friday the Dr. called on me, and intimated to me, as he said he did to you prior to the commencement of the suit, that the property did not belong to him—that he has not owned any property since he became involved at Bridgeton, at which place he was sold out by the Shff.; also, that he never intended to hold any, and that he always intended to pay off this judgment, if ever his circumstances would permit; but now, as things had gone as far as they had, he never would pay it. I suppose if I should advertise, the property would all be claimed, and then a trial of the right of property

would be the result. What disposition do you wish to be made of the case? Please let me know by return mail, and I remain

Yours truly,

CHAS. S. KEMBLE.

*Exhibit No. 3 on part of Plaintiff.*

Bridgeton, March 2, 1870.

DEAR SIR:—Yours of the 28th Feb. was rec'd last night. I presume from what you say, that you levied on Kirkpatrick's household goods, but not his horses, carriages, and professional apparatus. It is evident that he is more likely to own the latter than the former.

You ask for my instructions, and they are these: Levy on *everything* that he has, down to the medicines in his medicine-box, if such he have. Then take appraisers through the house, and have a careful and exactment made of *everything*, and let Kirkpatrick make his choice of \$200, and let the wife state what she owns, and send me a copy of the appraisalment and selection of \$200. I will then write you further instructions.

Kirkpatrick has acted toward a couple of confiding ladies here in a way that any gentleman would be ashamed of, and he has either got to pay the judgment or take the law.

I have not the pleasure of your acquaintance, but think you can easily make the money on this execution if you manage with any prudence. I presume you are, of course, well acquainted with Mr. Frederick Voorhees, of your place, who was a college-mate of mine.

I sent you my check day before yesterday, for caption fees.

Yours truly,

FRANKLIN F. WESTCOTT.

Sheriff Kemble.

My request for copy of appraisalment and Kirpatrick's inventory is, that I may make a selection of the articles more proper to be sold.

*Exhibit No. 4 on part of Plaintiff.*

Shff's Office, Mt. Holly, Mar. 28, '70.

*F. F. Westcott, Esq.:*

DEAR SIR:—I herewith enclose you subpoena, on which affidavit is endorsed. Ryder and wife live at Chambersburg, Pa.—so I am informed by a son of them living at “the cold water establishment” at Florence. I have been so busy that it was impossible for me to attend to Dr. Kirkpatrick, at Burlington, but will give him my earliest attention.

Yours truly,

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CHAS. S. KEMBLE.

*Exhibit No. 5 on part of Plaintiff.*

Sheriff's Office Mount Holly, N. J., May 24th, 1870.

*Franklin Westcott, Esq.:*

DEAR SIR:—Yours is just received, and in reply would state that a levy was made under the execution in Dr. Kirkpatrick's absence from home. The wife, at the time, stated that the property did not belong to the Doctor; and from what I have learned since, from his family and outside parties, I am fully satisfied and believe he owns no property whatever, with the exception of a few little trifles, which would not amount in the aggregate to over \$25. Under these circumstances, I did not make the appraisement as you requested, thinking you would not wish to run your party to an additional expense, and which I considered would amount to nothing. I was and am quite as anxious to collect this money as probably you are yourself, and would have been very happy to have forwarded you the amt., but you are well aware it is impossible to get blood out of a stone, which I think is a very fair illustration in this case. If, however, you insist upon my making the appraisement under these circumstances, I shall, of course, do so. Please advise me immediately, and I remain

Yours truly,

CHAS. S. KEMBLE.

P. S.—I wrote you a letter shortly after the receipt of yours, mentioning these circumstances,

C. S. K.

*Exhibit No. 6 on part of Plaintiff.*

Bridgeton, May 26, 1870.

DEAR SIR:—Yours of the 24th is rec'd. Please send me at once a copy of the execution vs. Dr. Kirkpatrick, your endorsements (and mine) on it, and the inventory you made under it, and a bill of your charges for making such copy.

10

Yours resp'y,

FRANKLIN F. WESTCOTT.

Charles S. Kemble, Sheriff.

Mailed letter of which above is copy, to Charles S. Kemble, Sheriff, May 26, 1870.

F. F. W.

*Exhibit No. 7 on part of Plaintiff.*

Sheriff's Office, Mt. Holly, N. J., May 28th, 1870.

F. F. Westcott, Esq.:

DEAR SIR:—Yours of the 26th was duly rec'd last evening, 20 but came too late for me to comply with your request, I having returned the writ to the Supreme Court, with the following endorsement, viz.: "I do hereby return this writ, with inventory of property annexed, which property has been claimed by other parties. Charles S. Kemble, Sheriff."

