

C. L. Cham.]

THE AUBURN EXCHANGE BANK V. HEMMINGWAY ET AL.

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thereafter made a seizure of a large quantity of goods, which goods he removed and advertised to be sold on the thirteenth of September.

Intimation was, before the day of sale, given to the sheriff by Mr. Osler, acting on the part of the Ontario Bank who claimed the goods seized, to the effect that the plaintiff's execution was fraudulent, and thus deterred the sheriff from proceeding with the sale, and he in consequence postponed the sale.

On his doing so the agent of the plaintiffs wrote to the sheriff that they would hold him responsible, while the claimants threatened an action for damages if he proceeded.

Nothing further was done until the 23rd of September, when Mr. Osler, on the part of the Ontario Bank, claimed the goods in writing.

The sheriff thereupon took the necessary steps and obtained an interpleader order on the 1st of October, by which it was directed that upon payment of the appraised value of the goods seized by the sheriff into court by the claimants within ten days from the date of the order, or upon their giving within the same time security to the satisfaction of the said sheriff for the payment of the same amount by the claimants according to the directions of any rule of court, &c., and upon payment to the sheriff of the possession money from the date of the order, that the sheriff should withdraw from the possession of the goods and chattels seized by him, &c. And it was further directed that unless such payment were made or such security given within the time aforesaid, the sheriff should proceed to sell the goods and chattels and pay the proceeds, after deducting the expenses and the possession money aforesaid, into court, to abide further order. And it was further directed that no action should be brought against the sheriff for the seizure of the goods, &c.

The claimants did not pay the money into court or give any bond until the 4th of November following, and the sheriff stated that during all that time he was put to expense, and that he devoted much time and labor to the matter. It was admitted, however, that the possession money, from the date of the order to the time of the giving of the bond, was paid by the claimants to the sheriff.

On the 22nd of November the plaintiffs and the claimants agreed to settle the matters in dispute in several interpleader suits between them, including the one herein, the plaintiff giving to the claimants control of the execution in this cause as well as another execution at their suit against the defendants in the hands of the sheriff of Norfolk, and an order to that sheriff for the proceeds of the goods seized by him. And it was also agreed that a chancery suit of Bank of Montreal against the plaintiffs, should be dismissed as against the plaintiffs. And the Ontario Bank agreed to pay ten thousand dollars to the plaintiffs—five thousand dollars down, and five thousand dollars in three months.

Under these circumstances the sheriff claimed that the plaintiff should be ordered to pay him poundage or reasonable compensation, and other moneys mentioned in the summons.

*E. B. Wood* showed cause.

*Robt. A. Harrison* in support of the summons referred to *Grant v. The City of Hamilton, ante*.

MORRISON, J.—No authority was referred to on the argument, deciding that in a case like the present, the sheriff is entitled to the fees or allowances he seeks. All the authorities I can find go to shew the sheriff is not entitled to any costs anterior to his application for relief. When he seizes under a *fi. fa.* and a claim is made to the goods, he elects to proceed on the execution or abandon the seizure, or to interplead. If the latter, it is for the purpose of relieving himself from the liability on account of the seizure and all responsibility for the future. Here he obtained that relief, and upon his withdrawing from the goods seized, he received all the costs adjudged to him under the interpleader order. If the sheriff had obeyed the interpleader order, which it was his duty to have done, (the claimants not having paid the money into court or given security for the value of the goods within ten days) he should have sold the goods after ten days, and in that case would have avoided the trouble he complains he was put to, and in all probability would have been reimbursed much of the expenses he now claims; but, instead of doing so, he retained the goods for nearly a month after it was his duty to sell, and any extra expense or trouble he was put to, besides the possession money that he was paid, he should, I think, have received from the claimants, at whose instance he refrained from selling, or he was himself guilty of neglect.

It was pressed by Mr. Harrison that it was through the instrumentality of the sheriff's services that the plaintiffs recovered the ten thousand dollars under the agreement made with the claimants, and that the sheriff was in consequence thereof entitled to poundage or some allowance. I cannot take this view of it. What formed the consideration for the claimants paying the plaintiffs the ten thousand dollars, or how far the seizure of the goods in this cause affected that payment, I do not know. But assuming that it was the result of a compromise between the plaintiffs and the claimants as to the goods in question, so far as the sheriff is concerned I cannot see what he had to do with it, for he had at his own instance and for his own benefit invoked the aid of the court to be relieved from all responsibility in the matter, as if he had never seized the goods at all; and instead of being instrumental in making the money for the plaintiffs out of the goods in question, he protected himself as to the plaintiff for not doing so, and threw the burden on the plaintiffs of ascertaining their rights to these goods.

Under these circumstances I see no ground for a claim for poundage, which is an allowance for seizing and making the money, and assuming all the responsibility of the acts necessary for that purpose.

It may appear hard upon sheriffs that in such a case they may incur much expense without the means of reimbursing themselves, but it is one, among others, of the many onerous incidents attending the office of sheriff for which no compensation can be given.

I discharge the summons, but without costs.

Summons discharged without costs.