DE BACA V. WILCOX, 1902-NMSC-009, 11 N.M. 346, 68 P. 922 (S. Ct. 1902)

RAMONA L. de BACA, Administratrix, et al., Plaintiffs in Error,
vs.
A. G. WILCOX, Defendant in Error

No. 921

SUPREME COURT OF NEW MEXICO

1902-NMSC-009, 11 N.M. 346, 68 P. 922

April 25, 1902

Error to the District Court of Valencia County, before J. W. Crumpacker, Associate Justice.

SYLLABUS

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1. Writs of **scire facias,** so far at least as the revival of judgments are concerned, were abolished in this Territory by the adoption of the code of civil procedure.

2. When a lower court has no jurisdiction to enter a judgment, the question of jurisdiction may be raised for the first time in an appellate court.

COUNSEL

Catron & Gortner for plaintiffs in error.

A proceeding to review a judgment by **scire facias** after the same has become dormant is an "action."

> Browne & Manzanares Co. v. Chavez, 9 N.M. 316; Fenner v. Evans, 1 Term R. 268; Grey v. Jones, 2 Wils. 251; Pulteney v. Townson, 2 Bla. Rep. 1227, 2 Tidd 1046, Co. Litt. 290; Ensworth v. Davenport, 9 Conn. 392; Greenway v. Dare, 6 N. J. L. 306; Gonnigal v. Smith, 6 Johns. (N. Y.) 107; Gibbons v. Goodrich, 3 Ill. App. 590.

See also --

Potter v. Titcomb, 13 Me. 39; Atwood v. Burr, 2 Salk. 603; Clark v. Paine, 11 Pick. 66; Kirkland v. Krebs, 34 Md. 93; Bentley v. Sevier, Hempst. (C. C.) 249; Smith v. Repley, 33 Conn. 36, 8 Bac. Abr. 598.

It is an action within the meaning of the N.M. Code of Civil Procedure passed March 18, 1897.

C. L. 97, sec. 2685. subsec. 1.

The New Mexico Code was taken almost entirely from the Codes of California and New York.

See on this point --

Humiston v. Smith, 21 Cal. 134; Cameron et al. v. Young, 6 How. Pr. (N. Y.) 373; Murphy v. Cochran, 1 Hill 342; Alden v. Clark, 11 How. Prac. 210; 1 Ten. Rep. 267; 2 Ten. Rep. 46.

The writ of **scire facias,** both as a public and private remedy is entirely abolished by the code.

Catskill Bank v. Sanford, 4 How. 100, 101.

While a judgment may be revived there is no revival of a lien of a judgment on real estate. The revivor of a judgment by **scire facias** creates no new lien.

Woolston v. Gale, 9 N. J. L. 32; Murray v. Baker, 5 B. Monroe 172; Bullock v. Ballew, 9 Tex. 498; Jordan v. McCurdy, 77 Va. 763; Wade v. Hancock, 76 Va. 620; Humphrey v. Lundy, 37 Mo. 320; Patrick v. Newell, 1 Bebb. (Ky.) 323; Tindell v. Carson, 16 N. J. L. 94; Camp v. Gainer, 9 Tex. 372.

McMillan & Raynolds for defendant in error.

The plaintiffs in error have no standing in court as they have failed to make or file assignments of error in this court.

Section 3140, Compiled Laws of 1897; Supreme Court Rule 14; Lamy v. Lamy, 4 N.M. 29, 291; Deemer v. Falkenburg, 4 N.M. 149; Martin v. Terry et al., 6 N.M. 491.

The abolishment of the remedy of revivor of a judgment **scire facias** was not contemplated by the code, and there is no express provision changing the common law remedy.

Freeman on Executions, sec. 82 and cases cited; Freeman on Judgments, sec. 442 and 444; Browne & Manzanarez v. Chavez, 9 N.M. 316, 54 Pac. R. 238.

In Missouri **scire facias** is the proper remedy to revive a judgment and no pleading is required.

Merchants etc. Co. v. Hill, 17 Mo. App. 590.

The plaintiffs in error cannot raise the question attempted in this court for the first time, not having raised it in the court below.