Below, please find my bill as you request:

F. F. Westcott,

To Chas. S. Kemble, Shff., Dr.

To levy and return on writ of ex.,

30 Phebe Harris }  
vs. } .....\$1 12  
Alexander Kirkpatrick, }

Yours truly,

CHAS. S. KEMBLE.

[The above *Exhibit No. 7* was mailed to F. F. Westcott, Solicitor of defendant, in an envelope post-marked "Mount Holly, N. J., May 28." Which said envelope is offered in evidence, on part of plaintiff, as a part of said *Exhibit No. 7.*]

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*Exhibit No. 8 on part of Plaintiff.*

Is an envelope directed to "Chas. P. Smith, Esq., Clk. N. J. Sup. Ct., Trenton, New Jersey," post-marked "Mount Holly, N. J., May 28."

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At the call of the defendant, the plaintiff also produced the following letter, which was offered in evidence: 10

Bridgeton, June 7, 1870.

*Chas. S. Kemble, Esq.:*

DEAR SIR:—Your letter dated *May 28th*, 1870, relating to the Kirkpatrick execution, was duly received. The letter to which yours of that date was a reply, requested copy of execution and inventory, and reply dated, as above stated, *May 28th*, says: "Yours of the 26th was duly received last evening, [*i. e.*, on the 27th,] but came too late for me to comply with your request, *I having returned the writ to the Supreme Court.*" 20

Upon the 31st of *May* I had business in the U. S. Dist. Ct. at Trenton, and after it was done, stepped into the Clerk's office to see the execution, and was told it had not been returned. I stated that I had been told the contrary, and further search brought it to light, it having been brought in by mail of the 30th; and in the waste paper basket was the envelope which now lies before me on the table, in which it had come, endorsed in your handwriting, and post-marked "*Mount Holly, May 28th.*"

The bare recital of the above facts, upon which I do not propose to comment, places you in a position which I do not envy. Your negligence in the whole case—your failure to

make an inventory, when twice positively directed to do so, preparatory to setting off the \$200 and making sale, coupled with the plain evasion—to speak politely—revealed in your letter of the 28th, taken in connection with the facts above recited, would, in my opinion, cause the court to order you amerced, and I propose in due time to give you formal notice of such a proceeding against you.

Perhaps Dr. Kirkpatrick will step forward and relieve you. I hope he will.

10

Yours resp'y,

FRANKLIN F. WESTCOTT.

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*Exhibit No. 3 on part of Defendant.*

This is to certify that I have this, the twenty-ninth day of June, eighteen hundred and sixty-four, given to my sister, Mary S. Kirkpatrick, (wife of Dr. A. Kirkpatrick,) a horse, carriage, and harness, costing three hundred and fifty dollars.

JOSEPH N. PRICE.

Philadelphia, June 29th, 1864.

Affirmed and subscribed, before me, this 9th day of De-  
20 cember, 1869.

WM. P. HIBBERD, *Alderman.* [L. S.]

## OPINION OF SUPREME COURT.

Argued before Justices Bedle, Dalrimple, and Scudder, by F. F. Westcott for plaintiff, and E. Merritt for Sheriff.

The opinion of the court was delivered by

DALRIMPLE, J. The *fi. fa.* in this case was delivered to the Sheriff on the 22d of February, 1870, returnable to the then next term. On the 25th of the same month of February, a levy was made on certain goods and chattels; and on or about the 28th of the following month of May, the Sheriff returned the *fi. fa.*, with the following endorsement: "I do hereby return this writ, with inventory of property annexed, which property has been claimed by other parties." It appears by the depositions taken that the goods levied on were in the actual possession of the defendant, but claimed by his wife, his daughter of about fifteen years of age, and his brother. It further appears that the Sheriff was urged from time to time while the writ was in his hands, to proceed thereon and execute the same. He gives no excuse for not doing so, except that the property levied on was claimed by other persons. In his correspondence with the plaintiff's attorney, he does not say who these persons are, nor what is the nature of their claims. While the plaintiff was urging him to proceed and execute the writ, having retained it until after the return day, he returned it with the endorsement above recited, and has proceeded no further therein. The question presented is, whether the Sheriff, under the circumstances, is liable to amercement, because he has neglected and refused to execute the writ. It is quite certain that a levy, of itself, is not an execution of a *fi. fa.* To execute, is to obey the command of the writ. There can be no execution of a writ of *feri facias de bonis* unless the debt or damages recovered are made of the goods and chattels of the defendant. *Scott v. Dow*, 2 *Green* 352. If the Sheriff fails thus to execute the writ, he is liable to amercement, unless he shows some lawful excuse for such failure. In the case before us it appears that the Sheriff, though he has levied on

