

HUMPHRIES *vs.* LAWSON, No. 2.

Where a sheriff sells property under an execution, and fails to make due return of the writ, and pay over the money, the defendant in the execution is not "the person entitled thereto," nor "the party aggrieved" within the meaning of the 64th section of chapter 60, Rev. Stat.; and he is not entitled to either remedy there given against the sheriff.

Writ of Error to the Circuit Court of Pulaski County.

At the October term of the Pulaski circuit court, 1845, John Humphries filed the following motion against James Lawson, having given him the usual notice thereof:

“John Humphries, by attorney, comes and represents and shows to the court here, that heretofore, to-wit: on the 16th day of May 1842, one Pleasant McCraw by the consideration and judgment of this court, recovered against said Humphries the sum of \$311.14 in damages, together with costs, &c.

That afterwards, to-wit: on the 14th day of April, 1843, said McCraw sued out of the office of the clerk of this court a writ of execution upon said judgment directed to the sheriff of the county of Pulaski, returnable to the 2d day of the May term thereof, 1843, and the same afterwards, and before the return day thereof, was delivered to, and came to the hands of said Lawson, who then and from thence until at and after the return day thereof, was sheriff of said county; and that said Lawson, as such sheriff, by virtue of said execution, levied upon and seized certain goods and chattels as the property of said Humphries: and afterwards and before the return day of said writ sold the same for the sum of \$219.75.

Said Humphries further represents that at said sale, so made by said sheriff under said execution, said McCraw became the purchaser of a portion of said property for the sum of \$179.87½, and the remainder thereof was sold to Harrison Dawson for the sum of \$40.

And said Humphries further represents that said Lawson did not have said sum of \$219.75, (the amount of said sale) before this court on the return day of said execution, or at any other time, nor has he as yet paid the same or any part thereof according to law, nor has he as yet endorsed said sum upon said execution, or applied the same as a credit upon said judgment, but has therein wholly failed and refused, and still refuses.

Wherefore the said Humphries, according to the statute for such purpose made and provided, moves the court here to render judg-

ment against said Lawson for said sum of \$219.75, with lawful interest thereon, and damages in addition at the rate of ten per cent per month, to be computed from the time when said execution was made returnable.”

Lawson’s counsel demurred to the motion upon the ground that “even admitting the allegations in said motion to be true, the said Humphries does not show that he is the person entitled to said sum of money, with lawful interest thereon, and damages according to the form of the statute in such case made and provided.”

The court (Clendenin judge) sustained the demurrer, and Humphries brought error.

WATKINS & CURRAN, for plaintiff. The 64th sec. of the 60th chap. Revised Statutes gives the remedy by motion to “the party aggrieved.”

It is urged by the defendant that the motion can only be made by the plaintiff in the execution and that Humphries can only obtain redress by a regular action. But we submit that if he is not “aggrieved,” he is not entitled to redress in any form, and if he is aggrieved, he is within both the letter and spirit of this statute giving a summary motion.

To sustain the judgment of the circuit court, this court must establish the following principle of law, viz: “that where a sheriff under an execution sells the defendant’s property to the plaintiff and then returns the execution unsatisfied without mentioning the sale in his return, or in any manner applying the money to the payment of the judgment the defendant is not thereby aggrieved.”

In Ohio, under precisely such a statute as ours it was decided that the debtor had the same right to move against the sheriff as the creditor. *Douglass vs. Wallace*, 11 *Stanton Ohio R.* 45.

FOWLER, contra. The motion was doubtless predicated on sec. 64, page 384 of the Revised Statutes, which makes the sheriff in such case “liable to pay the whole amount of such sale or money by him made to the person entitled thereto with lawful interest thereon, and damages in addition at the rate of ten per cent per

month" &c., and authorizing "the party aggrieved" to proceed by motion &c.

The terms "the person entitled thereto" and "the party aggrieved" manifestly mean one and the same person, and that person is the plaintiff in the execution. McCraw might have made and sustained such a motion, had Lawson failed to pay him the money made by the sale; but Humphries could not, he not being entitled to receive it. If wronged Humphries has other efficient remedies.

OLDHAM, J. The 64th sec. 60th chap. Rev. Stat. provides that "if any officer sell any property under any execution whether he receive payment therefor or not, or shall make the money in any execution specified or thereon endorsed and directed to be levied, or any part thereof, and shall not have the amount of such sale, or the money so made before the court, and pay over the same according to law, he shall be liable to pay the whole amount of such sale or money by him made to the person entitled thereto with lawful interest thereon and damages in addition at the rate of ten per centum per month, to be computed from the time when the execution is made returnable, until the whole be paid, to be recovered in an action against such officer and his securities on his official bond, or the party aggrieved may proceed against such officer by motion before the court, in which such writ is returnable, two days previous notice of such intended motion being given, on which motion the court shall render judgment for the amount which ought to have been paid with interest and damages as aforesaid and award execution thereon."

It is very plain that the terms "the person entitled thereto" and "the party aggrieved," as used in this section, refer to the same person and mean the same thing. The statute gives two remedies, the first "by an action against such officer and his securities on his official bond," and the second by a summary motion against the officer alone, to the court in which the writ is returnable.

It cannot be contended for a moment that the defendant in the execution in this case is entitled to the first remedy; and it is equally clear that he is not entitled to the last. Judgment affirmed.