

FAULKNER ET AL. *vs.* STATE, USE ELLER'S AD'X.

To an action on a constable's bond, assigning as a breach that he failed to return an execution issued to him on a justice's judgment, a plea that there is no record of such judgment and execution, is bad, because a justice's court is not a court of record.

Where an execution is delivered to a constable before he executes his bond, it is his duty to levy and return it according to law, after his bond is executed, and on failure to do so, his securities are liable.

If he receive money on such execution after the making of his bond, and fail to pay it over, his securities are liable.

Where the securities confess in their pleadings, that the money was received by the constable on the execution, but aver that he received it before the date of the bond, the *onus* is on them to prove that fact.

Writ of Error to Pulaski Circuit Court.

DEBT, on a constable's bond, brought by the State, for the use of Eller, against Faulkner, the principal in the bond, and Woodruff and Williams, his securities therein, and determined in the Pulaski circuit court, at the October term, 1846, before the Hon. WM. H. FEILD, judge. The suit was instituted 15th February, 1843.

The bond sued on is alleged in the declaration to have been executed on the 19th April, A. D. 1841, in the penal sum of five thousand dollars, conditioned "that if the above named Faulkner, who was duly elected constable of the township of Big Rock, in the county of Pulaski, at the October general election in 1840, should execute all process to him directed and delivered, pay over all moneys received by him by virtue of his office, and in every respect discharge all the duties of constable according to law, then said obligation to be void," &c. And the declaration assigns as breaches of the condition of the bond, in substance, as follows:

That on the 21st September, 1840, Eller, for whose use the suit was brought, obtained five judgments against Richard C. Byrd, before Jesse Brown, a justice of the peace of said township; the *first* for \$39.07 debt, 40 cents damages, and for costs: the *second*, for \$100 debt, \$4.80 damages, and for costs; the *third*, for \$100 debt, \$2.80 damages, and for costs: the *fourth*, for \$100 debt, \$2 costs of protest, \$1.50 damages and for costs: the *fifth*, for \$100 debt, \$2 costs of protest, 30 cents damages, and for costs; and the costs of each suit is alleged, under a *videlicet*, to amount to ten dollars. That the last four judgments were stayed by the recognizance of Wm. Brown, Senior.

That on the 12th day of April, 1841, said justice issued executions on all five of said judgments; on the first against Byrd, and on the other four against Byrd and Brown; directed to the constable of Big Rock township, and returnable within thirty days; which executions, on the 19th day of April, 1841, were delivered to, and came to the hands of said Faulkner, as constable of said township, which said Faulkner was then and there acting as constable of, in and for said township; and although the said Faulkner, as such constable, under and by virtue of said writs of execution, did levy, make, collect and receive of and from said Byrd the several amounts of money therein respectively specified, the said plaintiff in fact says that said Faulkner, as such constable did not, nor would, make due and legal return of each and every, or any of said writs of execution, so as aforesaid to him directed and delivered.

Second breach, that Faulkner did not, nor would, but wholly neglected and refused to pay over to Eller the money so collected by him as such constable, on said executions.

Faulkner made default. Woodruff and Williams filed eight joint pleas, in substance as follows:

1st. That Faulkner received the money on said executions before the making of the bond sued on, and that his refusal to pay it over was before the execution thereof, and that therefore his securities in the bond were not liable.

2d. That Faulkner did make due and legal return of said executions.

3d. That the failure of Faulkner to return said executions was before the making of said bond.

4th. That the causes of action did not accrue within four years next before the institution of the suit.

5th. That said executions never came to the hands of Faulkner, as such constable, for execution as alleged.

6th. That Faulkner, as such constable, did not collect the money of Byrd upon said executions, as alleged.

7th. That said executions were void, and Faulkner, as such constable, was not bound to execute or return them.

8th. That there was no record of said supposed recoveries, and of said executions.

The plaintiff took issue to all of said pleas, but the eighth, to which she demurred, and the court sustained the demurrer.

The death of Eller was suggested, and his administratrix, Catherine Eller, made a party.

