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EXECUTION AND *FI FA* IN THE PEOPLE'S COURT OF BALTIMORE CITY¹

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The writ of execution or *feri facias* is used to enforce a money judgment. Its purpose is the eventual sale, if necessary, of the defendant's goods to pay the plaintiff in cash the amount of the judgment and costs. Execution is effected by a levy upon the property; a schedule; notice of sale; sale and return.³

I. CIRCUMSTANCES AFFECTING ISSUANCE OF THE WRIT

Death. A *fi fa* cannot be issued on a judgment in the name of a dead plaintiff; and when a new party is to be charged or benefited after judgment a *sci fa* must issue.⁴

¹ *Foreword by the Author.* This Article, and the following one, Attachments in the People's Court of Baltimore City, are two chapters from a manual (in preparation) dealing with the practice and procedure in the People's Court of Baltimore City. Being taken from a manual, there is a certain amount of repetition.

As the basic principles of Execution and Attachment are the same at all jurisdictional levels in Maryland, this Article, and the one on Attachments, *infra*, p. 235, may be useful as a starting point on any problem involving either of these subjects in any Maryland court. The practitioner is urged, however, to keep in mind the procedural differences that exist in the various Maryland courts.

Editorial Foreword. Unless otherwise specified, all Code references in these two Articles are to Flack's 1951 Annotated Code of Maryland, and are hereinafter cited: "Code".

Certain texts are frequently cited throughout these two Articles by the names of the authors only. The full title of each such text, and the edition thereof, together with the method of citation, is as follows:

THOMAS, *JUSTICE OF THE PEACE PROCEDURE* (2d Ed., 1917), hereinafter cited "THOMAS".

POE, *PRACTICE*, Vol. II (5th Ed., 1925, Tiffany), hereinafter cited "2 POE".

LATROBE, *JUSTICES' PRACTICE* (8th Ed., 1889), hereinafter cited "LATROBE".

² Chief Judge, People's Court of Baltimore City; LL.B., University of Maryland, 1920.

³ 2 POE, Sec. 655.

⁴ *Trail v. Snouffer*, 6 Md. 308 (1854).

However, if a defendant dies after the issuance of the writ, the property may be levied on and sold without a *scire facias*,⁵ as the death of neither plaintiff or defendant stays the execution of a *fi fa* sued out before the death.⁶

Partnerships and Unincorporated Associations. A judgment rendered against a partnership or unincorporated association, when the defendant has had service reasonably calculated to give it notice of the action and an opportunity to be heard,⁷ is a binding adjudication as to the liability of the partnership or association with respect to its assets.⁸ When a valid judgment has been rendered against a partnership or association, execution may be levied on its property within the State and "a personal judgment can be rendered against a partner who is personally served within the State . . ."⁹

Plural Defendants. As judgment liability is joint and several, a judgment creditor should issue execution against all defendants but he may levy on the goods of one although another defendant has goods liable to execution, so that when there is a judgment against plural defendants the plaintiff may levy on the goods of a surviving defendant, without being required to revive the judgment against the personal representative of the deceased defendant.¹⁰

Plural Executions and Sci Fas. After a *scire facias* is sued out on a judgment, the plaintiff cannot have execution on the original judgment.¹¹ Provision is made for the issuance of more than one execution or attachment on a recorded judgment of a justice of the peace by Art. 26, Sec. 21, of the Code.

Recorded Judgment. Execution or attachment may issue out of the People's Court on any of its judgments, whether or not the same have been recorded.¹² By virtue of Chapter 693 of the Acts of 1951,¹³ and Chapter 409 of the Acts of

⁵ First Nat. Bank v. Equitable Soc., 157 Md. 249, 145 A. 779 (1929).

⁶ Jones v. Jones, 1 Bland. 443 (1828).

⁷ RESTATEMENT, JUDGMENTS (1942), Sec. 24c.

⁸ Code, Art. 23, Sec. 134; *op. cit.*, *ibid.*, Sec. 24.

⁹ *Op. cit.*, *ibid.*, Sec. 24e.

¹⁰ First Nat. Bank v. Equitable Soc., *supra*, n. 5.

¹¹ Wright v. Ryland, 92 Md. 645, 48 A. 163 (1901).

¹² Code, Art. 52, Sec. 52.

¹³ *Ibid.*, Sec. 53, as amended by Md. Laws 1953, Ch. 409, *infra*, n. 14.

1953,¹⁴ all enforcement of judgments of the People's Court, including execution and attachment, not recorded in the Superior Court of Baltimore City prior to January 1, 1954, shall be in the People's Court of Baltimore City.

A. *Misnomer Of Defendant*

When judgment is rendered against a person under a misnomer, the real defendant having been served with process, execution may be issued out in the erroneous name and levied upon the property of the real defendant.¹⁵ As it is now a court of record, a judgment of the People's Court, once given, cannot be corrected or amended except during the thirty-day period mentioned in Chapter 121 of the Acts of 1945 and Chapter 210 of the Acts of 1949.¹⁶ If the name of the judgment debtor is garbled or misspelt and the plaintiff desires process to issue out of the People's Court to enforce the judgment, the practice is:

“Order For Execution: Please issue an execution on the judgment in this case and levy upon the goods and chattels of (here insert the true name) defendant, who is named in the judgment as (here insert the name as in the judgment) (and continue as in the usual order for *Fi Fa*).”

“Writ: Whereas on before a Judge of the People's Court of Baltimore, a certain by the judgment of the said judge, recovered against a certain (here insert name as in the judgment) the sum of dollars debt, with interest thereon until paid and dollars costs. And whereas the plaintiff has directed that execution be made on the goods and chattels of (herein insert the true name), representing that the said (here insert true name) is the same person as (here insert judgment name) against whom said judgment was rendered and (continue as in ordinary Writ of *Fi Fa*).”

B. *Appealed Judgment*

Upon a judgment from which an appeal has been taken, execution may be issued in the People's Court at any time

¹⁴ Md. Code Supp. (1954), Sec. 53.

¹⁵ First National Bank v. Jagers, 31 Md. 38 (1869).

¹⁶ Flack's Charter and P. L. L. of Baltimore City (1949), Sec. 449.

before judgment is rendered by the Baltimore City Court, unless such execution is stayed by the filing of an appeal bond. Upon judgment being rendered by the Appellate Court, the case being heard *de novo*, the judgment of the People's Court becomes merged in the judgment of the Appellate Court. Upon the judgment of the Baltimore City Court, execution can be issued by such court, but no execution can be issued in the People's Court, although the judgment of the court be an affirmance, since the action of the Appellate Court is not certified back, but judgment is rendered as in an original case. Should the appeal be dismissed, the judgment appealed from remains as though no appeal had been taken.¹⁷

II. THE ORDER

The order for execution must be in writing, signed by the plaintiff or his attorney. When the amount of the judgment is one hundred dollars or less, the attorney may be one in fact, and not necessarily an attorney-at-law.¹⁸ When the judgment is for more than one hundred dollars, the order for execution may be made by the plaintiff in proper person or by his attorney-at-law. In such instance it may not be made by an attorney in fact.¹⁹ The assignee of a judgment may issue an execution in his own name against the debtor.²⁰

Form: Please issue an execution on the judgment in this case and levy upon the goods, chattels, lands and tenements of the defendant, which are located at, said property being as follows:

(list property).

