The only question in this case is whether the tenant of a party whose title is extinguished still remains tenant and [25] owes allegiance to such party after the extinguishment of his title.

It is a well-settled rule that the tenant is estopped to deny the title of his landlord. And this rule is not merely technical, but is founded in public convenience and sound policy. And the person once a tenant will, prima facie, be deemed to continue in that character so long as he remains in possession of the land demised. Yet it was always competent for such person to show that the relation has been dissolved, and, this being done, he will be permitted to controvert the title under which he formerly held. Camp v. Camp et al., 5 Conn. 291. In 2 Greenl. on Ev. 253, it is laid down that "the tenant may always show that his landlord's title has expired, or that he has sold his interest in the premises, or that it is alienated from him by judgment and operation of law." And it is held, in the case of Jones v. Clark, 20 Johns. 51, that a tenant of a mortgageor in possession after the mortgage has been forfeited, during the continuance of the lease from the mortgageor, may attorn to the mortgagee and take a lease from him. And in an action by the mortgageor for rent, under the lease, the tenant may set up the attornment as a legal defence.

These principles, so well established, are decisive of this case; for the only question is whether, when the title passes from the landlord, either by his own act or by operation of law, the tenant may attorn to the new owner. And unquestionably he may do so. And the relation between himself and his former landlord is thereby dissolved.

His honor seems to have thought that the form of this action would preclude the application of the principle above stated, because in it the only question is as to the right of possession, the title not being involved in the controversy. But this case makes no difference. If the relation of landlord [26] and tenant had ceased, it was competent for the defendant to show that fact, no matter what the form of action in which he was sued.

The ground of recovery here is that the defendant is estopped from denying his landlord's right of possession; but if he can show that the plaintiff is no longer landlord, that his relation as tenant has ceased, the estoppel no longer exists. Why may he not show this fact to avoid the estoppel as well in the action of forcible detainer as in ejectment? There can be no reason against it. He does not thereby bring the title into question, but

he only shows a fact connected with the title, by which his relation as tenant has ceased, and he is relieved from the estoppel.

We think there is error in this record, and therefore reverse the judgment, and remand the cause for another trial.

CLARK & NANCE v. BELL.

KNOXVILLE, SEPTEMBER, 1847.

1. General Issue and Special Plea—Evidence. A judgment will not be reversed in order to give the defendants the benefit of evidence upon a special plea, which they have already had upon a trial of the general issue.
2. Levy of Execution on Personal Property of Principal—When Not a Satisfaction. Although sureties are discharged from a judgment if the personal property of their principal has been taken in execution to an amount sufficient to satisfy it, yet no levy of an execution upon the property of the principal, nor any consequence thereof by the misconduct of the sheriff, can be any defence to an action by the surety who has paid, as he had the right to do, the amount of the judgment against himself and principal. [Cited, on the general principle of the first clause, in Finley v. King, 1 Head, 124, and Fry v. Manlove, 1 Baxt. 262.]
3. Case in Judgment. The second endorser sued the maker and first endorser on a note upon which the plaintiff's endorsee had previously recovered a judgment against all the parties, the judgment having been paid by the plaintiff. Held, that it was no defense, either by plea or proof under the general issue, that, before the plaintiff paid the judgment, an execution had issued thereon, and been levied on personal property of the principal of value sufficient to satisfy the execution, and that the property had been taken into the possession of the officer making the levy.

This is an action of assumpsit which was instituted by Bell, in the circuit court of Knox county, against Clark & Nance. There was a verdict and judgment rendered at the October term, 1846, in favor of Bell, Alexander, judge, presiding.

From this judgment the defendant appealed.

Wm. Swan, for plaintiffs in error.

Lyon, for defendant in error.

[27] Green, J., delivered the opinion of the court.

This is an action by the holder against the maker and endorser of a promissory note. The declaration alleges that on the 19th

day of July, 1842, Pryor Nance executed his promissory note to James Clark for $165, payable four months after date, at the office of discount and deposit of the Union Bank, at Knoxville; and that said Clark endorsed his name thereon, and ordered the contents thereof to be paid to the plaintiff, Samuel Bell; and that said Bell endorsed the same, and directed its contents to be paid to the Union Bank of Tennessee; that demand had been made, and due notice of non-payment thereof given to the endorsers; that the Union Bank instituted suit against all the parties, and prosecuted the same to judgment, recovering the sum of $172.78, besides cost; and that afterwards the said plaintiff, Samuel Bell, being the last endorser, paid and discharged said judgment, whereby a right of action hath accrued to him, to demand of the defendants the sum so paid by him.

To this declaration the defendants pleaded that, before the plaintiff paid the amount of the judgment in his declaration mentioned, an execution had issued on said judgment, and came to the hands of a deputy sheriff, and was by him levied on the personal property of the said Pryor Nance, of value sufficient to satisfy said execution, which property was taken into the possession of said deputy sheriff.

To these pleas the plaintiff demurred, and his demurrer was sustained by the court.

The cause came on then to be tried before a jury on the general issue; on which trial the court permitted the defendants to give the matters of their said pleas in evidence, and charged the jury that a levy on personal property sufficient to pay the debt was a satisfaction of the execution, but to [28] have that effect it devolved on the defendants to show that the property levied on was of value sufficient to discharge the debt, and that fact defendants must make out by clear and satisfactory evidence. The jury found for the plaintiff, and the court refused a new trial; to which the defendants excepted and appealed to this court.

Upon the evidence in this cause (if the issue before the jury were deemed material) there is no ground for a new trial.

The court left it to the jury to say whether there had been a levy on property sufficient to discharge the execution. The jury have responded in the negative and their verdict was well warranted by the evidence. But the defendants insist that, although they obtained, upon the general issue, all the benefit of the matter they had specially pleaded, yet that they had a right to plead

this matter specially if they chose, and that his honor erred in sustaining the demurrer.

If it were admitted that the facts thus in evidence on the general issue might be specially pleaded (a question now not necessary to consider), there certainly would be no ground to reverse the judgment in order to give the defendants the benefits of this evidence upon their special plea, which they have already had upon the trial of the general issue. But there has been, in the pleadings and on the trial of this case, an entire misapplication of the doctrine of the case of Young & Whitecomb, 3 Yerg., and other cases of a similar character. Those are cases where the plaintiff, whose execution has been once levied, attempts to levy the same execution, or an alias, on the same judgment, on the property of other parties. In such case, sureties are discharged, if the property of their principal has been taken in execution to an amount sufficient to satisfy the fieri facias.

But this is a suit by one of the parties to the execution in question who by the payment thereof has a right of action [29] against his co-defendants, who were preceding parties on the paper upon which the payment had been obtained. The defendant's pleas have no relevancy to such a case, were frivolous, and ought to have been stricken out. If, after the plaintiff paid and discharged the execution, the sheriff had retained the property of Nance, which he had levied on, he would have been liable to Nance therefor. But no levy, nor any consequence thereof by the misconduct of the sheriff, could be any defence to the plaintiff's action, who has paid, as he had a right to do, the amount of the judgment against himself and the other parties. Affirm the judgment.

DEARING v. CATE & SHIRLEY.

KNOXVILLE, SEPTEMBER, 1847.

Occupant-Right—Purchaser—Agreement to Share Profits. The preference of entry under the occupant laws is a valuable right, the occupant being entitled to the excess of the value of the land above the price the government demands, and the occupant may assert his right in equity against a person who has fraudulently deprived him of it, and any one claiming under him with information sufficient to put him upon enquiry, or