

MILLER & CAPPS *vs.* HEARD & Co.

Where a party appealing from the judgment of a justice of the peace enters into recognizance with security, which is approved by the justice, for the prosecution of the appeal, the circuit court has no right to require additional security for the appeal.

Where there is no recognizance, or a defective one, such an one as appellant should have entered into before the justice, may be given in the circuit court before a motion to dismiss shall be determined.

A judgment against the security in the recognizance is authorized only "when the judgment of the justice is affirmed, or, upon a trial anew in the circuit court, the judgment shall be against the appellant:" and not where the appeal is dismissed. Rev. Stat. ch. 87, sec. 187.

*Writ of Error to the Circuit Court of Crawford County.*

This suit was commenced in May 1843, by J. H. Heard & Co. against John Miller, before a justice of the peace of Crawford county. It was founded on a note made by Miller to J. H. Heard & Co., without any specification of the individual names composing the firm. Miller was summoned to answer J. H. Heard & Co., he appeared, contested the suit, and the magistrate rendered judgment against him. In the caption to the judgment entry made by the justice upon his docket, the individual names of the plaintiffs were given, being four in number, but the judgment was entered up in favor of J. H. Heard & Co. The defendant prayed an appeal to the circuit court of Crawford county, and entered into a recognizance to J. H. Heard & Co., in the usual form, with Capps as his security for the prosecution of the appeal.

The cause came on for hearing in the circuit court, at the July term 1844, before the Hon. R. C. S. BROWN, Judge. The appellant, Miller, moved the court to quash the proceedings had in the case before the justice of the peace, stating as the grounds of the motion, that "the suit was instituted before the justice by and in the name of J. H. Heard & Co., and the judgment was rendered in favor of Joseph Bennett, Luther Merrill, Daniel Bennett, and Joseph Heard 2d, that it appeared from the proceedings had before the justice that the suit was not instituted by the proper persons." The court overruled the motion.

On motion of the appellees, the court made an order requiring the appellant to give security for his appeal by the second day of the next term of the court, or in default thereof that the appeal be dismissed. At the next term, the appellant having failed to give security in obedience to the rule, the rule was made absolute, and judgment entered up against Miller and Capps, the security in the appeal bond, for debt, damages and costs. They brought error, and assigned for errors: 1st, that the court below overruled the motion to quash: 2d, that on the failure of Miller to give security for the appeal, the court rendered judgment against him and Capps for the debt, damages, &c., instead of dismissing the appeal.

CUMMINS, for the plaintiffs—The recognizance sent up by the justice, on the appeal, was in due form, and approved by the proper authority. *Sec. 173, ch. 87, Rev. Stat.* Without some showing that this recognizance was insufficient, and notice to the opposite party, the court had no right to deprive the party of his appeal. *Sec. 181, ch. 37, Rev. Stat.* Where the appeal bond is defective the only judgment which can be rendered is that the appeal be dismissed.

PIKE & BALDWIN, contra—Although the original summons was to answer J. H. Heard & Co., yet as the case was entitled before the justice in the names of the partners, and Miller appeared, thus waiving any defect in the summons, the judgment, which is in favor of “said Joseph H. Heard & Co.,” who appear by the same record to have been the four named persons, is good enough.

The motion to quash was properly overruled. Such an objection would not be listened to in the circuit court. The appeal bond was irregular, because it was not given to the partners, and a new one was properly required. If there is any error, it is in rendering judgment as an affirmance, instead of dismissing the appeal.

OLDHAM, J., delivered the opinion of the court.

From an inspection of the record in this case it appears that the appellant did every thing required of him by law to entitle him to an appeal. He made the necessary affidavit, prayed for his appeal within the time limited, and entered into a recognizance, conditioned according to law, with security which was approved by the justice of the peace before granting the appeal. The circuit court had no authority to require additional security for the appeal after the case came into that court. The law makes it the duty of the justice of the peace to receive the recognizance and approve the security before granting the appeal. *Rev. Stat. ch. 8, sec. 172.* When there is no recognizance, or the recognizance is defective, such an one as the appellant should have entered into before the justice may be given in circuit court, before a motion to dismiss shall be determined. The only additional security which the cir-

cuit court has power to require and, upon failure to give it, to dismiss the suit, is for costs as provided by the *Rev. Stat. ch. 34, sec. 3, 4, 5*. The circuit court therefore erred in ruling that the appellant give security for the appeal, and also in dismissing the appeal for the non-compliance with the rule so made.

The court also erred in rendering judgment against the appellant and his security upon the order dismissing the appeal. Such a judgment is authorized only "when the judgment of the justice is affirmed or upon a trial anew in the circuit court, the judgment shall be against the appellant." *Rev. Stat. ch. 87, sec. 187*.

The judgment of the circuit court must therefore be reversed, and the cause be remanded to that court for a trial *de novo* upon the merits.