REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE SUPREME COURT

OF

THE STATE OF ARKANSAS,

AT

JANUARY AND JULY TERMS, 1837, JANUARY AND JULY TERMS, 1838, AND

JANUARY TERM, 1839;

IN LAW AND EQUITY.

ALBERT PIKE, Reporter.

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VOL. I.

LITTLE ROCK:

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1840.

District of Arkansas, ss.

BE IT REMEMBERED, That on the 22nd day of February, in the Sixty-Second year of the Independence of the United States of America, ALBERT PIKE, of the said District, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit:

"Reports of cases argued and determined in the Supreme Court of the State of Arkansas. By ALBERT PIKE, Counsellor at Law, and Reporter appointed by the Court. Vol. I."

In conformity to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned." And also to an act, entitled "An act for the encouragement of learning, by the securing of copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of Designing, Engraving, and Etching historical and other prints."

WM. FIELD,
Clerk of the District of Arkansas.

JUDGES

OF

THE SUPREME COURT

OF THE

STATE OF ARKANSAS,

DURING THE TIME OF

THE FIRST VOLUME OF THESE REPORTS.

HON. DANIEL RINGO, *Chief Justice.*
HON. TOWNSEND DICKINSON, } *Justices.*
HON. THOMAS J. LACY, }

ATTORNEY FOR THE STATE,

JOHN J. CLENDENIN.

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PREFACE.

The first volume of these Reports is now presented to the profession. They are published under an act of the Legislature, from copies of the opinions of the court, and arguments of counsel, furnished the Reporter by the Clerk.

The meagre compensation allowed the Reporter for his labor in preparing five hundred volumes for the State, and the limited sale to be anticipated for the first Reports of a new State, in the first years of her existence, have not permitted the Reporter to devote his time to the correction of proofs, in exclusion of his daily avocations as an attorney.

Owing, therefore, to delay in printing, coupled with unavoidable absence of the Reporter during a great part of the year, many errors will be found throughout the volume, particularly in the latter part; and some of the most serious errors in the opinions are caused, either by negligence of the copyist, or some other cause unknown to the Reporter.

With very few exceptions, the Reporter has verified every quotation and reference in the volume; and has corrected them, with many other errors in the *Errata*. Others will undoubtedly be discovered by every reader.

With these few remarks, the volume is submitted, "with all its imperfections on its head," to the candor of the profession.

RULES

ADOPTED BY THE

SUPREME COURT

OF THE

STATE OF ARKANSAS.

———o———

RULE 1. *Ordered*, That, for the future, the docket shall be called, and the causes disposed of, as follows: The causes upon the docke shall be regularly called and tried, unless for good cause shown; and if, for any reason, a case shall be passed, it shall not be called up until it is again reached upon the next calling of the docket.

RULE 2. Motions are to be made by the Attorneys in the following order: First, by the Prosecuting Attorney for the State; next, by the eldest practitioner at the bar, and so on in regular succession to the youngest; but no Attorney shall be permitted to make a second motion until each has had an opportunity of making one motion.

RULE 3. When a cause is regularly called up, the appellant or plaintiff will be called. If he appear not by himself or Attorney, the suit will be dismissed for want of prosecution; if he appear, the appellee or defendant will be called; and if the process so operates as that he is bound to appear, and he makes default, the cause shall progress, unless for cause shown.

RULE 4. All motions shall be submitted in writing; and reasonable notice of such as are not of course, must be given to the adverse party or his Attorney; and such as are not of course, must be supported by affidavit.

RULE 5. Affidavits must be used when a motion is based on a matter of fact, which, according to the practice of the court, should be sworn to.

RULE 6. Motions may be made immediately after the record is

read, and the opinions of the court pronounced, but at no other time, unless in cases of necessity, or in relation to a cause when called in course.

RULE 7. The Clerk shall not suffer the papers, in any case, to be taken from his office, at any time, by counsel, nor, during term, from the court-room, but by the judges.

RULE 8. More than two Attorneys shall not be permitted to speak on the same side of any cause, without special permission of the court.

RULE 9. In every cause brought to this court by appeal or writ of error, it shall be the duty of the counsel of the respective parties, in addition to the statement of the case, and points intended to be insisted upon in argument, as prescribed by the 14th section of the act of the Legislature, approved October, 1836, to make out, in writing, a reference to the authorities upon which they rely, which shall be submitted to the court at or before the calling of the cause; and no cause standing for argument, will be heard by the court, until such statement of the case, containing the substance of all the material pleadings, facts, and documents on which the parties rely; and the points of law, and the facts intended to be presented in the argument, with reference to the authorities, as aforesaid, shall have been furnished to the court. The party failing to comply with this Rule, shall be considered as making default; and if such failure be on the part of the appellee or defendant in error, the opposite party shall be permitted to proceed alone in the argument.

RULE 10. The Clerk shall set the causes for hearing, in the order in which they come into his office, except those hereinafter provided for.

RULE 11. Causes which require oral testimony shall be set for trial by the Clerk, on such days of the term as may appear to him proper; having regard to the time such causes came into his office, and to the number of suits in the court.

RULE 12. The court will not permit a cause to be continued by the consent of the parties only; the consent of the court must be obtained.

RULE 13. Re-hearings must be applied for by petition in writing, setting forth the cause or causes for which the decision or judgment is supposed to be erroneous. The court will consider the petition without argument; and if a re-hearing is granted, direct it as to one or more points, as the case shall, in their opinion, require; but no ap-

plication for a re-hearing will be heard after leave has been given to take out a copy of the decision or judgment; and all petitions for a re-hearing must be presented during the term at which the decision is made or judgment pronounced; otherwise the court will not regard them.

RULE 14. No transcript of any judgment or decision of this court shall be given, or mandate issued by the Clerk, during the term at which the judgment is rendered or the decision made, without the special leave of the court; which shall not be granted without special cause shown.

RULE 15. The proceeding on a writ of error, shall be by notice as prescribed in the 8th section of the act entitled "An act to regulate the practice of the Supreme Court in appeals and writs of error in civil cases," or by a subpœna directed to the Sheriff of the proper county, (or, in case the Sheriff be interested in the suit, to the Coroner,) commanding him to summon the defendant in error to appear in court, to show cause, if any he can, why the judgment or decree mentioned in the said writ of error, should not be reversed. If the notice or subpœna be returned not executed, an *alias* and *pluries* may issue at any time, on the application of the party, without a special order therefor; which, being returned not executed, in due form, shall be deemed equivalent to a service on the defendant, and the cause shall proceed; or when it shall appear to the court, by satisfactory proof, that any defendant is not an inhabitant of this State, the court shall, in its discretion, fix a day for such defendant to appear, and make an order to advertise, which order shall be published once a week for three weeks successively, in some one of the newspapers published in Little Rock, the last of which publications shall be four weeks at least preceding the appearance day fixed as aforesaid, after publication as aforesaid, and an affidavit thereof shall be filed with the Clerk. The cause shall stand for hearing in the same manner as if a subpœna against such defendant had been returned executed. Such order to advertise may be made at any time after the writ of error, and first subpœna directed to the county where the venue is laid, shall be returned.

RULE 16. All transcripts shall commence with the style of the court in which the controversy was decided, and the name of the judge or justices presiding when the decree, judgment, or order in the cause, was rendered, to reverse which the appeal is prayed, or writ of error

intended to be prosecuted, and its date; as —— pleas before A. B., judge of the —— Circuit Court, on the —— day of ——, 18—, or C. D. E. F. and G. H., justices of the county court, &c.; the names of all the parties litigant, as they stood when the controversy was decided, with the nature of the suit or motion, as

J. K., Plaintiff,
against
L. M., Defendant, } *In Covenant.*

In cases at law, the declaration, capias, endorsement, and return, and the orders of the court, with the pleas, demurrers, replications, &c. referred to in the orders, in immediate succession, up to, and including the final judgment, will follow in the order they are named; orders for attachments against witnesses need not be copied; then the bills of exceptions and papers referred to therein; no other paper, not even a bond declared on, or deposition that may have been used on the trial, are to be copied, unless made part of the record by oyer, special verdict, agreed case, or demurrer to evidence, or by reference to it in some other paper, which is a part of the record. In ejectment, neither the title papers or Surveyor's Report is a part of the record, unless made so by bill of exceptions.

In Chancery causes, after the statement of the court, judge, and the parties, (as in a suit of law,) the bill should be copied, unless an order of the court properly precedes it; then the exhibits as referred to, and the subpœnas and returns thereon; the orders of court previous to the filing of the answer; then the answer and the exhibits referred to therein; and the remainder of the orders up to, and including, the final decree; introducing reports of commissioners, and certificates of printers where publication has been made against absent defendants, and the like, after the orders under which they were respectively made; then the depositions taken on the part of the complainant, either in the order they are taken, or those on which he most relies, first; then those taken on the part of the defendant, in the same order. The notices to take depositions, the caption of depositions, and the certificates of the officer before whom they were taken, will, in most cases, be omitted (but the time of taking it must be inserted) unless introduced by exceptions. They will be introduced by the Clerk in this manner: "Depostions read on the part of the complainant." The deposition of J. L., taken on the —— day of ——, 18—, who deposeth that, &c. [Here the deposition.] "Depositions read

on the part of the defendant." And the same course will be pursued in relation to them. No paper should be copied, that was not filed and used on the trial, except where the paper referred to is on file in the same court.

The following Rules will be observed in all transcripts made out, whether at law or in chancery:

The date of every order of Court must be distinctly stated, and not by reference to the day and year aforesaid, or the like, as is usual; mere orders of continuance not to be copied; depositions and other papers, offered as evidence and rejected by the court, not to be inserted, unless by exceptions; no paper to be more than once copied; when it occurs a second time, let it be referred to by the page in the preceding part of the record; when a cause has been once before the Court of Appeals, and a transcript is again called for, to have errors which occurred after its return corrected, the second transcript should begin where the former ended; omitting the opinion of the appellate court; the appeal or supersedeas bond to be the last paper copied; and at the end of the transcript (except when it is so small as to render it unnecessary) there should be added an index or table of contents, referring to the pages of the record where the papers are incorporated, as

Bill, - - - - -	page 1
B's. bond, - - - - -	" 5
Subpœna and return, - - -	" 6
Answer, - - - - -	" 7
Decree, - - - -	" 10
C. K's. Deposition, - - -	" 11

and so on, referring to the material parts of the whole record. The index will greatly facilitate the labors of the court and bar; and the clerks may with propriety add it in their fee for the transcript. The fee for the transcript, in all cases, must be certified, to enable the clerk of this court to tax it in the bill of costs.

It is desired, and the law requires, that the transcripts should be made out in a plain hand writing, on paper of ordinary size, (letter paper is too small) a half sheet forming one page, and stitched at the top of the page; by this plan transcripts are more convenient for examination than when stitched through the side. The margin ought to be large and the notes full. When surveys form a part of the record, it would be preferable to send up a copy returned by the Sur-

veyor without stitching it to the record at all, with a certificate thereon that it forms a part of the record, when it can be examined with much more convenience.

In every case the official certificate should state, that the preceding —— pages, (stating the number) contain a full and complete transcript of the record and proceedings in the cause therein mentioned.

When an application is made for a partial transcript for the purpose of having an appeal, which has been prayed and not prosecuted, dismissed, the clerk will copy the decree or judgment appealed from, the order praying the appeal, and the appeal bond; the day of the month, and year of each must be distinctly stated. The fee, therefore, should always be certified.

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF ARKANSAS,

IN JANUARY TERM, 1837, BEING THE 61st YEAR OF OUR INDEPENDENCE.

GOINGS *against* MILLS.

ERROR *to Pulaski Circuit Court.*

IF a party attempts to plead in bar a payment made after suit commenced, he must show a full payment, not only of the debt and interest, but also of all costs accrued in the suit.

A Constable is not authorized to receive payment of a debt, by his official character, unless when he obtains that authority by a writ of execution; and a payment made to him before the issuance of an execution will not release the party making it; nor will the Constable's receipt be any defence to the action.

An appeal granted from the judgment of a Justice after the lapse of thirty days from the rendition of the judgment, would be unauthorized and void, and would not warrant the Circuit Court in assuming jurisdiction.

A mandamus is not a writ of right, but within the discretion of the court, and the party applying for it must show a specific legal right, and the absence of any other specific legal remedy.

The prayer of an appeal within thirty days after judgment rendered, the offer of special bail as required by law, and a refusal by the Justice to grant the appeal, if shown upon the application for the *mandamus*, might have been sufficient to authorize the Court to grant the writ, and if such facts appeared upon the return to the writ, might furnish a sufficient ground for the Court to take cognizance of and adjudicate the cause upon its merits.

Unless these facts or others appear upon the record, a writ of mandamus will be held to have irregularly issued, and to have given no jurisdiction to the Circuit Court.

The facts in this case are stated with great particularity in the opinion delivered. The questions raised upon argument, were: 1st, Whether the Circuit Court could order an appeal to be granted by a

LITTLE ROCK, Jan'y 1837.

GOINGS vs. MILLS,

Justice of the Peace, after more than thirty days had elapsed since the rendition of the judgment before him. 2d, The right of the Circuit Court to hear, try, and determine the case without an appeal having been prayed before the Justice. 3d, The propriety of admitting a certain receipt in evidence, given by the Constable, without proof that he was authorized to receive the money. And 4th, Whether the Circuit Court erred in deciding the Constable's receipt for thirty dollars to be full satisfaction for a judgment of thirty dollars and fifty cents debt, sixty-eight cents damages, and costs.

HALL for the plaintiff in error, referred to *Dig.* p. 574, sec. 57, and contended that the Constable could not release the plaintiff's demand unless he had a process to warrant it, or a letter of attorney, *Dig.* 129; and that the plea of payment after the impetration of an original writ, ought to show the payment of debt, damages, and costs, to warrant the judgment rendered in this case by the Court below. 1 *Chitty*, Plea *puis darrein continuance.*

SCOTT, *Contra:* The questions to which the attention of the Court is called, are:

1st, The right of appeal. This right is given by statute, in all cases in which any person may think himself aggrieved by a judgment of a Justice of the Peace. See *Digest*, page 374, sec. 57. The Circuit Court had the exclusive right to determine its appellate jurisdiction under the Territorial Government. In all cases of appeal its judgments were final and conclusive. The Superior Court of the Territory had no jurisdiction, original or appellate, where the debt or damages claimed did not exceed a hundred dollars. Neither could a writ of error or appeal have laid in this cause from the Superior to the Circuit Court of the Territory. See *Digest*, title *Organic Law*, page 29, sec. 10; page 32, *Ch.* 1, sec. 1; page 38, sec. 7. If, then, the decision of the Circuit Court of the Territory was final in this case, how could the Constitution of the State clothe this Court with the power to open and revise their judgment: the Constitution having been adopted since the said judgment was rendered.

The 2d question to which the attention of the Court is invited is the payment to the Constable. This is an important question, and it is to be regretted that no authority can be had to settle the question. It would seem to be in accordance with the principles of justice and equity that the defendant should be allowed to stay the proceedings

in an action against him, and to relieve himself of costs by payment of the debt, &c.; and who so fit a person to receive it as the officer having the process: the Justice cannot receive it. See *Digest*, page 360, sec. 29.

3d, If the payment to the Constable was a good payment, his receipt was evidence of the fact. In all cases of appeal from Justices' jurisdiction, the Circuit Court were required to take up the case "*de novo*" and try the same upon its merits, having no regard to the proceedings before the Justice. This defendant had a set off *vs.* the plaintiff which with the thirty dollars paid the Constable was amply sufficient to discharge the debt and costs due said plaintiff. See *Digest*, page 375, sec. 60.

This defendant insists that this Court ought not to entertain jurisdiction in this cause, but should dismiss the same. Or if the Court believe they have jurisdiction, the judgment of the Court below ought to be confirmed.

RINGO, *Ch. J.*, delivered the opinion of the Court:

This was an action commenced before JOHN HUTT, a Justice of the Peace, by the plaintiff in error against the defendant, founded on a promissory note for $30 50. The original summons bears date and appears to have been duly executed on the defendant on the 11th day of May, 1835. On the 21st day of May, 1835, that being the return day of the summons, the plaintiff obtained a judgment by default for the amount of her said debt and also sixty-eight cents damages and costs of suit. On the 26th day of October, 1835, *Mills* applied to the Circuit Court of Pulaski county for a mandamus to the Justice of the Peace, requiring him to grant an appeal and to send the proceedings and papers to the Circuit Court. The Court entertained the motion and ordered the writ to issue upon the defendant *Mills'* entering into bond before the Clerk of said Circuit Court in the sum of one hundred dollars. And on the 22d day of January, 1836, a peremptory mandamus was issued by the Clerk of said Court to the Justice of the Peace, requiring him to grant an appeal and send the proceedings and papers to the Circuit Court; and the Justice thereupon certified a transcript of the proceedings on his docket and deposited the same together with the original papers in the cause with the Clerk of the Circuit Court; whereupon the Circuit Court proceeded to try and determine the cause upon its merits and give a final

LITTLE ROCK, Jan'y 1837.

GOINGS *vs.* MILLS.

judgment for the defendant in error, to reverse which this writ of error has been prosecuted, and several errors assigned. The first questions the authority of the Circuit Court to order an appeal to be granted after the expiration of thirty days after the rendition of the judgment before the justice. The second questions the right of the Circuit Court to take cognizance of and try the cause without an appeal having been prayed from the Justice's judgment. The third questions the correctness of a decision of the Circuit Court in admitting a receipt of *James F. Johnson* to be given in evidence on the trial without any proof that he was authorized to receive the money therein mentioned. And the fourth questions the decision of the Circuit Court, that thirty dollars, as received by *Johnson* after the institution of the suit, was a full payment of the plaintiff's debt as well as the damages and costs of suit. During the trial in the Circuit Court a bill of exceptions was taken by the plaintiff in error to the decision of the Court admitting the receipt of *Johnson* as evidence and deciding that it was sufficient evidence of full payment of the plaintiff's demand. The receipt as set out in the bill of exceptions is as follows: "Received of "*Mr. James Mills* thirty dollars on account of *Lucy Goings'* suit brought "before JOHN HUTT, Esquire, on a note of hand for thirty dollars and "fifty cents. JAMES F. JOHNSON,

Constable of Big Rock Township."

"The above amount is in full for debt and costs of constable, *James* "*F. Johnson*, constable." The bill of exceptions further states that the plaintiff produced the defendant's note on the trial and that *Johnson* was at the time of executing said receipt Constable of Big Rock township, in Pulaski county, and that the receipt bears date after the service of the original warrant on the defendant and before the return day thereof, which is also stated to have been all of the evidence produced on the trial in the Circuit Court. In considering the third and fourth assignments of errors, especially the latter, we have been at a loss to conceive upon what principle the receipt for thirty dollars (if admissible at all as evidence) could have been held by the Circuit Court to be a full payment and satisfaction of the plaintiff's demand for $30 50, besides the interest accrued thereon, which amounted to about sixty-eight cents, and the costs of suit. It is apparent upon the face of the receipt that the amount paid was not equal to the amount of the debt, without costs or interest, and nothing is said as to the Justice's costs; and it is understood to be a principle well settled that

if a party attempts to plead a payment made after suit commenced in bar of the action, he must show a full payment, not only of the whole debt and interest, but also of all costs accrued in the suit. This is not shown by the receipt in question; and there can be no doubt that the Court erred in deciding that it was sufficient evidence of full payment of the plaintiff's demand. But the receipt was not, in our judgment, legitimate evidence to prove the payment of the debt. It was given by the Constable after he had served the summons on the defendant and before the return day thereof, and it is not pretended that he had any authority to receive the money except such as was derived from his official character as Constable. In that character he was only authorized to do what the process in his hands commanded him to do; and when he had served and returned the summons his authority was fully executed and determined, until he should receive further process from the Justice. This he had not at the date of his receipt: therefore we consider him as not having had any authority to collect or receive the money at the date of his receipt, and the defendant in making payment was (as all debtors are) bound to see that the person to whom he made the payment had a sufficient authority to receive it: otherwise the Law considers it as no payment, and obliges him to abide the consequences of his own error, against which every person in the exercise of a prudential care, such as he is by law required to exercise, may be protected by requiring the person to whom the payment is about to be made to produce a sufficient authority to receive it before he parts with his money. In this case it was the duty of the defendant to have seen that *Johnson*, if he claimed the right to receive the payment in his official character, had an execution in full life, which alone could authorize him to collect it, or enable him in that character to discharge his liability to the plaintiff: otherwise he should have been required to produce some competent authority from the plaintiff. Therefore we are clearly of the opinion that the Circuit Court erred in admitting the receipt of constable *Johnson* as evidence of a payment to the plaintiff. Having considered and thus disposed of the third and fourth assignment of errors, it becomes necessary that we should consider also the first and second, to ascertain whether the Circuit Court, under the circumstances of the case, acquired any jurisdiction to try and determine the same upon its merits. This will depend upon the construction to be given to the act of the Legislature of Arkansas, approved November the 3rd,

LITTLE ROCK, Jan'y 1837.

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1831, found in *Steele's Digest*, page 274, sec. 57, which provides that in all cases within the jurisdiction of a Justice of the Peace, any person who may think himself or herself aggrieved by the judgment of the Justice or verdict of the jury, shall have liberty to appeal therefrom, within thirty days after the rendition of said judgment, to the next Circuit Court of the county where such judgment was rendered; and the party appealing shall give special bail for the faithful prosecution of his appeal, and that he will pay the costs and condemnation of the Court to which said appeal is taken. By the provisions of this act the right of appeal is given subject to the condition and limitation thereby prescribed. The condition is that the party appealing shall give special bail for the faithful prosecution of his appeal, and that he will pay the costs and condemnation of the Court to which the appeal is taken. The limitation is that an appeal shall be prayed and the special bail given within thirty days after the rendition of the judgment, and if a party fail to pray an appeal and give special bail within the time limited for the exercise of his right, the right ceases upon the expiration of thirty days from the rendition of the judgment, and the party loses all the advantages which he could have derived from the exercise of his right of appeal within the time prescribed, and he will be presumed to have acquiesced in the verdict of the jury or judgment of the Justice. Hence it results that an appeal granted after the lapse of thirty days from the rendition of the Justice's judgment would be unauthorized and void, and could not warrant the Circuit Court in assuming jurisdiction to try and determine the cause on its own merits. The only act which the Circuit Court would be authorized to do would be to dismiss or strike the cause from the docket and remand the papers to the Justice, whose duty it would be to proceed upon the original judgment in like manner as if no appeal had ever been prayed. In this case the record shows that the cause was brought before the Circuit Court on a peremptory mandamus issued to the Justice requiring him to send the proceedings and papers in the cause to the Circuit Court and to grant an appeal to the defendant upon his entering into bond before the Clerk in the sum of one hundred dollars. The order for this writ was made on the 26th October, 1835, and the writ issued on the 22nd day of January, 1836. It appears from the record that the defendant filed his bond in the Clerk's office for fifty instead of one hundred dollars, as required by the order of Court, and that the Justice of the

Peace never did grant the defendant an appeal or make any showing upon his docket or proceedings that an appeal was prayed by the defendant at any time, nor is there any thing in the record showing that an appeal was ever prayed before the Justice of the Peace either before or after the expiration of thirty days from the rendition of the judgment, nor does there appear to have been any petition or affidavit presented to the Circuit Court upon the application for the mandamus. There is no allusion to or mention made of them in the record; but it appears by the record that the mandamus was awarded upon the mere motion of the defendant in error, without any showing whatsoever. It is believed to be well settled that the writ of mandamus is not to be considered as a writ of right, but it is understood to be within the discretion of the Court to grant it; and it is held to be a general rule that the party applying for this writ must show a specific legal right, and the absence of any other specific legal remedy to induce the Court to award it. It follows, therefore, that without such showing the Court would not be warranted in awarding the writ. The fact upon which the Court exercises its discretion in granting or refusing this writ ought to appear in the record, and altho' it is said that a writ of error will not lie to the decision of a court awarding a mandamus, because there is no judgment given thereupon, yet where the writ is used, as it has been in this case, for the purpose of compelling the party to whom it was directed to do certain acts by which the Court might acquire jurisdiction of the cause and without the doing of which it could have no jurisdiction, it would seem to us to have been indispensably necessary to have shown upon the record those facts upon which the jurisdiction of the Court over the subject matter of the suit would attach. The prayer of an appeal from the Justice's judgment within thirty days after it was given and the offer of special bail as required by law, and a refusal to grant the appeal by the Justice, if shown upon the application for the mandamus, might have been sufficient to authorize the Court in the exercise of a sound legal discretion to award the writ, and if such facts appeared upon the return to the writ, might furnish a sufficient ground for the Circuit Court to take cognizance of and adjudicate the cause upon its merits. But these facts do not appear upon the record; nor do any other facts appear by which the Circuit Court was warranted in its assumption of jurisdiction to try and determine this cause upon its merits. We are therefore of opinion that the mandamus was irregularly and im-

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providently issued, and that the Circuit Court erred in taking cognizance of and proceeding to try the cause on its merits. No appeal appears to have been prayed or security given as required by law, which must have been done before the Court could legally have taken cognizance of the cause. The judgment of the Circuit Court must consequently be reversed, annulled, and set aside, with costs, and the cause be remanded to the Circuit Court of Pulaski county, with directions to the Circuit Court to dismiss and strike the cause from the docket for the want of jurisdiction to try the same; and to remit the original papers in the cause to JOHN HUTT, the Justice of the Peace from whence they first came, and that the plaintiff have the benefit of her judgment recovered before the said Justice. It is therefore considered by the Court that the judgment of the Circuit Court rendered in this cause be reversed, annulled, and set aside, and that the plaintiff in error have and recover of the defendant in error the costs in and about this suit expended. And it is also considered by the Court that the cause returned as aforesaid be remanded to the Circuit Court of Pulaski county, with directions to said Court to dismiss and strike said cause from the docket for the want of jurisdiction to try the same, and to remit the original papers in said cause to JOHN HUTT, the Justice of the Peace from whence they first came, and that the said *Lucy Goings* have the benefit of her judgment before the said Justice.

McKee *against* Murphy.

Error *from Conway Circuit Court.*

This case was argued, but owing to the reason in the opinion assigned, was not determined upon the assignment of errors.

Dickinson, *Judge*, delivered the opinion of the Court: This case came on to be heard and was argued by counsel on errors assigned. Upon examination of the papers in this case it appears that the writ issued to the clerk to remove into this Court the record and proceedings in a certain suit wherein *Lawson B. McKee* was plaintiff and *Benjamin Murphy* defendent, returned with said writ of error; and annexed thereto is a transcript of the record and proceedings of a suit in said county, brought in the name of *Lawson B. McKee*, against *Benjamin Murphy*, also a summons to hear errors in the usual form, commanding him to summon *Benjamin Murphy* to appear, &c., to answer a writ of error in a certain suit wherein *Lawson B. McKee* was plaintiff against *Benjamin Murphy*. The parties to the record returned with the writ of error appear to be different from the record and proceedings required to be removed to this Court, and there is no record between the parties named in the writ. The proceedings are therefore irregular, and it is unnecessary to enter into an investigation of the errors assigned. The writ of error must be dismissed.

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HUDSPETH vs. THE STATE

HUDSPETH *against* THE STATE.

ERROR *to the City Court of Little Rock.*

If the parties named in the record sent up here, are not the same as those named in the writ of error, the proceedings are irregular, and the case will be dismissed.

A motion was made by the Attorney for the State to dismiss this case, on the ground set forth in the opinion.

HALL and TAYLOR, *contra.*

RINGO, *Ch. J.*, delivered the opinion of the Court: A motion to dismiss this case having been made by the prosecuting Attorney for the State, and argued by counsel, we have examined the papers in the case and find a writ of error issued to the City Court of the city of Little Rock, to remove into this Court the record and proceedings in a certain indictment in said City Court for keeping a gaming house, wherein *the City of Little Rock* was plaintiff and *Charles M. Hudspeth* was defendant, returned with said writ of error, and annexed thereto is a transcript of the record and proceedings on an indictment in said City Court, for keeping a gaming house, prosecuted in the name of *the United States of America* vs. *Charles M. Hudspeth;* also a summons to hear errors in the usual form, addressed to the constable of the city of Little Rock, commanding him to summon ALBERT PIKE, *Solicitor for said City*, to appear to answer a writ of error issued to the City Court of Little Rock in a certain indictment in said court, in behalf of *the City of Little Rock* against *Charles M. Hudspeth.*

The parties to the record returned with the writ of error appear to be defendant from those to the record and proceedings required by the writ of error to be removed to this Court, and there is no record between the parties named in the writ of error returned therewith into this Court. The proceedings are therefore wholly irregular, and no case is thereby brought into this Court of which the Court can take cognizance. It is therefore deemed unnecessary at present to declare the effect of a failure to give the defendant in error notice, as required by law, or to whom the same ought to be given, if any. The writ of error must be dismissed.

It is therefore considered by the Court here that the State of Arkansas have and recover of the plaintiff in error all the costs in this suit expended.

GEORGE *against* THE STATE.

ERROR *to the City Court of Little Rock.*

In this case the same motion was made and the same opinion and judgment given as in the case last preceding.

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26	487
27	121

TAYLOR *against* THE GOVERNOR.

APPLICATION for a *Mandamus.*

The Supreme Court has the power to issue writs of *mandamus.* The party applying for this writ must show that he has a specific legal right, and no other adequate specific legal remedy.

A collector or holder of public moneys who was in default for moneys collected at the time of the adoption of the Constitution, at the time of his election to another or the same office, and at the time of his application for his commission, is not entitled to his commission.

A collector or holder of public moneys who was in default to the Territory at the adoption of the Constitution, became in law and by the schedule to the Constitution a defaulter to the State, and all his liability is transferred to the State.

No person had any natural, legal, or vested right to the office of Sheriff till it was created by the Constitution.

The right to the office is given upon the express condition that the party demanding it is neither a holder or collector of public money which he has failed to account for and pay over, and for which he is liable.

That condition not having been complied with, no legal, constitutional, or natural right to the office vests by an election to it. Therefore the clause in the Constitution cannot be retrospective in this case.

An *ex post facto* law declares an offence to be punishable in a manner that it was not punishable at the time it was committed, and relates exclusively to criminal proceedings.

The provision in the State Constitution that no holder or collector of the public money shall be eligible to any office of trust or profit till he has paid over and accounted, &c., is not repugnant to or in violation of the Constitution of the United States.

LACY, *Judge*, delivered the opinion of the Court: This case as it stands at present on the record is a motion supported by a petition, affidavit, and other exhibits filed with the clerk, requiring the Governor of the State to show cause why a peremptory mandamus should not issue directing him to deliver to *John K. Taylor*, his commission as Sheriff for the county of Pulaski.

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The petition states that the applicant received a majority of all the votes for the office of Sheriff for the county of Pulaski, on the first Monday of August last, and that the clerk of the county court issued him a certificate of election. That on 14th October, 1836, he demanded his commission of the Governor, and on the 15th day of October, 1836, the Governor refused to deliver it upon the ground that he was ineligible to the office. A commission to the applicant, as Sheriff of the county of Pulaski, signed by the Governor of the Territory, bearing date 23d December, 1835, and on the back of it an endorsement entered, showing that he took the oaths of office on the 28th January, 1836, was then read. The certificates of the county court and Auditor were also introduced as evidence. That of the Auditor is in the following words:

"AUDITOR'S OFFICE, *Little Rock, Ark.*
October 30th, 1836.

I hereby certify that from the books of this office, *John K. Taylor*, Sheriff of Pulaski county in 1834, stands charged for revenue due the Territory of Arkansas, for the year 1833, with the sum of $522 33, exclusive of 20 per cent. thereon, which is to be added for delinquencies. And that for the year 1835, the said *John K. Taylor* stands charged with $69 40, exclusive of 20 per cent. thereon, which is to be added for delinquencies. The above charges certified, are the amounts which appear now to be due from the said *John K. Taylor*.

ELIAS N. CONWAY, *Auditor*."

The petition alleges that as the applicant has till the first Monday in December, in every year, to account for and pay over the public money, and that time not having intervened since the adoption of the Constitution, he cannot be rendered ineligible. It denies that any default except that which may have arisen since the adoption of the Constitution, can produce a disqualification. It states that he has held and still holds public money in his hands as Sheriff and Tax Collector, but it denies that any default in not accounting for and paying over public money previous to the adoption of the Constitution can create a disqualification under the Constitution.

These are all the material facts and points that are necessarily involved in the decision, and they present questions of no ordinary interest or magnitude. The court has given them a careful and mature examination and reflection, and the result of their research and investigation and the reasons and principles on which they are

founded is now submitted. The first inquiry is, has the Supreme Court the power to issue a mandamus? That it has, there can be no doubt—for the Constitution gives it *in express terms*. See *article* 6, *section* 2. In England a mandamus is a high prerogative writ, belonging generally, if not exclusively, to the Court of King's Bench, and is used principally to enforce the performance of public rights or duties. Under our government it is a constitutional writ secured to the citizen. The nature of the writ and the remedy it affords, and to whom it may be properly directed, will be found fully examined in 3 *Blackstone's Commentaries*, page 110; *3rd Burrows Reports*, 1266; *1st Peters' Condensed Reports*, *Marbury* vs. *Madison*, 266. That a party applying for the writ must show that he has a specific legal right, and no other adequate specific legal remedy, is a doctrine so universally admitted and established that it is deemed unnecessary to say any thing more upon this branch of the subject than to refer to the authorities. See *1st Strange*, 513; *3d Term Reports*, 648; *8th East*, 213; *3d Burrows*, 1226, and *Chitty's Practice* 787; *Cowper* 378.

This enquiry brings the Court to the main question in the case, and one upon which it must turn.

Is the applicant eligible to the office of Sheriff, or has he a legal vested right to the commission?

If he is eligible by the constitution, he is entitled to the commission, for that is but the evidence and authority to exercise the duties of the office. All the evidence in the case was introduced by himself, and whatever facts or presumptions it may establish, he is bound by—for the law will not permit him to object to his own proof, which is uncontradicted and of his own showing. The applicant claims the right to the commission under the constitution, and by virtue of his certificate of election. The language of the constitution is as follows: "The qualified voters of each county shall elect one Sheriff, one Coroner, one Treasurer, and one County Surveyor, for the term of two years. They shall be commissioned by the Governor, reside in their respective counties during their continuance in office, and be disqualified from the office a second time if it should appear that they, or either of them, are in default for any moneys collected by virtue of their respective offices." Under this provision and the second section of the schedule appointing the time for holding the general elections, he claims to be constitutionally eligible to the office of Sheriff and legally elected to fill it. On the part of the Governor it

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is said that he is expressly disqualified by the constitution from holding any office of profit or trust. The following are the words of the constitution:

"No person who now is or shall be hereafter a collector or holder "of public money, nor any assistant or deputy of such holder or "collector of public money, shall be eligible to a seat in either house "of the General Assembly, nor to any office of profit or trust, until he "shall have accounted for and paid over all sums for which he "may have been liable."

In order to render the applicant ineligible, it must appear,

First, That he is a holder and collector of public money within the meaning of the constitution.

Secondly, That he has failed to account for and pay over all such sums for which he may have been liable at the time of his election.

In the present cause do the facts and legal presumption warrant these conclusions?

That he was a collector and holder of public money is expressly admitted in his petition. The Auditor's certificate establishes it, and his commission as Sheriff for the county of Pulaski, which continued in force until it was suspended by the authority of the State, and his official acts under it in the exercise of his duties, up to the time of his election, unquestionably prove that he was a collector and holder of public money, both before and after the adoption of the constitution, within the meaning of that instrument. See *Schedule*. It remains to be seen whether he has accounted for and paid over all sums for which he may have been liable at the time of the adoption of the constitution or at the time of his election, and the time of the demand and refusal of his commission, or at the time of filing his petition.

If he was still in default at all those periods of time, it is clear he can have no right to demand the office or the commission.

On the 30th October, 1836, the applicant stood charged by the Auditor's books with having failed to account for and pay over all or a part of the sums for the year 1834 and the year 1835, for which he was then liable to the Territory. This fact shows conclusively that he did not account for and pay over into the territorial treasury the public money for which he was liable, within the time prescribed by law, nor did he ever afterwards make payment to the territorial government so long as it continued its legal existence. The petition admits in substance, if not in direct words, this fact. It says he has

held and still holds public moneys in his hands, as Sheriff and Tax collector, belonging to the Territory; and the applicant seems to stake his case wholly upon the ground that no default to the territorial government can render him ineligible. The letter of the Governor charges him with being in default, and states that as the reason for withholding his commission. He does not show to the Court by competent and satisfactory proof (and if the facts had warranted it he surely could have done it) that the charges exhibited by the Auditor are erroneous, and that the Governor's letter was untrue. He was certainly, then, a defaulter to the territorial government at the time of the adoption of the constitution, and if that be the case he is rendered ineligible, by its plain and literal meaning, to any office of profit or trust. If it be true, as is manifest from the whole of the evidence, that the applicant was a defaulter at the time of the adoption of the constitution, then as the schedule transfers and passes over all the rights, contracts, and claims, belonging to the territory, to the State, it necessarily follows that the applicant is also a defaulter to the State; and having failed to account for and pay over all the sums of the public money for which he was liable, the constitution declares he is ineligible. See *Schedule*, *section* 1 and 4; *article* 4, *section* 11. Independently of this provision it is a doctrine of public law as well as of natural justice. that states neither lose any of their rights nor are discharged from any of their obligations by a change in their form of civil government. See *Federalist*, *Grotius*, *Rutherforth's Institutes*. The liabilities of the applicant as a defaulter, accrued under the Territory, were in full force at the adoption of the constitution and at every subsequent period of time from that moment to the present; so far at least as the Court are able to judge from the facts before them. It is not pretended that he has ever accounted for and paid over to the State the several sums for which he may be liable. The Auditor's certificate shows that upon the 30th of October, 1836, he was indebted to the State at the time, in the amount charged. The Governor's letter is also evidence of the same fact, and his own admissions virtually if not expressly prove it. He was then a collector and holder of public money which he had failed to account for and pay over within the time prescribed by law, first to the Territory and afterwards to the State, and for which he was still liable at the time of the adoption of the constitution, and at the time of his election, and at the time of the demand and refusal of the Governor to issue his

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commission, and at the time of his filing his petition. The clause of the constitution disqualifying the applicant is plain and significant, and admits of but one interpretation. It has been already shown that he was a defaulter to the Territory at the time of the adoption of the constitution, and by that instrument all his liability was transferred to the State: consequently he has been a defaulter to the State ever since that period. The words "*who now is*" apply to him, and disqualify him at the time of the adoption of the constitution; and the words "*should be hereafter*" also apply to him and disqualify him at the time of his election, and at the time of the demand and refusal of his commission. Consequently he falls within the plain and literal import of the constitution, and is ineligible to any office of profit or trust. If the Court are correct in this view of the subject there is an end of the question; but that the cause may be freed from all apparent difficulty, they will in a brief manner notice the position taken and relied on in support of the motion. It is contended that any construction or interpretation given to the constitution whereby the applicant is deprived of the office of Sheriff, makes it act retrospectively, or makes it an *ex post facto* law. The error in this argument consists in the manner of stating the question. It takes that for granted which in the nature of things cannot be, and which in point of fact is wholly untrue. It assumes the position that the applicant, *John K. Taylor*, had a legal vested right to the office, when his right, by his own showing, (if he had any) is exclusively conventional and wholly constitutional. What legal, vested, or inherent right had he or any other citizen to the office of Sheriff before the formation and adoption of the constitution? The office had no natural or legal existence prior to that time. The constitution created it and gave it form and being. As the applicant then claims his right under the constitution, must he not submit to all the conditions, restrictions, and limitations it imposes? The right to the office is given upon the express condition that the party who demands it is neither a collector nor holder of public money which he has failed to account for and pay over, and for which he may have been liable. The condition in the present instance not being complied with, no legal, constitutional, or even natural right, can vest. Can it be retrospective in its operation when it divests the applicant of no antecedent right acquired by law, nor does it disfranchise him of any privilege?

