Snead, Caswell T. et al v. Wegman, Peter 1858 St. Louis 395/1

593/9

57/May 58
27M0176

Snead indebted

Justice of the Peace John Black issued writ of attachment for Wegman, a constable, to seize Snead's wood-boat
constable petitioned to sell boat justice agreed
boat = $100
costs = $72
$28 left in constable's hand
Snead & Shelton want $100 back
court gave $28

Richardson - reversed & remanded
Shelton's involvement in reasoning
tell court to strike his name out

State of Missouri } Sf
County of St Louis }

Be it remembered that on the Tenth day of September 1856, was filed in the office of the Law Commissioners Court of said County, a petition, upon which the following Summons was issued, to wit;

(1) Caswell T. Snead in his own capacity and James H Shelton, in the capacity of administrator of the Estate of Usiah Creeck deceased against Peter Wegman

Summ. "The State of Missouri
To the Marshal of St Louis County,
Greeting;

We Command you to Summon Peter Wegman, to appear before the Law Commissioner's Court of St Louis County, on the first day of the next term thereof, to be held at the City of St Louis, within and for the County of St Louis, on the First Monday of October next, then and there to answer the complaint of Caswell T Snead in his own capacity and James H Shelton in the capacity of administrator

(2) of the estate of Uriah Creeck deceased, as set forth in the annexed petition. and have you then and there this writ. Witness Matthew Williams Clerk of the Law Commissioner's Court. of St Louis County. with the seal of said Court hereto affixed at office, in the City of St Louis this Tenth day of September, in the year of our Lord one thousand eight hundred and fifty six.

Matthew Williams Clerk.

Upon the foregoing Summons the Marshal makes the following return, to wit:

Return "Executed this writ in Saint Louis County, September 11th 1856. by delivering a true Copy of the same and petition to the within named defendant

Wm Smith Marshal By Henry McMeins Dept."

And afterwards to wit. at the October Term and on

Monday October 20th 1856

the following proceedings were had in this cause, to wit, "

Default, The plaintiffs by their

attorney comes, but the defendant although duly warned and solemnly called comes not, but makes default. Wherefore it is ordered by the Court, that the said Plaintiffs petition be taken as confessed, and that inquiry of defendants indebtedness to said plaintiffs be had at the next term. "

(3)

And afterwards to wit, on Wednesday October 29th 1856, the following further proceedings were had in this cause to wit; "

Motion filed

The defendant by his attorney comes, and moves the Court to set aside the Judgment by default herein, and files an affidavit in support thereof. "

And afterwards to wit on Saturday November 8th 1856, the following further proceedings were had in this cause to wit; "

Motion sustained

The defendants by his attorney comes, and submits to the court his motion to set aside the Judgment by default herein, Whereupon the Court being fully advised thereof, doth sustain the said motion at the defendants costs—

4 On motion six days time granted to answer."

And afterwards to wit, on Wednesday November 12th 1856, the following further proceedings were had in this cause to wit;

Ans filed "Answer filed"

And afterwards, to wit, at the December Term and on Wednesday December 10th 1856, the following further proceedings were had in this cause, to wit;

Cont "By Consent, Continued to the 13th day of December instant, at 3 O'clock P.M."

And afterwards to wit on Saturday December 13th 1856 the following further proceedings were had in this cause to wit;

Cont. "By Consent, Continued to the 19th day of December instant, at 3 O'clock P.M."

And afterwards to wit, on Thursday December 18th 1856,

the following further proceedings were had in this cause towit;"

(5) Amd Pet filed

By leave of the Court, plaintiffs by their attorney, file an amended petition herein."