None of said chattels are subject to liens or reservations of title in other persons except as noted. Upon completing the levy, you are requested to permit the goods to remain where found at the risk of the plaintiff."

¹⁷ THOMAS, Sec. 113.

¹⁸ *Rehm v. Coal Co.*, 169 Md. 365, 181 A. 724 (1935).

¹⁹ Code, Art. 10, Sec. 1.

²⁰ *Ibid.*, Art. 8, Sec. 1.

Naturally, the inapplicable statements set out in the form are to be stricken out at the time the order is filed.

III. FORMS OF WRIT

"Fi Fa: To, Chief Constable of Baltimore City, *Greeting:*

Whereas on, in this court, the plaintiff recovered against the defendant a judgment in the amount of dollars and cents, for damages, with interest from date of judgment, and as well the sum of dollars and cents for plaintiff's costs and charges. And whereas said judgment has been duly recorded in the Index of Recorded Judgments of the People's Court of Baltimore City. Therefore you are hereby commanded, that of the goods and chattels, lands and tenements of the said defendant, being in your bailiwick, you cause to be made and levied the debt, costs and charges aforesaid and have you those sums before the People's Court of Baltimore City, on next, to render unto the said plaintiff the damages, costs and charges aforesaid. Hereof fail not at your peril and have you then and there this writ. Witness the undersigned judge of the People's Court of Baltimore City, this day of"

"Fi Fa on Scire Facias: Whereas, before a judge of the People's Court of Baltimore City on a certain (plaintiff) by a judgment in this court rendered, recovered against a certain (defendant), as well the sum of, a certain debt, as the sum of, for his costs and charges, by him, in his said suit in that behalf, laid out and expended, whereof the said is convict; and whereas, also, before me it was considered that the said by me was adjudged for his costs and charges, which he had sustained by the delay of the execution aforesaid, whereof the said is convict. Therefore you are commanded, that of the goods and chattels, lands and tenements of the said (Defendant) being in your bailiwick, you cause to be made the debt, costs and charges aforesaid, and have you those sums before me on the day of next, to render unto the said plaintiff, the debts,

costs and charges aforesaid. Hereof fail not at your peril; and have you then and there this writ."²¹

"Against Administrator: Whereas, before, a Judge of the People's Court of Baltimore City, (plaintiff), on, recovered against, administrator of, a judgment for dollars, owing by (decendent) to (plaintiff), at the time of his death, and dollars costs. Therefore, you are hereby commanded, that of the goods and chattels of the said (decendent), at the time of his death, remaining in the hands of said (administrator), you cause to be made the debt and costs aforesaid, and that you have those sums of money before me on, to render unto the said, for the debt and costs aforesaid, and that you have then and there this writ."²²

"Fi Fa On Condemnation. Chattels: Whereas, on, a writ of attachment issued out of the People's Court of Baltimore City directed to the Chief Constable of Baltimore City commanding him to attach the goods, chattels, rights and credits of, defendant, to satisfy unto the said, plaintiff, the sum of \$....., a debt alleged by the said plaintiff to be due and owing to him from the said defendant and the costs of the said attachment, according to the form of the Act of Assembly in such case made and provided; And whereas, the said Chief Constable did afterwards return the said writ, as he was thereby required and did certify that by virtue thereof he had attached certain goods and chattels, to wit: as by schedule thereof returned with said writ doth appear; and whereas on, by the judgment of this Court, the goods were condemned as of the proper goods and chattels of the said defendant, to satisfy the said plaintiff the debt and costs aforesaid, according to the Act of Assembly in such case made and provided; And whereas, on, the said plaintiff did give bond with security as directed to and for the use of the said defendant conditioned to make restitution of the said goods and chattels as aforesaid condemned, or the value thereof, etc., according

²¹ THOMAS, Sec. 111.

²² *Ibid.*, Sec. 108.

to the form of the Act of Assembly in such case made and provided. And whereas, this Court on, did award execution of *feri facias* to be had and made of the said goods and chattels, so as aforesaid condemned, towards satisfying unto the said plaintiff as well as the aforesaid sum of and the sum of \$ costs of said writ of condemnation, and additional cost hereon. You are, therefore, hereby commanded, that of the goods and chattels aforesaid, being in your bailiwick, you cause to be made and levied the debt, interest and costs aforesaid, and have you the money before me, on the day of next, to render to the said plaintiff the debt, interest and cost aforesaid. Hereof fail not, and have you then and there this writ."

"Credits: Whereas, on the day of, 19....., a writ of attachment issued out of the People's Court of Baltimore City directed to the Chief Constable of Baltimore City, commanding him to attach the goods, chattels, rights and credits of defendant to satisfy unto the said plaintiff, the sum of \$....., a debt alleged by the said plaintiff to be due and owing to him from the said defendant, and the costs of the said attachment, according to the form of the Act of Assembly in such case made and provided. And whereas, on, the said plaintiff had judgment of condemnation on the writ of attachment against a certain, as garnishee of the said (defendant) for as well the sum of \$..... being the sum attached in the hands of the said, by virtue of the said writ of attachment as of the goods, chattels and credits of the said defendant as the sum of dollars, which to the said plaintiff was adjudged for costs and charges in said suit. And whereas, on the said plaintiff did give bond with security as directed to and for the use of the said defendant, conditioned to make restitution of the said property and credits as aforesaid condemned, or the value thereof, etc., according to the form of Act of Assembly in such case made and provided. You are, therefore, commanded that of the goods and chattels of the said (garnishee), being in your bailiwick, you cause to be made and levied the debt, costs and charges aforesaid, and have you those sums before me on next to render unto the said plaintiff the debt,

costs and charges aforesaid. Hereof fail not, and have you then and there this writ."

"*Goods In Hands Of Garnishee*: Whereas on a writ of attachment issued out of this Court, directed to the Chief Constable of Baltimore City commanding him to attach the goods, chattels, rights and credits of the defendant to satisfy unto the said plaintiff the sum of \$....., a debt alleged by the said plaintiff to be due and owing to him from the said defendant and \$ costs of the said attachment, according to the form of the Act of Assembly in such case made and provided; and whereas the Chief Constable did afterwards return the said writ, as he was thereby required and did certify that he laid the same in the hands of, Garnishee; and whereas the said garnishee did afterward confess that it held assets of the defendant, consisting of certain goods and chattels, to wit, And whereas on by the judgment of this Court, the goods aforesaid were condemned as of the proper goods and chattels of the defendant, to satisfy a debt of \$..... then found to be due the plaintiff as well as the costs aforesaid, according to the Act of Assembly in such case made and provided. And whereas, more than six months and a day having elapsed since said judgment of condemnation, the said plaintiff on requested that execution on *feri facias* be had and made of the said goods, chattels, so condemned as aforesaid, towards satisfying unto the said plaintiff as well the aforesaid sum of \$..... and the sum of \$..... costs of said condemnation, and additional costs hereon. You are therefore commanded that of the goods and chattels aforesaid, being in your bailiwick, you cause to be made and levied the debt, interest and costs aforesaid, and have you the money before me on next, to render unto the said plaintiff the debt, interest and cost aforesaid. Hereof fail not and have you then and there this writ."