The office of Sheriff is a public trust or agency, and it never be-

comes a right till the individual who claims it shows that he is constitutionally eligible. In the present case the applicant claiming a pretended right under the constitution, clearly demonstrates (within the meaning of the instrument) that he is a defaulter, and hence he falls within its disqualification, and has no right to demand the office.

The applicant has neither been dispossessed of his freehold nor in any manner deprived of his rights, privileges, or property, nor has he been denied the law of the land or judgment of his PEERS, or the freedom or equality of elections. All these privileges he possesses in as ample a manner and in as full a degree as any other citizen. The constitution simply withholds from him public trust which depended upon his own volition or will, provided he complied with the condition annexed to the office. An *ex post facto* law declares that to be punishable in a manner that it was not punishable at the time it was committed, and relates exclusively to criminal proceedings. How then can it be said (when the constitution annexes no penalty to the grant and inflicts no punishment) that it is void, being repugnant to the constitution of the United States? This question is so plain in the opinion of the Court that it requires no further solution. That the convention had full and ample powers to withhold office from public defaulters, and that they have done so is equally certain. To deny the people, when acting in convention, this power, is to impeach the right of self-government, and to destroy the means by which its blessings and excellence can alone be perpetuated.

What is a Constitution? The Constitution of an American State is the supreme, organized, and written will of the people acting in Convention, and assigning to the different departments of the government their respective powers. It may limit and control the action of these departments, or it may confer upon them any extent of power not incompatible with the federal compact. By an inspection and examination of all the constitutions of our own country, they will be found to be nothing more than so many restrictions and limitations upon the departments of the government and people. "And the distinction," says *Chief Justice Marshall*, "between a limited and an "unlimited government is abolished if those limits do not confine the "persons on whom they are imposed; and acts allowed and acts pro-"hibited are of equal obligation."

If the constitution can restrict the right of suffrage and the right of representation (and it has certainly done both) by positive enactments,

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and if it imposes conditions and limitations on all the departments of the government, legislative, executive, and judicial, and confines them within their proper and appointed spheres, can it be imagined that it is incompetent to annex a condition to the office of collector and holder of the public revenue? The question again occurs, can the applicant claim the office of Sheriff or demand the commission under the constitution and by virtue and authority of his certificate of election, when by his own showing he has already demonstrated that his pretended right is in express violation of one of its most important and salutary provisions? The simple statement of the question carries with it the answer. The applicant having failed to establish any legal or vested right to the office or commission, he is not therefore entitled to the benefit of the writ, for when there is no injury the law affords no redress. It is clear he is a defaulter both to the Territorial and State Government, and that he continued to be so at the time of the adoption of the constitution and at the time of his election and at the time of the demand and refusal of his commission and at the time of filing his petition; and that he was in the exercise of the duties of Sheriff, both before and after the adoption of the constitution, and after its acceptance and ratification by Congress. He is then clearly within the meaning of the constitution, and consequently ineligible to any office of profit or trust. So far as the rights and interest of the present applicant are concerned, the executive has done nothing that the law forbids; and whether his subsequent acts in relation to the same matter are inconsistent with his constitutional obligations to the county, or in violation of private rights, this Court will not take upon themselves to determine; for that question is not properly before them. The executive, in common with every other officer, is bound by oath to support the constitution, and whenever an effort is made to evade or violate it, it is not only his privilege but his duty to interpose and prevent it.

The Court conceive it to be no part of their duty to intimate an opinion in relation to the wisdom or folly of the clause disqualifying the applicant from office, or to say any thing in regard to its effect or consequences. It is sufficient for them that they have found it in the constitution, and of course they are bound to obey it.

The motion in this cause must therefore be dismissed with costs.

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF ARKANSAS,

IN JULY TERM, 1837, BEING THE 62d YEAR OF OUR INDEPENDENCE.

BENNETT, adm'r of BENNETT, *against* ENGLES, adm'r of CURRAN.

ERROR *from Independence Circuit Court.*

This case was originally commenced before a Justice of the Peace, and thence removed by appeal into the Circuit Court below. At the term of the Circuit Court at which it was set for trial, the regular terms of said court were required to be held on the Second Mondays of May and November. By an act of the General Assembly, the time of holding the court was changed from the Second to the Third Mondays of May and November, without any provision that cases pending should have day and be tried as though no change had been made. The court below decided that the act of the General Assembly operated as a discontinuance of this suit, and gave judgment accordingly: and to reverse that decision this suit of error is prosecuted.

FOWLER, for the plaintiff in error: The plaintiff relies upon the single error that the court below ordered the case to be stricken from the records of the court, &c., contrary to law. The court below predicated its decision solely on an act of the Arkansas Legislature of

LITTLE ROCK, July, 1837.

BENNETT administ'r *vs.* ENGLES, administ'r.

1833, page 34 *et seq.* of *the Pamphlets.* This same point was adjudicated upon in the case of *Boswell, adm'r.*, vs. *Newton*, and *Long and Wife* vs. *Thompson*, and *Compton* vs. *Palmer*, in the Superior Court of Territory, and the decision of the Circuit Court reversed.

LACY, *Judge*, delivered the opinion of the Court: This action was originally commenced by summons upon an open account before a Justice of the Peace. Judgment was obtained in favor of the plaintiff, from which an appeal was taken to the Circuit Court.

The appeal was returnable to the November term, 1832, and the cause regularly continued till the November term, 1834, when, on motion of the defendant's attorney, the court ordered the case to be stricken from the record. To correct this opinion the plaintiff prosecutes his writ of error.

At the time the appeal was set for trial, the regular terms of the Circuit Court of Independence were required to be holden on the Second Mondays of May and November, in every year, (see *Acts of the Legislature*, 1829, page 22,) and at the time the order was made dismissing the appeal, the regular terms of the court were changed from the *second* to the *third* Mondays of May and November. See *Acts of the Legislature* 1833.

The only point this court has to determine is, whether the change in the times of holding the Circuit Court operates as a discontinuance? This qestion was fully examined and decided in the case of *Boswell, administrator*, vs. *Newton*, and we deem it unnecessary to say any thing more than merely to refer to that opinion as stating the principle correctly, why the judgment of the Circuit Court below ought to be reversed. See *MSS. Opinions* of the Superior Court of the Territory of Arkansas.

Let it therefore be reversed, the cause remanded to be proceeded on according to the law, and the plaintiff in error have judgment for his costs in this court expended.

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DUGAN *against* J. & H. CURETON.

APPEAL *from Washington Circuit Court.*

A misrepresentation by the seller to the buyer of the advantages to result from the purchase, however contrary to good faith and sound morals, cannot form the basis of any suit, either at law or in equity.

It is not every misrepresentation which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it.

The common language of puffing and commendation of commodities, is not such a fraud as will avoid a contract.

The question of damages is purely legal, and parties cannot come into chancery to have their unliquidated damages assessed and set off against a judgment at law.

When courts of chancery have once taken jurisdiction of a case for one purpose, they will generally retain the cause until the whole subject is disposed of, but the primary and original object of the suit must be one clearly within their jurisdiction: nor will they even then always retain the bill; as where the allegation which gives the jurisdiction not being sustained by the proof on the hearing, the remedy sought appears to be complete at law.

A failure to perform a contract which formed part of the consideration for the payment of money, and was to be performed several months after the making of the contract, cannot, without some concurring equity, constitute a ground of relief against the payment, in chancery.

A party will not be aided after a trial at law, unless he can impeach the justice of the verdict or report, by facts or on grounds of which he could not have availed himself, or was prevented from doing it by fraud, accident, or the act of the opposite party, unmixed with negligence or fault on his part.

John and *Henry Cureton* filed their bill in chancery in the Washington Circuit Court, and set up a state of case, briefly, as follows:

That *Dugan*, having been engaged in mercantile business, and having on hand a remnant of goods, persuaded the appellees to purchase the remnant, upon his assurance that he would, the next spring, go to New Orleans and there purchase for them goods to the amount of three thousand dollars, to make their assortment complete, and deliver the same to them in Washington county, charging them but 12½ per cent. advance on the cost and charges of such goods. That the appellees were farmers, had never traded to any distant city for goods, were unknown and had no credit abroad, and therefore required the aforesaid assurance, and made the same an express condition, before they would agree to purchase his remnant of goods. That they paid part of the price of said remnant in money, and executed their notes for the remainder, at the same time calling witnesses to take notice that the notes were executed upon the express condition that *Dugan* should make their assortment complete by the purchase agreed upon.

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The notes so executed were three of $800 each, and one for $780. Before the notes became due, *Dugan* called on them for all the money they could spare, and a bill of such goods as they wanted, stating that he was about starting to New Orleans, and wanted the money to aid in purchasing the goods. That they thereupon advanced him between four and six hundred dollars, before said notes were due, and have since paid him $150 or $200 on said notes. That in consequence of this arrangement, and confiding in the promises of said *Dugan*, they declined cultivating their farm, and turned their attention wholly to the preparation for receiving and selling such goods. That finally, late in the season, and when they had no possible chance for getting goods themselves, and when it was too late to raise a crop, *Dugan* refused to go to New Orleans, and they were obliged to go on and sell the remnant at a great sacrifice and on credit; and that remnants and articles of cutlery, &c., unsaleable, were left on hand to the amount of $300, which they tender to be disposed of as the court should direct. That, laying aside their own time, labor, and expense, they have not realized any thing like cost out of said remnants. That had *Dugan* complied with his promise, they would, by uniting the goods so to have been purchased, with the remnant aforesaid, have cleared at least one thousand dollars by the sale of them. That *Dugan* had obtained judgment against them for $1750 debt and $148 14 damages—and praying an injunction—which was granted as to $1200, and refused as to the residue of the judgment.

The answer of *Dugan* denied positively all the equity and every material allegation of the bill; and insisted that the goods which he sold them were worth more at the time of the sale, at the wholesale prices in said county, than the price he sold for.

No motion was made to dissolve the injunction. The cause was regularly set down for hearing, on the bill, answer, exhibits and depositions, and the court below decided that the appellees relied upon unliquidated damages, if any, and a jury came to assess those damages. The damages sustained by the appellees by reason of the premises, were by the jury assessed to $1500; and the court decreed that the injunction for $1200 should be perpetual, and gave judgment against *Dugan* for the remaining $300 and costs.

The errors assigned were as follows:

1st, Granting the injunction.

2d, Overruling a motion to dissolve the injunction.

3d, That the order for, and the writ of injunction, were for a sum different from that for which the injunction was prayed in the bill.

4th, That the court ordered a jury to assess the unliquidated damages, and that they were assessed as an offset to a judgment at law.

5th, Allowing the said unliquidated damages as an offset, and decreeing accordingly.

6th, That no issue was made up for the jury to try.

7th, That the court overruled the appellant's motion to set aside the order for such jury to come.

8th, That the court overruled his motion to set aside the verdict.

9th, That the court admitted parole evidence to contradict, vary, and subvert a written contract.

10th, Because the court relieved against the judgment at law when no defence had been made at law, and no reason assigned for not doing so.

11th, That the remedy of the appellees was at law and not in equity.

12th, That the court released the appellees from paying the purchase money of the goods, without any rescission of the contract or return of the goods by them.

13th, Same in substance as the 11th.

14th, That the decree should have been for the appellant.

Taylor, for the appellant: The bill is founded upon mere matter of legal cognizance, and ought to have been dismissed. 10 *Ves. Jr.* 159; 8 *Ves.* 163; 14 *Ves.* 468; 1 *Jacobs' Cases*, 576; 13 *Ves.* 133; 1 *Jacobs'*, 394; *Hovenden on Frauds*, 11; 1 *Com. Dig.* 64; 8 *Com. Dig.* 64.

Where there is an adequate remedy at law, especially with regard to *personal* contracts and *personal* property, a court of chancery never interferes, either to enforce performance, or to prevent a breach, or to assess damages. It is only, in such a case, when the legal remedy is precarious or inadequate, that the equity interferes. 13 *Ves.* 133; 8 *Ves.* 163; 4 *J. C. R.* 559; 5 *J. C. R.* 195; 1 *Chitty on Pl.* 852–3; 1 *Scho. & Lef.* 25.

If the party fails to make his defence at law, or his defence proves ineffectual at law, he can have no relief in equity. 1 *J. C. R.* 49, 98, 91, 320, 323, 367, 439, 432, 465.

A contract cannot rest partly in writing and partly in *parole;* consequently conditions cannot be annexed, by extrinsic parole evidence

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to a promissory note, and still less to a writing obligatory, more especially after the debt created by it has passed into a judgment debt. 1 *Powell on Contr.* 259; 3 *Starkie on Ev.* 1008; 1 *Sch. & Lef.* 35; 1 *Ves. Jr.* 326.

A court of equity cannot take cognizance of any matter upon the vague suggestion, merely, that otherwise injustice would be done. Some distinct ground of equitable jurisdiction must be stated and put in issue. *Hov. on Fr.* 11; 8 *Com. Dig.* 65.

And the court which first has possession of it must determine it conclusively, even as to matter of fraud. 8 *Com. Dig.* 65; 9 *Wheaton* 592.

Unliquidated damages cannot be made a setoff, either against a note or a judgment. *Chitty on Bills*; 14 *Ves.* 369; 3 *J. C. R.* 357–8.

Where the whole of the equity is responded to or denied by the answer, the injunction ought to be dissolved. 1 *J. C. R.* 212.

WALKER and FOWLER, *contra:* 1st, No exceptions shall be taken, except upon points which "*have been expressly decided*" by the court below. *Acts of* 1836, p. 132, sec. 14. And this applies to cases in chancery as well as cases at law. *Ib.* p. 133, sec. 19.

2d, Appellant, in his assignment of errors, *assumes* the fact that many points were decided below which, by the record, were *not* decided; and *assumes* matters as appearing in the record, and assigns error thereon, when in fact they *have no existence in the record:* to all of which appellees insist that they shall be treated as nullities. Among which are the following, viz:

1st and 2d Errors assigned. No exceptions were taken below to the equity of the bill in any manner. *There was no demurrer.* The court *did not overrule* a motion to dissolve the injunction. The motion was filed, and then abandoned as hopeless: the appellant *answering* without a decision thereon, was a *waiver* of his motion. It is a general rule that a party who is to be damnified by irregularities and improper decisions, shall move their correction in the court below, or they will not be regarded in the court above. 2 *Bibb. Rep.* 167; 2 *Pirt. Dig.* 247, 256; 1 *Bibb. Rep.* 277, 526; *Hardin's Rep.* 304, 535, 559.

3d Error assigned, is of like character. The order granting the injunction is perfectly regular. *Geyer's. Dig.* 232. Irregularities in the order, or in the writ, should have been corrected below, or at-

tempted to be corrected. The record shows neither. *Same authorities as in the 1st and 2d assignments.*

4th, 5th, and 6th Errors assigned, Seem to be of a similar character, and all three touching one point alone. No *formal issue* of fact is necessary. *Gey. Dig.* 114.

Jury was properly called to assess damages, and properly assessed them. 1 *Bibb. Rep.* 338–9; 2 *Pirt. Dig.* 373, 375, 247; 5 *Little's Rep.* 51.

Jury was sworn to try proper issues; "matters of fact affirmed by one party and denied by the other." *Gey. Dig.* 114.

7th Error assigned. Court had no power to set aside the order made at the former term. The order was properly made; and if erroneous, appellant should have objected to it at the term in which it was made. His acquiescence was a *waiver* of irregularity, if any. *See authorities on 1st and 2d assignments.*

8th Error assigned. Court below did not overrule motion to set aside the verdict of the jury. The record shows that it was abandoned and *waived* by appellant, and that he suffered a *decree* to be entered without excepting to the verdict, or insisting upon his motion to set it aside. *Authorities on 1st and 2d Errors.*

If court had overruled the motion, there is no cause shown in said motion sufficient to set aside the verdict. In order to avail himself of any irregularities in the verdict, or any thing connected with it, or the issues upon which it was found, or the *insufficiency of the evidence,* appellant should have moved for a new trial, and set out all the *facts* upon the record by Bill of Exceptions. 1 *Bibb. Rep.* 340.

The motion, had it been acted on, shows no cause to set aside verdict; and as far as it refers to the record, it is contradicted by it. But it was not acted on, and is therefore a nullity.

A *fact* found by a jury, empannelled and sworn for that purpose, which finding has not been set aside, must be taken as conclusive. 2 *Bibb. Rep.* 169; 2 *Pirt. Dig.* 256; 1 *Bibb. Rep.* 340.

9th Error assigned. Parole testimony admitted was not "to contradict" "a written contract;" but in aid of it, to explain it, and was properly admissible.

10th Error assigned. No defence could have been made at law. The writings were under seal, and *fraud or failure of consideration* could not have been pleaded at law. Therefore no defence was necessary.

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11th Error assigned. Court of Chancery had undoubted authority to *enjoin* the judgment at law; and when jurisdiction once attaches, court of equity will hold it until all matters connected with it are settled, whether they would *per se* have been the subject of the Chancellor's jurisdiction originally, or not. 3 *Bl. Com.* 438 *et seq.*; 1 *Bibb. Rep.* 340.

12th Error assigned. There was no necessity for rescinding the contract; appellees sustained all the damages allowed them, over and above the depreciated prices for which they were compelled to dispose of the damaged goods.

13th Error assigned, Is fully answered under the 11th and others preceding it. And the 14th is fully responded to by the whole record.

Additional authorities. 1 *Pirt. Dig.* 259, 323, 329, 332; 1 *Bibb. Rep.* 278, 303; 2 *Pirt. Dig.* 247, 109, 255–6, 469, 373, 375; 1 *Marshall,* 419; 5 *Littell,* 51, 221.

Ringo, *Ch. J.,* delivered the opinion of the Court: The facts in the case, as set forth in the bill, are to the following effect. The appellant having a quantity of merchandize in his store at Cane Hill, in Washington county, urged the appellees to purchase them, which at first they declined doing, on account of the assortment being broken and consisting of such articles as were unsaleable; but the appellant representing to them the advantages which would result from the purchase, they finally consented and agreed to give him his price for the goods, upon his assurance that he would go to the city of New Orleans the next spring and procure and deliver to them in Washington county, $3,000 worth of such articles as would make their assortment complete when united with the remnants purchased of him: only charging them 12½ per cent. on the Orleans cost and carriage.

The appellees were farmers in Washington county, and had never traded to New Orleans or any distant city where merchants supply themselves with goods; were unknown and had no credit abroad, and for the purpose of enabling themselves to set up business acceded to the offers made them by the appellant, and did agree to give him his price for said remnant of goods, upon the express condition that he would purchase in New Orleans and deliver the amount of goods aforesaid, to make their assortment complete; and thereupon executed to said appellant their three several notes in writing or writings obli-

gatory; two for $800 each, and one for $786, payable six months after date, and paid in hand some three or four hundred dollars, making in all about $2700. At the time the notes were executed the appellees called witnesses to bear testimony that they were given upon the express condition that the appellant would make the assortment complete by the purchase of said goods in New Orleans.

The appellant, long before the notes become due, called on the appellees for all the money they could spare, and wrote to them requesting them to make out a bill of such goods as they wanted, stating that he was on the eve of starting to New Orleans, and wanted the money to aid in purchasing the goods. Whereupon they advanced him between four and six hundred dollars for that purpose, which was paid before said notes were due, and placed to their credit on them; and they have since paid him $150 or $200 on said notes. The appellees confiding in the honesty and integrity of the appellant, declined cultivating a farm to any extent, and gave their whole attention to the preparation for receiving and selling the said expected new assortment of goods to be furnished by the appellant, and to the sale of the remnants on hand bought of him as abovementioned.

The appellees repeatedly urged the appellant to purchase for them the goods promised, representing their dependant situation, and he as repeatedly promised to comply; but finally, late in the season, when the appellees had no possible chance of getting goods elsewhere, and when it was too late to raise a crop, informed them that he was not going to New Orleans, and could not comply with his promise. Being thus left with the remnants of unsalable goods on hand, they devoted their whole attention to the sale of them, and were compelled to sell many on credit to any and every person who would buy, and were thereby forced to make many bad debts. That for cash or good credit, the articles were generally sold for less than they would have been if they had been assorted; and that many articles of cutlery, and remnants to a considerable amount, say $300, were on hand and unsalable, and which they tender to be disposed of as the court may direct.

That, independent of their own time and expenses, the appellees have not made any thing like cost out of said remnants, and that with the additional supply of goods promised by the appellant, with less labor and expense, they could have realized a very handsome profit, and sold the remnants much faster and to better advantage; and that

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but for the fraud and neglect of said appellant, they should have cleared $1000 on the goods sold and those to have been purchased and delivered by him. That said appellant has sued and recovered a judgment at law against them, on said notes, for $1750 debt, and $148 14 damages, and threatens to collect the same by execution. The bill prays an injunction which was granted as to $1200 of said judgment, and refused as to the residue.

The answer of the appellant denies positively all the equity and every material allegation of the bill; and insists that the goods sold by him to the appellees were, at the time of the sale, worth more at the wholesale prices in Washington county, than he sold them for to said appellees.

No motion was made to dissolve the injunction: and although a motion for that purpose is copied in the transcript, it does not appear to have been noted of record, or in any manner noticed by the Circuit Court, and is not even endorsed as filed. We cannot, therefore, consider it as any part of the record.

The cause appears to have been regularly set down for final hearing, on the bill, answer, exhibits, and depositions. Upon the hearing the court decided that the complainants relied upon unliquidated damages, if any, and therefore ordered that a Jury come at the next term to enquire what damages the complainants had sustained, if any, and continued the cause. The record shows that at a subsequent term a jury was empannelled and sworn to enquire as to the loss and damage which the complainants sustained by reason of preparations for merchandizing, neglecting to cultivate their farms and attend to the ordinary pursuits of farming, and the loss and damages which they sustained by reason of their not being furnished with $3000 worth of assorted goods at New Orleans prices, deducting 12½ per cent. upon cost and carriage, and a true verdict to render according to evidence. The first jury sworn disagreed, and a juror being withdrawn, a second jury was called and sworn as aforesaid, which assessed the appellees' damages by reason of the premises to $1500; and thereupon the Circuit Court proceeded to pronounce a final decree. That the injunction for $1200, should be perpetual and absolute, and that the appellees should recover of the appellant $300, the residue of the damages assessed as aforesaid, and have execution therefor; and that the appellant should pay the costs of suit.

To reverse which this appeal is prosecuted. Many errors have

been assigned which it will not be necessary to notice. The 11th, 12th, 13th, and 14th, may be considered together. The 11th assignment asserts, that said Circuit Court took cognizance of a mere personal contract for the assessment of unliquidated damages, when (if any such contract existed) the said appellees had their full, complete, and adequate remedy at law. The 12th assignment of error asserts that the Circuit Court exonerated said appellees from the payment of the purchase money for the goods mentioned in their bill, purchased by them from said appellant, without the contract of purchase having been rescinded by said appellees, or the goods returned to said appellant. The 13th assignment of error is substantially the same as the 11th, asserting that the bill contained only matter cognizable in a court of law, without any thing to give jurisdiction to a court of equity. The 14th assignment of error is general: that the decree is for the appellees, whereas it ought to have been for the appellant, and the bill dismissed.

It is contended on the part of the appellant, that a court of equity can exercise no jurisdiction in the case, because the appellees have full, complete, and adequate remedy at law. The several allegations of the bill have been reviewed, and it is contended that each of them is examinable at law and ought to be decided in precisely the same manner in both courts. If, upon the sale of the remnants, it was a part of the original contract that the appellant should furnish the appellees a stock of $3000 worth of goods the ensuing spring, to be purchased by him in New Orleans, and delivered in Washington county at 12½ per cent. on New Orleans cost and carriage, his failure to supply the goods would subject him to an action at law in which the appellees might recover damages equal to the loss suffered by reason of his failure to perform the contract, and they could do no more in equity: but it would not be a ground for a rescission of the contract, either at law or equity.

If it was not part of the original contract, but merely an undertaking without consideration, no right accrued therefrom to the appellees either at law or in equity. If the contract, as stated in the bill, had been reduced to writing and duly executed and sealed by the appellant, the appellees might be compensated in damages in an action at law upon the breach, and could have nothing more in equity; and although the contract, covenant, or promise, might comprise a part of the consideration for the $2700 paid, or agreed to be paid, by the

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appellees to the appellant, (as the appellees insist it does,) still the undertakings, though mutual, would be independent, and a breach by either party would form the basis of an action at law in favor of the other party; but such breach could not alone constitute the ground of equity jurisdiction in favor of either party. The facts alleged are all examinable at law, and a court of law is as capable of deciding on them as a court of equity. In such case the existence of some fact which disables the party having the law in his favor from bringing his case fully and fairly before a court of law, has been generally supposed to be indispensable to the jurisdiction of a court of equity. Some defect of testimony, some disability, which a court of law cannot remove, is usually alleged as a motive for coming into a court of equity. But in this case the bill alleges nothing which can prevent a court of law from exercising its full judgment. No defect of testimony is alleged, but it is shown by the bill that witnesses to the contract were called to bear testimony to it when it was entered into. No discovery is required, no insolvency intimated, or other cause stated why a recovery at law could not be obtained and made available. No accident suggested, no appeal made to the conscience of the appellant, and lastly that there is no distinct ground of equity jurisdiction whatever set forth in the bill.

The argument on the other side is, that the appellees are wholly without remedy at law: that they could make no legal defence to the action at law, because it was founded on writings obligatory: that the Court of Chancery has undoubted authority to enjoin the judgment at law, and when jurisdiction once attaches, the court will retain the case until all matters connected with it are settled, whether they would *per se* have been the subject of chancery jurisdiction or not. That all irregularities, not objected to in the court below, are to be considered by this court as waived. That this court is not at liberty to review any points in the cause which were not expressly decided by the Circuit Court: and lastly, that the bill expressly charges the appellant with fraud in the premises.

The allegation of fraud is not distinctly and positively made in the bill, but if it was so made, it is positively denied by the answer, and is not supported by the proof. It is not alleged that there was any misrepresentation or concealment on the part of the appellant, at or before the sale, either in relation to the quantity, quality, or description of the goods, and it is proved that they had been in the

possession of the appellees for several months previous to the sale, and that they were placed in their possession to sell on commission. They therefore must have known the quantity, quality, and value of the goods as well, if not better, than the appellant. Consequently, there can be no pretence of fraud or imposition in the sale. And if the appellant did misrepresent the advantages to result to the appellees from the purchase, that was not a matter of which he was under any legal obligation to speak the truth, and however contrary to good faith and sound morals it may be, cannot form the basis of any suit either at law or in equity. It has been repeatedly held that it is not every wilful misrepresentation, even of a fact, which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it: for courts of equity like courts of law, do not aid parties who will not use their own sense and discretion upon matters of this sort.

STORY, in his treatise on equity jurispudence, says: "To this class "may be referred the common language of puffing and commendation "of commodities, which, however reprehensible in morals, as gross "exaggerations or departures from truth, are nevertheless not treated "as frauds which will avoid contracts. In such cases the other party "is bound, and indeed is understood to exercise his own judgment, if "the matter is equally open to the observation, examination, and skill "of both. To such cases the maxim applies *simplex commendatio non* "*obligat.* The seller represents the qualities or value of the commodi-"ty and leaves them to the judgment of the buyer." *Story's Equity Jurispudence* p. 208, 211. The same principle is stated in *Kent's Commentaries*, 2d vol., p. 379.

In this case the appellees do not seek to rescind or avoid the contract of sale, but expressly affirm it, and ask a compensation in damages for the alleged breach of the contract on the part of the appellant, without showing any obstacle whatsoever to their recovery in a court of law, or even alleging that they will suffer a great or irreparable loss or injury by being obliged to resort to a court of law to recover their damages. The question of damages is purely legal, and if the appellees are warranted in coming into a court of chancery to have their unliquidated damages assessed and set off againt the appellant's judgment at law; the like resort may be had to the courts of equity in every case of mutual and independent covenants, especially if one

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of the parties should sue and recover a judgment at law which the adverse party might pray the court to enjoin and setoff with his damages sustained by reason of the breach of covenant or agreement in his favor, and thus the jurisdiction in that class of cases might be effectually taken from the courts of law and transferred to the courts of equity, contrary to what is understood to be the well defined limits of the jurisdiction of courts of equity. And the attempt of the appellees to consider the failure of the appellant to keep and perform his contract or promise, as a fraud enabling the Court of Chancery to take jurisdiction of the subject for any purpose whatever, cannot be sustained upon any principle recognized by courts of equity. It is said that the court had an undeniable right to grant the injunction; and having taken cognizance of the case for that purpose might retain it until all matters connected with it were settled. This position, as stated, is not strictly correct. The rule established by courts of equity is, that when they have once taken jurisdiction of a case for one purpose, they will generally retain the case until the whole subject is disposed of; but the primary and original object of the suit must be one clearly within its jurisdiction, and even then the court will not always retain the bill. In the case of *Graves and Barnewell* vs. *the Boston Marine Insurance Company*, the bill was filed to obtain relief against an alleged mistake by omitting to insert the name of *Barnewell* in the policy, and also to charge the Insurance Company upon the policy of insurance effected by them. The answer denies that there was any mistake, and the evidence did not satisfactorily prove it. Upon the final hearing the court refused to reform the contract or grant the relief sought by the bill, and dismissed the bill upon the ground that *Barnewell* could have no relief on the policy either at law or in equity, and *Graves* had an adequate remedy at law on the policy to the extent of his interest; and the decree was affirmed in the Supreme Court of the United States. 1 *Peters' Con. Reports* 435.

In that case the bill was retained solely upon the ground of the alleged mistake in the policy, until a final hearing, when that allegation not being sustained by the proof, the court refused to retain the suit for the purpose of charging the Insurance Company upon the policy—the remedy being complete at law—and for that cause alone the bill was dismissed.

In the case before us, no specific ground of equity is alleged in the bill; no accident or mistake is charged; no specific performance of

any contract is sought to be enforced; no want of consideration is shown; no irreparable mischief or injury is to be prevented by the injunction; no peculiar hardship is shown to exist; no trust is to be enforced, or complicated accounts settled. The appellees have received the whole consideration for which they contracted. The stock received, together with the covenant or promise of the appellant to furnish an additional supply the ensuing spring, constituted the entire consideration for which they consented to pay $2700. The appellant's undertaking was to be performed several months after the date of the contract, and the appellees relied solely upon his parole undertaking (an undertaking which, although materially varied by the answer, is substantially proved by the evidence) and if they failed to take from him a binding obligation or promise to perform the contract on his part, it was their own fault. There was no mistake, misrepresentation, or concealment about it; the contract is just what all the parties to it intended it should be; and if the appellant has failed to perform his part in the manner stipulated, it is nothing more than the ordinary breach of a contract to pay money or to do, or refrain from doing, any other specified act, and cannot, without some concurring equity, constitute a ground of relief in a court of equity. The appellees treat the promise of *Dugan* as binding upon him, thereby affirming the whole contract, and considering themselves damnified by his breach of promise, pray an injunction, to restrain him from enforcing his judgment at law against them. This practice is without precedent, and is contrary to the well established principle that uncertain damages arising on a breach of contract, cannot be made the subject of a setoff, either in a court of law or equity. The authorities fully sustain these principles.

In the case of *Duncan* vs. *Lyon*, 3 *John. Ch. Rep.* 357, 358, which was a bill filed for the purpose of obtaining a discovery and setoff as well as an injunction to stay the proceedings at law in a suit founded on an agreement under seal containing mutual covenants for the furnishing of timber, &c., by the complainant, which the defendant was to take to Montreal and Quebec, &c., and to pay the complainant half the proceeds, &c., and furnish an account, &c., an injunction was obtained, but not until an award had been made by arbitrators in favor of the plaintiff at law. CHANCELLOR KENT, after saying that the bill was filed too late for a discovery, declares that "it is a settled principle that a party will not be aided after a trial at law, unless he can

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impeach the justice of the verdict, or report, by facts or on grounds of which he could not have availed himself, or was prevented from doing so by fraud or accident, or the acts of the opposite party, unmixed with negligence or fault on his part. This point has been so often ruled that it cannot be necessary or expedient to discuss it again, and it is one by which I mean to be governed."

Having disposed of the case as to the discovery sought, he proceeds to examine the claim to setoff, and says: "The matters of account stated in the bill were not proper subjects of setoff in the action of covenant, and if the discovery had been obtained in season, I presume it would not have aided the defence. The breaches assigned in the action at law were that the plaintiff had refused to perform his part of the covenant in furnishing lumber and provisions, &c., and the demand at law was in the nature of a redress for a wrong or injury committed, and not for a debt due. It rested entirely on uncertain and unliquidated damages. There cannot be a setoff even of a debt, against the demand of the plaintiff, unless that demand be of such a nature that it could be setoff by a debt, if it existed, in him. There must be mutual debts: this is the settled doctrine in the courts of law. The same rule prevails, also, in courts of equity. The practice may perhaps be more liberal in respect to *mutual* credits, but there is no case in which a setoff has been allowed, where the demand was for uncertain damages arising on a breach of covenant. The courts of law and equity follow the same general doctrine on the subject of setoff. If the recovery at law is to be taken under the present motion as a just recovery, then it would be unreasonable to delay the defendant until the accounts between the parties can be taken and stated, and the balance struck in this court. One judgment may be setoff against another, but here is a demand on one side raised to a debt certain, by a legal assessment, and an uncertain claim on the other, depending on a settlement of accounts. These accounts were not the subject of setoff, and there is no case to warrant me to stay execution on the demand until the other is settled and in a condition to be setoff."

The principles asserted in that case are in point in this, and the promise being merely *parole*, cannot vary the case. The damages are equally uncertain whether they arise upon the breach of a parole promise or covenant; and the uncertainty of the claim is the principal ground of its exclusion. The promise alleged is not for the

payment of money, but for the performance of certain acts by the appellant, and the claim to damages results from his nonperformance of those acts. This claim is as uncertain, at least, as if it rested upon a breach of covenant to perform the same acts. It is no debt due and cannot therefore be made the subject of setoff in either a court of law or equity.

The court below decreed a setoff of $1200 of the damages assessed by the jury, and a perpetual injunction against the appellant's judgmment at law, and awarded execution against the appellant for $300, the residue of said damages.

In pronouncing the decree, the Circuit Court expressly decided upon and in favor of the equity of the appellees' claim, as well as their right to enforce that claim in a court of chancery. And as the cause must be decided upon the ground there being no equity upon the face of the bill, and no facts therein to authorize or sustain the final decree pronounced in the cause, we deem it unnecessary to notice the other errors assigned, or to decide how far the court is at liberty to correct errors, which do not appear to have been expressly decided upon by the Circuit Court, or to declare under what circumstances the same will be considered as waived.

Wherefore, upon the reasons above stated, it is the opinion of this court that there is no equity in the bill of complainant, and that the Circuit Court, sitting as a court of chancery, erred in granting relief thereupon to the appellees and perpetually enjoining the appellant from proceeding upon his judgment at law. The decree, therefore, must be reversed, annulled, and set aside, the injunction dissolved, with damages, according to law, and the bill dismissed with costs.

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HAWKINS vs. Carrington.

HAWKINS *against* CARRINGTON.

APPEAL *from Miller Circuit Court.*

This day came the appellee, by his attorney, TRAPNAL and COCKE, and produced here in court, and filed a duly certified transcript of the judgment and proceedings in this case, according to the form of the statute in such case made and provided, whereby it appears that an appeal was prayed by said appellant, and allowed by the Circuit Court of Miller county, more than thirty days before the first day of the present term of this court, and the said appellant having failed to prosecute this appeal, and cause to be filed in the office of the Clerk of this Court, ten days before the first day of the present term of this court, to which said appeal was returnable, a perfect transcript of the record and proceedings in this case,

Therefore, on motion of said appellee, it is considered by this court that the judgment of the Circuit Court of Miller county, given in this cause, be, and the same is hereby, affirmed; and that the appellee recover of the appellant the costs in this case, in this court expended. And it is further ordered, that the appellee have execution of his said judgment in the court below. All which is ordered to be certified to the said Circuit Court.

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF ARKANSAS,

IN JANUARY TERM, 1838—BEING THE 62d YEAR OF OUR INDEPENDENCE.

JEFFERY *against* MARSHALL.

APPEAL *from Lawrence Circuit Court.*

A recognizance in appeal, conditioned "for the prosecution of the appeal," is not sufficient.

The appellee moved to dismiss this appeal, for want of a sufficient recognizance.

HAGGARD and TAYLOR, for the motion.

FOWLER, *contra.*

DICKINSON, *Judge*, delivered the opinion of the court: The appellant in this case prayed an appeal from the Lawrence Circuit Court, which was granted; and thereupon *William F. Denton* and *James Pope*, acknowledged themselves justly bound with the plaintiff in the sum of One Hundred Dollars, "*for the prosecution thereof.*"

The appellee moves to dismiss this case upon the ground that the recognizance is not sufficient. The statute requires that the plaintiff, if he appeal, shall enter into a recognizance with one or more sufficient sureties, in a sum sufficient to cover the costs in the Circuit Court and the costs of such appeal, conditioned that he will pay the costs in case the judgment of the Circuit Court shall be confirmed by the Supreme Court. See *Digest*, page 334.

It is evident that the recognizance given by the appellant in this case is not in conformity with the statute, for it contains no condition whatever. Therefore the motion to dismiss must be sustained.

Appeal dismissed, with costs.

LITTLE ROCK, Jan'y 1838.

HALDERMAN vs. FRISBIE

HALDERMAN *against* FRISBIE.

ERROR *to Independence Circuit Court.*

Where the terms of a Court are changed by law, and no provision is made for the causes then pending in such court to have day and be tried at the term fixed by law, those cases are not discontinued.

The same court still existing, the mere fact of changing the time of holding its terms, works no discontinuance.

The opinion given in this case clearly presents all the facts therein. It is therefore not necessary that it should be here stated.

WALKER and HAGGARD, for the plaintiff in error, relied upon the case of *Bennett* vs. *Engles*, decided in this court at July term, 1837, *Ante* p.

RINGO, *Chief Justice*, delivered the opinion of the Court: This is an action of debt, commenced in the Independence Circuit Court, returnable to the May term, 1834. At that term the defendant appeared and filed a general demurrer to the declaration, to which the plaintiff joined issue, and judgment was thereupon given for the defendant. The plaintiff then, by leave of the court, amended his declaration, and the cause was continued generally to the next term. At the November term, 1834, the Circuit Court, on motion of the defendant, decided that the cause was discontinued by operation of law, and dismissed the same. To correct that decision this writ of error has been prosecuted.

One question only is presented by the record and assignment of error, for the decision of this court; that is, "did the court below err in dismissing the case on the ground that it was discontinued by operation of law?" When this suit was commenced, the Independence Circuit Court was required by law to be held on the Second Mondays in May and November. See *Act of the Legislature of* 1829. *Pamphlet* page 22. By an act of the Legislature, approved the 5th day of November, 1833, which took effect on the first day of November, 1834, the time of holding said court was changed from the SECOND to the THIRD Mondays in May and November, without any declaration that the suits and proceedings then pending in the court, should be continued therein, or be tried and decided by said court, at the terms thereof to be held at the times prescribed by the act of

1833. For the omission of such declaration, it was held by the court below, that all suits and cases pending therein when the act of 1833 took effect, were discontinued by operation of law. To this conclusion we cannot yield our assent. The causes were properly in court, and stood continued by the order of the court or the operation of law, until the succeeding term, and the time when that term should be held, could make no difference as to the question of a discontinuance. If the same court existed, the mere fact that the times of holding the terms of the court were changed by law, would not, of itself, operate as a discontinuance.

