

James Gordon

vs. $\frac{E}{3}$

E. B. Bigley Sheriff and his sureties. -

This is a motion for judgment against the sheriff and his sureties, for an insufficient return of an execution. -

James Gordon recovered judgment, at the September term 1854 of Davidson Circuit court, for the sum of \$750. 49/100; against Robert G. Smiley, Wm. L. Stamer, and James M. Merrill. Execution, founded on that judgment, issued on the 6th of November 1854, tested as of the 8th of September previous, and returnable to January term 1855 of said court. Said execution appears to have come to the sheriff's hands on the 8th of November 1854; about which time, Robert G. Smiley, one of the defendants, died. On the 15th day of December 1854, the said execution was levied on two slaves, Henry and Stephen; without its appearing from the return of the sheriff, whose property said slaves were; though, in the delivery bond, it is recited that the levy had been made on slaves Henry and Ephraim, belonging to Wm. L. Stamer, and that said slaves Henry and Ephraim, were worth \$1500. The day appointed for the delivery of the property, was the 6th of January 1855, which was the Saturday next before the session of the court to which the execution was returnable; that session commencing on the 8th, and the intervening day being Sunday. So that, there was an omission to levy at all, from the 8th of November, until the 15th of December, being a period of about five weeks and two days; and between the date of the levy, and the meeting of the court, there was an interval of 24 days; and yet, the time appointed for the sale of the property, was the Saturday before court, when, if there should be a forfeiture of the delivery bond, it was made impossible by the sheriff's own act, to do his duty, or in other words, to levy and sell under that execution. -

No notice is taken in the sheriff's return, of Robert G. Smiley's death, or of his property, who was the maker of the note upon which the judgment was founded; and Stamer and Merrill were only indorsers. It was proved by John A. McQueen, who was introduced as a witness by the sheriff, that he did not know of any property which the said Robert G. Smiley owned at the time of his death, that was subject to execution, and that he (McQueen) had

benefit of Robert G. Smiley, before his death, the Verondah, which was the only property of the said Robt. G. Smiley, so far as he knew, that ever was subject to execution. Upon the cross-examination of Mr. M. Ewen, he proved, that in the purchase of the Verondah, he had assumed to pay the very note upon which this judgment is founded; and Mr. M. Ewen is the surety, and the only surety, in the delivery bond; which is executed by Stacey and Churchill, as principals, and by no one as representing Smiley; and the property levied upon, is described as belonging to Stacey. —

1st. — The statute which authorizes the sheriff to take the delivery bonds, directs that they shall be taken in double the amount of the judgment; which has not been done in this case. The penalty in which this bond is taken, is for a sum less than double the amount of the judgment, by the amount of forty nine cents; which is as much short of a compliance with the law, as if it had been forty nine dollars. — Act of 1801. Ch. 13. S. 1. —

2. The bond is not given, for the delivery of the property levied upon; but, only for a portion of that property. The property levied upon, was Henry and Stephen, and that which by the bond was to have been delivered, was Henry and Ephraim. It makes no difference, that both of the slaves together, are said in the return, to be worth more than the amount of the judgment. Now constat, that either of them, singly, is worth $\$750.49/100$; or that Henry, who appears to have been levied upon, both according to the return and the bond, is worth that sum. As to the other and Ephraim, it is impossible to tell from the return, which of them was levied upon. The bond constitutes a part of the return; and therefore, the return is contradictory. Act of 1831. Ch. 25.

3. — The return is insufficient, because it takes no notice of Robert G. Smiley's death, or of his property; when the statute requires his property to be levied upon first, if he had any. Act of 1820. Ch. 151. —

The sheriff has taken it upon himself to drop Smiley, altogether; without giving any reason or excuse for it. It may be, for aught the court can tell, that, had not the property of an indorser been levied upon, no bond would have been given; and then, the plaintiff

would not have been subjected to this delay. By the course which the sheriff has adopted, in not levying in sufficient time, or in not appointing the day of sale, (which is his act) in sufficient time to deliver and sell by virtue of the first execution; he has necessarily thrown the plaintiff, for his recourse, either upon himself, or upon an alias execution against the defendants in the judgment and the parties to the delivery bond. In either case, the plaintiff is subjected to delay, beyond the term at which he ought to have had his money. But, in this case, Smiley being dead, there could be no alias to correspond with the judgment, without a *Scire Facias quare executionem non*, against his representative; which would subject this particular plaintiff to a further delay of two terms at least. —