When Exemption Is Waived. When defendant has waived his right of exemption, the words *right to exemption waived* must be on the back of the writ.²³

²³ Code (1951), Art. 83, Sec. 14.

IV. EFFECT OF THE WRIT

Lien. The lien of an execution attaches from the time the writ is delivered to the sheriff;²⁴ and if part of his goods are secreted by the debtor and the return so shows, the lien is not discharged.²⁵

Joint Tenants. The lien of a recorded judgment against one of two joint tenants does not sever the joint tenancy, so that upon the death of a joint tenant, the entire interest in the property concerned is in the surviving co-tenant free of lien. A joint tenant may voluntarily sever the tenancy by granting or mortgaging his interest. The interest of a joint tenant may be sold in execution by the judgment creditor while the judgment debtor lives. By *obiter dicta*, the Court has suggested that a mere levy on the land under the judgment against one co-tenant, under which there is no destruction of the unity of possession, does not sever the co-tenancy.²⁶

Priority. As an execution creditor is not a purchaser for value²⁷ writs of *fi fa* against a single debtor, one being in the hands of the sheriff of Baltimore City and the other in the hands of a People's Court constable, have priority according to dates of levy. When two writs of *fi fa* against the same defendant are delivered to the constable on different days and no sale is actually made of defendant's goods, the first execution must have priority even though the seizure was first made under the second execution.²⁸ When a constable has several *fi fas* against the same goods, he may hold a single sale and that under either writ. As it is his duty to execute in the order in which writs are delivered to him, the proceeds of sale are to be distributed in the same order.²⁹ The holder of a junior lien has the right to apply to the court for distribution to him of any surplus

²⁴ 29 Charles II, Ch. 3, Sec. 16, 2 Alexander's Brit. St. (2d Ed., 1912), 512; *Furlong v. Edwards*, 3 Md. 99 (1852); *Prentiss Co. v. Whitman & Barnes Co.*, 88 Md. 240, 41 A. 49 (1898).

²⁵ *Selby v. Magruder*, 6 H. & J. 454 (1825).

²⁶ *Eder v. Rothamel*, 202 Md. 189, 95 A. 2d 860 (1953).

²⁷ *Lemp Brewing Co. v. Mantz*, 120 Md. 176, 87 A. 814 (1913).

²⁸ LATROBE, Sec. 366; 2 POM, Sec. 667.

²⁹ POM, *loc. cit.*, *ibid.*

after satisfaction of the execution by the holder of the senior lien.³⁰

Life Of The Writ. There is a practice to order *fi fa's* with instructions to leave the goods where found, at plaintiff's risk. Such action does not necessarily invalidate the writ.³¹ However, courts frown upon the use of the writ for purposes other than its enforcement. When issued to obtain security or hinder or delay other creditors of the defendant, the levy is void,³² therefore, the plaintiff in execution may not take out the same for the purpose of binding the defendant's property with no intent to make an immediate levy and sale and thus to convert an execution into a mortgage.³³

V. EXECUTION OF THE WRIT

Payment By Defendant. If the defendant desires to pay the entire judgment and costs, the constable shall accept the money and give the defendant a receipt therefor. A constable may not accept a part payment. A constable has no right to receive money due on a judgment unless he has an execution commanding him to make the same by levy.³⁴

If a defendant claims credits in excess of those allowed on the writ, he may on motion obtain a rule on the plaintiff to show cause why the credits claimed should not be allowed; and upon such rule execution may be stayed until a determination.³⁵

VI. THE LEVY

Constables may serve and levy executions issued by a Justice in the same manner as the Sheriff is authorized to do.³⁶ It is the duty of the constable to levy upon all of the goods of the defendant including those at the location given by the plaintiff and including goods that are subject to purchase money liens or mortgages and to make a schedule of them. He is required to make an actual seizure. However, only enough goods may be taken out of the

³⁰ Leonard v. Groome, Trustee, 47 Md. 499 (1878).

³¹ Horsey v. Knowles, 74 Md. 602, 607, 22 A. 1104 (1891).

³² First National Bank v. Corp. Comm., 161 Md. 508, 157 A. 748 (1932).

³³ Myers Co. v. Banking & Trust Co., 170 Md. 198, 183 A. 543 (1936).

³⁴ Akin v. Denny, 37 Md. 81 (1872).

³⁵ Gorsuch v. Thomas, 57 Md. 334 (1882).

³⁶ Code, Art. 20, Sec. 5.

judgment debtor's possession as are reasonably sufficient to satisfy the execution.³⁷ In the absence of instructions from the plaintiff the goods should not remain on defendant's premises longer than is reasonably necessary. The sale cannot take place on defendant's premises unless defendant expressly consents. It is the duty of the constable to place goods in a safe place with the shortest practicable delay.³⁸

When Levy May Be Made. A *fi fa* cannot be levied after the return day, although if a levy has been made before, property may be sold after the return day.³⁹ The writ can be executed on any day except Sunday on or before the return day and at any hour of the day or night.⁴⁰

How Levy May Be Made. The officer executing a writ of *fi fa* must have the property within his view and where he can control it or the attempted levy is void.⁴¹ While a forcible entry may make the constable liable as a trespasser, it does not vitiate his levy or the proceedings thereunder.⁴² The constable may resort to artifice to obtain admittance, and once within, may break open inner doors or chests,⁴³ and may take any necessary reasonable step to execute the writ.⁴⁴

Force. Generally, a sheriff may force entry into any enclosure except the judgment debtor's dwelling in order to levy execution on judgment and this rule applies to safe deposit boxes.⁴⁵

Dwellings. In executing a civil writ an officer may not break an outer door, or other outside protection to a dwelling house, or forcibly enter a dwelling, even after request for and refusal of admittance.⁴⁶ The rule is applicable to all civil process including replevin.⁴⁷

³⁷ *Infra*, XX, *To Defendant*, p. 233.

³⁸ 2 POE, Sec. 668.

³⁹ *Gaither v. Martin*, 3 Md. 146 (1852); *Busey, et al. v. Tuck, et al.*, 47 Md. 171 (1877).

⁴⁰ *Op. cit.*, *supra*, n. 38, Sec. 669.

⁴¹ *Horsev v. Knowles*, *supra*, n. 31.

⁴² *Op. cit.*, *supra*, n. 38, Sec. 671.

⁴³ THOMAS, Sec. 119.

⁴⁴ LATROBE, Sec. 359.

⁴⁵ *O'Connor v. McManus*, 71 N. D. 88, 299 N. W. 22 (1941).

⁴⁶ 2 FREEMAN, EXECUTIONS (3rd Ed., 1900), Sec. 256.

⁴⁷ Note, 57 A. L. R. 210.

Buildings Other Than Dwellings. While the question has not been decided in Maryland, it is the general rule that an officer with a writ of execution may break into a garage to seize an automobile, when the garage is on the grounds of but not connected with the dwelling house⁴⁸ and the rule against forcing an entry for the purpose of civil arrest or execution extends only to dwellings and does not relate to barns or outhouses not connected with the dwelling.⁴⁹

VII. EXECUTIONS OR FI FAS ON REAL ESTATE

The statutes bearing upon this matter are contained in Article 83 of the Maryland Code (1951), as follows:

“Sec. 1. Any sheriff or other officer to whom any execution may be directed may seize and expose to sale any legal or equitable estate or interest which the defendant named in such writ may have or hold in any lands, tenements or hereditaments.”

