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COURT OF ERRORS AND APPEALS.

Tarr & Wonson, vs. Day & Carter.	On Error to Camden Circuit by Marshall G. Kinney, Jr.

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BRIEF OF C. V. D. JOLINE,
For Plaintiff in Error.

Carter & Peall were ship builders at Camden, New Jersey, and had a ship yard at that place, where they carried on their business. Adjoining the ship yard was a blacksmith's shop conducted by James Dawick & Co., composed of Dawick & Carter.

Numerous judgments were recovered against Carter & Peall and Dawick & Co., and on November 5th, 1877, the Sheriff of Camden county sold to Shoe & Chard the ship yard and blacksmith shop (bunching and selling them as one lot) for $7,050.00.

At the time of the sale there was due to Mr. Samuel C. Cooper rent from November 5th, 1874, to November 5th, 1877, at $800 per annum, amounting in all to $2,400.

Mr. Cooper served no notice upon the Sheriff for the payment of any of this rent, never looked to the Sheriff for it, never received any of it from him, and did not hold him responsible for it in any way.

He refused to have anything to do with it, his scheme and policy being to look to the new occupants of the yard to pay the back rent or that they should get out.

He knew that a claim upon the Sheriff would only give him one year's rent, and believed that the purchasers at the sale would prefer to pay the back rent than to leave the place of business.

No doubt they made their bid with that end in view.

Cooper's testimony, p. 9 and 10 of evidence.

Nichols' testimony, p. 8 of evidence, line 1.

Daubmann's testimony, p. 18 of evidence, line 7.

The purchasers at the sale, instead of paying to the Sheriff the full amount of the purchase money paid only $4,450.

The balance, $2,600, we submit, without authority or right, and in violation of the law, they paid, by permission of the sheriff, over to Mr. Cooper and thus purchased the chance to occupy the yard, and continue the business, out of the purchase money of the sale. At the same time they gave to the Sheriff a notice from Mr. Cooper to the effect that he didn't hold the Sheriff responsible for the whole or any part of said rent, but looked entirely to the occupants of said yard for his back rent.

Testimony, page 8, line 1.

This they endorse, "release of notice for rent, twenty-six hundred dollars, Carter & Peall."

It appears from the testimony that this endorsement is

in the handwriting of M. B. Taylor. It is nowhere shown or intimated that he was acting as the agent or attorney of Carter & Peall. Consequently the endorsement made by him is of no avail.

Testimony, page 8, line 15.

The fact is, that Mr. Taylor represented Mr. Shoe, one of the vendees.

Taylor's testimony, page 15, line 18.

This endorsement then amounts to no more than if it were made by Mr. Shoe.

This scheme worked so well that, unless this court corrects its manifest injustice, the vendees, Shoe & Chard, with the aid of the Sheriff will have got the shipyard, blacksmith shop, stock and fixtures, and also the right and privilege to carry on the business in the yard, for the purchase money bid for the yard, shop, stock and fixtures.

They took possession immediately.

Carter's testimony, page 12, line 2.

If this is sustained as legal, they purchased this privilege out of money due to the creditors of Carter & Peall and of Dawick & Co.

After the consummation of the above transaction certain other creditors appear, and thinking that they and not Messrs. Shoe & Chard are entitled to the benefit of these $2,600, a rule was obtained and the proceedings had that are now carried to this court.

These creditors saw that money disposed of by the Sheriff without color of authority or right was the same as money in the Sheriff's hands, that the Sheriff could not successfully urge his illegal payment in extenuation thereof, and that they were entitled to these moneys and should be paid from them. To sustain this position authorities are hereinafter cited.

The rule was obtained by Tarr & Wonson, who were creditors of *Day & Carter.*

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On the 6th of April, 1880, Marshall G. Kinney, Jr., the plaintiff in error, who held a judgment against Carter & Peall, and one against James Dawick & Co., was admitted under this rule.

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The court ordered the Sheriff to pay to the clerk $762.72.

Page 8 printed book.

The order of distribution is on page 9. The plaintiffs, to whom the money was ordered to be paid, held judgments against Harvey K. Carter alone, except Tarr & Wonson, whose was against Day & Carter. None of them was against Carter & Peall, or James Dawick & Co.

These judgments are on pages 4 and 5 of the testimony and are those of Tarr & Wonson, Anthracite Insurance Co., Edward Ecke, and James Dawick, numbered respectively, 5, 6, 7 and 8.

The property that was sold, and of and from which the money in the Sheriff's hands was made, was the property of the respective firms of Carter & Peall and James Dawick & Co.

Testimony, p. 7.

The plaintiff in error contends that as his judgments were against the firms of Carter & Peall and Dawick & Co., of and from whose property the money was made, they should have been paid prior to judgments against Harvey K. Carter individually, or against firms of which he was a partner.

But even though the plaintiff in error should prevail in this contention, as there will be insufficient money to

satisfy his judgments (the judgments of S. B. Garrison & Barrett, and of Samuel B. Garrison, being ahead of his) he further contends that the Sheriff should be ordered to pay to the clerk the sum of $2,600, part of the purchase money which he failed to receive from Shoe & Chard, and which the latter paid to Mr Cooper that they might retain the ship yard.

As they took possession immediately they must have paid this money to Mr. Cooper before they made any settlement with the Sheriff.

A writ of error lies in a case like this :
Woodruff vs. Chapin, 3 Zab. 555.

This decision was approved of in
Eames vs. Stiles, 2 Vr. p. 493.
Adams vs. Disston, 15 Vr. p. 662.

The writ presents a question of mixed law and fact, and is similar to that presented in
Stout vs. Leonard, 8 Vr., 493.

The first contention of the plaintiff in error is one of law solely. It is that presented in the 18th assignment of error.

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Marshall G. Kinney's judgment being against Carter & Peall and Dawick & Co., should be paid prior to judgments against Day & Carter or Carter individually, for the reason that the money in the Sheriff's hands was made from a sale of the property of the respective firms of Carter & Peall and Dawick & Co., and not from a sale of the property of Day & Carter or of Carter individually.

Page 7 of testimony, line 12, et seq.
Page 11 of testimony, line 23, et seq.

Partnership debts must be paid before those of the individual members of the firm.

Linford vs. Linford, 4 Dutch, 113 and cases cited.
Crane vs. French, 1 Wendell, 311.
Brown vs. Bassett, 1 Zab., 46.
Matter of Smith, 16 Johns, 106.
Menagh vs. Whitwell, 52 N. Y., 158.
Dunham vs. Murdock, 2 Wendell, 554.
Clements vs. Jessup, 9 Stew. 570.

The assets of a copartnership are first liable for the payment of the copartnership debts, and until these are satisfied neither individual partners nor their creditors have any right to participate in the assets.

Freeman on Executions, § 199.
Collyer on Partnership, § 166, 822.
Parsons on Partnership, p. 343, Ed. 1867.
Story on Partnership, § 261.
Lindley on Partnership, p. 688, et seq. and notes.

That the executions of Kinney, Jr., reached the Sheriff's hands subsequently to the executions against Day & Carter and Carter individually will not militate against this position.

The fact remains that they were partnership debts and were in the hands of the Sheriff before the surplus was distributed.

In Linford vs Linford, 4 Dutch., 113, the execution of Lent against Linford, Jr., was in the Sheriff's hands prior to the execution against the firm, yet the court plainly intimates that but for the agreement the execution against the firm would have priority.

Crane vs French, 1 Wendell, 311.
Clements vs Jessup, 9 Stewart, 569.
Dunham vs Murdock, 2 Wendell, 554.

The court will control surplus money, whether in the hands of the Sheriff or in court, till it has been fairly exhausted in the payment of debts, and will apply it towards the satisfaction of executions in the order of their priority.

Cox vs Marlott, 7 Vr. 390.

The court, in settling priorities, will first consider from whose property the money was made. If partnership property the executions against the firm will first be paid.

In this instance the result of any other decision would be the payment of a debt due from Day & Carter or Carter individually, with money owned by Carter and Peall and by Dawick & Co.

By what authority could the court order that Peall's and Dawick's money should be appropriated to the payment of moneys due from Day & Carter or Carter individually.

The executions against Day & Carter, or Carter individually, cannot be paid from Peall's or Dawick's share of the proceeds of this sale, which share is one-half.

Vide Carter's evidence.

If for the sake of argument we were to admit that they may be paid from any share, it is from Carter's only which would be no more than one-half of the surplus.

The other moiety, to wit: that of Peall's and that of Dawick's, is not affected by the judgment or execution against Carter.

Collyer, § 822.

That other moiety is subject to and liable for the payment of the executions against the firm alone. Carter's creditors have not the most remote claim upon it.

I submit this without in the least receding from my former proposition. We may go further and say that the

rights of Peall & Dawick are involved in this matter, for if Carter's share of this surplus should be devoted to the payment of his individual or other firm's debts you deprive them of just that much money with which to pay the firm's debts and leave them liable for just that much more money. Each partner is liable for the whole. If this share is applied to the payment of the firm debts, such debts will be reduced to just that extent. The individual creditors of Carter will be in no worse position, and Peall's and Dawick's rights and the rights of their creditors will be respected, maintained and subserved.