The cause submitted to a jury, verdict for plaintiff for \$311.57. Motion for new trial overruled, and bill of exceptions by defendants setting out the evidence and instructions of the court to the jury; from which it appears:

Plaintiff read in evidence to the jury the bond sued on, dated 19th April, 1841, and conditioned as stated in the declaration. Also a certified transcript from justice Brown's docket of the five judgments against Byrd in favor of Eller, corresponding in amounts, dates, &c., with the allegations in the declaration. Plaintiff proved by the deposition of justice Brown that he issued executions on said judgments on the 12th April, 1841, in conformity with law, directed to the constable of Big Rock township, that he delivered them to Faulkner who was then acting as constable of said township, on the day they were issued; and that Faulkner never returned them, though requested by him to do so. Plaintiff also proved by the depositions of Baldwin, clerk of Eller's attorneys, that said executions were issued on the 12th April, 1841, and on the same day delivered to Faulkner as such constable. That Faulkner frequently admitted to witness, between that time and the following September, that he had collected the money on the executions of Byrd, and promised to pay it over, but failed to do so; and that Faulkner never returned the executions.

Plaintiff admitted that the first judgment was entitled to a credit of \$28.57, the second of \$100, and the third of \$100, as of 13th October, 1840.

Defendants introduced no testimony.

Defendants asked the court to charge the jury as follows:

"That if the jury believe from the evidence that the writs of execution, mentioned in the declaration, came to the hands of Faulkner prior to the making of the bond specified in the pleadings, the said Woodruff and Williams, as sureties, are not liable either for a failure to return the executions, or to collect or to pay over the money on said executions, and the jury are bound to find for them."

Which instruction the court refused, and defendants excepted; but the court gave the instruction in a modified form as follows:

"If the jury believe from the evidence that the said writs of execution came to the hands of Faulkner prior to the making of the bond specified in the pleadings, and that Faulkner was at the time legally constable of Big Rock township, the said Woodruff and Williams, as sureties, are not liable either for a failure to return the executions, or for collecting and failing to pay over the money on said executions, and the jury are bound to find for them." Defendants excepted to the giving of the instruction so modified.

The court further instructed the jury, on motion of defendants, that plaintiff was not entitled to recover unless she had proven the truth of one or both of the breaches assigned in the declaration.

The court further charged the jury, of its own motion, "that if the money specified in said executions was received by Faulkner, as constable of Big Rock township, before the bond mentioned in the pleadings was executed, his securities were not liable for the money so received; but if received after the 19th of April, 1841, the date of the bond, they were liable, although in point of fact the executions might have come to his hands on the 12th of April, 1841."

And further, "that although in point of fact the said executions might have been received by Faulkner on the 12th of April, 1841, yet that if he was not then legally a constable of Big Rock township, and did not become such until the 19th of

April, 1841, when the said bond was executed, the said writs of execution would be considered in point of law as having been received by him on the 19th of April, 1841, as alleged in the declaration, and that the said Woodruff and Williams would be liable as his securities in the action, either for a failure to return the said writs of execution, when the same became returnable, or for any money collected by Faulkner upon them after said 19th of April, 1841, and not paid over according to law."

And further, "that if the money mentioned in said writs of execution was paid to Faulkner before the execution of said bond, the burden of proving that fact rested upon the defendants according to their pleading."

Defendants excepted to the instructions so given by the court to the jury of its own motion.

Defendants brought error.

S. H. HEMPSTEAD, for plaintiff.

WATKINS & CURRAN, contra.

OLDHAM, J. The first question to be determined is whether the court correctly sustained the demurrer to the eighth plea filed by the defendants below. The first breach is for failing to return the executions, and consequently there could be no record of the executions. The breach does not aver that there is any such record; the plea denies what is not averred. A justice's court is not a court of record. *Rev. St. Ch. 43 sec. 13.* The demurrer was properly sustained.

The remaining question is whether the instructions given by the court to the jury were correct. In the *State vs. Roberts*, 7 *Halst.* 114, it was held that "if an execution remain in the hands of a sheriff when his term of office expires, yet it is his duty on his reappointment to execute it, and his neglect is a breach of his new bond." The executions in the present case

came to the hands of the constable seven days before he executed his official bond. After the execution of his bond it was his duty to levy the executions and make return according to law, and for his failure to do so his securities became liable. They were bound for the faithful performance of his duties, from and after the date of the bond. For acts previously done they were not liable. If he received the money upon the executions after the date of the bond the securities were liable for his failure to pay it over.

According to the principles thus stated the court correctly refused the instruction asked by the defendants below, and erred in their favor in giving it under the modified form in which it was given. All the other instructions upon this point were correctly given.

By the pleadings the defendants confessed that the money was received by Faulkner as constable, but averred that it was before the date of the bond; they averred an affirmative fact, which it devolved upon them to prove and consequently the last instruction was correct.

We are of opinion that the evidence authorized the verdict and that a new trial was properly refused. Affirmed.
