

14769

No. _____

Supreme Court of Illinois

Bay

vs.

Cook

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 286

J. W. Middleton & Co., Stationers, 196 Lake St.

1864

Bay
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Cook

14769

J. L. Clark



IN THE

Supreme Court of the State of Illinois,

THIRD GRAND DIVISION,

April Term, A. D. 1863.

EDGAR T. BAY, ET. AL., PLAINTIFFS IN ERROR.

vs.

ISAAC COOK, DEFENDANT IN ERROR.

ARGUMENT OF E. A. STORRS FOR PLAINTIFFS.

CHICAGO:

PRINTED BY BEACH & BARNARD, NO. 14 SOUTH CLARK STREET.
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STATEMENT OF CASE.

On the 12th day of March, 1850, Daniel T. Wood made and delivered to the defendant in error, who was at that time the sheriff of Cook county, his bond, signed by himself as principal, and John McFall, Loren G. Butler, Martin Dodge, Peter H. Bigelow, Henry B. Bay, and T. E. Hamilton as sureties, in the penal sum of ten thousand dollars, and which bond was upon the following condition :

“Whereas, the above bounden Daniel T. Wood has been appointed, by said Isaac Cook, to the office of deputy sheriff in and for said county of Cook. Now, therefore, the condition of the said obligation is such, that if the said Daniel T. Wood, as such deputy sheriff, as aforesaid, shall faithfully discharge all the duties required of him as such deputy sheriff, and shall save said Isaac Cook, and his legal representatives, harmless from all costs and damages, on account of, or by reason of, any and all acts of said deputy, or by color of his said office, then this obligation to be void; otherwise to remain in full force and virtue.”

At the December term of the Cook County Circuit Court, this defendant in error commenced suit, and filed his declaration against said Wood and the sureties on said bond, assigning as breaches of said bond : 1. The collection by Wood; as deputy sheriff, of a certain execution issued out of the Cook County Circuit Court, amounting to the sum of about three hundred and thirty dollars, and a failure to pay over the same; and that Cook, as sheriff, paid over to the plaintiff, in said execution, the sum of one hundred and forty-six dollars and fifty cents, the balance due on said judgment. The second breach is as follows :

"And, for assigning a further breach of the condition of said bond, according to the form of the statute in such case made and provided, said plaintiff says that the said Daniel T. Wood, deputy sheriff as aforesaid, after the making of his said bond, and during his continuance in office as deputy sheriff as aforesaid, did not in all things faithfully discharge all the duties required of him as such deputy as aforesaid, and did not save said Cook, late sheriff as aforesaid, harmless from all costs and damages on account of by reason of all acts of said deputy, or by color of his said office, but on the contrary, after the making of the said bond, and while the said Daniel T. Wood was deputy sheriff as aforesaid, the said plaintiff being sheriff of said county of Cook, during the year of our Lord eighteen hundred and fifty, and ex-officio collector of State and county taxes assessed for the year eighteen hundred and forty-nine, the list of taxes for the year last aforesaid, and also the list of taxes for the year eighteen hundred forty-six, eighteen hundred forty-seven, and eighteen hundred forty-eight, and eighteen hundred and forty-nine, duly assessed, was delivered to him, said plaintiff, as such collector, for collection, and afterwards, to wit, on the twentieth day of April, in the year eighteen hundred and fifty, the said plaintiff, collector as aforesaid, delivered to said defendant Wood, as deputy sheriff as aforesaid, a large amount of said taxes, to wit, six thousand four hundred and forty dollars and thirty-four cents, to be collected or returned to him, said plaintiff, as sheriff as aforesaid; and the said plaintiff avers that said defendant, Daniel T. Wood, collected the said last mentioned sum of money for taxes, as aforesaid, as deputy sheriff as aforesaid; and that he has neglected and refused, and still does neglect and refuse to pay said sum, or any part thereof, to said plaintiff, as sheriff as aforesaid."

The third breach is for a failure to pay over taxes collected for the year 1849, amounting to the sum of \$441.22.

On the 30th day of May, 1857, judgment was entered by default against the defendants Wood, Butler, Dodge, Bigelow and Bay, for \$5,382.17 damages.

ARGUMENT.

The sole question presented by the record is, as to the liability of Wood's sureties for the defaults of Wood in the non-payment of taxes collected by him? and it is insisted by the plaintiff in error that the condition of the bond does not cover defaults of that character, and the entire question turns upon the special duties of the sheriff *as such*, as defined and pointed out by the statutes creating the office. For, clearly, if the sheriff, as such, be not bound to collect taxes? and if those duties be imposed upon him by different authority, and are of a distinctive character from his duties as sheriff, then his deputy can be merely bounden to the discharge of such duties as appertain to the office of sheriff, and the bond, for the faithful performance of such duties, would require nothing further.

That the office of sheriff and collector of taxes are, although reposed in the same individual, entirely distinct and independent in their character, is abundantly shown by the statutes.

The sheriff receives his commission from the governor of the State (Statutes S. 7 and B. p. 1122, Sec. 1), and is required, within thirty days after receiving notice of his commission, to enter into a bond with *the people of the State of Illinois*, with good and sufficient security to be approved by the *Judge of the Circuit Court of his county*, conditioned for the faithful discharge of all the duties required, or to be required, of him by law as sheriff or coroner. He is also required to take and subscribe before the clerk of the Circuit Court, the several oaths required by law, and an oath for the faithful discharge of his duties as sheriff, &c., (Sec. 2).