Said Amended petition is in the words and figures following towit;"

Amend^d Petition

By leave of the Court plaintiffs file this their amended petition. Plaintiffs State that Said Caswell T. Snead and one Uriah Creek were the joint owners of a certain Wood-boat (Name unknown), and that the Said Creek died such part owner, and that thereafter on the 11th day of August A.D. 1852, the County Court of Lincoln County in the State of Missouri, (the County of Said Creek's residence, at the time of his death) appointed Said James W. Shelton administrator of all and Singular the goods chattles, sights and credits which were of the Said Uriah Creeks at the time of his death, and that the Said Shelton executed the bond required by law, and took upon himself the burden of Said Administration. Plaintiffs farther States that,

(6) one John Small sued the said Caswell T Snead, before John Black a Justice of the peace in and for said County of St Louis, in two attachment suits which were afterwards consolidated one on account for Seventeen dollars & 55/100 cts and one on a note for Eighteen dollars and 85/100 cts, in which he made the following affidavit, in substance to wit; that said Snead was justly indebted to him after allowing all just offsets and credits in the sum of Eighteen dollars & 85/100 cts on on account of a promissory note and that he had good reason to believe and did believe that said Snead is about fraudulently to convey or assign away his property or effects so as to hinder or delay his creditors in the collection of their debts, which affidavit is sworn to on the 6th day of December A.D 1852, upon the filing of which the said Justice issued his summons of same date to any Constable of St Louis Township in St Louis County, Commanding any Constable to attach said C. T. Snead by all and singular his goods, chattles

(7) Moneys, effects and credits or as much thereof as would be sufficient to satisfy said sum of $18.85, cts. and $17.55 cts with interest and costs of suit, so that he appear before the said Black at his office in said Township on Dec 23rd day 1852, to answer the complaint of said Small and that said Constable summon the said Snead to appear before said Justice, at the time and place aforesaid to answer the action or actions of said plaintiff, and the same was placed in the hands of the defendant a constable of said Township for service, and said Constable made the following return dated thereon 6th of Decr 1852, to wit:

"Executed by the order of plaintiff by attaching and seizing as the property of the within named defendant to wit. A Wood boat name unknown, and now at the Wharf of the City of St Louis in my custody, the defendant not found in my Township, and no other goods and chattles found in my Township,

Peter Wegaman Constable
by Fred Laeneve Dept,

Plaintiffs farther state that said Constable

(8)

by his deputy Fred petitioned the said Justice for a Sale of said boat, because it was likely to perish or depreciate in value, before the probable determination of Suit, or that the Keeping of the Same would be attended with much loss and expense, and the said Black as Justice aforesaid on the 21st of December 1852, issued an order, to said Constable to sell said wood boat belonging to said Caswell T. Snead according to law, upon which order of Sale the defendant as Constable aforesaid made the following return, Executed this writ of Special order of Sale as therein Commanded by selling as the property of said C. T. Snead a certain wood boat (Name unknown) by me theretofore attached in this cause, at the landing of the City of St Louis, just below the foot of Poplar Street in said City to Carl Smith the highest bidder for the sum of $100.00. done on the 11th of Jany 1853, Signed Peter Wegman Constable, Plaintiffs farther state that on the 14th day of January 1853, the said Caswell T. Snead by his Attorney filed a statement in the nature of a plea

(9) in abatement in substance stating that at the time of issueing said attachment the defendant Caswell T. Snead was not about fraudulently to convey or assign his property or effects so as to hinder or delay his creditors and which he prays may be inquired of by the County in manner and form as provided by law, and plaintiffs farther state that on the 28th day of March 1853, on a trial of said issue the Jury found the following verdict, We the Jury in this case find a verdict for the plaintiff, Plaintiffs farther state that a Judgment by Consent of parties for said Sums of $18.85 & 17.55 cts was entered against said C. T. Snead from which Judgment the said Snead appealed and carried said cause to the Law Commissioners Court for the County of St Louis, and said case was called for trial in said Court at October Term 1853. the plaintiff not appearing upon motion of defendant the plaintiff was nonsuited and the Court then and there entered a Judgment against said plaintiff and in behalf of defendant for his costs and charges therein expended, Plaintiffs

(10)

further state that by reason of the premises they are entitled to demand and recover from said defendant said sum of $100.00 and interest upon the same from the 29th of Oct 1855, when demand was made by plaintiff by order of Court of said defendant to pay over said sum of $100.00 which he refused to pay, wherefore plaintiff asks for judgment for said sum of $100.00 with interest and costs

R C Woods for Pltffs.

R. C. Woods agent for plaintiff being duly sworn says that to the best of his knowledge and belief the matters and things as stated in the above petition are true

R. C. Woods

Sworn to and subscribed Dec 18th 1856 before me Matthew Williams Clerk C. P.

