

*Money paid by the defendant to the seizing officer to prevent a sale of his effects is money levied within the meaning of C. C. P. 601, and must be returned into court where an opposition is filed.*

PER CURIAM. This case is before the court upon two oppositions, both of them contested by the plaintiff. The first is the opposition of the defendant himself, based upon the last part of article 581 C. P. C., which says that if a part only of the debt is paid, the opposition prevents the sale for more than is due; and that is just what is asked by the opposant here now. He says he paid \$133.39 on the 11th of December, and he asks that the seizing officer should be ordered to levy the balance only (some \$619) remaining due. The facts proved are that on the 11th of December last at 5 p. m., an execution having been issued by the plaintiff, and the seizure made under it, a sum of \$133.39 was paid to him, as appears by his receipt written on the back of the writ bearing the apparent date of 13th December, and signed by the plaintiff himself. This receipt, however, was not written on the back of the writ until after the 24th December, as shown by the evidence of the bailiff Dansereau in his cross-examination. On the 24th December, the day before that fixed for the sale, the defendant, there being no retraxit for the sum paid, filed the opposition for a partial annulment of the writ.

The plaintiff contests by saying that when the seizure took place the whole debt was due, and remained due when the bailiff had finished seizing, which is inexact, the proceedings on the seizure terminating only on the 11th in the evening, and the \$133.39 being paid during that day. The plaintiff says, further, that the defendant and the guardian were both of them informed that the sale would only take place for the balance. The bailiff, however, admits that he only informed the defendant that he had been instructed to deduct the amount paid at the moment when the opposition was signified to him between 4 and 5 in the afternoon. He admits, however, that the bailiff Darveau had warned him that an opposition was being prepared, and he went to get it at the office of the defendant's attorneys. He admits, further, that he had not then his writ with him;

and further still, he admits that on the 24th December the receipt on his writ, signed by plaintiff, as of the 13th December, was not there, but was only put there afterwards. Thus it would appear that if the defendant wanted to prevent his effects from being sold to satisfy what was not due he had to resort to this opposition; and the plaintiff who undertakes to contest it is entirely wrong, and his contestation should be dismissed with costs.

The second opposition is *afin de conserver*, and is made by Kent and Turcotte, to whom all the creditors of the defendant excepting the plaintiff himself had made an assignment. The plaintiff does not contest the quality of the opposants as creditors of the defendant, or as representing the creditors; on the contrary, there is an admission that they are creditors and that the defendant is insolvent, and had made an assignment for the benefit of his creditors. The effect of such an assignment as against non-consenting parties is not, therefore, now in question.

It appears by the return of the bailiff that on the 24th December, the defendant by the hands of Kent paid into the bailiff's hands \$730, being the balance he could levy; and at that time the opposition *afin de conserver* had been served. This opposition alleges the insolvency and *déconfiture* of the defendant, and asks that the monies levied be brought before the court, and distributed *au marc la livre* among the creditors in the ordinary way. The plaintiff contests this opposition, and he says that true enough this money was paid to the seizing officer by the defendant acting through Kent to avoid a sale of his effects; but he contends that this money is not to be considered monies levied in the sense of the law (art. 601, C.P.C.) That article is: "The monies seized or levied after deducting duties and taxed costs may be paid by the sheriff to the seizing creditor, if no opposition has been placed in his hands; otherwise he must return them into court." The plaintiff must sustain, in order to succeed, that monies paid by a defendant under stress of execution are monies not levied from him. Art. 564, C.P., says that if current money is seized the sheriff must return it with the other monies levied, so that