They have a right to insist that the whole of the partnership funds or property should be first applied to the payment of partnership debts.

Lindley, page 690.

I respectfully submit that the court should not sustain a decision or judgment so unjust to these partners as the one under discussion is.

Jacob's Fisher's Digests. Title Execution columns, 5165, 5166.

As the proper and legal application of the moneys so ordered to be paid into court will not fully satisfy the claims of the plaintiff in error, he further contends that the judge erred in not ordering the Sheriff to pay to the clerk the sum of $2,600, which he failed to receive from Shoe & Chard, the vendees, but permitted them to pay to Mr. Cooper who had no claim upon or right to it.

These $2,600 were a part of the purchase money.

The insistment is that as this sum was disposed of by the Sheriff without right or authority, in other words illegally, the court will regard it as still in the hands of the Sheriff. Any other decision would admit the right of one to plead his illegal act as an excuse therefor.

The Sheriff, we submit, cannot now plead his illegal disposition of this money as an excuse for his liability therefor. We then submit, that this money being in the possession of the Sheriff when these executions, including that of the plaintiff in error, reached his hands, the court should have ordered that it be paid into court, there to remain till it was disposed of in the payment of said executions.

The court will control surplus money, whether in the hands of the Sheriff or in court, till it has been fairly exhausted in the payment of debts, and will apply it towards the satisfaction of executions in the order of their priority.

Cox vs. Marlatt, 7 Vr., 390.

Just so long as money remains in the hands of the Sheriff, justice demands that it should be devoted to the payment of claims that come into his hands against the debtor or debtors from the sale of whose property it was made.

Turner vs. Fendall, 1 Cranch, 137.

A surplus in the Sheriff's hands should, in the interests of justice, be considered the same as property in the debtor's hands. If it is not the law confers upon the debtor the privilege of cheating his creditor, and that too from moneys in the custody of the law.

Property in the debtor's hands is liable for an execution. Why should not that same property converted into money, in the Sheriff's hands, and therefore in the custody of the court, be liable therefor?

Suppose a debtor to own property valued at $5,000, and an execution to issue against him for $1,000. The Sheriff might levy upon and sell all of this property and that for its full value, pay the $1,000 to the execution creditor, and the remaining $4,000 to the debtor, who could stalk away it and snap his fingers in the face of

creditors whose claims were just, but whose executions reached the Sheriff's hands after the sale, but before the money had been paid away and while it was still in the possession of the Sheriff.

Surely this would not be justice, but it is a case similar to the one in hand. Kinney's execution reached the Sheriff's hands while the money, as we contend, was still there. Suppose, however, that the Sheriff in the above suppositional case had not levied on the entire $5,000 worth of property but on $1,500 worth only, and had sold it. The balance of the debtor's property, to the value of $3,500, would remain liable for the subsequent executions.

What distinction then should the court make between the creditor's right as to that property in the hands of the debtor, and the same property converted into money in the hands of the Sheriff, and under the control of the court. The Sheriff's writ is his command and his authority. If he disobeys it he is liable to subsequent creditors. The mandate of the writ is that the money be in court on a certain day, there to be paid to the creditors. Originally it was the duty of the Sheriff to have the money in court, and not even payment to the creditor was an excuse for his failure so to do. The rigor of the law is now considerably relaxed, but even now the form of the writ is that the money shall be in court on the return day, although the Sheriff is permitted to pay the money to the creditor.

We submit that the Sheriff is liable for all moneys except those paid to the creditor or to the defendant from whom said moneys are made.

If after paying the creditor there is a surplus, and before it is *legally* paid away other executions come into the Sheriff's hands, they are entitled to be paid from it.

We admit that the Sheriff can't levy on it in his own hands, but he could pay it to the defendant and then

immediately levy on it. Chief Justice Marshall, in Turner vs. Fendall, 1 Cranch, 136, says: "It appears unreasonable that the law should direct a payment under "such circumstances. If the money shall be seized the "instant of its being received by the creditor, then the "payment to him seems a vain and useless ceremony "which might be well dispensed with, and if the money "should, by being so paid, be withdrawn from the power "of the officer, then his own act would put beyond his "reach property rendered by the law liable to his execution, and which the law made it his duty to seize." "The "absurdity involved in such a construction" led the court to decide that in such a case it was the duty of the Sheriff to pay the money into court, there to be disposed of by the court.

He also says that the Sheriff "may make payment out "of court if no circumstance occurs which legally obstructs or opposes it," as where there is "an execution "against the goods and chattels of the person to "whom the money in his hands shall be payable."

In the case in hand Sheriff Daubmann had in his hands, in addition to the money ordered to be paid into court, the sum of $2,600. This surplus was payable to either Carter & Peall or Dawick & Co. Now the Sheriff, before paying said money to them, had an execution against their goods and chattels. Then, by the latter part of my citation of Chief Justice Marshall's decision, it was the duty of the Sheriff to have paid this money into court, and by the first part of said citation it was the duty of the court to have parcelled it out to executions in the order of their priority.

Turner vs. Fendall, 1 Cranch, 136.

Bell vs. Ryers, 3 Caines, 84.

Williams vs. Rogers, 5 Johns, 163.

Van Nest vs. Yeomans, 1 Wend., 87.

The People ex. rel. Hasbrouck vs. Ulster, 18 Wend. p. 630.

The view above is entirely confirmed in the opinion, of Justice Bronson in the case of

American Bank vs. Morris Canal, 6 Hill, 365.

In New Jersey, in the case of Stebbins vs. Walker, 2 Gr., 90, the reasoning of the Judge points directly to the conclusion that surplus money in the hands of the Sheriff is liable for all claims that reach his hands against the person from whose property the money is made.

It is not stated in the above case whether the junior execution was delivered to the Sheriff before or after the sale.

The Judge says (p. 100) "I do not now say that an execution never levied will constitute a lien on surplus money." He doesn't say that it will not, only that he does not "now say" it. We submit he didn't "now say" it, because the requirements of the case didn't demand it, and for that reason only. But he goes on to say that there will be an "equitable lien upon the surplus money," which the court will respect and have paid, and his entire reasoning leads irresistibly to the conclusion that were the matter brought before him he would decide that executions placed in the Sheriff's hands subsequent to a sale would be entitled to be paid out of any surplus that there then might be in his hands.

The reasoning of Judge Hornblower, on page 99 and 100, is incontrovertible and it would be impossible for me to direct the attention of the court to anything stronger in support of the position of the plaintiff in error.

This brings us to a discussion of the facts, and this in-

volves a consideration of the question of mixed facts and law.

Stout vs Leonard, 8 Vr. 493.

The position of the plaintiff in error is this: If his executions reached the Sheriff's hands while the latter held money belonging to Carter & Peall, or Dawick & Co., then said executions were entitled to be paid therefrom, along with other executions in the order of their priority. It rests upon the Sheriff, then, to show that he has disposed of this money legally, and he must show this by evidence that is sufficient in the law to maintain the issue. In this the plaintiff in error insists that the Sheriff failed entirely and completely.

Judge Parker was the judge of the weight of the evidence, but he had no right to disregard competent evidence that was unimpeached.

N. J. Flax Co. vs. Mills, 2 Dutch., 60.

Judge Parker clearly misunderstood the evidence in regard to the $2,600, and his conclusions are plainly erroneous. There was no evidence in the case for him to weigh; it was all one way and unimpeached. His findings are clearly wrong, for there is not a single fact to base them upon—consequently they are illegal and contrary to law. The facts point solely and irresistibly to a conclusion the opposite of that announced by the Judge.

We claim that the Sheriff permitted the $2,600 to be paid away by Shoe & Chard (it is admitted that he never received it) without authority or right—in other words, illegally. The Sheriff can be excused from the payment of the $2,600 on two grounds only:

First. Payment to creditors having legal claims.

Second. Payment to the defendants in execution.

The latter includes any payment made upon the order of the defendants.

There is no pretense that any of it was paid to a person or creditor having a legal claim, for Mr. Cooper, to whom it was paid, distinctly declined to assert his claim. In addition the fact prevails that the Sheriff didn't pay the money to Mr. Cooper. Mr. Cooper never received any of it from him.

Cooper's testimony, p. 10, line 14.

The truth is that the money was paid by Shoe & Chard to Mr. Cooper, in order that they might immediately get possession of the ship yard, no doubt a valuable plant, and continue the business without interruption. It was a very adroit and wise piece of business on the part of Mr. Cooper not to interpose his claim for one year's rent, but to look to the purchaser for the three year's rent or that he should get out. He knew that the privilege of continuing the business in an established place was worth the three years' rent. But his adroitness and wisdom pales into insignificance in the face of the scheme of Shoe & Chard to pay for this privilege out of the money bid for the goods and chattels sold by the Sheriff. It is no more than a mild characterization of it to say that it was a fraud upon the defendants, a barefaced steal and swindle, and one that they have not attempted to justify by any evidence in this matter. Neither Shoe nor Chard was produced as a witness.

