STATE OF MISSOURI TO THE USE OF TYLER, ALEXANDER, L.

BOISLINIERE, L. CHARLES, McPHEETERS, WILLIAM M. AND LINTON, H.S.

MARCH 1867 COUNTY OF ST. LOUIS 578/6

OLD 661

- REVERSED AND REMANDED

- INVOLVED
  - PRACTICE, PARTIES – REPLEVIN - BOND - OFFICER – SHERIFF

The State of Missouri, ss.

The State of Missouri, to the Honorable the Judge of

Eight judicial Circuit in said State,---GREETING:

Whereas, *In the record and proceedings in a certain cause lately pending in the* Saint Louis Circuit Court *wherein* Alexander H. Tyler was

plaintiff

and L. Charles Boisliniere, William M. McPheeters and M. L. Linton were

defendants

in a civil action, manifest error hath intervened, to the great damage of said plaintiff *as by his complaint we are informed.*

NOW, *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 St. Louis, in the County of St. Louis, in said State, on the Third Monday in* October *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.*

O. D. Filley

WITNESS, ~~**ANDREW W. MEAD,**~~ *Clerk of our said Supreme Court, at office in the City of St. Louis, the* 29th *day of* September *in the year of our Lord one thousand eight hundred and sixty-* Six

STATE OF THE SUPREME COURT OF MISSOURI

O. D. Filley Clerk.

STATE OF MISSOURI, } ss.

County of .....

I, ...

Clerk of the ..... Court, within and for the County aforesaid, in obedience to the mandate of the within writ, herewith transmit to the Honorable Supreme Court of the State of Missouri, held at St. Louis, a full, true and complete transcript of the record and proceedings in the within entitled cause as fully as the same remain of record and on file in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Court, at office, in the .....

this ..... day of 186

.....

Clerk.

State of Missouri }
County of St Louis } Be it remembered that heretofore to wit
on the Seventeenth day of March A D
1860 there was filed in the Office of the Clerk of the St Louis
Court of Common Pleas within and for the County aforesaid
a petition in which Alexander L Tyler was plaintiff and
L Charles Boisliniere William M McPheeters and M
L Linton were defendants and upon which a summons
issued in the words and figures following to wit:

Summons

The State of Missouri
To the Sheriff of St Louis County .... Greeting
We command you to summon L Charles Boisliniere, William
M McPheeters and M L Linton to appear before the Judge
of our Court of Common Pleas on the first day of the next term
thereof to be held in the City of St Louis within and for the
County of St Louis on the first Monday of April 1860 then and
there to answer the complaint of Alexander L Tyler as
set forth in the annexed petition, and have you then and
there this writ. Seal Witness Lewis Papin Clerk of our
said Court with the seal thereof hereto affixed at Office in
the City of St Louis this seventeenth day of March in the year
of our Lord eighteen hundred and sixty. Lewis Papin. Clk
Upon said summons the Sheriff made the following return.

Sheffs Return

Executed this writ in St Louis County on the 17th day of
March 1860 by delivering a copy of the writ and petition
as furnished by the Clerk to L Charles Boisliniere also
by leaving a copy of the writ as furnished by the Clerk

(25)

at William M. McCheeters and M. L. Linton's usual place of abode with a white person of their family over the age of fifteen years. Thos. E. Courtenay Sheriff
By T. M. Barron Dpty

And afterwards on the 20th day of February A.D. 1865 by leave of Court the following amended petition was filed to wit;

Amended Petition

The State of Missouri to the use of Alexander L. Tyler Plaintiff
vs
L. Charles Boisliniere, William M. McCheeters & M. L. Linton Defendants

In the St. Louis Court of Common Pleas April Term, 1865
State of Missouri } ss
County of St. Louis }

Plaintiff by leave of Court for his amended petition in this behalf states that on or about the second day of August 1858 the said defendant L. Charles Boisliniere was at an election held in the County of St. Louis in said State duly elected Coroner of said County and on the ninth day of said month he as principal and the said other defendants as sureties executed their certain bond of that date and thereby acknowledged themselves bound to the State of Missouri, in the sum of five thousand dollars which bond was conditioned as follows; "That whereas the said "Boisliniere was at an election held in the County of St. Louis on "the 2d. instant (meaning the 2d. day of August 1858) elected "Coroner of said County for the ensuing two years, and if the said "Boisliniere shall faithfully perform the duties of his office of "Coroner as aforesaid, then said bond was to be void, otherwise "of full force," which said bond was duly approved according to law, before the Judges of the St. Louis County Court

