

MORROW *vs.* WALKER AND WIFE.

By the act of January 4th, 1849, an appeal is allowed from an order of a Probate Court removing a guardian, to the Circuit Court.

But where the appellant in such case fails to give the bond required by the act, the appeal will be dismissed for want of jurisdiction.

And the appeal being dismissed for want of jurisdiction, the Circuit Court can render no judgment for costs.

*Appeal from the Washington Circuit Court.*

James Walker and wife, Temperance, filed a petition in the Probate Court of Washington county, praying the removal of George Morrow from the guardianship of George T. Morrow, a minor. The Probate Court revoked the order appointing Mor-

row guardian of said minor, and appointed one Leach in his stead. Morrow prayed an appeal to the Circuit Court, filed the necessary affidavit, but no bond for costs, and the appeal was granted.

At the October term (1849) of the Circuit Court, (Hon. WILLIAM W. FLOYD presiding,) the appellees moved to dismiss the appeal on the grounds that there was no appeal from the decision of the Probate Court in such matters. The Court dismissed the appeal, and rendered judgment against appellant for costs; and he appealed to this Court.

W. WALKER, for the appellant. The right of appeal from the Probate Court is given by the constitution and by the act approved 4th January, 1849: and if the Circuit Court had no jurisdiction, it was erroneous to give judgment for costs. *McKee vs. Murphy*, 1 Ark. 55. *Levy vs. Shurman*, 1 Eng. 183.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

This case, on the motion of the appellees, was dismissed by the Circuit Court for the want of jurisdiction. The ground relied upon was, that there was no law authorizing the appeal. The act of 4th January, 1849, declares "that appeals shall be granted from any final order, judgment, or decree of the Probate Courts of this State, to the appropriate Circuit Courts, in the same manner as they are now allowed in certain cases from the Probate Court;" and "that appeals shall be granted from all orders or judgments of the County Court making allowances, or refusing to make allowance, to any individual or individuals, made in the County Court;" and "that, before such appeals shall be allowed, the party applying for the same shall make and file his affidavit, or the affidavit of some other person, that said appeal is not taken for delay, but that justice may be done; and a bond conditioned for the payment of all costs for which the applicant may be liable." There can be no question in regard to the right of appeal, in the case before us, but it is not so certain that the appellant did comply with the conditions

annexed by the statute in order to enable him to enjoy the benefit of the right thus secured. It is by this act that the right is conferred, and the legislature possessed the undoubted power to impose such restraints upon its exercise as in their wisdom might seem just and proper. They have seen fit to require, as conditions precedent to the exercise of the right of appeal, that the party applying for the same shall make and file his affidavit, or the affidavit of some other person, that said appeal is not taken for the purpose of delay, but that justice may be done, and a bond conditioned for the payment of all costs for which the appellant may be liable. These are restraints imposed upon the right, each of which must be removed before it can be exercised.

It appears, from the record, that the appellant filed his affidavit in strict conformity to the act, but that he wholly failed to file any bond whatever. The Circuit Court, in the absence of such bond, could not legally take cognizance of the case, and consequently decided correctly in dismissing it. But, it having been dismissed for the want of the necessary steps in the Probate Court to enable the Circuit Court to exercise jurisdiction, it was clearly error to render a judgment for costs against the appellant.

The judgment of the Circuit Court, for this error, must be reversed, and the cause remanded, with instructions to dismiss the cause but without any judgment for costs.