25/18

JAN 1844 #1324

F.B. McCUDDY

vs

W.D. BROWN & T. GIBSON

McCurdy
vs.
Brown and Gibson

§ Appeal from the Jasper Cir cuit court.

This was a proceeding by motion, instituted by McCurdy against Brown a Constable and Gibson his security on his official bond, under the act of Jany. 4. 1841, entitled "an act the better to secure the liability of county officers on their official bonds"; for the failure of Brown the Constable to return an execution. McCurdy recovered against Brown & Gibson ~~double~~ double the amount of the execution. An appeal from this judgment was taken to the circuit court, where on motion of Gibson and Brown the cause was dismissed, because no security for costs had been given, and because the act regulating constables, did ~~go~~ not give such proceedings against the Constable and his sureties.

The 5th sec. of the act of 4th Jan. 1841 provides, that persons injured by the neglect or mis~~conduct~~ feasance of any County officer may proceed against the principal ~~and an~~ or any one or more of his sureties jointly ~~and so~~ or severally in any proceeding authorized by law against such officer for official neglect or ~~duty~~ injury. The 8th section of the act concerning constables prescribes that if any constable shall fail to return any execution he shall forfeit and pay to the plaintiff double the amount to be recovered by motion before any Justice of the peace of his township, giving five days notice thereof in writing to said Constable. This proceeding against the Constable and his surety was founded upon the two foregoing provisions of law.

In regard to the question, ~~as to~~

as to the security for costs, we are of the opinion that the first section of the act concerning costs does not apply to this proceeding, it is neither within in its letter nor spirit. ~~of that section~~. This is not a proceeding upon an official bond. The act was intended for cases in which a party used the name of another in suing. ~~In such~~ When the name of the real plaintiff is not upon the record as a party, as when an official bond is given to the State, a person aggrieved by the violation of ~~the~~ its conditions ~~of the bond~~, bringing a suit does it in the name of ~~the~~ State in such cases it is necessary to give security. So it may be where bonds are given to officers for the use of another. In these cases, inasmuch as the real party does not appear as ~~of~~ such upon the record, and the name of the State ~~of~~ or officer is used for form's sake, security for costs is required. In the case under consideration the party who instituted the proceedings appeared as plaintiff on the record. ~~The State~~ Neither the State nor any officer was the formal plaintiff. Moreover the section above referred to, evidently contemplates suits commenced in the Circuit Court, and in its terms there is no reference to Justices Courts. Nor is the necessity of applying that act to Justices courts conceived, as the act regulating those courts has provided when and in what cases security for costs shall be given. But it is a conclusive answer to the objection of a want ~~for~~ of security for costs, that this is ~~not~~ no suit or proceeding on an official bond.

As to the question, whether the constables securities are liable under the fifth sec. of the act of 1841 to the penalty imposed on constables for failing to return an execution by the 8th section of the act relative to constables, we are inclined to the

opinion, that they are not. When a statute gives a penalty against a constable or other officer, and does not make the securities liable thereto by express words, we know of no principle which would subject them to its payment. The obligation of sureties is always construed strictly and never extended beyond the fair scope and import of its terms. The act of 1841 takes effect from and after its passage, the fifth section of that act does not purport to act prospectively on bonds thereafter to be given, but it relates to bonds then in force as well as those to be given in future. When the security in this case executed the bond by which he is bound, the liability he thereby incurred was fixed and ascertained by law. Can the Legislature, then by a subsequent act say that this liability shall be increased? The existence of such a power in the General Assembly cannot be maintained under our form of government. If authority was wanting to the legislature to pass such a law, in construing their acts, we should avoid a construction, which would make them guilty of a usurpation of power. The fifth section of the act of 1841 does not in terms pretend to interfere with the liability of securities, its whole scope and design is to give a more speedy remedy against them, an object clearly within the constitutional competency of the General Assembly. Its aim is to enable a party aggrieved by a neglect of duty in an officer to recover in a summary manner, that which he was before entitled to recover, but in a more dilatory & expensive form of procedure. The 8th sec. of the act relative to constables does not pretend to make the sureties liable for the penalty therein denounced against

constables, and there is no necessity and as we think no warrant in any law or principle of law to make them so.

The 20th section of the 7th Article of the act concerning justices courts gives a summons against a constable for failing to return an execution and subjects him to a penalty ~~for such failure~~ of one hundred per cent ~~for such failure~~ per annum on the amount of the execution for such failure. The last section of that article provides that this recovery may be had against the constable alone by a proceeding on a summons as before directed or that the party may by action of debt on his bond have the same recovery against him and his securities. Inasmuch as the penalty is by this act expressly given against the securities and as by the terms of the act it was only recoverable by action of debt on the bond, the act of 1841 was intended to give the party aggrieved a more speedy & less expensive remedy to obtain that to which he was by law entitled.

Thus as we find a provision on which the act of 1841 can operate, a provision extremely liberal to plaintiffs in executions we cannot see the necessity ~~by a forced construction~~ of extending its ~~provisions~~ operation by a forced construction to cases not within its letter, and to an extreme to which the legislature we cannot suppose ever would have gone. Judge Napton concurring in this opinion the judgment of the court below is affirmed

W. Scott

Three sever

The plaintiff read in evidence three several Deeds ~~one~~ executed by himself one by himself H. C. & R. L. and one by the three last named & Robert Wallace respectively bearing date 28th Decbr. 1821 26th Jany 1820 & 29th Jany 1820 releasing to the several alienee for the sum of five dollars severally all their right title to but & estate in three several lots in the Town of Booneville and describing them by reference to the Town plat above mentioned: ~~Two~~ But one of these three lots was in the land in controversy

McCurdy –
vs.
Gibson & Brown

Opinion

Scott

Filed March 4th 1844.
H. L. Bonney

Boonville April 9th 1843

Dr Sir.

