FOWLER *vs.* PEARCE, SHERIFF, &C.

The judgment inclusive of costs, upon which an execution issues, is in the name of, and for the benefit of the plaintiff in the writ: the writ itself is issued at his instance, and is at all times subject to his control.

He may order its return, or a suspension of action at the moment property levied on is offered for sale, and thus control the beneficial interest of officers and others entitled to fees upon it.

The items of the judgment embraced in the execution, inclusive of costs, constitute an entirety, the legal right to which is in the plaintiff, and cannot be parceled out by the sheriff with a view of discrimination.

Where the money due upon the execution, is collected in part only by the sheriff, he is not bound to discriminate in favor of officer's fees, and apply it in satisfaction of the beneficial, without regard to the legal interest.

If in such case, there be a necessity for the exercise of discretionary power in its application as a credit, it attaches to the legal rather than the beneficial interest.

Where a plaintiff bids at a sale of property under his own execution, it has been held to be unreasonable "to insist that he should advance money on his bid, when the sole object of the sale is to put money in his hands, by paying a debt due to him."

And of the correctness of this, as a general rule, no doubt is entertained.

There might, however, be cases where it would be otherwise—such, *ex gr.* as liens of equal dignity created, by judgment or execution, in favor of different creditors, upon the real or personal property of the defendant. In all such cases, it would be proper for the sheriff to require an execution creditor to pay over the amount of his bid, in order to enable him to render it in court, on the return of the writ, to abide such award as might be made on the adjustment of conflicting claims.

A *vend. exponas* was delivered to Pearce, as sheriff, &c., commanding him to sell lands therein specified, and have the money arising therefrom in court, &c. to render the plaintiff therein his debt, damages, costs, &c. The sum of $44.54 was endorsed upon the writ as costs due to former clerks and sheriffs, and $2 to Sheriff Pearce. At the sale of the lands, the plaintiff in the writ became the purchaser thereof, at the sum of $50; tendered Pearce his own fees, offered to enter the balance of the purchase money as a credit on the *ven. ex.*, prepared a deed, and demanded its execution for the lands by the sheriff, but he refused to execute it unless the plaintiff would pay upon his bid the entire fees endorsed upon the writ—held that he was bound to execute the deed upon payment of his own fees, and *mandamus* issued to compel him.

On motion for Mandamus.

In November 1845, Absalom Fowler, Esq., presented to the chief justice of this court, in vacation, a petition, stating substantially, that on the 5th Nov. 1839, James Boswell, adm'r. of Hartwell Boswell, obtained against J. L. Lafferty, on petition to foreclose a mortgage, in the circuit court of Van Buren county, judgment for the mortgage debt, damages and costs, and a decree that the mortgaged lands be sold to satisfy the same. That on the 17th Jan'y. 1840, Boswell sued out a *fi. fa.* upon the judgment and decree, which was levied by the then sheriff of the county, upon the lands, but returned without sale. That afterwards said James Boswell died, petitioner, Fowler, was appointed adm'r. *de bonus non* of Hartwell Boswell, and on the 3d Nov. 1841, obtained a revival of the judgment and decree in his name as such adm'r. That on the 20th August, 1845, he sued out a *vend. exponas* thereon, directed to the sheriff of said county, which came to the hands of James M. Pearce, who was then, and now (the time of petition) sheriff of said county. That Pearce, as such, after having given due and formal notice, proceeded to sell said lands, at the proper time and place, and that Fowler, by his agent, Smith, became the

purchaser thereof, at the sum of $50. That thereupon he tendered Pearce all the costs due to him, and all other *legal costs* due and unpaid in the case, offered to endorse as a credit upon the writ the residue of purchase money, over and above the *legal costs,* and at the same time presented him a deed, for his execution, to the lands, but that Pearce refused to receive such legal costs, and permit the residue of the $50 to be entered as a credit upon the writ, and refused to execute the deed unless Fowler would pay into his hands the entire $50 to be applied by him to the payment of pretended costs, &c. which had been previously paid, which were never due Pearce, and over which he had legally no control, &c., &c.