By section 5 of the same statute, the duty of the sheriff is thus defined:

"It shall be the duty of every sheriff and coroner, when qualified as aforesaid, to execute and return all writs, warrants, process, orders and decrees of every description that shall or may be legally directed and delivered to him within the limits of his county, under pain of contempt of the court from which such writ, warrant, process, order or decree may have issued; and for the service of such process, and for keeping the peace, such sheriff or coroner may call to his aid the power of the county, when necessary."

By the 6th section, sheriffs and coroners are made conservators of the peace, and it is made their duty to suppress all riots, attend all circuit courts, and courts of county commissioners.

By section 10 of the same statute, the sheriff is authorized to appoint a deputy or deputies, which appointment is required to be in writing, filed in the office of the clerk of the Circuit Court, and entered of record; and any deputy, when so appointed, and having taken and subscribed the several oaths required to be taken by the sheriff, is authorized to perform any and all of the duties required of the sheriff, in the name of the sheriff. The sheriff is made liable for any neglect or omission of the duties of his office, when occasioned by any such deputy, in the same manner as for his own personal neglect or omission. The sheriff, deputy sheriff, and coroner, are prohibited from becoming purchasers at sales under execution.

These are the leading provisions of the statute regulating the duties of the sheriff; and to more clearly show the entire dissimilarity of the duties of the sheriff as such, and his duties as collector of taxes, I present here, in what may be called a tabular form, the provisions of the statute relating to each:

SHERIFF.	COLLECTOR.
1. The sheriff receives his commission from the governor.	The sheriff shall be ex-officio collector of taxes, and his refusal to act shall vacate his office. (Stat., 1845, Sec. 27, p. 441.)
2. The sheriff is required to enter into a bond with the people of the State, to be approved by the judge of the Circuit Court of his county, in the penal sum of \$10,000.	The collector is required to execute a bond in a penalty of at least double the amount of the tax, to be by him collected, and with such securities as the county commissioners shall deem sufficient.
3. The condition of the bond which the sheriff is required to execute, is the faithful discharge of all the duties required or to be required of him by law, as sheriff.	The condition of the bond executed by the collector is, that if the above bounden A. B. shall perform all the duties required to be performed by him as collector, etc.
4. The sheriff is required to take and subscribe an oath, before the Clerk of the Circuit Court, for the faithful performance of the duties of his office.	The collector is required to take and subscribe an oath before any person authorized to administer an oath, that he will faithfully, diligently and impartially, and, to the best of his ability, perform all the duties required of him by law, as collector. (Stat. 1845, Sec. 28.)
5. The bond of the sheriff is required to be filed and recorded by the clerk of the Circuit Court.	The collector's bond is transmitted to the office of the Secretary of State. (Sec. 29.)
6. The duty of the sheriff is to execute and return writs, etc., and to act as conservator of the peace.	The duty of the collector is to proceed to collect the taxes charged in the list, etc.
7. The sheriff upon failure to pay over money collected on executions, etc., is liable to prosecution on the bond, etc., at the suit of the party aggrieved; or after demand the party aggrieved may, upon ten days' notice, proceed against the sheriff in a summary way, by motion before the Circuit Court.	In case of a breach of the bond given by the collector, the auditor shall direct the commencement of suits, etc., against the collector. (Stat. 1845, Sec. 30.)

SHERIFF.	COLLECTOR.
8. In case of the <i>death</i> of the <i>sheriff</i> , the <i>coroner</i> is authorized and empowered to discharge all the duties of <i>his office</i> .	In case of the death of the <i>collector</i> , the <i>clerk of the County Court</i> is empowered to take charge of the tax-books, and to <i>appoint a suitable person</i> to complete the collections, who shall execute a bond in the same manner, and his acts shall be as binding and effectual as the collector's would have been had he completed the collections. (Black Stat., p. 1093, Sec. 32-33.)
9. There is no provision of the statute making the bond given by the <i>sheriff</i> a <i>lien</i> , etc.	The bond given by the <i>collector</i> is made a <i>lien</i> against all his real estate, until he shall have complied with the creditors thereof. (Black, Stat., p. 1085, Sec. 6.)
10. The <i>sheriff</i> is authorized to appoint deputies, and to take bonds from them for the faithful performance of their duties, etc.	The <i>collector</i> , by himself or <i>agent</i> , shall attend, etc., for the purpose of receiving taxes (Black, Stat., p. 1023, Sec. 6); and the clerk of the county Commissioners' Court is required to attend, with the collector, all sales of lands for taxes (Stat. 1845, Sec. 63); and no provision is made for the appointment of deputy collector.
11. The <i>sheriff</i> is prohibited from purchasing any property <i>sold on execution</i> , etc.	The <i>collector</i> is prohibited from purchasing property sold at <i>tax sales</i> . (Stat. 1845, p. 447, Sec. 70.)
12. The sureties for the <i>sheriff</i> may release themselves from such securityship, by filing with the <i>clerk of the Circuit Court</i> a notice that he is unwilling longer to be security for said <i>sheriff</i> , etc. (Black. Stat., p. 800, Sec. 7.)	The sureties for the <i>collector</i> may, in like manner, become released by filing a like notice with the clerk of the <i>County Commissioners' Court</i> . (Black. Stat., p. 800, Sec. 7.)
13. Upon the filing of such notice by the security for the <i>sheriff</i> , the clerk of the <i>Circuit Court</i> is required to notify the <i>sheriff</i> , who is thereupon to file a new bond. (Black. Stat., p. 801, Sec. 8-9.)	Upon the filing of such notice by the security for the <i>collector</i> , the clerk of the <i>County Commissioners' Court</i> is requested to notify the <i>collector</i> , etc. Black. Stat., p. 801, Sec. 8-9.)