You will confer a favour on me by issueing two writs of error, directed to the Clerk of the Jasper Circuit Court ~~both of them in~~ in the cases of H. B. McCurdy against William Brown, and Tryon Gibson, and the same against the same, the writs are asked by J. B. McCurdy.

please direct the writs to Carthage Jasper County Mo. to the care of John R Chenault Esqr. as I intend ~~ing~~ practising in Jasper I will see that your fees are collected.

You will very much oblige me by issueing the writs as soon as possible.

Yours with great respect &c.

James Winston

Hampton G. Boone Esqr.

F. B. McCurdy
vs } Precipe
W. D. Brown &
Lyon Gibson

Issue writ of Error
to Jasper County.

Filed 15 May 1843.
H. L. Boon clk

Flemming B McCurdy
vs
Willie D Brown &
Tryon Gibson

Appeal from Justices' Court

In Jasper Circuit Court October Term A D 1842

The transcript sent up by the Justice of the peace in this Cause is in the words & figures following to wit

F. B. McCurdy
vs
Willie D Brown &
Tryon Gibson

September 24th AD 1842

Motion for a Judgment against Willie D Brown Constable of Centre Creek Township to wit the township of Marion and Tryon Gibson security on said Willie D Browns official Bond.

This day the parties appeared in Court the plaintiff by his agent Mr. M. Chenault and the defendants in person and the parties having answered to their names and said that they were ready for trial. The plaintiff moved the Court to render judgment against the defendants for double the amount of a certain writ of execution which the said Willie D Brown Constable of Centre Creek Township to wit the Township of Marion failed to return according to the Command thereof said writ of Execution being in favour of F B McCurdy and against the goods and Chattels of Jacob Rader and for twenty five dollars and seven cents debt & interest and for Costs of suit taxed at Eighty One and One fourth cents said execution issued on the 8th day of November 1841 by James Walker a Justice of the peace of Centre Creek Township to wit the township of Marion the defendants asked for a Jury which was objected to by the plaintiff which objection was overruled by the Court a Venire was issued directed & delivered to the Constable who returned the same with the following names thereon endorsed Levi A. P. Jenkins John J. Scott William Scott John Pinington Silvester Stiles and Daniel Noland. The Defendants plead Justification and payment The Jury after hearing the proofs & allegations retired and returned into Court with the following verdict we the Jury find for the the plaintiff ten dollars and fourteen cents September the 24th A.D. 1842

Levi A. P. Jenkins foreman

It is therefore considered by the Justice that the plaintiff have judgment against

Willie D Brown and Lyon Gibson the defendants for ten dollars and fourteen cents debt & damages and also for costs of suit taxed at two dollars eighteen and three fourths cents

Thomas G Watton J.P.

September 26th 1842 Execution issued and directed to W.B. McCabe Constable of Marion Township in Jasper County returnable in 60 days from this date endorsed as follows

F. B. McCurdy

vs

Willie D Brown &

Lyon Gibson

Execution

Debt & damages	$10.44
Justices fees	93¾
Constable "	1.25

September 29th day AD 1842

The defendant filed an affidavit for an appeal in the above cause which appeal was allowed by the Justice

October the 19th 1842

The above execution by William B McCabe Constable

Thomas G. Watton Justice of the peace

State of Missouri County of Jasper

I Thomas G. Watton a Justice of the peace of Marion Township in Jasper County and State aforesaid do hereby certify that the above is a true copy of the entry on my docket wherein F.B. McCurdy is plaintiff & Willie D Brown & Lyon Gibson are defendants and that the papers accompanying said copy or transcript are all the papers that were filed in my office in said cause

Given under my hand this 27th day of October AD 1842

Thomas G. Watton Justice of the peace

Jasper Circuit Court Friday morning Oct. 28th AD 1842

Flemming B. McCurdy
vs } Appeal
Willie D. Brown &
Tryon Gibson }

This day came the defendants by their attorney and by leave of the court files their motion to dismiss this appeal on the ground that the said plaintiff had not given security security for the costs in said cause

Flemming B. McCurdy Pltff
vs } Appeal
Willie D Brown &
Tryon Gibson } Defts

This day came the parties aforesaid by their respective attorneys and on the defendants motion to dismiss this cause the court after hearing the arguments of counsel takes until to morrow morning to determine said motion

October 29th AD 1842

Flemming B. McCurdy Pltff
vs } Appeal
Willie D Brown &
Tryon Gibson } Deft

This day came the parties aforesaid & and on the defendants motion to dismiss this cause the court after considering said motion and due deliberation thereon being had it is considered by the court that the said cause be dismissed and that the said defendants have and recover of and from the said plaintiff their costs of suit in this behalf laid out and expended and that they have execution therefor

3rd Because a proceeding by motion is not ~~authorized~~ ~~against~~ allowed against said Tryon Gibson in this Case