This question was first brought before the Superior Court of the late Territory of Arkansas, at the January term, 1835, in the case of *Boswell, amd'r.* vs. *Newton*, and was then fully examined and decided, and the decision of the Circuit Court corrected and reversed.

The same question was again brought before this court, at the July term, 1837, in the case of *Noah Bennett, administrator of James Bennett, deceased*, vs. *Henry A. Engles, administrator of Henry Curran, deceased*, and the principles declared in the case of *Boswell, adm'r.* vs. *Newton*, reviewed and confirmed.

The principle established by the cases abovementioned, is considered as too clear and too well settled to require further argument or illustration.

The judgment of the Circuit Court, dismissing this cause from the docket, must be reversed and set aside, with costs, and the case remanded to the court from whence it came, to be proceeded in according to law.

LITTLE ROCK, Jan'y 1838.

GILBREATH vs. KUYKENDALL

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7	359
1	50
59	586

OLIVER GILBREATH *against* JAMES KUYKENDALL.

ERROR *from Crawford Circuit Court.*

On judgment by default, the defendant below is entitled to all legal exceptions to the writ and service thereof.

The return of the Sheriff must show with reasonable certainty, the time, place, and manner of the service, and the name of the person upon whom it is made.

"Served this Summons right, by reading it to him," is not a sufficient service.

A writ running in the name of the United States of America, issued after the 15th June, 1836, is void.

This was an action of debt commenced in Crawford Circuit Court. Judgment was taken by default, and writ of error prosecuted by *Gilbreath*, defendant below. The case was submitted without argument.

WALKER and FOWLER, for the plaintiff: This was an action of debt brought by *Kuykendall* against *Gilbreath*, in the Circuit Court of Crawford county, *State* of Arkansas; and judgment rendered against *Gilbreath*, in the December term thereof, 1836, by default.

It is contended, for the plaintiff in error, that the declaration was not sufficient in law, because there was no proper venue: the declaration should have alleged that the contract, &c., was made in Crawford county, *State* of Arkansas, to show that it was within the jurisdiction of the Court; said suit having been instituted *after* the admission of Arkansas into the Union as a *State*. See *State Const.*, *Schedule*, sec. 1.—*Act of Congress of June* 15, 1836.

It is also contended that the writ is void because it does not run in the name of the "*State of Arkansas.*" Arkansas being a sovereign State, and her Constitution in full force from and after the 15th of June, 1836, the date of her admission into the Union. See *Act of Congress* and *State Constitution*, article 6. sect. 14, p. 16.

It is also contended that said original writ is a nullity and void, because, 1st. It was not issued by any officer known to the Constitution, or in or returnable to any court known to the Constitution, as appears from the face of the writ. 2d, It is not made returnable to the term next after its date; or to the second term after its date. 3d, It is not made returnable to any term fixed by law for holding said Circuit Court. The writ bears date, August 18, 1836, and is returnable "on the first day of our next September term, it being the fourth Monday

of August *next;*" consequently returnable in *August*, 1837, *eight months after* judgment appears to have been given. *Pope, Steele & McC's. Dig.* p. 313, sec. 1, 3, 4; p. 320, sec. 18; *Acts of* 1835, p. 76, sec. 2; *Johns. Dig.* 503; 2 *Johns. Rep.* 190; 4 *Johns. Rep.* 309.

It is also contended that there was no service of the writ and *declaration*, legal or illegal; and as *Gilbreth* did not appear to cure the want of service, judgment against him was clearly error. *Pope, Steele and McCampbell's Dig.* p. 317, sec. 10.

It also appears that the contract given in evidence was not under seal, while the one declared on was under seal, and that such variance is fatal. And if it be a writing obligatory, it is one with conditions, which conditions should have been stated and breaches assigned, before judgment. And whether under seal or not, *on default*, it is such an instrument as would require the intervention of a Jury to assess the damages, at the *next* term *after* the default. 1 *Saunders' Rep.* 51 to 58. *Gainsford* vs. *Griffith*; *Pope and McCamp. Dig.* p. 322, sec. 24; p. 348, sec. 95. Cases in this Court, *Campbell and wife* vs. *Strong*, and *Robbins and Reese* vs. *Horner*.

CUMMINS and PIKE, *contra.*

RINGO, *Ch. J.*, delivered the opinion of the Court: This is a writ of error with supersedeas to a judgment by default in an action of debt, obtained by *Kuykendall* against *Gilbreath*, in the Crawford Circuit Court. The suit was commenced and the writ bears date on the 18th day of August, 1839, and commences as follows, to wit:

"TERRITORY OF ARKANSAS,
County of Crawford.

"The United States of America to the Sheriff of Crawford county, "Greeting: You are hereby commanded to summon *Oliver Gilbreath*, "if he be found in your bailiwick, to appear before the Judge of our "Circuit Court, at the court-house in the county aforesaid, on the first "day of our next September term, it being the fourth Monday of "August next, then and there to answer *James Kuykendall*," &c.

The Sheriff's return to the writ, is in these words, to wit: "Served "the within summons *rite*, by reading the same to him in presence of "*A. Boyd* and *James Rise*. *Richland township, Crawford county*, "*Arkansas Territory, August* 28th, 1836.

"JESSE MILLER, deputy Sheriff.
"WM. P. MOORE, *Sheriff.*"

LITTLE ROCK, Jan'y 1838.

GILBREATH vs. KUYKENDALL.

The defendant below failed to appear, and final judgment by default was given against him at the December term, 1836, for the debt mentioned in the declaration, and damages for the detention thereof, with costs of suit. Several errors have been assigned, most of which it is unnecessary to mention. The second is to the effect that the writ runs in the name of the "United States of America," when it should have run in the name of the "State of Arkansas." And the fourth states, in substance, that it appears that there was no legal service of the writ and declaration on *Gilbreath*, and that he did not appear to the action. The questions raised by these assignments of error, may well be considered together; for if the writ was void, or not legally executed on the defendant below, he was under no legal obligation to appear or answer the plaintiff's action, and could not be considered as in default in failing to do so. The defendant's right to insist upon a valid writ and legal service thereof upon him, before he was bound to appear, or subject to the consequences of a legal default for not appearing, unless waived by himself, must be admitted. No such waiver, either in fact or in law, expressed or implied, is shown by the record, and none can be presumed. Consequently, as the defendant below did not appear, he must be regarded as entitled to the benefit of all legal exceptions to the writ and service thereof.

We will now proceed to examine the writ and return, and see how far they justify and support the judgment given thereupon by the court below. The writ was an ordinary summons. By the act of 1807, sec. 10 in *Steele and McCampbell's Dig.* of the laws of Arkansas, pages 316, 317, yet in force in this State, it is provided that "The service of a summons shall be by reading the writ, declaration, "petition, or statement, to the defendant, or delivering him a copy "thereof, or leaving such copy at his usual place of abode with some "person of the family above the age of fifteen years, and informing "such person of the contents thereof; such service to be at least "fifteen days before the return day thereof."

This statutory provision furnishes the only rule by which the officer executing the summons must be governed. He must conform to the directions there given, and any material variation therefrom, will vitiate the service. His return ought to show, with reasonable certainty, the time, place and manner of the service, and the name of the person or party upon whom it is made, so that it may appear to the court that the service was made in conformity with the provisions of the

statute upon the person or party named in the writ, at a proper time, and within the jurisdiction of the officer making it. By comparing the return of the Sheriff to the writ in this case, with the statutory provisions above recited, it appears, manifestly, that the service was not made in the manner directed. The summons, only, and not the writ and declaration, as required by the statute, was read; but to whom that was read, does not appear by the return: and for aught that does appear, the writ may have been read to some person not named in it: we will not presume the fact to have been so; yet such might have been the case, and every thing stated in the return be true. The service was, therefore, not only not in conformity with the provisions of the statute, but the return thereof by the Sheriff is too indefinite and uncertain to be the foundation of a judgment by default. By the Constitution of this State, under the title *Judicial Department*, sec. 14, page 16, it is declared that "all writs and other process shall run in the name of the State of Arkansas, and bear *teste* and be signed by the Clerks of the respective courts from which they issue." The first section of the Schedule to the Constitution, page 19, declares, "That no inconvenience may arise from the change of government, "we declare that all writs, actions, prosecutions, judgments, claims, "and contracts of individuals and bodies corporate, shall continue as "if no change had taken place; and all process which may be issued "under the authority of the Territory of Arkansas *previous to the ad-* "*mission of Arkansas into the union of the United States*, shall be as "valid as if it issued in the name of the State." By act of Congress, approved June 15th, 1836, Arkansas was admitted into the union of the United States as a sovereign and independent State. From that period the Constitution has been in full operation as the paramount law of the State. The provision first quoted, requires that all writs and other process shall run in the name of the State of Arkansas, and the declaration in the Schedule only applies to writs and process issued "previous to the admission of Arkansas into the union of the United States." This writ was issued more than two months after the admission of Arkansas into the Union, and does not run in the name of the State of Arkansas, as required by the Constitution; and for that reason it is void. Other exceptions to the writ have been assigned by the plaintiff in error, which it is unnecessary to notice, as we consider the writ void, and the service thereof entirely insufficient, for the reasons above stated.

LITTLE ROCK, Jan'y 1838.

GILBREATH *vs.* KUYKENDALL

The judgment of the court below must therefore be reversed, with costs; but as the plaintiff in error has now made himself a party to the suit, by voluntarily appearing and prosecuting his writ of error, according to the rule of practice established in similar cases by the Court of Appeals of Kentucky, in which we fully concur, he must, upon return of the case to the court below, be considered as regularly before the court, in like manner as if he had been duly served with process to appear at the term to which the cause is returned.

The case must therefore be remanded to the Crawford Circuit Court, to be proceeded in by that court, at the next regular term thereof, as if the defendant below was duly served with process returnable thereto.

LITTLE ROCK, Jan'y 1838.

McKEE vs. MURPHY.

HESTER vs. MURPHY.

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McKee *against* Murphy.—Hester *against* Murphy.

Error *to Conway Circuit Court.*

If the original process before a Justice of the Peace is correct, it makes no difference on appeal whether it is regularly served or not.

If the defendant does not appear before the Justice and make his objection to the service, he admits the jurisdiction of the Justice and his right to try the cause.

The defendant having appealed to the Circuit Court, the plaintiff must be permitted to sustain his action on a new trial upon the merits.

Where a court has no jurisdiction of the case, there can be no judgment for costs.

In these cases the same judgment was given. In each the plaintiff in error brought his suit on a writing obligatory, before a Justice of Welborn township. The process was a summons directed to the Constable of the same township, who served the same personally on the defendant, in Cadron township, (all in Conway county,) in which latter township the defendant resided. There was no Justice or Constable in said township of Cadron, at the time of the commencement of the suit. The defendant suffered judgment by default to go against him before the Justice, and appealed to the Circuit Court. When the cause was called there, he moved the Circuit Court to dismiss the suit, on the ground that the Justice had no jurisdiction of the case; which motion the court sustained, and gave judgment for the defendant in error for costs.

Trapnall and Cocke, for the plaintiff in error, contended that the Circuit Court erred: 1st, In quashing the proceedings on the appellant's motion. The Justice had jurisdiction: the suits respectively were founded on writings obligatory for less than $100 each. If the Justice had not jurisdiction of defendant's person, because of his residence in a different township, the privilege was merely personal, and the defendant could only avail himself of it by appearing personally and pleading to the jurisdiction.

This he failed to do, and appealed to the Circuit Court. On the appeal that court had unquestionable jurisdiction of the cause and person, and was imperatively required by statute to try the cause on its merits. The acts on this subject are remedial, and should be liberally expounded, so as to obviate the evil and advance the remedy. One evil was, that in many townships no one could be found to act as

LITTLE ROCK, Jan'y 1838.

McKEE vs. MURPHY.

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justice or constable, and the administration of justice was thereby defeated. To remedy which the act of 1816, *New Digest*, p. 366, sec. 44, was passed. Another evil was, that upon appeals from Justices, suits were dismissed and proceedings quashed, by the Circuit Courts, for errors, omissions, and defects, in the proceedings before the Justice, insomuch that the administration of justice was thereby defeated, and the parties subjected to great delay, loss, and inconvenience; to remedy which, the act of 1831, *New Digest*, p. 374, sec. 57, was passed.

2d, If the Justice had exceeded his jurisdiction, the defendant might, in addition to his remedy by plea to the jurisdiction, have obtained redress by writ of prohibition, which was his only remedy after judgment given. The authorities on this point are full and conclusive; and in a proper case the writ may be obtained either before or after judgment. See 7 vol. *Comyn's Digest*, page 137, *title prohibition*. By the appeal, the defendant waived all objection to the jurisdiction, and could not be heard to question (in such a case as this) the jurisdiction of the tribunal to which he had himself resorted. In cases where the court has not jurisdiction of the subject matter, no waiver or failure to plead, or even consent of the parties, could give jurisdiction; but it is othewise where it has cognizance of the subject matter, although the defendant may claim the right of being sued in some other court or place. This distinction is well sustained by authority. Its application to these cases is direct, and absolves them from all difficulty.

3d. Again, if the court had no jurisdiction, it could simply dismiss the suits, or strike them from the docket, without giving any judgment for the costs. This principle is fully sustained both by reason and authority: yet in these cases the court adjudicated costs against the plaintiff, which was most certainly erroneous.

LIST OF AUTHORITIES.—1. To show Justice's jurisdiction: See *New Digest*, p. 366, sec. 44; 374, sec. 57.

2. To show how and when advantage of want of jurisdiction may or must be taken: See *Chitty, Jurisdiction*, 384.

3. To show that it was too late to object to it on defendant's appeal: See *Comyn's Digest*, vol. 7, p. 148; and 3d *Littell's Rep.* 444; and 1st *Pirtles Digest*, 24, 7; *Monroe*, 228.

4. To show that if court had no jurisdiction, costs could not be

adjudged: See *Skillern's Exr's.* vs. *May's Exr's.*, 2 *Peters' Con. Rep.* p. 367; *Montalet* vs. *Murray*, p. 19, *same book.*

5. To show writ of prohibition was proper remedy: See *Comyn's Digest*, 7th vol. p. 137, title *Prohibition.*

HALL, *contra*; insisted that the service of process in Cadron township was absolutely void, being beyond the bounds of the Justice's jurisdiction; and cited *Ark's Digest*, p. 355; and the case of *Ledbetter* vs. *Kendall*, decided in the late Superior Court of the Territory of Arkansas.*

DICKINSON, *Judge*, delivered the following opinion in each case: This action was founded on a writing obligatory, and commenced before a Justice of Welborn township. The process was directed to the Constable of the same township, by whom there was a personal service in the adjoining one where the defendant resided; and on the day of trial, a judgment was entered against him by default, from which he appealed to the Circuit Court. When the case was called, the defendant moved to dismiss, on the ground that the Justice had no jurisdiction of the case, the defendant, *Murphy*, being a resident of a different township from the one in which the Justice resided; which motion was sustained by the court, the case dismissed, and judgment entered against the plaintiff for the costs, as well in the Circuit Court as in the Court below, as appears by the bill of exceptions filed; and the plaintiff now brings his writ of error to reverse the judgment. Several objections are raised to the proceedings in this case. The first which we deem material to be noticed, questions the propriety of sustaining the motion to dismiss. The decision of the Circuit Court appears to be predicated upon the ground that they had a right to look into the proceedings of the Justice, and if there was any irregularity, to quash them and dismiss the case. Is this position sustained by the statute? In 1814, the Legislature authorized an appeal from the judgment of a Justice in all cases within his jurisdiction, (except when the judgment had been entered by default or nonsuit,) and that it should be tried and determined in the Circuit Court, in its order, like other cases where the parties are considered in Court the first term. In 1831, the act was passed which extended the right of appeal to all cases, but expressly provides that it shall be tried *on its*

*At term, A. D. 183

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merits, without regard to any irregularity or want of form in the trial or proceedings of the Justice. See *Digest* 373–45. To give these provisions effect, if the original process is correct, it makes no difference whether it is regularly served or not. The defendant, *Murphy*, by not availing himself of his defence, if he had any, before the Justice, at the proper time, admitted his jurisdiction and right to try the case. He appealed, as he was authorized to do, to a court competent to decide on the matter in controversy. If the party who was successful before the Justice, was prepared to sustain his action on a new trial upon the merits before the Circuit Court, he must be permitted to do so: the defendant can there make his defence if he has any. The second objection, that the court erred in giving judgment for costs, must also be sustained; for if they had no jurisdiction of the case, there could be no judgment for the costs.

The judgment of the Circuit Court must therefore be reversed and set aside, with costs, and this case remanded for proceedings to be had not inconsistent with this opinion.

PHILLIPS AND SECURITY *against* PENNYWIT.

IN ERROR, *from Pulaski Circuit Court.*

It is a general rule that all actions upon contracts, whether expressed or implied, by parole, under seal or of record, must be brought in the name of all parties legally interested.

Nonjoinder of a party plaintiff who ought to be joined, is good cause of demurrer, or fatal on arrest of judgment or in error, may be pleaded in abatement or is ground of non-suit. The same principle applies to part owners of a ship: they are partners as to freight.

Dormant partners need not join. Nor infants, nor nominal partners.

Where one partner represents himself as acting on his own account, and the firm sue, they will be non-suited.

The party with whom the contract has been expressly made, may alone maintain the action, though others may be interested.

Where all the contracts of a vessel and all its transactions are carried on in the name of one part owner, he may sue alone: the other part owner is merely a dormant partner.

This was originally an action on an account for freight due by *Phillips* to the steamboat *Neosho*, brought before the Justice, by and in the name of *Pennywit*, owner of the steamboat Neosho. Judgment being rendered by the Justice for *Pennywit*, *Phillips* appealed to the Circuit Court. In the Circuit Court it appeared upon the trial that an individual named *Yeatman*, not a party to the suit, was part owner of the boat with *Pennywit*, and beneficially interested in the event of the suit, but that the business of the boat was managed solely by *Pennywit;* all her contracts made by him, and that she was entered in port in his name. On this state of case, the plaintiff in error moved the Circuit Court to nonsuit the plaintiff there, for nonjoinder of *Yeatman*, as a party plaintiff. This motion the Circuit Court overruled, and gave judgment for *Pennywit*, for the amount of the account.

CUMMINS and PIKE, for the plaintiffs in error: No principle of law is more clearly settled than the one here brought up for consideration, to wit, that nonjoinder of a party plaintiff who ought to be joined, is fatal in every stage of the proceedings, in arrest of judgment or on error. See 2d *Wheaton's Selwyn*, p. 867–8. It is clear that *Yeatman* was a partner of *Pennywit*, and as being part owner of the said boat, beneficially interested in the result of this suit. See also 1st *Chitty on Pleading*, p. 7, 8; 1 *Johns. Rep.* 122, *Bird and others* v. *Pierpoint*, and 2 *Saunders on Pleading and Evidence*, p. 702, 706; *Story's Pleading*, p. 20, 88; 5 *Burr*, 2611; 1 *Bos.* 71; 6 *T. R.* 369; 2 *Str.* 819; 1 *Sid.* 238; 1 *Saund.* 154, *N.* 1, 291 f.; 2 *Str.* 1146. Part owners of a ship are not excepted from the general rule: *Story*, 88;

LITTLE ROCK, Jan'y 1838.

PHILLIPS vs. PENNYWIT.

3 *Lev.* 354; 1 *Salk.* 32; *Str.* 820; *Show.* 189; *Carth.* 170; 1 *Saunders*, 291, *notes; Abbott on Shipping*, 81, 82.

It is clear that the judgment in the court below in favor of *Pennywit*, would by no means release the defendants below from the demand of *Yeatman*. See *Story*, 20; 6 *Mars. Rep.* 460; 7 *T. R.* 279.

It may be said, as in the court below, that *Pennywit*, being master of said boat at the time the contract arose, had the right to sue alone, and the principles of maritime law will be claimed as applying to the present case. The plaintiff in error denies the position. This is an action brought in a common law court, and by the rules of common law it must be decided. Again, if *Pennywit* would sue alone, he should have sued as master. When he sued as owner, he showed that he claimed in a character in which he did not stand alone in the suit, and the rule of law heretofore mentioned applied. Were *Pennywit* and *Yeatman* partners? They were joint owners; they were interested and participated in the profits of the boat. It is not necessary to a legal partnership that it should be confined to commercial business. See 3d *Kent*, 6, 7. It has never been doubted that part owners of a vessel were *partners*, so far as regards the freight and cargo. The case of *Nicoll & Vandewater* vs. *Mumford*, 4 *Johns. Ch. Rep.* 523, settled that point, and decided that they were tenants in common of the vessel, but partners as to freight and cargo. This is an action to recover freight. See also 5 *Vesey*, 575. And this case, overruling as it did the doctrine of *Lord Hardwicke*, in 1 *Vesey*, 497, was afterwards overruled in the Court of Errors of New York; 20 *Johns. Rep.* 611, and opinion of *Ch. Justice* SPENCER, in that case; 3 *Kent*, 16, 17; 12 *Mars. Rep.* 54.

TRAPNALL and COCKE, *contra:* This case presents but one question for the consideration of the court, and that is, whether the Circuit Court erred in overruling the defendant's motion for a nonsuit, predicated on the ground that a party was not joined as plaintiff, who by the law of the land ought to have been joined. Although the bill of exceptions shows that the appellee proved *Yeatman* was at the time the cause of action accrued, and at the time of bringing suit, a part owner of this boat with *Pennywit*, and beneficially interested as such in the event of this suit, yet it also shows that *Pennywit* was master of the boat, and that *Yeatman*, although a part owner, was a dormant partner, and had no agency in the transactions of the boat; and that the boat was entered in port in the name of *Pennywit*, and

all its contracts made, and writings entered into, in his name. The rule of law is well settled that dormant partners need not be joined. See 1st *Chitty's Pleading*, p. 7; 1st *Saunders' Reports*, p. 291, note *h.*; 3d *Starkie on Evidence*, p. 1070, marg.; 1 *Comyns' Digest*, 48.

Besides, *Pennywit* was master of the boat and had a right, as such, to carry on its transactions and institute suits in his own name, and did do so.

LACY, *Judge*, delivered the opinion of the court; the Chief Justice absent: This suit was originally commenced before a Justice of the Peace, upon an open account. Judgment was rendered in favor of *Pennywit*, from which *Phillips* appealed to the Circuit Court. On the trial before that court, the appellant moved as in case of a nonsuit, but the court overruled the motion; which opinion was excepted to, and this writ of error prosecuted to reverse the judgment below. The bill of exceptions contains all the evidence adduced on the trial, and the assignment of errors questions the correctness of the decision of the Circuit Court, in overruling the defendant's motion as in case of a nonsuit. The proof is, that at the time the cause of action accrued, and of bringing the suit, *Yeatman* was part owner with *Pennywit* in the steamboat *Neosho*, and as such owner, beneficially interested in the event of the suit; but that *Pennywit* was the master of the boat, and it was entered in port in his name, and all its transactions, contracts, and writings were carried on by *Pennywit* alone, and in his name.

It is said that as the suit is for freight, it cannot be maintained in *Pennywit's* name alone, for *Yeatman* is part owner of the steamboat with him, and ought to have joined in the action.

In general, all actions upon contracts, whether express or implied, or whether by parole, or under seal, or of record, must be brought in the name of the parties legally interested; and a failure to join them is good cause of demurrer, in arrest of judgment, or on writ of error; or it may be taken advantage of by plea in abatement, or is ground of nonsuit on the trial upon the general issue. 1 *Chitty Pl.* 28; 1 *Saunders* 153; 2 *Strange*, 1820; 2 *Starkie*, 424. This principle holds good as to joint or part owners of a vessel or ship, and as to partners in its freight. *Abbott on Shipping*, 81, 82. There are, however, many exceptions to the rule. All ostensible partners of a firm, who have a legal interest in the contract, must join in the action; but dormant partners, though legally interested in the event of the suit,

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need not join; neither is an infant or nominal partner required to join. It has been held in the case of *Myers* vs. *Edge*, and *George* vs. *Clagget and another*, reported in 7 *Term Rep.* 137, 202, and 361, that if one partner represents himself as acting on his own account and the firm sue, they will be nonsuited; and LORD KENYON, in *Leavick* vs. *Shafton*, 2d *Esp. N. P.* 468, refused to nonsuit the plaintiff, though it appeared upon the trial that one of the parties whose name was not joined in the action, was legally interested in the contract at the time it was entered into; but that fact was not known to the defendants. In the case of *Loyd* vs. *Archibold*, 2 *Taun.* 324; 6 *Ves.* 438, it is expressly decided that the nonjoinder of a dormant partner whose name appears not to be held out to the world, is not matter of nonsuit; and *Starkie* lays it down, 1070, that the parties with whom the contract has been expressly made, may alone maintain the action, although it turn out that another person, whose name is not mentioned, is secretly interested. 3 *Greenl.*, *Bastow* vs. *Gray*, 409.

The question then recurs, is *Yeatman* an ostensible or dormant partner with *Pennywit*, in the boat? It is true he is a joint owner, and as such interested in the freight and cargo; but all the contracts of the firm, and all its transactions were made alone by *Pennywit*, and carried on in his name, and he presents himself as the sole and ostensible partner in the management of all its concerns. *Yeatman* is not held out to the world as an ostensible, but as a dormant partner, and therefore the action is rightly brought. Where it appears that the name of a person is not held out to the world as one of the members of the firm, he need not be joined as co-plaintiff in the action. This principle has been repeatedly and expressly recognized in the Court of King's Bench. 1 *Starkie* 25, *Glassop* vs. *Colman;* and LORD MANSFIELD has even gone further and declared that if a factor deliver goods on his own account, and conceals his principal's name, and an action be brought by the principal against the buyers, that they will be allowed an offset for any demand they may have against the factor. *Bailey* vs. *Morley*, in London, Sittings 1788.

The proof set out shows that *Pennywit* was not only the ostensible partner of the firm, but that he represented himself as such, and that all its contracts and accounts were made solely and alone in his name; and consequently the Circuit Court rightly overruled the defendant's motion as in case of nonsuit. The judgment must therefore be affirmed, with costs.

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1 70	63 347

SMITH vs. CLARK.

SMITH, USE OF HARTFIELD *against* CLARK.

ERROR *from Sevier Circuit Court.*

In action of debt, or in Scire Facias on a recognizance of bail, by bill, and in debt on a judgment of record, the venue is *local*, and must be laid in the county where the record is.

The plaintiff in error in this case obtained judgment against the defendant in error in the Hempstead Circuit Court, on the 23d day of July, 1823, for $1487 95¼ cts. debt and costs: and brought his action of debt on this judment, against the defendant, in the Sevier Circuit Court, to the October term, 1834. To his declaration the defendant demurred, on the ground that the venue in an action of debt upon a judgment is *local*, and the action should be brought in the county where the judgment was rendered. The demurrer being sustained, final judgment went thereupon against the plaintiff in error.

FOWLER and HUBBARD, for the plaintiff in error: By our statute, no person is liable to be sued out of the county in which he resides, unless the plaintiff shall reside in the county where the defendant may be found at the time of the service of the process. *Steele's Digest*, title *Judicial Proceedings*, sec. 16. At common law, if the plaintiff did not sue execution within a year and a day after judgment, he could not have his *scire facias*, but was put to his action of debt on the judgment. See 2 *Saun. Rep.* 6, (1); *Tidd's Practice*, vol. 2, p. 1000; *Statute Westminster* 2d (13th *Edw'd* 1) *c.* 45, gives the *scire facias* after a year and day; this remedy is cumulative, and does not take away the remedy by action, and both obtain here. See 2d vol. *Tidd*, p. 1001; 2 *B. Com.* 421. Our statute contemplates actions of debt founded on judgment in the broadest terms. See *Steele's Digest* title *Judicial Proceedings*, sec. 12. A *scire facias* is in contemplation of law an action, and in effect an original writ, and by necessary implication embraced by our statute. See 2 *Saunders Reports* p. 71; *Steele's Digest*, title *Judicial Proceedings*, sec. 12 and 16; *Bentley's Ex'rs.* vs. *Sevier*, decided in this court July term, 1834, and *Simmerman* vs. *Cross*. Then if I am sustained by authority that *scire facias* is an action, and a proceeding by original under our statute, the consequence must follow that the action must be governed by the

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same rules as other actions, as well in relation to the service of process as the pleadings. Therefore the plaintiff is bound by the same rules as in other actions, (and it is concluded he is,) he would be remediless should the defendant not come into the county where the plaintiff resides. If the action of debt founded on the judgment of a court of the Territory, other than the county in which the defendant resides, a consequence which cannot be reasonably deduced, giving to our statutes a rational and sound construction. Again, if I am sustained by authority in the position that the proceeding by *scire facias* is an action and an original proceeding, to sustain a recovery by such proceeding there must be personal service of process, or the recovery would be void. See the cases cited in (*note*) 1st vol. *Starkie on Evidence*, p. 215; also the opinion of WASHINGTON, *Justice*, in 1st *Peters' Rep.* 74. For the above reason it is clear that the plaintiff was not compelled to resort to his remedy by *scire focias*. That debt lies in any county where the defendant resides, founded on a recovery in another county, and that the action in this case was well brought and that the judgment of the Circuit Court ought to be reversed.

TRAPNALL and COCKE, *contra*: The only question in this record is, is the venue in action of debt on a judgment, local? The authorities are ample. See 1st *Chitty*, 242; 2 *Johnson's Cases*, 381; 2 *Saunders*, 755, marg. 608; *Tidd*, 1175.

The declaration is debt on a judgment of the Circuit Court of Hempstead. The venue is laid in Sevier county. The defendant demurred upon the ground that the venue was local. The court sustained the demurrer, and the plaintiff brought up the cause.

The principle that in an action of debt on a judgment or a *scire facias*, the venue is local, and must be laid in the county where the judgment was obtained, is without an exception.

LACY, *Judge*, delivered the opinion of the court: This is an action of debt brought by the plaintiff in error against the defendant, in the *Sevier* Circuit Court, on a judgment rendered in favor of *James Smith*, against *James Clark*, in the *Hempstead* Circuit Court. The defendant filed a demurrer to the plaintiff's declaration, which was sustained by the court below; and this writ of error is sued out to reverse that judgment.

There is but one point in the case, and that is, was the venue well laid in the plaintiff's declaration? In all cases, the venue is either

local or transitory, and if it is laid improperly it furnishes good ground for a demurrer, or may be taken advantage of on the trial upon the general issue, by way of nonsuit. See 1 *Chitty's Pl.* 241; 1 *Wils.* 165; *Cowper*, 410; 1 *Tidd*, 367.

Where the cause of action could only have arisen in a particular county, the venue is local, and could only be laid in that county. Such are all real and mixed actions, as the actions of ejectment and *quave clausum fregit.* In general, where the cause of action is founded upon contract, or where the injuries affect personal rights or personal property, the venue is transitory, and may be laid in any county they may select: such as actions of assault and battery, false imprisonment, libel, or actions on the case, or trespass for damages to personal property. The authorities are conclusive upon the point that in action of debt, or in *scire facias* on a recognizance of bail by bill, and in action of debt on a judgment of record, the venue is local, and must be laid in the county where the reeord is. The reason assigned is, that the judgment constitutes a new contract between the parties, and the plaintiff must count upon the record, by which it will appear that the cause of action arose in the county where the judgment was obtained. See 2 *Salk.* 564; 7th *Mod.* 120; *Barnes* vs. *Kenyon*, 2 *Johnson's Cases*, 381.

In the case now under consideration, the judgment recovered by *Smith* against *Clark*, in the Hempstead Circuit Court, formed a new contract, and as that judgment could not be brought up to the Sevier Circuit Court, the venue must be local, and the demurrer rightly sustained.

The judgment below must therefore be affirmed, with costs.

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POPE, GOVERNOR, USE OF REED, *against* LATHAM AND OTHERS.

APPEAL *from Clark Circuit Court.*

There is no difference, in this Court, between cases on appeal and on writ of error. They stand upon the same footing and must be governed by the same rule of proceeding.

In either, the whole record is open for re-examination and revision, and the party injured has the full benefit of all and every objection and exceptions, that would have availed him in the Court below, though not formally made or taken there; *provided*, it be not waived by the pleadings, cured by the Statute of jeofails, or aided by verdict.

Where a motion in arrest of judgment, and for a new trial are filed at the same time, it makes no difference which is first decided in the court below.

When the plea is *non est factum*, generally, the proof lies on the plaintiff; but when a special *non est factum* is pleaded, it devolves upon the defendant.

To prove that the Sheriff's bond was not approved by the County Court, does not support the affirmative allegation that the bond was delivered as an escrow till it should be approved; and such proof cannot be admitted.

Where the defendant, who takes upon himself the burden of proof, fails to prove the issue, a new trial will be granted; and if refused it is error.

A plea denying the execution of the deed, and a plea admitting the execution, but averring that the conditions have not been broken, cannot be pleaded together.

Where there are two issues, material, inconsistent, and contradictory, no valid judgment can be given upon them.

A bond delivered to the obligee, cannot be an *escrow*.

A Sheriff's bond, delivered to the Clerk of the County Court, is the same as if delivered to the obligee, and cannot be an *escrow*.

This was an action of debt, brought in the Clark Circuit Court, by the plaintiff, against *Joseph Butler*, a nonresident, as principal, and *Latham and others*, as his securities on *Butler's* bond as Sheriff, to the March term, 1831. No breaches were assigned in the declaration. Upon general demurrer the declaration was adjudged insufficient, and an amended declaration filed at March term, 1831; to which the defendants specially demurred, at September term, 1831, and their demurrer being overruled, they pleaded, first, a special plea of *non est factum*, and second, a general plea of conditions performed. The plaintiff demurred to the first plea, and filed his replication, assigning breaches, to wit, that *Butler* had collected the amount of two executions, and failed to pay over the same; to the second, to which replication there was a rejoinder, that he did not collect the money, and issue. The demurrer to the first plea being sustained, the defendants, by leave, filed their amended first plea, the plaintiff's objection to its filing being overruled by the court. The plaintiff then demurred to the first plea, as amended, and the demurrer being over-

ruled, issue was taken on it. The plea, as amended, sets up the facts, that the bond was executed by the defendants and *Butler*, as the official bond of *Butler*, and by the defendants delivered to one *Isaac Ward*, (who was the Clerk of the county,) as an *escrow*, on the special condition that if it was approved by the next County Court thereafter, it should stand and be in full force; and that it was not approved, and therefore is not their deed.

Under this state of pleadings the parties went to trial, and a general verdict of finding "for the defendants" was rendered by the jury—and judgment for costs accordingly.

On the 30th of March, 1832, the plaintiff filed in writing his motions for a new trial and an arrest of judgment; in mentioning which upon the record, the motion in arrest of judgment is first named. Both motions were taken under advisement. At the Oct. term, 1832, the motion in arrest of judgment was overruled; and at April term, 1833, the motion for a new trial was also overruled. The plaintiff then tendered his bill of exceptions, which was made a part of the record, and is as follows: That on the trial, the plaintiff produced and offered to read in evidence the bond declared on, and offered to prove the execution thereof by witnesses: That *Hubbard*, a witness, proved that he was present at the clerk's office when *Butler* and the defendants signed and sealed the bond; that he saw each of them sign, seal and deliver it to the Clerk; and that nothing was said by either of them as to its being by them delivered conditionally, and to be their deed upon the approval or disapproval of the County Court; but that it was delivered as *Butler's* official bond; that the Judge of the County Court was present, and it was stated that he had come there for the purpose of swearing *Butler* as Sheriff, and approving his security: that he did then and there verbally express his approval of the security as sufficient, and swore *Butler* in as Sheriff: that *Ward*, a witness, proved that at the time of the date of the bond he was Clerk of the circuit and county courts of Clark county; that *Butler* and the defendants, as his securities, respectively, in his presence, signed and sealed the bond, and delivered it to him, *Ward*, by leaving it as the official bond of *Butler*; and that neither of them said any thing about its being delivered as an *escrow*, and to be their deed upon the approval or disapproval of the County Court; but that it was delivered as *Butler's* official bond: that the Judge of the County Court was present, approved the security, and swore *Butler* in as stated by *Hub-*

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bard: that the bond was presented to the County Court, at the subsequent term, for approval; and that there was no record of its disapproval: that the plaintiff then produced and read in evidence, two executions mentioned in the replication, with *Butler's* endorsment thereon that they had been fully satisfied; and proved *Butler's* hand writing to the endorsment: that *Moore*, county Judge, a witness for plaintiff, proved the same facts as *Hubbard* and *Ward;* and that he never did, as county Judge, approve the bond: that the plaintiff objected to his stating whether the bond was approved or disapproved by the County Court, which objection was sustained: that the defendants then read the record of the County Court, and there was on said record no entry of the approval or disapproval of the bond: that the plaintiff excepted to the opinions of the court, refusing to exclude, and allowing the oral testimony of *Ward* to establish the disapproval of the bond by the County Court, and overruling the motion for a new trial.

The appellant assigned for error, that the court erred,

1st, In the leave given by the court below to file the amended plea of special *non est factum*, after demurrer sustained to the plea of special *non est factum* first pleaded.

2d, In overruling the demurrer to said amended plea of special *non est factum.*

3d, There were *two* issues joined, and the jury were sworn to try "the *issue* joined."

4th, The admission of the parole evidence objected to.

5th, That the verdict is *general* for the defendant.

6th, Overruling the motion in arrest of judgment.

7th, Overruling the motion for a new trial.

8th, Judgment for the appellees, when it should have been for the appellants.

9th, The issue on the plea of special *non est factum*, is immaterial.

TRAPNALL and COCKE, for the appellant: The points upon which the appellant principally rely are, first, That the court below should have granted the motion in arrest of judgment, inasmuch as the verdict of the jury did not respond to the issues joined. The first plea denies altogether the execution of the bond. The other admits that the bond was duly executed, but denies that its conditions were ever broken. The verdict is in terms so general and indefinite as to render it impossible to say to which one of these issues the jury intended

it should be applied. It cannot apply to both, as the matter set up in the first is directly repugnant to that alleged in the second. The jury should have found separately upon each. A vague and general finding, such as we have in this case, cannot satisfy both issues. In support of this position we refer to the following authorities: *Tidd's Practice*, vol. 2, p. 831; 6th *Comyns' Digest*, 245; 4th *Peters' Cond. Rep.* 98, *Patterson* vs. *The United States;* 4th *Johns.* 213, *Van Benthuysen and another* vs. *De Witt and others*; 4th *Munford*, 492, *Brown, executor of Jones*, vs. *Henderson;* 401, *Fenwick* vs. *Logan;* and *Missouri Rep.* 422, *Easton* vs. *Collier.*

It is of the very first importance to the rights of the appellant that the jury should have declared with certainty to which of those issues they intended their verdict to apply. A finding for the defendants upon either, would have released the securities from responsibility; but the consequences to the appellant would be materially different. Even if it be found that this bond was delivered as an escrow, and that the contingency upon which it was to become absolute as the deed of the parties, never happened, it would free the securities from liability without affecting *Reed's* right of action, hereafter, against *Butler.* If, however, the jury meant to find that the bond was duly executed, and that its conditions were faithfully complied with, it settles the whole question, and *Reed* would be forever barred from obtaining a recovery against *Butler.* For this reason the verdict should have been more direct and explicit.

It may be, also, of the first importance to the interest of other persons in the community, that the jury should in this instance have given a direct and specific response to each issue. According to the well settled principles of the common law, when a bond has been sued on and the plea is *non est factum*, and judgment for defendant, the question as to its validity is forever settled. The decision is not only binding upon the actual parties to the suit, but it concludes all others from maintaining an action on the bond. If, then, the Sheriff's bond in this case shall be declared an escrow, it not only defeats this suit of *Reed's*, but every other person in the community who might have a cause of action against the Sheriff would be barred from proceeding upon it against his securities. If the jury, however, merely meant, when they say in general terms "we of the jury find for the defendants," that the conditions of the bond were never broken, then, although *Reed* might fail in this particular action, yet the validity of

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the bond would not be impeached, and the Sheriff and his securities might be held responsible for any breach of its conditions.