(3)

in open Court on the 11th day of August 1858 and said Boisliniere on that day took the oath of Office as required by law, and entered upon his duties as Coroner for the County of St Louis, a copy of said bond and oath is herewith filed and made a part hereof. the original not being in the possession or under the control of this plaintiff

And plaintiff further says that on the 19th day of October 1858 he caused a writ of attachment to be issued out of the St Louis Circuit Court against the property and effects of one Christian Schaffler and directed to Michael S Cerre then the acting Sheriff in & for the said County of St Louis for the recovery of a note belonging to the plaintiff Alex[r] L Tyler described in the petition filed in said attachment suit amounting to the sum of $1538 50/100 dollars with interest costs and damages due and owing by said Schaffler to plaintiff. And plaintiff says that under said writ of attachment sued out as aforesaid the said Michael S Cerre as Sheriff levied upon and seized certain property and effects of said Christian Schaffler which are fully described in the returns of said Cerre on said writ of attachment to which reference is herein made, to an amount sufficient to satisfy said demand with interest damages and costs of suit all of which will fully appear by reference to the records of said suit of attachment on file in the St Louis Circuit Court.

And afterwards on the 20th day of October 1858 one Lorenz Schaeffler caused a suit to be brought in the St Louis Court of Common Pleas against said Michael S Cerre

(4) Sheriff as aforesaid claiming said property under the act relating to the claim and delivery of personal property as owner and procured from said Court an order upon said Cerne for the delivery of said property to the defendant Boisliniere as Coroner and afterwards under and by virtue of said order the said defendant Boisliniere as Coroner took the said property from the possession of said Cerne Sheriff as aforesaid and delivered the same to the said Lorenz Schaeffler claimant.

And plaintiff avers as a breach of the said official bond of said Boisliniere that he did not faithfully perform the duties of his office as Coroner in the execution of said order in this that he failed & neglected to take and return from the said Lorenz Schaeffler a good and sufficient bond with two or more securities as required by the laws of this State relating to the claim and delivery of personal property & otherwise failed and neglected to perform his duties as Coroner in the execution of said order as required by law, and as he was in duty bound to do. And afterwards upon the motion of the attorney of said Cerne the said suit of said Lorenz Schaeffler was dismissed the said Lorenz Schaeffler having failed to file a new replevin bond as ordered by this Court and thereupon the said Court of Common Pleas made an order upon said defendant Boisliniere to retake said property and deliver it to the said Cerré defendant in said suit as will fully appear from the order of this Court herewith filed. And plaintiff says that

(5) said defendant Poisliniere although often requested so to do and notified of the order of this Court, ~~heretofore filed~~ has hitherto wholly neglected and refused to retake said property or deliver it to said Cerre Sheriff as aforesaid. And plaintiff says that on the 10th day of December 1859 he recovered judgment against said Christian Schaeffler upon the said attachment brought by this plaintiff in the said St Louis Circuit Court (No 40 Feby Term 1859) for the sum of 179 4/100 Dollars with the costs of this suit And plaintiff says that said Christian Schaeffler is wholly irresponsible and insolvent and that this plaintiff can not make or collect the said judgment of or from the said Christian Schaeffler. And plaintiff further says that by reason of the premises and the wrongful and unlawful acts of the said defendant Poisliniere as aforesaid he has been damaged in the sum of two thousand five hundred dollars and plaintiff avers that by force of the statute in such case made and provided an action has accrued to this plaintiff against the said defendants upon their bond aforesaid for his said damages and he therefore asks judgment for his said damages with costs and interest. David W Hill with Hill & Leavitt attys for Plff

County of St Louis ss

David W Hill atty for the plaintiff being duly sworn upon his oath says that he believes the foregoing petition and the matters therein as stated are true.

David W Hill.

(6) Sworn to and subscribed before me this 17th day of February 1865 Leon J Papin &c

And afterwards to wit on the 27th day of March A D 1865 a demurrer to said amended petition was filed which is in the words and figures following to wit;

Demurrer to Amended Petition

Now come the defendants and file this their demurrer to the plaintiffs amended petition and for cause of demurrer state.

1st. That there is a defect of parties plaintiff in this that the plaintiffs relator is not a proper party to this action as he has no special or general property in the goods taken and could not therefore have suffered damage within the meaning of the statute provisions

2d. That the petition does not state facts sufficient to constitute a cause of action in this that it does not appear that the plaintiff has been damaged in any way or that he had any general or special property in the goods which would entitle him to maintain the action or that Michael S Cerre assigned or transferred to him his right of action.