The following is a true copy of the defendants answer to the foregoing petition. "

Peter Neyman the defen-

Answer dant denies that the sum of One hundred dollars being the proceeds of the sale of said wood boat remain in his hands,

(11) He states that he expended Seventy two dollars for the necessary expenses of the Safe-Keeping and Sale of said boat and that before the Commencement of this Suit he tendered the balance, viz: twenty eight dollars, to plaintiff.
The defendant denies that any order of Court was ever made requiring him to pay over the proceeds of said Sale to plaintiffs or either of them.
The defendant further states that Although he made said tender and is Now willing to pay over said Amount of $ 28.00/11 to plaintiff, yet he is advised by his Counsel and believes that he is not liable to plaintiffs in any sum whatsoever Krum & Harding
Attys for deft.
Peter Wegman the defendant being sworn upon his oath says, that he believes the foregoing answer and the Matters therein as stated to be true
Peter Wegman
Subscribed & Sworn to before me this 11th day of November 1856.
L.S. As witness my hand and official seal the day & year last aforesaid

12 Jeremiah F. Young Notary Public,

And afterwards, to wit, on
Friday December 19th 1856
the following further proceedings
were had in this cause, to wit,

Subm "The parties by their attorneys come,
and the defendant files his answer to
the plaintiffs amended petition, and
thereupon the parties by their attorneys
submit the cause to the Court, whereupon
the trial proceeded and is finished, "

And
afterwards, to wit, on
Friday January 2nd 1857
the following further proceedings were
had in this cause to wit,

Judgt "The Court having duly considered the
proofs herein, and being fully advised
of and concerning the premises, doth
find that the defendant is indebted to
the plaintiffs in the sum of Twenty eight
dollars. Therefore it is considered by the
Court that the plaintiffs recover of the said
defendant, the debt aforesaid, in form

(13)

aforesaid, by the Court found, also their costs and charges herein expended and that execution issue therefor."

And

afterwards to wit, on

Tuesday January 6th 1857,

the following further proceedings were had in this cause, to wit,

Motion filed

"The plaintiffs by their attorney come, and move the court to set aside the judgment herein and to grant a new trial and file their reasons therefor."

And

afterwards to wit, on

Saturday January 10th 1857

the following further proceedings were had in this cause to wit,

Motion submitted

"The plaintiffs by their attorney comes and upon argument submits to the Court their motion to set aside the judgment and for a new trial herein."

And

afterwards to wit, on

Tuesday January 13th 1857

the following further proceedings were

(14)
M. O.
Co'd

had in this cause, to wit; "The Court having duly heard and considered the plaintiffs motion to set aside the Judgment and for a new trial herein, and being thereof fully advised doth overrule the same."

and afterwards to wit, on

Thursday January 15th 1857 the following further proceedings were had in this cause, to wit;

Bill Ex filed

"Bill of exceptions filed by plaintiffs Attorney;" which is in the words and figures following to wit;

Bill Ex

Be it remembered, that on the 19th day of December 1856, being of the December Term of said Court, this cause coming on to be tried, the same was submitted to the Court, a Jury being waived by consent of parties. It was then admitted by the plaintiffs that the defendant expended and paid out of the proceeds of the sale of said boat Seventy two dollars, for the necessary expenses

(15)

of the Safe Keeping and Sale of said boat. It was also admitted that twenty-eight dollars the balance of said proceeds was before the commencement of this Suit tendered by the defendant to the Plaintiffs. The above admissions together with the facts alleged in the amended petition and not denied by the Answer thereto were all the facts established in the case. The Court of its own motion gave the following declaration of law or instructions Marked 1, 2, 3, 4. to wit;

Instruction

1. The fact of the judgment, having been rendered in the Justices court by Consent does not preclude the right to appeal, only a confession of judgment made in the certain manner prescribed by the Statute, precludes the right to appeal.

2. The petition states, that the whole property was sold and this is not denied by the Answer, there is a proper joinder of Plaintiffs.

3. In this case the defendant had a lien on the proceeds of the sale of the property in his hands, for the necessary expenses of the Safe Keeping and Sale of said boat,

(16) 4. The defendant having in his Answer alleged a tender of the balance, in his hands, to the plaintiffs, is presumed to waive the necessity of an order on him to pay over any sum in his hands.