Since, then, the consequences of a finding upon one issue are so important and so materially different from those which flow from a finding upon the other, the jury should have defined with certainty the one to which they intended their verdict to apply. They have not done so. The verdict is ambiguous and uncertain; and the court below ought, for this reason, to have arrested the judgment. The counsel for the appellant further contend that inasmnch as the bond was delivered to the Clerk, who was the officer appointed by law to accept it, it could by no form of words be made an escrow, for it is essential to the nature of an escrow, that it should be delivered to a stranger. If it be delivered to the party himself, or to his agent authorized to receive it for him, the delivery is absolute, the deed takes effect as his deed, and the party to whom it is made is not bound to perform the conditions. 1st *Sheppard's Touchstone*, 58, 59. Even if the jury had found that this bond was an escrow, their verdict should have been set aside and judgment entered for us *non obstante veredicto*.

The appellees having put in a special plea of *non est factum*, the burden of proving the facts in support of the plea, necessarily devolved upon them. This, the court will perceive by a reference to the bill of exceptions, they utterly failed to do. True, it does not appear from the records of the County Court whether this bond was approved or rejected. But such testimony is mere negative evidence, and clearly cannot be competent to support an affirmative plea. See 2d *Harris' Entries* 53.

But admit, for the sake of the argument, that the County Court never did approve the bond, still it would not be void; it would be good as a common law obligation. 2 *Littell*, 305, *Stevenson* vs. *Miller*; 4 *Littell*, 235, *Cobb* vs. *Curts*.

The bill of exceptions shows that the verdict was palpably against evidence. Appellant proved by the Sheriff's own endorsement that he had received the money, and no countervailing evidence was adduced on the part of the appellees. The witnesses called by the defendants below to prove the delivery of the bond as an escrow, show conclusively that the delivery was absolute and unconditional. The court should therefore have awarded a new trial.

HALL, *contra*, referred to 1st *Chitty's Pl.* 479, that the deed was delivered as an escrow may be pleaded. That *non est factum* and *conditions performed* may be pleaded together: See *Story's Pl.* 248; 2 *Str.* 908; 3 *Pick.* 388.

That a statute bond must conform to the statute: See same authorities.

The demurrer to the plea of *non est factum* cannot be revised by this court. 3 *Marshall*, 56.

LACY, *Judge*, delivered the opinion of the court: This was an action of debt brought by the plaintiff below, in Clark Circuit Court, against the defendants, as sureties on a Sheriff's bond. As the case now appears before us, we deem it unnecessary to notice several steps that were taken in the early stage of the proceedings. At the March term of the Circuit Court the plaintiff filed an amended declaration, to which the defendants demurred. The demurrer was overruled and they obtained leave to plead over to the action. Their first plea was a special *non est factum*, and their second the plea of conditions performed. The plaintiff put in a replication to the second plea, assigning the breaches upon the bond; to which there was a rejoinder by the defendants, and issue. The plaintiff demurred to the first plea, and the demurrer was sustained. The defendants had leave to plead over, and they tendered another special plea of *non est factum*, or rather an amendment to their first plea. The plaintiff objected to the filing of the plea, but the court overruled the objection and permitted the plea to be filed. He then demurred to it, and the demurrer was overruled, and issue was then taken on the plea. Under this state of pleadings the parties went to trial, and a general verdict was found for the defendants. The plaintiff then moved the court for a new trial, and in arrest of judgment, and the motions were taken under advisement and continued until the October term of 1832, when the motion in arrest of judgment was overruled; and at the April term, 1833, the motion for a new trial was also overruled. The plaintiff then tendered a bill of exceptions which is made part of the record; and appealed from the judgment of the court below.

Before entering into an examination of the questions presented for our consideration in this case, it may not be amiss to state the rule of practice that this court will adopt in all cases coming before it for

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revision or correction by appeal or upon writs of error. It is evident that there is no difference between the two classes of cases, and that they stand upon the same footing and must be governed by the same rule of proceeding. The principle may now be considered conclusively settled upon reason and authority, that on all appeals or writs of error from an inferior to a superior jurisdiction, the whole record is open for re-examination and revision, and that the party injured shall have full benefit of all and every objection and exception that would have availed him upon the proceedings in the court below, though not formally made or taken at the time of the trial; provided the error, defect, imperfection, or omission, be not waived by the pleadings, cured by the statute of amendment and Jeofails, or aided by verdict. This is believed to be the uniform rule of practice in all supreme or appellate courts, and in strict conformity with our own statutory provisions on the subject. See 2 *Starkie*, 430; 2 *Tidd*, 290; 5 *Johnson's C. C.* 489; *Dugan* vs. *Cureton*, *Ante page* 31; *Acts of the Legislature*, 1836, p. 133, sec. 15.

It is first necessary, before we examine the main questions arising upon the assignment of errors, to dispose of a preliminary objection made and insisted on in behalf of the defendants. It is said that a party shall not have a motion for a new trial after he has first moved in arrest of judgment, and that has been decided against him by the court. We do not mean to question the rule or its authority, but it can have no application in the present case. He did not file his motion in arrest of judgment first, and when that was adjudged against him, come in with his motion for a new trial. Both motions were submitted by him at the same time, and in proper order, but the court decided them at different periods, and irregularly; overruling the the motion in arrest of judgment first, and the motion for a new trial afterwards. He was certainly entitled to the benefit of both motions, for he filed them rightly, and as he never afterwards waived the privilege of either, consequently the irregularity in the proceedings, which was entirely the action of the court, cannot prejudge his right or deprive him of his advantage, when he has been guilty of no neglect or any mispleading. He cannot be held responsible for the errors or irregularities of the proceedings of the court over which he could exercise no control, or in any way direct. The objection then is not well founded. See 1 *Salk.* 647; 1 *Burr*, 334; 2 *Tidd*, 831; 3 *Burr*, 1692.

We will now in inquire whether the court erred in overruling the motion for a new trial, and also the motion in arrest of judgment. The defendants relied on two pleas in bar of the plaintiff's action. The issue found by both, were affirmative in their nature and character; and the whole burden of proof necessarily devolved on the defendants. When the plea is *non est factum*, generally, the proof lies on the plaintiff; but when the plea shows that the deed is void, for special matter, the issue is on the defendant. See 2 *Strange*, 482; 6 *Mod.* 218; *Com. Dig. Pl.* 2, (*w.*) 18.

The special plea of *non est factum*, put in issue the execution of the deed, and its continuance as such at the time of the plea; and negative evidence, or rather the absence of all evidence, that the bond of the Sheriff was not approved or accepted by the County Court, certainly does not support the affirmative allegation or issue. So far as it could be considered evidence in the cause, it would go expressly to disprove the plea. The court then erred in permitting the minutes of the County Court to be read as evidence to raise a negative presumption, when the party was bound to prove an affirmative fact. There is also manifest error in receiving the oral or verbal statement of witnesses in relation to the acceptance or rejection of the Sheriff's bond by the County Court, when that fact, if it existed at all, could only be verified by the record itself. This principle is too clear and self-evident to require either comment or authority to sustain it.

In relation to the second plea, of *conditions performed*, the defendants are in no better condition. The bill of exceptions contains all the evidence given on the trial, and there is not the shadow of proof adduced in support of the plea. It is expressly disproved by their own witnesses, and that too, affirmatively. Besides, the plaintiff produced two executions which came to the hands of the Sheriff, and they showed that he had collected the money upon them and failed to pay it over. Consequently, both he and his sureties are liable; and these facts unquestionably disprove the defendant's plea of *conditions performed*. It follows from these conclusions, that the court erred in not setting aside the verdict and awarding a new trial; for it is a well established principle, and one that cannot be controverted, that where the defendants take upon themselves the burden of proof, and fail to prove the issue, a new trial will be granted. See *Steph. on Pl.* p. 123; 1 *Burr*, 393 to 398; 3 *Bibb*, 35, *Bacon* vs. *Brown*; *Ditto* 224. The court erred in not arresting the judgment.

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The defendant's special plea of *non est factum*, denies the execution of the deed, and their plea of *conditions performed*, admits its execution, and affirms that their covenant has not been broken, but kept and performed according to the conditions of the bond. There is, then a manifest absurdity and contradiction of the issues made up by the two pleas, and the existence of one fact presupposes the non-existence of the other; and the question has been repeatedly determined, and that by the best authorities, that when there are two issues, materially inconsistent and contradictory of each other, no valid judgment can be pronounced upon them. See 2 *Tidd*, 831; 6 *Com. Dig.* 245; 2 *Peters' Con. Rep.* 98, 102; 4 *Johnson*, 213.

We are not prepared to admit that the special plea of *non est factum*, if it even had been established by legal or competent proof, would form a good bar to the plaintiff's action. The case of *Paulding, et al* vs. *the United States*, simply decides this question, that a bond may be delivered as an escrow, to one of the obligors; which does not in the slightest degree counteract the general doctrine on the subject. A bond cannot be delivered to an obligee as an escrow. The moment such a delivery is made, the deed, to all intents and purposes, becomes absolute and unconditional; and the parties are bound by it. In the case now before the court, the delivery of the Sheriff's deed was to the Clerk of the County Court, who, if not strictly an obligee, received it for the obligee, which is the same thing; and consequently the bond of the Sheriff could not become an escrow, and he and his sureties are liable upon it. The statute requires that before a sheriff shall enter upon the discharge of his duties, he shall give bond with good and sufficient security to the Governor, and his successors in office, to be approved or accepted by the County Court; which clearly shows that when he has executed the bond, with his sureties, neither he nor they are released from any previous liabilities though the County Court should refuse to receive or accept the bond. If these positions be true, then the special plea of *non est factum*, as pleaded by the defendants in the record, can form no bar to the plaintiff's action. 2 *Starkie*, 477; *Cro. Jac.* 85, 86; *Shep. Touchstone*, 58; *Coke on Lit.* 36, (*a*); 2 *Peters' Cond. Rep.* 277.

The judgment of the court below must therefore be reversed, the cause remanded, to be proceeded in conformably to this opinion; and the appellant have judgment against the appellees for his costs in this court expended.

And at the same term, HALL, for the appellees, filed the following motion and argument for a re-hearing in this case:

In the decision of this case the court has been pleased to inform the plaintiffs and their counsel, that the appellants' motion for a new trial was made in proper order, and that the decision of the motion in arrest of judgment, first, was an irregularity in the court.

We are constrained to ask the court to re-consider the opinion in this particular. The only part of the record returned in this case which relates to the order in which these motions were filed, is in the following words, to wit:

"And afterwards, to wit, at the same court, continued and held as "aforesaid, before the same judge, on the 30th day of March, 1830, "the following proceedings were had in said cause, and entered on "the record of said court, viz: *John Pope, Governor of the Territory "of Arkansas, for the use of Thomas Reed*, vs. *Mastin Latham, Robert "Frier, and Silas McDaniel, impleaded with Joseph Butler, defendants.* "This day came the parties aforesaid, by their attorneys, and the "plaintiff filed his motion in arrest of judgment, and also his motion "for a new trial in this case; whereupon it is ordered that this cause "be continued until the next term of this court."

The record shows that these motions were argued and decided at subsequent terms of the court, precisely in the order in which they were filed. Both these motions, as appears by the copies of them returned by the clerk, correspond in date with the above entry. According to LORD COKE, pleadings must not only be interposed in apt time, but in due order; the *quando et quomodo* must appear: that is, the record must show that the pleas were filed, not only in apt time, but in due order. It cannot be contended that the fact of the clerk having copied the motion for a new trial first, in the transcript, makes any difference. He has given true copies of both motions, and has given a true copy of the record of the filing thereof. The defendants also insist that the argument of the motion in arrest, first, was in itself a waiver of the motion for a new trial, provided it had been first filed; and if the court had arbitrarily ruled him to argue his motion in arrest first, he should have taken his bill of exceptions. The court has obviously considered the copies as given by the clerk, as evidence of the order in which these motions were filed. Whereas, the entries from the record, as transcribed, show their order and their relation to each other. The fact that he did not wait until the

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motion for the arrest of judgment was overruled, can make no difference. If he interposed his motion in arrest, as he obviously did, first, he cannot afterwards file a motion for a new trial. *Fiat, justicia, ruat cœlum!* Two several transcripts of this case have been certified to this court, and both of them show that the motion in arrest was interposed first. It was admitted in the argument; but it was alleged to be a clerical misprision; and we offered to call in the Judge who tried the case, and set it right; they replied, "*Timeo Danaos et Dona Ferentes;*" and all then considered this matter as settled. If it could be considered doubtful, this court, knowing, as they certainly do, that the fact is recorded differently in the Circuit Court, would order it to be certified correctly. This court has also decided that the Circuit Court erred in not arresting the judgment; and the reason given is, that the defendant's pleas are contradictory and inconsistent. By the Statute of Arkansas, (see *Digest*, p. 321, sec. 22,) the plaintiff in replevin, and the defendant in all other actions, may plead as many pleas, either of law or fact, as he may think proper: and this statute gives the right to be exercised at the will and pleasure of the defendant, without regard to the opinion of the Circuit Court, or any other person whatever; and the authority cited by the court from 4th *Johnson's Reports*, 213, is a case in point. This was an action on a bond, and a general plea of *non est factum*, and a plea of *performance of conditions*, were interposed, and the court not only sustained the pleas, contradictory as they were, but they set aside the verdict against the defendant, because it did not find both the issues against him. As to the right to plead double, see 1st *Chitty*, p. 540, 1, 2, &c. If there is any authority against it, they are cases adjudged at the common law, or where the statute requires the leave of the court to be first had and obtained; and I doubt whether any court, at this day, would refuse leave to plead double. However, we are gratified that the philosophy and liberality of our laws, has absolved us from consulting any authority but our own will. This court has said that they are not prepared to admit that the special plea of *non est factum*, if it had even been established by legal and competent proof, would form a good bar to the plaintiff's action: and the reasons given are, that a bond cannot be delivered to an obligee as an escrow. In answer to which, I beg leave to suggest that if that plea was sustained by legal and competent proof, it would show a delivery of the deed to one *Isaac Ward*, and not to the obligee, or any of his agents: nor is

there any plea in this case showing a delivery to the clerk. Indeed, sir, this plea has stood the test of the most technical rules of special pleading, before the ablest Judges in Arkansas, and was found to be certain, to a certain intent, in every particular. This, sir, shows a delivery of the deed upon a condition, not only lawful, but laudable; with a proper commencement and conclusion. No matter *dehors* the record can be a ground for arrest of judgment; and if it was proved upon the trial that it was delivered to the clerk as such, which these defendants do not admit, yet it would form no ground for arresting the judgment, whatever ground it might afford for a new trial; for no extraneous matter can afford any ground for arrest of judgment. And how the court could conceive that the defendant's plea is bad, containing an averment of a delivery to the clerk, when no such allegation is found in the plea, is to these defendants inexplicable; and how the court come to the conclusion that the plea, as pleaded by the defendants, could form no bar to the plaintiff's action, is equally inexplicable: and the authority cited by the court from *Starkie*, *Cro. Jac.*, *Sheppard*, *Coke on Lit.*, and *Peters' Cond. Reports*, all show that this plea is pleaded according to the most technical rules. And I have concluded that the court meant to say, not that the plea, as pleaded, was bad, but that the proof adduced on the trial was not sufficient to sustain or establish the plea, as pleaded.

The court seems to suppose that the defendants held the affirmative, and were bound to prove the rejection of the bond; whereas, there is no such condition set forth in the plea; the condition stated in the plea is, that if the bond should be accepted and approved, it was to be absolute. And if not accepted and approved, to be void: whether tendered and accepted or approved, is a matter in *pais*, which is to be proved by the best evidence the nature of the case admits of. It does not differ in principle from any other agreement. If I deliver a bond to A, upon the special condition that he tender it to you for a precedent debt, and to be my deed on condition that it be accepted in payment of such precedent debt, and if not to be cancelled; here it is clear that all these facts may be proved by the witness to the contract in the principal case. The court are required to keep a record of what they do, but they are not bound to keep a record of what they do not do. Here the condition was, that the court should accept and approve, which it alleged they did not do; and how is it to be proved, *quod non apparentibus et non existentibus*

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eadem est ratio; and it is sufficient to show either by witness or by the record, that there is no such approval. But suppose I am mistaken, and suppose, for the sake of argument, that this motion for a new trial is still open for investigation, the utmost that the court can do, is to do what the court below ought to have done: that is, to grant a new trial to the plaintiffs upon the payment of costs. Whereas, the court has given judgment against the defendants, for all the costs in this Court and in the Circuit Court. The defendants insist that the costs of this court only, can attach to this appeal; and the other costs should await the event of the suit in the court below. The defendants also insist that if this judgment is reversed, it should be reversed back to the first default in pleading; there is no profert made of the supposed bond, or copy thereof, and the objection was taken on special demurrer and the point reserved.

The defendants also insist that this contract, if binding at all, is good only as a common law obligation, being payable to W. S. FULTON, *Secretary, &c.*, and therefore cannot be sued in the name of the Governor.

But the court overruled the motion for a rehearing.

GRAHAM *against* THE STATE.

ERROR *to the City Court of Little Rock.*

On error from a judgment of the City Court of Little Rock, the city must be made a party, and a summons to hear errors must be served upon the corporate authorities of said city.

The Attorney for the State is not authorized to enter an appearance for the city.

But a failure to make the city a party by such summons, is no ground for dismissal here.

This case was brought up by writ of error from the City Court of Little Rock, and the City, by Solicitor, interposed a motion to dismiss the suit, because the city was not made a defendant in error; and the writ of error had not been served upon the corporate authorities of the city, as required by law.

WATKINS and CLENDENIN, in support of the motion.

HALL and TAYLOR, *contra.*

RINGO, *Ch. Justice*, delivered the opinion of the court: A motion was filed on behalf of the Mayor and Aldermen of the city of Little Rock, to dismiss this cause, on two grounds: first, that the Corporation of the City of Little Rock is, in truth, and ought of right to be, the defendant in error, and heard by counsel, instead of the State of Arkansas, as the case now stands; and second, because this writ of error has not been served upon the corporate authorities of said city, as required by law.

The question presented by this motion is important, not on account of the interest to be effected by it in this case, but from the number of cases in which it may arise. To understand the question correctly, it is important to ascertain what parties are interested in the controversy. The plaintiff in error has a direct and unquestionable interest; for the judgment to be pronounced is to operate directly for his benefit or to his prejudice. The State is the other party to the record, and no third party is mentioned in it; and if interested in the controversy is entitled to notice, and may claim the right to be heard. But if, on the contrary, the State occupies the attitude of a party merely nominal, and is a trustee for public purposes, without any beneficial interest, whatever, in the controversy; not entitled to the bene-

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fit of the fine, if recovered, or subjected to the payment of costs, if the prosecution fails, to what purpose should she be served with notice? Could she assume the control of the case, and exclude from its management and direction the party really and beneficially interested? If the interest of the party entitled to the benefit of the recovery, be legitimately shown in such manner that the court is bound to take judicial notice of it, we think it cannot be doubted that such party is entitled to notice, and may well insist upon the right to be heard; for it is a fundamental maxim, admitted in the jurispudence of all civilized and enlightened countries, "that the law will never suffer a man to be divested of his rights, without having an opportunity to make a defence." The interest of the Corporation of Little Rock, in the present controversy, is clearly ascertained by the City Charter, or act of incorporation, approved November the 5th, 1835. Section 10th, where it is enacted,

"That the full amount of all sums arising from the tax on all licen-"ses in said city, *and from amercement* of fines, shall be paid into the "treasury of said city: forty per centum of all the nett proceeds of "said sums shall be paid by the city treasurer into the treasury of "the county of Pulaski, for the benefit of said county; and the resi-"due applied to the common benefit of said city."

By the same act the City Court is created, and its jurisdiction and powers prescribed. Section 7, provides "that the said City Court "shall have exclusive jurisdiction, without the privilege of appeal of "all offences which are less than felony at common law, which shall "be committed within the limits of the City of Little Rock, in viola-"tion of the by-laws, ordinances, or regulations of said city," &c.

By an ordinance of the Common Council of the city of Little Rock, approved December the 17th, 1835, betting money or other valuable thing, on any gaming table commonly called A, B, C, or E, O, or *rouge et noir*, or faro, or any other gaming table, or bank, of the same or like kind, or of any other description, under any other denomination whatsoever, is prohibited, and a fine denounced against those who shall be convicted thereof in the City Court. The present controversy arises upon a prosecution and conviction in the City Court, for betting at a game commonly called faro; an offence which was clearly within the jurisdiction of that court; and the fine, when collected by the statutory provisions above recited, as clearly belonged to the Corporation; into the treasury of which it is required to be paid. It is true that

the corporation is directed to pay forty per cent. of the nett proceeds of the fine to the county of Pulaski; but that does not, as to the present question, affect in the slightest degree the interest of the corporation in regard to the controversy; for it must be remarked that the claim of the county does not arise until the controversy between the corporation and the individual is determined, and the fine collected and paid into the city treasury: then, and not until then, the interest of the county commences: and until that interest arises, the attorney for the State cannot, in his official character, have any thing to do with the controversy. The corporation has, by law, a Solicitor, whose duty it is to prosecute in all cases in behalf of said city. This duty is expressly enjoined upon him by the city charter. The right and interest of the corporation in the subject matter of this controversy, is legal; the statutory provisions above recited make it legal: and hence we are bound to take judicial notice of it. If the right was merely equitable, the court could not regard it until specially shown; but if we are correct in the conclusion that the corporation of Little Rock has the legal interest in the controversy, and that their interest appears by a general law of the land, we are not at liberty to overlook or disregard it. By the Constitution it is made the duty of the attorney for the circuit in which the Supreme Court may hold its terms, to attend the Supreme Court and prosecute for the State: and by the act of the Legislature of 1836, the same duty is enjoined in all cases in which the State is interested. These provisions, if the view which we have taken of the subject be correct, can have no influence, whatever upon the question now before us. They only require the attorney for the State to attend the court, and prosecute or defend in such cases as the State may be interested; but where the State has no interest whatever, although named in the record as a party, it is not reasonable to conclude that either the Convention or Legislature intended to require him to appear and take part in the controversy; especially in such cases as the present, where such interference would conflict with the legal rights of the party alone interested in the cause. It is, therefore, the opinion of this court, that the Corporation of the City of Little Rock [illegible] be heard in this controversy, and ought to [illegible] summons or notice to appear, as required by law: and that the attorney for the State is not, by virtue of his office, authorized by law to enter an appearance in this case for the defendant. But the fact

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that the corporation of the city of Little Rock has not been summoned or notified to appear, is not a ground to dismiss this suit.

The present motion to dismiss, must consequently be overruled.

ELLIS *against* BROWN AND MANN.

ERROR *to Lawrence Circuit Court.*

A writ of error not directed to any particular Clerk cannot be amended.

The writ of error in this case was directed as follows: "State of Arkansas, etc. To the Clerk of the Circuit Court of —— *Greeting:*

TAYLOR, for the defendants in error, moved to dismiss the case "for irregularity, on the ground that there is no writ of error, and "that the paper filed as such is not directed to the Clerk of the Cir-"cuit Court of any county in this State."

FOWLER, *contra*, moved at the same time to amend the writ of error.

Per Curiam:

This is a motion to quash a writ of error because the name of the county to which it ought to have been directed, is not specified. A motion to amend the writ, was also made at the same time. We are of opinion that there is nothing to amend by. The motion to dismiss must be sustained.

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HYNSON AND WIFE *against* TERRY.

APPEAL *from White Circuit Court.*

To charge a jury, that "from the law of the case the Court is of opinion that the plaintiffs have not made out such a case as will entitle them to recover; but that the facts are with the jury," is *not* such a charging, as to matters of fact, as is prohibited by the Constitution. In this respect, the Constitution has not altered the common law in the slightest degree.

Gifts have no reference to the future, but go into immediate and actual effect.

Delivery is essential, both at law and in equity, to the validity of a gift. Without delivery the title does not pass.

Actual delivery cannot be dispensed with, unless the gift be by deed or other instrument of writing.

In this country there is not the slightest difference between real and personal estate, except so far as such difference is created by particular Statutes.

There can be no reservation, condition, or limitation, to a gift, by parole, to take effect in future.

A parole gift, without delivery, is ineffectual, even between donor and donee.

This was an action of detinue, instituted in the Pulaski Circuit Court, by *Hynson* against *Terry*, for a negro boy named *Daniel*, and transferred to White Circuit Court, when White county was created. *Terry* pleaded *non detinet*, and the issue was tried by a jury. The testimony, as embodied in the bill of exceptions, is as follows:

Morgan Magness deposed, that about twenty years previous to the trial, in the State of Illinois, his father, *Jonathan Magness*, gave to *Terry* and his wife, (she being a daughter of said *Jonathan*,) a negro girl named *Nancy*, between eight and twelve years of age, with the express understanding that the first child she should have, should be the property of *Eliza*, daughter of *Terry's* wife, and grand-daughter of said *Jonathan;* and that the said witness was called upon to witness this. That *Eliza* and *Hynson* intermarried in 1831, and had issue.

David Magness deposed, that the negro girl *Nancy* was not delivered to *Terry* till about eighteen years previous to the trial; at which time he heard nothing said about her first child. That *Daniel*, her first child, was worth four hundred dollars.

William Terry deposed, that *Daniel* was *Nancy's* first child, about ten years old, and worth from three to four hundred dollars; and that *Hynson* had demanded him of *Terry*.

William Cook, also deposed as to his value.

Upon this state of testimony, the court below was called upon by both parties to charge the jury; and charged them.

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"That to make a verbal gift valid, there must be a thing in being at the time, capable of being delivered, and an actual delivery must be made." Also, "that a delivery of the girl *Nancy* to *Terry* and wife, was not a sufficient delivery to them as trustees, so as to vest the child of *Nancy*, when born, in *Eliza*, so as to enable the plaintiff, *Hynson*, to recover:" and that "from the law in this case, the court was of opinion, that the plaintiff had not made out such a case as would enable him to recover, but that the facts were with the jury.

The jury found for the defendant, *Terry*, and a judgment was entered accordingly.

Hynson then filed his motion for a new trial, with an affidavit that since the trial he had discovered new and material testimony. That his first witness had recollected after the trial, that at the time that the said *Jonathan* gave the girl *Nancy* to *Terry* and wife, he also gave them a mare, with the express agreement, understanding and condition, that the said *Eliza* was to have the first colt the mare might have, and the first child *Nancy* might have. And also, that he believed he had not had a fair trial, whereby justice had not been done.

The motion for a new trial being overruled, *Hynson* appealed; and assigns for error, the overruling the motion for a new trial, and the charge to the jury on all the points abovementioned.

FOWLER, for the plaintiff in error: It is contended, on the part of *Hynson*, that *Magness*, (*Mrs. Terry's* father,) had a right to make a stipulation in behalf of his grand-daughter, to take effect in future; and that such stipulation is binding on *Terry*; and gives a perfect legal right to his grand-daughter, which may be enforced, unless barred by the statute of limitations, which has not been, nor could be, set up as a defence in this case. 1 *Comyn on Contr.* p. 13, 26; 1 *Ch. Pl.* 4.

It is also contended that the title to *Nancy* vested in *Terry*, on delivery by *Magness;* and the right to sue, in *Eliza*, on the birth of *Daniel;* and *Hynson's* right to sue, on his marriage with *Eliza;* and that no *actual* possession by plaintiff is necessary to sustain detinue. 1 *Bibb's Rep.* 186; *Buller's N.P.* 11th p., title *Detinue;* 3 *Com. Dig.* 358; *Steele & McCampbell's Dig.* p. 526, sec. 19, page 216, sec. 12.

It is further contended that the Circuit Court erred in charging the jury on *matters of fact;* and instructing the jury that *Hynson* had not made out such a case as would entitle him to recover. *State Constitution*, article 6, sec. 12, page 16.

HAGGARD, *contra*: The boy *Daniel* was not born till some eight or ten years after the pretended gift.

The bill of exceptions does not any where show that all the evidence is set out in said bill of exceptions. See 2 *Littell*, 182, 186; 5 *Littell*, 316, 221. The defendant in error insists that no notice can be taken of plaintiff *Hynson's* affidavit, for several reasons: 1st, It is not incorporated in the bill of exceptions, and should not have been copied in the record. 2d, It exhibits only an experiment by plaintiff, in which he failed, to examine his witness to certain points, and when he ascertained his weak points, attempted to strengthen them. It opens a door for tampering with a witness which the law abhors.

The defendant insists that where justice has been done between the parties so far as the court can see, the verdict should not be disturbed. See 1 *Pirtle's Digest*, 359; 2 *do.* 118, 119; *Johnson's Dig.* 145. For which purpose it is essential that all the evidence should be spread out upon the bill of exceptions, and the record should so inform the *revising tribunal*.

It will be seen that so far as the evidence is spread out, the evidence of *David Magness* goes to counterbalance that of *Morgan Magness*, leaving the evidence equally poised; provided the evidence of *Morgan* alone would furnish a right of recovery.

Again, it no where appears that the defendant, *Terry*, even had the negro *Daniel* in his possession, or *detained him*, or exercised any control over him. The defendant insists that there is no *error* in the charge of the court: for to make a good and perfect gift, there must be an actual delivery of possession at the time. See *Chitty's Ed. of Blk. Com.* vol. 2, page 441–2; *Barn. & Ald.* 551; *Laws of Arkansas* page 527, sec. 24, etc.

It will be seen that from the general principles of law, the delivery of the negro girl to defendant, was a gift, and he could have sold her (and did do so, for any thing the court here can see) at any time; and the plaintiff could not recover from defendant or his sub-purchaser; (especially, without proof that defendant was possessed of *Dan*;) and so the defendant insists, that in any point of view, this court should affirm the judgment of the court below.

This defendant further adds, that it is laid down as a general rule, in the case of *Kingsby & Nichol* vs. *the Bank of the State of Tennessee*, that the court will presume that the evidence was sufficient to author-

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ize the verdict, unless the party who prays for a new trial shows that all the evidence is in the bill of exceptions. See *Yergers Reports*, vol. 3, page 107.

LACY, *Judge*, delivered the opinion of the court: This is an action of detinue for a slave. The defendant pleaded the general issue, upon which he had a verdict in the court below. The plaintiffs then moved for a new trial, but the motion was overruled; to which opinion they filed their exceptions and appealed to this court. All the material facts of the case are spread upon the record; and the substance of the proof is, that about twenty years ago *Jonathan Magness*, who is the father of the defendant's wife, and grand-father of the plaintiff's wife, gave to his daughter and the defendant, a negro girl by the name of *Nancy*, about eight or ten years old, with the express understanding that the first child the negro girl might have, should be the property of *Eliza Magness*, the present plaintiff's wife. This is all the proof in the cause, except that the slave in controversy is the first child of the negro girl *Nancy*, and that his value is from three to four hundred dollars, and that the plaintiffs made a demand of him before the commencement of this action. To reverse the judgment rendered in the Circuit Court, the plaintiffs assign for error, that the judge who tried the cause erred in overruling the motion for a new trial, and in the instructions given to the jury. It is contended he has charged the jury upon matters of fact which is expressly prohibited by the Constitution. We are unable to see the force of this objection. The judge seems simply to have stated his opinion of the law, and left the matters of fact entirely to the consideration of the jury. It is not only his right, but his duty, to declare what the law is; and the expression in the charge, that "from the law in the case, the court was of opinion that the plaintiffs had not made out such a cause of action as would enable them to recover, but that the facts were with the jury," certainly cannot be so construed as to fall within the meaning or prohibition of the Constitution.

The judge leaves the matters of fact where the Constitution places them, for the consideration and judgment of the jury, and he merely declares his opinion of the law of the case, which he is bound to do under the most sacred obligations of his office, and upon every principle of legal right and constitutional duty. The latter clause of the twelfth section of the sixth article of the Constitution, which says that "Judges shall not charge the jury upon matters of fact, but may

state the testimony and declare the law," does not alter or change, in the slightest degree, the common law on the subject. It only gives its wise and protecting authority, additional sanctity and force. The law, as matter of right, belongs to the court, and the facts to the jury. It is the duty of the court to decide what is competent or legal evidence, and to declare the law that must govern the case. It is the province of the jury to weigh and compare the testimony, and to apply the facts to the principles given them in charge by the court. To make the jurors judges of the law, and the courts judges of matters of fact, is to confound the clearest distinctions of right and wrong, and to put to hazard the life, liberty, and property of every man in the community. Such an experiment would, in almost every case, be followed by the most gross and criminal violation of every principle of natural as well as civil justice.

It remains now to be enquired whether the court erred in the other charge given. The assignment of errors raises several questions, but they all substantially amount to the same thing, and may be taken up and considered together. The court charged the jury that to make a verbal gift valid, there must be a thing in being at the time it was made, upon which the gift could act, accompanied with actual delivery; and the delivery of the negro girl *Nancy*, to defendant and wife, was not such a delivery as to vest the first child of the negro girl, when born, in the plaintiffs, or enable them to maintain this action. A gift or grant is defined to be "the act of transferring the right and possession of a personal chattel; whereby one man renounces and another acquires all the title and interest therein; (2 *Chitty's Black. Comm.* 441–2;) which may be done by deed or other instrument in writing, or by parole. The civil law considered a gift as a contract, but the common law does not place it on any such ground; "though it would be difficult," CHANCELLOR KENT remarks, "to perceive the reason of the distinction; for an executed grant certainly contains all the essential requisitions of a contract." Ever since the celebrated case of *Ward* vs. *Turner*, 2 *Ves.* 431, it has been held that gifts have no reference to the future, but go into immediate and absolute effect. Delivery is essential, both at law and in equity, to the validity of a gift. Without actual delivery, the title does not pass. In the case referred to, LORD HARDWICKE gave the subject a most profound and elaborate investigation, and the doctrine there laid down has never been questioned since his time. The case of *Tate* vs. *Halbert*, 2 *Ves.*

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Jun'r, and *Irons* vs. *Smallprice*. 2 *Saun. Rep.* 47, (*n*) declares that actual delivery cannot be dispensed with, except the transfer of the gift be by deed or other instrument of writing. And the Appellate Court of Kentucky, in *Banks' administrators* vs. *Marksberry*, 3 *Littell*, 280, 1, 2, say there is no doubt that, to the completion of a parole gift, the delivery of the thing is *essential*, but they apprehend the principle does not apply to a gift by deed or other instrument in writing. That was a case where the party claimed under a deed of gift duly acknowledged and recorded; and of course the point now to be determined was put directly in issue. By the common law, as it anciently stood, personal property was very little regarded, and it was not until modern times it received that just and liberal protection which it now so rightly enjoys. At this day the principle and characteristic distinction in England, between personal and real estate, consists in this, that real estate may be entailed, but personal estate cannot. In our country, since estates intail have been abolished, there is not the slightest difference between the two species of property, except so far as they may be regulated by the particular statutes of the several States on the subject: so that personal estate, as it now stands, may pass by deed or other instrument of writing, duly acknowledged and recorded with a condition or reservation annexed; provided the limitation be not too remote or uncertain to be valid, or not inconsistent with the gift. But there can be no reservation or condition to a gift by parole, to take effect in future. By our statute, passed in 1804, *Dig.* 527, sec. 24, no gift or gifts of any slave or slaves, shall be good or sufficient to pass any estate in such slave or slaves to any person or persons whatsoever, unless the same be by will, duly proved and recorded, or by deed in writing, to be proved by two witnesses, at least, or acknowledged by the donor, and recorded in the county where one of the parties lives, within eight months after the date of such deed or writing. This question was expressly decided in the case of *Pile* vs. *Maulding*, 7 *J. J. Marshall*, 204, and upon a statute of which ours is an exact copy.

The court in declaring their opinion say, that without actual delivery, a parole gift is ineffectual; and even between donor and donee, the title does not pass, unless the deed be duly proved and recorded according to the requisitions of the act. The language of our statute is very similar to 27th *Henry VIII*, c. 16, requiring deeds of bargain and sale to be recorded. And it has never been doubted that a

deed of bargain and sale was inoperative, as between bargainer and bargainee, unless it was proved and recorded within the time prescribed by law. In this instance it is not even pretended that there was a deed of gift, or any other instrument of writing, between the donor and donees, of the negro girl *Nancy*, much less of the slave in controversy. It was simply a verbal gift of the father to his daughter and son-in-law, accompanied with actual delivery of the possession; and of course all the right, title, and interest the donor had to the slave and her increase, passed to and vested absolutely in the present defendant. The condition that was annexed to the gift was by parole, and the law is clear that no limitation or reservation can be raised or created unless by deed duly proved and recorded. The necessity of delivery is so essential to the validity of a gift, that it is no longer regarded as a rule, but as a maxim; and the courts have in no instance dispensed with it. There must be an actual delivery accompanied by possession, if the gift be by parole; and if by deed, the execution of the deed constitutes the delivery, and it takes effect by way of relation.

The case now under consideration does not even assume the appearance of a valid or legal gift. It was a mere parole promise to operate upon a future and contingent interest, which could not, in the nature of things, be delivered; for it was not then in being, and of course no title or interest of the slave in question could be passed or vest in the plaintiffs, without a deed or other instrument of writing duly proved and recorded. There can be no condition or limitation to a parole gift; and as none was produced, or shown to exist, the Circuit Court decided correctly in charging the jury that the plaintiffs had not made out such a cause of action as would entitle them to a recovery.

The judgment of the court below must therefore be affirmed, with costs.

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EASON vs. FISHER.

EASON *against* FISHER.

ERROR *from Phillips Circuit Court.*

Where profert of an instrument is made in the declaration, a defendant who has craved oyer, is entitled to it before he can be required to answer.

But if he plead, he waives his right to oyer.

After an issue of fact is made up, a party is not bound to notice a demurrer filed to any previous pleading.

A warrant of joinder in demurrer is cured by verdict.

A party may add the similiter for his adversary, and if they go to trial without it, the objection is waived.

A mortgage is but a collateral security to a bond. It is neither of a higher order, nor a payment of the debt: and a plea which states, not in direct terms, that the defendant paid the debt, but that he paid all the sums for which the mortgage was given, is bad on general demurrer.

Where the facts have been submitted to the Court, without the intervention of a jury, it must be inferred, in the absence of any showing upon the record to the contrary, that the evidence introduced was sufficient to warrant the verdict.

Fisher brought his action of debt against *Eason*, in the Phillips Circuit Court, to the May term, 1834, in an action of debt upon a writing obligatory executed by *Eason* to *Sylvanus Phillips*, for $1300, due the first day of March, 1831, and assigned to *Fisher*, by *Phillips*, September 21st, 1830.

At the November term, 1834, *Eason* appeared and filed his prayer of *oyer;* his first plea, of *nil debet*, his second plea, denying the assignment, and his third plea, setting up the following facts:

That on the 22d of February, 1830, he also executed to said *Phillips* a mortgage, or deed of trust, to a certain piece of land therein mentioned, to secure the payment of the writing in the declaration mentioned, together with others; that on the 22d day of September, 1830, and before any assignment had been made on said deed of trust or mortgage, he paid to and satisfied *Phillips* "all and every sum or sums of money for which the said mortgage or deed of trust was given;" and that satisfaction had been endorsed on said deed of trust or mortgage, by the Clerk of said court, by order of said *Phillips*, under the seal of the court and the hand of the Clerk; concluding with a verification.

At the November term, 1835, the defendant demurred to the plaintiff's declaration, and at the same time the plaintiff demurred to defendant's third plea. The defendant then withdrew his first plea,

issue was taken on the second, and the demurrer to the third sustained, and leave given to interpose a plea of payment: and thereupon the case was submitted to the court, and the plaintiff, *Fisher*, had verdict and judgment.