4. — The return is insufficient, because it shows no excuse whatever, for not levying and appointing the day of sale, in sufficient time to have enabled the sheriff, after a forfeiture, to have performed his duty, as the statute directs; instead of neglecting his first duty as prescribed by the statute, and placing his defence upon his readiness to perform his second duty, which is always an injury to the plaintiff, and a willful act of disobedience to the command of the court, as expressed by the writ which is in his hands. Such an omission, without desiring to offer any excuse for it, is a contempt to the court, in every instance; for which, the sheriff ought to be laid by the heels, and held fast, until he purges himself of the contempt, by the payment of the money into court. It is no excuse for the sheriff, that he has made himself liable for the judgment, by purchasing his levy and sale, until it was impossible for him to comply with his duty; if a forfeiture of the bond should take place. To make himself and his sureties liable for the judgment, is not what the court commanded him to do. The liability of the sheriff, is not satisfaction of the judgment; it is only the remedy against him, for some default. The sufficiency of a sheriff's return upon an execution, can only be judged of by some standard, to which we must refer it; and that standard can only be, the statute which prescribes his duty, and if his whole duty has not been performed, and he shows no excuse for the

non-performance of a fact, it follows, of course, that his return must be insufficient. - Act of 1831. Ch. 25. -

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5. There is enough in this record to warrant the belief, that it was understood between the sheriff and Stacey and Merrill, that the bond was to be forfeited; so as to give further time, to make the money out of Smiley's estate, and at the same time, to protect the sheriff. How did they happen to go to Mr. McEwen, and get him to become surety in the delivery bond? Because they knew that they were not primarily liable, and that Smiley was; and furthermore, that Mr. McEwen was under an obligation, as purchaser of Smiley's property to pay this very debt; but, he was no party to the judgment. If he was not prepared to pay it then, the execution could not be levied upon his property, but it could be levied upon theirs. But, at the same time, if they would give a bond, and submit to the form of a levy upon their property, without an actual levy, it would give Mr. McEwen time to meet his engagement, and protect them and the sheriff too; and nobody could be the sufferer but the plaintiff, who, if he should complain, would have to bring a regular suit, and before that could be ended, McEwen could pay the money; or, if he should not, it could be made by an alias execution, so that, there would be no danger of a suit, and a motion would not lie. -

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6. - The statute under which the delivery bond was taken, and in virtue of which, the sheriff made his return in this case, is absolutely null and void; and gave the sheriff no authority to pursue the course which he did, which having pursued, it was at his own peril.

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7. The statute is void, because it is in conflict with the 20th Sec. of the Declaration of the Constitution of Iowa, which forbids the passage of any law impairing the obligation of contracts. Peck's Rep. 1. Townshend and Townshend. 6th Mercer 119. Fisher's executors vs. Dabbs. 44th Howard U. S. Rep. 318. 319. 320. Cannon vs. State of Arkansas. 5th Wharton 1. Green vs. Kiddle. 2nd Howard 608. Mitchell vs. Hayward. 1st Howard 311. Brown vs. King. Cal. Dec. Ad. 11. Sec 2. - Declaration of Rights Sec. 17. - 1st Miss Dig page 517. Little Executive, 965. S. 3. -

(2. If the statute, and the sheriffs proceedings under it in this case, be va-
-lid; then, the construction of the statute, practically, is left to the sheriff,
in all cases; and it is always in his power, to grant to the defendant
in an execution, an indulgence of one term, without being subject to any
control whatever; and without any responsibility whatever, unless the for-
-ties to the delivery bond should prove insolvent. And his responsibility in
that event, attaches, in virtue of the levy which he has made, which levy,
is a discharge of the judgment, but not of the sheriff; and the plaintiffs re-
-course is then an indirect one, through the sheriff, which was before against
the defendants in the judgment. It is a perfect anomaly, to ~~make~~ hold the sheriff
liable in consequence of his levy, and yet, to deprive him by law, of the pro-
-perty upon which he has levied, the title to which was vested in him by the
levy, and constituted the sole ground of his responsibility. -