Judge Parker thought that the defendant Carter ordered the $2,000 to be paid to Cooper.

We submit that in this he erred, and that there is not a scrap of evidence to base such a conclusion upon. There is not a particle of evidence to sustain the findings of the court as set out in the 7th, 8th, 9th, 10th and 13th assignments of error.

We undertake to make the assertion that there is no evidence, of even the slightest character, to maintain them.

There is no evidence that "the balance, $2,600, was, by the direction of the defendant, paid to the landlord by the purchasers for the rent due him."—7th assignment of error.

No one of the witnesses swears that Carter gave this direction to Shoe & Chard, the purchasers. There is no evidence "that the defendant made any arrangement to pay the rent with the surplus money."—8th assignment.

No one of the witnesses swears to it. There is no evidence that the creditors agreed to the arrangement set out in the 9th assignment).

There is no evidence that any direction or arrangement to pay the rent was ever made (10th assignment), except that Cooper said that the purchaser must pay or get out.

There is no evidence that it was agreed between the defendants and the landlord that all the rent should be paid out of the surplus. (13th assignment.)

No one of the witnesses swears to these things. Nicholls doesn't; Cooper doesn't; Carter doesn't; Taylor doesn't; Daubmann doesn't. Daubmann comes the nearest to it, but he swears all around it without once testifying that there was an order from either Carter, Peall, or Dawick.

Daubmann's conduct and actions show that he never received such an order or authorization.

He certainly wasn't governed in any way by the remark of Carter that "he wanted Mr. Cooper paid," for his subsequent action and conduct show that he looked upon this as nothing more than the idle remark that any debtor would make. Observe Carter doesn't say how he wants him paid. No mention is made of surplus—no direction is given, no order, no authority. Did one ever see a debtor that didn't say that he wanted his creditor paid? Of course Carter wanted him paid, but his wanting him paid is not an order upon a third person to pay him.

The remark can not mean more than this, viz: "There is money due Mr. Cooper and I hope it will be paid." Any other construction is a mere speculation, and speculation is not proof—not facts. In fact Daubmann doesn't say or in any way intimate that he understood this as an order, for he says "that was a verbal notice." Observe that he doesn't say order. It was taken and understood by Daubmann as a notice that rent was due Cooper.

Any other construction of it is a perversion of sense. In truth it is so direct, so plain and so devoid of ambiguity that no other conclusion can be drawn from it.

Observe further, that the Sheriff says that this statement of Carter's was made just as he was striking the property off at a bid of a little over $4,000. Now the claims against the property at that time were $3,687.28 which would leave in the Sheriff's hands a balance of only $312.72, not even one year's rent, and yet it is claimed that Carter told Daubmann to pay Cooper's $2,400 out of this $312.72.

If Mr. Daubmann had understood Mr. Carter's remark as an order for him to pay Mr. Cooper out of any surplus, why should he, Daubmann, have adjourned the sale "for them to fix it up."

Testimony, p. 17, line 34.

Who "*them*" were he doesn't testify, but we are justified in presuming that *they* were Shoe & Chard, for he says: "*They* went away"—"afterwards came back and stated that *they* were ready to go on." "I started the sale again and *they* bid, &c." *They* who bid were Shoe & Chard.

It thus appears that Shoe & Chard were the ones who went away and saw Mr. Cooper.

If Daubmann had this order from Carter to pay Cooper, why, I repeat, would he have adjourned the sale "for them to fix it up." Would he not have said, there

is no need of an adjournment, let's go on and finish the sale? Mr. Carter has given me an order to pay Mr. Cooper out of the surplus. What need was there "for them to fix it up," if Mr. Carter had given this order? What need for them to go away with Mr. Cooper or his attorney?

Testimony, p. 17, line 35.

In the light of the last clause of Mr. Daubmann's direct examination it seems clear that the adjournment was made that Shoe & Chard might see Mr. Cooper, ascertain his views and their position in the event of their purchase of the yard; having done so, having ascertained that if they purchased the yard they must pay the back rent if they desired to retain possession of it, they return to the sale and bid accordingly. It must be observed that they were not bidding to save a claim; they held a chattel mortgage which was secure; they were virtually outsiders bidding with a view to conducting the business. The Sheriff had no authority then to let them pay this back rent, or privilege of conducting the yard, out of Carter's, et als, money, which he, the Sheriff, was bound to receive.

Mr. Daubmann says, "it was the understanding at the sale among them all that Cooper's rent was to be paid."

Testimony, p 18, line 3.

We don't deny this understanding.

Certainly it was to be paid, but by whom? Shoe & Chard had just seen Mr. Cooper and ascertained that the purchaser of the yard must pay the rent or get out. In the face of this they had purchased the yard. Therefore, Shoe & Chard, the purchasers, were to pay it or get out. They, however, didn't get out; they took possession immediately. Doesn't it then follow that they were to pay it?

Testimony, p 12, line 2.

We don't deny this understanding, but assert that its existence cannot by any possibility be construed as an order from the defendants to the Sheriff that he shall pay it or permit it to be paid out of their money. Observe that the understanding was only, "that Cooper's rent was to be paid." There was no understanding that it was to be paid from the defendant's money. Oh, no; the understanding was that the purchaser must pay or get out. Mr. Cooper's testimony is to the same effect, viz: that the purchaser must pay or get out.

Cooper's testimony, p. 10, line 17.

Compare this with Daubmann's testimony and see how they agree and harmonize.

Mention is made of the rent. Daubmann adjourns the sale for "them" (Shoe & Chard) "to fix it up." They go to see Mr. Cooper, have the conversation that Mr. Cooper relates. He pronounces his ultimatum, viz: that if they purchase the property they must pay the rent or get out. With this in their minds, knowing what they have to do in order to carry on the business, they go back to the sale and bid in $30,000 worth of property for $7,050.

Now observe that Cooper gave his decision during the adjournment, and when the parties came back they told it to Daubmann.

Daubmann's testimony, p. 18, line 7.

How then, when Daubmann knew that the purchaser was to pay the rent, can he now claim that Carter gave him an order to pay it from the surplus? Really he doesn't claim it. Judge Parker by mistake inferred that it was an order, when in fact Daubmann says it was only a notice.

There is no testimony anywhere that Carter told Shoe & Chard to pay Cooper. Can it then be doubted that

"the understanding that Cooper's rent was to be paid" was any other than that testified to by both Cooper and Daubmann? They substantially agree.

Cooper's testimony, p. 20, line 10.

Daubmann's testimony, p. 18, line 7.

Observe, further, Daubmann says, p. 18, line 5, "I said at the time of the notice that I ought to have a written notice," et seq. Nothing is here said about an order from Carter. The Sheriff doesn't say that any such order had been given, and would he have made any remark about a notice had such an order been given. What is the answer to the Sheriff's remark? If Carter had given him an order to pay the rent out of the surplus, would not some one have said no notice is necessary; Mr. Carter's order obviates the necessity of a notice. But this is not said. The answer to the Sheriff is that Cooper would have to be paid or the purchaser move his property purchased from the premises. This demonstrates that there was no order from Carter. In verity there was no thought of an order at that time. That was an afterthought. Again, if Carter had given such an order, would Shoe & Chard have run the risk of making as a part of their bid the amount of money involved in the order; would they have involved themselves in the uncertainty of bidding, in addition to the price of the yard, the $2,600 which were to go to Mr. Cooper? Would they not have bid the purchase-money, less the $2,600?

And is it not too absurd for belief to suppose that Carter, after Cooper's decision, would have given such an order? What benefit had he to derive from giving it? He would have really been a sufferer, for would he not instantly have seen that the final bid would be made with reference to Cooper's final decision; that the purchaser of this valuable plant would reduce his bid just

the amount of this unpaid rent? Even if Carter had, previous to the time allowed "for them to fix it up," given such an order, Cooper's decision and the understanding attendant thereupon would have amounted virtually to a repudiation thereof. We however insist that there was no need of such a repudiation, for Carter never gave any such order, and none of the parties at the sale ever understood that he did, or testify that he did. And further, if Mr. Carter had given the Sheriff the order, would the latter have been content to rest upon it without having it in writing?

Observe again, that the Sheriff doesn't even think of asking for a release from Carter. If Carter had given the order, and verbal at that, would the Sheriff have parted with the money without Carter's release? We therefore think that we have shown positively that there is not a particle, scrap or spark of evidence to prove that such an order ever was given, but that all of the evidence proves beyond a doubt that the order *never* was given.

We claim therefore that as this money (the $2,600), is liable for the plaintiff's execution, the court below erred in not ordering the Sheriff to pay it into court.

The plaintiff in error further contends that the court erred in finding that the rent due from the defendants to their landlord was $2,600.

There were three years' rent due Mr. Cooper at the rate of $800 a year, making in all $2,400.

Cooper's testimony, p. 10, line 8.

Still the court below sustained a payment of $2,600 to him.

Surely this is wrong. Cooper was not entitled to any more than $2,400, if he was entitled to any, and Daubmann in any event should be required to pay into court these $200.