4th and for other reasons. — Which said motion to dismiss was by the Court sustained and to which opinion of the court the plaintiff by his attorney excepts and on the same day was filed by the plaintiffs attorney a motion to set aside the order dismissing said action and reinstate said Cause on the docket for the following reasons viz

1st Because the above action was instituted by the plaintiff against said defendants by motion under the act of 1841 the better to secure the liability of County officers on their official bonds and is not such a suit as the law requires security for Costs to be given

2nd The said principal in an official Bond & any One or more of his securities may be proceeded against in any manner or proceeding authorized by law against such officer for Official neglect or injury

3th Because no bond for security for Costs can be required on a motion against the Constable & his security for failing to return an execution according to the Command thereof

4th Because this is not a suit against the Constable & his security on said Constables official bond & no security for Costs is required —

Which said motion to reinstate was by the Court overruled to which Opinion of the Court the plaintiff by his Counsil excepts and prays that this his bill of exceptions may be signed sealed & made a part of the record in the above Cause this 29th day of October AD 1842

C. S. Yancey Circuit Judge Seal

which said bill of exceptions was signed sealed and ordered to be made a part of the record in this Cause

F. B. McCurdy } Appeal from a Justice of the Peace
vs
Willis D Brown & } In Jasper Circuit Court
Lyon Gibson

We John R Chenault attorney for the above plaintiff & L Sendrick attorney for said defendants do agree that the record of the above cause may be filed in the Supreme Court on the first day of the next Term thereof & the same shall be proceeded on to a final decision as if a Writ of Error had been sued out and notice thereof given

John R. Chenault
L Sendrick

The above agreement was filed in my office on the 13th day of May AD 1843

Ellwood B. James Clerk

State of Missouri
County of Jasper } I Ellwood B. James Clerk of the Circuit Court within and for the County and State aforesaid do Certify the foregoing to be a true transcript ~~Copy~~ of the record & proceedings in the Case Flemming B. McCurdy against Willis D. Brown & Lyon Gibson

In Testimony whereof I Ellwood B. James Clerk of the Court aforesaid have hereunto set my hand and affixed the seal of said Court done at Office this 30th day of May AD 1843

Ellwood B. James Clerk

Jasper Circuit Court October 29th AD 1842

Flemming B McCurdy
vs
Willie D Brown & Tryon Gibson } Appeal from Justice of the peace

This day came the plaintiff by his attorney and by leave of the Court files his motion to set aside the order of dismissal in this cause and to reinstate said cause on the docket. The Court after hearing the arguments of Counsel and all things therein seen and fully understood the said motion was by the Court overruled

Flemming B McCurdy
vs
Willie D Brown & Tryon Gibson } Appeal from Justice of the peace

This day came the said Plaintiff by his attorney and by leave of the Court files his bill of exceptions to the Opinion of the Court in this cause which is in words and figures following to wit –

Flemming B. McCurdy
vs
Willie D. Brown & Tryon Gibson } In Jasper Circuit Court October Term AD 1842
Appeal from Justices Court

Be it remembered that on the 29th day of October in the year of our lord Eighten hundred and forty two this cause coming on to be heard the defendants by their Counsel filed their motion to dismiss the above cause for the following reasons – 1st because no bond for security for Costs was filed in said cause 2nd because a proceeding by motion is not authorized against the said Willie D Brown & said Tryon Gibson jointly

Jasper Circuit Court Friday morning Oct. 28th AD 1842

Flemming B. McCurdy
vs } Appeal
Willie D. Brown &
Tryon Gibson }

This day came the defendants by their attorney and by leave of the court files their motion to dismiss this appeal on the ground that the said plaintiff had not given security security for the costs in said cause

Flemming B. McCurdy Pltff
vs } Appeal
Willie D Brown &
Tryon Gibson } dfts

This day came the parties aforesaid by their respective attorneys and on the defendants motion to dismiss this cause the court after hearing the arguments of counsel takes until to morrow morning to determine said motion

October 29th AD 1842
Flemming B. McCurdy Pltff
vs } Appeal
Willie D Brown &
Tryon Gibson } dft

This day came the parties aforesaid & and on the defendants motion to dismiss this cause the court after considering said motion and due deliberation thereon being had it is considered by the court that the said cause be dismissed and that the said defendants have and recover of and from the said plaintiff their costs of suit in this behalf laid out and expended and that they have execution therefor

39. ~~94~~

F. B. McCurdy

vs. } Error

Willie M. Brown &

Tryon Gibson

Filed June 10. 1843.

H. L. Boon clk

Jasper

Flemming B McCurdy
vs
Willie D Brown &
Lyon Gibson

Appeal from Justices Court

In Jasper Circuit Court October Term AD 1842

The transcript sent up by the Justice of the peace in this cause is in the words & figures following to wit

September 24th AD 1842

F. B. McCurdy
vs
Willie D Brown &
Lyon Gibson

Motion for a judgment against Willie D Brown Constable of Centre Creek Township to wit The Township of Marion and Lyon Gibson security on said Willie D. Brown's official Bond This day appeared in Court the plaintiff by his agent William M. Chenault & the defendants in person and the parties having answered to their names and said they were ready for trial the plaintiff moved the court to render judgment against the defendants for double the amount of a certain writ of execution which the said Willie D Brown Constable of Centre Creek Township to wit the Township of Marion failed to return according to the Command thereof said writ of execution being in favor of F. B. McCurdy and against the goods & Chattels of William W. Babb and for nineteen dollars & twenty two cents Debt & interest and also for costs of suit taxed at One dollar The said execution was issued on the eighth day of November 1841 by James Walker a Justice of the peace of Centre Creek Township to wit the Township of of Marion The defendants asked for a Jury which was objected to by the plaintiff & which objection was over ruled by the court a Venire was issued to the Constable who returned the same with the following names thereon endorsed as