Thos. Washington
Att. for Jeff. -

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James Gordon

E. B. Bigley vs

This is a motion against the Sheriff for an inefficient return on an execution. The first and main error complained of, is the misnomer of ~~the~~ one of the negroes listed upon, causing a variance in that respect between the levy & delivery bond filed in the cause. The Sheriff offered an affidavit after the motion was made to correct the return by ~~quod~~ making the names correspond, but the Circuit Court refused this application. We insist this was erroneous. If it be admitted (which we think is doubtful) that a Sheriff who has had no previous notice of a motion cannot amend his return after a motion actually made, still we insist that this was not properly an amendment but a correction and as the delivery bond was filed and made part of the return, there was written evidence on which to found this correction. Such corrections have been uniformly allowed by this Court of this record at a subsequent term and there is no evil which can arise from allowing Sheriffs the same privilege. But if we are wrong in this view, the error was wholly immaterial, it was not necessary for the Sheriff to have given the names of the negroes in his levy for possession of them was a concurrent act with the levy and identified the property. When he laid ~~out~~ them out on the Delivery Bond the names were rightly given and this was sufficient. The names of negroes in a deed have been decided to be immaterial to their identification. See 10th Yeager Wardens Refs 508

The second error is that the Bonds lacked 60 cents of being in double the amount of the execution, this is immaterial under the old legal maxim de minimis lex non curat -

The third error alleged is that the property of the second person named in the execution is levied upon and nothing said in the return as to the first. We do not see how this error to be complained of by the Plaintiff, more especially when the proof shows the first person named was dead when the execution actually came to the Sheriff hands and

most probably insolvent

The Circuit Court refused the motion I've thought rightly
Living Hope



James
Gordon

} Brief

E. B. Bigley Feb.

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United States



of America.

STATE OF TENNESSEE.

CIRCUIT COURT OF DAVIDSON COUNTY, January TERM, 1855

PLEAS at the Court House in the City of Nashville, County of Davidson, and State aforesaid, on the second Monday, being the Eighth day of January in the year of our Lord one thousand eight hundred and fifty - five and in the seventy - ninth year of the Independence of the United States.

PRESENT—The Honorable Nathaniel Baxter one of the Judges of the Circuit Courts of the STATE OF TENNESSEE, and assigned to hold the Courts of the Sixth Judicial Circuit, in said State.

James Gordon

E B Bigley and S W Nance John Beatty J W Dobbie James Hamilton Motion

R W Porter James Matlock J Dunn R W Wallace John H Bowen

The parties appear by their Attornies and the plaintiff by his attorney moves the Court for judgment against E B Bigley Sheriff of Davidson and S W Nance John Beatty J W Dobbie James Hamilton R W Porter James Matlock J Dunn R W Wallace John H Bowen his securities for an insufficient return of an execution in favour of James Gordon against Robert H Lindsey William S Nance and James M Maxwell which motion is after argument of Counsel upon due consideration of the Court not sustained. Therefore it is considered by the Court that the said motion be dismissed and that the plaintiff pay the costs for which execution may issue and the plaintiff thereupon tenders his Bill of Exceptions to the opinion of the Court which he prays may be signed sealed and made a part of the record in this cause which is done and he also prays an appeal in the nature of a writ of Error to the next Supreme Court of Errors and Appeals to be held at the City of Nashville on the first Monday in December next which is granted bond and security being given accordingly to law.

Bill of Exceptions

Be it remembered that at the September Term 1854 of the Circuit Court of Davidson County Tennessee the said James Gordon recovered a judgment before said Court against Robert H Lindsey Wm S Nance and James M Maxwell for the sum of \$750 00/100 in virtue of the principal judgment and costs the record of which recovery is here inserted and made part of this Bill of Exceptions. The parties appear by their Attornies and thereupon the Defendants withdraw their pleas and say that cannot deny but that they owe the plaintiff the debt of Seven hundred and Seven Dollars and Sixty five cents together with the further sum of Thirty Dollars and Sixty five cents damages for the detention thereof. Therefore it is considered by the Court that the plaintiff recover of the Defendants his debt aforesaid together with his damages aforesaid and his costs by him done and expended and that he have his execution. That on the 6th day of November 1854 a writ of Habeas Corpus founded on said judgment was issued from said Court directed to the Sheriff of Davidson County aforesaid which W. Fa came to the hands