To the giving of the third instruction of the Series the plaintiffs by their counsel objected, their objection was overruled, and they excepted.

The Court found for the plaintiffs Twenty eight dollars, and Judgment was accordingly entered. Afterwards the plaintiffs filed a motion for a new trial, in the words and figures following to wit

Motion The plaintiff by his attorney D. C. Woods, Comes and moves the Court to set aside the verdict in said case and grant him a new trial for the following reasons to wit

1st Because the verdict was contrary to the law and evidence of the case

2d Because the Court erred in declaring the law, to be that the defendant had a lien on the proceeds of the sale of the property in his hands, for the necessary expenses the Safe Keeping and Sale

of said boat,

17 3d Because the verdict was for too little it ought to have been for One hundred dollars with interest thereon from the time said boat was sold until paid

Caswell T Snead &c

By D. C. Woods atty.

which motion was heard by the Court and overruled to the overruling of which motion the plaintiffs by their counsel at the time excepted and now pray the Court to sign and seal and allow this, their bill of exceptions which is accordingly done.

John W Colvin Lawlow Seal

State of Missouri } Ss
County of Saint Louis }

I Matthew Williams Clerk of the Law Commissioners Court of said County, certify that the above and foregoing is a true transcript of the Record and proceedings (Excepting the Original Petition and Answer) in the Suit of Caswell T. Snead &c plaintiff and Peter Wegman, defendant

as fully as the same remain in the office of said Court.

In testimony whereof I hereto setting hand and affix the seal of said Court at office, in Saint Louis this 30th day of January 1857

Matthew Williams
Clerk

The State of Missouri, ss.

The State of Missouri, *To the Honorable the* St. Louis Law Commissioner's Court *in said State, GREETING:*

WHEREAS, In the record and proceedings in a certain cause lately pending in the Law Commissioner's Court held in and for the County of St Louis in said State —

wherein Caswell T. Snead, and James N. Shelton administrator of Uriah Crush were plaintiffs and ~~John Black~~, Peter Wegman ~~and others were defendants~~ was defendant

in an action of manifest error hath intervened, to the great damage of said plaintiffs as by their complaint we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held in the City of Saint Louis, in the County of Saint Louis, in said State, on the third Monday in March next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right, and according to law, ought to be done.

Witness, WILLIAM S. GLANVILLE, Clerk of our said Supreme Court, at office, in the City of Saint Louis, the twenty seventh day of January in the year of our Lord one thousand eight hundred and fifty seven.

Wm S Glanville

$1.50 paid by D. C. Woods atty for pltff. CLERK.

State of Missouri, County of St Louis, ss
I Matthew Williams Clerk of the Law
Commissioner's Court of said County, in
obedience to the Command of the within writ
herewith transmit a full, true, and Complete
transcript of the Record and proceedings
(Excepting the Original petition & Answer)
in the case of Caswell T. Snead et al
Plaintiffs and Peter Arequian, defendant,
as fully as the same remain in the office
of said Court

In testimony whereof I hereto
set my hand and affix the seal
of said Court at office in St Louis
this 30th January 1857

Matthew Williams
Clk Law Commr Court

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18 [illegible]

March. T. 1858

(9)

Caswell T. Snead &
James N. Shelton &c
Pfs in Error.

Transcript

Peter Wegman
Dept. in Error

Error to Law
Commissioners Court

D. C. Woods
Krum & Harding

Notice of writ of Error
waived. Krum & Harding
for deft in
Error.

Filed 7 Feby. 1857
Wm. J. Glanville
Cl. Cochdey D. C. Woods Esq

18 [illegible]

Judgt. reversed & cause remanded 31 March '58

Caswell & Snead
& James H Sheldon admr
against
Peter Wegman

In Supreme Court
March Term 1857
No 153.