goods and chattels which he calls the defendant's, and which are in his possession, has refused and neglected to sell the same as required by law, because they are claimed by other parties. If there be reasonable ground to induce an officer to believe that in seizing property by virtue of an execution, he may make a mistake, and expose himself to an action for damages by taking property which does not belong to the defendant, he may insist on the plaintiff showing him the debtor's goods, and also demand an indemnity for any liability he may incur in conforming to the plaintiff's directions. Besides, where the position of property is doubtful or litigated, the Sheriff may summon a jury to inquire into the fact, and their finding in favor of the claimant will authorize a return of *nulla bona*. There are, in addition to these, other ways by which the Sheriff may protect himself from harm. *Bayley v. Bates*, 8 Johns. 186; *Bond v. Ware*, 7 Mass. 126; 2 Greenl. Ev., § 585; *Crocker on Sheriffs*, §§ 446, 447; *Nix. Dig.*, p. 295, § 11.

The Sheriff not having asked an indemnity nor summoned a jury to try the right of property, nor adopted any of the other methods provided by the law to shield himself from the consequences of the claims of third parties, could not lawfully return the execution unsatisfied, and refuse to proceed further thereon.

The plaintiff was not bound to tender an indemnity before it was demanded. The evidence brought to show that indemnity was demanded by the Sheriff is not satisfactory.

The goods having been found in possession of the defendant, and levied on, the Sheriff was bound to sell the same, unless the defendant's title was brought into reasonable doubt. In that case, he could protect himself in any of the modes indicated. He could not, as he did, without even notice to the plaintiff, return the writ and refuse to proceed further thereon. In the case of *Lummis v. Kasson*, 43 Barbour 373, it was held that where a Sheriff has levied on goods, and afterwards discovers that they are not subject to the levy, he may release them at any time before sale, and if he return the execution unsatisfied, and be sued for a false return, will have a good defence, notwithstanding the levy. So, in the case of *Hopkins v. Chandler*, 2 Green 299,

on motion to amerce the Sheriff of Essex, it was held that the Sheriff is not, by levy and sale, estopped from denying the plaintiff's right to the proceeds of sale, nor from showing that the property sold under the plaintiff's execution was not the defendant's, nor liable to such levy and sale.

But the burden of showing that the property of which the defendant was found in possession, and on which a levy has been made, is not his, is upon the Sheriff. He ought, in such case, to show a plain case of mistaken levy. He must do more than bring into question or doubt the defendant's title to the goods levied on. After a careful examination of the evidence taken in this case, it is found that the Sheriff has only succeeded, at most, in casting some doubt over the ownership of some of the goods in question. The only witness sworn who has knowledge on the subject is the defendant. It is true he disclaims the ownership of personal property to the amount of \$200, and says, in rather general terms, that the articles in dispute were given to, and bought by his wife with her own money. I do not think, in the absence of all legal proceedings to test the ownership of the property, this evidence, of itself, is, under the circumstances, sufficient to excuse the Sheriff's neglect to proceed on the execution, and sell the goods seized. It is observable that neither the wife, daughter, or brother of the defendant has been sworn, and, so far as we can gather the facts from the depositions taken, the claims of the last two have been abandoned, and the Sheriff's defence put solely on the ground that the goods in question belong to the wife. If an indemnity had been demanded, or a jury summoned to try the right of property, the decision of the case would have been governed by different principles. It was objected on the argument that the notice of amercement was insufficient. It is in the usual form, and states that the motion would be made on the ground that the Sheriff had refused and neglected to execute the writ. This is in the words of the statute. In the case of *Stryker v. Merselless*, 4 Zab. 452, it seems to have been admitted by court and counsel that a notice of the form of that now before us would have been sufficient. The proceeding by amercement takes the place of the common law action on the case. It will be found

that the precedents of declarations in such cases, (2 *Chitty's Pl.* 747,) simply allege, that although there were divers goods and chattels of the defendant, whereof the Sheriff could and ought to have levied the moneys directed to be levied, yet he did not nor would not levy the said moneys, but wholly neglected and refused so to do, and falsely returned the writ *nulla bona*. This is only saying in a more formal manner that the Sheriff neglected and refused to execute the writ. The result is, that the Sheriff must be amerced in the 10 amount remaining due on the execution, with costs.

Justices Bedle and Scudder concurred.