

Case No. 4,727.

FENDALL v. TURNER.

{1 Cranch. C. C. 35.}¹

Circuit Court, District of Columbia.

July Term, 1801.²

SHERIFF—FAILURE TO PAY MONEY MADE UPON A FI. FA.—LEVY ON MONEY
MADE ON ANOTHER FI. FA.

- 1 A motion against a sheriff for not paying over to the plaintiff money made upon a h. fa may be made in the name of the original plaintiff in the fi. fa., although he had taken the insolvent oath.
 2. The sheriff cannot levy a fi. fa. upon money in his hands made upon another fi. fa.
- {See note at end of case.}

FENDALL v. TURNER.

This was a motion for judgment against Charles Turner, late town sergeant of Alexandria, for not paying over to the plaintiff money made on a *fi. fa.* of *Fendall v. Towers*. The motion was grounded on the act of assembly of Virginia respecting executions. Rev. Code, p. 317, § 51. See this case in the supreme court of the United States. 1 Cranch [5 U. S.] 117.

The cases cited in this court were: *Esp. N. P.* 741; *King v. Webb*, 2 Show. 166; *Dalt. Sher.* 145, 543; *Fulwood's Case*, 4 Coke, 67; *Rex v. Bird*, 2 Show. 87; *Hoe's Case*, 5 Coke, 90; Act of Virginia respecting executions, §§ 13, 51, 25, 36, 50; *Armistead v. Philpot*, Doug. 231; *Benson v. Flower*, 4 Cro. Car. 166, 176; *Staple v. Bird*, Barnes, Notes Cas. 214; *Miller v. Race*, 1 Burrows, 457; *Cannon v. Smalwood*, 3 Lev. 203; *Godb.* 147; *Bealy v. Sampson*, 2 Vent. 95.

THE COURT decided: 1. That, the motion might be sustained in the name of *Fendall*, although he had taken the insolvent oath. 2. That the sergeant could not levy the execution of *Deneale v. Fendall* on the money in his own hands made on the *fi. fa.* of *Fendall v. Towers*, and that such return was not good.

Judgment for the amount made on the *fi. fa.*, and fifteen per cent per annum damages.

[NOTE. On writ of error this judgment was affirmed by the supreme court, the opinion being delivered by the chief justice. It was held that as the mandate of a writ of *fieri facias* as originally formed is that the officer have the money in court on the return day, there to be paid to the creditor, and that in this case the sheriff, not having brought the money into court, but having levied an execution on it while in his hands, has not sufficiently justified the nonpayment of it to the creditor, and therefore the court committed no error in rendering judgment against him on the motion of that creditor. *Turner v. Fendall*, 1 Cranch (5 U. S.)

¹ [Reported by Hon. William Cranch, Chief Judge.]

² [Affirmed in 1 Cranch (5 U. S.) 117.]