The said Snead and Sheldon by their attorney come and say that there is in the Record & proceeding in the above cause and in the giving judgement therein manifest error in this Court

The Court below erred in not granting a new trial –

The Court below erred ~~in not~~ giving judgement for a larger sum in favour of said Snead & Sheldon –

The Court below erred in finding that Defendant Wegman had a lien on the proceeds of the sale of the property in his hands for the necessary expenses of the safe keeping and saleg said boat

The Court below erred in giving instructions asked by deft. and this the plaintiff is ready to verify &c

Snead & Sheldon by
their attorney
D. C Woods

The defendant in error joins in error
Kasson & Harding
for deft

153

Coswell J Snead
&
James H Shelton
vs
Peter Wegman

assignment of
errors

No 153

& joinder
Krum & Harding
for deft in error

Filed 25th March 1857
Wm S Glanville
Clk

D. C Woods
P.Q.

153

Caswell & Sneed et al } In the Supreme
vs } Court March
Peter Weyman } Term A.D. 1857
at St Louis Mo.

Appellant's Brief.

The court below in declaring the law applicable to the case, has relieved us from the necessity of deliberating the 1st and 2d points. The 1st is, with reference to a Judgement that was given by consent before a Justice, that the case might be appealed to a court possessing the power to instruct a Jury with reference to the law applicable to the case. The 2d is that the whole property was sold and that there was a proper Bond of plaintiffs. We now come to the 3 & 4th points where we take issue with the Court below for the whole case turns upon these two points. The 1st is that "the defendant had lien on the proceeds of the sale of the property within hands for the necessary expenses of the safe keeping and sale of said boat. The Rev Statutes of Mo. of 1845 Page 151. Sec 21. under the head of Attachments in Justices courts provides that when property is seized on attachment which is likely to perish or depreciate in value or the keeping of which would be attended

with much loss or expense in keeping the same, the Justice may order the same to be sold in the same manner as goods sold on fieri facias and the proceeds shall remain in the hands of the constable, subject to be disposed of as the property would have been subject, if it had remained in specie." What is intended to be the meaning of this clause in the statute? Does the officer not hold the proceeds just as if they were the goods themselves? and must not the proceeds follow the judgement of the court? If the case mathematically decided in favor of the defendant he was entitled either to the goods or proceeds. The plaintiff was not entitled to them, and why should the officer be? The attachment bond is worthless for both bondsmen are bankrupts. It was Weymon's place to have filed a good bond. Sneed came in & moved for additional security which the Court refused to allow. Sec 14 page 150 Rev Statutes 1845. provides for such bonds and when officer is ordered by Justice to give additional bond and fails he is held liable as security for all moneys and costs.

the security in the attachment bond was notoriously known as a bankrupt. at the time the bond was made. We think the losses of the plfts sufficient already. their boat having been sold without their knowledge for one hundred Dollars when it was proven on a former trial to be worth for or five hundred Dollars were the expenses of sale and safe keeping to be paid before the claims of Small, if there had of been a Judgement for Small? the boat sold for 100$ the expenses for keeping were 72$. Small's claim was 38$. the two making 110$. Why could not the court claim their costs with equal propriety? which would greatly exceed the amt the boat sold for. The plaintiffs have had to pay some 60$ in the way of costs in seeking to obtain their rights and now to be compelled to accept 28$ is a hardship irreconcileable with their notions of Justice, when the Legislature of Missouri has declared by Statute that in all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other ~~other~~ party, except in those cases in which a different provision is made by law. Rev

Statutes Page 242 sec 6. under the head of Costs. The Cert pont. The deft having in his answer alleged a tender of the ballance in his hands to the plfts is presumed to waive the necessity of an order on him to pay over any sum in his hands. There was testimony ~~tending~~ to show that Weyman had been served with an order to pay over the proceeds in his hands which he refused to obey the order of the court. We think in Justice that Weyman ought to pay the 100$ with ten percent damages for refusing to pay over money when ordered in Oct 1853. It is to obtain Justice that this case has been brought here by Write of error.

