

Case No. 16,714. UNITED STATES v. WILLIAMS.
[5 Cranch, C. C. 400.]¹

Circuit Court, District of Columbia.

March Term, 1838.

MARSHAL OF DISTRICT OF COLUMBIA—ACTION ON BOND—FAILURE TO RETURN EXECUTION.

An action will not lie upon the official bond of the marshal of the District of Columbia for not returning an execution, unless he has been required by the rule of court to return it, and has failed so to do.

Debt on the official bond of the marshal of the District of Columbia. The declaration was in the usual form for the penalty of 820,000, with a profert of the bond, the condition of which, upon oyer, appeared to be, “that if the said Henry Ashton” (the marshal) “do and shall, by himself, and his deputies, well and faithfully perform and fulfil all the duties of the said office of marshal of the said District of Columbia, in pursuance of, and according to, the acts of congress in such case made and provided,” then the obligation to be void, otherwise of full force and virtue in law; dated February 7, 1831.

The defendant (James Williams) pleaded general performance. The plaintiffs replied specially, setting forth, as breaches of the bond, that sundry executions, particularly described, being writs of fieri facias, issued in favor of the Chesapeake and Ohio Canal Company, against divers individuals, for divers sums of money; and averring as to each execution, that it “was delivered into the hands of the said Henry Ashton, as marshal aforesaid; that the said Henry Ashton ought to have made a true and lawful return thereto; but the plaintiffs aver he wholly neglected so to do, and that the said judgment is still wholly unsatisfied and unpaid to the said company, contrary to the form and effect of the said condition of the said writing obligatory.” To this replication the defendant demurred generally.

Mr. Bradley, for defendant, contended that the marshal is not liable to an action upon his bond for not returning an execution, unless he has been ruled by the court to return it, and amerced for not returning it, according to the law of Maryland, 1794, c. 4, § 1, which is in force in this county. That the statute is not cumulative, but exclusive. It is the only mode of proceeding against the marshal; and if a rule is necessary to charge the marshal; a fortiori to charge the surety. The default of the marshal must be judicially ascertained, to justify an action upon his bond. *Wats. Sher.* 63, 64, 82, 198, 203; 2 *Inst.* 452, *Chesley v. Barnes*, 10 *East*, 73; *Allred v. Halliwell*, 1 *Starkie*, 117; *People v. Spraker*, 18 *Johns.* 391.

R. J. Brent, contra. This question depends on the 27th section of the judiciary act of 1789. The oath of the marshal makes it his duty to make true returns of all lawful precepts to him directed; and the statute gives an action upon the bond for every breach of

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his duty. The act of Maryland, 1794, c. 54, is only applicable to the sheriffs of Maryland. 1 Com. Dig. (Am. Ed.) tit. "Action for Mifeasance," A, 2; *Hinman v. Brees*, 13 Johns. 531; *Maccubbin v. Thornton*, 1 Har. & McH. 194; *Barton v. Webb*, 8 Term R. 459; *People v. Birdsall*, 20 Johns. 298.

Mr. Bradley, in reply. No action will lie against the marshal for not making the money, nor for a false return, until the execution is returned; nor for not returning it until called on by the court to return it, and failing so to do, and his default entered upon the record. A fieri facias is not a returnable writ. *Wats Sher.* 203; *Moreland v. Leigh*, 1 Starkie, 388.

THE COURT (nem. con.) gave judgment for the defendant on the demurrer, upon the ground that the marshal is not liable upon his bond for not returning a fieri facias, unless he has been called upon by the court to return it, and has refused.

{See Case No. 16,715.}

¹ {Reported by Hon. William Cranch, Chief Judge.}