“Sec. 2. Any person who shall purchase any equitable estate or interest in any lands, tenements, or hereditaments which may be sold under Section 1 shall be entitled, upon payment of the purchase money, to an assignment or conveyance of such equitable interest, to be made by the sheriff or other officer making such sale, and shall in consequence of such purchase and assignment or conveyance stand as to title and be entitled to such remedy against all persons and in all cases as the person whose title he may purchase.”

“Sec. 3. The legal notice required to be given by any sheriff, coroner or elisor of the sale of any goods or chattels, under any execution, shall be by advertisement set up at least ten days before the sale at the court house door of the county or city and at least two other public places most convenient to such goods and chattels; and in case of lands or tenements, notice of the sale shall be given by advertisement set up at least twenty days before the day of sale at the court house door of the county or city and also published for the same period of time previous to the day of sale in one newspaper, if any, published in said county or city.

⁴⁸ *Silverman v. Stein*, 242 Mich. 64, 217 N. W. 785, 57 A. L. R. 209 (1928).

⁴⁹ 57 A. L. R. 220, See also: 21 AM. JUR., EXECUTIONS, SECS. 130-136.

Notice of a constable's sale of goods and chattels under any execution shall be given by advertisement set up at least ten days before the sale at two public places at least most convenient to such goods and chattels."

"Sec. 5. Any sheriff or other officer who shall, by virtue of any legal process, give notice by publication in any newspaper of the sale of any lands or tenements, as required by law, may recover the costs of such publication from the defendant in such process as other legal costs, and if the defendant be unable to pay the same, the sheriff or other officer, after having paid the same, may recover the amounts so paid from the plaintiff as other debts are collected."⁶⁰

The plaintiff's order should be in substantially the following form:

"Please issue a *fi fa* on the judgment in this case and levy upon the property in Baltimore City, known as 9900 N. Charles Street and described as follows: (here insert metes and bounds description and Land Record reference)."

If the real estate so ordered sold in execution is subject to prior liens, such as a mortgage or judgment, it is most desirable that reference be made in the order for *fi fa* to the prior liens. By law, such reference is not absolutely necessary. However, question may arise later on as to the adequacy of the purchase price if these precautions are not followed. The real estate subject to such sale extends to the estate of the judgment debtor in lands, etc., for terms longer than five years. If the real estate seized and levied upon is subject to a prior mortgage or lien, it is not necessary that the prior lienee be made a party to the proceedings. Based upon the judgment and the plaintiff's order for execution or *fi fa* against real estate, a writ of execution, which gives authority to the constable to levy and seize, is issued in the following form:

⁶⁰ For the benefit of the lawyer who desires to examine the cases and authorities, the following citations are given: 2 PoE, Secs. 656-665; Preissman v. Crockett, 194 Md. 51, 69 A. 2d 797 (1949). Detailed citations of earlier cases are not given, as all applicable authorities may be found in PoE and the Preissman case.

“To, Chief Constable of Baltimore City, *Greeting*:

Whereas on, in this court, the plaintiff recovered against the defendant, a judgment in the amount of dollars, and cents, for damages, with interest from date of judgment, and as well the sum of dollars and cents for plaintiff’s costs and charges. And whereas said judgment has been duly recorded in the Index of Recorded Judgments of the People’s Court of Baltimore City. Therefore, you are hereby commanded that of the goods and chattels, lands and tenements of the said defendant being in your bailiwick, you cause to be made and levied the debt, costs and charges aforesaid and have you those sums before the People’s Court of Baltimore City, to be held in People’s Court Building, Fayette and Gay Streets, Baltimore, Maryland, on next, to render unto the said plaintiff the damages, costs and charges aforesaid. Hereof fail not at your peril and have you then and there this writ. Witness the undersigned, Judge of the People’s Court of Baltimore City, this day of”

Upon receipt of the writ the constable must go upon the land and make his levy, notifying the defendant (if in possession) or the tenant in possession of the purpose of the constable’s entry. The levy must be made before the return day of the writ; if not made on or before the return day of the writ, the levy and all subsequent proceedings under the *fi fa* are void. The writ may be executed on any day except Sunday, at any hour of the day or night. An actual entry and levy upon the land must be made. This can be done by an entry upon the land and a declaration by the constable, as a part of the act, that the entry is made for the purpose of levying the execution. The constable may not evict or dispossess any person on the land.

It is absolutely indispensable that the *Levy Be Made On Or Before The Return Day Of The Writ*. As regards seizure, only such seizure is necessary as the character of the property permits. However, this can be done only by an entry upon the land and a declaration by the constable, as part of the act, that the entry is made for the purpose of

levying the execution, accompanied by a record of his proceedings. It is not necessary, for example, that to constitute a valid levy on a dwelling house, the constable go through the house from cellar to garret.

At the time of levy the constable will prepare his schedule of the property levied upon. A copy of the schedule is to be left with the defendant. Therefore, there is to be a duplicate of the schedule for each defendant. As a suggestion, if the property levied upon is real estate, it would be wise to have the schedule typed in advance, so at the time of levy only a few details need be filled in.

The form of schedule is as follows:

“Schedule of the several goods and chattels, lands and tenements levied upon and seized on, 19....., by virtue of a Writ of *Fieri Facias* directed to, Chief Constable of Baltimore City.

(Here insert description and land record reference.)

....., Chief Constable.

Received of, Chief Constable, the goods and chattels mentioned in this schedule, which I hold as custodian thereof

NOTICE TO DEFENDANT. As set out above, your right, title and interest in the chattels or lands above scheduled have been levied upon and seized. This levy and seizure is based upon an execution on a judgment against you in favor of the plaintiff. The amount of the judgment and court costs are set out in the writ. Also owing by you are the court costs. The next step will be the sale of the property levied upon at public auction. To stop these proceedings, the judgment and costs must be paid without delay. **CAUTION.** Payment must be made only to the Chief Constable of Baltimore City. If any third person has any interest, lien or claim in the goods or lands listed on this schedule, it is recommended that you notify such person immediately. By this levy the goods or lands are subjected to a judicial lien and your right to sell them is suspended. Unless waived, certain exemptions may be available to you, which may be lost if you fail to assert them. This statement is not exhaustive. It is suggested you seek independent legal advice.”

There is no requirement of law that the defendant or defendants be personally served with the writ of *fi fa* and with a copy of the schedule. If either is on the land, then personal service should be made. If the defendant is not on the land, then the constable should make known to the occupant the purpose of his visit and leave with the occupant a copy of the writ and a copy of the schedule. The return of the constable should clearly show his actions at the time of levy and seizure. If the defendant is in possession the return should show:

“Seized, levied the within described property as per schedule herewith returned and defendant notified.”

If the defendant is not in possession, the return should show:

“Seized and levied the within described property as per schedule herewith returned. Defendant *non est*. Occupant of the property, to wit, notified.”

The constable may not find anyone in possession or occupancy of the land; or the person in occupancy may be a minor child, or a servant. In such case the levy and seizure and a copy of the schedule should be left upon the premises. In such case, the return of the constable should be in the following form:

“Seized and levied the within described property as per schedule herewith returned. There being no defendant on the premises to receive notice, a copy of the writ and schedule was left on the premises.”