James Dawick recovered a judgment against Harvey Carter, (testimony, p. 5, top), and the Judge ordered it to be paid ahead of the judgment of Marshall G. Kinney, Jr., (the plaintiff in error), which was against James Dawick & Co., composed of Dawick & Carter. It must be remembered that the money, out of which Judge Parker ordered James Dawick to be paid, was raised by a sale of the property of James Dawick & Co.

If Judge Parker is correct, then the judgment of one partner against the other has preference over a judgment against the firm.

This we submit is manifestly wrong. James Dawick's judgment should be postponed until after the judgments against the firm.

Respectfully submitted,

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Attorney of Plaintiff in Error.

West Jersey Press Printing House, Front and Market Sts., Camden, N. J.

N. J. Court of Errors and Appeals.

Tarr & Monson,	)	On Error.
vs.	}	Brief of
Day & Carter.	)	Jacob C. Daubmann.

Jacob C. Daubmann as the Sheriff of Camden county, on the 22d of October, 1877, received four executions out of the Camden County Circuit Court in favor of Charles S. Hugg—one against Harvey K. Carter for $296.62; one against James Dawick & Co., and Harvey K. Carter for $653.39; one against James Dawick & Co., and Carter & Peall for $1047.71; and one against the last named defendants for $1397.21.

Pp. 2 & 3, of the depositions.

November 5th, 1877, under and by virtue of these four executions, he sold certain property of the defendants on the premises, a ship yard, rented of Samuel Cooper. (Pp. 7, 14, 17.) Harvey K. Carter, who was a member of each of the defendant firms of Day & Carter, Carter & Peall and James Dawick & Co., was present at the sale. (Pp.

10, 13.) So was Samuel Cooper, the landlord, who gave notice that three years' rent, amounting to $2,600 was due and whoever bought the defendants' property would have to pay it all or quit the premises at once. (Pp. 8, 9, 10 & 17,) and it was therefore agreed by all the parties to the sale that the purchaser should apply $2,600 of the purchase money to the payment of Cooper's rent, p. 18. Shoe & Chard, under this arrangement, made by all the parties concerned, bid off the property and became the purchasers at $7,050, and paid $2,600 of the purchase money to Cooper, (pp. 7 & 16,) and $4,450 to the Sheriff, (p. 18) who applied $3,687.28 to the payment of the four executions under which he made the sale, and two small prior executions in a constable's hands, leaving a surplus in his hands of $762.72. Pp. 9, 17 & 18.

This surplus the court on rule to show cause obtained by Tarr & Monson, subsequent execution creditors on judgment recovered after sale, was ordered to be paid into court on the 16th of January, 1884; and subsequently, to wit: on the 21st day of January, 1884, the court made an order for the payment and distribution of the surplus among five subsequent execution creditors, not including the plaintiff in error, pp. 8 & 9, state of the case.

These two orders are in the nature of final judgments, affecting different persons, and are therefore not reviewable together on one writ of error as proposed in this cause.

The Sheriff is the principal party to the first order, but in the second he is not concerned in the least degree; yet the plaintiff in error has brought both orders here in one writ and assigns part of his errors on one of the orders and part on the other. Can the court pronounce two different and inconsistent judgments on the same record under one writ, one reversing the order directing the money to be paid into court, and the other affirming the order of distribution?

There is nothing before the court in the record which shows that the plaintiff in error had any status in the court below, or has any here to question the orders of that court. We submit therefore that the plaintiff's suit and proceedings in this respect are radically defective and ought to be dismissed.

But treating the order on the Sheriff for the payment of money into court as properly here for consideration and judgment, we think it must be sustained for the following reasons:

1st. Because the plaintiff in error, who assumes to be a judgment creditor, has no standing in law to question the terms and conditions of the Sheriff's sale, it no where appearing when, if ever, his judgment was recovered or when, if ever, execution was issued upon it.

2d. Because the uncontradicted testimony of the Sheriff shows that on account of the arrangement of all the parties in interest, at the time of the sale, he did not receive the $2,600 which went to pay Cooper's rent.

3rd. Because, in the absence of clear proof to the contrary, the law will assume that the Sheriff, in the performance of his duty under the sanction of his official oath, did what was lawful and just in the premises.

In Stevens vs. Deats, 12 Vroom, 342, the court on proceedings to amerce a Sheriff for his failure to perform his duty under an execution said: "He who bases his claim on the default of another must establish the default, a rule intensified in the case of a public officer by the presumption in favor of the propriety of official conduct."

DAVID J. PANCOAST,
Attorney.

SAMUEL H. GREY,
Counsel.

CAMDEN CIRCUIT COURT.

JAMES G. TARR and AUGUSTUS H. WONSON, trading as TARR & WONSON, vs. JOSEPH C. DAY and HARVEY K. CARTER, trading as DAY & CARTER.	IN CASE.

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It appearing to the court by affidavit, that judgment was duly rendered in the above stated cause, on the seventh day of November, A. D. 1877, for the sum of two hundred and fifteen dollars and ninety cents, and that execution was immediately issued thereon and delivered to Jacob C. Daubmann, the then Sheriff of the county of Camden, to be executed.

And it further appearing, that there were other executions in the hands of said Sheriff at this time against the defendant, Harvey K. Carter and others, and that there subsequently came into the hands of the said Sheriff other executions against the said Harvey K. Carter and others to be executed.

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And it further appearing, that the said Sheriff did, by virtue of the said executions, cause the property of the defendant, Harvey K. Carter and others, to be duly sold, he realizing therefrom a large sum of money.

And it further appearing, that there is still in the hands of said Sheriff the whole amount of said money, or a large portion thereof, and that the priorities of said executions are in dispute.

It is thereupon, on motion of Bergen & Bergen, attorneys of the plaintiffs in the above stated cause, ordered that the said Jacob C. Daubmann, Sheriff as aforesaid, do show cause, before the said Circuit Court of the county of Camden, on Tuesday, the thirteenth day of January next, why all of said money arising from the sale of the property of said Harvey K. Carter and others should not be paid over to said court, and that all persons interested in said moneys have leave to take depositions, on notice to the other parties, and that said depositions may be used on the argument for said rule, and on the argument for the settling of the priorities of the executions against said Harvey K. Carter and others; and that a copy of this order be entered in the minutes of the Circuit Court of the county of Camden, and served on said Jacob C. Daubmann, Sheriff as aforesaid, and on each of the attorneys of the execution creditors.

G. S. WOODHULL,
Judge.

Dated December 24, 1879.

CAMDEN CIRCUIT COURT.

JAMES G. TARR and AUGUSTUS H. WONSON, trading as TARR & WONSON,	IN CASE.
vs.	
JOSEPH C. DAY and HARVEY K. CARTER, trading as DAY & CARTER.	NOTICE.

Notice is hereby given of the taking of depositions before Richard T. Miller, a Supreme Court Commissioner, on Saturday, the third day of January next, at 10 o'clock in the forenoon of said day, at his office, No. 106 Market street, Camden, New Jersey, in pursuance of an order made in the above stated cause, a copy of which said order is hereunto attached.

BERGEN & BERGEN,
Attys of Pltffs.

Dated December 26th, A. D. 1879.

RULE ADMITTING MARSHALL G. KINNEY, JR.

It appearing that since the granting of the rule to show cause in the above stated suit, bearing date December 24th, 1879, Marshall G. Kinney, junior, hath a judgment against Harvey K. Carter and William A. Peall, trading as Carter and Peall, and also a judgment against Harvey K. Carter, who hath survived James Dawick, lately trading as James Dawick and Co., and that notice of this application hath been served upon the attorneys of the parties embraced in the aforesaid rule. It is on this sixth day of April, A. D. 1880, on motion of Charles V. D. Joline, attorney of Marshall G. Kinney, junior, ordered that the said Marshall G. Kinney, junior, plaintiff in the aforesaid suits, be admitted under the rule aforesaid to the same rights and privileges with the parties mentioned, referred to or embraced therein.

JOEL PARKER,
J.

OPINION OF JUDGE PARKER.

PARKER, J. A rule was obtained on the Sheriff, on part of Tarr and Wonson, to show cause why he should not pay moneys into court and also to settle the priority of payment on executions. Under this rule testimony has been taken. The question of priority has not been argued, and by consent I am now only to decide how much money the Sheriff shall pay into court.

The rule was taken after the Sheriff had paid off the executions that were in his hands at the time of sale.

Subsequently other executions (including that of Tarr and Wonson) were delivered to the Sheriff.

The sale of the goods took place on the 5th of November, 1877, under four executions then in the Sheriff's hands, being all the executions the Sheriff had received up to that time. The amount for which the property was sold was $7,050; of this sum $4,450 was paid to the Sheriff in cash. This amount was more than sufficient to pay the executions that were in the Sheriff's hands on the day of sale, and after paying those executions a surplus of $762.72 remained which the Sheriff now has.

