

STATE, USE OF BROOKS *vs.* KIRBY ET AL.

In declaring against an officer upon his official bond, it is essential that the breach should clearly and distinctly charge the manner in which the plaintiff has been damaged by the failure of the officer to perform his duty.

In declaring against a constable for failure to levy an execution, it is necessary to allege that the defendant in the execution had property upon which the levy might have been made.

*Writ of error to the circuit court of Hempstead county.*

THIS was an action of debt upon a constable's official bond, brought by the State for the use of Brooks against Kirby, the principal in the bond, and Jett and Trimble his securities: determined in the circuit court of Hempstead county, in January, 1845, before the Hon. GEO. CONWAY, judge.

The declaration, after setting out the bond in the usual form, alleged the following breach of its condition:

“And the said plaintiff for breach, &c., says that the said Kirby did not well and truly execute all process to him directed and delivered according to law, in this: that the said Brooks, on the 17th day of April in said year, 1844, caused to be delivered to the said Kirby as such constable of said township, &c., his certain process of execution in the words and figures following:” (here the execution was recited, and then the declaration continued thus:) “and that the said Kirby, as such constable as aforesaid, did not levy the said sum of sixty-one dollars and ninety-nine cents with interest, &c., together with the costs of suit according to law of the goods and chattels of the said Cole, and return said writ to the said justice within thirty days from the date thereof, according to law, as in and by the said writ of execution he was commanded: by means whereof,” &c.—usual conclusion.

The defendants demurred to the declaration, and assigned as cause of demurrer, among numerous others, “that said declaration does not allege that the execution debtor mentioned therein had property upon which to make a levy, &c.”

The court sustained the demurrer, and the plaintiff brought error.

HEMPSTEAD & JOHNSON, for the plaintiff.

The declaration is substantially good. The breach alleges, in the language of the statute, that Kirby, as constable failed to levy an execution placed in his hands, on the goods and chattels of the defendant therein named or have the money therein specified

before the justice within thirty days, and that he failed to return the execution according to its mandate. This is the substance and nearly the precise language of the breach specially assigned. It is not necessary to aver special damages, because the law implies it; it is not necessary to aver that the defendant possessed goods and chattels, because if there were none, it was a matter for the defendant to set up by way of defence. That there were goods and chattels however is sufficiently averred. Proof of a failure to levy or return an execution, obliges the officer to pay the whole debt, unless he can relieve himself by showing want of property, or, after due diligence, inability to seize it, and that some unavoidable accident prevented him from returning the execution. *Rev. Stat. sec. 62, page 383. Haynes vs. Tunstall, 5 Ark. R. 680. Faulkner vs. The State, for the use of Bartley ante 150.* And so if the debt was paid, the defendant was bound to show it and bring it forward by way of defence. It is clear that all the grounds of demurrer are untenable.

JOHNSON, C. J., delivered the opinion of the court.

The only question, necessarily involved in the decision of this case, is, whether the court below erred in declaring the declaration insufficient in law. It is contended by the defendants in error that the plaintiff has wholly failed to disclose any cause of action against them. It is essential, in declaring against an officer upon his official bond, that the breach should clearly and distinctly charge the manner in which the plaintiff has been damnified by the failure of the officer to perform his duty. It is averred that the constable committed a breach of the condition of his bond by failing to levy the execution upon the goods and chattels of the defendant in execution, and also in not returning the same to the justice within thirty days from the issuance thereof. This is the only allegation that could by any possibility fix and determine the liability of the defendants. The officer was under no legal obligation to make the levy, unless the defendants in execution had property at the time upon which to make it, and it was incumbent upon the plaintiff to

allege that fact in his declaration in order to fix the liability of the defendants.

We think it clear, therefore, that the declaration is fatally defective in failing to set out good cause of action against the defendants, and that consequently the circuit court decided correctly in sustaining the demurrer.

Judgment affirmed.

