W. H. Kennedy, for the appellant.

R. U. McPherson, for the plaintiff, respondent.

RIDDELL, J., read a judgment in which he said that the facts were simple and not in dispute. On the 4th June, 1910, judgment was obtained by A., now deceased, against B. On the 7th June, a writ of execution was put in the sheriff's hands. On the 24th October, B. sold his land to the plaintiff, who, on the 15th November, caused a mortgage thereon to be discharged. On the 11th October, 1911, A. died, and on the 8th November probate of his will was granted. On the 5th June, 1913, the writ of execution was renewed; and on the 12th December, 1914, the sheriff sold the land of B. to the defendant.

The District Court Judge held that the plaintiff had title because there was no revivor of the action by the executors of A.

"If, after execution awarded, the plaintiff die, yet . . . the sheriff may levy the money:" Thoroughgood's Case (1597), Noy 73. See also Tomlin's Law Dictionary, vol. 2, "Scire Facias" (iii.); Churchill on Sheriffs, 2nd ed., p. 216.

The theory was, that the issuing of a writ of fi. fa. was a judicial act: Wright v. Mills (1859), 4 H. & N. 488, 492; and that the writ was an order of the Court to make the money—in other words, the authority of the sheriff came from the Court, not from the plaintiff.

This doctrine had never been questioned, and could not now be successfully attacked. The fi. fa. lands in Ontario has, by virtue of 5 Geo. II. ch. 7 (Imp.) and subsequent legislation, an effect unknown to the common law of England; but there is no reason why it should be treated in a different way from a fi. fa. goods. None of the Rules affects or modifies this principle. The renewal was simply an extension of the effect of the writ, and did not require a revivor: Doel v. Kerr (1915), 34 O.L.R. 251, and cases cited.

The questions as the effect of the discharge of the mortgage should not be disposed of here. If the parties cannot agree, they may be determined in an action for that purpose in which all the facts can be brought out.

The appeal should be allowed with costs and the action dismissed with costs.

MIDDLETON, J., read a judgment to the same effect, in which MASTEN, J., concurred.

MEREDITH, C.J.C.P., read a dissenting judgment.

Appeal allowed; MEREDITH, C.J.C.P., *dissenting.*