HORNER, for the plaintiff in error: The first cause of error assigned is, that oyer was prayed and not granted. The instrument declared upon is under seal and made profert of; therefore the defendant had a right to oyer, and having craved it before any other plea pleaded, neither the plaintiff nor the court had a right to withhold it. See *Tidd's Practice*, 526, &c. And the defendant having afterwards filed other pleas, does not justify the withholding oyer from him. See also 1 *Chit.* 416; *Howe's Prac.* 420.

The second error assigned is, that no disposal was made of the demurrer to the plaintiff's declaration. A demurrer, like all other pleas, having been filed, must be withdrawn, avoided, or answered; neither of which was done in this case, and therefore it is error. 1st *Chit.* 656–7; *Howe's Practice*, 220.

The third error assigned is, that the demurrer of the plaintiff to defendant's third plea was heard, determined, and sustained, without having been joined in or responded to. This was certainly error, because if the defendant would not join, the plaintiff might have stricken out the plea or moved the court to do so. But the court had no right to try an issue never made by the parties, and it was error so to do. And if the court had the right to try the law arising upon this demurrer without joinder, why should not the same rule apply to the defendant's demurrer to plaintiff's declaration? 1 *Chit.* 656–7; *Howe's Prac.* 420; 1 *Tidd*, 705.

The fourth error assigned is, that the third plea of the defendant was overruled. This was a plea of payment and satisfaction, specially pleaded. It sets out in the first place, that another and higher obligation than that declared upon, had been given for the same debt, to wit, a mortgage upon land; and that that mortgage had never been assigned away, and that payment had been made upon the mortgage and full satisfaction entered, which was a discharge of the whole obligation. Why this was not a good plea, we are unable to see. A man may give several obligations and several securities for the same debt, but the obligee shall have but one satisfaction. As if several bills of exchange be drawn for the same debt, the pay-

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ment of one is payment of all. So if a bond be given and a bill of exchange drawn to satisfy the bond, payment of the bill is payment and satisfaction of the bond also, and may be pleaded in an action on the bond; and so if the bond be paid, in like manner it might be pleaded to an action on the bill. So if several different individuals go security, all equally liable to be sued, payment by one would be a satisfaction for all, and may be pleaded in an action against any one of the others. And so in this case a bond was given, and a mortgage was given, both for the same debt, and the creditor had the right to sue upon either; if he had sued upon the bond and collected the money by judgment and execution, could not that be pleaded in an action to foreclose the mortgage? And so, on the other hand, if the mortgage be foreclosed, and the debt made by the sale of the land, could not that be pleaded in an action on the bond? The plaintiff certainly could have but one satisfaction.

It may be contended that as the bond does not show that a mortgage had been given for the same debt, the assignee was not presumed to know it. To this we answer that the mortgage did set out that it was given for the same debt, and the mortgage was of record, and therefore every person knew it. If, then, *Fisher* took an assignment of the bond, knowing that there was a mortgage of record for the same debt, and took no assignment of the mortgage, it was evident that he left the debt to be paid to either party, as the defendant might choose, and plead it in bar of the other. Or will it be contended that the assigning of the bond by *Phillips* to *Fisher*, was an absolute, positive, and entire cancelling of the mortgage? or is it a discharge of the mortgage? If the latter, the defendant had a right to plead it in satisfaction of the debt. If neither of these be true, then both remedies still exist, and *Phillips* had a right to sue for a foreclosure of the mortgage and *Fisher* had a right to sue on the bond; but they could have but one satisfaction, and if both had the right to sue, the defendant had the right to pay either. And as he had the right, by the terms of the contract as set out in the plaintiff's declaration, to *pay on or before* the day, he had a right to pay at any time; and as the mortgage was an incumbrance on his land and as he had no notice of the assignment, (for it is not averred that he had any,) he had a right to pay *Phillips* and discharge the mortgage and release his land from the incumbrance and plead that in an action on the bond. Either satisfaction or payment is special matter, and must

be pleaded specially; for all of which reasons the plea is good, and was wrongly overruled. 1 *Chit.* 480; 1 *Tidd*, 712–13; *Laws of Arkansas*, 433.

The fifth error assigned is, that after the demurrer had been sustained to the third plea, and the plea overruled, leave was given the defendant to enter a plea of payment, which plea was entered short on the record, and the plaintiff neglected to reply thereto. This being an issuable plea, the plaintiff was bound to reply thereto, and by not doing so, the plea was admitted to be true, and therefore it was error to give judgment against the defendant while this plea stood uncontradicted. 1 *Chitty* 633 and 640. As to payment before or after assignment, *Laws Ark's.* 74–5, *Steele's Dig.*

The sixth error assigned is, that the judgment was rendered without evidence. The issue made upon the second plea is, that no assignment had been made by *Phillips* to *Fisher*, as laid in the declaration; to sustain the declaration under this plea, the writing declared upon should have been produced, the assignment shown and proved, and the writing filed with the papers. The issue could be proved in no other way, and the giving judgment without this proof was error. For assignment, *Laws of Ark.* 74–5 *Steele's Dig.*

Cummins and Pike, *contra:* As to the first assignment of error, the defendant remarks that from the record it appears that the prayer of oyer, and the three pleas of the defendant were filed at the same time. A party who is entitled to oyer, is not bound to answer till it is granted, if he has demanded it. If he pleads without demanding it, he waives his claim to it. *Gould's Pl.* 439. The reason is, not only that the claim of oyer should be made, by the rules of pleading, at a certain time, but also because the only purpose in craving oyer is to demur; and after *pleading* a defendant cannot demur. For the same reason it would seem to follow that if a party pleads, and at the same time prays oyer, his prayer is a nullity. By the common law, if oyer was not granted, the defendant might sign judgment. By our statute the same end is attained. Unless oyer is given in proper time, the plaintiff is precluded from giving the paper in evidence. *Gould*, 440; *Ark's Dig.* 320. If oyer was not granted, the defendant had the right to take advantage of the failure to grant it. He did not do so. Nor has he filed any bill of exceptions. This court must therefore infer that he waived his right to oyer.

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Was oyer denied? By no means. The record does not show it. The plaintiff, be it admitted, refused or neglected to give it. This neglect or refusal was not the act of the court. Error can only be for some decision of the court. Had the court refused to permit oyer to be given, and did that fact appear from the record, it would be error. This is not the case. The court never makes an order for oyer, unless the right to it is questioned. The copy is generally given voluntarily by one attorney to the other, without the intervention of the court. *Gould*, 439, note; 1 *Tidd*, 518; *Steph. Pl.* 87. Every presumption here, is in favor of the court below. This court must infer that oyer *was* given, unless the contrary appear. *Gould*, 451; 1 *Chitty's Pl.* 372.

As to the second assignment, a party cannot demur and plead at the same time. The demurrer to the declaration in this case was put in *after* the pleas were filed, and at the second term. If a party cannot plead and demur at the same time, (see *Story Pl.* 53, 341; *Lit. Set. Cas.* 509, *Patrick vs. Conrad*,) as little can he demur *after* pleading. The demurrer was a mere nullity. It was not necessary for the court to regard it, or make any decision or order about it. A demurrer must be put in before issue joined. *Gould*, 460, 472. After a party *has* answered, he cannot be admitted to say that he stops short, because he is not bound to answer. After he has denied the facts and offered an issue, he cannot admit them and say he is not bound to answer. If he does, the court will disregard the demurrer and go on with the case.

But the court did decide the demurrer. The plaintiff and defendant both demurred at the same time; one to the plea, and the other to the declaration. The plaintiff's demurrer was sustained. This, of course, decided both demurrers, and the defendant's was overruled; because on a demurrer to the plea, the court looks back to the declaration and gives judgment accordingly. *Gould*, 474.

Besides, this court is never bound to infer that the demurrer was disposed of. 5 *Litt.* 119, *Cochran's Ex'rs* vs. *Davis*. Where a plaintiff omitted to waive his demurrer, but went to trial, it was held no ground to reverse the judgment. *Story*, 368; 9 *Mars. Rep.* 533.

As to the third assignment, a similiter and a joinder in demurrer are alike. It was always the practice in England for the clerk to add both. *Steph. on Pl.* 281. A similiter may be added after verdict. 1 *Chitty* 537; 1 *Lit.* 159. The party who demurs may himself

add the joinder in demurrer. 1 *Chitty's Pl.* 644. When parties have gone to trial on a plea which has not been traversed, the traverse may be added after verdict. 1 *Chitty*, 588; 5 *Taunton* 164. A demurrer to the declaration being then pending, it was in fact a joinder in the demurrer to the plea.

As to the fourth assignment, the demurrer to the plea was rightly sustained. The object of the plea was simply to set up a payment; because the mortgage was neither a higher security, nor a satisfaction for the debt. It was but a collateral security. Considered as a plea of payment, the plea was undoubtedly bad. Every plea in bar must be certain, unambiguous, and present a distinct issue. This plea is doubtful, ambiguous, uncertain, and not issuable; besides being multifarious, argumentative, and for the most part, surplusage. It does not say in direct terms and in legal language, with sufficient certainty that the defendant had paid the debt in the declaration mentioned, or had paid the note. It only avers that he had paid all the money for which the mortgage was given. This was the issue offered. Was it such an issue as the plaintiff was in law entitled to? See *Gould*, 735; *Stephen*, 337, (*n*) 421, 425, 488.

Allowing the demurrer to have been wrongly sustained, the defendant has estopped himself from urging this as error. After it was sustained, he asked leave to amend by filing a plea of payment. By so doing he submitted to the judgment of the court sustaining the demurrer, and withdrew his plea. It is no longer a part of the record. If three or four declarations or pleas have been demurred to and amended in succession, those demurrers cannot be reargued here. It would be a waste of time, and could not be allowed.

As to the fifth assignment, the point here raised has been fully answered in the remarks on the third assignment. After verdict the traverse may be added. 1 *Chitty's Pl.* 588; 12 *J. R.* 353, *Coon* vs. *Whitimore*. In the cases mentioned in 2d *Saunders*, 319, *n.* 6; in *Cowp.* 407, *Sawyer* vs. *Pocock;* and 3 *Burr*, 1793, *Harvey* vs. *Peake;* and other cases referred to, the courts refused to set aside a judgment for want of a similiter.

As to the sixth assignment, it is well settled that this court will now infer that sufficient evidence *was* offered to warrant the verdict. *Gould*, 497, 498; 1 *Chitty Pl.* 360. That the law is the same where the court sits as a jury, see *Lit. Sel. Cas.* 351, 353, *Vernon* vs. *Young;* 2 *J. J. Marsh.* 253, *Logan* vs. *Donisshon;* 7 *Mon.* 454, *Herndon's*

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Exr's vs. *Bartlett's Exr's.* Errors, in fact, cannot now be taken advantage of. This court, after verdict, will suppose every thing to be right unless the contrary appear. *Story*, 72; *Stephen* 179, 180; 4 *Mon.* 42, *Jones* vs. *Williams*; 1 *Bibb*, 308, *Heydon* vs. *Lockhart's Adm.*; 3 *Marsh.* 222, *Mummy* vs. *Johnston;* 1 *Marsh.* 106, *Braxdate* vs. *Speed;* 1 *Marsh.* 233, *Trabue* vs. *Coleman.*

The plaintiff in error has no right to assert that the evidence was not offered, unless he has made that fact appear of record, by bill of exceptions, or in some other way. If illegal evidence is admitted, that fact must appear by bill of exceptions; or not being of record, it will not be ground to reverse: *Story*, 369; which is respectfuly submitted.

Dickinson, *Judge*, delivered the opinion of the court: This was an action of debt brought on a writing obligatory, by *Fisher*, as assignee of *Sylvanus Phillips*, against *Eason.* In his defence, *Eason* craved oyer, and filed three pleas. First, *nil debet;* second, denying the assignment of said writing; and third, that *actio non* on the second day of February, 1830, he executed to *Phillips* a mortgage or deed of trust on a certain tract of land lying in said county, near the mouth of the river St. Francis, to secure the payment of the writing in the plaintiff's declaration mentioned, (together with two other notes, all bearing the same date,) by which said deed of trust or mortgage, he, the said *Eason*, conveyed to the said *Phillips*, his heirs or assigns in trust, to secure the payment of the sum above demanded on said writing, with others, a certain tract of land as aforesaid, containing 640 acres: and the said *Eason* avers that on the 22d day of September, 1830, without any assignment having been made on said deed of trust or mortgage, and before any assignment had been made upon said writing in said plaintiff's declaration mentioned, he, the said *Eason*, fully paid to and satisfied him, the said *Phillips*, all and every sum or sums of money for which the said mortgage or deed of trust was given: and he, the said *Phillips*, to wit, on the said 22d day of September, 1830, at the county aforesaid, caused the Clerk of the Circuit Court to endorse upon said deed of trust or mortgage, that he, the said *Phillips*, acknowledged the payment of the money for the said deed of trust or mortgage, and relinquished all his right, title, claim, and interest, of and to the premises mentioned in said deed; which said endorsement so made upon said deed, is under

the seal of said court, and under the hand of *Austin Rudwick*, then clerk and ex-officio recorder of said county. Of all which profert is made, concluding with a verification, &c. Afterwards the parties, by their attorneys, appeared. The defendant withdrew the plea of *nil debet*, issue was taken upon the second, and a demurrer filed to the third plea. On argument the demurrer was sustained; when leave was given the defendant to interpose the plea of payment, of which, however, he did not avail himself; and neither party requiring a jury, the case was submitted to the court for trial: whereupon, afterwards, the court being sufficiently advised of the premises, found for the plaintiff, and judgment was entered up accordingly: to reverse which the defendant in the court below prosecutes his writ, and assigns for error, first, that having craved oyer of the writing declared on, the court ought to have awarded it. Second, that the demurrer to the declaration was not disposed of. Third, that there was no joinder to plaintiff's demurrer. Fourth, that the court erred in sustaining plaintiff's demurrer. Fifth, no replication to, or disposition made of, defendant's plea of payment. Sixth, that on the trial there was no evidence of the assignment, nor was the writing declared on produced in court.

As regards the first assignment, on profert made as in this case, the defendant having craved oyer, was entitled to it before he could be required to answer; as he is supposed to be unable to plead advantageously without it. There is no evidence that it was refused, nor is it necessary to enquire; for having afterwards filed his pleas to the action, he thereby waived all his right to oyer. See *Gould*, 451; 1 *Chitty*, 372. 2d, The demurrer to which the plaintiff in error refers, does not appear to have been either regularly filed or entitled as of this or any other suit. As presented to us, it could have no bearing upon these parties; and even if correct in form, it was too late. As an issue in fact had been made up, the adverse party was not bound to notice it. 3d, The want of joinder in demurrer is cured by verdict. The defendant below might have aded the similiter, and he waived it by going to trial. See *Chitty*, 587, 614, 588; 5th *Taunton*, 164. 4th, This assignment demands more serious attention; for upon it the defendant below appears to have placed the most reliance; but whether the third plea to which the demurrer was sustained, was intended as a plea of payment or of satisfaction or both, we have been unable to ascertain. It cannot be considered as a plea

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of payment, and it wants the requisites of the other. It sets up a special defence that a collateral security had been given, which was neither of a higher order nor a payment of the debt. It does not, in direct terms, assert that *Eason* paid the debt in the declaration mentioned, but that he had paid all the money for which the mortgage or deed of trust was given. The plea is doubtful, ambiguous, and uncertain; and no distinct issue being presented, we think the demurrer correctly sustained. *Stephens on Pl.* 421, 425, 488, 387. The fifth assignment is without foundation, the record contains no plea of payment. After the demurrer to the third plea was sustained, leave was granted the defendant below to interpose the plea of payment, but he did not avail himself of it. Nor is the sixth objection better taken; for the facts having been submitted to the court without the intervention of a jury, we must infer, in the absence of any objection or bill of exceptions to the contrary, that the evidence introduced was sufficient to justify the finding. *Gould*, 497, 498; 1 *Chitty*, 360; *Story*, 72; *Stephens on Pl.* 179.

The judgment of the Circuit Court is therefore affirmed.

TALLY, Administrator of RIGGS, *against* REYNOLDS.

ERROR *to Washington Circuit Court.*

It is a general rule that the mere appearance of an Attorney for the defendant is always deemed sufficient for the opposite party and for the Court, who will look no further, and will proceed as if he had sufficient authority, and leave any party who may be injured, to his action, unless there appear to be fraud or collusion in the case.

But a party may, before judgment, upon a sufficient showing, to be adjudged of by the Court, require the Attorney representing his adversary to show his authority.

To this purpose he must show to the Court, by affidavit, facts sufficient to raise a *reasonable presumption* that the Attorney is acting without authority.

The mere possession of the transcript of a judgment does not raise even a presumption, that the possessor of it is legally or beneficially interested in it.

The simple allegation that a party is "informed and believes" that the Attorney has no authority, without stating the facts upon which it is founded, is not sufficient to call for his authority.

The license and admission of an Attorney does not give him the right to appear for any particular person. To this end he must be *employed.*

This employment may be proved by circumstances, as well as by warrant of Attorney.

This was an action of debt. *Reynolds*, defendant in the court below, filed his affidavit, stating that he verily believed that the plaintiff's attorney had no authority to bring the suit, and his reasons for that belief. The attorney objected to the sufficiency of the affidavit, and his objections were overruled. He then introduced testimony to prove his authority. The court decided the testimony insufficient, and dismissed the suit. It is assigned as error that the court erred in deciding the affidavit sufficient, and also in dismissing the suit.

WALKER and FOWLER for the plaintiff in error: After the appearance and plea of oyer, the motion came too late. That admitting it to have been in time, it did not set out a sufficient cause to warrant the court in entering the rule against him. The affidavit should have set forth the reasons upon which his belief is founded; for he does not affirm it to be true, absolutely, but only gives his belief; and the court should see upon what that belief was founded. The circumstances of the records being in the possession of the attorney, and his appearing in the case, create a presumption of authority, which must be met by a well founded belief. The question has been settled by the Superior Court of Arkansas. See the case of *Donlin, use of McPhail*, vs. *A. Standifer*, decided in this court, at January term,

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1833, page 100; and in *Earhart* vs. *Murphy*. See 1st *Pirtle's Digest*, page 76, case 14; and *Johnson's Digest*, page 82, cases 22 and 23; 6 *Johns. Rep.* 37, 302; 1 *Salk.* 86, 88.

And said attorney further insists that if the court should be of opinion that the affidavit was sufficient, still the evidence adduced shows ample authority for prosecuting the suit; all of which will be clearly seen by reference to the record.

CUMMINS and PIKE, *contra:* This was an action of debt. The defendant in the court below filed his affidavit stating that he verily believed that the plaintiff's attorney had no authority to bring the suit; and stating his reasons for that belief. The plaintiff's attorney objected to the sufficiency of the affidavit, and his objections being overruled, he introduced testimony to prove his authority to prosecute the suit. The court decided the testimony to be insufficient, and dismissed the suit. The plaintiff in error assigns as error that the court below erred in deciding the affidavit of the defendant to be sufficient, and also in dismissing the suit.

The defendant in error contends, first, that the affidavit was sufficient to put the plaintiff's attorney upon proof. There are no statutory provisions on the subject, and we are to be guided by the rules of practice, in this respect, in England and our sister States. Nothing is better settled in England than that no attorney can appear without a regular warrant of attorney. 1 *Bac. Ab. Attorney, c. t.* It is true that in this country the practice has not been to call upon attorneys for the warrant and authority by which they appear. That such has not been the practice, is creditable to the profession; yet when the authority is disputed, it must be made to appear. Practice has only dispensed with, and not abrogated the rule. It has been the common practice in England, when no authority could be produced by the attorney who brought the suit, to dismiss on the mere motion of the defendant alone, for want of that authority. From this follows,

Secondly, That the court below did not err in dismissing the cause, inasmuch as no regular warrant of attorney was produced. See, as to the points here taken, 2d *Yerger*, 325, *Gillespie, ex parte.* The attorney who obtains the judgment cannot issue a *capias ad sat.* without a new warrant of attorney; nor after his client, who was plaintiff, dies, can he revive the suit or take any other step in it, without such new warrant of attorney. Professional courtesy may dictate that the

authority by which a brother attorney acts, should not be disputed; but when it is so done by express instruction of the client, the court must administer the law, and decide, as the court below did, that the attorney will not be presumed to have any authority to appear in the cause, but must produce such authority. See 2 *Bibb*, 382, *Richardson* vs. *Talbot;* 2 *J. J. Marsh.* 181, *Ball* vs. *Lively;* 3d *Monroe*, 189, *Mc Alexander* vs. *Wright;* 2 *Bibb*, 284; *Ark. Dig.*, *Jud. Pro.* sec. 58.

Third, But even granting that a warrant of attorney was not necessary, the plaintiff's attorney utterly failed to prove his authority by parole. One witness deposed that he had talked with the plaintiff, *Tally*, about the solvency of the defendant; that he afterwards conversed with *Fulton*, an attorney in the original suit, about it; and that he had received a letter from one *Holman*, who *said* he had bought an interest in the judgment. He did not know from whom he received the record for collection, but infers it to have been *Fulton*, for reasons stated. That he brought the record from Tennessee, and gave it to the plaintiff's attorney. The plaintiff's attorney stated that *Holman* sent him a copy of the letters of administration; said that he had an interest in the judgment, and urged its collection. Here was no proof whatever, of any authority from *Tally*, to the plaintiff's attorney.

Fourth, A writ of error will not lie in such a case as the present. See 3d *Yerger*, 325, *Gillespie*, *ex parte;* and this cause must be stricken from the docket for want of jurisdiction.

RINGO, *Chief Justice*, delivered the opinion of the court: This was an action of debt founded on a record of the Circuit Court of Lincoln county, in the State of Tennessee, brought in the name of the present plaintiff, against the defendant, in the Washington Circuit Court. The defendant appeared in the court below, and after filing a prayer of oyer of the record, and letters of administration mentioned in the declaration, on his affidavit then filed, obtained a rule against the attorney prosecuting the suit, to show by what authority he prosecuted the same. The affidavit stated in substance that *David Walker*, the attorney prosecuting the suit, had no warrant or authority to prosecute this suit, as he verily believed; and that this belief was founded on the fact that the plaintiff is a resident of the State of Tennessee, and the papers were in the hands of *A. F. Greer*, and by him placed in the hands of said *Walker*, without the consent

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or knowledge of said *Tally*. On the return of the rule, the attorney prosecuting the suit, produced a witness who testified that whilst an attorney at law, he conversed with the plaintiff in this suit, relative to the solvency of the defendant, who resided in Arkansas, and his ability to pay said debt; that he responded to plaintiff that defendant was good. That he afterwards conversed with *Fulton*, an attorney in the original suit, about the collection of said debt; and after his arrival in Arkansas, he received a letter from ——— *Holman*, who said he had bought an interest in the judgment. He does not recollect which of these gentlemen gave him the record for collection which is the ground of action in this suit; but from circumstances infers that it must have been *Fulton*, as the plaintiff lived some distance from, and *Fulton* lived in town; that he brought said record from Tennessee, and placed it in the hands of *David Walker*, the attorney prosecuting this suit for collection, and took the receipt of said *Walker* and *A. F. Greer*, for the collection of the same. *Walker*, the attorney prosecuting the suit, also testified that he conversed with the defendant long before this suit was brought, and showed him the record, and upon his refusing to pay, wrote to Tennessee and procured the letters of administration granted to the plaintiff. They were sent to him by *Holman*, who stated that he had an interest in the claim, and urged the collection thereof. Upon that evidence the court decided that the attorney had not shown any sufficient authority to prosecute the suit; and thereupon made the rule absolute, ordered the suit to be dismissed, and rendered judgment for costs in favor of the defendant, against the plaintiff.

The plaintiff excepted to the opinion of the court, and by his bill of exceptions spread the evidence on the record; and has brought the case before this court by writ of error. The assignment of error questions the decision of the court below:

1st, That the affidavits of the defendant were sufficient in law to require the attorney to produce and show his authority to prosecute this suit: and 2d, That the authority shown upon the rule against the attorney was not sufficient to enable him to prosecute the suit. The right of the defendant to call upon the attorney representing the plaintiff to show his authority, does not appear to have been questioned; but its exercise was resisted on the ground solely that the facts disclosed by the affidavits were not sufficient in law to authorize the interference of the court for that purpose. And the validity of this

objection to the case shown by the affidavits, is the first question presented by the record, and made by the assignment of errors, for the decision of this court. The circumstances under which the authority of an attorney regularly licensed and duly admitted to practice in the courts, may be questioned, and the attorney required to have his authority, do not appear to be very clearly defined, or very accurately stated in any of the authorities or books of practice to which we have been referred or had access. One general rule is, that the mere appearance of an attorney for the defendant is always deemed sufficient for the opposite party, and for the court; who will look no further and will proceed as if he had sufficient authority, and leave any party who may be injured, to his action, unless there appears to be fraud or collusion in the case. This rule appears to have been too long and authoritatively settled to be now disturbed. Under its influence the Supreme Court of the United States have decided that the non-appearance in the record of an authority to the attorney to prosecute or defend the suit was not error. *Osborn* vs. *the Bank of the United States*, 9 *Wheaton*, 738; 5 *Peters' Cond. Rep.* 752; and the Supreme Court of New York, after a most elaborate examination of authorities, decided that the confession of judgment by an attorney without any authority therefor, from the defendant, was not irregular, and refused to set it aside, although the defendant's affidavit was positive that he had not in any manner, directly or indirectly confessed or authorized the confession of any judgment. The court, however, after it had ascertained and stated the rule, and admitted its authority, subjected it to such modifications as justice required, and leaving the judgment to stand as a security to the plaintiff, to save the defendant from injury and prevent abuse in the practice granted to the defendant leave to plead to the merits within a limited time, and during that time suspended the execution of the judgment; but in the default of such plea, the plaintiff was at liberty to proceed with his execution, under said judgment. 6 *Johnson's Rep.* 296, *Denton* vs. *Noyes*. The Supreme Court of Pennsylvania have acted on the same principle, in *McCullough* vs. *Guefner*, 1 *Binney* 214; an attorney undertook to appear for a defendant not summoned, and without any warrant of attorney, and the court held the appearance good. In England, the Court of King's Bench, on the same ground compelled an attorney, who had, through misinformation, undertaken to appear for the defendant, without warrant or direction, to complete his appearance, so as to

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render the judgment which the plaintiff had taken by default, regular: 1 *Str.* 693, *Lorymer* vs. *Hollister*. Other authorities might be cited in which the same principle has been recognized and acted on in the United States as well as in England; most of which were examined, reviewed, and cited in the case of *Denton* vs. *Noyes*, 6 *Johns.* 296. But however conclusively this general rule may have been established, it does not follow as a necessary consequence that a party may not, before judgment, upon a sufficient showing, to be adjudged of by the court, require the attorney representing his adversary to show his authority. This right is essential to the security of all suitors, and its existence cannot be denied. In *Howe's Practice*, page 31, title *Warrant of Attorney*, it is said, "If the defendant suspects that the suit has been commenced without the authority of the plaintiff *on the record*, he may call on the plaintiff's attorney for proof of his authority." This right was elaborately discussed by the Court of Appeals of Kentucky, in the case of *McAlexander* vs. *Wright*, 3 *Monroe's Rep.* 189. And it was there decided that the defendant had such right, and upon a sufficient showing that his right was jeopardized, or that he was disturbed by being brought into litigation without the consent of the man who stood on the record as his adversary, he was entitled to its exercise. According to the rule settled by the Court of Appeals of Kentucky, it is incumbent on the party undertaking to question the authority of the attorney representing his adversay, to show to the court by affidavit, facts sufficient to raise a reasonable presumption that the attorney is acting in the case without authority from the party he assumes to represent, then, and not until then, the attorney may be required to show his authority.

In defining this rule, which we understand to have been the settled rule of practice in the courts of England and most, if not all, of our sister States, we would not be understood as imposing on the profession hardships in their management of suits, or deciding that they are bound to gratify the party to which they are opposed with a sight of their authority upon light or frivolous grounds; but when substantial reasons are shown why the interest of the adverse party is jeopardized by the prosecution of suit without the leave or consent of the real owner of the demand, every reasonable person will agree that their authority ought to be shown.

The facts stated in the defendant's affidavits in this case, we think were such as to entitle him to the rule against the attorney prosecut-

ing the suit to show his authority. He shows that the record was placed in the hands of the attorney by *A. F. Greer, without the consent or knowledge of the plaintiff*, and that the plaintiff resided in Tennessee. These facts must be regarded as strong circumstances, tending directly to show that *Tally* had no hand in this suit; and for that reason the defendant might be in danger of another contest with him for the same demand. We will here remark that the facts shown in this case are just sufficient to raise a legitimate legal presumption against the attorney's authority; and if the facts that the record was placed in his hands by a third person, and not by the plaintiff, and without his consent or knowledge, had been less positively stated, the rule ought not to have been granted. In cases like the present, where the action is founded on the judgment of some court, a transcript of the record whereof may be procured at any time, and by any person who will pay the legal fees therefor, and suit be instituted in the name of the judgment creditor, without his knowledge or consent, and the money coerced from the defendant without any authority whatever from the real owner of the demand; and because the mere possession of such transcript does not raise even a presumption that the possessor has any legal or beneficial interest in the judgment, the custody of which does not belong to the creditor, the rule should be made whenever it is shown that there is a reasonable probability that the suit is prosecuted without authority of the judgment creditor or other person really and beneficially interested in the judgment; but where the action is founded on any written obligation, the obligee has the legal custody of the instrument and if any other has the possession of it the legal presumption is that he obtained it fairly and with the consent of the obligee; and this presumption stands, unless repelled by evidence: therefore, in such cases, stronger circumstances should be required to be shown than in the case of record, to induce the court to grant the rule against the attorney to show his authority. We have been referred to the case of *Standifer* vs. *Doulin, for the use of McPhail*, decided by the Supreme Court of the late Territory of Arkansas. In that case, as in this, an affidavit was filed by the defendant denying that the attorney prosecuting the suit had any authority for that purpose. The affidavit there stated that the defendant was informed and believed that that suit had been instituted against him by *John McPhail* and his counsel, without any lawful authority from the plaintiff; and

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he had good reason to believe that neither *McPhail* nor the attorney could execute a legal acquittance for the debt, if it should be paid to them. There was no statement of the facts or circumstances upon which the fears of the defendant were founded, and for that reason it was held insufficient to require the attorney to show his authority. The principle of that decision meets our approbation fully. The simple allegation of information and belief, without stating the facts upon which it is founded, however positively asserted, ought not, in our opinion, to be held sufficient. The facts themselves should be stated, to enable the court to determine how far they warrant the conclusions of the party. In the case before us, the facts are stated, and in that, this case differs from the case of *Standifer* vs. *Doulin, for the use of McPhail.*

We are, therefore, of the opinion that the affidavits filed in this case were, in law, sufficient; and that the court did not err in granting the rule thereupon.

The second question is, did the court err in deciding that the authority shown by the attorney representing the plaintiff was insufficient? The general right of an attorney regularly licensed and duly admitted to practice in courts to appear for all of the suitors in courts for whom he may be employed, is admitted. This right he has by virtue of his license and admission, and it is proved by the production of the license, and the law under which it was granted; but it is not of itself an authority to appear as the representative of any particular person, until he is in fact employed or retained for that person. Then, and not until then, he becomes his attorney and representative, and is authorized to appear in his stead.

In the case before us, no warrant of attorney for the plaintiff was produced, nor any evidence whatsoever that he had retained or employed the attorney to prosecute this suit or collect the demand in question. One witness (whose name is not even mentioned in the record) testifies that whilst an attorney at law, he conversed with the plaintiff relative to the defendant's solvency and ability to pay the debt, and informed him that the defendant was good; and that he afterwards conversed with *Fulton*, who had been an attorney in the original suit about the collection of this debt. That one *Holman*, afterwards informed him by letter that he had bought an interest in the judgment. He does not recollect who gave him the record, but infers that he received it from *Fulton*. He brought it from Tennessee

and placed it in the hands of WALKER, the attorney prosecuting this suit, for collection; and took the receipt of WALKER and *A. F. Greer*, for its collection. WALKER, himself, testified that he showed the record to the defendant and conversed with him about it long before this suit was brought, and his refusal to pay: that he wrote to Tennessee and obtained the plaintiff's letters of administration, which were sent to him by *Holman*, who stated he had an interest in the claim, and urged its collection.

From a careful examination of this testimony, it is apparent that the plaintiff has taken no part whatever in the present controversy: neither the transcript of the record nor letters of administration, appear to have been procured or sent by him; nor does he appear to have given any instruction about them, or to have been consulted in relation to the matter. No letters were written to or received from him. Once, indeed, he did converse with the witness about the defendant, and his ability to pay; but he is not shown to have done any thing more. The witness does not pretend to have acted as his agent, or by or under his directions or authority, in bringing the transcript of the record from Tennessee to Arkansas, and placing it in the possession of WALKER and *Greer* for collection. If he had acted as the agent of the plaintiff, why did he not say so? We cannot believe that a point so important would have been silently or inadvertently passed without explanation, if the fact had been so: and his silence on that subject furnishes strong presumptive evidence that he did not act in that character. The evidence in regard to *Holman's* conduct in the matter, cannot help the attorney; for although *Holman* appears to have corresponded with him and urged the collection of the claim, and at the same time claimed an interest in the judgment, yet he is not shown to have had, in fact, any interest whatever in the matter; and until that was shown by some right delivered from the plaintiff or his intestate, he could not be regarded as a person competent to confer the authority requisite to enable the attorney to prosecute this suit. We are therefore of the opinion that the attorney representing the plaintiff did not show any competent legal authority to prosecute this suit, and there is no error in the decision of the court below.

The judgment of the Circuit Court is therefore affirmed, with costs.

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JEFFERY *against* UNDERWOOD.

ERROR *to Lawrence Circuit Court.*

The clause of "*in cujus rei*," &c., is not essential to a deed or bond. Only three things are essentially necessary to making a good obligation, viz: writing, on paper or parchment, sealing, and delivery.

It is not necessary that the obligor should subscribe his name.

There is no occasion in the bond to mention that it was sealed and delivered. And this rule applies with equal force, under our Statute, to writings where a *scroll* is affixed at the end of the name.

Where an action is commenced before a Justice of the Peace, the cause of action must be truly stated in the *summons*, with sufficient certainty to apprize the defendant of the legal character of the suit he is called upon to answer; and the plaintiff's evidence must correspond with and support the summons. Evidence of a cause of action entirely variant from it, will not be received.

The Statute which provides that the case "shall be tried in the Circuit Court *on its merits*," cures only irregularities and formal defects.

The admission of improper testimony is not such an irregularity as is cured by the Statute.

Where the summons was to answer an action "on a *note of hand*" a writing obligatory cannot be given in evidence to sustain the action in the Circuit Court.

Summoning a party to appear before a Justice in an action of debt, does not make it an action of debt.

It is not necessary to state in the summons the species of action, whether in *debt, covenant*, &c.; and if inserted it is surplusage.

A note for fifty dollars, *to be paid* in a horse, will not sustain an action of debt.

The opinion delivered in this case sets forth the facts with great particularity and precision. *Underwood* commenced his suit before the justice by summons, against *Jeffery* and one *Crawford*. The summons was, to answer "in an action of *debt* on a *note of hand*." The summons was not served, nor were any proceedings had on *Crawford*. *Underwood* obtained judgment before the juitice against *Jeffery*, for twenty-five dollars debt, and costs; and *Jeffery* appealed to the Circuit Court.

In the Circuit Court, a writing was offered in evidence, in the opinion set forth *verbatim*, whereby *Jeffery* and *Crawford* promised to pay *Underwood* "fifty dollars, *to be paid in a horse*, to be valued against good trade," &c. This writing was signed by *Jeffery* and *Crawford*, and the word "seal," surrounded with a scrawl, not with any thing said in the body of the note about a seal, or any clause of *in cujus rei, &c.*

To the reading of this writing, *Jeffery* objected, and his objections were overruled by the court. Judgment was thereupon given against him for twenty-five dollars debt, and costs, &c.

FOWLER and WALKER, for the plaintiff in error: 1st, The Circuit Court erred in admitting the instrument in writing in evidence, it not being "*a note of hand*," but a *writing under seal*, as evidenly appears by the word "*seal*" being written at lenght at the end of *Jeffery's* name, and circumscribed with a scroll, in the usual manner: consequently there was a *variance* between it and the writ. *Vide Geyer's Dig.* 382, case of *Mading* vs. *Payton*, in this court at the ——— term, A. D. ———.

2d, The Circuit Court ought to have excluded said writing, because an action of *debt* will not lie thereon; it being a contract for the payment of *fifty dollars*, "*in a horse to be valued against good trade*," &c. Then if it be a writing under seal, the action should have been *covenant;* if not under seal, it should have been *assumpsit: debt*, in either case, being wholly improper and untenable. *Vide Hard. Rep.* (*Ky.*) 510, *in note;* 1 *Ch. Pl.* 88, *etc.* 100, 101, 109, *et seq.* 112, 113, *et seq.;* 1 *Pirt. Dig.* 234, *et seq.;* 2 *Bibb's Rep.* 584; *Hardin's Rep.* 118; 3 *Monroe's Rep.* 8. See a conclusive adjudication on this point, in 8 *Peters*, 181.

3d, Even throwing the *writ* entirely out of the case, still the judgment should have been for *damages*, either in covenant or assumpsit. The judgment should always correspond to the demand and species of action. See 2 *Tidd's Pr.* 842; 1 *Ch. Pl.* 100, 108, 109, 116.

LINTON and TAYLOR, *contra:* 1st, The court below decided correctly in admitting in evidence the writing sued on; and an action of debt will lie on an instrument of this kind. See *Bac. Ab. action of debt; Com. Dig., debt, A.* 8, *page* 370; *Chit. Pld.* 103, 104, 105, 106; *Blackford's Rep.* (*Indiana*) 216, 217, 230, 234; 3 *Moore's Index*, 359; 8 *East.* 7.

2d, There is no classification of actions required by law, in proceedings before a Justice of the Peace: *Camp. Dig.* 367, 365, 368, *in sections* 41, 45, 48.

3d, The judgment was right, or if not technically entered, it is cured by statute of Jeofails: *Campb. Dig.* 333, 322.

4th, The appearance cured all defects and irregularities in the writ and form of action. 1 *Tidd's Prac.* 181, 562; 4 *Peter's Rep.* 501.

RINGO, *Chief Justice*, delivered the opinion of the court: This is a writ of error with supersedeas to a judgment of Lawrence Circuit

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Court, given upon an appeal from the judgment of a Justice of the Peace, in a suit commenced by *Underwood* against *Jeffery* and one *N. W. Crawford*. The summons issued on the 4th, returnable on the 9th day of January, 1836, requiring the said defendants to appear before the Justice to answer the plaintiff in an action of *debt* on a *note of hand*. The summons does not appear to have been executed on *Crawford*, and no further proceedings were had against him in the case. Several continuances and two trials by jury were had in the case before the Justice of the Peace; the last of which resulted in a verdict in favor of *Underwood*, for $25; and for that sum, together for the costs of suit, the Justice gave judgment against *Jeffery*, who appealed therefrom to the Circuit Court. On the trial in the Circuit Court, after the jury was sworn, *Underwood* offered to read as evidence to the jury, the following instrument in writing, to wit:

"On or before the twenty-fifth day of this month, I promise to pay "*John J. Underwood* fifty dollars, to be paid in a horse, to be valued "against good trade, for keeping the mare.

"*Lawrence*, December the 14th, 1835.

"JESSE JEFFERY, [SEAL.]
"N. W. CRAWFORD, [SEAL.]"

To the reading of which as evidence, *Jeffery* objected; and his objections being overruled by the court, he excepted, and spread the writing on the record, *in haec verba*, as above set forth; and the jury having returned a verdict, the court rendered judgment thereupon for twenty-five dollars debt, together with all the costs expended in and about the case, in favor of *Underwood* vs. *Jeffery*.