> 19 Ency. Pl. & Pr., 266; State v. Shively, 10 Or. 267; People v. Hall, 80 N. Y. 119; People v. Thatcher, 55 N. Y. 528; McDowell v. Asbury, 66 N. C. 444; Freeman on Judgments, sec. 538; Chavez v. McKnight et al., 1 N.M. 147; Laguna v. Acoma, 1 N.M. 220; Crabtree v. Segrist, 3 N.M. 495; Nehr v. Armijo, 66 Pac. 517; Holmes et al. v. Fitch et al., 16 Ind. 358; Slaughter v. Farland, 31 Gratt. (Va.) 134; Brown v. Waterman, 10 Cush. (Mass.) 117; Asher v. Deyoe, 77 Hun (N. Y.) 531; Folmsbee v. Amsterdam, 66 Hun 214; Creager v. School District, 62 Mich. 214; Buffalo etc. Co. v. Delaware etc. Railroad Co., 130 N. Y. 152; Scudder v. Jones, 134 Ind. 574; 8 Ency. Pl. and Pr., p. 197.

PLAINTIFFS' REPLY BRIEF.

Plaintiffs' points and citations in response to defendant's brief.

> Lutz v. Ry. Co., 6 N.M. 497; Perea v. Bank, 6 N.M. 1; Humeston v. Smith, 21 Cal. 129.

The Code furnishes its own rules for the construction of its pleadings, and it is to be carried into effect according to its terms, and upon principles peculiar to itself.

> 4 Ency. Pl. and Pr., p. 557, note 1, p. 558 from 11 N. Y. 354; 12 Ency. Pl. and Pr., p. 120.

Parties must be brought before the tribunal by proper pleadings according to the practice and the law of the case, before the power to hear and determine the cause attaches.

> 12 Ency. Pl. and Pr., 129; 71 Iowa 421-4; Dunlap v. Southerlin, 63 Tex. 42; 1 Elliott's Genl. Practice p. 250; Thomas v. People, 107 Ill. 524.

The statement of facts constituting a cause of action is absolutely jurisdictional, and if a petition lack this essential, the judgment upon it will be avoided.

> 4 Ency. Pl., p. 601, note p.; Halleck v. Janden, 34 Cal. 173; Weil v. Greene Co., 69 Mo. 286; Greer v. Adams, 6 Kan. 126; Gragin v. Lovell, 109 U.S. 199; Thurston v. King, 1 Abb. Pr. 126.

JUDGES

Mills, C. J. Parker, Baker, McFie and McMillan, JJ., concur.

AUTHOR: MILLS

OPINION

*{*349}* STATEMENT OF FACTS.

{1} On September 1, 1893, a judgment was rendered in the district court of Valencia county, in favor of A. G. Wilcox, plaintiff, v. Roman A. Baca, defendant, for $ 372.27, and costs. Execution was sued out, to which return was made January 10, 1894; alias execution was sued out May 8, 1894, to which return was made December *{*350}* 15, 1894. Nothing further was done until April 20, 1900, when writs of **scire facias** were issued to the sheriffs of Santa Fe and Valencia counties, seeking to revive the judgment of September 1, 1893, for its full amount, and interest and costs. The **scire facias** proceedings were brought, according to the recitals in the writ, against the plaintiffs in error as the successors, administrators and heirs of said original defendant Roman A. Baca, stating their succession as a matter of fact.

{2} Service was made, as appears by the record, certificate of non-appearance was issued by the clerk of the district court on April 20, 1900, and on June 1, 1900, the judgment was revived by the court against the plaintiffs in error herein, they not appearing, for the amount of the original judgment, interest and costs, and execution was awarded against all of the property which the said plaintiff was entitled to have subjected to his execution during the lifetime of the deceased Roman A. Baca.

{3} To this judgment, writ of error was sued out.

OPINION OF THE COURT.

{4} But two points are involved in the decision of this case, to-wit: (1) Will the writ of **scire facias** lie to revive a judgment since the enactment of the code of civil procedure in the year 1897? and, (2) if the writ does not lie are we estopped from considering the points assigned as error, because plaintiffs in error allowed a judgment to go against them by default in the lower court, and reserved no exceptions on which to base a writ of error?

{5} Previous to the passage of our practice act or code of civil procedure, section 2685, Compiled Laws of 1897, writs of **scire facias** were freely issued by the courts of this Territory in appropriate cases. Subsection 1 of the code provides that, "There shall be in this Territory but one form of action for the enforcement or protection of private rights, and the redress or prevention of private *{*351}* wrongs, which shall be denominated a civil action, etc." By subsection 175 of the code, as amended by section 6, chapter 75, Session Laws of 1899, it is provided that the code shall not affect proceedings for habeas corpus, mandamus, prohibition, **quo warranto** or other proceedings, to-wit: . . . or actions in replevin, ejectment or proceedings by attachment, except so far as the

same prescribes the time of service and return of process. Writs of **scire facias** are not mentioned as exempted from its operation.