Jurors Silvester Stiles Daniel Noland William A Spencer Charles S. Irby John Pennington and John Mills the defendants plead Justification & the Jury after hearing the proofs & allegations retired and returned into Court the following verdict We the Jury find for the plaintiff double the amount of the execution debt and Costs September the 24th 1842 Daniel Noland foreman

It is therefore considered by the Justice that the Plaintiff have Judgment against Willie D Brown & Lyon Gibson for Thirty eight dollars & forty four cents and for two dollars the original Costs and for Costs of Motion taxed at two dollars six & 1/4 cents

Thomas G Walton J. P.

September 26th AD 1842 Execution Issued and directed to W.B. McCabe Constable of Marion Township returnable within sixty days from this date endorsed as follows F. B. McCurdy

vs

Willie D Brown &
Lyon Gibson

debt & damages	$38.44
Justices fees	1.06 1/4
Constable "	1.25

State of Missouri }
County of Jasper }

I Thomas G. Walton a justice of the peace of Marion township in Jasper County & state aforesaid do hereby certify that the above is a true copy taken from the entry on my docket in the above Cause wherein F. B. McCurdy is Plaintiff & Willie D. Brown & Lyon Gibson are defendants and that the papers accompanying this transcript are all the papers that were filed in the above case in my office Given under my hand this 26th day of October AD 1842 Thomas G. Walton Justice of the peace

Jasper Circuit Court Saturday Morning October 29th AD 1842

Flemming B. McCurdy Pltff
vs
Willie D. Brown & Lyon Gibson } defts } Appeal from Justices Court

This day came the said defendants by their attorney and by leave of the Court filed their motion to dismiss this cause. The Court after hearing the arguments of Counsel and due deliberation thereon being had it is considered by the Court that the said cause be dismissed and that the said defendants have and recover of and from the said Plaintiff their costs of suit in this behalf laid out and expended and that they have execution therefor

Flemming B. McCurdy
vs
Willie D. Brown & Lyon Gibson } Appeal from J. P.

This day came the said Plaintiff by his attorney and by leave of the Court files his motion to set aside the order of dismissal in this cause and to reinstate said cause on the docket — The Court after hearing the arguments of Counsel and all things therein seen and fully understood the said motion was by the Court over-ruled

Flemming B. McCurdy
vs
Willie D. Brown and Lyon Gibson } Appeal from Justices Court

This day came the said Plaintiff by his attorney and by leave of the Court files here his bill of exceptions to the Opinion of the Court in this cause which is in words and figures following Viz —

F. B. McCurdy vs Willie D Brown & Lyon Gibson } In Jasper Circuit Court October Term AD 1842

Appeal from Justices Court

Be it remembered that on the 29th day of October in the year of Our Lord Eighteen hundred and forty two this Cause Coming on to be heard the defendants by their Counsil filed their Motion to dismiss the above Cause for the following reasons

1st Because no bond was filed for Costs.

2nd Because the said Willie D Brown & the said Lyon Gibson ought not to be proceeded against jointly in this Case.

3rd Because this proceeding by motion is not allowed by law against said Lyon Gibson Jointly with said Brown

which said motion to dismiss was by the Court sustained and to which Opinion of the Court the plaintiff by his Counsil excepts — And on the same day was filed by the plaintiffs attorney a motion to set aside the order of dismissing said action and reinstate said Cause on the docket for the following reasons

1st Because the above action was instituted by the plaintiff against said defendants by motion under the act of 1840 the better to secure the liability of County Officers on their official bonds and is not such a suit as the law requires security for Costs to be given

2nd The said principal in an official Bond & any one or more of his securities may be proceeded against in any manner or proceeding authorized by law against such officer for official neglect or injury

3rd ~~Because~~ no bond for security for Costs can be required on a motion against the Constable & his security for failing to return an execution according to the Command thereof

4th Because this is not a suit against the Constable & his

security on said Constables Official Bond & no security for costs is required—

Which said motion to reinstate was by the Court overruled to which Opinion of the Court the Plaintiff by his Counsil excepts and prays that this his bill of exceptions may be signed sealed and made a part of the record in the above Cause this 29th day of October AD 1842

C. S. Yancey Circuit Judge (Seal)

Which said bill of exceptions was signed sealed and ordered to be made a part of the record in this Cause

F. B. McCurdy vs Willis P. Brown & Lyon Gibson — Appeal from a Justice of the Peace — In Jasper Circuit Court

We John R Chenault attorney for the above plaintiff & L. Sendrick attorney for said Defts do agree that the record of the above Cause may be filed in the Supreme Court on the first day of the next Term thereof & the same shall be proceeded on to a final decision as if a writ of Error had been sued out and notice thereof Given

John R Chenault
L. Sendrick

The above agreement was filed in my office on the 13th day of May AD 1843

Ellwood B. James Clerk

State of Missouri
County of Jasper } I Ellwood B. James Clerk of the Circuit Court within and for the County and State aforesaid do certify the foregoing to be a true transcript of the record and

proceedings in the Case Flemming B McCurdy against Willie Q Brown & Tryon Gibson

In Testimony whereof I Ellwood B James Clerk of the Court aforesaid have hereunto set my hand and affixed the seal of said Court done at office this 30th day of May A D 1843.