The money actually paid to the Sheriff by the purchaser was $2,600 less than the amount of the bid, and subsequent execution creditors (among which are Tarr and Wonson) claim that the Sheriff should have received that sum ($2,600), in addition to what he did receive, and pay the whole surplus into court, after satisfying the executions in the Sheriff's hands. This fact cannot avail them so far as the question relating to the $2,600 is involved. Their execution, issued on the 7th of November, 1877, commanded the Sheriff to raise the sum of $185.53 of debt and $30.37 costs.

In order of time is the first unsatisfied execution. There is surplus money in the hands of the Sheriff, and all the persons interested agree should be paid into court, amounting to $762.72, out of which Tarr and Wonson will be paid. They therefore have no interest in what becomes of the $2,600. One other small execution in favor of the "Anthracite Insurance Company" came to the Sheriff on the 24th of November. These two executions the Sheriff received before the 28th of November, the day the money was actually paid to the landlord for the rent.

Now, after deducting the amount of these executions from the surplus, which was $772.62 more than the executions he had amounted to, and the balance $2,600 was

by direction of the defendant paid to the landlord by the purchasers for the rent due him. That money belonging to the defendant there was no lein upon it, and the defendant had the legal right to make the arrangement to pay the rent with it. It was the same in effect as if the purchasers had paid all the money to the Sheriff, and the Sheriff at once paid the surplus to the defendant, and the defendant paid it over to the landlord.

No persons were then interested legally in the business except the creditors who had executions at that time in the Sheriff's hands, whom the Sheriff represented, and all these agreed to the arrangement that was made whereby the $2,600 was appropriated to the payment of the rent. There was no fraud in the transaction of which other creditors have the right to complain. The rent was a bona fide debt, was due and unpaid. The execution of Tarr and Wonson, who obtained the rule and on whose application this matter is under consideration, was not delivered to the Sheriff until two days after the sale and after the aforesaid arrangement to pay the rent was made.

On the day of sale they had no legal status which gave them a right to interfere with the payment of rent out of the moneys which belonged to the defendant.

But it is said, although the agreement to pay the rent of the $2,600 was made on the 5th day of November, on the day of sale and before the execution of Tarr and Wonson was delivered to the Sheriff, yet the money was not actually paid over to the landlord until the 28th day of November, and after their execution was in his hands, at the time of the sale. If this claim be well founded the Sheriff should pay into court the sum of $2,600 in addition to the sum of $762.72, which last named sum he has and is willing to pay in.

The question now to be decided therefore is, whether the Sheriff is legally bound to account for and pay into

court for the benefit of executions delivered to the Sheriff after sale the sum of $762.72 or the sum of $4,450.

It is admitted that the $2,600 was never in the Sheriff's hands. At the time of sale that sum was due from the defendants to their landlord for about three years' rent of the premises where the Sheriff found and sold the goods.

The landlord informed the Sheriff that there were three years' rent due. One of the defendants, who was present acting for the others, agreed upon the amount of rent due and unpaid and said he wanted it paid. A legal notice claiming rent was not served upon the Sheriff, and if such notice had been served the claim on the Sheriff would not have been good for more than one year's rent, but when the Sheriff received information that rent was due he voluntarily stopped for a few minutes to give opportunity for the parties to arrange for its payment. It was known by all the parties interested that the goods advertised were worth much more than the amount of all the executions then in the Sheriff's hands. Of course the surplus would belong to the defandants and it was agreed between the defendants and the landlord that all the rent due should be paid out of the surplus. The sale then proceeded and the property was struck off for $7,050. The purchaser paid the Sheriff $4,450, which the Sheriff has in his hands and offers to pay into court. There remain nearly $500 to go towards the payment of subsequent executions.

Surely the creditors having executions delivered to the Sheriff after the money was actually paid to the landlord for rent can have no claim on the $2,600, and no right to have it paid into court.

The truth is, that the $2,600 was never in the hands of the Sheriff, nor was he legally bound to receive it. His duty was performed when he received sufficient money to satisfy the executions in his hands. The surplus belonged to the defendants who had a right to appropriate some to

their landlord for rent due and unpaid, or to direct the purchaser of the goods to do so.

Let an order be entered that Jacob C. Daubmann, former Sheriff, pay into this court the sum of $762.72, the surplus which he received on sale of the goods of the defendant, on executions under which he sold on the fifth day of November, 1877, that sum being all the surplus he received which he is legally liable to pay into court.

He will not pay interest on the same because it appears he has had the money in hand ready to pay when safe for him to do so.

After the said amount is paid into court further order will be made as to the disposition of the same on application.

RULE THAT SHERIFF PAY PROCEEDS TO CLERK.

Upon reading and filing the depositions taken in the above stated matter, and hearing the argument of counsel of the respective parties concerned, and having taken time to consider the same. It is, on motion of Bergen & Bergen, attorneys of Tarr & Wonson, ordered that Jacob C. Daubmann, late Sheriff of the county of Camden, do pay to the clerk of this court the sum of seven hundred and sixty-two dollars and seventy-two cents, the costs of these proceedings to be taxed, &c., and paid out of the fund to be paid in.

JOEL PARKER, J.

Dated January 16th, 1884.

ORDER OF DISTRIBUTION.

It appearing that Jacob C. Daubmann, late Sheriff of the county of Camden, hath, in pursuance to the order of this court, paid to the clerk thereof seven hundred and sixty-two dollars and seventy-two cents, and that by an order of this court dated on the day of October, eighteen hundred and eighty-three, the same was ordered to be paid over by the said clerk to the judgment creditors of the defendants; and whereas said order failed to state the proper amounts due to the respective creditors;

It is, on this twenty-first day of January, eighteen hundred and eighty-four, ordered, that said order of October, eighteen hundred and eighty-three, be vacated and for nothing holden.

It is further ordered, on application of Bergen & Bergen, attorneys of Tarr & Wonson, that the said clerk pay the said sum over to the respective plaintiffs, or their attorneys, in the following order:

1st. That he pay Bergen & Bergen, attorneys of the said Tarr & Wonson, the sum of forty dollars and seventy-three cents, the costs of this application.

2d. That he pay to James G. Tarr and Augustus H. Wonson, trading, &c., or their attorneys, the sum of two hundred and ninety-three dollars and forty-one cents, the amount due on this judgment.

3d. That he pay to the Anthracite Insurance Company, or its attorney, the sum of eighty dollars and thirty-five cents, the amount due on its judgments.

4th. That he pay to Edward Ecke, or his attorney, the sum of one hundred and fourteen dollars and eighty-five cents, the amount due on his judgment.

5th. That he pay James Dawick, or his attorney, the

sum of two hundred and thirty-five dollars and sixty-six cents, the same being on account of the judgment recovered by same James Dawick, against the said Harvey K. Carter.

JOEL PARKER, J.

WRIT OF ERROR.

NEW JERSEY, ss. The State of New Jersey to the Camden County Circuit Court, GREETING:

[SEAL.] Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain cause or proceeding which was in our said court between James G. Tarr and Augustus H. Wonson, trading as Tarr & Wonson, and Joseph C. Day and Harvey K. Carter, trading as Day & Carter, on a rule to show cause for the payment of money into court by Jacob C. Daubmann, Sheriff of the county of Camden, and for the settling of priorities between the executions against said Harvey Carter and others, as is said manifest error has intervened, to the great damage of Marshall G. Kinney, Jr., as is said. We being willing that the said error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if the judgment be thereon given, then without delay you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things concerning the same, to our Court of Errors and Appeals in the last resort in all causes, as heretofore, on the twenty-sixth day of February, instant, at Trenton, together with this our writ, that the record and proceedings aforesaid being inspected, we may further cause to be done therein what of right, and according to law ought to be done.

Witness the Honorable Theodore Runyon, our Chancellor, and President Judge of our said Court of Errors and Appeals in the last resort in all causes, as heretofore, at Trenton, this seventh day of February, in the year of our Lord one thousand eight hundred and eighty-four.

HENRY C. KELSEY,
Clerk.

C. V. D. JOLINE,
Attorney.

The answer of the Camden County Circuit Court within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, is hereby certified to the Court of Errors and Appeals, in a certain schedule to this writ annexed, as within it is commanded. 10

JOEL PARKER, [L. S.]
Judge.

ASSIGNMENTS OF ERROR.

COURT OF ERRORS AND APPEALS.

JAMES G. TARR and AUGUSTUS H. WONSON, trading as TARR & WONSON, vs. JOSEPH C. DAY and HARVEY K. CARTER, trading as DAY & CARTER.	IN ERROR TO CAMDEN CIRCUIT (ON A RULE TO SHOW CAUSE IN SAID SUIT) ON PART OF MARSHALL G. KINNEY, JUNIOR.

And now, at this day, the said Marshall G. Kinney, Junior, assigns the following causes of error :

First.—Because the orders and judgment of the court are against the law of the case.

Second.—Because the findings of the court are against the evidence in the case.

Third.—Because the findings of the court are against the law of the case.

Fourth.—Because the court erred when it found that

the purchasers at the Sheriff's sale paid four thousand four hundred and fifty dollars in cash on the day of sale.