{6} Defendant in error contends that a **scire facias** to revive a judgment is not affected by the code it not being an original but a judicial writ, founded on some matter of record; and that it is only the continuation of an action, a step leading to the execution already obtained, and enforcing the original demand for which the action was brought.

{7} This court however held in the case of Browne & Manzanares Co. v. Chavez, 9 N.M. 316, 54 P. 234, that a **scire facias** proceeding was an action. In that case the court said: "The proceedings in this case show all the characteristics of an action at law. The record shows that a **precipe** was issued for the writ, and the writ of **scire facias** was issued, which is declared to be the equivalent of a declaration. The writ was returnable as other writs are. The defendant was ordered to show cause; pleas and demurrer were filed as in other cases; a judgment overruling the demurrer and dismissing the cause was entered; and plaintiffs in error have the **scire facias** proceedings, not the original action, in this court, seeking a review and reversal, and we see no reason why such proceedings should not be considered an action within the meaning of out statute."

{8} A proceeding by **scire facias** to revive a judgment being an action must be carried on as provided by our code. A complaint must be filed, summons must issue and be served, and the various steps leading to a judgment must be complied with.

*{*352}* **{9}** Our code being largely taken from the State of California, we are bound by the decisions of that State in interpreting such parts of it as are taken from it, when such interpretation is not locally inapplicable or unsuited to us on account of the different conditions and circumstances which exist.

{10} In October, 1862, a clause of the California code read as follows, to-wit: "There shall be in this State but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, etc." It will be observed that the provision in our code is in almost the same words as this, and in the case of Humiston v. Smith, 21 Cal. 129 (decided in October, 1862), the Supreme Court of that State, basing its opinion on cases decided in the State of New York, from the code of which State all other codes are taken, holds distinctly that the terms "civil action" includes the remedy of **scire facias,** and that the adoption of their code or practice act abolished and superseded that writ. The remedy by **scire facias** in California, was we are aware, specifically repealed on March 10, 1880, but this was long after the decision of the case of Humiston v. Smith, supra.

{11} We are therefore of the opinion that the writ of **scire facias,** so far at least as the revival of judgments is concerned, was abolished in this Territory by the adoption of the code of civil procedure by the Legislature of 1897.

{12} We will now consider the second point, as to whether or not we are estopped from considering the points assigned as error, because plaintiffs in error suffered a judgment

to go against them by default in the lower court, and reserved no exceptions on which to base a writ of error.

{13} It is a general rule that errors complained of must be objected to and exceptions saved, or they will be disregarded in an appellate court. This principle has been frequently enunciated by this court. Neher v. Armijo, *{*353}* 11 N.M. 67, 66 P. 517 and cases cited: but we have also recognized the exception to the general rule which authorizes us to notice without exception jurisdictional and other matters which may cause a case to be inherently and fatally defective. Neher v. Armijo, 11 N.M. 67, 66 P. 517. The question of jurisdiction may be raised for the first time in the appellate court, or the court may, of its own motion, take notice of such want of jurisdiction. 2 Cyc. 680.

{14} If another inferior court has no jurisdiction of a cause, an appeal from its decision confers no jurisdiction upon appellate court. 2 Cyc. 537.

{15} A court can not try a question except when approached in a particular way as the law withholds jurisdiction unless the court is approached in the manner provided by law. 12 Ency. P. and P., p. 120. Courts have no power until their action is called into exercise by some kind of pleading, authorized by law, to render a judgment in favor of any person, than they have to render judgment against a person until he has been brought within the jurisdiction of the court in some manner recognized by law as sufficient. Dunlap v. Southerlin, 63 Tex. 38.

{16} Having held that the writ of **scire facias** was abolished in this Territory by the adoption of the code in 1897, it necessarily follows, that the lower court had no jurisdiction to entertain and enter judgment upon said writ, consequently the action of the court in entering such judgment was **coram non judice.** The court below having no jurisdiction, to enter the judgment, we hold that we can take notice of such want of jurisdiction, of our own motion, without any exception having been reserved in the court below.

{17} In accordance with the views expressed above, this cause is therefore reversed and remanded to the district court of Valencia county, with instructions to dismiss the writ of **scire facias,** and it is so ordered.