Two errors have been assigned specially. The first questions the decision of the Circuit Court, admitting the writing offered by *Underwood*, and admitted by *Jeffery*, to be read as evidence to the jury. And the second alleges that the Circuit Court erred in rendering judgment in debt, when it ought to have been for damages alone. These questions will be examined in the order in which they are made.

By the summons, the plaintiff in error was called upon to answer in an action of debt on a note of hand; and it is contended by the plaintiff in error, first, that the instrument offered in evidence, and objected to by him, was not a note of hand, but a writing obligatory; and consequently there was a material variance between the writing

offered to be read as evidence to the jury, and the contract mentioned in the summons as the foundation of the action; and that therefore the court ought to have excluded it from the jury: and secondly, that this is an action of debt, and debt will not lie on the writing offered and admitted in evidence, and for that reason the court ought to have excluded it. Was the instrument offered and objected to on the trial, a writing obligatory or a promissory note? is the first question to be met and decided. There is no attestation whatever, nor express declaration, any where on the face of the instrument, that it was signed or sealed by the makers. The signatures of the makers appear at the foot of the instrument, with a scrawl in writing annexed, immediately at, against, and after the end of each name. Each scrawl circumscribes the word "*Seal*," which is plainly written within the scrawl. It is not denied that the scrawl and the word seal inclosed by it, were placed upon said writing as they appear there, by the makers respectively. And it is admitted by all, that if the clause of "*in cujus rei testimonum sigillum meum apposen*," or any words of the same or like import, had been inserted in the body of the instrument, or prefixed to the signatures, it would have the same force and obligation as if it had been actually sealed; and this would be its legal effect by virtue of the provisions of the statute, which declares that "any instrument in writing to which the person executing the "same shall affix a scrawl by way of seal, shall be adjudged and "holden to be of the same force and obligation as if it were actually "sealed."—*Ark's Dig.* p. 321.

The question then is, whether an instrument in writing to which the persons executing the same shall affix a scrawl by way of seal, without any attestation or clause of "*in cujus rei*," &c. or other words of the same or like import, appearing on the face of the instrument, shall be adjudged and holden to be of the same force and obligation as if it was actually sealed. This question would seem to be answered by the provisions of the statute before recited; the language of which is clear and explicit. Its reference is to the act of the party executing the obligation, not to the evidence necessary or proper to prove that act. To affix a scrawl by way of seal to an instrument in writing, is one thing, and the *proof* that it was so affixed by the person who executed the instrument, is another. The scrawl must appear on the face of the instrument; the proof that it was placed there by way of seal may be by evidence *dehors* the instrument. The effect

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of the former is declared by the statute; the latter is no where mentioned in the statute. They are not mutually dependant one upon the other; the former may exist upon the writing without any evidence to prove that it was placed there by the person who executed the writing; in which event it would be deemed sufficient, until its authenticity was denied; when, if there was a defect of proof to establish the execution, the instrument would be avoided; not for any defects on its face, but for matter entirely *dehors* the writing. And this would be the result, although it was said on the face of the instrument that the maker had thereunto set his hand and affixed his seal: for it is clear that if the person sought to be charged, never in fact signed, sealed and delivered the instrument, as his deed, he would not be estopped by any thing appearing on the writing from denying that it was his deed; because until that execution and delivery is admitted or proved, the language of the deed cannot be said to be his; and this proves that the clause of "*in cujus rei*," &c. is not essential to the deed, and does not *per se* prove that it was in fact signed and delivered by the person whose name and seal appear to the writing. The fact of sealing only, and not the attestation is mentioned in the statute. The intention of the Legislature in enacting this law, was to place all writings to which the person executing the same should affix a scrawl by way of seal, upon the footing of sealed instruments. This object, and no other, was designed to be accomplished by the law, as is clearly indicated by the language used. It was not designed to abrogate seals, but to leave the law as it then stood, in relation to them, untouched. And there can be no doubt that a writing duly sealed and delivered in the mode anciently used, would still be good, although the practice has been long disused, and is now almost entirely superseded under statutory sanction, in most if not all of the Western and Southern States, and a scrawl by way of seal, substituted in its place. If we are correct in the view which we have taken of this statute, and the object it was intended to accomplish, we have only to ascestain what acts and expressions were essential in the proper execution of a good and valid obligation at common law, substituting only the scrawl in the place and lieu of the common law seal.

A deed is "a writing or instrument written on paper or parchment, sealed and delivered;" and "an obligation is a deed in writing whereby one man doth bind himself to another to pay a sum of

money or do some other thing." *Shep. Touch.* p. 50, 367. And it is said that there are only three things essentially necessary to the making a good obligation, viz: writing on paper or parchment, sealing, and delivery: and it has been adjudged not to be necessary that the obligor should sign or subscribe his name, because subscribing is no essential part of the deed; sealing being sufficient. *Bacon's Abr.* title *Obligation*, (6); *Shep. Touch.* p. 54, 56, 60, 369; *Co. Lit.* 35, b. 2; *Blackstone's Com.* 305, 306. Also, though sealing and delivery be essential to an obligation, yet there is no occasion in the bond to mention that it was sealed and delivered. *Bacon's Abr.* title *Obligation*, (C,) and so it has been adjudged; 2 *Co. Rep.* 5, (*a*); *Co. Lit.* 7 (*a*); 1 *Sergeant & Rawle*, p. 72; 2 *Serg. & Rawle*, 502; 4 *Yerger*, 528.

The practice of affixing seals to the most solemn and important obligations, appears to have existed in times of great antiquity, and has been continued in some form or other down to the present period. It appears to have been introduced into England by the Normans, and came into general use about the time of Edward III; *Sheppard's Touch.* 56; and as the law stood prior to the fourth year of James the First, (up to which period we have adopted the laws of England of a general nature and not local to that kingdom; *Ark's Dig.* p. 130,) the seal must have consisted of some tenacious substance capable of being impressed, attached to the paper or parchment on which the obligation was written, with an impression made thereon by the person to be bound by the obligation or deed; but it was immaterial whether the impression was made with the seal of the party or any other seal, or with a stick or any such like thing. In either manner it was good.

Having thus shown, as we conceive, conclusively, by the authorities cited, that an obligation at common law without the clause of "*in cujus rei*," &c., or any other expression of the like kind, or even the signature of the maker, *if sealed and delivered by him*, would be good as his deed: Therefore, if the construction which we have given to the statute authorizing the substitution of a scrawl by way of seal be true, it follows necessarily that every instrument in writing to which the maker shall affix a scrawl by way of seal, must be adjudged and holden to be of the same force and obligation as if it was actually sealed. The authorities cited also prove that it has been decided uniformly, that the sealing and delivery being matters of fact, are to be tried by jurors, and we cannot perceive any substantial reason

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why a different rule should be applied to instruments to which there appears to be a scrawl affixed by way of seal. If this was an original question upon the statute, and there was no adjudication upon it, we should not hesitate to declare the note to be as we have stated it; that an instrument in writing to which there is affixed a scrawl in the place of a seal, is considered of the same force and obligation as a sealed instrument, although it is not stated on the face of the writing, or in the attestation, if there be any, that the maker "*thereunto affixed his seal;*" but it is not. It has been decided in some of the States upon statutes precisely similar to ours. In the Supreme Court of Pennsylvania, it has been decided that any mark made by the pen in imitation of a "*Seal,*" may be considered as a seal. The usual mode is to make a circular, oval, or square mark opposite to the name of the signer; but the shape is immaterial. Something, however, there must be, intended for a seal, and the writing must be delivered as a deed. The court, in deciding upon the question, remarked:

"I will premise that two principles are, in my opinion, well founded: "one, that although in the body of the writing it is said that the "parties have set their hands and seals, yet it is not a specially, "unless it be actually sealed and delivered. Another, that if it be "actually sealed and delivered, it is a specialty, although no mention "be made of it in the body of the writing. The fact and not the "assertion fixes the nature of this instrument." 2 *Sergeant & Rawle*, 502, *Taylor and another* vs. *Glaser;* and 1 *Sergeant & Rawle*, p. 72, *Long* vs. *Ramsey, executor of Long.*

A similar decision was made by the Supreme Court of Tennessee, in the case of *Scruggs* vs. *Brackin*, 4th *Yerger*, 528. But in the case of *Austin's administrator* vs. *Whitlock's executors*, 1st *Munford*, 487, the Supreme Court of Appeals of Virginia held a contrary doctrine, and decided that an instrument in writing attested, "*as witness my hand, this 22d day of February*, 1791," and signed by the maker, with a written scrawl annexed to the signature, was not a deed or specialty. The court appears to have rested the decision upon the ground, first, that it was essential to a deed that the clause of *in cujus rei testimonium* should recite that the maker of the deed hath thereunto put his seal; and that without that, or some similar expression appearing on the face of the instrument, it is not a deed, although the subscriber affixed a scrawl to his signature. In support of this position see *Co. Lit. C. a.* 35, *b.* 175, *b.* 225, *a.* and *b.*; and *Litt.* 371, 372,

are cited: but, with all due deference to the opinion of the learned Judges who decided in that case, we feel bound to declare that we have not, after a careful examination of the authorities referred to, been able to discover any thing from which we could feel warranted in drawing the like conclusion; for it is even there said, *Co. Lit. C. a.*, "I have termed the said parts of the deed, *formal* or *orderly* parts, "for that they be not of the essence of a deed of feoffment, for if "such a deed be without premises, *habendum*, *tenendum*, *reddendum*, "clause of warranty, the clause of *in cujus rei testimonium*, the date, "and the clause of *his testibus*, yet the deed is good: for if a man by "deed give lands to another, and to his heirs, without more saying, "this is good, if he puts his seal to the deed, delivers it, and makes "livery accordingly," and although *Littleton*, in the sections before referred to, gives the form of the commencement and conclusion of an indenture in the first and third persons, in which the clause of *in cujus rei*, &c. appears, that is no where said to be essential, except in one special case of an entirely different nature. *Co. Lit.* 230, *b.* It is there merely given as an approved form, to which there is certainly no objection; and COKE, in commenting upon him, says "it is a safe thing to follow approved precedents;" and also observes, "but thereof hath been spoken at large, *Sections* 1, 4, and 40;" in each of which the fact of sealing is considered as essential to the deed, while in some of them the clause of *in cujus rei*, &c. is said to be merely formal: and this appears to us to be the result of all the authorities cited.

Second, That the omission of the word *Seal*, in the clause of attestation, according to the maxim of law, *expressum facit cessare tacitum*, precludes all evidence *dehors* the instrument, of the execution of it in any other manner than is expressed in the body of the instrument. However just the application of this maxim may have been in that case, where the instrument contained on its face the assertion of the maker that he had thereunto set his hand, without also saying that he had also affixed his seal or scrawl, it can have no application whatever to the case before us, where neither the signature nor seal is mentioned, and there is no attestation whatever on the face of the writing.

Third, That the profert of an instrument importing in the body of it to be executed under the hand of the party only, will not support the allegation of a deed, sealed with the seal of the party, although

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a seal be to the instrument in reality affixed; inasmuch as that may be done without the party's knowledge or consent. To this conclusion we do not assent; for if it be true, as we have supposed, that it is the sealing and delivery alone which distinguishes the instrument from a simple promise in writing, imparts to it superior efficacy, and elevates it to the dignity of a deed, it cannot, in the nature of things, make any difference whether the instrument bears upon its face or not, the express declaration of the maker that he put his seal thereunto. It is the fact of sealing by the maker, and not his assertion that he *has* sealed the instrument, which binds him. To illustrate this rule, suppose an obligation drawn for $100, by A, payable to B, at the conclusion of which it was added, "I, the said A, do *not* sign or seal this instrument;" yet, without saying otherwise, A does in fact seal and deliver the writing to B, as his deed. There the assertion on the face of the writing is expressly opposed to the act of A, and according to the principle of this decision, the assertion would control the act, and the profert of the instrument importing in the body of it that it was not signed or sealed by A, would not support the allegation that the writing was sealed with the seal of A, although the seal was manifestly there; and the instrument would be adjudged, simply upon the profert and oyer, not to be his deed. And according to the second position under the potent influence of the maxim, "*expressum facit cessare tacitum*," all evidence that it was in fact sealed by A, must be necessarily excluded. It is true that the facts of that case were a little different, but if we have comprehended the principle decided, it is that the fact of the scrawl appearing to the instrument, was not, *ex vi termini*, evidence that it was placed there by the maker, by way of seal, and the assertion on the face of the writing that he had *signed*, without also saying he had *sealed* it, was sufficient to preclude all proof *dehors* the instrument, that he had in fact sealed as well as signed it, and we do not perceive why they are not equally as applicable to the case supposed, as to that decided; but if we have not entirely misapprehended the force and bearing of the authorities, they all look to the sealing and delivery as the solemn and only essential acts of the party, and declare the legal rule to be, that where, upon inspection, a seal appears to the instrument, it must be intended to be the seal of the maker, and must be so adjudged, unless he will deny that it is his seal, and then it becomes a question of fact, to be determined by a jury; but it could never be regarded as a

mere promise in writing, because if sealed and delivered it would be an obligation: but if that seal was forged, whenever that fact appeared by the finding of a jury, on the plea of *non est factum*, it would be void; and such we apprehend would be the consequence of the payee adding a scrawl to the name of the maker of a promissory note without his consent, after it was signed and delivered. It would be such an alteration of the instrument in a material part as to make it void. This point, however, is not before us, and we would not be understood as deciding it, although we suppose the authorities would sustain us in the conclusion stated. The decision in this case has, we believe, been uniformly followed, and the principle established in it acted upon by the courts of Virginia, from the time it was given: and the same rule we are informed prevails in the States of South Carolina and Alabama. We have not seen any authentic report of the cases decided in either, but understand the decision in Alabama was confessedly made on the authority of the decision in Virginia. The like decision, and upon the same authority, has been made in some of the courts of Arkansas; but we are not aware of any solemn adjudication having ever been made directly upon the question by the Superior Court, and it is now, for the first time in this court, presented in such manner as to require a direct decision to be made upon it. The question has been deemed important, not from any consequences to result from it in the present controversy, but because a great variety of interests of the first magnitude may be either directly or indirectly affected by it in other cases. We have given to it a patient and careful examination, the result of which is, that we are decidedly of the opinion that the instrument in question having upon its face every thing required by law to give to it the same force and obligation as if it was actually sealed, must be regarded as a writing obligatory.

Having ascertained and settled the legal character of the instrument, the question arises, did the court err in overruling the objection of *Jeffery*, and admitting the obligation to be read as evidence to the jury? The objection appears to have been taken on the ground of a variance between the obligation and the contract mentioned in the summons as the foundation of the suit, and was founded on the assumption that the evidence must correspond with the cause of action stated in the summons. That the allegation and proof must correspond, as a general rule, is incontrovertibly established; but its application to this case is questioned, on the ground that the proceeding is

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summary and the pleading *ore tenus*, and therefore there is nothing with which the evidence can be compared and to which it must correspond. This argument, although plausible, and in some respects true, cannot be admitted to the extent contended for, without disregarding the provision of the statute prescribing the form of the writ to be issued in cases commenced before a Justice of the Peace. The form there given appears to contemplate and require some definite specification of the contract, which is the foundation of the suit in the body of the writ, not indeed with all the circumstances of time, place, date, and amount, as required in a declaration or other pleading in a regular suit at law; yet with such certainty as to apprize the defendant of the legal character of the demand he is called upon to answer; and this we understand to be the meaning of the Legislature when they use this language in prescribing the form of the summons, viz: "Summons C. D. to appear before me," &c. "to answer unto A. B. in an action on bond, bill, note, book account, or promise, as the case may be." If this is not the true construction of the statute, we are unable to discover the intention of the Legislature. If it is, then it certainly is material that the ground of action should be truly stated; and it follows as a necessary consequence that the plaintiff's evidence must correspond with and sustain it. Evidence of a cause of action entirely variant from it ought not to be received. The defendant in error also insists that the appeal comes before the Circuit Court as an original case, and must be there tried on its merits, without regard to the proceedings had before the Justice. This argument, although true in some respects, is entirely too broad to be admitted without qualification. The statute provides that "on the trial of the appeal," no exceptions shall be taken to any irregularity or want of form in the trial or proceedings of said Justice. Mere irregularities and formal defects are only cured by this statute: but objections of a substantial nature, extending to the merits of the case, as we apprehend, do not come within either its letter or spirit. The exception taken in this case was not to any thing in the trial or proceedings of the Justice, but to the testimony offered and admitted at the trial in the Circuit Court. The former may be strictly regular and technically formal; the latter illegal or irrelevant, or the exclusion of competent legal proof on the trial in the Circuit Court, should be regarded as an irregularity or want of form in the trial or proceedings of the Justice, and therefore cured by the statute. The foundation

of this suit was a note of hand, and it was incumbent on *Underwood* to sustain it by evidence of a demand of that legal character. He could not therefore be at liberty, at the trial, to set up and prove a demand upon book account, bond, obligation, or for rent due, for which he had not sued or legally called upon the defendant to answer. Such a practice would be at variance with every principle of common law, and in our opinion it is not warranted by any statute. This was the doctrine of the Supreme Court of the Territory of Arkansas, in the case of *Madding* vs. *Payton*, decided at the term 183–, where it was held that a writing obligatory could not be admitted as testimony, the cause of action stated in the summons being a promissory note. The Circuit Court had in that case excluded the evidence on the ground of variance, and the judgment was affirmed.

We are therefore of the opinion that the obligation offered by *Underwood* as evidence on the trial of this case, and objected to by *Jeffery*, ought to have been excluded; and that the court erred in not excluding it. And for this error the judgment must be reversed with costs. But as this case may progress on its return to the court below, some other points assigned as error will be noticed. It is said this is an action of debt, and that debt would not lie on the instrument offered and admitted as evidence.

That it is an action of debt, is urged upon the ground that it is so styled in the summons. That does not, in our opinion, make it so. There is no law requiring the species of action to be stated in the summons. It is not mentioned in the form of the writ prescribed in the statute, and might be wholly omitted without prejudice to the plaintiff, or advantage to the defendant. It is in every point of view immaterial, and being inserted must be regarded as surplusage. The ground of action must be described, but the species of action need not be stated; and the plaintiff must be permitted, on the trial, to adduce any legal evidence to establish any demand which he may have against the defendant, of the same legal description of that stated in the summons, and within the jurisdiction of the Justice, but evidence of any demand of a different character in law, must be excluded. The instrument in question is not for the direct payment of money. The language used does not authorize the conclusions that the obligor expected to pay, or the obligee to receive payment in money. The former intended to pay a horse, and the latter expected to receive one in payment, of the value of fifty dollars, in

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good trade. This was the evident understanding and intention of the parties. A horse was the subject matter of the contract. Fifty dollars, his stipulated price, was to be ascertained, not by valuation according to the ordinary legal standard of value, but by an appraisement to be made according to the usual terms of barter; or in other words, the value of the horse was not to be estimated by what he was worth in cash, but in good trade, supposing the payment for him to be made in trade. This was the legal import of the contract, and being for property and not money, it is clear that an action of debt would not lie on it.

The cause must therefore be remanded to the Lawrence Circuit Court, for further proceedings to be there had not inconsistent with this opinion.

WEBB AND ESTEILL, adm's, *against* HANGER AND WINSTON.

APPLICATION *for Mandamus to the Judge of Chicot County Court.*

The Circuit Courts have a superintending control over the County Courts in matters of allowance against estates, and power to issue to the County Courts writs of *supersedeas, certiorari, habeas corpus, mandamus,* and *quo warranto.*

The Supreme Court has the same power, and if the party aggrieved chooses to present his case at once to this Court, he is entitled to his writ.

A party applying for a *mandamus* must show that he has a legal right to it, and no other adequate specific legal remedy.

CUMMINS and PIKE, for the applicants.

FOWLER, *contra.*

RINGO, *Chief Justice,* delivered the opinion of the court: This is an application for a peremptory mandamus. From the petition filed and sworn to, and the record exhibited, it appears that at the January term, 1838, the County Court of Chicot proceeded to render judgment in favor of *Peter Hanger and John P. Winston* against *Albert W. Webb and James M. Estill, administrators of James Estill, deceased;* and the Judge of that court refused to the defendants an appeal to the Circuit Court. After the motion for a peremptory mandamus was made, the applicants asked and obtained leave for a rule *nisi* against the Judge of the County Court. The Judge of the County Court of Chicot appeared in person, and waived service and asked time to respond to the rule, which was granted him. Upon a subsequent day he appeared by counsel, and moved the court to set aside the rule; first, because the writ could not issue against him, as Judge of the County Court, in vacation: and secondly, because the Circuit Court had exclusive jurisdiction of the matter.

The only question for this court is, shall the rule be set aside or made absolute? Should this court deem it advisable to award a peremptory mandamus, it would not operate, as has been suggested, personally upon the Judge of the County Court in vacation, but would simply command him, at the first regular Chicot County Court, to grant to the applicants an appeal. We have no doubt that the Circuit Court has jurisdiction in the case, for the constitution expressly

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confers upon it a superintending control over the County Court, and over Justices of the Peace, and it gives to it authority to issue all necessary writs to carry into effect its general and specific powers. Such is the language of the grant, and the terms are too explicit and certain to admit of but one interpretation. See *Article* 6, *section* 5. The act organizing the Circuit Courts and defining their jurisdiction, does not restrain or limit the grant of their creation, and if it did, such an act would be null and void; for it would be in express violation of the constitution. Are the original and remedial writs specified in the instrument necessary to enable the Circuit Court to control the actions of the County Courts and Justices of the Peace. Without their aid and assistance, it would be impossible for the Circuit Courts to regulate or govern the inferior tribunals, and if this is the case, they have express power to issue writs of *supersedeas*, *certiorari*, *habeas corpus*, *mandamus*, and *quo warranto*. Admitting this to be the case, it does not necessarily follow that the Supreme Court has no jurisdiction in the matter. The object and intention of the Convention was to confer upon both courts the power, and they have so expressly declared.

The Supreme Court, except in cases otherwise directed by the constitution, has appellate jurisdiction only; and that instrument has given it a general superintending control over all inferior courts and other courts of law and equity. It certainly requires neither argugument nor authority to show that the County Court is a court of inferior jurisdiction. Then the Supreme Court has power to control and regulate its proceedings in the cases enumerated in the constitution, and as there is an express clause conferring upon it the power to issue *writs of error* and *supersedeas*, *certiorari*, *habeas corpus*, *mandamus*, *quo warranto*, and other remedial writs, to hear and determine the same, they must have jurisdiction of the case now before them. The terms of the constitution are so clear and explicit that the proposition becomes self-evident the moment it is stated: *Article* 6, *sec.* 2. Both the Supreme Court and the Circuit Courts have the power to issue the writ, and they both have concurrent jurisdiction over it. In general we would deem it more appropriate and regular for the application to be first made to the Circuit Court; but should the party aggrieved prefer this tribunal, and present his case before us, it becomes our duty to award him the writ, if he is legally entitled to it. At common law, a *mandamus* was a prerogative, and could only issue

out of the King's Bench. But under our form of government, it is a constitutional writ, and may either issue from the Supreme Court or the Circuit Court. In both countries, the party applying for it must show that he has a legal right to it, and no other adequate specific legal remedy: and it is now universally issued to enforce the performance of public rights or duties. 3d *Black. Com.* 100; 3d *Burr's Rep.* 1226.

In the case now under consideration, have the applicants showed that they are entitled to the benefit of the writ. By the express provision of the statute, regulating the proceedings of the County Court, a party defendant has an absolute and unconditional right of appeal. See *Digest*, 157, secs. 1 and 7. An appeal in this instance was refused to the administrators, in express violation, not only of the statute, but of every principle of legal right. They were entitled to it, whether the judgment was formal or informal, or whether valid or illegal, and it was the duty of the Judge of the County Court to have granted it without requiring any condition or limitation. To deny to any party a general or absolute right, or seek to encumber it with conditions, where the law annexes none, is to destroy the right and take from him all remedy or redress for the injury sustained. This has unquestionably been done in the present case; and as the Judge of the County Court of Chicot has failed to show any cause why a peremptory mandamus should not issue against him, this court is bound to award the writ, agreeably to the prayer of the petitioners.

And the same opinion was also given in the following cases, to wit: WEBB & ESTILL, administrators, *against* BAILEY; same *vs.* Mathis; same *vs.* Ware & Miller; same *vs.* Maulding, adm'r, &c.; same *vs.* Mathis; same *vs.* Johnson; same *vs.* Wesley and Henry Roberts; same *vs.* Stewart; same *vs.* Brookie & Brungard; same *vs.* Adair & Brungard; same *vs.* Ford et. als.; same *vs.* same; same *vs.* Mathis; same *vs.* Woodruff; same *vs.* Goodloe; same *vs.* Davis; same *vs.* Herring, assignee, &c.

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

1 125
4 439

OF THE

STATE OF ARKANSAS,

AT JULY TERM, A. D. 1838.

GREENUP D. WOMSLEY *against* WILLIAM CUMMINS.

ERROR *to Crawford Circuit Court.*

In suits against several defendants, residing in different counties, where a counterpart of the writ is issued to a county other than that in which suit is commenced, the counterpart must correspond strictly and in every respect with the original, except in its direction to a different sheriff.

A party may be permitted to quash his own writ, where there is error in it, as he can proceed no further, and it works a discontinuance.

If there be error in the counterpart, there must be error in the original, and the dismissal or quashal of one is a dismissal or quashal of the other.

A summons in which the place of holding Court is not named, is erroneous.

This was an action of debt, instituted in the Court below by the defendant in error, as assignee of Randolph & Keethley, against the plaintiff in error, and *Martha Trimble*, alias *Patsy Riggs*, joint promissors. The plaintiff in error being a resident of the county of Crawford, and his co-defendant below a resident of the county of Washington, a writ of summons issued upon the declaration, directed to the Sheriff of Crawford county, and a counterpart thereof to the Sheriff of Washington county. The summons to Crawford county ran as follows:

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"TERRITORY OF ARKANSAS, } *Sct.*
County of Crawford, }

"The United States of America to the Sheriff of Crawford county, "Greeting: You are hereby commanded to summon *Greenup D. "Womsley* and *Martha Trimble*, alias *Patsy Riggs*, if they be found "within your bailiwick, to appear before the Judge of our Circuit "Court, at the court house in the county AFORESAID," &c.; and the summons to Washington was in the same words, except that it was directed to the Sheriff of Washington county.

The writ and counterpart were regularly served, and at the return term the plaintiff below moved the Court to quash the counterpart for uncertainty, inasmuch as two counties were named in the commencement thereof, and the parties were required to appear "at the court house in the county *aforesaid;*" an uncertainty not existing in the original, although one was a literal copy of the other, except in its direction to the Sheriff of Washington—the county of Crawford only being named in the original. The Court sustained the motion, quashed the counterpart, and permitted the plaintiff below to proceed against *Womsley* alone. *Womsley* then craved oyer, which was granted him, and he pleaded *nil debet*, to which plea the plaintiff below demurred, and the demurrer was sustained, on the ground that the plea should have been sworn to, under the statute—and the plaintiff below then had final judgment upon the demurrer.

The plaintiff in error assigned for error the quashing of the counterpart of the writ, and permitting the defendant below to proceed against *Womslsy* alone, and also the sustaining of the demurrer to the plea of *nil debet.*

FOWLER, TRAPNALL, and COCKE, for plaintiff in error.

The Court on the motion of the plaintiff had no right to quash the counterpart of the writ. It was an exact copy of the other, and there was no defect on its face or in the return of the Sheriff. Therefore, as there was no defect in the writ or in the return, the Court had no reason or authority to set it aside, particularly at the instance of the plaintiff. *Steele's Digest*, 312.

The plaintiff contends further, that even under the statute of the Territory the plea was good. Vide 1*st Chitty*, 422; 1*st Salkeld*, 565; 1*st Saunders*, 38. The plea of *nil debet*, under the statute, does not put in issue the execution of the note. The plea is in the present tense, and alleges that the defendant was not indebted at the time of

bringing the suit; and, therefore, as the plea does not put in issue the execution of the note it was not necessary to support it by affidavit. See *Missouri Reports*, 487, 161, that *nil debet* and *non assumpsit* are good pleas to an action on promissory note.

CUMMINS and PIKE, *contra:* The settled practice of the country sustains the judgment of the Court below upon the demurrer to the plea of *nil debet.* It has been often decided that such a plea is not good, under the statute, to an action of debt on a promissory note. *Steele's Dig., Jud. Proc.*, Sec. 23, Art. 2. See *5th Bac. Ab.* 460; 1 *Wh. Sel.* 405; 1 *Ch. Pl.* 478. 476; *Gould Pl.* 310; *Steph. Pl.* 307.

As to the quashal of the counterpart, it seems clear that the plaintiff could not assign this point as error, if the quashing of the writ had been wrong and illegal, which is not the case.

This counterpart neither gave a legal right to *Womsley* nor took any from him. It neither extended nor limited his liability to the laws of the land. It was a mere matter in which the plaintiff below and *Martha Trimble* were concerned, and no one else. It was a mere suit between her and the plaintiff below, and *Womsley* was in law no wise concerned. The plaintiff in error might as well assign as error that in the case between *John Doe* and *Richard Roe* an error was committed which should operate to reverse this case. *Womsley* was not a party to the counterpart, and cannot assign for error a matter to which he was no party and in which he was not legally interested. His concern in her being a party was a mere possibility, not a legal interest. Again—Was the dismissal of the writ an act of the Court—a judicial act? It was the mere act of the plaintiff, who can dismiss any process he has power to issue. It is a clear principle that a plaintiff in error cannot assign, or obtain relief for, errors (admitting them to exist) in matters not judicially acted on by the Court below, and which are not connected with his right.

The plaintiff below had a legal election either to include Mrs. *Trimble* in the action or not; the defendant had no right to have her in Court. How then, as by the statute this cannot be denied, can the plaintiff *Womsley* complain, and reverse this judgment because she was not sought to be made a party to the judgment? There was an election given to the plaintiff below. There is no law taking it from him at any subsequent period. The books abound with authority that a plaintiff can at all times dismiss his suit or process. These exist by

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his discretion and terminate when he pleases. The general doctrine concerning writs and process (See 3 *Blackstone*, 272–3) fully sustains this position.

But this counterpart was notoriously bad on the face of it. It was issued to Washington county, and the defendant was not informed in which county she was required to appear. Two counties are mentioned in the first part of the writ, and she was commanded to appear at the court house in "said county." Now there might have been some reason for intending the county of Washington, but there can be none that Crawford was meant. A counterpart is not necessarily a literal copy of the original. A literal copy in this case is uncertain, and might in many cases be void of meaning. The counterpart should contain *the same command* with the original. That command in this case is to summon the defendant to appear in the county of Crawford. This the counterpart does not do in this case. It is therefore variant from the original, although a *literal* copy, except in the change of one word. If it vary from the original, may it not be quashed? If quashed, is the original also quashed, where the very ground of quashal is that the counterpart is bad, because it varies from the original? What is the quashal of the counterpart but a dismissal as to one defendant? May not the plaintiff at anytime dismiss as to one and proceed against the other?—Because he has a bad writ against one defendant, shall his good writ against the other avail him nothing? Sec. 3d of *Judicial proceedings* points out the nature of this writ—see, also, Sec. 15 *Digest*, p. 316.

A writ must be certain in every part and to every intent. It is no writ unless it be so. See *Com. Dig.* p. 685; 3 *Bq.* p. 699; 3 *B.* 15; 2 *Bac. Ab.* 456–7, 490.

Womsley was not a party to the judgment of the Court quashing the counterpart, and can neither assign it for error, nor bring error for it. That judgment affected neither his legal liabilities nor his rights. He had not then, nor has he now, any right to object to it. He could have made no motion, and predicated no action, on or under the counterpart served on his co-promissor.

DICKINSON, *Judge*, delivered the opinion of the Court: This is an action of debt, commenced by *Cummins* against *Greenup D. Womsley* and one *Martha Trimble*, alias *Patsy Riggs*. Under the act of the Legislature regulating the mode of proceeding where there are several defendants, residing in different counties, (See *Digest*, p. 312,) a counterpart of the writ issued against *Womsley* in Crawford county,

was sent to Washington and served upon *Martha Trimble*, alias *Patsy Riggs*.

The writs appear to have been regularly served, and at the return term thereof the Court below, upon motion of the plaintiff, quashed the writ issued to Washington county, upon the ground that it was void, for uncertainty appearing on the face of it, and permitted the plaintiff to proceed against *Womsley* alone.

Oyer of the writing declared on was craved and granted, and the plea of *nihil debet* filed, to which a demurrer was sustained, and judgment thereupon entered in favor of the plaintiff; to reverse which, *Womsley* assigns various causes of error. In the investigation of the case we are necessarily led to an examination of the counterpart which was quashed or set aside by the Court.

The statute prescribes that in all cases where the obligor or obligors, maker or makers, of any note, bill, bond, or contract, reside in different counties, it shall be lawful for the plaintiff to institute a suit against all or as many of them as he may think proper, and it shall be lawful for the Clerk of the Court in which such suit shall be instituted, to make out a separate summons or capias, as the case may be, against the person or persons residing in a different county, directed to the Sheriff of the county or counties where such person or persons reside, and endorse on such writ that it is a counterpart of the writ issued where such suit is commenced.

It will be observed that the counterpart is but a separate summons, which the party is permitted to have, to save further litigation and the accumulation of costs.

Upon the service of the process upon the several parties, they stand precisely in the same position as if they were all residents of the same county; it follows then that if the separate summons against *Patsy Riggs*, alias *Martha Trimble*, is but a counterpart, it must correspond strictly and in every respect with the writ issued against *Womsley*, with the exception only that they are directed to different Sheriffs; if there should be a variance, it would not conform to the statute, and could consequently be taken advantage of by the party.

In this instance, it appears upon the motion of the plaintiff, the counterpart or separate summons against the defendant in Washington county was quashed for error appearing upon the face of it. That the plaintiff had a right to dismiss his case will be conceded; and though we have been unable to find a case reported in which a party had his

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own writ quashed, yet we see no reason why he should not be permitted to do so, where there is error, and it operates as a discontinuance, and he can proceed no further in his suit. But in this case, there being two defendants, he appears to have proceeded upon the ground that one summons was good and the other bad, although they are counterparts, and must correspond with each other.

The writs against *Womsley* and *Riggs*, alias *Trimble*, do correspond, and therefore if there is error in one it must consequently extend to the other, and the dismissal or quashing of the process against the former must operate in the same way upon the latter.

We are of opinion that the summons issued to Washington county was erroneous, inasmuch as the place of holding Court was not set forth therein. See *McCampbell's Digest*, p. 314. The Circuit Court should not have permitted *Cummins* to proceed any further in his suit, but have dismissed the same with costs. The judgment of the Circuit Court must therefore be reversed and set aside with costs, and further proceedings be had thereon not inconsistent with this opinion.

In this case RINGO, *C. J.*, having been of counsel, did not sit.

SAMUEL ESTILL *against* BENJAMIN BAILEY.

ERROR *to Chicot Circuit Court.*

A writ issued since the admission of Arkansas into the Union, is void if it do not run in the name of the State.

After a reversal on this ground, the plaintiff in error will be considered as regularly before the Court below, and must appear and defend as if he had been served with valid process.

This was an action of debt brought in the Court below by *Bailey* against *Estill*, and a writ of summons issued, commencing as follows:

"STATE OF ARKANSAS, "COUNTY OF CHICOT. } *The United States of America, To the Sheriff of Chicot County*—GREETING:"

At the return term, the defendant below appeared, and moved to "dismiss the writ, for defects and informalities on its face." This motion was overruled by the Court, and thereupon the defendant below permitted judgment to go against him by default, and brought his writ of error to reverse the judgment for error in the overruling of the motion to dismiss. The writ original bore date February 20, 1837.

TRAPNALL and COCKE, for the plaintiff in error:

The Constitution of the State requires that all writs should run in the name of the State of Arkansas. This writ does not run in the name of the State of Arkansas, but in the name of the United States, and therefore the writ should have been quashed.

The motion is to dismiss the suit. The writ is the commencement of the suit, and the foundation upon which it rests. If the writ be void, of course there is no suit; and therefore the motion to dismiss the suit for the want of a sufficient writ is correct. The technical wording of the motion is to set aside the proceeding, which is the same thing. See 6 *Mon.* 560; 2. *J. R.* 190, *Bunn* v. *Thomas;* 2 *Ld. Raym.* 775; 4 *J. R.* 309, *Bank* v. *Bernard;* 5 *J. R.* 233, *Morrill* v. *Wagner;* 1 *Tidd* 182, 188, 192; *Gould's Pl.* 27.

FOWLER, *Contra:* In this case the plaintiff relies on a single error assigned, which supposed error, the defendant contends, does not exist in the record. The defendant admits that the writ should run in the name of "The State of Arkansas," and contends that the writ in this case does. The words "The United States of America" in the commencement, are but surplusage, and cannot vitiate, nor are they re-

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pugnant to the words "*The State of Arkansas*," which are also used in conformity with the State Constitution. The two phrases may well stand together. Unmeaning technicalities should be discountenanced. It is also insisted that the *appearance* of *Estill* in the Court below, cured the irregularity in the writ, if any existed.

LACY, *Judge*, delivered the opinion of the Court:

This case was an action of debt brought by *Benjamin Bailey* against *Samuel Estill* in the Chicot Circuit Court. The defendant by his attorney moved the court to dismiss the suit; but the motion was overruled and judgment entered up against him by default. To reverse the judgment, he has sued out his writ of error, and now prosecutes it in this court.

There is but one point raised by the record or the assignment of error; and that has been fully decided in the case of *Gilbreath* vs. *Kuykendall*. See 1 *Pike's Rep.* 50, 51, 2, 3. The writ bears date on the 20th of February, 1837, and it runs in the name of the United States of America. It was issued since the admission of Arkansas into the Union; and of course should have run in the name of the State; for by the 14th Section of article VI. of the Constitution, it is declared that "all writs and other process shall run in the name of the State of Arkansas." And as this writ does not, it is therefore null and void, and the judgment below must be reversed with costs. But as the plaintiff in error has voluntarily made himself a party to the suit by appearing and prosecuting this writ; he must now be considered as regularly before the court below as if he had been duly served with a valid process to appear at the term to which the cause was returnable.

The case must therefore be remanded to the Chicot Circuit Court, to be proceeded therein agreeably to this opinion.

THOMAS B. BALLARD AND OTHERS *against* JESSE NOAKS.

APPEAL *from Washington Circuit Court.*

An appeal bond must be conditioned, to pay "the debt, damages, and costs," in case the judgment of the inferior Court be confirmed.
Yet, if not in exact conformity with the statute, it would be good if it comprehended every essential stipulation in the statute.
A stipulation "to pay such sum of money as shall be finally adjudged against the said defendants, or them," is not sufficient.

HALL, for the appellee, moved to dismiss this appeal for want of a sufficient recognizance.

TRAPNALL, COCKE, and WALKER, *contra:*

RINGO, *Chief Justice*, delivered the opinion of the Court: The appellants, defendants in the Court below, prayed an appeal from a judgment against them, in favor of the appellee, in the Washington Circuit Court, which was granted; and, thereupon "appeared David Walker "and Henry Cureton, and acknowledged themselves to owe and be "indebted unto *Jesse Noaks*, plaintiff in this suit, in the sum of two "hundred and fifty dollars, to be levied of their respective goods and "chattels, lands and tenements, to be void upon condition that they "pay such sum of money as shall be finally adjudged against the said "defendants or them."

A motion has been made by the appellee to dismiss this appeal, upon the ground that the recognizance is insufficient. The statute directs the Court to require of the party appealing, if defendant, a recognizance with one or more securities, in a sum sufficient to cover the amount for which judgment has been given, together with the costs that have accrued or that may accrue by such appeal, conditioned, that the appellant shall pay the "debt or damages and costs," in case the judgment of the inferior Court shall be confirmed by the Supreme Court. See *Dig.* p. 344.