Fifth.—Because the court erred when it found that all the parties interested agreed that $762.72 was the surplus that should be paid into court, and that Tarr & Wonson would be paid out of it.

Sixth.—Because the court erred when it found that on the 28th day of November any money was actually paid to the landlord for rent.

Seventh.—Because the court erred when it found that "the balance $2,600 was by the direction of the defend-"ant paid to the landlord by the purchasers for the rent "due him."

Eighth.—Because the court erred when it found that the defendant made any arrangement to pay the rent with the surplus money.

Ninth.—Because the court erred when it found that all the creditors who had executions in the Sheriff's hands "agreed to the arrangement that was made whereby the "$2,600 was appropriated to the payment of the rent."

Tenth.—Because the court erred in finding that any direction or arrangement to pay the rent was ever made.

Eleventh.—Because the court erred in finding that the rent due from the defendants to their landlord was $2,600.

Twelfth.—Because the court erred in finding that one of the defendants was present at the sale acting for the others, and he agreed upon the amount of rent due.

Thirteenth.—Because the court erred in finding that it

was agreed between the defendants and the landlord that all the rent due should be paid out of the surplus.

Fourteenth.—Because the court erred in finding "that "the creditors having executions delivered to the Sheriff "after the money was actually paid to the landlord for "rent, can have no claim on the $2,600, and no right to "have it paid into court."

Fifteenth.—Because the court erred in finding that the Sheriff was never legally bound to receive the $2,600, and that his duty was performed when he received sufficient money to satisfy the executions in his hands.

Sixteenth.—Because the court erred in that it did not order the Sheriff to pay interest on the moneys ordered by him to be paid into court.

Seventeenth.—Because the court erred when it ordered that Jacob C. Daubmann, former Sheriff, should pay into court only the sum of $762.72 without interest, when by the law of the land he should have been ordered to pay into court in addition thereto the sum of $2,600, with interest from November 28th, 1877.

Eighteenth.—Because the court erred when it ordered the executions of James G. Tarr and Augustus H. Wonson, trading as Tarr & Wonson, the Anthracite Insurance Company, Edward Ecke and James Dawick to be paid out of the moneys in the clerk's hands, whereas, by the laws of the land, the executions of Marshall G. Kinney, Junior, should have been paid ahead of the aforesaid executions out of said moneys.

C. V. D. JOLINE,
Attorney of Marshall G. Kinney, Junior.

CAMDEN CIRCUIT COURT.

JAMES G. TARR, and AUGUSTUS H. WONSON, Trading as TARR & WONSON,	IN CASE, &c.
vs.	DEPOSITIONS,
JOSEPH C. DAY, and HARVEY K. CARTER, trading as DAY & CARTER.	&c.

Examination of witnesses in the above stated cause, taken before Richard T. Miller, Supreme Court Commissioner, at his office, No. 106 Market street, Camden, New Jersey, on Saturday, January third, eighteen hundred and eighty, pursuant to an order of said court, bearing date December twenty-fourth, eighteen hundred and seventy-nine, pursuant also to notice hereunto annexed, with service thereon acknowledged, in the presence of Bergen & Bergen, attorneys of plaintiffs; Alfred Hugg, attorney of Edward Ecke; Charles S. Hugg, Samuel B. Garrison and Garrison & Barrett; Peter L. Voorhees, attorney of the First National Bank, of Camden, New Jersey; M. B. Taylor, attorney of James Dawick, Thomas E. French, attorney of the Millville Mutual Marine and Fire Insurance Company and Jacob C. Daubmann.

JOSEPH C. NICHOLS, a witness produced on part of the plaintiffs, being duly sworn according to law, on his oath saith:

I reside in Camden, New Jersey. I am Deputy Register of Deeds now; prior to this time I was Deputy Sheriff, under Jacob C. Daubmann. I was deputy from November, eighteen seventy-four, until November, eighteen seventy-eight. I was deputy during the entire term of Sheriff Daubmann. During that time, I had executions to come into my hands against Harvey K. Carter. The following is a list of the executions that came into our hands:

1 CAMDEN COUNTY CIRCUIT.

CHARLES S. HUGG, vs. HARVEY K. CARTER,	Fi Fa de bon, &c., $296 62, 257 21, Damages, 37 70, Costs.

This execution was received October twenty-second, eighteen seventy-seven. It was settled on the twenty-sixth of November, eighteen seventy-seven. There was two hundred and ninety-six dollars and sixty-two cents paid to Alfred Hugg, attorney of record.

2 CAMDEN CIRCUIT COURT.

CHARLES S. HUGG, vs. JAMES DAWICK, & Co., and HARVEY K. CARTER.	IN CASE. Damages, $615 07, Costs, 38 32.

This execution was received October twenty-second, eighteen seventy-seven. This was settled November twenty-sixth, seventy-seven. Amounts paid, six hundred and fifty-seven dollars and two cents, by Sheriff Daubmann, to Alfred Hugg, attorney of record.

3 CAMDEN CIRCUIT COURT.

CHARLES S. HUGG,
vs.
JAMES DAWICK, & Co.,
and CARTER & PEALL,

IN CASE.

Damages, $1008 89,
Costs, 38 82,

This execution was received October twenty-second, eighteen hundred and seventy-seven. This was settled November twenty-six, eighteen hundred and seventy-seven, by Sheriff paying Alfred Hugg, attorney of record, ten hundred and fifty-three dollars and fifty-four cents.

4 CAMDEN CIRCUIT COURT.

CHARLES S. HUGG,
vs.
JAMES DAWICK, & Co.,
and CARTER & PEALL,

IN CASE.

Damages, $1355 52,
Costs, 41 70.

This execution was received October twenty-second, eighteen hundred and seventy-seven. This was settled on November twenty-sixth, eighteen hundred and seventy-seven, by Sheriff paying Alfred Hugg, attorney of record, fourteen hundred and five dollars.

5 CAMDEN CIRCUIT COURT.

JAMES G. TARR, AUGUSTUS H. WONSON, trading as TARR & WONSON. vs. JOSEPH C. DAY, and HARVEY K. CARTER.	IN CASE. Damages, $185 53, Costs, 30 37.

This execution was received November seventh, eighteen hundred and seventy-seven. Nothing has been paid on account of this execution by the Sheriff.

6 CAMDEN COMMON PLEAS.

THE ANTHRACITE INSURANCE COMPANY, vs. HARVEY K. CARTER.	IN DEBT. $51 56 Costs, 3 84 Costs of Transcript, 1 50 Docket, 2 35

This execution was received November twenty-fourth, eighteen hundred and seventy-seven. Nothing has been paid on account of this execution by the Sheriff.

7 CAMDEN COMMON PLEAS.

EDWARD ECKE, vs. HARVEY K. CARTER.	DEBT, $80 92 COSTS, 3 84

This was received December first, eighteen hundred and seventy-seven. Nothing has been paid on this execution by the Sheriff.

8 NEW JERSEY SUPREME COURT.

JAMES DAWICK,	IN CASE.	
vs.	Am't Assess'd,	$1,297 03
HARVEY K. CARTER.	Costs,	30 48

This was received December fifth, eighteen hundred and seventy-seven. Nothing has been paid on this execution by the Sheriff.

9 CAMDEN COUNTY CIRCUIT.

S. B. GARRISON & BARRETT,	IN CASE.	
vs.	Damages,	$102 10
CARTER & PEALL.	Costs,	38 67

This execution was received December seventeenth, eighteen hundred and seventy-seven. Nothing has been paid on this execution by the Sheriff.

10 CAMDEN COUNTY CIRCUIT COURT.

SAMUEL B. GARRISON,	IN CASE.	
vs.	Damages,	$197 33
CARTER & PEALL.	Costs,	39 51

This was received December nineteenth, eighteen hundred and seventy-seven. Nothing has been paid on this execution by the Sheriff.

11 CAMDEN CIRCUIT COURT.

MILLVILLE MUTUAL MARINE and FIRE INSURANCE COMPANY, vs. HARVEY K. CARTER.	IN CASE.
	Damages, $113 35
	Costs, 33 70

10 This execution was received January thirty-first, eighteen hundred and seventy-eight. Nothing has been paid on this execution by the Sheriff.

12 NEW JERSEY SUPREME COURT.

THE FIRST NATIONAL BANK, of Camden, New Jersey, vs. HARVEY K. CARTER.	IN CASE.
	Damages, $1,987 75
	Costs, 34 47

20

This was received May tenth, eighteen hundred and seventy-eight. Nothing has been paid on this execution by the Sheriff.

There were, previous to all these executions levies, on the goods and chattels of Harvey K. Carter and William A. Peall, in the hands of the constable, Charles Gordon.

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JULIUS & ANDERSON, vs. HARVEY K. CARTER and WILLIAM A. PEALL, trading, &c.	IN DEBT.
	Judgment, $70 00
	Costs, 2 89
	Interest, 34
	Execution, 1 35
	Constable com. 2 24
	$76 82

Benjamin F. Day	Judgment,	$89 46
	Costs,	2 33
	Interest,	79
vs.	Execution,	1 35
	Constable com.,	2 82
Harvey K. Carter.		$96 75

The Sheriff paid to Constable Charles H. Gordon in full for these two executions the sum of one hundred and seventy-three dollars and fifty-seven cents on November twenty-fourth, eighteen hundred and seventy-seven.