3d. That it does not appear that the defendant Boislinière could have executed the order of Court to retake the property and there appears in this regard no breach of his official duty. Krum & Decker with Lackland Clure & Jameson for Defts

And afterwards the following further proceedings were had in this cause to wit;

(7)

April Term 1865

Saturday April 29th 1865

Demurrer Sustained Leave to amd. The Court having heard and fully considered the demurrer to the amended petition herein doth sustain the same and grants leave to the plaintiff to file an amended petition on or before the first day of the next term of this Court.

Saturday November 18th 1865

Pff declining to amend final Judgt. The plaintiff having refused to amend on motion of the defendant by attorney it is ~~ordered that~~ adjudged by the Court that final judgment be rendered, and that the plaintiff take nothing by his suit in this behalf but that the said defendants L. Chas Boisliniere, William M McPheeters and M L Linton go thereof without day and recover of said plaintiff Alexander L Tyler their costs and charges herein expended and have execution therefor.

State of Missouri }
County of St Louis } Ss. I Frank A H Schneider Clerk of the St Louis Circuit Court, having by law the custody of the records and papers of the St Louis Court of Common Pleas, certify the above and foregoing to be a full true and complete transcript of the record and proceedings in the cause of Alexander L Tyler plaintiff against L Chs Boisliniere et al defendants as fully as the same remain in my office

In testimony whereof I hereto set my

hand and affix the seal of said Circuit
Court at Office in the City of St Louis this
Twelfth day of September A.D. 1866
D. A. Schweider Clk

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72 ~~Rec~~ (2) 72

March Term 1867

Alexander L Tyler
Pltff in Error

vs Z Transcript

L Charles Poisliniere
William M McPheeters
and M L Linton
Defts in Error

Error to St Louis Circuit Court

Filed Sept 29th 1866
O. F. Fishback
Clk

Hill & Jewitt for
Pltff in Error

Krum & D, Clure & Jameson
for Defts in Error

Ex 6
3
1 Cor pd by B. A. Hill

1867 April 22 Short & brief of Ap filed
" May 13 Revised & Remanded

1866. Oct 20 Assgmt of Error filed
1867 April 22. Short & brief of Ap filed
" " 23 " " " Res " Arg & Sub

Tyler Pltff in writ of error
v
Boistinere Deft in error

IN SUPREME COURT,
Oct TERM, 1866.
206.

AND now comes the said Plaintiff in error and says that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Plaintiff in error assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by
2. That said Court rejected proper and legal testimony offered by
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
~~9.~~ 1. That the judgment was rendered in favor of the Defendant when it should have been rendered for the Plaintiff
10. That said Court ~~overruled the motion for a new trial, made by~~ should have overruled the Defendants Demurrer to Plaintiffs amended petition

B. A. Hill
for Pltff in error

And now come the Defendants in Error and for joinder in error say, that there is no error in the record and proceedings of said in said cause, as assigned by said

Kneen Dickerson
for deft error

Supr Court

206. Oct T. 1866

Tyler writ on
v
Boislinier

Agst of errors

B. A. Hill
for Appts

Filed Oct. 20. 1866
O. T. Fisleback
Clk

Alex L Tyler
Appt
vs
L Boislinière &c
Respt

Supreme Ct
St Louis Co
March 2, 1867

Statement

The Pltff had a demand vs Schaeffer, & on it attached property on mean process. One Lorenz Schaeffer replevied the property from the possession of the Sheriff, the Deft Boislinière being the Coroner, who served the replevin writ. The bond taken by Boislinière was bad, being signed by only one surety, ~~& advantage~~ notice was taken of this by Pltffs counsel at the first term of the Court & on motion to that effect, the Court ordered a new bond, on the ground that the bond was insufficient. This order was not complied with by the Coroner or Pltff in replevin & on motion by Pltff ~~[illegible]~~ (Tyler) the suit was dismissed & an order made, that the Sheriff or other proper officer retake the property & deliver it to the Deft in replevin (Pltff in this case) & that the Pltff

in replevin (Lorenz Schaeffer) deliver the property to the officer therefor -

When demand made for this purpose, the property was never delivered up, & found & the Pff in this case has never been able to find any property of the original Defft out of which to make the debt, & the debt remains wholly unpaid to this day -

When the original attachment suit, the original debtor & Defft denied the cause of attachment by plea in the nature of a plea in abatement; and issue was tried before a jury, & verdict found for the Pff

This action is brought by the Pff in this case, the original Pff in the attachment suit against the constable, Bourbonnais & his bondsmen, on his official bond to recover the damages suffered by the Pff. It is brought under the 22d section Art 7th of the Practice act. Rev Statute 1853 p 1246

The Defts demurs to the petition on the ground that the Pff is not

the proper party to bring the action.
~~That~~ the action should have been in the name of the Sheriff, who made the attachment. The demurrer was sustained by the Court of Common Pleas & the Pltff appeals from the decision on the demurrer.