Petitioner prayed a writ of *mandamus* to compel Pearce, as such sheriff, to execute to him a deed to said lands. The chief justice granted an alternate writ, returnable to the present term of this court. On the coming in of the response of Pearce to the writ, which is sufficiently set out in the opinion of the court, Fowler moved for a peremptory mandamus against him, on the ground that the answer was insufficient.

FOWLER, *pro se,* maintained the motion, by the following positions and authorities, among others:

1. The costs are a part of the judgment, and as much so as the debt, and the party in whose favor the judgment is rendered has the legal right to collect them. *Rev. Stat. p.* 203 *to* 206, *Ib.* 374, *Sec.* 6.

2. The presumption of law is, where there is no proof to the contrary, that each party pays all his costs, as the suit progresses, and the judgment for them is to enable him to reimburse himself—to recover them back. 2 *Wils. Rep.* 91, 2 *Tidd's Pr.* 865. *Rev. Stat.* 203 *to* 206.

3. Pearce's costs being tendered, he had no right to demand more. It would be an idle act for plaintiff to pay the other costs to the sheriff, when he would have a right, immediately, to demand and receive them back as part of his judgment. And it has been correctly adjudged that when a plaintiff purchases on his

own execution, he is not bound to pay the money. The purchase enures as a payment *pro tanto. Nichols vs. Ketcham,* 19 *John. Rep.* 92. *Russell vs. Gibbs,* 5 *Cowen Rep.* 391.

4. The costs of a suit are adjudged legally to belong, and must be paid to the successful party. 1 *Cowp. Rep.* 367, 3 *Burr. R.* 1724. 1 *Salk. R.* 206-8. 6 *T. R.* 602. 3 *Ib.* 654. *Buller's N. P.* 328 *et sequ.* 2 *Wilson R.* 91. 2 *Tid. Pr.* 864, *et sequ. Tom. Law. Dic. Article Costs,* 445-8, &c., &c.

CUMMINS, *contra:* Cited *acts of* 1842-3, *p.* 38, *sec.* 31.

CROSS, J. Delivered the opinion of the court.

From the answer and accompanying papers to an alternative writ of mandamus heretofore issued, it appears that Absalom Fowler, as adm'r. *de bonis non* of the estate of Hartwell Boswell, deceased, regularly sued out, and caused to be placed in the hands of James M. Pearce, sheriff of Van Buren county, a writ of *venditioni exponas,* commanding him to expose to sale, certain lands therein specified, and the money arising therefrom, to have before the circuit court of said county, on the second day of term thereof, to be holden on the first Monday after the fourth Monday of October next, ensuing the date of said writ, to "render to said Absalom Fowler, as such adm'r., the debt, damages and costs," &c. In obedience to the command of the writ, Pearce, as such sheriff, proceeded to advertise and sell the lands in due form, and at the sale Fowler, through his agent Howard W. Smith, being the last and highest bidder, became the purchaser at the sum of fifty dollars. Pearce immediately thereafter, as he states in his answer, demanded payment of the said sum of fifty dollars, which, with the exception of the costs due to him as sheriff for his service, was refused. Upon this refusal of Fowler, through his agent aforesaid, to pay the sum of fifty dollars, he states further in his answer, that as such sheriff he offered to take, and requested Smith, the agent, to pay him the costs legally due and taxed upon the writ of *vend. exponas,* and give him the receipt of Fowler, as adm'r, &c., for the residue of the said sum of fifty dollars. This being also declined,

he adds, "I, as such sheriff, did refuse to execute and acknowledge a deed of conveyance for said lands unto the said Fowler, and still do refuse to execute and acknowledge a deed of conveyance as such sheriff for said lands and tenements" &c. It appears further from a copy of the writ, which is exhibited and made part of the answer, that the sum of forty-four dollars fifty-four and three-fourth cents, was endorsed upon it as costs due to former clerks and sheriffs, and two dollars to the then and present sheriff. These being the material facts as set forth in the answer to the alternative writ, and relied upon by the sheriff, Fowler contests their sufficiency and moves the court to award him a peremptory writ of mandamus, commanding the said sheriff absolutely to execute and acknowledge a proper deed for the lands &c.