If the constable is unable to gain admission into the house, then a copy of the writ and a copy of the schedule will be attached to the front door of the premises. In such case the return is:

“Unable to gain entrance to premises. Seized and levied the within described property as per schedule. Copy of writ and schedule affixed to front door of premises.”

While the levy *must* be made on or before the return day, an irregularity in the making of the return, such as later than the return day, does not invalidate the sale. There is no law requiring an appraisal of the property levied upon. As appraisal is not required by law and it appearing to be an empty and meaningless act, there is no appraisal of real estate involved in *fi fas* or executions issued out of the People's Court.

While not required by law, it is an existing practice that the defendant be specifically advised of the pending sale of his property by letter. Consequently, in all cases where *fi fa* or execution against real estate is pending and the sale is advertised, a letter is sent by registered mail to the defendant or defendants in the following form:

"Mr., Defendant. Dear Sir: For your information I enclose copy of advertisement now appearing in the DAILY RECORD in connection with the sale of your property No., in Baltimore City, Maryland. If it is your intention to settle this matter before the date of sale, please communicate immediately with this office. I direct your attention to the fact that you have certain statutory rights as regards the advertisement. Exercise of these rights can be made only by a personal visit by you to my office. Of great importance is the fact that all of your rights in the property in question may be extinguished if the matter goes to sale. Consequently, I urge you to take whatever steps that may be available to you., Chief Constable."

Notice Of Sale. Before making sale the constable shall give notice of the time and place of sale. The notice of sale shall be by advertisement set up at least twenty days before the day of sale at the court house door and also published for the same period previous to the day of sale in at least one newspaper. The form of such notice is:

"Under and by virtue of a writ of *feri facias* issued out of the People's Court of Baltimore City, at the suit of plaintiff vs. defendant, Case No., I have seized and taken in execution all of the right, title and interest and estate of the said

defendants in and to the lot of ground and improvements and described as follows: The improvements are known as Improved by a story dwelling. And I hereby give notice that I will sell on the premises (here insert address) on at o'clock M., all of the right, title, interest and estate of the said defendants, in and to the above-described property, seized as aforesaid. Terms: Cash."

Place Of Sale. This is within the discretion of the constable. Ordinarily the sale should be made on the premises or at the court house door.

Mode Of Sale. The sale shall be made by an auctioneer, publicly, at the time and place mentioned in the notice and for the highest cash price. Naturally, if the *fi fa* goes to sale, the property should be sold for the highest price obtainable. As a sale on *fi fa* is a judicial sale, mere inadequacy of price standing by itself is not enough to justify the setting aside of the sale, because courts maintain with jealous vigilance the titles of purchasers under judicial sales and go very far in favoring and supporting them.

VIII. PROPERTY WHICH MAY BE LEVIED UPON

Only tangible property in the possession of the defendant may be taken in execution. Money in the actual possession and ownership (not on the person) of the defendant may be taken in execution. A chose in action is not subject to execution.⁵¹

Joint property in the possession of one of the owners may be seized and sold in a *fi fa* against him only and the purchaser's right is complete against him against whom the execution issued.⁵²

The interest of a joint tenant may be sold in execution by a judgment creditor during the life of the debtor joint tenant.⁵³

⁵¹ *Harding v. Stevenson*, 6 H. & J. 264 (1824); *LATROBE*, Sec. 364; *POE*, *op. cit.*, *ibid.*, Sec. 640.

⁵² *M'Elderry v. Flannagan*, 1 H. & G. 308 (1827).

⁵³ Code, Art. 26, Sec. 20 and Art. 50, Sec. 13; *Eder v. Rothamel*, 202 Md. 189, 95 A. 2d 860 (1953).

IX. PROPERTY WHICH MAY NOT BE
LEVIED UPON

Property on the person of the defendant may not be seized in execution, so that an article of jewelry worn by a judgment debtor may not be forcibly taken from his person, even though it may be so worn in order to escape seizure in execution.⁵⁴ Goods in *custodia legis* may not be levied upon. There is a general principle that property in use is privileged and may not be distrained upon.⁵⁵ A distinction is possible between distress and execution. As distress is a landlord's remedy and not an action at law and greater privilege is given to an officer with a writ of execution, so it may be that one may not claim exemption from seizure in execution of a bag of money held in defendant's hand, although this is questionable.⁵⁶

The lien of a consignee or pawnee, who has no legal title to goods, is not subject to execution.⁵⁷ Similarly pawned goods cannot be taken in execution while in pawn, for a debt of the pledgor.⁵⁸

Equitable Interests. Personalty in which the judgment debtor has only an equitable interest cannot lawfully be seized and sold in execution;⁵⁹ similarly with goods as to which he is bailee or consignee;⁶⁰ thus, personalty or chattels which are mortgaged by the execution debtor cannot be seized and sold in execution.⁶¹ In the instance of a conditional sale contract or chattel mortgage executed in Maryland, the effect of Sections 53 and 54 of Article 21 of the Code is that the mortgage must be recorded within twenty days from its date. Section 56 of Article 21 provides that mortgages of personal property shall be valid and take effect, except as between the parties thereto, only from the time of recording. As regards a defectively executed or recorded chattel lien the relative rights of the holder of

⁵⁴ ALDERSON, JUDICIAL WRITS AND PROCESS (1895), Sec. 176.

⁵⁵ 21 AM. JUR., EXECUTIONS, Sec. 130.

⁵⁶ *Ibid.*

⁵⁷ *Harding v. Stevenson*, 6 H. & J. 264 (1824).

⁵⁸ LATROBE, Sec. 365; *Dowler v. Cushwa*, 27 Md. 354 (1867).

⁵⁹ *Martin v. Jewell*, 37 Md. 530 (1873).

⁶⁰ 2 POE, Sec. 639.

⁶¹ *Op. cit.*, *ibid.*, 630.

the lien and the execution creditor become somewhat involved. An unrecorded chattel mortgage is valid between the mortgagor and mortgagee.⁶² Also, a chattel mortgage defective in that it does not comply with Article 21, Sections 54-58 of the Code, is valid against prior existing unsecured creditors.⁶³ The provisions of Article 21, Sections 51-58 of the Code setting out the requirements of execution and recording of chattel mortgages of personal property are intended for the protection of purchasers, lienees and subsequent creditors without notice;⁶⁴ so that while an equitable mortgage or lien is not valid and enforceable against a bona fide purchaser or mortgagee for value without notice, it is enforceable against the mortgagor himself and also against parties who claim under him as volunteers, or without an equity superior to that of the creditor holding the lien.⁶⁵ The case of *Cramer v. Roderick*,⁶⁶ discusses the superior equity of a prior specific lien, created by a defective conveyance, over the general lien of a judgment. In the instance of a chattel subject to a lien under the law of another State, and brought into Maryland, the lien or claim of the mortgagee or conditional vendor is superior even to the claim of a bona fide purchaser for value.⁶⁷ The practice is to issue a *fi fa* and cause it to be levied; then upon application to a court of equity, the plaintiff will be permitted to redeem the encumbrance or be granted a decree of sale.⁶⁸ The issuing and levying of a *fi fa* on personal property covered by a mortgage secures for the execution creditor a priority or lien on the debtor's equitable interest, which lien dates from the time the execution was placed in the officer's hands.⁶⁹

⁶² *Fire Ins. Co. v. Merrick*, 171 Md. 476, 190 A. 335 (1937).