Brief

The Statute says "the party injured" is the one to whom the Sheriff or other officer & his bondsmen shall be liable for damages, to be recovered by civil action, or by civil action on ~~his~~ the officers official bond."

Who else is injured than the Pltff in the original suit - it is difficult to see or imagine.

That he is injured by the failure of the Coroner to take a good bond, & to furnish one when ordered by the Court, is plain from the fact that he has not been able to collect his debt - & will lose it unless he can make the Coroner pay it. The Sheriff who made the attachment is not injured & cannot be, because he did

his duty & was not guilty of any default, for it was not his business to see that the Coroner had a good bond before he gave up the property to him — The Court, whose servant he was, sent an order to him to give up the property, — Art 7th Sec 2 & 3 Chap 128 Rev. Statuts 1853 p 1243 & he could not refuse — The law made the Coroner the judge of the goodness of the bond, & his duty not to serve the process without a good bond, & his duty to see that a good one was furnished when the Court ordered a new one.

The Pff has no power to compel the Sheriff to bring suit & recover damages, & in this case the Sheriff, Courtney, had become a defaulter, was out of office & had run away before this action was brought or at least long before the Court ruled that the action must be to the use of the Sheriff. How the Court below could put such a construction upon the Statute, is more than I can see

D T Jewett for Appt

No 85

A L Tyler

v

Borstenieu &c

Sup. Ct

March 2

1867

~~Statement~~

& brief for Appt

Filed April 22 1867

C T Fishbackett

per E O McCarty Defs

The State of Missouri
to the use of
Alexander L. Tyler
Plff in error
vs.
L Charles Boisliniere
Dr. M L Linton and
Wm M. M Pheeters
Defts in error.

Statement by Defts in error.

This is an action on the official bond of the Coroner of St Louis County.

Plff in his petition alleges that ~~in October last~~ he caused a writ of attachment to be issued out of the Circuit against the property of one Christian Schaffler, and directed to Michael L Cerre then the acting Sheriff of St. Louis County for the recovery of a note belonging to plaintiff amounting to $15-38.50/100 with interest damages and costs due & owing by said Schaeffler to plaintiff. That under said writ of attachment said Michael L Cerre levied upon & seized certain property described in the records of said suit of attachment. That afterwards a third party Lorenz Schafler caused a

suit to be brought in the St Louis Common Pleas Court against said Michael S. Cerre claiming said property under the act relating to the claim and delivery of personal property, and pursuant from said Court an order upon said Cerre for the delivery of said property to the defendant Boisliniere, and Boisliniere as Coroner took the property under said order of Court and delivered the same to said plaintiff Lorenz Schaefer.

Plaintiff avers as a breach of the bond that the Coroner failed in executing the order of delivery in suit of Lorenz Schaefer vs. Michael S. Cerre neglected and failed to take from said Lorenz Schaefer a bond with two or more securities

Petition alleges that afterwards on the motion of said Cerre the said suit of Lorenz Schaefer vs Cerre was dismissed the said Lorenz having failed to file a new replevin bond as ordered by the Court and

thereupon said Court of Com. Pleas made an order upon defendant Bordiniere to retake said property and deliver it to said Cerre defendant in said suit, but said Commissioner although requested has neglected & refused to retake said property or deliver it to said Cerre.

Plff then alleges that afterwards he recovered a judgment against Christian Schaefer & avers that Christian Schaefer defendant is wholly irresponsible & insolvent & plff cannot collect the judgment from said Christian Schaefer - and avers that by reason of the premises and under the Statute an action has accrued in his favor against the defendants sureties on the Commissioners bond.

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Tyler
v
Boisliniere

State use Tyler
vs.
Borkinier
McPheers & Linton

The only question in this case is whether Cerre the defendant in the replevin suit, or Tyler the attaching creditor is the proper party to maintain a suit against the coroner & his sureties for damage occasioned by omitting to take two sureties on the replevin bond. in case of Shafer v Cerre

The Statute provides that (sec. 3) the bond shall be made to the defendant; the 12th sec. provides that upon plaintiffs failure to prosecute his action ~~&~~ where the defendant shall in his answer claim the return of the property (see sess acts 59/60 p 87. the a judgment shall be rendered against plaintiff & his sureties &c.