Ellwood B. James Clerk

324 39 23

J. B. McCurdy
vs
Error.
Willie Q. Brown &
Tryon Gibson
Transcript

1324

Filed June 10. 1843.
H. L. Brown clk

Draper

F. B. McCurdy
vs
Brown & Gibson

Sup. Court
July Term 1843
Error

And the sd Plf in error comes & says that in the giving & rendering sd judgt there is manifest error in this

That judgt was given for Dft in error on motion to dismiss sd cause when it ought to have been given for Plf. in error

That Court erred in overruling sd motion to reinstate sd cause on the docket. Wherefore he prays that sd judgt be reversed &c

Wenton & Phelps for
Plf. in error

F. B. McCarty

vs } Assign^ts of Errors

Brown & Gibson

Filed Aug 3. 1843.
H. L. Boon clk

Mc Candy
vs
Brown
& Gibson

In the Supreme
Court July Term
1843

Plaintiff's assignment of errors:

and the said Plaintiff comes and says that in the record proceedings and judgment of the Court below ~~there~~ in the above cause there is manifest error.

1st because the Court gave judgment for the Defendants when judgment ought to have been given for the Plaintiff in this therefore there is error.

Second the Court sustained the motion of the Defendants to dismiss the cause in this therefore there is error.

Wherefore for the errors aforesaid the said Plaintiff prays the Court to reverse the judgment of the Court below and remand the cause to the Court below, for further proceedings.

Dunston for
Plff.

McCurdy
vs } assignment
of errors.
Brown & Gibson

Filed Aug. 3. 1843.
H. L. Boon Clk.

STATE OF MISSOURI-----Sct. The State of Missouri----To the Sheriff of the County of Jasper in said State-----**GREETING:**

Whereas, Willis D. Brown and Orion Gibson, on the Sixteenth day of February in the year eighteen hundred and forty-four at our Supreme Court for the State of Missouri aforesaid, before our Judges of said Court, recovered against Flemming B. McCurdy the sum of Six dollars and eighty five Cents for their costs and charges by them expended in a certain suit wherein the said Flemming B. McCurdy was plaintiff, and the said Brown and Gibson were defendants, which to the said defendants were adjudged, as appears to us of record:== Therefore, we command you, that of the goods and chattels, lands and tenements of the said Flemming B. McCurdy in your bailiwick, you cause to be made the aforesaid costs and that you have the same before the Judges of our said Supreme Court, on the first Monday in July next, to render unto the said Defendants the costs aforesaid: and that you certify to our said Judges, how you execute this writ, and have you then there this writ.

Witness, Hampton L. Boon, Clerk of our said Supreme Court, at office, in the City of Jefferson the Tenth day of May in the year of our Lord one thousand eight hundred and forty-four.

H. L. Boon

Came to hand June 22nd 1844.

Jno. P Osborn Sheriff of J. County

This Execution is satisfied in full of debt & Cost July 20th 1844 Jno P Osborn Sheriff of Jasper County

72.
Supreme Court
July term 1844

Willie D Brown &
Jim Gibson
vs Exec
Flemming B McCurdy
" "

Costs.
H. L. Boon $6.85
This Writ 1.00
$7.85

STATE OF MISSOURI-----Sct. The State of Missouri----To the Sheriff of the County of Jasper ——— in said State-----**GREETING:**

Whereas, Willie D. Brown and Orion Gibson ———

on the Sixteenth — day of February — in the year eighteen hundred and forty-four at our Supreme Court for the State of Missouri aforesaid, before our Judges of said Court, recovered against Fleming B. McCurdy ——— the sum of Six Dollars and eighty five Cents for their costs and charges by them expended in a certain suit wherein the said Fleming B. McCurdy was plaintiff ———, and the said Brown and Gibson were Defendants ——— which to the said Defendants ——— were adjudged, as appears to us of record:==

Therefore, we command you, that of the goods and chattels, lands and tenements of the said Fleming B. McCurdy ——— in your bailiwick, you cause to be made the aforesaid costs and that you have the same before the Judges of our said Supreme Court, on the first — Monday in July — next, to render unto the said Defendants ——— the costs aforesaid: and that you certify to our said Judges, how you execute this writ, and have you then there this writ.

Witness, Hampton L. Boon, Clerk of our said Supreme Court, at office, in the City of Jefferson the Sixth ——— day of May ——— in the year of our Lord one thousand eight hundred and forty-four

H. L. Boon.

Came to hand June 22nd 1844

Jno P Osborn Sheriff of
Jas County

This Execution is satisfied in full of debt &
cost July 20th 1844 Jno P Osborn Sheriff of
Jasper County

71.
Supreme Court
July term 1844

Willm D Brown &
Trion Gibson
vs Eson
Flemming B. McCurdy
"

Costs.
H.D. Boon $ 6.85
This Writ 1.00
$7.85

$1570

10 31
5 75
1.00
$17.06

In the Supreme Court —
July Term 1843 —

McCurdy - appellant -
vs
Brown & Gibson appellees -

} Appeal from Jasper Circuit Court —

Appellees Brief —

This was a proceeding instituted before a Justice of the peace upon the motion of the said McCurdy against Brown as constable and Gibson his security for a judgment against the said appellant for double the amount of an execution in favour of said McCurdy and not returned by the said Brown. An appeal was taken from the judgment of the Justice to the Circuit Court of Jasper County — where the motion was dismissed — from which judgment of the Circuit Court an appeal has been taken to this Court —