SHERIFF.	COLLECTOR.
14. The statute provides (Sec. 10) that if the <i>sheriff</i> shall not in the time and manner prescribed, file a new bond, his office shall be vacant.	The statute also provides that if the collector shall not in the time and manner prescribed, file a new bond, his office shall be vacant.
15. By the 12th Sec. of the same Statute, it is also provided, that if any <i>sheriff</i> shall embezzle or appropriate to his own use, any money which may be paid him, by virtue of his office, he shall be liable to be indicted therefor, etc.	By the same Section it is provided, that if any <i>collector</i> shall embezzle or appropriate to his own use any money which may be paid <i>him</i> , by virtue of his office, <i>he</i> shall be liable to be indicted therefor, etc.
16. By the 13th Sec. of the same Statute, it is made the duty of the <i>sheriff</i> , if he shall fail to give bond as provided for, etc., to deliver over to his sureties, forthwith, all books, moneys, vouchers, papers and every description of property whatever, pertaining to <i>his office</i> .	By the same Section it is also made the duty of the <i>collector</i> , if he shall fail to give bond as provided for, etc., to deliver over to his sureties, forthwith, all books, moneys, vouchers, papers and every description of property whatever, pertaining to <i>his office</i> .
17. It is made the duty of the presiding <i>judge of the Circuit Court of each County</i> , at every term of said Circuit Court, to examine and inquire into the sufficiency of the offered bond of the <i>sheriff</i> . (Black. Stat., p. 799, Sec. 1.)	It is made the duty of the County Commissioners' Court, at the regular June and December terms of said court, on the first day of the term, in open court, to examine and inquire into the sufficiency of the official bond of the <i>collector</i> .
18. If, upon such examination, it shall appear that any one or more of the securities, on the official bond of such <i>sheriff</i> , have removed from the county, died or become insolvent, an order shall be entered of record, requiring such <i>sheriff</i> to file, in the office of the clerk of the Circuit Court, a new bond, to be approved and recorded, etc.	If, upon such examination, it shall appear that any one or more securities on the <i>collector's</i> bond has removed, etc., the <i>County Commissioners' Court</i> shall cause such collector to be summoned to appear before said court, on a day fixed, to <i>show cause</i> why he should not be required to give a new bond, etc.

In view of these various provisions of the statutes, which might be extended almost *ad libitum*, it is impossible to arrive at any other conclusion than that the offices of sheriff and collector of taxes, although vested in the same individual, are nevertheless, as offices, entirely distinct and independent of each other, calling for the performance of entirely different duties, and imposing altogether different obligations. It is not a merger of one office in the other, but when the person who holds these offices collects an execution, serves judicial process, acts as conservator of the public peace, he then acts as, and is, *sheriff*. But when the same individual collects a tax, or sells property at a tax sale, he then acts as, and is, *collector*. The acts done by him in the former capacity, are done by color of his office as *sheriff*. In the latter by virtue and color of his office as *collector*. All through the statutes the clear distinction is kept up between the sheriff and collector, as much so as if they were offices held by different individuals. That they were to be regarded as entirely distinct and independent of each other, results of a very necessity from that provision of the statute which provides that upon a vacancy in the office of sheriff, by his death or resignation, the coroner is authorized and empowered to discharge *ALL the duties of his office*. Yet, in such an event, the duties of collector of taxes are discharged by some person especially appointed for *that* purpose. Hence it is clear, that wherever the duties of the sheriff are spoken of, or wherever reference is made to the duties of the office of sheriff, it includes and embraces only those duties which the law has devolved upon the sheriff as such. This is indeed a direct legislative determination of the entire question in controversy, for the legislature has, by the very case which I have put, declared that *all the duties of the office of sheriff* may be, and are, discharged, without the discharge of any of those duties which the law has devolved upon the collector of taxes. If the words, "*all the duties of the office of sheriff*," used in the statute, do not, as they do not in fact, embrace the duties of collector of taxes, it must follow that the same words used in a bond could have no wider meaning, nor be considered as of a more comprehensive character. The obligation which the securities of the bond sued

upon in this case assumed, was simply to save the defendant in error and his legal representatives "harmless from all costs and damages on account or by reason of any and all acts of said deputy, *as such deputy, or by color of his office*." This is the extent to which those securities bound themselves; that is the measure of their liability. They are simply to protect and save harmless *the sheriff* from all costs and damages, on account of or by reason of any acts of his deputy, as *such deputy sheriff*.

