

STATE OF INDIANA *EX REL.* RICE *V.*
BALDWIN AND OTHERS.

Circuit Court, D. Indiana.

February 24, 1881.

1. ATTACHMENT—UNDER-FILING
CREDITOR—RELEASE OF ATTACHED
PROPERTY—LIABILITY OF SHERIFF—STATUTES
OF INDIANA.

In the state of Indiana an under-filing creditor in an attachment proceeding, not dismissed of record, has a right of action against the sheriff and his sureties for the prior release of the attached property, without notice, under an agreement between the original parties to the attachment suit.—[ED.]

Civil Action.

GRESHAM, D. J. The complaint avers that on the twenty-second day of September, 1876, Jason Wilson and Adam

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Wolf began an action in attachment in the Grant circuit court against Isaac Crosslet, John B. Graves, Samuel Pugh, and Daniel Mitchell; that on the same day the writ of attachment which came into the hands of Lancaster D. Baldwin, as sheriff, was levied by him on a lot of lumber, shingles, and laths, of the value of \$5,000, the property of the attachment defendants; that on the first day of February, 1877, while the suit and attachment proceeding were still pending and undisposed of, the relator, Charles Rice, filed his complaint, affidavit, and bond in attachment, under the proceeding of Wilson and Wolf, and became entitled to the benefit of the same; that on a subsequent day Wilson and Wolf appeared in open court and dismissed their action and attachment; that thereafter, to-wit, on the twenty-sixth day of September, 1877, Rice recovered judgment against the attachment defendants on his cause of action for \$3,619.94, and at the same time obtained an order for the sale of the

attached property, and an application of the proceeds to the payment of his debt; that without the authority or orders of the court Baldwin allowed the attached property to be taken from his custody and to be wasted, sold, and otherwise disposed of, and failed and refused, upon proper demand, to deliver the same to his successor in office to be sold under the order of the court; and that Baldwin and the sureties on his bond are liable to the relator for the value of the attached property.

In the ninth paragraph of their answer, after admitting the commencement of the action and proceeding in attachment by Wilson and Wolf, and the levy by Baldwin on the lumber, shingles, and laths, under the writ of attachment, as stated in the complaint, the defendants aver that before the relator filed his complaint, affidavit, and bond, and attempted to become a party to the original proceeding, Wilson and Wolf and the attachment defendants agreed that one Mitchell, the agent of the attachment defendants, should take possession of the attached property, sell the same, and apply the proceeds to the payment of Wilson and Wolf's debt; that, by direction of Wilson and Wolf and the attachment defendants, Baldwin, the ³² sheriff, permitted Mitchell to take possession of the attached property, sell the same, and with the proceeds, on the eleventh day of January, 1877, pay Wilson and Wolf's debt in full; that on the last-named day it was agreed by the parties, no other creditor having them become a party to the attachment proceedings, that the suit should be at once dismissed; but, by neglect, the same was not done until after the first day of February, 1877, when the relator filed his complaint, affidavit, and bond, as aforesaid, and the attached property was thus sold, the debt of Wilson and Wolf paid, and the agreement for the dismissal of the suit and attachment proceedings entered into in

good faith, and without any knowledge that the relator or any other creditor intended to file thereunder.

The tenth paragraph of the answer is in substance the same as the ninth.

There is a demurrer to the ninth and tenth paragraphs of the answer.

Section 165 of the Indiana Code makes a writ of attachment a lien upon the property of the attachment defendant from the time it is delivered to the sheriff. Section 186 authorizes any creditor of the defendant, upon filing the proper affidavit and bond, to become a party to the action and attachment proceeding at any time before the final adjustment of the suit. Section 187 declares that a dismissal of the action or proceeding in attachment shall not operate as a dismissal of the action or proceeding of any subsequent attaching creditor. Section 192 declares that the money realized from the attached property, after paying all costs and expenses, shall be paid to the several creditors in proportion to the amount of their several claims.

In *Shirk v. Wilson*, 13 Ind. 129, it was held that the claims of other creditors filed under an attachment suit are liens from the time the original writ was placed in the hands of the sheriff.

The records in the clerk's office showed that Wilson and Wolf's suit in attachment was pending, and that the sheriff had levied on property of the attachment defendants when Rice filed his complaint, affidavit, and bond. The plaintiffs 33 neglected to dismiss their suit, as they had agreed to do, and the defendants neglected to have the suit dismissed, as they might have done. The dismissal by Wilson and Wolf, after Rice had become a party to the proceeding, had no effect on any rights which Rice had acquired. While Baldwin was not a party to the attachment suit, he was interested in having that suit dismissed before other creditors filed under it. But he neglected to

inform the court of the payment of Wilson and Wolf's debt, the agreement to dismiss, and the disposition that had been made of the attached property, and Rice took the necessary steps to become an under filing creditor, and proceeded in the regular way to judgment on his claim. The court also found that the property which the sheriff had seized was subject to the lien of Rice's attachment, and ordered that it be sold to pay his debt. Baldwin and his sureties are now sued because Baldwin failed to deliver the attached property to his successor in office for execution, and the defence is an indirect attack on the order of the court.

The court could, and perhaps would, have permitted Baldwin to set up the agreement between the original attachment plaintiffs and defendants for the dismissal of the suit in opposition to Rice's motion for an order to sell the attached property and have the proceeds applied to the payment of his debt. *Adams v. Balch*, 5 Me. 188; Drake on Attachment, § 304. But finding that the original suit in attachment was pending on the docket, that there had been no "final adjustment" of it by dismissal or otherwise, was Rice bound to go further and inquire whether there was any private or outside agreement for its dismissal? I think not. What effect it would have had if, before taking the necessary steps to become an under filing creditor, Rice had known of the payment of Wilson and Wolf's debt, and of the agreement to dismiss the suit, is not a question now before the court. The attached property was in the custody of the court for the benefit of Wilson and Wolf, and all other creditors who saw fit to become parties to the proceeding. While the case remained on the docket, unless the defendant substituted a bond for the attached 34 property, Baldwin was bound to hold it, not under the orders of the plaintiffs, as in the case of an ordinary execution, but under the orders of the court, and have it forthcoming when demanded for execution.

His failure to do this was a neglect of his official duty, whereby Rice acquired a right of action against him and the sureties on his official bond. The surrender of the attached property to Mitchell, by direction of Wilson and Wolf and the defendants, was of course a protection to Baldwin against them. Rice is entitled to such damages as will indemnify him for Baldwin's neglect of official duty.

Whether Rice is entitled to recover nominal damages only, or the amount of his debt, if the value of the attached property was enough to pay the debt, or an amount equal to what his *pro rata* share would have been had there been no agreement to dismiss and the property had been held for execution, need not now be decided. It is sufficient, in overruling the demurrer, to say that Rice had a right of action.

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