Under all the foregoing executions the Sheriff advertised and sold all the personal property of the defendants, Harvey K. Carter, William A. Peall and James Dawick in and about the ship-yard at Cooper's Point, together with the blacksmith shop and its connections. The sale took place on or about the twenty-fourth day of November, eighteen hundred and seventy-seven. We sold all this property subject to a chattel mortgage of five thousand dollars. It brought, over and above the chattel mortgage, seven thousand and fifty dollars ($7,050) Bonaparte Shoe and William Chard purchased the goods; they were the holders of the chattel mortgage.

The goods of the defendants were all sold at the same time and in bulk.

The Sheriff gave Shoe and Chard a bill of sale for the goods purchased at the sale. We received four thousand four hundred and fifty dollars in cash and a release for rent from Samuel C. Cooper of twenty-six hundred dollars.

The release is dated November twenty-eighth, eighteen hundred and seventy-seven, and reads as follows:

COOPER'S POINT, N. J.
Nov. 28th, 1877.

To JACOB C. DAUBMANN, ESQ.,

Dear Sir:—As it seems to be the impression that I hold you responsible for rent of ship-yard lately occupied by Carter & Peall, this is to show that I do not hold you responsible for the whole or any part of said rent, as I look entirely to the occupants of said yard for my back rent.

Yours respectfully,
SAMUEL C. COOPER."

This is Samuel C. Cooper's handwriting, I think, and on his letter-head it is endorsed "release of notice for rent twenty-six hundred dollars.
CARTER & PEALL."

The endorsement is in the handwriting of M. B. Taylor. I do not know where the notice is of the amount of rent that was then due but this is the sum that was given notice as being due at the time of sale. Samuel C. Cooper gave this notice.

Ques. How was the seven thousand and fifty dollars disposed of?

1. By Release from Samuel C. Cooper for rent	$2,600 00
2. Execution Julius & Anderson vs. Harvey K. Carter and William Peall	76 82
3. Execution Benj. F. Day vs. Harvey K. Carter	96 75
3. Execution Charles S. Hugg vs. Harvey K. Carter	296 62
4. Chas. S. Hugg vs. James Dawick & Co. and Harvey K. Carter	657 02
5. Chas. S. Hugg vs. James Dawick & Co. and Carter & Peall	1,053 54
6. Chas. S. Hugg vs. James Dawick &	

Co. and Carter & Peall.....	1,405 00
7. Sheriff's fees.....	101 53
	$6,287 28

After these disbursements it leaves a balance in the Sheriff's hands of seven hundred and sixty-two dollars and seventy-two cents.

I arrived at the amount of rent due by the notice of Mr. Cooper. I do not know where that notice is.

JOS. C. NICHOLS.

Sworn and subscribed before me, this 3d day of January, A. D., 1880.

RICHARD T. MILLER,
Supreme Court Commissioner.

Examination adjourned, by consent of counsel, to Wednesday, January 7th, A. D., 1881, 10 A. M.

Wednesday, January 7th, A. D., 1880, 10 A. M. Examination resumed in the presence of Bergen & Bergen, attorney of plaintiffs.

SAMUEL C. COOPER, a witness produced on part of plaintiff, being duly affirmed according to law, on his affirmation saith:

I live in Camden, New Jersey. I know Harvey K. Carter and William A. Peall, the members of the firm of Carter & Peall, Day & Carter originally, rented a ship yard of me. Joseph C. Day and Harvey K. Carter ran the yard after it was rented. My impression is that Harvey Carter, and a man by the name of Peall, ran the yard after Day & Carter dissolved. This was the only property rented of me by Harvey K. Carter, or by Carter & Peall; they paid eight hundred dollars a year rent. I understood that Carter & Peall were sold out by the Sheriff. The rent was paid up to November fifth, eighteen hundred and seventy-four. That is, the rent of

the ship-yard; Harvey K. Carter, or Day & Carter, or Carter & Peall, never paid me any other rent after that date; Day & Carter, Harvey K. Carter, or Carter & Peall, on November seventh, eighteen hundred and seventy-seven, or whoever the occupants of the yard were, owed rent for the same, from November the fifth, eighteen hundred and seventy-four, to November fifth, eighteen hundred and seventy-seven. They owed me twenty-four hundred dollars for the rent of said yard, for the said term of three years.

I do not remember giving the Sheriff any notice in writing of the amount of rent due for the yard, previous to the sale of the same by the Sheriff.

I never received any of this back rent from the Sheriff. I never looked to the Sheriff for any of this back rent, and I did not hold the Sheriff in any way responsible for this back rent. Some one called my attention to the matter, but I refused to have anything to do with it, either to claim the whole amount, or even a year's rent at the time. I proposed to look to the occupants of the yard for the back rent, or that they should either pay it or get out.

SAMUEL C. COOPER.

Affirmed and subscribed before me, this 7th day of January, A. D. 1880.

RICHARD T. MILLER,
Sup. Ct. Com.

HARVEY K. CARTER, a witness produced on the part of the plaintiffs, being duly sworn according to law, on his oath saith:

I reside in the City of Camden, New Jersey. I am one of the defendants in the above stated cause. I was a member of the late firm of Day & Carter, also a member of the late firm of Carter & Peall, and also a member of the late firm of James Dawick & Co. Joseph C. Day and myself constituted the firm of Day & Carter with equal interests in said firm. William A. Peall and myself con-

stituted the firm of Carter & Peall with equal interests in said firm, except Peall had not paid in the amount he agreed to pay. James Dawick, William A. Peall and myself constituted the firm of James Dawick & Co. James Dawick had one-half interest, William A. Peall one-quarter and myself one-quarter. William A. Peall became possessed of his interests in these two firms from me by an agreement between us.

Paper produced and marked Exhibit "A" on part of plaintiffs. Witness says, William A. Peall never carried out the provisions of the agreement on his part. He never put into either of the firms more than from four to six hundred dollars. He came into these firms on the twenty-third day of June, eighteen hundred and seventy-six.

The debt of Tarr & Wonson was contracted long before this time; they are the plaintiffs in the above stated cause. The blacksmith shop and all connected with it was owned and managed by James Dawick & Co. The ship-yard and railway and saw-mill were owned and managed by Carter & Peall. There was a separate set of books kept for each firm. I considered the property of James Dawick & Co. to be worth not less than thirty-five hundred dollars at the time of the Sheriff's sale. I consider the property of Carter & Peall, outside of James Dawick & Co., at the time of the Sheriff's sale, to be worth between twenty-five and thirty thousand dollars. There was a chattel mortgage of five thousand dollars on the ship-yard of Carter & Peall at the time of the Sheriff's sale; this did not include, as I understand, the interest of Carter & Peall in the property of the firm of James Dawick & Co. At the Sheriff's sale the property of James Dawick & Co. and the property of Carter & Peall was lumped and sold as one property, subject to the chattel mortgage on the ship-yard for the sum of seven thousand and fifty dol-

lars, and Bonaparte Shoe and William Chard were the purchasers. Shoe and Chard took possession of the property immediately after the sale. Samuel C. Cooper was the landlord and we paid him eight hundred dollars a year rent. This covered the rent of both firms. At the time of the Sheriff's sale I think there was three years' and one quarter's rent due. Mr. Cooper kept the account and he may be correct. Mr. Cooper told me that he had notified the Sheriff that he did not look to him for any of the rent, and that whoever bought the yard would have to pay the back rent or get out.

H. K. CARTER.

Sworn and subscribed before me, this 7th day of January, A. D., 1880.

RICHARD T. MILLER,
Supreme Court Commissioner.

HARVEY C. CARTER, recalled on part of the plaintiffs, saith:

When I stated at my last examination that I had conveyed a part of my interest in the firm of James Dawick & Co. to William A. Peall, I was mistaken. I did not convey any interest in the firm of James Dawick & Co. to William A. Peall. The interest that I conveyed to Mr. Peall was the ship-yard and its connections entirely independent of James Dawick & Co., which was a blacksmith shop. There were some debts against the ship-yard at the time Mr. Peall bought his interest from me. He bought his interest subject to the debts. All the judgments against Harvey K. Carter individually, against Carter & Peall, against James Dawick & Co. and Carter & Peall, they were all for the indebtedness of the ship-yard. James Dawick & Co. never received any benefit from any of the moneys or claims on which these judgments are founded. The individual indebtedness of Mr. Harvey K. Carter was all

indebtedness of the yard. I never used a dollar for my individual expenses outside of the yard.

Cross-examined by Mr. Taylor.