Now, unless it be claimed that the duties of a deputy sheriff are larger and more comprehensive in their character than the duties of the sheriff, it is clear that the act of Wood, in collecting taxes, was not an act as deputy sheriff. For, as we have seen in a case where *ALL* the duties of the office of sheriff are vested in the coroner; the law does not include within those duties that of collecting taxes. Hence the collection of taxes is not an act done *as sheriff*. If, therefore, the same act be done by the sheriff's deputy, it is not done as deputy *sheriff*, nor does he then act as *such deputy*. *He acts as the agent of the collector of taxes*, and in no other capacity. Any other rule would make the deputy sheriff superior to the sheriff; would give the agent larger powers than the principal; and would impose duties upon the subordinate more extended than the duties of the chief. If it be true that the two offices are merged one in the other, then it would follow that suit might be brought against the securities on the sheriff's bond for neglect of the duties of collector of taxes, and this has, I believe, never yet been claimed. The words, "*by color of his said office*," used in the bond, do not enlarge the boundaries of the liability of the securities. For these words simply relate to acts done *within the limits of official authority*. (*Weller vs. Take*, 9 East. 364; *Alcock vs. Andrews*, 2 Esp. Ni. Pr. Cas. 542). And the same question thus returns, in inquiring as to the limits of this particular authority. If the collector of taxes is outside the limits of the duties of a deputy sheriff; then, in collecting taxes, he is not acting within the limits of those duties, and is, therefore, not acting by color of his office as deputy sheriff. If the legal duties of the sheriff do not, as we have seen, embrace

the collection of taxes, then, in making those collections, he would not be acting within the legal limits of his duties as collector, and consequently not *colore officii*; and the same doctrine would of course be applicable to the deputy sheriff. There is not, indeed, any provision of the statute relating to the duties or obligations of sheriffs and collectors of taxes, where the distinction between the two officers and their entire and complete independence of each other is not preserved and kept up. Thus, the sheriff executes a bond as sheriff, in a certain penalty, and upon certain prescribed conditions; while the collector executes his bond as *collector* in a different penalty, and under entirely different conditions. These bonds are as distinct and independent of each other as are the bonds of a sheriff and county treasurer. The oath of office taken by the sheriff is taken by him as sheriff, and is entirely different from the other taken by the collector, which is taken by him as *such*. The *duties* of the sheriff are especially defined and pointed out by the statute, and so, too, are the duties of the collector, which are entirely different from each other.

The manner of procedure against the sheriff, in the event of a breach of the bond by him, is also pointed out by the statute, and so, too with reference to the collector. Their liability is made dependent upon entirely different circumstances; they are liable to different persons; the course of procedure against them is entirely different, and the authority to proceed is derived from different sources.

In providing the manner of releasing securities; filing new bonds; examining official bonds, and requiring the execution of new ones, under certain classes of cases, the statutes provide for the bonds of all officers, from whom bonds are, by law, required, the statute, in every instance, speaks of sheriffs and collectors, in its enumeration of officers, in the same connection that it provides for the same matters with reference to coroners, justices, probate justices, constables, school commissioners: thus showing that the offices of sheriff and collector are regarded as distinct and independent of each other as

the offices of probate, justice, and school commissioner; if not, why are they all specially named. Thus, for example, the 10th section is: "If said sheriff, coroner, justice, probate justice, constable, school commissioner, or *collector* of state and county revenue, *as the case may be*," &c. But clearer still is the section with regard to embezzlements by public officers. Thus, it is proved by the 12th section thereof: "Any sheriff, coroner, justice of the peace, probate justice of the peace, constable, school commissioner, or *collector of State and county revenue*, shall embezzle, or appropriate to his own use, any money which may be paid them by *virtue of their offices*, they should be liable to be indicted therefor," &c. Now, it is clear from this section alone, that the legislature intended that the offices of sheriff and collector should be independent and distinct, and *because the collection of taxes and money received thereby* was not money paid the sheriff, *by virtue of his office as sheriff*, the statute has embraced within the list of officers, against whom the particular section referred to is leveled, *collectors of taxes*.

And since the section expressly provides that if either of the officers therein named shall embezzle or appropriate any money paid him by *virtue of his office*, he shall be liable, &c., it is clear, as sheriffs and collectors are respectively named, that the money received on the collection of taxes is not paid *by virtue of the office of sheriff*, for if it were then there would have been no necessity in naming the collector at all. By the 13th Sec. of the same statute it is provided as follows: "It shall be the duty of such sheriff, coroner, justice of the peace, probate justice of the peace, constable, school commissioner, or *collector* of state and county revenue, if he shall fail to give bond, provided for in this chapter, to deliver over to his sureties forthwith all books, moneys, vouchers, papers, and every description of property whatever pertaining to his said office, and the said sureties may at any time after said failure to fill said bond maintain an action of replevin or other appropriate action to recover such property," &c.

Now, if upon the examination of the sheriff's bond by the Judge

of the Circuit Court, as provided for in the first section of this chapter, it should be found that one of the sureties was insolvent, and the sheriff should fail to file a new bond as required by the statute, it is clear that the 13th Sec. would require of him the delivery only of the books, moneys, vouchers, and papers pertaining to his said office of sheriff, and would interfere in no respect with the papers in his hands as collector of taxes. Nor would the securities on the collector's bond have any claim whatever against the sheriff as such. The distinctness of the two offices is, therefore, as it seems to me, abundantly shown. But we are not without authority on this subject. By the statutes of the State of California (Revenue Act 1854), the sheriff is made *ex-officio* tax collector, but the same statute also provides that he shall be liable on his bond for the discharge of his duties in the collection of taxes, and no other one is required than the one executed by him as sheriff, except when he acts as collector of taxes for foreign miners' licenses.