The motion is opposed upon the ground that the amount bid at the sale should have been paid, at least to the extent of the costs endorsed upon the writ of *venditioni exponas* as fees due for services rendered by other officers in the cause, it not appearing that Fowler, the plaintiff, had paid any part of these fees. *Section* 31 of the act entitled "an act to regulate the fees of office of the several officers of this state," approved the 23d Dec., 1842, is relied upon and is in these words: "If any party to a suit shall pay any fees allowed by this act, before final judgment, and the judgment shall thereafter be rendered in his favor, and costs adjudged to him, the amount so paid shall be taxed and endorsed on the execution, and levied and collected by virtue thereof, for the benefit of such party; and all fees which shall not be paid, shall be endorsed on the execution and collected by virtue thereof, for the benefit of the person rendering the service, or the same may be collected on fee bills according to preceding provisions of this act, but only the costs of the prevailing party shall be so taxed on such execution." See *Session Acts, p.* 38. Under this provision it is insisted that the sheriff is not bound to pay over to any but the party beneficially interested, or the plaintiff authorized to receive costs, endorsed on the execution as being due to officers, &c., and that if it were otherwise, those entitled to fees would be deprived of the responsibility of the sheriff and his securities. However plausible this

view, it may well be questioned. The judgment, inclusive of costs, upon which the execution issues, is in the name of, and for the benefit of the plaintiff in the writ, the writ itself is issued at his instance and is at all times subject to his control. He may order its return, or a suspension of action at the moment property levied on is offered for sale, and thus control the beneficial interest of officers and others entitled to fees endorsed upon it. The items of the judgment embraced in the execution constitute an entirety, the legal right to which is in the plaintiff, and cannot be parcelled out by the sheriff with a view of discrimination. In the case before us the sheriff seems to have acted under the impression that where money was or could be collected in part only, due upon an execution in his hands, he was bound to apply it in satisfaction of the beneficial, without regard to the legal interest, to the extent at least of such beneficial interest, and therefore discriminate in favor of officers' fees. This refusal to admit the plaintiff's bid as a credit can be accounted for in no other way. If right, and were sheriffs so bound, it might and frequently would operate prejudicially to the interests of both plaintiff and defendant. Such would be the case where the property levied on was near the value, or but little beyond it, of the amount of costs, and the execution creditor being desirous of bidding at the sale, and willing to pay more than others, could not command the means of paying over his bid. But we think no such obligation rests upon them, and that notwithstanding the statutory provision on the subject of fees, where money in part is collected under an execution, if there be a necessity for the exercise of discretionary power in its application as a credit, it attaches to the legal rather than the beneficial interest. In this view, we are strengthened by the consideration, that the party legally interested is liable and may be proceeded against by fee bill at any time for the costs due to officers having rendered services in the cause, and also that the taxation of costs is subject to correction by the proper court on application of the party concerned. Where a plaintiff bids at a sale of property under his own execution, it has been held by the supreme court of the state of New York to be unreasonable "to insist that he should advance money

on his bid, when the sole object of the sale is to put money in his hands, by paying a debt due to him." *Nichols vs. Ketcham,* 19 *John. Rep.* 92. *Russell vs. Gibbs,* 5 *Cow. Rep.* 396. Of the correctness of this, as a general rule, we entertain no doubt. There might, however, be cases where it would be otherwise—such, for instance, as liens of equal dignity created by judgment or execution in favor of different creditors, upon the real or personal property of the defendant. In all such cases it would be proper on the part of the sheriff to require an execution creditor to pay over the amount of his bid, in order to enable him to render it in court on the return of the writ, to abide such award as might be made in the adjustment of conflicting claims. The sheriff in the case under consideration urges no defence of this description in his answer, and in our judgment was not justified, except as to the amount of his own fees, under the circumstances, in his refusal to admit the plaintiff's bid as a credit. We are, therefore, of opinion that the motion must be sustained, and that a peremptory writ of mandamus issue accordingly, requiring him absolutely to execute and acknowledge in due form, a deed to the plaintiff for the lands in question, when his own fees shall have been paid, and such deed presented to him.