The appellees will insist that the judgment of the Circuit Court in dismissing the said Motion was correct —

1st Because the proceeding by motion against the Constable and his security for double the amount of the Execution is not authorised by law —

Digest Laws Mo. Page 117. sec. 8. — Page 368. sect. 20 21. 22 — & 23 —

2d Because the recovery by motion against a constable for failing to return an execution is double the amount of the same — but in no case can the recovery against the securities exceed the amt. of the execution with interest thereon at the rate of 100 percentum per annum —

3rd Because the plaintiff failed to file a bond for costs — See Rev. Code of 1835. page 127 —

In the digest of 1835. page 117. Sec. 6. it is provided that if a constable fails to return an execution he may be proceeded against by motion and the recovery shall be for double the amount of the execution. On page 368. Sect.ns 20-1-2 — it is provided that for a failure to return an execution the Constable may be proceeded against by summons. and the recovery in that mode of proceeding is not double the amount of the execution - but the amount thereof with interest at the rate of 100 per cent. per annum also on same page Sec. 23. it is further provided that the party injured may institute a suit against the Constable and his securities upon his official bond. and shall be entitled to the like recovery as upon a summons against the Constable. which is not double the amt. of the Execution. but the amount thereof with interest at the rate of 100 per cent. per annum

Thus by the law of 1835. three different remedies are provided — two of which are against the Constable alone — the 1st by motion when the recovery is double the amt. of the execution. and the 2nd by summons. when the recovery is the amt. of the execution with interest at the rate of 100 — per centum per annum —. the third proceeding is against the Constable and his securities upon his official bond — when the recovery is the amount of the execution with interest at the rate of 100 per cent per annum —

It will be observed that there is no provision

any where authorizing a proceeding against the Constable and his securities by motion - nor is there any proceeding by which a recovery can be had against the securities for double the amount of the execution -

But by the act of the General Assembly approved Jan. 4. 1841 - it is provided in sec. 5. that "Persons injured by the negligence or misfeasance of any such officer may proceed against such principal - or any one or more of his securities jointly or severally in any proceeding authorized by law against such officer for official neglect or injury" It manifestly is not contemplated by the section just recited to enlarge the liabilities of securities - but only to give additional and more summary remedy where the same exists against the principal - and the recovery against the securities upon an official bond cannot be changed by any proceeding which a party may adopt under this section. The most reasonable interpretation which can be given to this act is that where the recovery is the same against the principal and his securities and one of several remedies existed against the principal alone - the same can now be adopted against both the principal and his securities

The law of 1835. authorized two remedies which applied exclusively to the Constable. one by motion in which the recovery was double the amt. of the execution. and the other by summary where the recovery was the amount of the execution with interest at the rate of 100 per cent per annum

securities then under the late act may now be proceeded against by summons jointly with their principal since the judgment against the principal and the securities would be the same; but the constable and his securities cannot be joined by motion because the recovery against the principal by that mode is double the amt. of the execution which cannot be double the amount of the execution in any case against the securities. Under a proceeding by motion joining the principal and his securities, two seperate judgments must be given one against the principal and the other against the securities since their liabilities are different. The judgment against the constable must be for double the amount of the execution and there is no authority for such a recovery against the securities

The greatest latitude which could be legitimately allowed to the act of 1841 would only authorize a proceeding by motion against the securities jointly or severally for the amount of the execution with interest at the rate of 100 per cent per annum; the words jointly or severally used in the act apply to the securities alone and the very language of the act shows that the proceeding is not intended to be against the principal and his securities jointly but against the principal or his securities jointly or severally

In the Digest of 1835 It is provided that in all actions on office bonds. &c - before the institution of suits thereon. the plaintiff or person for whose use the action is brought shall file the obligation of himself or some other person for the costs — The original and primary Obligation of Gibson one of the appellees accrued by his having signed the official bond of Brown. indeed no liability upon his part could be otherwise established and it was the foundation of this proceeding so far as he was concerned. and this proceeding therefore is 'pro hac vice' a suit upon an Office bond. and a bond for costs should have been filed.

All of which is respectfully submitted

by

Richardson & Hendricks
attys for appellees

Supreme Court

McCurdy
vs } appeal
Brown & Gibson

Appellants Brief —

authorities —

Rev code 1835 — Page 117
Sec. 8. also pag 368.
Sectn. 20-1-2-3

Hendrick &
Richardson } attys.