The People vs. Edwards, 9 California 291, was an action brought against the sureties upon the official bond of the sheriff of Nevada County. The bond was executed for the faithful discharge of his duties as sheriff, and the breaches assigned were his failure to pay over moneys collected by him as taxes in his *ex-officio* capacity of collector. The court says: "The offices of sheriff and tax collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. * * * *The offices are not so blended that the bond, executed for the faithful performance of the duties of the one, would embrace in the absence of the statute the obligations belonging to the other.* The eighth section of the act concerning official bonds, which provides that every such bond shall be obligatory upon the principal and sureties therein, for the faithful discharge of all duties which may be required of the officers by any law enacted subsequently, applies only to duties properly appertaining to his office as such, and not to new duties belonging to a distinct office, with the execution of which he may be charged. The duties of sheriff *as such* relate

"to the execution of the orders, judgments and process of the courts; the preservation of the peace; the arrest and detention of persons charged with the commission of a public offence; the service of papers in actions and the like; they are more or less directly connected with the administration of justice; *they have no relation to the collection of revenue.* The difficulty, however, with the demurrer, is the fact that the Revenue Act of 1854, by *virtue of which the sheriff is made ex-officio tax collector*, provides that *he shall be liable on his bond for the discharge of his duties in the collection of taxes, and does not require the execution of any new bond; nor is any other bond required than the one executed by him as sheriff, except when he acts as collector of taxes for foreign miners' licenses.* The bond in suit must be deemed to have been executed in view of the provisions of the Revenue Act. *For moneys collected for foreign miners' licenses the defendants are not responsible*, but all delinquencies in the collection of other taxes are covered by the bond in suit." Now the liability of the sureties in *People vs. Edwards* on the sheriff's bond, was rested solely on the ground that the statute so expressly provided. The liability was not created by the language of the bond, nor from the fact that the sheriff was *ex-officio* collector of taxes, but simply and alone from the fact that the statute declared that on the sheriff's bond the sureties should be liable for his defaults in the collection of taxes. But where the statute had not thus expressly provided, as in the case of taxes collected on foreign miners' licenses, the court expressly hold that the sureties are not responsible under the bond. But all the general principles for which we contend are settled by this case, viz: 1. That although the sheriff is tax collector *ex-officio*, still the offices are "as distinct as though filled by different persons." 2. That "the duties and obligations of the one are entirely independent of the duties and obligations of the other." 3. That "the offices are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace the obligations belonging to the other." 4. That "the duties of sheriff as such relate to the execution of the orders, judgments, and process of the courts; the preservation of the

"peace; the arrest and detention of persons charged with the commission of a public offense; the service of papers in actions and the like; they are more or less connected with the administration of justice; *they have no relation to the collection of revenue.*" There is no statutory provision in this State making the sureties of the sheriff on his official bond responsible for his acts as collector of taxes. The liability, if it exist at all, must be by mere force of the fact that he is *ex-officio* tax collector. This the case of *People vs. Edwards* expressly denies, and it must be considered as decisive of the point under discussion.

The same doctrine was also expressly held in *Moore et. al. vs. Foote*, 32 Miss. 480, where the court say :

"It is contended that the action should not be maintained against the plaintiffs in error, who were sued alone as sureties, because the liability of Bale, the principal, had not been fixed, as was required by the act of 27th of February, 1836, sec. 1, Hutch. Code, 450. Without further consideration of that statute, it is sufficient to remark that it applies in terms only to sheriffs' bonds. This action was brought on a tax collector's bond; and although the statute subsequently passed, provides that the duties required by law to be performed by the tax collector should be performed by the sheriff, *yet the intention of the law is merely that the same individual shall perform the duties of both officers. They are, however, separate and distinct*; and in addition to the bond of the individual as sheriff, the statute requires him to execute a bond and take an oath of office, as tax collector. *The duties and responsibility of the individual in the different capacities in which he acts, are as distinct as though each office were held by a different individual.*"

The case of *Crumpler vs. The Governor*, 1 Devereux (law), 52, is in point. By the statutes of the State of North Carolina, (Revised Code, 650, ch. 334, in argu. 56,) the sheriff was made *ex-officio* collector of taxes, and it was made his duty to collect and account for

them. The sheriff was, however, required to give bonds for the collection of the public taxes, and the question in the case was, whether the sureties upon the sheriff's bond were liable by the general obligation contained in the condition, viz., "to satisfy all sums and fees received or levied by him by virtue of any process, and *faithful performance of the duty of sheriff.*" This was contended by the plaintiffs, and upon this point Ch. J. TAYLOR says :

"Now this argument proves too much, for every other bond entered into by them contains the same engagement. * * * The general condition for the performance of the sheriff's duty, is improperly inserted in all the bonds, except that given in the act of 1777. * * If the condition of this bond had recited that the sheriff, by virtue of his office, was bound to collect the county taxes and to account for them according to law, the authorities are full to prove that the general engagement afterwards inserted in the condition shall receive such a construction as will restrain it to the particular duty for which the bond was given, and that in a case between individuals. I consider the doctrine thus established, as more directly applicable to the case of a public officer, *whose peculiar duties are pointed out by a public law, and the substantial terms of the condition of the bond he is to give also defined by it.* The law having, by a particular provision, imposed the duty and defined its extent, a security called upon to execute a bond would naturally confide that he was binding himself so far and no further than the law had bound the sheriff, and would not be likely to inquire scrupulously whether the bond contained a term beyond the law."