of Edward B Bigley Sheriff as aforesaid on the 8th day of November 1854 said was returnable to the January Term 1855 of said Court - which together with the Sheriff's return drawn and the bond for the delivery of the property levied upon an executing writ of said return are in the following words and figures and to form part of this writ of Execution "State of Tennessee To the Sheriff of Davidson County bearing - We command you that of the goods and chattels lands and tenements of Robert S Smiley William S Vance and James Mc Murray late in your County you cause to be made seven hundred and fifty \$100 Dollars debt damages and costs which James Gordon late in our Davidson Circuit Court at Nashville recovered against them whereby they are convicted as appears to us of records and that you have the same before the Judge of our said Court at the next Term to be held for the County of record at the Court House in Nashville on the second Monday in January next to render said plaintiff the moneys aforesaid and have them and these this writ

Witness the S Smiley Clerk of our said Court at office the second Monday in September AD 1854
The S Smiley - Enforced James to day of Nov 1854 - Came to hand the 8th day of Nov 1854 and levied this writ on two negroes Henry J Stephen agreed to be worth of \$1500 bond taken who is herewith filed and made a part of this writ Dec 15th 1854 and which bond was this day forfeited Jan 6th 1855

Know all men by these presents that we William S Vance and John A McEwen all of Davidson County and State of Tennessee are held and firmly bound unto James Gordon in the sum of fifteen hundred dollars to the payment of which well and truly to be made we said creditors and each of our heirs jointly severally and jointly by these presents and sealed with our seals this 15th day of Decr 1854 The condition of the above obligation is such that on the day and date hereof E B Bigley Sheriff of Davidson County hath levied an execution in favour of James Gordon arising from Circuit Court of Davidson County upon the following property to wit; Henry J Ephraim two negroes agreed to be worth of \$1500 levied upon on the proper goods and chattels of Wm S Vance Now if the above bound Wm S Vance shall well and truly deliver the above described property to E B Bigley Sheriff of Davidson County at the Court House in Nashville on the 6th day of Janry 1855 then and there to be sold in satisfaction of said Execution or pay such moneys as is called for in said Execution then this obligation to be void otherwise to remain in full force and virtue - Wm S Vance

John A McEwen Secured "The plaintiff James Gordon by his attorney moved the Court at the January term 1855 for judgment against the said Edward B Bigley Sheriff and his said securities for an insufficient return of said execution The plaintiff in support of his motion read to the Court an authentic copy of the official Bond of the said Edward B Bigley which is in the words and figures following "State of Tennessee Davidson County Know all men by these presents that we Edward B Bigley Wm S Vance John Beatty for W Dells James Hamilton Rice W Porter James Matlock James Mc Murray Adam R H Wallace and John H Brown all of the County of Davidson and State of Tennessee are held and firmly bound unto the State of Tennessee in the special sum of Forty thousand dollars to be paid to the said State of Tennessee to which payment well and truly to be made we said creditors our heirs executors and administrators and each and every of us and them both jointly and severally jointly by these presents Witness our hands and seals this 7th day of March 1854 The condition of the above obligation is such that whereas the above bound E B Bigley was on the 4th day of March 1854 duly elected Sheriff of Davidson County State of Tenn; Now if the said Edward B Bigley shall well and truly and faithfully discharge all the duties of his office as Sheriff as aforesaid and pay over and account for all moneys by him collected by virtue of his office to the person or persons authorized to receive the same and shall in all things belonging to his office well truly and faithfully demean himself during his continuance therein then this obligation to be void otherwise to be and remain in full force and virtue - Edward B Bigley

John Beatty for W Dells James Hamilton Rice W Porter James Matlock Adam R H Wallace John H Brown which foregoing bond was acknowledged in open Court by all the parties thereto and tendered to & accepted by the Court and the said Edward B Bigley was duly qualified Sheriff of Davidson County" After the motion had been entered and was under going discussion the Defendant Edward B Bigley moved for leave to amend his return upon his own affidavit which is in the following words and figures - E B Bigley Sheriff of Davidson County makes oath that