The 2 cases of McCurdy vs Brown & Gibson are similar in every particular —

Hendrick & Richardson
for appellts

In the Supreme Court
July Term 1843

W Curdy appelt
vs
Brown & Gibson appellees

Appeal from Jasper Circuit Court

Appellees' Brief

This was a proceeding instituted before a Justice of the peace upon the motion of W Curdy the appellant. against Brown a Constable and Gibson his security. for a judgment against the said appellants for double the amount of an execution in favour of said W Curdy and not returned by the said Brown.. An appeal was taken from the judgment of the Justice to the Circuit court of Jasper County: where the motion was dismissed. from which judgment of the Circuit Court an appeal has been taken to this court

The appellees will insist that the judgment of the Circuit Court in dismissing the said motion was correct. and should not be disturbed for the following reasons

1st Because the proceeding by motion against the Constable and his securities for double the amount of the execution is not authorized by law — Digest Laws of Mo. page 117. Sec 8. also page 368. sections 20-1-2-3 —

2nd Because the recovery by motion against a Constable for failing to return an execution is double the amount of the same. but in no case can the recovery against the securities exceed the amount of the execution with interest thereon at the rate of 100 per centum per annum —

3rd. Because the plaintiff failed to file a bond for costs

Rev Code of 1835. page 127

In the Digest of 1835 page 117. Sec. 8. it is provided that if a constable fails to return an execution he may be proceeded against by motion. and the recovery shall be for double the amount of the execution; On page 368. Sectns 20-1-2 - it is provided that for a failure to return an execution. the constable may be proceeded against by summons and the recovery in that mode of proceeding is not double the amount of the execution but the amount thereof with interest at the rate of 100 per Cent per annum. It is further provided in the 2nd section of the same page that the party injured may institute a suit against the constable and his securities upon his official bond. and shall be entitled to the like recovery as upon a summons against the constable which is not double the amount of the execution. but is the amount thereof with interest at the rate of 100 per cent per annum.

Thus by the law of 1835 - three different remedies are provided - two of which are against the constable alone - the 1st by motion. when the recovery is double the amt. of the execution. and the 2nd by summons when the recovery is the amount of the execution with interest at the rate of 100 per cent per annum - the third proceeding is against the constable and his securities upon his official bond when the recovery is the amount of the execution with interest at the rate of 100 per centum per annum

It will be observed that there is no provision

any where authorizing a proceeding against the constable and his securities by motion. nor is there any proceeding by which a recovery can be had against the securities for double the amount of the execution

But by the act of the General Assembly approved Jan. 4. 1841. Lg. 31 - Sec. 5. it is provided that "Persons injured by the negligence or misfeasance of any such officer may proceed against such principal or any one or more of his securities jointly or severally in any proceeding authorized by law against such officer for official neglect or injury" -

It manifestly is not contemplated by the section just recited to enlarge or increase the liabilities of securities. but only to give additional and more summary remedy where the same exists against the principal - and the recovery against the securities upon an official bond cannot be changed by any proceeding which a party may adopt under this section - The most reasonable interpretation which can be given to this act is that where the recovery is the same against the principal and his securities - the same remedy may now be adopted against both the principal and the securities which existed against the principal alone

The law of 1835. authorized two remedies which applied exclusively to the constable — one by summons in which the recovery was the amt. of the execution with interest at the rate of 100 per cent per annum and the other by motion in which the recovery was double the amount of the execution

Securities then under the late act may now be proceeded against by summons jointly with the principal since the judgment against the securities and the principal would be the same, but the constable and his securities cannot be joined in the same proceeding by motion because the recovery against the principal by that mode is double the amount of the execution which cannot be double the amount of the execution in any case against the securities - Under a proceeding by motion joining the principal and the securities two seperate judgments must be given one against the principal and the other against the securities since their liabilities are different - The judgment against the constable must be for double the amount of the execution and there is no authority for such a recovery against the securities -

The greatest latitude which could be legitimately allowed to the act of 1841 would only authorize a proceeding by motion against the securities jointly or severally for the amount of the execution with interest at the rate of 100 per cent per annum; the words "jointly or severally" used in the act apply to the securities alone and the very language of the act shows that the proceeding is not intended in all cases to be against the principal and his securities jointly but against the principal or his securities jointly or severally

In the Digest of 1835. it is provided that in all actions on office bonds &c. before the institution of suits thereon. the plaintiff or person for whose use the action is brought. shall file the obligation of himself or some other person for costs.

The original and primary obligation of Gibson one of the appellees, accrued by his having signed the official bond of Brown.

Indeed no liability upon his part could be otherwise established. and it was the foundation of this proceeding so far as he was concerned. and this proceeding therefore is "pro hac vice" a suit upon an office bond and a bond for costs should have been filed.

All of which is respectfully submitted by

Hendrick & Richardson
Attys pro. Appellees

Supreme Court

McCurdy }
vs } Appeal
Brown & Gibson

Appellees Brief

Authorities -
Rev code 1835. Pag 117 -
Sec 8. also page 368 -
Section 20. 1-2-3

Hendrick &
Richardson atty's

The two cases of McCurdy
vs Brown & Gibson are alike
in every particular -
Hendrick & Richardson

F. B. McCurdy
vs
Brown & Gibson

This was a proceeding against Brown a Constable & Gibson his security on motion for judgt against them for Brown's failing to return agreeable to Law an execution which had been placed in his hands. The proceeding is founded on the 8th Sect. of law respecting Constables page 117. Judgt having been rendered against Dfts they appealed to the Circuit where they filed their motion to dismiss ad cause. This motion the Court sustained. Plf. made his motion to reinstate the cause on the docket which motion was overruled. To these decisions of the Court the Plf. excepted.

The act respecting Constables Sect 8 page 117 authorizes a proceeding by motion against a Constable for failing to return any execution.

The act of 1840-41 page 31-32 Sect 5 provides that "Persons injured by the neglect or misfeasance of any such officer may present against such principal or any one or more of his securities jointly or severally

in any proceeding authorized by law against such officer for official neglect or injury."