And, again, in *The Governor vs. Barr*, 1 Devereux, 65, which was debt upon a bond conditioned that William Barr should well and truly execute, and due return make of all process, &c., and pay and satisfy all fees and sums of money by him received, &c., and in all other things well, truly, and faithfully execute the office of sheriff, &c.

The breach assigned was that Barr had not paid over certain

county taxes, which he had collected and received by virtue of his office as sheriff. In denying the right of recovery against the sureties, the court held this language :

"The bond on which this suit is brought, certainly cannot be converted by the declaration into an obligation upon the sheriff to pay the county tax. The bond is a proper one given to the Governor, and conditioned that the sheriff shall execute all process, &c., but nothing in the bond makes it his duty to collect the county and poor tax."

The same doctrine is also recognized in *The Governor vs. Mattock*, 1 Dev. 213, and in *Jones vs. Montfort*, 3 Dev. & Batt. 73, in both which cases it is expressly held that a bond given by a sheriff, with a condition to return process, and in all things well, &c., to execute the said office, is not broken by a neglect to collect and pay taxes.

Quite as decisive upon this point is *Amos vs. Johnson*, 3 Harris & McHenry, 216. This was an action of debt upon a writing obligatory executed by Barnet Johnson, and the defendant, his security, to the plaintiff, who was then sheriff, and conditioned as follows: "That if the above bounden Barnet Johnson do and shall well and faithfully execute and perform the several duties required of him as deputy sheriff, in Hartford county aforesaid, according to law, and shall well and faithfully make return to the said Robert Amos, of all such sum or sums of money or tobacco as he the said Barnet may or ought to have received for and during the sheriffship of the said Robert, or put into his hands by the said Robert, either by taxes, fines, penalties, forfeitures, judgments, amercements or officer's fees that may be put into his hands for collection, and shall well and faithfully make good and indemnify the said Amos from all final amercements, defaults and escapes which he, the said Johnson, as deputy, shall or may be entrusted with; also, all such precepts as may or shall come into his hands, and shall in all things act and do as a good and faithful deputy ought to do,

then," &c. The cause was referred by consent, and the arbitrators returned their award as follows :

"This action having been referred to us by a rule of the general court, at October term, 1792, we have heard and considered the proofs and allegations of both parties, and being of the opinion that the condition of the bond on which the action is brought tends only to the duty of a deputy sheriff, and not to the collection of public assessments, with which the plaintiff might have been entrusted by the State; and also, that as deputy sheriff, and exclusive of such public assessments, the defendant has fully paid up and settled all that could be rightfully demanded of or was due from him to the plaintiff, we do award and determine in favor of the defendant, that the plaintiff is not entitled to recover any thing in this action, and that judgment of non-suit be entered against him."

The plaintiff *caveated* the award and assigned for reason that the arbitrators were mistaken in point of law, inasmuch as the condition of the said bond does include the public taxes of the State, and county of Hartford. The caveat and reason were overruled by the court; judgment was entered upon the award, and upon appeal to the court of appeals of the State of Maryland, the judgment was affirmed. See, also, *Waters vs. The State of Maryland*, 1 Gill. 302.

It cannot be claimed that the duties of the deputy sheriff are more extended than those of the sheriff. Whatever would fall within the list of the official duties of the latter, would also embrace all the official duties of the former. Whatever the sheriff is authorized and directed by the statute to do, as sheriff, his deputy would also do as deputy sheriff, and if a certain class of acts are not embraced within the declared official duties of the sheriff, they clearly could not be within the official duties of his deputy. Whatever acts the former does by *color of this office, as sheriff*, are those which the law directs and authorizes him to do in that capacity; and as the bond of the sheriff conditioned for the faithful discharge

of all the duties of his said office, does not cover his acts as collector of taxes, it must follow that the bond of the deputy conditioned for the faithful performance of all his duties as such, would not. The sheriff has power to appoint a deputy or deputies. The deputy is required to take and subscribe the several oaths required to be taken and subscribed by the sheriff, upon which he is authorized to perform any and all of the duties of the sheriff in the name of the sheriff.

The oath taken and subscribed by the sheriff is for the faithful performance of the duties of his office; the deputy takes and subscribes the same oath; those duties then become the same, and, as we have seen, the failure to pay and collect taxes is no breach of *those* duties, but a breach of the duties of a distinct and independent office, viz: the collection of taxes. It is further provided that the sheriff shall be liable for any neglect or omission of the duties of his office, when occasioned by any such deputy; *in the same manner* as for his own personal neglect or omission. Now, it cannot be contended that the sureties upon the sheriff's bond would be liable for the neglects or omissions of a deputy in the collection of taxes, and this is so for the reason that it is not a neglect or omission of *any of the duties* of his office, and if the sheriff's sureties would not be liable for such neglect or omissions of a deputy, it is difficult to perceive how, or for what reason, the sureties of the deputy could be made liable to the sheriff for neglects and omissions of the same character, when in neither case were they neglects or omissions of official duty. The sureties upon the bond of the deputy hold the same relation to the sheriff that the sureties upon the sheriff's bond hold to the people. The obligation is the same in each case, viz: for the faithful discharge of all the duties required of him by law. The sureties of the sheriff would not be liable for neglects or omissions of the sheriff in the collection or payment of taxes, because those are not the duties which the law requires of him. Nor would the sureties of the deputy be liable to the sheriff for the same neglects and omissions, for precisely the same reason. Now what is the undertaking of the parties to this bond. First, it

is recited that Daniel T. Wood has been appointed by said Isaac Cook to the office of deputy sheriff in and for the county of Cook. The condition of the obligation is, that if Wood, "*as such deputy sheriff*," shall faithfully discharge all the duties required of *him as such deputy sheriff*," and shall save Cook harmless, &c., "from all costs and damages on account of or by reason of any and all acts of said deputy *as such deputy*" then, &c. The parties to this bond agree that Wood, as *such deputy sheriff*, shall faithfully discharge all the duties required of him *as such deputy sheriff*. This obligation is not broken until Wood fails, faithfully, to discharge some of the duties there referred to; and the language expressly limits the class of duties, for the faithful performance of which, they become bounden *to such as are required of him as deputy sheriff*, and that means such as the law requires of him in that capacity.