I was present at the Sheriff's sale. The property was struck off to some one else before Shoe & Chard bought it. It was struck off to me. I can't remember the figures; I think it was $8,000.00. I was not able to comply with the conditions of the sale. The Sheriff adjourned the sale for two or three hours, I think to give me a chance to comply. I was unable to comply with the conditions. Then he put it up and sold it again, and Shoe & Chard became the purchasers. The chattel mortgage of Shoe & Chard did not cover the blacksmith shop, or any interest of James Dawick & Co. The five thousand in the chattel mortgage was paid in for the benefit of the ship-yard. Twenty-five hundred dollars of that money was paid on the day it was received, to the First National Bank of Camden for part of my indebtedness in the ship-yard. The rest of the money was paid shortly after by Mr. Shoe to me.

Re-examined-in-chief.

The twenty-five hundred dollars that Mr. Shoe gave me also went towards paying my indebtedness in the ship-yard.

H. K. CARTER.

Sworn and subscribed before me, this 12th day of January, A. D., 1880.

RICHARD T. MILLER,
Supreme Court Commissioner.

Examination of witnesses in the above stated cause, before Thomas E. French, Supreme Court Commissioner, at the office of S. H. Grey, Esq., No. 104 Market street, in the city of Camden, New Jersey, pursuant to an order of said court, bearing date December 24th, 1879; pursuant also to notice hereunto annexed, which notice is

for May 13th, 1881, at three o'clock in the afternoon, at which time the taking of said depositions was adjourned to May 14th, 1881, at four o'clock in the afternoon, at the place aforesaid.

May 14th, 1881, four P. M., examination in the presence of S. H. Grey, Esq., of counsel Jacob C. Daubmann, and Martin V. Bergen, Esq., of counsel with plaintiffs.

JOSEPH C. NICHOLS, a witness produced on the part of said Jacob C. Daubmann, being duly sworn, on his oath says:

I kept a book of sales of personal property, as Deputy Sheriff. I have that book. (Witness turns to book) and says, the personal property of Harvey K. Carter, Carter & Peall, and James Dawick & Co. was sold on the fifth day of November, eighteen hundred and seventy-seven, as appears by that sale book. This was the sale in relation to which I previously testified, as having taken place on or about the twenty-fourth day of November, eighteen hundred and seventy-seven; upon looking at the sales book, I find that the sale was advertised for the twenty-ninth day of October, eighteen hundred and seventy-seven, and then adjourned to November fifth, eighteen hundred and seventy-seven, when the property was sold; this sale was made under the executions that were in the Sheriff's hands at that time.

Ques. You have stated in your previous examination that an execution at the suit of Charles S. Hugg against Harvey K. Carter, an execution against James Dawick & Co., and Harvey K. Carter at the suit of Charles S. Hugg, two executions against James Dawick & Co. and Carter & Peall, at the suit of Charles S. Hugg, were respectively received by the Sheriff, on the twenty-second day of October, eighteen hundred and seventy-seven;

were these the executions under which the sale was made?

Ans. Yes sir, they were. There were no other executions received by the Sheriff against these defendants prior to the fifth of November, when the sale was made.

Cross-examined by M. V. Bergen, Esq.

JOSEPH C. NICHOLLS.

Sworn and subscribed before me, a Supreme Court Commissioner, this 14th day of May, A. D. 1881.

THOMAS E. FRENCH.
Sup. Ct. Com.

MARMADUKE B. TAYLOR, a witness produced on the part of said Jacob C. Daubmann, being duly sworn, on his oath says:

I represented Bonaparte Shoe, the vendee of Jacob C. Daubmann, Sheriff, of the property of Harvey K. Carter, Carter & Peall, and James Dawick & Co. The Sheriff's sale was made on the fifth day of November, eighteen hundred and seventy-seven. I paid to the Sheriff on that day five hundred dollars. That sale was made under executions in the hands of Jacob C. Daubmann, Sheriff, at the suit of Charles S. Hugg against Harvey K. Carter, Charles S. Hugg against James Dawick & Co. and Harvey K. Carter, Charles S. Hugg against James Dawick & Co. and Carter & Peall; there were two executions against the last named defendants at the suit of the same plaintiffs. There were also two small executions, one against Harvey K. Carter and one against Harvey K. Carter and William A. Peall in the hands of a constable.

Cross-examined by M. V. Bergen, Esq.

The property, I believe, brought seven thousand and

fifty dollars. Five hundred dollars of this was paid on the day of sale. I paid thirty-nine hundred and fifty dollars more in cash to the Sheriff, on the eighth and twenty-second days of November, eighteen hundred and seventy-seven. The balance was paid by a settlement of rent of Mr. Cooper to the amount of about twenty-six hundred dollars. There was a paper signed by Mr. Cooper, delivered to me by Shoe & Chard, and which paper I delivered to the Sheriff, purporting to be a receipt for rent, or something of that kind. (Witness examines paper in Sheriff's docket, page 47,) and says that is the paper, and has my endorsement thereon as a release of rent in my handwriting. A copy of this paper is incorporated in the testimony of Joseph C. Nichols, taken in this case, January third, eighteen hundred and eighty. The whole of the seven thousand and fifty dollars was paid in cash to the Sheriff, except the twenty-six hundred dollars, and that was paid by the release of Samuel C. Cooper, for rent, and the last of the money I paid in cash was paid on the twenty-second day of November.

Re-direct by S. H. Grey, Esq.

The twenty-six hundred dollars was settled with the Sheriff before the bill of sale was delivered, which was the rent claimed by Mr. Cooper, and after the bill of sale was delivered the Sheriff requested a paper to show that Cooper had been settled with; that Cooper released him from the rent, which was given on the twenty-eighth of November, and is the paper referred to.

Bill of sale produced and marked Exhibit No. 1, of Jacob C. Daubmann.

Question by M. V. Bergen, Esq.

I do not know how the twenty-six hundred dollars rent was arrived at. At the sale Mr. Cooper stated there was a large amount of rent due him and that nothing should be removed until he was settled with, or some-

thing to that effect. I do not know how long a time this twenty-six hundred dollars rent covered. I have never seen any other written notice from Mr. Cooper to the Sheriff except the one above referred to.

M. B. TAYLOR.

Sworn and subscribed before me a Supreme Court Commissioner, this 14th day of May, A. D. 1881.

THOMAS E. FRENCH,
Sup. Ct. Com.

Adjourned to May, 20th, 1881, at 4 P. M. by consent.

Thursday May 20th, 1881, examination resumed in the presence of S. H. Grey and Martin V. Bergen, attorneys of the parties.

JACOB C. DAUBMANN, a witness produced on the part of himself, being duly sworn according to law, on his oath says:

I was Sheriff of the county of Camden from November, eighteen hundred and seventy-four, to November, eighteen hundred and seventy-eight, and Joseph C. Nichols was my deputy. I recollect the sale of the personal property of Harvey K. Carter, Carter & Peall and James Dawick & Co.; that sale was made the fifth day of November, eighteen hundred and seventy-seven. I received a notice from Samuel C. Cooper on the day of the sale, in regard to the rent of the property occupied by the defendant. Mr. Cooper, or his attorney, came to me and mentioned about the rent just as I was selling and knocking down the property. Harvey K. Carter also came and said he wanted Mr. Cooper paid; that was a verbal notice; this occurred just as the property was about being struck off at a bid of something over four thousand dollars. I said I would adjourn the sale fifteen or twenty minutes for them to fix it up. They went away together with Mr. Cooper, or his attorney, and afterwards came back and stated that they were ready to go on. I then started the

sale again, when they bid seven thousand and fifty dollars; this was Shoe & Chard's bid, at which the property was sold and delivered to them, Shoe & Chard; it was the understanding at the sale, among them all, that Cooper's rent was to be paid. I said at the time of the notice that I ought to have a written notice; that Cooper was only entitled to a year's rent, any way; and they said Cooper would have to be paid or the purchaser would have moved the property purchased off the premises.

Cross-examined by M. V. Bergen, Esq.

I never received any written notice from Cooper to pay him the rent. I have still, of the money raised by the sale remaining in my hands, about seven hundred and sixty, or seven hundred and sixty-five dollars. I received from Shoe & Chard, of the seven thousand and fifty dollars, four thousand four hundred and fifty dollars. I never got the twenty-six hundred dollars that was settled by Shoe & Chard with Mr. Cooper, and I received a letter from Mr. Cooper, dated November 28th, 1877, a copy of which is in the testimony of Mr. Nichols, first given in this cause. The last of this money was paid to me November 22d, 1877. I have had this seven hundred and sixty odd dollars of the money on hand ready to pay on the order of the court.

JACOB C. DAUBMANN.

Sworn and subscribed at Camden, this twentieth day of May, A. D., 1881, before me.

THOMAS E. FRENCH, M. C. C.

The execution in the case of Linsey Jr vs Carter and Pc all was delivered to the Sheriff on or about March 14/1880 and was endorsed

Levy Damages $636.62
Costs 37.94
Interest thereon from March 13/1880 $673.56

The execution in the case of Linsey Jr vs Carter who had survived James Daniel trading as James Daniel & Co was delivered to the Sheriff on or about March 16/1880 and was endorsed

Levy Damages 636.80
Costs 33.81
Interest thereon from March 15/1880 $669.61