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in writing out his return on the execution of James Gordon vs R. B. Smiley vs a name and James Maxwell for seven hundred & fifty
dollars forty nine cents dated of September Term 1854 and returned to January 1855 he made an accidental mistake in writing
the name of one of the negroes listed on the back of his fieri facias in that the name is written Stephen instead of Ephraim
Affiant states that the names of these negroes are rightly given in the delivery bond returned with the fieri facias and that in the hurry
of writing he accidentally wrote Stephen instead of Ephraim in his execution he therefore prays to correct this error — E. B. Bigley
Done before me Jan'y 15th 1855 Tho. S. Smiley CLK — To the reception of said affidavit and to the amending of said
return after the motion was entered the plaintiff objected and the Court decided that it was not competent for said Sheriff to amend his
return at that step of the proceedings to which the Defendant excepted — The defendant introduced John D. McEwen as a witness who stated
upon his examination in chief that Robert B. Smiley one of the Defendants was dead having died since the date of the judgment and that he
did not know of any property that the said Robert B. Smiley had at the time of his death that was subject to execution — The witness himself
had purchased of the said Robert B. Smiley the house and lot known in Nashville as the Verandah which was the only property that
he had ever known of Robert B. Smiley that ever was subject to execution Upon cross examination he stated that he had assumed in his
purchase of the Verandah to pay this very debt upon which the said judgment was founded and was under obligation to pay it The
Defendant then introduced Tho. S. Smiley a brother of said Robert B. Smiley who stated that his brother died before the actual
issuing of the execution that is before it actually came to the hands of the Sheriff and perhaps on the very day it is marked on
the back as having issued The above was all the evidence in support of or against said motion the Court denied the motion and
refused to give judgment to which ruling and opinion of the Court the plaintiff excepts and tenders this his Bill of Exception
which he prays may be signed sealed and made a part of the record which is done And the plaintiff prays an appeal
in the nature of a writ of Error to the Supreme Court which is granted

Nathaniel Baxter Judge Clerk

Know all men by these presents that we James Gordon and Thomas Washington are held and firmly bound unto E. B. Bigley Sheriff of
Davidson County or his certain attorney executor administrator or assigns in the penal sum of One hundred and fifty dollars for the true
payment whereof we have ourselves our heirs executors and administrators firmly by these presents sealed with our seals and date this
9th day of February 1855. The condition of the above obligation is such that whereas the above bound James Gordon has prayed and
obtained an appeal in the nature of a writ of Error from the Circuit Court of Davidson County to the Supreme Court of Errors and Appeals of Nashville
in the State of Tennessee in a judgment of said Circuit Court recovered at the personal term thereof by the said E. B. Bigley Sheriff against
the said James Gordon for costs Now if the said James Gordon shall well and truly prosecute his said appeal with effect or in case he
fail therein pay and satisfy the whole debt which may be awarded against him for wrongfully prosecuting said Appeal and
satisfy the judgment of said Supreme Court then then the above obligation to be void else to remain in full force and effect

James Gordon by Tho. Washington Att. (S)
Tho. Washington (S)

Recd Cash

Check of Motion & Judgment 199 appeal 18 and 125 Transcripts 325

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STATE OF TENNESSEE.

I, THOMAS T. SMILEY, Clerk of the Circuit Court for the County of Davidson in the State aforesaid, do certify that the foregoing is a correct transcript of the record and proceedings had in said Court, in the case heretofore prosecuted and determined therein, between James Gordon plaintiff, and Ed. Bigley & Decentis defendants as the same remain of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at office in Nashville, the 20th day of June in the the year one thousand eight hundred and fifty five and in the seventy ninth year of our Independence.

Tho. T. Smiley

STATE OF TENNESSEE.

I, one of the Judges of the Circuit Court for the State aforesaid, and presiding Judge of the Circuit Court for the County of Davidson, do certify that THOMAS T. SMILEY, whose name is subscribed to the foregoing certificate, is Clerk of the Circuit Court for said County, and that his said attestation is in due form of law. Given under my hand at in said State, this day of in the year 185

James Gordon

James Gordon

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James Gordon

Ed. Bigley & Decentis

STATE OF TENNESSEE.

I, THOMAS T. SMILEY, Clerk of the Circuit Court for the County of Davidson, in said State, do certify that whose name is subscribed to the foregoing certificate, is one of the Judges of the Circuit Courts for the State aforesaid, and presiding Judge of said Circuit Court for the County of Davidson, duly commissioned and qualified.

In Testimony Whereof, I hereunto subscribe my name, and affix the seal of said Court, at office in Nashville, the day of in the year one thousand eight hundred and and in the year of our Independence.