D. C. Woods &
A Buckner

No 153
Creeches Ad &c et al
Rec'd Weyman
Appellat's Brief
D. C. Woods & Aglette
Buckner
Atty
Filed 20 April 1857
Jno Sylvanville
Ck

Caswell & Lucas & James N Shelton in the Capacity of Admrs of the Estate of Uriah Breech Sec'd
vs
Reed Wegman

In the Supreme Court October Term A.D. 1837 —

Statement of the Case

In December 1832 two suits were instituted by attachment before John Black, a Justice of the peace within and for the Township of St Louis, by one small against one Sneed. The writes of attachment were directed to Reed Wegman, then a constable of said Township, who executed them by seizing a certain wood-boat, then lying at the wharf in St Louis, as the property of said Sneed, the same being in his possession & control. Afterwards, the Justice ordered the constable to sell the wood-boat, as being property likely to perish, or depreciate in value, or the keeping of which would be attended with much loss or expense, in conformity with the 21st section of article

2d of the attachment act of 1845. Sale was made accordingly and report thereof filed by the Constable. Pleas in abatement were put in by Sneed; the cases were tried by a Jury, who found for the plaintiffs and there was a Judgement in his favor for the amt of the deft. The Cases were appealed to the Law Commissions Court and there decided for the defendant (Sneed) and afterwards to wit: Suit was brought by the above plaintiffs in their different capacities against the said Peter Weyman for the sum of one hundred Dollars and interest, the said Weyman failing to come in to court on answer plaintiffs petition Judgement was taken by default and afterwards to wit November 8th 1856. the defendant file his motion with affidavit to set aside the default and permit him to file answer the said being sustained the defendant filed his answer. Dec 13th 1856 the following further proceedings were had in this case to wit: By

consent of counsel the case was continued to Dec 19th. When the plaintiffs asked leave to file an amended petition which was granted by the Court. The defendant for answer stated that he had paid out $72. for the necessary keeping of said boat in the sale thereon. and that before the commencement of this suit he had tendered the balance to plaintiffs being $28 and on the 19th of Dec 1856. the parties appeared by their respective attorneys, and waiving a trial by Jury the case was tried by the Court. It was admitted by the plaintiffs that the defendant paid out the sum of 72$. it was also admitted that 28$ was tendered by the defendant. The above admissions together with the facts set forth in the amended petition and not denied were all the facts established in the case. The court of its own motion gave the following declarations of law or instructions marked 1.2.3.4 to wit: 1st The fact of the Judgment, having been rendered

in the Justices court by consent does not preclude the right of appeal, only a confession of Judgement made in the certain manner prescribed by the statute, precludes the right of appeal. 2d The petition states that the whole property was sold and this is not denied by the answer, there is a proper Bond of plaintiffs 3d In this case the Defendant had a lien on the proceeds of the sale of the property in his hands, for the necessary expenses of the sale keeping and sale of said boat. 4 The Defendant having in his answer alleged a tender of the balance in his hands, to the plaintiffs is presumed to avoid the necessity of an order of an hin to pay over any sum in his hands. To the Ghoy of the third instruction of the series the plaintiffs by their counsel objected their objection being overruled they then and there excepted. The court found for the plaintiffs I 8th. from which Judgment the plaintiffs came in and made their motion

for a new trial alleging
reason, the 2nd motion
being heard was overruled
on said case has been
brought to this court for
reversal. Y Wrily error.

Woods & Buchner
for Plentiffs

No 104

Caswell & Snead in
Lewis N Shelton
vs
Peter Weyman

Statement of the
Case filed by
Plft in error

Filed 3d Novr. 1857
Wm S Glanville
Clk

Snead &c. plffs in error
vs:
Wegman, deft in error } Supreme Court. -

Points on behalf of defendant in error -

1st The defendant in error was not bound to take notice of the judgment of nonsuit rendered by the Law Commissioner on the appeal of the original attachment suit against Snead, there being no certificate of said judgment sent down to the justice by the Law Commissioner -

2d The order of sale & the sale itself were regular & according to the provisions of the statute -

Attachment Act 1845. § 21. Art II.

3d The officer ~~was bound~~ had the right to retain the proceeds of the sale in his hands until the final determination of the cause ~~& until he was~~ & to then dispose of the fund according to the order of the Court - If Snead claimed the money, he should have had the judgment of nonsuit certified down to the justice and then procured ~~the~~ his order upon the constable to pay over.

4th The plaintiffs cannot sue jointly - The money in the defendants hands were the proceeds of Snead's interest in the boat and not of the interest of the co-owner - If it belongs to either it is to Snead alone.

5th If the plaintiffs cannot jointly maintain their action or if defendant was not liable to Snead, until defendant was legaly notified of the nonsuit or until Snead had obtained an order upon him to pay over, then & in either case, it becomes immaterial to enquire whether the Court below erred in giving, of it's own motion, the declaration of law complained of by the plff in error.