The failing to return the execution was official neglect of the Constable - The law gave the remedy by motion against the Constable ~~by motion~~ only. The last act extends this remedy to the injured party against the Constable & his securities.

The law not where requires a bond for costs to be filed in a proceeding by motion against a Constable ~~& if it did~~ For these reasons Plf. in error contends the Court below erred & that its judgt must be reversed

Winston & Phelps attys
for Plf in error

F. B. McCurdy

vs } Error

Brown & Gibson

Pltf. Brief

Winston & Phelps.
atty's.

Pltf. Brief
authorities

Digest page 117 sect 8

Acts 1840-41 page 31-2 s. 5

The 2 cases of McCurdy
vs Brown & Gibson similar
in every respect
Winston & Phelps
attys

This was a proceeding before a Justice of the peace by motion by the Plff in error against the Defendants Brown a Constable, and Gibson his security on his official Bond for Brown's failing to return an execution issued in favour of McCurdy the Plaintiff in Error before the Justice of the Peace the Plaintiff McCurdy had judgment from which the Defendants appealed to the Circuit Court.

in the Circuit Court the Defendants moved to dismiss the case. because the proceeding by Motion was not allowed against the Constable and his sureties ~~or~~ jointly on the Constable's official Bond.

This motion the Court below sustained and the case was dismissed.

the Plaintiff then moved to reinstate the case on the docket, which was refused, to which the Plaintiff excepted; and to ~~refuse~~ reverse the

Rescission brings his writ of error —
to this Court.
I conceive the only question in this
case is whether the Statutes allow this
proceeding, by motion, against a Constable
and his securities on his official bond
jointly I contend they do.
See revised code 116 : 260 . 368 :
acts of 1840 & 41 : page 31.
Winston for Pltff.

McCurdy
vs } writ of
Error
Brown & Gibson

Plff's brief

revised Code

116: 260: 368.

acts of 1840 & 41-
page 31.

Winston atty.

McCurdy vs Brown & Gibson } Error to the circuit court of Jasper county

Fleming B. McCurdy moved before a justice of the Peace of Jasper county for a judgment, against Willie D. Brown a constable of a township in said county and Flyon Gibson the security to said Brown in his official bond, for double the amount of an execution delivered to said Brown and which he had failed to return. Judgment was given before the justice for McCurdy and the defendants Brown and Gibson appealed to the circuit court When the cause came into the Circuit Court Brown and Gibson appellants there moved to dismiss it. It was dismissed on their motion and exceptions taken to the decision of that court, and to reverse the judgment of the circuit court this writ of Error is now prosecuted

The reason assigned for the dismissal of the cause in the circuit court was 1st that the plaintiff before he commenced his proceeding did not file a bond with security in conformity with the provision of the 1st section of the act concerning costs p. 127 of the digest of 1835

2nd The proceeding by motion against the constable ~~in~~

is not authorised by law.

1st The first section of the act concerning costs, requires that in all actions for the use of any person, the plaintiff or person for whose use such action is to be commenced, shall, before he institutes such suit, file with the clerk of the circuit court in which the action is to be commenced a bond for costs

By the act of 1833 - three different remedies against constables are provided 1st one by motion against the constable alone, If the constable fails on this motion he forfeits and pays to the person moving double the amount of the execution section 8 of the act concerning constables. p 117. 2nd by summons against the constable alone in which he may recover the amount of the ~~principal~~ money received and one hundred per cent per year Digest p. 368 Sections 20-1-2 of the 7th article of the act concerning justices courts; and 3rd. One may sue the constable ~~alone or his~~ and his securities on the official bond, and recover as in the aforesaid proceeding by summons against the constable

By the 5th section of the act intitled an act the better to secure the liability of county officers on their official bonds p. 31 of the acts of 1841 it is provided that "Persons, injured by the misfeasance or neglect of any such officer, may proceed against such principal (or) any one or

more of his securities, jointly or severally, in any proceeding authorised by law against such officer for official neglect or injury

~~Costs are given~~ Persons suing on official bonds in the circuit court are required to give bonds to secure costs. It is not provided in the statute that the plaintiff moving against a constable shall give ~~costs: it~~ security for costs, ~~although if he had sued the co~~ probably on account of the restricted jurisdiction of the justice;* it is not then apparent why he should give security for costs when he moves against both constable and security; the circuit court then in my opinion committed error in dismissing the case because security had not been given for costs

2nd The provisions of the act of 1841 above cited are very broad. I should read "and" instead of "or" with which last word the blank in the 5th section is filled; but the meaning is in my opinion the same with either of those words inserted. The injured person then may move against the constable and his securities jointly or severally ~~for any official neglect or injury~~ in any proceeding authorised by law against such officer for official neglect or injury. The two remedies above mentioned given in the digest against the Constable alone are for the same injuries ~~except that the latter is more comprehensive than the fo~~

* nor is one suing on a constables bond before J. P. required to give bond for costs. See section 4 of act respecting constables Digest p. 116.

and I can see no reason why the last law should not be construed to give the injured person the right to choose either the one or the other, and if he choose to move against the constable and his securities he ought in my opinion to recover one hundred per cent as he would have done had he moved against the Constable alone. I'm my opinion the judgment of the Circuit court ought to be reversed

G Tompkins

~~I am~~

~~W. B. Napton~~

~~The other [illegible] will be disposed of the the like manner~~

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McCurdy
vs Opinion
Brown et al

Dissenting

~~July term 1843~~
January term 1844

Tompkins