⁶³ *Tyler Co. v. O'Ferrall*, 153 Md. 353, 138 A. 249 (1927).

⁶⁴ *Roberts & Co. v. Robinson*, 141 Md. 37, 118 A. 198 (1922).

⁶⁵ *Goldsborough v. Tinsley*, 138 Md. 411, 113 A. 861 (1921).

⁶⁶ 128 Md. 422, 98 A. 42 (1916).

⁶⁷ *RESTATEMENT, CONFLICT OF LAWS* (1934), Secs. 265-278; *Third National Bank v. Handy Janey*, Daily Record, Jan. 17, 1951, noted, 13 Md. L. Rev. 154 (1953).

⁶⁸ *Harris, et al. v. Alcook*, 10 G. & J. 226 (1838); *Rose v. Bevan*, 10 Md. 466 (1857); *Myers v. Amey*, 21 Md. 302 (1864); *Green v. Western Nat. Bank*, 86 Md. 279, 38 A. 131 (1897).

⁶⁹ *Furlong v. Edwards*, 3 Md. 99 (1852).

X. SCHEDULE OF PROPERTY LEVIED UPON

To vest valid title in the purchaser at an execution sale, the officer must first effect an actual seizure and the return must show with reasonable clearness the extent and subject of the levy.⁷⁰ At the time of the levy the constable lists or schedules the property taken in execution. This listing should give identifying characteristics, as for example, the serial number and make of a cash register. Likewise, the date and time of levy should be noted on the writ. A copy of the schedule, together with a copy of the writ, should be left with the defendant. Whether or not in writing, if defendant claims an exemption, a notation to this effect should be made by the constable on the writ. If the property levied upon consists of chattels, subject to mortgage or other lien, the form of return is:

“Levied as per schedule. Defendant alleges the existence of a chattel mortgage on the goods so scheduled.”

Appraisement. Constables shall not summon appraisers in levying under a writ of *fi fa*.⁷¹ In the People's Court, the valuation of property selected by a defendant for exemption from execution shall be made by the constable subject to review and revision by the People's Court.⁷²

XI. PROCEEDINGS AFTER THE LEVY

If, after the levy has been made and the goods taken into his possession by the constable, they should be lost or destroyed, no further seizure for the amount covered by the levy already completed can be made. The question of who bears the loss is a matter between the constable and the execution creditor.⁷³

The constable is authorized to move the goods to a place of safety. Unless plaintiff directs that goods be left where found and accepts responsibility in writing, the constable is personally responsible for their loss or damage, if the

⁷⁰ Wright v. Orrell, 19 Md. 151 (1862).

⁷¹ Code, Art. 20, Sec. 5.

⁷² Md. Laws (1941), Ch. 387.

⁷³ 2 Pog, Sec. 668.

loss of the goods arises from their being left where found. The cost of moving and storage are chargeable as a part of the costs.⁷⁴ The constable may require that plaintiff advance these charges.

When his goods are left in the defendant's possession he may not sell them nor are they liable to seizure under a subsequent writ; as for all purposes and against all persons the first writ is as binding as though the officer has personal possession.⁷⁵ If the execution debtor removes the goods from the limits of Baltimore City without written consent, or if he performs any other acts to fraudulently defeat the lien, then he is guilty of a misdemeanor.⁷⁶

The constable cannot keep the goods himself and pay the plaintiff the debt; nor can he deliver the goods to the plaintiff in satisfaction of the debt. The goods must be sold, although the plaintiff may buy them at their real value.⁷⁷

The constable cannot retain money of a plaintiff made on an execution because he has another execution against the same plaintiff, in which he appears in the character of a defendant. In such case the court can order the constable to retain for the use of the second plaintiff money which the constable received in another execution at the suit of the first plaintiff.⁷⁸

Poundage. The sheriff shall have as poundage, fees for levying an execution, computed upon the value of the personal property or the amount of the debt, whichever is less, at the rate of seven and a half per cent on the first Twenty-six Dollars and Sixty-seven Cents, and at the rate of three per cent on the residue; but if execution be laid on any interest in lands only one-half of the poundage fees shall be charged; and if laid upon lands and the lands be not sold by the sheriff he shall charge only one-fourth of the poundage fees aforesaid; and if upon personal property and the same be not sold by the sheriff he shall charge three per cent as mentioned above.⁷⁹

⁷⁴ Charter and P. L. L. of Baltimore City (Flack, 1949), Sec. 446.

⁷⁵ First Nat. Bank. v. Corp. Comm., 161 Md. 508, 157 A. 748 (1932).

⁷⁶ Code, Art. 27, Sec. 262.

⁷⁷ LATROBE, Sec. 381.

⁷⁸ *Op. cit.*, *ibid.*, Sec. 365.

⁷⁹ Code, Art. 36, Sec. 25.

XII. VENDITIONI EXPONAS

If the constable, after seizing the goods, has not time to give the required notice before the return day of the writ, or if because of lack of buyers he is unable to sell the property he makes the return:

"The following goods, to wit: have been seized and remain in my hands to be sold."

A writ of *venditioni exponas* is then issued.⁸⁰

A *venditioni exponas* confers no new power, but simply directs the carrying of the *feri facias* into effect and the return to the *vedi* becomes a part of the return to the *fi fa*.⁸¹ The writ should simply recite the former writ and return and command the sale of the property seized and remaining unsold.⁸²

"Writ: Whereas, before, a judge of the People's Court of Baltimore City, recovered judgment on against for the sum of dollars debt, and dollars costs and charges; and whereas, on command was given to you to make said sums of the goods and chattels of the said in your bailiwick, and have the same before me on on which day you made return that you had, in accordance with said command, taken the following property of the said, to wit:, which goods and chattels remained in your hands unsold. Therefore, you are hereby commanded to sell said goods and have the money arising from the sale thereof before me on, to render unto me this writ, and make known to me how you shall execute the same."

XIII. THE SALE

Lands. The People's Court became authorized to make sale of real estate in execution by Chapter 693 of the Acts of 1951.⁸³ A late case dealing with the sale of land under *fi fa* is *Preissman v. Crockett*,⁸⁴ which gives an analysis of the procedure.

⁸⁰ THOMAS, 125.

⁸¹ Hall v. Clagett, 63 Md. 57 (1885).

⁸² *Ibid.*

⁸³ Code, Art. 52, Sec. 53(g).

⁸⁴ 194 Md. 51, 69 A. 2d 797 (1949).

Chattels. The sale should be had where the goods are stored⁸⁵ and opportunity must be afforded to inspect the goods.⁸⁶

No bond is required by law prior to the issuance of a *fi fa*. When an officer is confronted with a claim of ownership by a third person to property of a defendant levied upon, he may demand a bond of indemnity before proceeding to sell. However, there must be substantial reason for demanding the bond and the officer must act in good faith in demanding it. An arbitrary or capricious refusal to execute the writ unless indemnified is no justification for not executing it.⁸⁷

However, in a *fi fa* on judgment of condemnation, there may be a different situation. Article 52, Section 60 of the Code provides:

“The plaintiff in an attachment, before execution on any judgment of condemnation shall be issued, shall give bond to the defendant in such penalty as the Justice of the Peace shall direct, not less than double the amount of the judgment of condemnation, with good and sufficient security to be approved by the said Justice and conditioned to make restitution of the property so condemned, or the value thereof, and to pay such damages as may be awarded to the defendant, if the defendant shall at any time within six months and a day from the date of issuing the attachment appear, either in person or by his agent, before the Justice issuing such attachment, or before some other Justice of the same county and make it appear that the plaintiff has satisfied the said debt, or show that it ought not to be paid, or that the said defendant was not indebted to the plaintiff at the time of issuing said attachment.”