It is admitted that the recognizance taken in this case is not in strict accordance with that prescribed by the statute; but the appellants insist that it is as comprehensive, and secures to the appellee every benefit which he could derive from one taken in exact conformity with the provisions of the statute, and consequently that it is as good.

If the condition, though not in the language of the statute, comprehended every essential stipulation prescribed in it, we should consider

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it sufficient; but we think this does not. The stipulation "to pay such sum of money as shall be finally adjudged against the said defendants or them," in our opinion differs essentially from that prescribed by the statute, to "pay the debt or damages and costs, in case the judgment of the inferior Court shall be confirmed by the Supreme Court," and makes the legal liability of the parties to the recognizance depend upon a condition entirely different from that prescribed by law, and although it may be possible that the appellee, if the judgment below should be affirmed, could recover of these securities his damages and costs, upon this recognizance, his remedy against them would be more difficult and less certain than if their liability had been made to depend upon the condition prescribed in the statute, the provisions of which are plain, and evidently intended to furnish in all cases a clear and adequate security to the plaintiff for his debt, or damages and costs, if the judgment should be affirmed; and we are not prepared to sanction a practice by which the liability of the securities can be made to depend upon any condition other than that prescribed in the statute, or any departure therefrom be permitted in any essential part.

This recognizance is also objectionable, upon the ground of uncertainty appearing on the face of the condition thereof.

Therefore, the motion to dismiss must be sustained, and the appeal dismissed, with costs.

ADAMS AND WADKINS ADM'RS. *against* OWENS AND HOLYFIELD.

APPEAL *from Conway Circuit Court.*

When a motion has been made at a previous term to dismiss an appeal for want of a final judgment or decree in the Court below, and on a subsequent suggestion at the same term by the appellants, that there was a diminution of the record, a certiorari has been awarded for a new record; if, then, the Clerk below returns the writ, with a new transcript, certified by him to be a true copy, and which does not cure the defect, unless good cause be shown for a new writ, the appellees will be entitled to the benefit of their renewed motion to dismiss.

This was an action of debt, commenced in the Court below by the appellants, as administrators of Titsworth, against the appellees, to September Term, 1835. At the return term, the plaintiffs by leave filed their amended declaration, which was demurred to at February Term, 1836, demurrer sustained, and by leave a second amended declaration filed. At March Term, 1837, the defendants demurred to the second amended declaration, and the following entry of record was made thereupon: "This day come the plaintiffs by LINTON, their attorney, as well as the defendants by FOWLER, their attorney; the defendants by their attorney demurred in short to the plaintiffs' amended declaration, and the Court, after hearing the pleadings, was fully of opinion that the demurrer should be sustained: And the plaintiffs by attorney craved an appeal to the Supreme Court of the State, which was granted by the Court," &c. This, according to the transcript of record, was the last order made in the case.

At January Term, 1838, FOWLER, for the appellees, moved the Court here to dismiss the appeal because there was no recognizance entered into in the Court below, on appeal, and because there was no final judgment or decree rendered in the Court below from which an appeal could be prayed or granted.

Immediately after the filing of the motion to dismiss, TAYLOR and LINTON, for the appellants, suggested a diminution of the record, and moved the Court for a certiorari to perfect the same.

In obedience to the certiorari the Clerk below sent up a new transcript at this term, certifying the same to be a true copy of the record. The appellants then moved for an alias certiorari to the Clerk, and a rule on him to show cause why an attachment should not issue against him for contempt; and the appellees renewed their motion to dismiss, for want of a final judgment.

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DICKINSON, *Judge*, delivered the opinion of the Court: This is an action of debt, commenced in the Circuit Court of Conway county.—An amended declaration was filed, to which there was a demurrer sustained, and a transcript of the record brought into this Court by the plaintiffs at the last July Term, and continued to January Term, 1838, when the defendants moved to dismiss the appeal, because there was no final judgment or decree rendered in the Court below. Previous to any action upon the motion to dismiss, the plaintiffs on affidavit, suggested diminution of the record, and a writ of certiorari was awarded to the Clerk of Conway county to send up a new record.

The plaintiffs now come in and again ask that an *alias* certiorari be awarded them, and that a rule be entered against the Clerk to show cause why an attachment should not issue for not complying with the mandate of this Court. We have looked into the papers, and find that the Clerk has returned the writ issued to him, with a new transcript, which he certifies to be a true copy from the record; yet it does not cure the defect upon which the defendants moved at a former term to dismiss, and to remedy which the certiorari was ordered. In neither record does it appear that any final judgment was entered in the Circuit Court; and as the plaintiffs show no good cause for a new writ, we are of opinion that the defendants are entitled to the benefit of their motion made at the last term of this Court and now renewed and insisted on. The appeal must therefore be dismissed.

JARRETT, ADM'R OF ACHESON, *against* WILSON, ADM'R OF WILSON.

ERROR *to Lawrence Circuit Court.*

If the defendant pleads, after demurrer to the declaration overruled, he can take no advantage in this Court of insufficiency of the declaration. He should let judgment go upon the demurrer, and appeal.

Upon issue on replication that there are goods unadministered, to the plea of *plene administravit*, the verdict ought to find the amount of assets unadministered, and if it do not, the judgment is bad.

And if in such case the judgment be that "the plaintiff recover of the defendant his debt and damages, &c., to be levied of the goods, &c. of his intestate, if any he hath unadministered, and if none, of his own proper goods, &c.," it is equally bad, whether one part of the judgment might be reversed and the other affirmed, or not.

If one part could be affirmed and the other reversed, still the situation of the plaintiff in error would not be bettered. His own property would still be liable, if he has no assets unadministered.

The statute of the State curing informality, &c., does not extend to a case like the present.

This was an action of debt, commenced in the Lawrence Circuit Court, by *Marcus Wilson* against *Jarrett*, administrator of John Acheson, deceased, upon a writing obligatory, executed by Acheson in his lifetime, whereby he acknowledged that Wilson had advanced and become liable for him, Acheson, to the amount of $6676 70. At May Term, 1835, of the Court below, the defendant below craved oyer of the writing obligatory, and demurred to the declaration, which demurrer was overruled, and the defendant below then filed his plea of *plene administravit*, except as to the sum of $940 92, to which plea the plaintiff below demurred, and his demurrer being overruled, he filed his replication, that the defendant had in his hands at the commencement of the suit, goods and chattels of his intestate unadministered, to the amount of the debt—concluding to the country, to which the defendant below joined issue, and thereupon the following judgment was rendered—that the defendant having failed to produce evidence to sustain his plea, and saying nothing further in bar or preclusion, &c., and there being sufficient evidence of the plaintiff's demand, "it is therefore considered by the Court that the said plaintiff have and recover of the said defendant the sum of $6676 70, debt, and $1068 23, damages, and costs of suit, to be levied of the goods and chattels which were of the said John Acheson at the time of his death, in the hands of the said administrator, defendant as aforesaid, remaining to be administered upon; if so much thereof in his hands to be ad-

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ministered he hath not, then to be levied on the proper goods and chattels of said defendant."

The errors assigned were, 1st, That the declaration was uncertain and insufficient: 2d, The overruling of the demurrer: 3d, That the Court rendered judgment without impannelling a jury, or having the case submitted to the Court: and 4th, The form of the judgment as against the proper goods and chattels of the administrator.

RINGO, *Chief Justice*, and DICKINSON, *Judge*, having been engaged in the case, did not sit therein, and it came on to be tried before LACY, *Judge*, CAUSIN and HAGGARD, *Special Judges*, in the name of *Jarrett, adm'r.*, against *Alexander Wilson, adm'r. of Marcus Wilson*, the oiginal plaintiff below.

HALL, for the plaintiff in error, contended that the demurrer to the declaration was wrongly overruled, and that there was error in the judgment below.

TRAPNALL and COCKE, *contra*: Various objections are taken to the declaration, the sufficiency of which cannot certainly at this stage of the cause be put in question. But the objections themselves are without form or propriety. See Statute of Jeofail, *McCampbell's Digest*, 332. Demurrer overruled or withdrawn precludes the defendant from going back to the judgment.

The plaintiff contends there is no order on the record, referring the decision of the case to the Court. The Court could not have decided upon the case without the consent of the parties, and after judgment the legal presumption is conclusive that it was by virtue of that consent that the Court acted. Every thing will be presumed in favor of the judgment below, which is not contradicted by the record, is a principle too well settled and too frequently referred to before the Court to need a reference now.

The judgment against the administrator *de bonis intestati*, is undoubtedly good. The residue of the judgment may be erroneous. If it is, as the two judgments are separate and not dependant on each other, so much of the judgment of the Court below as is *de bonis propriis* may be reversed, and the judgment *de bonis intestati* be affirmed. *Tidd's Practice*, 1128, 1129; 4 *Burrows*, 2018; 2 *Bacon* 228–29. A judgment for debt and damages may be reversed as to the damages and affirmed as to the debt. *Tidd*, 1128–9.

CAUSIN, *Special Judge*, delivered the opinion of the Court: This

cause comes before the Court upon a writ of error, sued out by the plaintiff in error, against the intestate of defendant in error, to the Lawrence Circuit Court.

The intestate of the defendant in error brought an action of debt in the Court below against the plaintiff in error in an instrument of writing, signed and sealed by John Acheson, the plaintiff's intestate, by which the intestate acknowledges his indebtedness to the defendant's intestate in the sum of three thousand and seventy-seven dollars, and the liability of the defendant's intestate for him to pay certain debts to sundry persons, amounting to the sum of three thousand two hundred and ninety-nine dollars and seventy cents, the two sums making the aggregate amount of six thousand six hundred and seventy-six dollars and seventy cents. To the declaration filed the defendant in the Court below demurred, but the Court overruled the demurrer; he then pleaded that the action was prematurely brought, but withdrew this plea pleaded *plene administravit, praeter* two hundred and forty-two dollars and ninety-two cents, to which plea the plaintiff in the Court below demurred: the Court however overruled the demurrer, and he then filed his replication, in which he alleges that the plaintiff in error at the commencement of this suit, and ever since, had divers goods and chattels which were of his intestate at the time of his death, in his hands as administrator, to be administered, of great value, to wit: of the value of the debt set forth in the declaration, and wherewith as administrator he could and ought to have satisfied the debt in the declaration mentioned; on this replication issue was joined. Under this state of pleading, the Court below (for it appears that no verdict was rendered by a jury) entered up judgment *de bonis intestati et si non de bonis propriis* against the plaintiff for the debt, and one thousand and sixty-eight dollars and twenty-three cents damages and costs. The errors assigned may be resolved into two: First, that the declaration is insufficient: Second, that the judgment given in the Court below is erroneous and illegal.

The first objection the Court considers untenable; admitting the insufficiency of the declaration, there being a cause of action apparent on the face of it, no such objection can be successfully urged before this tribunal. The proper time for making the objection has passed. The plaintiff, if he relied on the insufficiency of the declaration, should have appealed from the judgment of the Court, on the demurrer to the same. On this point, the authorities are too conclusive to admit of a

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doubt. See *2d Marshall's Reports*, 142, 251, 436; 3 *Bibb*, 52; *Comyn's Digest*, 6 v. 262; *Story's Pleadings*, 71.

It has been contended by the counsel for the defendant that the objection against the judgment should not be sustained, because the judgment consists of distinct and independent parts, and that portion operating unjustly against the plaintiff's own property may well be reversed, and the remaining part affecting him in his representative character of administrator affirmed: but in the view of the Court, whether the judgment consists of distinct and independent parts, so that one part might be reversed and the other affirmed, or the same is incapable of separation is a matter perfectly immaterial, as the omission to state in the judgment the amount of assets unadministered vitiates the whole of it. The plea of *plene administravit*, though not sustained, is not necessarily a false plea within the knowledge of the party pleading it; and if it be found against him, the verdict ought to find the amount of assets unadministered, and he is liable for that sum only. *Siglar* vs. *Haywood*, *8th Wheaton*, 675.

Suppose one part of the judgment were reversed and the other affirmed, would it better the situation of the plaintiff in error? Not in the least, for even then the plaintiff's own property (upon the supposition that he has no assets to be administered,) would be exposed to the payment of the debt. Whether the plaintiff has assets unadministered or not, it is impracticable for this Court to determine. From the record *non constat* he has one cent; if the consequence suggested would result from carrying into effect either part of the judgment, (and that it would seems too clear to be denied), a reversal of it is absolutely required. The act of the Legislature in regard to informality in pleading, relied upon in argument by the defendant's counsel, the Court cannot consider applicable to the case presented by the record.

The judgment is therefore reversed, the case remanded for a new trial, and costs in this Court awarded to the plaintiff in error.

NATHAN HAGGARD, one of the Judges in this cause, dissents from the opinion of the Court herein delivered at this time, so far as the first assignment of errors is decided upon. It is not deemed necessary or important to decide on said assignment, because such decision would not vary the result of the case. And inasmuch as there was no withdrawal of the demurrer to the declaration prior to the plea to the merits being interposed, the reasons upon which that part of the opinion of the Court is predicated, have no force here. Therefore a non-con-

currence on that point with that opinion is here stated, and said dissent ordered to be entered with the opinion delivered in this case.

G. N. CAUSIN,
NATHAN HAGGARD,
THOS. J. LACY.

c

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McCAMY vs. SMITH.

ROBERT McCAMY *against* JACOB SMITH.

APPEAL *from Washington Circuit Court.*

This Court can take no jurisdiction of any case brought into it by appeal, where the sum in controversy is less than one hundred dollars.

WALKER, for the appellee, moved to dismiss this case, because the sum in dispute was less than one hundred dollars, and therefore this court had no jurisdiction of the case; and because of a defect in the recognizance of appeal.

HALL, *contra.*

RINGO, *Chief Justice*, delivered the opinion of the court: The appellant recovered judgment against the appellee before a Justice of the Peace of Washington county, in 1836, for the sum of $33 75, and in 1837, about a year after the date of the first judgment, obtained from the Clerk of the Circuit Court of said county, a certified transcript of said judgment, and thereupon caused a summons or scire facias to issue from a different Justice of the Peace of said County, against the appellee, which being served, both parties by their attorneys appeared before the Justice, who, upon hearing the case, adjudged it in favor of the appellee, from which decision *McCamy* appealed to the Circuit Court; where, on *Smith's* motion, the appeal was dismissed, and judgment entered against *McCamy*, and his security in the appeal for the costs of suit, from which he prayed an appeal to the Supreme Court, which was granted on the 22d day of November, 1837, and a recognizance taken for the prosecution thereof.

A motion has been made to dismiss this appeal on the grounds: 1st, That this court has no jurisdiction thereof by appeal, the sum in controversy being less than one hundred dollars: 2d, That the recognizance taken for the prosecution of the appeal is defective and insufficient.

It is, we think, very clear that this court cannot take jurisdiction of any case brought into it by appeal, where the sum in controversy is less than one hundred dollars. See *Digest, page* 334; *Organic Law, page* 38.

The facts above stated shew conclusively that the amount in controversy in this case, is not equal to that sum; consequently the mo-

tion must be sustained, and this appeal dismissed. It is therefore unnecessary to express any opinion upon the second ground stated, and we will simply remark further, that the transcript of the record was not filed, or the case docketed, at the last term of this court, to which the appeal was returnable, as required by law.

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ASHLEY *vs.* BRASIL and LINDSEY.

CHESTER ASHLEY *against* BRASIL and LINDSEY, EXTRS.

APPEAL *from Pulaski Circuit Court.*

The Superior Court of the Territory of Arkansas, had appellate jurisdiction only in cases in which the amount in controversy was one hundred dollars or upwards.

An appeal taken to the Supreme Court, in a case in which that Court has no jurisdiction, is a nullity, and the recognizance of the appellant in the Court below to prosecute his appeal is void. The appellees sustain no injury by a non-compliance with its conditions, and no action lies upon it.

A dismissal of an appeal "for want of prosecution," is not a confirmation of the judgment below. The appellant may still have his writ of error and supersedeas. The dismissal of the appeal merely places the parties in the same situation as if no appeal had been taken.

A recognizance in appeal being conditioned, "that in case the judgment be confirmed, the recognizor will pay the debt, damages and costs," no breach of the condition accrues on a dismissal for want of prosecution.

In an action of debt on recognizance, the breaches must be proved as laid in the declaration. If the plaintiff declare upon an absolute promise, and a conditional one be proved, the variance is fatal.

The party declaring must prove the allegations according to their legal effect.

If the declaration be on a recognizance, conditioned "to pay the debt, damages and costs if the judgment be confirmed," and the breach assigned is "that the appeal was dismissed for want of prosecution," it is a fatal variance.

In such an action, it is error to render judgment by *nil dicit* for the whole amount of the recognizance. A writ of enquiry should be awarded, to assess the damages.

The appellee in this case recovered judgment before a Justice of the Peace, for the sum of ninety-eight dollars, exclusive of interest and costs, against Christian Brumback, Martin Guest, and Alexander S. Walker; and also three judgments, each for the sum of one hundred dollars debt, before the same Justice, against Christian Brumback and Edward Shurlds; in each of which cases the defendants before the Justice appealed to the Circuit Court of Pulaski county, where each appeal was dismissed, and judgment given for the costs of appeal, and that the plaintiffs before the Justice should have the benefit of their judgment before him, in each case. From these judgments appeals were taken in each case to the Superior Court of the Territory of Arkansas, and the appellant in this case, *Chester Ashley*, entered into recognizance in each case before the Circuit Court, as required by law; in one case together with Edward Shurlds, Benjamin Clemens and Kirkwood Dickey, and in the three other cases together with Clemens and Dickey; the recognizance in each being in the sum

of two hundred dollars, and conditioned that the appellants in each case should pay the original debt and damages, and all costs that had then accrued, or that might thereafter accrue, in case the judgments of the Justice and of the Circuit Court should be confirmed by the Superior Court. The first mentioned case was afterwards dismissed from the Superior Court for want of jurisdiction in that court to try the same; and the other three cases were dismissed, for failure of the appellants therein to prosecute the same.

The appellees in this case then brought their action of debt on said recognizances in the court below, for eight hundred dollars debt, the aggregate amount of the recognizances. The declaration contains four counts, each alleging as a breach of the condition of the recognizance on which it is founded, the dismissal of the appeal for which the recognizance was taken, and the non-payment of the debt, damages and costs in each case. To each count the defendant below filed his separate demurrer, and the plaintiffs below joined in demurrer, and each demurrer being overruled, the plaintiffs took judgment by *nil dicit* for the sum of eight hundred dollars, the debt demanded in the declaration. From that judgment the defendant below appealed, and assigned for error the insufficiency of the declaration; the overruling of the several demurrers; the variance between the obligation in the condition of each recognizance and the breach alleged; and the rendition of judgment for the whole amount of the debt claimed.

HALL, TRAPNALL and COCKE, for the appellant:

The demurrer should have been sustained, because the declaration does not allege a breach of the condition of the recognizances. The allegation is that the appeals are dismissed by the Superior Court for the want of jurisdiction, and judgment given for costs. The condition upon which *Ashley* was to be liable, was that the Superior Court should affirm the judgment of the court below. By dismissing, the court refused to affirm or reverse, or act upon the merits of the case in any way, and therefore as the "Superior Court" did not "affirm" the judgment of the court below, of course the appellant was not liable to the judgment rendered in the action of the appellees against him.

The judgment was rendered for the aggregate amount of the penalty in each recognizance; whereas it should have been, if given at all,

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rendered for the debt due the appellees, together with the interest and costs. The obsolete common law principle, of making the penalty the debt by failure to perform the condition, has been too long exploded to need a citation of authority, and judgment cannot be rendered upon a penal bond with collateral conditions, except by jury, and the verdict is in damages. *Statute of* 8, 9, *William* 3*d*, *Chap.* 11, *Sec.* 8., 7 *Monroe*, 122, *McGuire* v. *Trimble.*

And further: Each of the judgments appealed from was under one hundred dollars, and therefore no appeal *by law* could be allowed to the Superior Court. See *Sec.* 59, *Page* 334, *Steele's Digest.* And therefore, as the appeal could not be granted, the recognizances are void in law, and no action could be maintained on them. 5 *Mass. Rep.* 376; *Howe's Pr.* 447.

FOWLER, *contra:*

It is contended by the appellees that this suit was well brought, and judgment regularly rendered against the said *Ashley.* That the legal effect of *dismissing the appeals for want of prosecution*, as three of them were, each being from a judgment for *more than one hundred dollars*, and the court having complete jurisdiction, is the same as though the judgments had been *formally confirmed* by the court, and the recognizors liable under the law. And the same principle applies to the case which was dismissed for want of jurisdiction. The object of an appeal is to obtain redress for a real or supposed grievance: the design of the recognizance is to secure the party delayed by the appeal from the benefit of his judgment;—and the failure to prosecute the appeal with effect, by any means or neglect whatever, in law or in fact, operates equally prejudicial to the party delayed, and inflicts the same injury upon him, as though the appellant had pursued his appeal until it was regularly *confirmed* against him. The appellant takes the appeal at his peril, and is liable to all the consequences, whether his appeal be taken without legal authority, dismissed for his neglect, *or technically confirmed* against him. Such Statutes as those authorizing appeals should be construed so as to give them effect; to protect the rights of the injured, not to countenance frauds. They should be construed according to their intent.

The Circuit Court, therefore, very properly overruled the demurrer to said declaration: each of the four counts setting forth legitimate causes of action, with proper averments and breaches.

Judgment *nil dicit* was rendered for the whole amount of the recognizances: Bail bonds and recognizances do not come under the Statutes, requiring the assignment of breaches and assessment of damages by a jury on penal bonds. See 1 *Tidd's Pr.* 511 et seq—2 *Bos. & Pull.* 446.

The appellant had no cause of complaint, nor could have any, on that account, until the said appellees were to attempt to coerce the collection of the whole sum. The execution would properly have issued for the whole sum, with an endorsement that it would be satisfied by the payment of the aggregate sum of the several debts, damages, and costs.

But even upon the supposition that a judgment for the entire sum of eight hundred dollars is irregular, and that a writ of inquiry should have been awarded to assess damages; still who could contend that the judgment *nil dicit* was improperly rendered? The plaintiff in the Circuit Court was surely entitled to this. All, then, that the appellant could possibly obtain from the Court, would be a reversal of the latter part of the judgment—that part which is final—leaving the judgment *nil dicit* to stand, with directions for a writ of enquiry to be awarded to assess the damages on breaches assigned. A judgment may be reversed in part, and confirmed as to the residue.

LACY, *Judge*, delivered the opinion of the court:

This was an action of debt instituted by the appellees against the appellant on four several recognizances in the Pulaski Circuit Court. The declaration contains four counts, and there is a demurrer and issue put in to each count. The court below overruled the demurrer, and judgment by *nil dicit* was had against the defendant for the full amount of the several recognizances. To reverse that judgment, he appealed to this court, and assigned for error, first, that the plaintiff's declaration is insufficient, and that the demurrer to each of the counts ought to have been sustained; secondly, that judgment is given upon *nil dicit* for the whole amount of the recognizances, when, if the defendant was liable at all, it could only be to the extent of the injury sustained, and a writ of enquiry should have been awarded to assess the damages.

Before the court proceed to determine these questions, it is necessary to state the facts of the case.

The appellees recovered four several judgments at law against

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Christian Brumback, *Martin Guest*, and *Alexander S. Walker*, before a Justice of the Peace. From these judgments, the defendants appealed to the Circuit Court, and the judgments were there affirmed. All of the judgments are for the value of one hundred dollars, exclusive of interest, except one, which is for the sum of ninety-eight dollars. From the judgments rendered by the Circuit Court in favor of the appellees, the appellants, with *Chester Ashley* as their surety, together with Edward Shurlds, Benjamin Clemens, and Kirkwood Dickey, who were not sued in this action, entered into four several recognizances to prosecute their appeals in the Superior Court of the Territory of Arkansas, conditioned as the Statute directs.

The declaration, in assigning the breaches of the recognizances, does not state that the judgments of the Circuit Court were affirmed or reversed. The first count sets forth, that the appeal from the judgment of the Circuit Court for the ninety-eight dollars was dismissed for want of jurisdiction in the Superior Court with cost.

The act of the Legislature, approved July 3, 1807, Sec. 59, and *organic law*, Sec. 7, *Digest page* 335 and 38, regulating appeals from the Circuit to the Superior Court, give "appellate jurisdiction only in all civil cases in which the amount in controversy shall be one hundred dollars or upwards." The party appealing must *show* that the court has jurisdiction of the subject matter; and it is evident, as the sum is not one hundred dollars or upwards, the Superior Court could not rightfully take cognizance of the first appeal. What, then, is the legal effect of that recognizance? Is it binding on the sureties in the appeal? or is it null and void, as no such appeal could be lawfully allowed? In the case of *The Commonwealth* vs. *Messenger*, 4 *Mass. Rep.* 462; *Campbell* vs. *Howard*, 5 *Mass. Rep.* 376; and *Weatherby* vs. *Johnson et al.* the court expressly decided this point. The appeal is declared to be a mere nulllity, and the recognizance of the appellant n the court below to prosecute his appeal, held to be void, and that he appellees can sustain no injury by a failure to comply with its conditions. "The party obtaining the judgment, may," says Chief Justice Parsons, "sue out execution upon it, or maintain an action of debt 'upon it, for the judgment remains in full force, and forms a legal "consideration."

On this point the court have no difficulty in coming to a conclusion.

The second, third and fourth counts of the declaration allege that

the appeal on the three remaining recognizances for one hundred dollars were dismissed for want of prosecution, by the Superior Court, and judgment entered in each case for costs.

The Superior Court unquestionably had jurisdiction of the appeals, for each is for one hundred dollars, and that sum is sufficient to give to the party a right of appeal. The appeals were then properly granted by the Circuit Court, and the only question for us to determine, is the liability of the securities upon the recognizances. The enquiry, then, naturally arises, does the declaration contain a good cause of action, or are the breaches properly assigned? It must be admitted that, if the recognizances are good, the declaration must be sufficient; for it sets out the only cause of action the plaintiffs have, which is, that there was a judgment of the Superior Court dismissing each of the appeals, and which is declared to be in full force and effect.

This is an action of debt on four several recognizances, and to ascertain the responsibility of the sureties, we must see how far they are bound by their conditions.

The appellees have declared that the appeals were dismissed for want of prosecution. But is that one of the conditions or stipulations of the recognizances? Did they ever covenant, that the appeals should not be dismissed for want of prosecution, or that they would prosecute them with effect, or does the legal consequence flowing from their recognizances contain any such provision?

The recognizances are "that in case judgment shall be confirmed they will pay the debt, damages and costs." Does the declaration negative the condition, or declare that the judgments on the appeals were affirmed or reversed by the Superior Court? There is no such allegation in any of the counts. It is merely stated that they were dismissed with costs for the want of prosecution, but upon whose motion this order was entered, does not appear. That, however, does not in our estimation materially affect or change the nature of the case. Was the dismissal of the Superior Court equivalent to an affirmation of the judgments? Certainly there is a striking difference between the two propositions. Had the judgments been affirmed, there would have been an end to the cases, and the condition of the recognizances would not have been complied with, and the liability of the present defendant fixed. The Superior Court in dismissing the appeals, placed the parties in the same condition as if no appeal had been prayed or allowed; and notwithstanding the order, the appellants might still have had a

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writ of error and supersedeas, if the facts or the law had justified it, and brought up the cases, and in this manner have had the judgments below affirmed or reversed in the Superior Court. Suppose the judgments of the Circuit Court had been reversed, would the sureties have still been liable upon the recognizances, in express contradiction of the Statute, which declares if the defendant appeals, and "the judgment shall be reversed, the recognizances shall be null and void." The Statute upon the subject does not leave the appellees without remedy or redress. If the party appealing shall fail or neglect to file with the Clerk a copy of the record and proceedings on or before the third day of the next succeeding term of the Superior Court, "it shall be lawful for the adverse party, producing a certificate from the Clerk of the court below, that an appeal has been entered, and a recognizance given, to move the court that the judgments stand affirmed."

Here, then, the appellees had it their power, if they wished it, by producing the certificate of the Clerk, to have the judgments appealed from, affirmed.

They did not choose to do this, but the cases are dismissed for the want of prosecution. If they have sustained any injury by delay, or in failing to sue out execution on their judgments, it was as much their own fault as that of the appellants. For the neglect or unwillingness of the one to have the causes tried and determined, could have been prevented by the vigilance and attention of the other. Both parties after the appeal is prayed and taken, have legal duties to perform, and if either omit his part, the other can take advantage of the negligence.

Between the writing or obligation sued on and the breaches assigned for the non-performance of its conditions, there seems to us a manifest and substantial variance, and one that is fatal to the declaration. It is a universal rule that the breaches must be proved as laid in the declaration. Thus, if the plaintiff declare upon a covenant to repair at all times, and the covenant contains the additional words, "at farthest, within three months after notice," the variance is fatal. So, if the plaintiff declare upon an absolute promise, and a conditional one be proved. *Horsefall* vs. *Ester*, 1st *Mad.* 89. *Churchill* vs. *Wilkins*, 1st *T. R.* 47. *Sower* vs. *Winters*, 7 *Cowp. Rep.* 20[illegible]. The universal rule on the subject is, that the party declaring must prove the allegations according to their legal effect. 3rd *Stark. Ev.* 564. If, in an action of debt on recognizance of bail, the recognizance be alleged generally,

and it appear from the record, that it be a recognizance with a condition annexed, the variance will be fatal. *Ward* vs. *Griffith*, 1st *Ld. Raym.* 83. In an action against a surety on a bail bond where there is a material difference between the bond and breaches assigned, the variance is fatal. 1 *Roll.* 551. In the case now under consideration, the variance between the recognizances set out in the declaration and the breaches assigned, is most manifest.

This does not arise, however, from any defect in the manner of the averments, but from the fact that under the judgment of the Superior Court, no other allegation could properly be made.

The legality of the recognizances springs from the authority of the act of the Legislature; and to give them a construction that would change or alter their terms or conditions in order to charge the sureties, would be both unreasonable and unjust. To make them liable, the condition of the recognizance must be violated. Until this appears, no cause of action accrues. The three last counts in the declaration do not show that the conditions have not been complied with. Dismissal and an affirmation of the appeal, are, in the opinion of the court, two separate and distinct things, and a wholly different undertaking. The former by no just or legal inference can be made to include the latter. If this view of the subject be correct, then the plaintiffs have shown no cause of action, and the demurrer to the declaration ought to have been sustained.

The decision of this question necessarily disposes of the whole case, and it is deemed unnecessary to examine at length the second assignment of errors. It is obvious, however, that the judgment ought not to have been rendered for the plaintiffs for the whole amount of the recognizances upon *nil dicit*.

A writ of enquiry should have been awarded to assess the damages. The opinion of the Circuit Court on this point was, therefore, evidently erroneous. The judgment of the court below must be reversed with costs, and the cause remanded, to be proceeded in agreeably to the opinion here delivered.

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CHANDLER vs. BYRD.

SARAH CHANDLER *against* RICHARD C. BYRD.

ERROR *to Pulaski Circuit Court.*

The securities of the defendant in a bond taken of him on a capias in detinue under the statute, are his *bail;* and are only *personally* responsible for the defendant, not answerable in all events for the delivery of the property sued for.

The liability of the defendant is wholly personal, and the bail are liable to no greater extent than he. By the condition of the bond, the defendant binds himself "to deliver the property to the plaintiff, and pay the damage for the detention, and costs of suit," and the bail are bound with him.

In an action upon such bond, an assignment of a breach, that judgment was rendered against the *administrator* of the defendant for the property, and that such judgment remains in full force and effect, and unsatisfied, does not constitute a good breach.

The sureties in a bail bond in detinue may surrender their principal in discharge of bail, in the same manner as in other actions, and, as in other actions, are only liable for the *personal* responsibility of their principal—and the death of the principal exonerates them from responsibility.

The plaintiff in error brought an action of detinue in the Supreme Court of the Territory of Arkansas, to the April Term thereof, 1823, against one *Alexander W. Cotton*, for four negroes, and sued out a capias in detinue under the statute. *Cotton* was taken upon the capias and entered into bond to the plaintiff, on the 31st of October, 1827, with the defendant in error and John H. Cocke as his securities, in the sum of two thousand four hundred dollars, conditioned that he would appear at the return term and make good his claim to the negroes, and that if judgment should be given against him at that or any subsequent term, he would deliver said negroes to the plaintiff, and pay all damages assessed for their detention, and costs of suit. It is upon this bond that the suit below was brought.

Cotton appeared at the return term of the writ in detinue, and the suit was continued, until by his death in November, 1828, it abated. The suit was afterwards revived against his administrator against whom judgment was obtained for the negroes by the plaintiff in error, at the July Term of the Supreme Court, 1830, which judgment is unsatisfied.

An action of debt was then commenced on the bail bond by the plaintiff in error, against the defendant in error and the said John H. Cocke, to June Term, 1831, of the Court below, and after various steps had been taken in the cause, the defendant in error, against whom alone the suit proceeded, filed two amended pleas. To each

of these the plaintiff filed a demurrer, and the demurrer to the first was sustained, and to the second overruled. The first plea was not afterwards amended. The second, which the Court below adjudged good, alleged in bar the death of *Cotton* before judgment obtained in detinue, and the consequent abatement of the suit. After the plaintiff's demurrer to this plea was overruled, she filed her replication to the plea, alleging as an answer to the plea, that after the death of *Cotton* the suit was revived and final judgment obtained therein, against his administrator, and that such judgment was entirely unsatisfied. To this replication the defendant demurred, and his demurrer being sustained, the plaintiff suffered judgment to be rendered on the demurrer, and sued his writ of error. The errors assigned were that the Court below erred in overruling the demurrer to the second amended plea, and in sustaining the demurrer to the replication.

HALL and CUMMINS, for plaintiff in error:

TRAPNALL and COCKE, *contra*:

The bond and condition having been set out on oyer, the defendant by his second amended plea, relies upon the fact that his principal, the said *A. W. Cotton*, appeared at the return of the process mentioned in the condition of the bond, and made good his right to the slaves then in controversy, and no judgment in that suit was given against him at that or any subsequent term of said Court until his death, at which time there was no breach whatever of the condition of his bond.

The replication to that plea admits all of the facts stated in it, but undertakes to avoid them, and relies upon the facts that after the death of said *Cotton*, the principal, David Rorer, administrator of his estate, appeared, and the suit was revived against him as such administrator, and judgment subsequently obtained against him as administrator, for some of the slaves in controversy in that suit, damages, &c.; that the slaves were not delivered, or their value paid, &c. to the plaintiff.

The judgment against the replication rests upon the ground that the obligation of the defendant was simply an obligation of bail; that in all cases the obligation of the bail ceases upon the death of the principal before judgment; that their obligations being personal merely, that is, an undertaking that their principal shall do and perform certain acts, the performance of which are regulated by law, and hence

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they have by law the power (at any time before their liability becomes fixed,) of arresting their principal and surrendering him in discharge of their obligation. They are in law considered as his prison. He is by law placed in and under their custody and keeping, and they have the power at all times to restrain his action so as to keep him subject to their control. This is the meaning and very essence of bail, and there is no exception to it known to the law. The extent of their liability, and the conditions upon which their obligation becomes absolute, are clearly defined by law; and as to the circumstances under which their liability becomes absolute, there is no statute changing them. See 2 *Com. Dig.* 51, *n. y.;* 1 *Johns. Cas.* 359; 9 *J. R.* 84; 2 *Com. Dig.* 50.

That bail, either common or special, were discharged of all obligation whatever by the death of their principal before judgment, is fully established by all the authorities. 2 *Com. Dig.* 53, (2,) 5; 1 *J. R.* 515; 2 *Mass. Rep.* 435; 2 *Com. Dig.* 58–9, *and authorities there referred to;* 2 *Ch. Bl.* 292, *n.* 33.

That in this case, as in all other cases of bail, the plaintiff has had all the benefit conferred by law. The defendant was arrested and imprisoned, (*in the custody of his bail it is true*, but that is as effectual and beneficial to her as if he was imprisoned in the common jail), and so remained until his death, which was before any recovery against him. Upon his death the parties changed, and the bail never were bail or in any wise security for the new party, who was himself by law required to give security for the due and faithful performance of the trust reposed in him.

The contract of the bail was as it always is, conditional. One of the conditions in this instance was that the defendant in the original case should appear at the return of the writ against him and make good his claim to the property, &c., and if judgment should be given against him at that or any subsequent term, &c., he would deliver the property, &c. This was an act (may it not well be said a personal act,) to be performed by the defendant, *Cotton* himself, and upon his failure to perform which the liability of the bail first attached. Did he fail?—Certainly he did not. Then when did the obligation of the bail attach? Certainly never.

And this is the true distinction between this kind of obligation or contract and a contract where the obligation commences at the time of making the contract. In the former something subsequent and con-

tingent must appear before any legal obligation attaches, and until the happening of the event on which the obligation is to attach there is no liability whatever. In the other case, the obligation commencing with the contract continues until it is discharged or extinguished, but in this case the contingency on which the obligation of the bail was to attach had not happened when *Cotton* died, and never could happen afterwards, either by the express stipulation of the contract or any condition thereof expressed by law.

It will be further seen that the conditions of the bail bond in detinue are substantially the same with those in debt. *Dig.* p. 318, 459.

In this case, RINGO, *C. J.*, having been of counsel, did not sit.

LACY, *Judge*, delivered the opinion of the Court:

This was an action of debt, commenced by the plaintiff in error against the defendant and John H. Cocke, as securities for *Alexander W. Cotton*, on a bail bond.

"The undersigned, *Alexander W. Cotton*, of the county of Pulaski, in the Territory of Arkansas, as principal, and R. C. Byrd and John H. Cocke, his sureties, by these presents bind themselves, their heirs, executors, and administrators, jointly and severally to pay to *Sarah Chandler* the just and full sum of two thousand and four hundred dollars, lawful money of the United States. Witness their hands and seals, this thirty-first day of October, eighteen hundred and twenty-seven.

"The condition of the above obligation is such, that if the above *Alexander W. Cotton* be and appear at the next April term of the Superior Court in and for the Territory of Arkansas, in the year eighteen hundred and twenty-eight, and shall then and there make good his claim to the slaves mentioned in the declaration, and if judgment shall be given against him at that or any subsequent term, he, the said *Alexander W. Cotton*, shall deliver to the plaintiff, the said *Sarah Chandler*, the said negroes, Polly, Andy, Angeline, and Marion, mentioned in the said declaration, and if he shall pay all damages which shall be assessed for the detention of said negroes, and shall pay the costs of suit, then this obligation to be void and of no effect, otherwise to remain in full force and virtue. In testimony whereof, they have hereunto set their hands and seals the day and year above written.

A. W. COTTON, [SEAL.]
R. C. BYRD, [SEAL.]
JOHN H. COCKE, [SEAL.]"

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The service of the summons or capias on John H. Cocke was quashed for insufficiency, and as the principal, *Alexander W. Cotton*, was not joined in the action, the case was permitted to proceed to trial in the names of the present plaintiff and defendant. It is deemed unnecessary to notice any of the steps taken in the pleadings until the defendant had leave to file his amended pleas. He craved oyer of the bond or writing sued on, which was allowed, and then put in two amended pleas in bar of the action. To each of the pleas there was a separate demurrer and issue. The demurrer to the first plea was sustained, and judgment entered up against the sufficiency of the plea. The demurrer to the second plea was overruled, and the plaintiff had leave to reply. She then filed her replication, and the defendant demurred to it. Judgment was pronounced sustaining the demurrer and declaring the replication insufficient.

To reverse the decision of the Court below on these points the plaintiff now prosecutes her writ of error.