The replevin bond required to be taken is taken for the benefit of the defendant only; the judgment for failure to prosecute can be only in favor of the defendant. The defendant alone has the benefit of the bond - not a stranger.

Hence the Court below properly ruled that for any defect of the bond, the

proper party to sue was the defendant in replevin bond. — The suit must be brought in the name of the party to whom bond is given. Sec. 19.

The Statute requiring Sheff & Owner to give bond & giving to "parties injured" the right to sue ~~it~~ was not intended to create new causes of action, but only such as had a right under that Statute.

The object of this section (22) was to furnish to the parties who under the Statute would have had the benefit of the judgment ~~(if in their favor)~~ a remedy against the officer on his bond.

It was not intended to create a new cause of action, but merely additional security

The common law rules of liability which create causes of action are not changed. Any "party injured" means a party who would be injured according to the rules of law.

~~Every good~~

Plff here has no property general or special in the goods — he is not the owner never was in possession — a judgment in the attachment suit would

not have determined his right to the goods attached.

But the Sheriff has a special property by virtue of the seizure — & therefore he is party out of whose poss. goods are taken to sue — he is the "party injured." under the Statute. In his name the suit ought to be brot — he has his action now & then — plff's recovery would be no bar to his action. —

An interpleader in the injured attachment suit could not sue the Conveyer — the real owner of the goods could not sue him — a garnishee in the attachment suit could not sue —

Such a construction would make an officer liable to a multiplicity of actions to many parties without limit.

But again the attaching creditor is not injured by taking of an invalid bond, but merely by the non-return of the goods —

In other words if the goods had been

returned, attaching creditor would have sustained no injury.

And petition ought allege that the coroner could have returned the goods. –

Plaintiff must show a legal duty to himself, before he can recover for an act of neglect against a public officer. –

Bank of Rome v Mott 17 Wend 556

A replevin is brought against Cerre – bond under Stat is made to him – + to him alone + for his benefit only – if any other party than the defendant may sue, then the officer would become liable to a mortgagee, interpleader, bailee, or any ~~[illegible]~~ number of persons who had an interest direct or remote in the property – such is not the Statute or its object or spirit.

Tyler v Boislinière

By the judgment in replevin, a judgment for the whole value is rendered in favor of Cerre individually he has his election to take the property in specie or its value assessed. – (sec. 12)

It would be monstrous to hold that a judgment in his favor for value or specie – can be made available to a stranger – No assignment by Cerre to plff Tyler is alleged. –

In construing the words "the party injured" in the 22d section, the Court will seek the intent of the legislature -

a- this intent is to be gathered from the scope of the act

b- with reference to the common law at the date of its passage.

The object of the Statute was to give to the party out of whose possession the property is taken security for its return -

not to give all parties who might have some interest contingent or remote a remedy -

but purely to give the security to him out of whose possession it was taken.

Hence the defendant is "the party" to whom the property is to be returned - the bond is to be made to him alone - the judgment upon the bond shall be in his favor - the order to return shall be to him alone.

~~All the proceeding~~

Defendant may retain property

and give a bond - in that case the plaintiff (in replevin) is "the party" to whom the bond is made, & is "the party" to whom it is to be delivered -

Clearly then referring to these preceding provisions, the section declares that for a failure in taking "these" bonds the Officer shall be liable to "the party injured", meaning "the party" to whom the property or its value would have been adjudged, (either plff or deft) as the case may be.

It would be strange if the Statute had intended a liability to all the world, who might have some contingent interest. -

An prior attaching plff has no interest whatever right of property in the thing whatever - either general or special - - being a stranger he could not be bound by the judgment - incurs no costs or liability; yet he claims the benefit of the bond, or of a defective bond. -

By the common law, as it stood before the Statute was enacted it is clear that the attaching plff would have no right to sue the officer, for the

means that he had "no property" in the thing.

Similar Statutes have received the same interpretation.

Stewart v Ball 38 Miss 209.

85

State use of
Tyler
vs
Boislinière
& his securities
Linton &
McPhecters

Respondents
Statement &
Brief

Krum & Dicker
for report

Filed April 23 1867
O T Fishback clk
per E McCarty Dep

In the Sup Ct Mo
March 7, 1867,

State to use of A. L. Tyler P.E.,
vs
Boislmiere & others D.E.
} Error to St Louis Circuit Court.