Under Maryland practice, property is not sold under the writ of attachment. After judgment of condemnation a writ of *fi fa* may be issued for the purpose of selling the property so condemned.⁸⁸ Therefore, even though a bond may have been filed in the attachment case, the plaintiff

⁸⁵ *Horsley v. Knowles*, 74 Md. 602, 22 A. 1104 (1891).

⁸⁶ 2 POE, Sec. 674.

⁸⁷ *Robey v. State*, use of Mallery, 94 Md. 61, 50 A. 411 (1901).

⁸⁸ *DeBearn v. Winans*, 119 Md. 390, 398, 86 A. 1044 (1913).

must file a bond before he may have a *fi fa* on condemnation for sale of goods condemned; provided, of course, this second bond (for *fi fa* on condemnation) is necessary only if the sale takes place within the period of six months and a day from the date the writ of attachment issued.⁸⁹

“Bond Of Indemnity To Constable: Know all men by these presents: That we hereinafter called ‘Obligors’ are jointly and severally held and firmly bound unto, Chief Constable of the People’s Court of Baltimore City, in the full and just sum of current money, to be paid to the said, or his attorneys, executors, administrators or assigns, to which payment well and truly to be made and done, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this day of, in the year of our Lord, one thousand nine hundred and Whereas, a certain writ of issued out of the People’s Court of Baltimore City, returnable on next, at the suit of Plaintiff against Defendant and directed to the said, Chief Constable, commanding him to levy on the goods and chattels of the said Defendant. And whereas, the said plaintiff has applied to and directed the said, Chief Constable, to seize and take under and by virtue of the said writ, certain Goods, Wares, Chattels and property of which said Defendant may not be the rightful owner, and the said, Chief Constable, has consented to do so upon being INDEMNIFIED for so doing. Now, the condition of the above written obligation is such, that if the above bounden obligors jointly and severally, their heirs, executors and administrators, do and shall from time to time, and at all times hereafter, well and sufficiently save harmless, and keep indemnified, the said, Chief Constable of the People’s Court of Baltimore City as aforesaid, and his deputy or deputies, and each and every one of them, of, from and against all losses, costs, charges, damages and expenses, which he or they shall or may sustain, suffer, bear, pay or expend, or be put to or unto, for or by reason or means of seizing, or selling the said goods

⁸⁹ See also 2 POK, Sec. 551.

and chattels and property, so seized or taken in execution as aforesaid, or payment unto the said Plaintiff the money arising from the sale thereof, and also of, from and against all action and actions, suit and suits, or any proceeding or proceedings at law or in equity, which now are or shall or may at any time or times hereafter, be brought, commenced, or prosecuted, rightfully or wrongfully against the said Chief Constable of the People's Court of Baltimore City as aforesaid, or his deputy or deputies for or on account, or by reason or by means of the seizing or selling the said goods, chattels and property, by virtue of the said writ, or paying unto the said Plaintiff, the money arising from the seizing or sale thereof, as aforesaid, or from, for or by reason or by means of any other act, matter, cause or thing whatsoever relating thereto or to the execution of the said writ, then the above written obligation is to be void, otherwise to stand and remain in full force, vigor and effect."

XIV. NOTICE OF SALE

The legal notice required of an execution sale, to be given by the constable is by advertisement set up at least ten days before the sale at two or more public places most convenient to the goods and chattels.⁹⁰ It is a presumption that the sheriff has performed his duties, so an attack on a sheriff's sale must affirmatively show that no notice of sale was given.⁹¹

"*Form:* By virtue of a writ of fieri facias, issued by Judge of the People's Court of Baltimore City, at the suit of against the goods and chattels of to me directed, I have seized and taken in execution all of the estate, right, title, interest, property, claim and demand at law and equity of the said in and to And I hereby give notice that on the day of at o'clock M., at in the City of Baltimore, I will offer for sale the said property so seized and taken in execution at Public Auction, to the highest bidder for cash."

⁹⁰ Code, Art. 83, Sec. 3.

⁹¹ Miller v. Wilson, 32 Md. 297 (1870).

XV. THE RETURN

If the goods are found by the constable and sold for a sufficient sum to pay the plaintiff's claim the return is: "\$..... made and plaintiff satisfied". Attached to the writ must be the schedule which designates the property seized and sold, as this sets out the specific items acquired by the purchaser at the execution sale.⁹²

If the amount realized is insufficient to satisfy the debt, the return is:

"\$..... made and paid plaintiff (or brought into Court) and defendant has no other goods in my bailiwick of which I can cause to be made the balance of the within claim."

If the constable is unable to find any property, the return is *nulla bona*.

When part of the goods are sold, the return is:

"Levied as per schedule; made and paid plaintiff \$....., remainder on hand for want of buyers."⁹³

When the residue is sold—

"Made and satisfied plaintiff."⁹⁴

An endorsement on the writ such as "*Countermanded*" or "*Paid*" is recognized as a part of the return.⁹⁵

Failure To Make Return. If a constable fails to make due return of an execution, a future day not exceeding fourteen days may be allowed him. If the constable then fails to make return the Justice may enter judgment against the constable and his securities for the amount of the debt and costs.⁹⁶

Death Of Constable. If a constable shall die without having made levy under an execution directed to him, the writ shall be returned, and another writ of *fi fa* issued on the judgment.⁹⁷ If a constable shall die after levy but

⁹² LATROBE, Sec. 398.

⁹³ *Op. cit.*, *ibid.*, Sec. 408.

⁹⁴ *Ibid.*, Sec. 411.

⁹⁵ Parker v. Sedwick, 5 Md. 281 (1853).

⁹⁶ Code, Art. 20, Sec. 7.

⁹⁷ *Ibid.*, Sec. 11.

before sale, the plaintiff may have a new writ of *fi fa* or *venditioni exponas*, as the case may require.⁹⁸

In all collateral inquiries the return of the officer is taken as correct.⁹⁹

XVI. RIGHTS OF OWNER OF SEIZED GOODS

The goods of a stranger taken in execution out of the possession of the defendant by the sheriff cannot be replevied; the remedy of the owner being trespass or trover. After the goods are sold they are no longer in *custodia legis* and replevin may be brought against the purchaser.¹⁰⁰

Husband And Wife. When possession of property is in the husband, in order that the wife's claim to defeat rights of husband's execution creditor may prevail, she must show by clear proof a *bona fide* right and title to the property.¹⁰¹ However, in the absence of estoppel, a wife may show by parole that mutual mistake occurred in the drafting of a deed, and quash an execution on her husband's purported interest in property ostensibly conveyed to him; because while reformation of a deed can ordinarily only be accomplished in equity, attachment and execution proceedings are in a class by themselves where the real ownership is in issue and equitable defenses are available.¹⁰²

While possession of property by the defendant at the time it is levied on in execution is not conclusive evidence of ownership, such possession is some evidence of title and casts upon the claimant the burden of showing a superior right.¹⁰³

If a third person permits his goods to become intermingled with those of an execution debtor so as to prevent separation or identification and fails to point out his goods to the constable, the levy and seizure may be upon all of the goods.¹⁰⁴

⁹⁸ *Ibid.*, Sec. 12.