In the collection of taxes the sheriff does not act as sheriff; these are not acts of the sheriff, as *such*, consequently they would not fall within the duties required of the deputy sheriff, *as such*; and therefore the securities upon this bond could not be liable for the *unfaithful* discharge of such duties, because they have not bound themselves for their faithful performance. They are not duties required of Wood as deputy sheriff, and the securities on the bond have become bounden for the faithful performance of none other. It is a general principle that the sureties upon the official bond of an officer, are only responsible for his *official acts*.

Hill vs. Kemble, 9 Cal. 72;

and this rule is as applicable to the deputy as to the principal. Hence it is clear that this portion of the bond has not been broken. But in addition to the obligation which the securities entered into, that Wood should faithfully discharge all the duties required of him as deputy sheriff, they have also bound themselves to indemnify and save Cook harmless from all costs and damages on account of, or by reason of, any and all acts of said deputy, as such deputy. Here, also, is an express limitation inserted in the instrument. It is not sufficient, in order to entitle the sheriff to recover upon this bond

against the sureties, to show that he has suffered, or sustained costs or damage by reason of the acts of the deputy; but he must show from what acts the injury proceeded, and that they are of the character against which he is indemnified. It is only against a particular class of acts by the deputy that the sheriff is indemnified; and it is as much his duty to show, in order to entitle him to recover, that he has suffered loss and damage from the particular acts mentioned in the bond, as that he has suffered damage at all. The sheriff's right of recovery rests upon this bond—and by it he is bound.

The extent of the obligation of the security is measured by the language of the bond, and cannot be extended beyond its provisions. The parties have made the agreement for themselves, and the court cannot make another or different one. The bond is taken for the private security of the sheriff. If he desired to secure himself against the acts of his deputy collectors, he should make that a condition of the bond. Unless he does so, he is presumed to have assumed all those risks himself. He is required by law to give separate bonds. One for the faithful performance of his duties as sheriff, and another for the faithful performance of his duties as collector; and such a precedent should teach him the necessity of exercising the same degree of prudence for his own protection. The bond upon which this suit is brought, is conditioned for the faithful performance of the duties required of Wood as deputy sheriff; the breach assigned, is a failure faithfully to perform his duties as deputy collector. For this the securities have not bound themselves. No obligation of theirs, therefore, has been broken. Cook has sustained no damage by any act of Wood, against which they indemnified him. The law, as we have seen, compels the deputy sheriff, before he can act as such, to take the same oath of office as the sheriff himself takes; but no where authorizes the deputy sheriff to take the oath required of the sheriff when he assumes the office of collector. The deputy sheriff cannot legally serve a writ until he has properly qualified. The statute has expressly provided for the appointment of deputy sheriffs. It no where provides for the ap-

pointment of deputy collectors. The office of deputy collector is one unknown to the law as *an office*, and the person appointed by the collector to discharge these duties, acts simply as the *agent* of the officer from whom he receives his appointment, in no sense in an official capacity; nor is there attached to any of the acts of such agent, any official sanction, nor is he clothed by the law with any official power or authority. The auditor and county treasurer are authorized by the statute to direct suits only against defaulting collectors and their bonds, and not upon *sheriffs'* bonds, which are distinct bonds from those given by the same sheriffs in their capacity as collectors; and it must follow that the bond given by the deputy of that sheriff could not be prosecuted where that of his principal could not.

Regarded in any light, it seems to me clear that the breaches assigned in this declaration are not acts against which the securities of the bond sued upon indemnified the sheriff; that the defendant in error shows no failure to comply with the conditions of that bond, and that if he has suffered damage, it is from the acts of his private agent, for the faithful performance of whose duties these sureties never became bounden.

It is submitted, therefore, that the judgment in this case should be reversed.

EMERY A. STORRS,
Counsel for Plff in Error.

Supreme Court of Illinois.

John S. Bay et al

vs
Isaac. Cook

The bill in this case was filed upon
the judgment, sought to be reversed
Bay v. Cook. no 71. The reasons urged
in the petition for a rehearing filed
in that cause. apply here, and for
those reasons, the appellants respectfully
petition this Court for a rehearing
Yours & Manly
App'ts Allys

Impressment of Slaves
3 hand down
John S. Ray et al 287

Isaac Cook.

Petition for Release

Filed April 28. 1824
L. Leland
Clerk

Supreme Court of Illinois
Third Grand Division

John S. Bury et al
vs
Franc Cook

Error to Superior Court
of Chicago.