Opinion of the Court.

This was an action on the official bond of the defendant as Coroner of St Louis County.

Plaintiff in his petition alleged that he caused a writ of attachment to be issued out of the Circuit Court against the property of one Christian Schaffler, and directed to Michael S Berne then the acting sheriff of St Louis County for the recovery of the amount of a note which the said Christian owed to the plaintiff, That under said writ of attachment, said Michael S Berne as sheriff, levied upon and seized certain goods and chattels more than sufficient in value to satisfy the debt, That afterwards a third party, Lorenz Schaffler

caused a suit to be brought in the St Louis Court of Common Pleas, against said Cerne claiming said property under the act relating to the claim and delivery of personal property, and have issued from said Court an order upon Cerne for the delivery of the property to the defendant; and that the defendant as Coroner took the property under the order of the said Court and delivered the same to the plaintiff in that suit Lorenz Schaffler,

It is then assigned as a breach of the bond, that the defendant as Coroner failed in executing the order of delivery in the suit of Lorenz Schaffler vs Michael S Cerne, to take from said Schaffler a bond with two or more securities

It is further alleged that afterwards on the motion of Cerne the suit of Lorenz Schaffler vs Cerne was dismissed, the said Lorenz having failed to file a new replevin bond as ordered

by the Court and thereupon the Court of Common Pleas made an order whereby the defendant as Coroner to retake the property and deliver it to the said Cerne defendant in the suit, but that the said Coroner although requested, neglected and refused to retake the property or deliver it to Cerne, Plaintiff further alleges that afterwards he recovered judgment against Christian Schaffler, and that the said Christian is wholly irresponsible and insolvent and that the judgment cannot be collected from him, and that by reason of the premises and under the statute an action has accrued in his favor against the defendant and his securities on his official bond,

A demurrer was filed to the petition, and the grounds assigned for causes of objection were; That there was a defect of parties, that the relator was not a proper party to the action as he has no special or general interest in the goods

taken and therefore could not
have suffered damage within
the meaning of the statute,
2d, That the petition did not state
facts sufficient to constitute a
cause of action, because it did
not appear that plaintiff had
any property in the goods, or that
Cerre had assigned or transfer
red to him his right of action,
3d That it did not appear that
the defendant could have execu
ted the order of the Court to retake
and there was no breach of the bond,
the property, This demurrer
the Court sustained, and after
wards gave judgment for the defen
dants,

It is preposterous to say here,
that there was no breach of the
bond, The statute provides that
the officer shall not receive
or take the property until the
plaintiff shall deliver to him
a bond, executed by two or more
sufficient securities, It is
confessed that the statute was
not complied with, and the act
of taking an invalid and insuf

ficient bond constitutes a breach. Nor is there any thing in the statute in a case like this, requiring the assignment or transfer of the bond taken by the officer, to enable the party interested to sue. Section 20 of the act (2 Rev Stat 1853 p 1246) provides that after the due execution of any bond taken in virtue of that article, the parties to the action shall be barred of any right of action against the sheriff, or other officer, for the seizure and delivery of the property. That is when the officer has done his whole duty and taken a good and sufficient bond under the statute. But the 22d section says that if the sheriff or other officer, fail to take or return a bond as required by law, or if the bond taken is adjudged insufficient, he and his securities shall be liable to the party injured, for all damages by him sustained, to be recovered by civil action, or by

civil action on the officers bond.

Who else but the plaintiff was injured, by the officers neglect to perform his duty? It was not the sheriff, from whom the property was replevied. He had a special property, but so far as his loss was concerned, it was damnum absque injuria. We see no merit in the objection, that the suit can only be prosecuted in the name of the sheriff, from whom the property was wrested. Suppose the sheriff refuses to sue, or is dead, or has absconded, is the party to be deprived of all remedy, when the statute declares that any person who is injured may maintain the action? The plaintiff has sufficient property attached to secure satisfaction of his indebtedness, which has been entirely lost to him by the official misconduct and negligence of the defendant, the statute gives him a remedy

and there is no legal pretext on which the defendant can escape responsibility

Reversed and remanded.

The other judges concur.

David Haque

State to use of Tyler
v
Boislinere & others

Opinion of the
Court
Wagner

Filed May 13th 1867
O T Fishback Clerk
per E P McCarty Dep

Reversed & Remanded