⁹⁹ *Keedy v. Newcomer*, 1 Md. 241 (1851).

¹⁰⁰ *Cromwell, et al. v. Owings*, 7 H. & J. 55 (1826).

¹⁰¹ *Erdman v. Rosenthal*, 60 Md. 312 (1883).

¹⁰² *Kolker v. Gorn*, 193 Md. 391, 67 A. 2d 258 (1949).

¹⁰³ *Guyer v. Snyder*, 104 A. 116, 133 Md. 19 (1918).

¹⁰⁴ *Chappell v. Cox*, 18 Md. 513 (1862).

XVII. RIGHTS OF PURCHASER AT SALE

While the rights of a judgment creditor are governed by the real, and not the apparent interest of the judgment defendant, a purchaser for value at an execution sale can resist an attempt by parole to vary the provisions of a deed of the property so sold.¹⁰⁵

XVIII. CLAIMANTS

"When an execution on a judgment of a Justice of the Peace is levied upon property claimed by any person other than the party against whom it issued, such person or his agent or attorney may apply to a Justice of the Peace of the county or city in which the levy is for a warrant to a constable, requiring him to summon both the judgment creditor and debtor to show cause why the property so levied upon should not be discharged from the levy, and said warrant shall be returnable in not less than five days; and if an earlier day shall have been fixed for the sale of the property so levied upon, the Justice shall make an order on the warrant requiring a postponement of the same until after the return day; and upon hearing the parties, or such of them as may attend after being summoned, he shall order the property to be delivered to the claimants, or the person from whom it was taken, or shall dismiss the summons, as may seem most proper, and may give such judgment for costs as shall seem just, subject, however, to the right of appeal as now provided by law; and upon appeal from the judgment of a Justice awarding the property to the claimant, the Justice shall require security of the claimant for the safe keeping and return of the property to await the determination of the appeal."¹⁰⁶

"Upon appeal from an order or judgment under (the preceding) section, the court hearing such appeal shall give such judgment respecting the property, the expense of keeping it, and any injury done it as may appear to be most equitable to all parties."¹⁰⁷

"*Form Of Claim:* (Claimant) claims the following goods and chattels, to wit: _____, seized

¹⁰⁵ Kolker v. Gorn, *supra*, n. 102.

¹⁰⁶ Code, Art. 52, Sec. 87.

¹⁰⁷ *Ibid.*, Sec. 88.

by, constable, on an execution upon a judgment rendered in this Court against, in favor of one"

"*Summons*: To, Chief Constable. You are required to summon (here insert names of plaintiff and defendant to judgment) to show cause why the following goods and chattels, to wit:, levied on by, constable, upon a judgment in favor of said, against said, should not be discharged, and make return hereof on"

XIX. IRREGULAR EXECUTIONS

The defendant in execution has the right to appear on the return day and move to quash the writ or set aside the sale for irregularity,¹⁰⁸ but a motion to quash an execution may not be used to review irregularities in the judgment on which the execution issued unless the judgment be utterly void;¹⁰⁹ thus on a motion to quash execution of a judgment of condemnation by a justice no questions will be considered that could have been presented on appeal.¹¹⁰

While the case of *Preissman v. Crockett*,¹¹¹ deals with the regularity of a sale of real estate on execution, the irregularities discussed by the Court of Appeals bear upon sales of chattels under *fi fa*.

A *fi fa* for more than is due on a judgment is not *per se* void; if it is issued with a fraudulent intent it is void, but if it is issued *bona fide* it is available to the plaintiff for the amount remaining due on the judgment.¹¹² However, a perversion of legal process, as for example, levying execution for double the amount of a debt is an actionable tort.¹¹³

XX. LIABILITY OF CONSTABLE

Constables shall execute process according to the command therein contained¹¹⁴ and for failure to make return

¹⁰⁸ *Eakle v. Smith*, 24 Md. 339 (1865).

¹⁰⁹ *Schultze v. State*, 43 Md. 295 (1875).

¹¹⁰ *Bank v. Shriver*, 68 Md. 435, 13 A. 332 (1888).

¹¹¹ 194 Md. 51, 69 A. 2d 797 (1949).

¹¹² *Harris, et al. v. Alcock*, 10 G. & J. 226 (1838).

¹¹³ *Heinekamp v. Beaty*, 74 Md. 388, 22 A. 67 (1891).

¹¹⁴ Code, Art. 20, Sec. 3.

thereof according to the command are subject to fine.¹¹⁵ If the officer performs an act which neither the writ nor his office authorizes he thereby becomes liable as a tortfeasor.¹¹⁶

To Plaintiff. When a sheriff or other officer is prevented by injunction from selling personal property taken in execution, he shall deliver back the property to the party from whom it was taken and shall not be answerable to the plaintiff at law on account of the same.¹¹⁷

To Defendant. A sheriff must so execute writs as to do as little damage as possible to debtors. When it is important to the debtor's business to have the benefit of his exemptions, the officer must act promptly in setting them off to him. In levying, an officer has no right to seize and hold all of a debtor's property if less will suffice to secure the creditor. The officer should be a minister of justice and not of oppression. Thus when execution is upon a growing crop of peaches, if the officer neither has the fruit picked himself nor permits the defendant to pick them, the officer and his bond are liable for the loss.¹¹⁸

To Third Parties. Executions must be against goods and chattels of the defendant; the constable is bound, at his peril, to take only goods of the defendant;¹¹⁹ so that if an officer takes the goods of one person upon a *fi fa* directed against another, an action in trespass may be maintained by the real owner against the officer,¹²⁰ and also against the plaintiff if he be privy to the wrong.¹²¹

XXI. AMENDMENT

The officer can amend his return to make it conform with the facts at any time while the matter is in *feri*,¹²²

¹¹⁵ *Ibid.*, Sec. 4.

¹¹⁶ *Wilson v. Fowler*, 88 Md. 601, 42 A. 201 (1898).

¹¹⁷ Code (1951), Art. 16, Sec. 99; *Redding v. Redding*, 180 Md. 545, 26 A. 2d 18 (1942).

¹¹⁸ *Wilson v. Fowler*, *supra*, n. 116.

¹¹⁹ LATROBE, Sec. 355.

¹²⁰ *Chappell v. Cox*, 18 Md. 513 (1862); *Corner v. Mackintosh*, 48 Md. 374 (1878).

¹²¹ *State, use of Vanderworker v. Brown*, 54 Md. 318 (1880).

¹²² *Berry v. Griffith*, 2 H. & G. 337 (1828); *Jarboe v. Hall*, 37 Md. 345 (1873).

unless the rights of innocent third parties have intervened.¹²³ When the judgment is *in rem*, as one of condemnation, the issuance of a *fi fa* reciting a judgment in *personam*, being of a judgment never rendered, is void and cannot be cured by amendment.¹²⁴

¹²³ Hall v. Clagett, 63 Md. 57 (1885).

¹²⁴ Deakins v. Rex, 60 Md. 593 (1883).