William T. Bury Esq
Counsel for Plaintiff in Error,
Please take notice
that we have filed a
petition for a rehearing in
the above entitled cause,
& shall call it up on
Friday ~~morning~~ April
29, 1864 or as soon there
after as Counsel can
be heard.

Storrs & Marsh
Counsel for Defendant
in error.

I admit service of copy
of above notice Apr 29th
1864

W. T. Bury
Counsel for Plaintiff
in error.

286 & 287

Bay in book

Bay in book

S. Notice

Filed April 29, 1874
L. Leland
Clerk

Supreme Court of Illinois
Third Grand Division

John S. Bay et al
vs
Grace Cook

Error to Cook County Circuit
Court

William T. Burgess Esq.
Counsel for Plaintiff in Error

Please take notice
that we have filed a petition
for a rehearing in the
above entitled cause,
& shall call it up on
Friday ~~morning~~ April
29th 1864 or as soon there
after as Counsel can be
heard.

Storrs & Merck
Counsel for Plaintiff
in Error.

I admit service of Copy
of within notice apt 2 19
1864

W. J. Burges
Counsel for Plaintiff
in error.

Supreme Court of Illinois
Third Grand Division

Edgar T Bay
Et al

vs
Isaac Cook

71.

To the Supreme Court of the State of
Illinois

The above named plaintiff in
Error by Storrs & Marsh his attorneys
respectfully presents this his petition
for a re-hearing of the above entitled
cause

The question involved in this
Case, viz. whether the duties of the
deputy sheriff, are liable on the
bond conditioned for the faithful
performance of all his duties as
deputy sheriff, for his default in
the collection ^{of taxes} is new in this Court &
important in its character. The
opinion of the Court, filed in this cause,
holds the affirmative. ~~for~~ The opinion
of ~~From~~ ~~that~~ the Court was not
unanimous. Chief Justice Calton
dissenting.

2.

We would submit

1. That the Act imposing upon the Sheriff, the duty of collecting taxes, does not change, nor enlarge the duties of the Sheriff as such.

It is the case then of two offices ~~reposed in~~ in one individual

Should the Statute declare, that the Sheriff should be Ex. officio. & Justice of the peace, the Character & duties of the office of Sheriff would not thereby be enlarged, but the duties of the office would be. His duties as Sheriff would be precisely the same, as they were before, viz those duties which the law imposes upon the office of Sheriff - Whenever he served a summons he would be Sheriff - Whenever he held Court he would be Justice of the peace. - He could not hold Court as Chief, nor could he sell ~~lands or~~ property on execution as Justice. - His duties as Sheriff would be those which the law had previously attached to that office. - His duties as Justice of the peace those which the law had previously attached to that. It seems to me quite clear, that in the case put

3.

if the Sheriff were by Statute made ex officio ~~made~~ a Justice of the Peace the deputy Sheriff could not therefore hold Court. nor could the Sheriff compel him to do so.

So too when the person holding the offices of Sheriff & Collector of taxes serves a summons, he is then Sheriff - he is obliged to ~~serve~~ execute process judicial process placed in his hands, for that purpose, not because he is Collector, but because he is Sheriff.

When he enforces the payment of taxes, then he is then the same individual & is taxe, but a different officer. The oath which he is required to take & subscribe before the Clerk of the Circuit Court, for the faithful performance of the duties of his office as Sheriff, imposes upon him, all the duties & obligations of that office, as prescribed & declared by law. The oath which he takes before any person authorized to administer an oath, to faithfully perform all the duties required of him by law, as collector, imposes upon him, all the duties & obligations of that office. - The error, which we respectfully submit, the Court has fallen

4.

into in this case, is that of confounding
the office, with the individuals
So we insist that the duties of a sheriff are
the duties of the sheriff. And that the
duties of the deputy cannot be greater
than those of the principal. If in the
case put, of sheriffs being made Ex. officio
justices of the peace, the deputy sheriff
could not be required to hold court,
neither we contend could he be required
to collect taxes. The reason is that when
he assumes the duties of deputy sheriff
he simply undertakes to discharge the
duties, pertaining to that office, & can
be required to go no farther. If he could
not be required to collect taxes, surely
his sureties would not be liable for his
defaults, in ~~in~~ those ~~matters~~ things which
from the nature of his office he could not
be required to do

This is again the opinion in this
case, that ~~was~~ "any other decision
" would bring great injury in its train
" for the reason that deputy sheriffs
" have for near twenty years collected
" for the sheriff the public taxes & given
" their receipts therefor. If they have
" no power to collect these taxes these

5

recif receipts might be declared void"
 We would suggest in answer, that we
 do not deny the power of a deputy
 Sheriff to collect taxes. The Statute provides
 that the Collector by himself or agent
 shall attend for the purpose of
 receiving taxes" (Black. Stat page 1023
 sec. 6). Now whoever, does attend for
 that purpose, or does collect the taxes
 is the agent of the Collector. If the
 Coll Sheriff deliver to one of his
 deputies the tax list & directs him to
 authorize him to collect the taxes, he
 thereby makes him his agent. He may
 as well appoint a deputy Sheriff his
 agent for that purpose, as for any other
 any other person, and since he is authorized
 as collector to act by his agent, the acts of
 the agent are binding

Wm. H. Marshall
 for Peffer Envy

Superior Court Pls
Thos Geo Durston

286 & 287
Edgar Wray

Marble

Petition for Release

Wm. H. Smith
for Refr

Ch 71

Filed April 28 1864
L. Leland
Clerk