Krum & Harding for
deft in error.

18.

Mead
vs
Wegman

Points for deft in error.

Kinn & Harding
P.D.

Filed 18 March 1858
W. S. Glanville
Clk.

Snead &c, pltff in error
vs.
Peter Wegman deft in error

Supreme Court.
Mar T. 1858.

Statement by deft in error.

Wegman, a constable of St Louis township, in obedience to a writ of attachment issued by John Black, a justice of the peace, in & for the same township, seized as the property of Snead, a wood boat, lying at the wharf in St Louis - He afterwards petitioned the justice for an order of sale of the boat as perishable property, which order was made & the boat regularly sold under & by virtue thereof - After the sale there was a trial, verdict & judgment, in the justice's Court, for plaintiff in the attachment - The defendant took an appeal & the plaintiff was nonsuited in the Law Commissioner's Court. -

The wood boat sold for $100. The costs, charges & expenses of the safe keeping & sale of the boat were $72, leaving a balance of $28.00 in the hands of the constable, - but no order ~~to pay over~~ was ever made upon him to pay over the proceeds of sale to any one

The plaintiff in this case sues to recover the $100, proceeds of sale The Court below gave judgment for $28.00, declaring the law to be as follows. viz " In this case, the defendant "had a lien on the proceeds of the sale of the property "in his hands, for the necessary expenses of the safe "keeping and sale of said boat " - To the giving of this instruction plaintiff excepted and sued out his writ of error &c &c.

Krum & Harding
Attys for deft in error

18.

Sup C

Snead plff in Error
vs.
Wegman d.e.

Statement by
deft in error
Kunn & Harding
(p.c.)

Filed 18 March 1858.
Wm S Glanville
Ck

No 18 Snead & Shelton vs Wegman

The 25th section of the 2nd article of the attachment act of 1845. declares that "when property shall be seized on attachment which is likely to perish or depreciate in value, before the probable end of the suit, or the keeping of which would be attended with much loss or expense, the justice may order the same to be sold by the constable, in the same manner, and on the same notice, as goods are required to be sold on fieri facias, and the proceeds of such sale shall remain in the hands of the constable, subject to be disposed of, as the property would have been subject, if it had remained in specie". It cannot be doubted that if the boat had not been sold, Snead would have been entitled to the possession of it, after the dissolution of the attachment by the nonsuit of the plaintiff, and having prevailed in the suit, judgment for costs would have been rendered against the ~~plaintiff~~ losing party. The 45th section of the same act provides that "when property is seized on attachment, the justice may allow the officer having charge thereof, such compensation for his trouble and expenses, in keeping and maintaining the same as shall seem reasonable and just," and as the measure of compensation is not fixed by law, the officer is not permitted to determine the amount, but it must be ascertained and allowed by the ~~Court~~ justice, and until it is so

allowed he has no demand against either of the parties to the suit. When however his compensation for his trouble and expenses in taking care of the property is properly allowed the allowance would be taxed as costs in the cause and would fall on the unsuccessful party. The boat having been sold, Snead had the right after the nonsuit to follow the proceeds of the sale in all respects as if the property had remained in specie, and if he was not liable for the general costs of the suit, it is difficult to perceive on what principle he was bound to pay this demand of the constable.

The defendant tendered to the plaintiff before the commencement of the suit a portion of the proceeds of the sale, and it cannot now be said that he had no notice of the dissolution of the attachment.

The attachment was against Snead alone, and the officer could only seize and sell his interest; therefore the money in the defendants hands belonged to Snead, in which his coplaintiff had no interest, and ~~[illegible]~~ was improperly joined in the action, but the objection to the misjoinder was not raised in the court below and if it had been taken the pleading could have been amended by striking out the name

of Shelton. (2 R.S. 1855 p 1253)

The judgment will be reversed and the cause remanded, with leave to the plaintiffs to amend the petition by striking out the name of Shelton

The other judges concur

J. C. Richardson

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&

Wegman

Opinion of the Court

Second Demurrer

Filed 31st March 1858
Wm L Glanville
Clk.

Richardson