The assignment of errors presents several questions for consideration, but they all substantially resolve themselves into one, which is, was the second amended plea good in bar of the action; or in other words, was the demurrer to the replication rightly sustained?

The plea and replication cannot stand together. If the former is good the latter must be bad, and in deciding the first point we are compelled necessarily to examine and pass upon the second.

The second amended plea as set forth is, "that the defendant ought not to be charged with the debt in the said declaration mentioned, because he says that the said *Alexander W. Cotton*, after the making of the said writing obligatory, to wit: at the said April term of the said Superior Court in and for the Territory of Arkansas, held in the year eighteen hundred and twenty-eight in said condition mentioned, did appear, and did then and there defend and make good his claim to the slaves mentioned in the declaration, and such proceedings were thereupon had in said suit in said condition mentioned, that the same was continued in said Superior Court without any judgment whatever having been given for the said plaintiff against said *Alexander W. Cotton* for said negroes or any or either of them, until the 25th of November, eighteen hundred and twenty-eight, as will more fully and at large appear by reference to the record thereof still remaining in the said Superior Court; and the said defendant in fact says, that *Alexander W. Cotton*, on the said 25th day of November, eighteen hun

dred and twenty-eight, did die at New Orleans, to wit, at the county of Pulaski aforesaid, and that the said suit in this condition mentioned, afterwards, to wit, on the same day and year last aforesaid, became and was abated by reason of the death of the said *Alexander W. Cotton*, and that no judgment was ever given for said negroes or any or either of them in favor of the said plaintiff against the said *Alexander W. Cotton*, and this the said *Richard C. Byrd* is ready to verify; wherefore," &c.

The replication is accurately plead, and the legal consequences that flow from it are stated with particularity and certainty. But it wholly avoids the issue tendered by the plea, which is, that the death of the principal before final judgment rendered against him discharges his bail, and consequently there is no cause of action against the defendant. The replication alleges that the suit was revived in the name of David Rorer, the administrator of *Alexander W. Cotton*, and that final judgment in the action of detinue was obtained against him at the July term of the Superior Court, 1830, and that judgment still remains unreversed and in full force and effect.

The question then recurs, is the plea good, or ought the demurrer to it to have been sustained?

This proceeding is had under an act of the Legislature, approved December 22d, 1818. See *Digest*, 459. "SEC. 6. In all actions of detinue where the plaintiff shall file in the office of the Clerk of the proper Court, an affidavit stating that the property in the declaration mentioned is his property, and that he is lawfully entitled to the possession thereof and the value thereof, and that the defendant unlawfully detains the same, the Clerk shall issue a writ of capias in detinue and endorse thereon the amount as sworn to, and direct the Sheriff to take bail of the defendant in double that sum, and it shall be the duty of the Sheriff to whom the writ may be directed, to take the defendant's body and commit him to the jail of the county, or take a bond of such defendant to the plaintiff with sufficient securities in double the sum so sworn to, conditioned that he be and appear at the term of the Court to which the writ is returnable, and then and there to defend and make good his claim to the property in the declaration mentioned, and that if judgment shall be given against him at that or any other subsequent term, *he will deliver to the plaintiff the property for which judgment shall be so given*, and pay all damages which shall be assess-

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ed for the detention thereof, and costs of suit; and the writ and bond shall be returned as in other cases."

Is the principal and his sureties bound by this act as in ordinary cases of bail, such as debt, covenant, actions on the case, and the like, or is it an absolute and unconditional undertaking on his and their part to deliver the property or specified thing sued for, whenever judgment shall be obtained against the defendant or his administrator?

By the act of the Legislature, passed July 2d, 1837, (see *Digest*, 317.) "SEC. 12. In all actions of debt founded on any judgment, writing obligatory, bill or note in writing, for the payment of money or other property, in action of covenant, and in actions on the case, where the plaintiff makes affidavit or affirmation of a real subsisting debt and of the sum in which he verily believes the defendant ought to give bail to secure such debt and costs, it shall and may be lawful for the plaintiff to sue out of the Clerk's office of the proper county a writ of summons, as is prescribed in the preceding section, or a writ of *capias ad respondendum*, on which capias the time, species of action, and the sum for which bail is demanded, shall be endorsed on such writ. It shall be the duty of the Sheriff to whom such *capias ad respondendum* may be directed, to take the defendant's body, and commit him to the common jail of the district, (county), or to take a bond of the defendant, with sufficient securities, in the sum endorsed on such writ, conditioned that the defendant shall be and appear at the term of the Court to which the writ is returnable, and that if judgment be given at that or any subsequent term against him, that he will pay the debt or damages, as the case may be, and costs, and surrender himself in execution, or that the securities will do the same for him."

Is the obligation here sued on, a bail bond? To determine this question we must enquire into the meaning of the term *bail*, and see to what extent the principal and his sureties are liable.

Bail signifies a guardian, or one who has the legal custody of another. See 2 *Comyn* (*A*) (*Bail*). The word means to deliver, because the defendant is bailed or delivered to his securities. 2 *Chitty's Blackstone*, 290. The method of putting in bail to the Sheriff, is by entering into a bond or obligation, with one or more sureties, to insure the defendant's appearance at the return of the writ, which obligation is called the *bail bond*. Upon the return of the writ, or four days afterwards, the defendant must appear according to its summons, and the appearance is effected by putting in and justifying what is com-

monly called *bail to the action*, whereby the bail jointly and severally undertake that if the defendant be condemned in the action, he shall pay the costs and condemnation, or that they will do it for him.

Special bail may be discharged by surrendering the defendant into custody within the time allowed by law, for which purpose they are entitled to a warrant to apprehend him. They may even have a writ of *habeas corpus* to bring his body into the Court of King's Bench, and that too when he is confined in a civil action or upon a criminal charge. 7 *T. R.* 226; 6 *Mod.* 221.

After judgment against the principal, if he does not pay the condemnation nor surrender himself to prison, a *scire facias* goes against the bail.

And the *capias ad satisfaciendum* ought to have eight days between the *teste* and the return. 2 *Comyn* (*R.*) 4, (*R.*) The bail may plead payment or satisfaction after judgment against the principal, so if he pay, the Sheriff being taken upon a *capias ad satisfaciendum*. 2 *Comyn*, (2,) 2, 6. So after judgment and error brought, and before judgment affirmed, if the plaintiff in the original action release to the defendant all demands against him for damages, and afterwards the judgment be affirmed, the bail in the suit shall nevertheless be excused.

The bail is not considered fixed until the capias is returned against the principal *non est inventus*, and filed upon record, and then they cannot be discharged. 4 *Johnson's Rep.* 407; *Beekley* vs. *Cotton;* 1 *Johnson's Rep.* 505; 2 *Mass. Rep.* 485, *Champion* vs. *Noyes*. But the bail may plead a discharge, if the principal die before the capias is returned and filed of record. *Comyn Dig.* (*Q.*) 2, (*Q.*) 52.

"The death of the principal at any stage of the proceedings before the return of the *capias ad satisfaciendum* against the principal discharges the bail; and the bail may take advantage of the death of the principal, either by pleading it in bar or by applying to the Court in term time, or to a Judge in vacation, for permission to enter an *exoneretur* on the bail piece." See *Petersdorf's Treatise on Bail*, 216, 217.

The Court will now test the question before them by the principles here laid down. By a careful inspection and comparison of the acts of 1807 and 1818, regulating the proceedings in cases of bail, and fixing the liability of the defendant and his sureties, it will be perceived that the language of the two statutes are very similar, and the last act almost a literal copy from the first. In one instance the condition of

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the bond is, in case judgment shall be given against the defendant "he will pay the debt or damages, as the case may be, and costs, and surrender himself in execution." In the other, the condition is, that the defendant, in case judgment be given against him, "will deliver to the plaintiff the property, and pay all damages that shall be assessed for the detention thereof, and costs of suit." By both statutes the Legislature makes it the duty of the Sheriff, when the proper affidavit is filed by the plaintiff with the Clerk, to take the body of the defendant and commit him to prison, or take a bond from such defendant, with sufficient securities, for his appearance.

They call it in each of the acts a bond, and treat it as *bail* throughout the whole proceedings. It is declared by the act of 1818 to be bail; and the Clerk in issuing the capias in detinue, is required to endorse on the writ "the amount sworn to, and direct the Sheriff to take *bail* of the defendant in double that sum."

The very words of the statute determine that it is bail. Admitting that the Court may be mistaken in this view of the case, let us now see what is the proper legal construction of the act. The validity of the bond is derived from and depends upon the authority of the act of the Legislature; and the liability of the defendant and his sureties cannot be enlarged or diminished beyond its legal consequences. That in an action of detinue it was the intention and object of the Legislature only to hold the bail personally responsible for the principal is obvious, from the fact that the law directs the Sheriff to take the body of the defendant, and not the property or specified thing sued for. Had it been intended to make the sureties answerable in all events for the delivery of the property, it would have directed that the property itself be taken into custody, and not the body of the defendant. Should the defendant refuse to give security according to the requisitions of the act, has the Sheriff any right or authority to seize and retain possession of the property? Certainly not. The liability of the defendant is then wholly personal, and if that be the case, it cannot be contended that the securities are liable to a greater extent than their principal. What are the terms of the bond, and how far is it binding? The securities do not stipulate that if judgment is rendered against the administrator, executor, or legal representative of the defendant, that they will deliver the property or pay the value of it, and damages, to the plaintiff. There is not even any express words that they will deliver the property in case judgment is rendered against the princi-

pal, but the condition is, "that the defendant will deliver the property to the plaintiff, and pay the damages for the detention, and costs of suit." Although there are no express terms including the securities, still this Court believe, upon a fair and just construction of the act, they are bound with their principal. How does the case now stand on the record? Briefly as follows: The plaintiff, *Sarah Chandler*, sued out a *capias* in detinue, for the recovery of the slaves in the declaration mentioned, and held the defendant, *Alexander W. Cotton*, with his sureties, Richard C. Byrd and John H. Cocke, to bail. Judgment was never given against *Cotton* in his lifetime, but the suit abated by his death, and was revived in the name of David Rorer, his administrator, against whom the plaintiff obtained judgment at the July term of the Superior Court in 1830. On this state of facts, the sureties in the bail bond are sought to be made liable.

The replication assigns for a breach of the condition of the bond, that judgment was rendered against the administrator for the slaves in controversy, and that it remains in full force and effect, and unsatisfied. Does such an assignment constitute a good breach? There is no such stipulation or condition contained in the bond; nor is there any such implied covenant in the deed, arising from any just legal presumption. The statute gives validity to the bond, and the parties to it cannot be held responsible for any condition not contained in it, or deducible from its legal tenor and effect.

In an action of detinue, the judgment is in the alternative, that the plaintiff do recover the goods, or the value thereof, if he cannot have the goods themselves, and his damages for the detention, and his full costs of suit. 1 *Chit. Plead.* 683; *Tidd's Prac.*, 388. The form of the judgment in an action of debt, covenant, case, and the like, is essentially different from that in detinue; and this is the reason why the bail bond in each of the cases is made to correspond precisely with the respective judgments. The liability of the sureties on the bonds is the same, for the mere difference in the terms of the expression that in case "judgment shall be rendered against the defendant, he will deliver the property, and pay damages for the detention thereof, and costs of suit," or that "he shall pay the debt, damages, and costs, or surrender himself in execution," does not at all vary the legal effect of the two instruments. Suppose judgment had been rendered against the defendant in an action of detinue, could he not discharge himself and thereby exonerate his securities, by paying the value of the property

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and damages for the detention, provided the plaintiff would accept the same in full satisfaction of his demand? If the plaintiff release all claim against the defendant, or receive accord and satisfaction in lieu of his judgment, could not the sureties plead either of these facts in bar of the action brought against them for a breach of the condition of the bond? Would the plea be good? That they would form a good bar cannot be doubted. If this be true, then the bond sued on is not absolute and unconditional for the delivery of the property or specific thing. If these pleas be not good and sufficient in bar of the action, then might a plaintiff have two satisfactions for the same or one judgment, which is manifestly unjust and illegal. Suppose after judgment given against the defendant he had removed the slaves beyond the jurisdiction of the Court, or the plaintiff had elected to take the value of them, or during the pendency of the suit they had died, would the sureties still have been bound for their unconditional delivery? Most surely not; for that would be holding them responsible on the bond for the performance of a condition which was possible at the time of making it, but which afterwards might become impossible by the act of God, the act of the law, or or the act of either the plaintiff or the defendant, and the happening of any of these things will, says Blackstone, "discharge the condition and save the penalty." "For no prudence or foresight of the obligator could guard against such a contingency." *Co. Litt.* 206; *Black. Com.* 341.

That the bail in such a case is only responsible as in other actions, is apparent from the condition of the obligation itself, and the evident intention of the Legislature. Should the defendant in the action refuse or fail to deliver the property, and should his bail become apprehensive that he was not acting with good faith, the law gives them a warrant to apprehend him, that they may render him in discharge of their liability. This authority is delegated to them for the purpose of indemnifying themselves against fraud or loss; and this is the reason they are said to be his guardians and keepers, he being in legal contemplation, in their custody.

Now, what power have they over his administrator, or the property of their principal? None at all. Their guarantee is the good faith and personal responsibility of the defendant, and not that of his administrator or legal representatives, whom they may not know, and whom they may be unwilling to trust. Had the bail surrendered their principal, either before or after judgment, would they not be dis-

charged, and would not the plaintiff in the action be in as good a condition as if the Sheriff had first committed the defendant's body to prison? The surrender would certainly have discharged them, provided their responsibility had not been previously fixed by the return of *non est inventus* on the *capias ad satisfaciendum*. Admitting this to be true, then the sureties on the bail bond in the case now before the Court are only liable for the personal responsibility of their principal, as in other cases. The statute treats the obligation as a *bail bond*, and calls it *such*, and of course, the Court are bound to presume that it is one, and to apply to it the rules and principles that govern in other cases of a similar kind.

The doctrine on the subject of bail is so clearly and incontrovertibly established, and so well founded in reason and authority, that it cannot be easily mistaken or misapplied. The sureties at any stage of the proceedings, may excuse themselves from all liability, both before and after judgment, provided the *bail* be not *fixed*, as heretofore explained, by showing any thing by which it appears that the defendant is relieved, for it is unjust "that the bail should continue responsible after the principal is discharged." *Petersdorf on bail*, 390. The bail may discharge themselves by pleading payment, release, accord and satisfaction, or any other matter that will show the plaintiff's demand was satisfied, or the surrender or death of the principal, in bar of the action. The defendant in this instance alleges that the condition of the bond was complied with, and that *Alexander W. Cotton* did, at the April Term of the Superior Court, in and for the Territory of Arkansas, held in the year eighteen hundred and twenty-eight, appear and make good his claim to the slaves mentioned in the declaration, and that the suit was continued without any judgment having been given against him, until the 25th day of November, eighteen hundred and twenty-eight, as the record shows, and that on that day he died within the jurisdiction of the Court, and by reason of his death the writ abated, and that no judgment was given for said negroes, or any or either of them, against him during his lifetime, and in favor of *Sarah Chandler*, the present plaintiff. The demurrer to the plea admits these facts.—It has already been shown that the obligation sued on is a *bail bond* to all intents and purposes, and that being the case the rule is uncontradicted and conclusive, that the death of the principal or the defendant exonerates and discharges the bail, and forms a good bar to the action. The demurrer to the plea was then rightfully overruled. The

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replication instead of responding to the plea and taking issue upon it, entirely evades its legal conclusion, by setting up new matter in avoidance. If the plea is good in bar to the plaintiff's cause of action, then the replication must be defective. The demurrer to the replication was then properly sustained. The plea fully answered the cause of action, for it alleged a fact which in the opinion of this Court wholly destroyed it, and set it out in such a manner as to show that the condition of the bond was fully and substantially complied with by the defendant, according to the requisitions of the statute.

There then being no error in the record, the judgment of the Court below must be affirmed, with costs.

BENTLEY, EXTR. OF BENTLEY *against* WILLIAM A. DICKSON.

APPEAL *from Conway Circuit Court.*

An amended declaration filed in the court below without leave either asked or given to amend, is not part of the record, and entitled to no attention; and it will be here presumed that upon demurrer to the declaration, the court below treated the amendment as a nullity, and considered the demurrer as applying to the original declaration.

When a suit is revived in the name of an executor or administrator, the pleadings stand in the same attitude as before the abatement, and only the names of the parties are changed upon the record. It is a legal fiction by which the pleadings, &c. are considered as being in the name of the executor or administrator.

Debt is the proper action on promissory note.

This was an action of debt commenced in the court below by appellant's intestate against the appellees. The declaration was filed to March Term, 1833, and alleged that the defendant had executed his writing obligatory to the plaintiff, for four hundred and five dollars, with a breach that he had "not paid the aforesaid sum of four hundred and five dollars, according to the tenor and effect of said writing obligatory, nor any part thereof, nor the interest thereon, nor any part thereof, though often requested." The defendant appeared, and at the September Term, 1833, the suit abated by the death of the appellant's testator; and after two *sci. fa's* had been sued out by the appellant and returned *non est* as to the appellee, the suit was revived against him at February Term, 1835, and the suit was continued to the next term, on the 17th of March, 1835. On the day after, the following entry was made of record: "This day the plaintiff filed his amended declaration in this cause, and this cause is continued to the next term of this court." This is the only notice taken of the amended declaration, previous to its filing. The amended declaration so placed among the papers, was in the name of the deceased testator, and was otherwise entirely informal and insufficient.

At the two next terms, the cause was continued by consent, and then a term intervened without a court, and at March Term, 1837, the defendant demurred, by consent, "to the plaintiff's declaration," and upon the demurrer judgment was rendered, that "it seems to the "court that the law is for the defendant. Whereupon it is considered "by the court that the plaintiff take nothing by his bill and the de-"fendant go hence without day, and the plaintiff for his false clamor

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"be in mercy, &c." From this judgment on the demurrer, the plaintiff below appealed.

TAYLOR and LINTON, for the appellant:

The demurrer was permitted to be filed at the term of the court subsequent to that at which the declaration was filed, which is not allowed by law, and the rules of practice. See *Statute, Digest.*

The original declaration was good: the second was superfluous, or at most but an additional count to the original declaration, and on either ground the demurrer ought to have been overruled. If there be one good count, it is sufficient. *McCamp. Dig.* 332. All matters of form disregarded. *McCamp. Dig.* 344, Sec. 94. Suit was revived and no new pleading was required. *McCamp. Dig.* 326.

FOWLER, TRAPNALL and COCKE, *contra:*

The amended declaration was throughout in the name of *George Bentley*, who had long been dead.

It is contended by the appellee, that said demurrer was properly filed; and if there could have been otherwise any possible doubt as to its propriety or legality, the consent of the said appellant cures all such objections.

And it is contended that it was properly sustained, because *George Bentley was dead*, and not a party to the action: therefore the declaration was improperly filed in his name. It could only be filed in the name of the plaintiff, who was then *Eli Bentley*—not *George.*

The original declaration was voluntarily abandoned by the plaintiff: therefore, he cannot rely upon it, for any purpose whatever, in sustaining the amended declaration. The original itself is too bad, in addition to this reason, to stand either by itself or otherwise. But he having voluntarily avoided it, it does not now come before this court for consideration.

DICKINSON, *Judge*, delivered the opinion of the court:

This was an action of debt brought by *George Bentley*, in his lifetime, against the defendant, in the Conway Circuit Court, at the March Term, 1838. The suit was revived in the name of *Eli Bentley*, as executor of *George Bentley* deceased. After its revival, it appears from the record that the Executor filed an amended declaration in the name of *George Bentley*.

The defendant also filed a general demurrer, which was sustained

by the court, and judgment entered thereon; from which the plaintiff has prosecuted an appeal to this court. The record presents but one question for our consideration, and the decision upon it necessarily settles all the points raised under the assignment of error. Was the judgment upon the demurrer rightfully sustained by the court below?

The counsel of both parties appear to have taken a wrong view of this case, and occupied a position in their arguments not born out by the record. It is contended on the part of *Dickson*, that the amended declaration should have been in the name of the executor, and that it was to this declaration the demurrer went, while, on the other hand, the executor insists that the declaration is good in substance, and correct as to form.

Whether the court below considered the amendment as part of the pleadings, and the one upon which judgment was given, we are unable to say, but will presume they did not; for although we find the amendment in the record, and in the name of the deceased after the suihad been revived by his executor; yet, it never was entitled to any attention, either in this or the Circuit Court, as it does not appear that leave had ever been asked or given, to amend.

It is not only evidently absurd, and inconsistent in its terms and character, but irregularly and improperly filed: it could have no bearing upon the case, and though never actually stricken out, it would have been improper for the court to have looked into it. Taking the record, then, as we are bound to do, for our guide to the course pursued by the inferior court, in relation to the points assigned for error, we will presume that the Circuit Court treated the second declaration as a nullity; that discretionary power vested in the court as to amendments, never having been exercised in authorizing the plaintiff to change, alter, or amend his pleadings.

The act of the Legislature passed October 30, 1810, makes it the duty of executors and administrators to defend and prosecute all suits that survive to them, and gives them full power for that purpose. See *Digest.* p. 326. When the suit is revived, all the pleadings stand in the same attitude, as if they had never been abated by death: the names only are changed upon the record, and it is a legal fiction by which the writ, declaration, plea and other proceedings, are all considered as there standing in the name of the executor or administrator. This, it is believed, is the universal rule of practice, and in strict accordance with the principles of right and justice. This case now

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under consideration, so far as regards the pleadings, stands in the same position before us as it did before the Circuit Court at the time of its revival, and the declaration subsequently filed, being irrelevant and a mere nullity by reason of its irregularity, the demurrer must go to the declaration filed at the commencement of the suit. And it now remains for us to decide whether that declaration is sufficient to enable the party to recover. The action is in debt, founded on a promissory note for "the sum of four hundred and five dollars, with interest to be computed after the date of ten per centum per annum, from the 8th day of June, 1831, till paid." We have carefully examined the declaration, and the authority having any bearing upon the subject, and can discover no well founded objection to it. The breach, though somewhat improperly set out, is, we think, sufficiently assigned. Debt was the proper action, it being for a sum certain, or which could be reduced to a certainty. The authorities on this point are numerous and conclusive. The objection made by the appellant's counsel, that the demurrer ought to have been filed at the first term, it is unnecessary to consider, as it appears to have been filed by consent of parties, and generally to the declaration.

And throughout the whole record, there is no mention made of the second declaration, except that a copy of it is sent up to us in the record, and that is marked as filed on the 18th of March, 1835. And in the whole course of proceedings, there is no other mention made of it, by either the court or the parties. As, then, the demurrer could only apply to the declaration legally and regularly filed, (which is the first,) and that is deemed good and sufficient, we are consequently brought to the conclusion, that the court below erred in sustaining the demurrer. The judgment must, therefore, be reversed with costs, and the cause remanded to the Circuit Court of Conway, for further proceedings to be had therein, not inconsistent with this opinion.

CHARLES L. JEFFRIES *against* CHARLES MORGAN, *for use, &c.*

ERROR *to Pulaski Circuit Court.*

If a judgment by confession is formally and properly entered up, the party confessing is estopped by his own voluntary act from questioning its correctness.

In such case, if there be error in the computation of interest, it is too late in the Supreme Court to take advantage of it.

This was an action of debt on a judgment recovered against the plaintiff in error in the State of Alabama. The record states that the plaintiff in error confessed judgment in the court below for $429 40 debt, and $166 damages, to reverse which judgment for an error, as he contended, in the computation of interest, he brought his writ of error.

HALL, for the plaintiff in error: The only question for the consideration of the court is as to the amount of interest to be allowed on the judgment in Alabama. The defendant contends that the judgment below is for a greater sum than purports to be due on the record, or in the confession. See *Digest, title "Interest."*

SCOTT, *contra:* A judgment by confession is a release of all errors. *Digest*, p. 332, sec. 52.

The damages given by the court below were for interest, and were calculated under the laws of Alabama, at eight per cent, the legal interest of that state. See *Laws of Alabama.* The principle is well settled that interest is to be paid on contracts according to the law of the "place" where they are to be performed. *Story's Conflict of Laws*, 241. This action was instituted on a judgment rendered in the State of Alabama. The debt was to be paid in Alabama, consequently the interest due on said judgment was to be calculated under the laws of Alabama.

It is a universal rule of the common law that the "*lex loci contractus*" will in all cases give the rule of interest. If the place of performance is different from that of the contract, the interest will be according to that of the former. See *Story's Conflict of Laws*, 246–7; and the other authorities there cited; *Johnson's Digest*, p. 284.

LACY, *Judge*, delivered the opinion of the Court:

This is an action of debt, founded on a judgment recovered by the plaintiff below, against the defendant, in the State of Alabama.

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The record shows that the present plaintiff in error came into open court, and in proper person confessed judgment "for the sum of four hundred and twenty-nine dollars and forty cents, the debt in the declaration mentioned, and also the sum of one hundred and sixty-six dollars in damages." The Circuit Court gave judgment for the two sums acknowledged to be due. To reverse the judgment so rendered, the defendant now prosecutes his writ of error in this court.

There is but one assignment of errors, which is, that judgment was given for a greater sum than the record shows to be justly due.

The judgment is formally and properly entered up, and the party confessing it is estopped by his own voluntary act from questioning its correctness.

If there be error in the computation of the interest, it is too late for him now to take advantage of it.

By an act of the Legislature, approved 3d of July, 1807, "judgment on confession shall be equal to a release of error." There being no other assignment of errors, the judgment of the Circuit Court must therefore be affirmed, with costs.

JOHN E. GRAHAM *against* THE STATE OF ARKANSAS.

ERROR *to the City Court of Little Rock.*

The act of 1838, which incorporated the city of Little Rock, and conferred jurisdiction upon the City Court thereof in certain criminal and penal cases, does not conflict with the origanic law of the Territory, or the Constitution of the State.

The organic law expressly authorized the Legislature to institute and establish courts inferior to the Superior Court, and to fix their respective jurisdictions, except in cases where the United States was a party.

By the Constitution, the City Court was not abrogated, or its jurisdiction taken away.

Under a law to punish any person "who shall be guilty of betting any money or other valuable thing," on certain games, among which faro is named, the allegation in the indictment that the defendant "did game, play and bet with cards with certain persons, at a certain unlawful game commonly called faro;" and that the same defendant "did, then and there, by playing at the same unlawful game commonly called faro, with the said persons, at one time and sitting, win of the said persons a large sum of money, to wit, one dollar, &c., is sufficient. No rational man can hear this charge read, without understanding from it that the defendant was guilty of betting money at a game commonly called faro.

The City Court being a court of limited and special jurisdiction, the allegation in the indictment, that the offence was committed "*at* the City of of Little Rock," is a sufficient allegation that it was committed within the jurisdiction of the court, at least in indictments for misdemeanors, where only a pecuniary fine is imposed. So much strictness is not required in these indictments, as in indictments for offences of a higher grade.

The word "at" is often synonimous with the word "in," and may with propriety be so understood and regarded, in the venue in an indictment for a misdemeanor.

An objection to an indictment for a misdemeanor, founded on a single statute, that the conclusion thereof is in the plural, instead of the singular number, is not valid, and will not be allowed; and an indictment for a misdemeanor in the City Court concluding "contrary to the laws and statutes of the Territory of Arkansas, and the ordinances of the city of Little Rock," is good.

Where the defendant pleads guilty to such an indictment, the record should show whether he elected to have his fine assessed by the court or by a jury.

The statute and ordinance having fixed the fine at not less than one hundred nor more than two hundred dollars, the City court had no power to impose a fine of only thirty dollars. The court had no authority either to mitigate or increase the punishment.

The plaintiff in error was indicted for playing at faro, before the City Court of Little Rock, and pleaded guilty to the charge, whereupon the court below gave judgment for thirty dollars fine and costs, and that "in default of the payment of such fine and costs, that the said *John E. Graham* be committed to the common jail of the county of Pulaski, for and during the space of three months, from and after the date of this sentence, unless said fine and costs be sooner paid, or the prisoner be discharged by due course of law."

To reverse this judgment the said *John E. Graham* prosecuted his

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writ of error The indictment and all the facts in the case are so fully set forth in the opinion, as to render it entirely unnecessary to repeat them here.

TAYLOR, for plaintiff in error:

The judgment is erroneous:

1st. Because the court had no jurisdiction of crimes or misdemeanors. *Dig.* 29, 35, 38, 41—*Acts of* 1835, p. 58.

2d. The indictment does not aver that the offence was committed, or any act was done within the jurisdiction of the court. 1 *Peters*, 237—6 *Com. Dig.* 52, 88, 89—1 *Durnford & East*, 151, 316, 317—4 *Com. Dig.* 691.

3d. The indictment concluded against the statutes of the State and ordinances of the city. 1 *C. C. Law*, 238—1 *Chitty Pld.* 231—1 *Chit. C. Law.* 244—*Dig.* 333, 322—4 *Com. Dig.* 691.

4th. It does not show the circumstances which bring the offence within the definition of the offence, as defined by the ordinances.—1 *C. C. Law*, 231, 235—Law of gaming, *Dig.* 205.

5th. It joins different offences subject to different punishments, and joins several offences in the same count. 1 *Com. Dig.* 224, 225. See *Indictment and Ordinance.*

6th. The judgment is for three months' imprisonment, which is no part of the punishment by the ordinance. See *The Ordinance.*

CLENDENIN, *Pros. atto. contra:*

The defendant in error insists that the offence charged in said indictment is contrary to the 3d Section of the act for the prohibition of gaming. See *Digest*, p. 205. That the City Court had full power to enter up said judgment against defendant—*Act of Incorporation.* That the offence is properly charged in said indictment—*Archbold Crim. Law*, 27, 28; *Chitty Crim. Law*, 1st vol. 229, 230, and that the conclusion of said indictment is legal, formal and according to approved precedent—*Archbold*, 57, 58; 1st *Chitty Crim. Law.* 244, 245. That the time for objecting to informality or duplicity in pleading, has been passed, as it should have been objected to in the court below on demurrer, or in arrest of judgment, and not after confession of judgment, by writ of error. *Archbold Plea. and Evi.* 96; *Crim. Law*, 55, *and Virginia Cases*, 2d vol. p. 17—it is decided that if a defendant confess judgment in a presentment for gambling, although

the presentment might have been defective on a demurrer, the judgment ought not to be reversed.

RINGO, *Chief Justice*, delivered the opinion of the Court:

This is a writ of error with supersedeas, to reverse a judgment of the City Court of Little Rock, against *John E. Graham*, for betting at *faro*, contrary to the statutes of the State, and the ordinances of the city.

At the October Term, 1833, the Grand Jury returned into court the indictment against him, a true bill. The first count is as follows, viz:

"STATE OF ARKANSAS, "CITY OF LITTLE ROCK. } *City Court of the City of Little Rock, Ociober Term A. D.* 1838.

"The Grand Jurors of the State of Arkansas chosen, tried, elected, empanneled, sworn, and charged to enquire in and for the body of the City of Little Rock, on their oath do present: That *John E. Graham*, late of said city, being a person of ill name, fame and dishonest conversation, on the first day of October, in the year *aforesaid*, at the City of Little Rock aforesaid, with force and arms, did game, play, and bet with cards with sundry persons to the jurors aforesaid as yet unknown, at a certain unlawful game commonly called *faro:* and that the said *John E. Graham* did, then and there, with force and arms, by playing at the said unlawful game, commonly called *faro*, with the said persons to the jurors aforesaid unknown, at one time and sitting, win of the said persons to the jurors aforesaid unknown, a large sum of money, to wit, the sum of one dollar, lawful money of the United States, to the great damage of the good people of the State of Arkansas, contrary to the laws and statutes of the State of Arkansas, and the ordinance of the City of Little Rock aforesaid, and against the peace and dignity of the State of Arkansas."

The second count charges—"That *John E. Graham*, being a person of ill name, fame and dishonest conversation, on the said first day of October, in the year aforsaid, at the City of Little Rock aforesaid, with force and arms, did game, play and bet, with cards, with sundry persons to the jurors aforesaid unknown, at a certain unlawful game commonly called *faro:* and that the said *John E. Graham*, with force and arms, did then and there, by playing with the said persons to the jurors aforesaid unknown, at the said unlawful game commonly called *faro*, at one time and sitting, *unlawfully lose* to the said persons to the jurors aforesaid unknown, a large sum of money, to wit, the sum of one

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dollar, lawful money of the United States, to the evil example of all others, in like manner offending, contrary, &c." concluding like the first count.

The 3d and 4th counts are in form and effect, the same as the 1st and 2d, except that instead of charging the accused with the winning and losing of money, as in the two former, the 3d charges him with winning, the 4th with losing "certain pieces of money of great value, to wit, the value of one dollar, lawful money of the United States."

To this indictment, the said *John E. Graham* entered his appearance, and in open Court, "confessed that he had been guilty of playing at *faro*, as charged in the indictment preferred against him." This entry then follows in the record; "whereupon, it is ordered by the court, that the said State of Arkansas have and recover of said *John E. Graham, thirty dollars as a fine;* and that he pay all costs in and about this suit expended; *and in default of the payment of such fine and costs, that the said John E. Graham be committed to the common jail of the county of Pulaski, for and during the space of three months, from and after the date of this sentence, unless said fine and costs be sooner paid, or the prisoner be discharged by due course of law.*"

Upon this record, the plaintiff assigns for error:

1st, That there is no offence charged in the indictment.

2d, That the supposed charge in the indictment is not an offence by statute or common law, or by the ordinances of said City.

3d, That the several counts in said indictment conclude against the laws and statutes of the State of Arkansas, and the ordinances of the City of Little Rock; whereas, there are no such laws, statutes, or ordinances, as in said indictment is supposed.

4th, That the conclusion to said indictment is uncertain, doubtful, informal, and insufficient.

5th, That the said judgment is in favor of the State; whereas, by the law of the land, it ought to have been in favor of said *Graham.*

6th, That by the judgment, said defendant (*Graham*) is committed for the term of three months, without bail or mainprize; which is not warranted by law.

7th, That the City Court had no jurisdiction of this case, nor any criminal jurisdiction whatever.

By this assignment of error, three questions are presented:

1st, Had the City Court jurisdiction in this case?

2d, Is the indictment valid?

3d, Is the judgment legal?

These will be examined in the order in which they are stated.

By an act of the Legislature of the Territory of Arkansas, approved the 2d day of November, 1835, Little Rock was incorporated a City. After defining the boundary and prescribing the limits thereof, the act declares that "the same shall be and the same are hereby erected into a corporate city forever; and shall henceforth be called, designated and known, by the name of the City of Little Rock."—Having thus created the corporation, the Legislature by the same act proceeded to create the several offices, deemed necessary for the government of the City, and provided for the election and qualification of the requisite officers to fill them, and defined and prescribed their respective powers and duties.

Among the offices thus created, was that of the City Court, in relation to which there is, in the 5th section of said act, the following provisions: "That, for the purpose of enforcing the bye-laws and regulations aforesaid, there shall be constituted in said City of Little Rock a *City Court*, which shall be a court of record, to be holden by one Judge, who shall not be the mayor or an alderman of said City, but shall be elected by the qualified voters of said City, at the same time, and in the same manner, of the election of the other officers of said City; who shall hold his office for one year, and who shall also be a resident free-holder of said City; which said City Court shall be holden in said City, at such place as the mayor and aldermen may direct, on the first Monday in each month, throughout the year; and shall continue to sit at each term thereof, until the business of said court shall be disposed of."

And in the seventh section, it is enacted, "That the said City Court shall have *exclusive jurisdiction* without the privilege of appeal, of all offences which are less than felony at common law, *which shall be committed within the limits of the City of Little Rock, in violation of the bye-laws, ordinances, or regulations of said City:* Provided, that any person aggrieved may have the right to sue a writ of error out of the Superior Court of said Territory, and there have his case examined according to law, and confirmed, or reversed and awarded for trial *de novo*, as in civil cases in the Circuit Court." *Acts A. T.*, 1835, page 55.

The charter thus granted, was accepted by the inhabitants of the Territory thus incorporated, and persons chosen to fill the several of-

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fices created by the charter for the preservation of peace and good order, and the better government of said city and the inhabitants thereof. This being done, their corporate authority was fully and legally established, and might have been properly exercised to the fullest extent, as authorized by their charter.

But it is contended by the plaintiff in error that the provisions of the act of 1835 are in conflict with the organic laws of the late Territory, and the Constitution of the State, so far as they attempt to confer on the City Court jurisdiction in criminal or penal cases, and consequently to that extent void.

After a careful examination of the organic law and constitution, we have been unable to discover any conflict whatever between them and the act of 1835, in regard to the question now before us.

By the act of March 2d, 1819, (sec. 7, *Digest*, p. 38,) it was provided, "that the judicial power of the Territory shall be vested in a Superior Court and in such inferior courts as the Legislative department of the Territory shall from time to time institute and establish, and in Justices of the Peace. The Superior Court shall have jurisdiction in all criminal and penal cases, and exclusive cognizance of all capital cases." In the act of April 17th, 1828, there is a provision that the Legislature shall be authorized in all cases except when the United States is a party, to fix the respective jurisdiction of the District and Superior Courts."

That when any party to a suit is aggrieved by a decision of a Judge holding a District Court except in criminal cases, the party aggrieved shall be at liberty "to remove said suit to the Supreme Court of said Territory for further trial." *Digest*, p. 32, sec's 3, 5.

These were the whole of the provisions of the organic laws having any relation to the subject before us, when the act of 1835 was passed; and it will be at once seen that instead of restricting the power of the Legislature, they expressly authorize it to institute and establish courts inferior to the Superior Court, and to fix their respective jurisdictions in all cases except when the United States is a party, meaning, as is evident from the whole context and tenor of the acts, to leave the Legislature free from any restriction in distributing the judicial power, except in criminal cases arising under the laws of the United States, and in civil cases to which they were a party, in which the jurisdiction is absolutely retained in the Superior Court.

The following are the only constitutional provisions which could

be supposed to have any bearing on the question: "The judicial power of this State shall be vested in one Supreme Court, in Circuit Courts, in County Courts, and in Justices of the Peace. The General Assembly may also vest such jurisdiction as may be deemed necessary in Corporation Courts." *Const.* p. 14. "The Circuit Court shall have original jurisdiction over all criminal cases which shall not be otherwise provided for by law, and exclusive original jurisdiction in all crimes amounting to felony at the common law."

At the time of the adoption of the Constitution the act of 1835 was in force, and the City Court established and organized by and under its authority, was in the possession and full exercise of criminal jurisdiction under its provisions, in cases not considered felony at common law. And although it is not expressly embraced by the language used in the Constitution, yet the convention, with a full knowledge of its existence and authority, instead of destroying the former or restricting the latter, expressly provided that the Legislature might vest in Corporation Courts such jurisdiction as might be deemed necessary, and declared that all laws in force in the Territory, after the adoption of the Constitution, and not repugnant thereto, should remain in force until they expired by their own limitation or should be altered or repealed by the General Assembly. *Const. Schedule*, sec. 2, p. 19.

The ordinance of 16th December, 1835, prohibits the betting of money or any other valuable thing on any gaming table commonly called A. B. C., or E. O., roulette, or rouge et noir, or *faro*, or any other gaming table or bank of the same or the like kind, and inflicts a penalty upon every person who shall be convicted thereof in the City Court.

From this view of the law, it appears to us that the provisions of the act of 1835, so far as they regard the present question, are not in conflict with the organic law of the Territory, or the provisions of the Constitution, and that they were in full force at the time the proceedings before us were had in the City Court. It results, therefore, that the City Court had jurisdiction and legal cognizance of this case.

The second question is one of more importance and greater difficulty. The language used in the several counts in this indictment is not as explicit as it might have been, nor as comprehensive as that found in many of the old forms of indictments, and may be liable to some criticism.

The charge in every indictment must be sufficiently explicit to support itself; no latitude of intention can be allowed to make it include

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any thing more than is expressed. 2 *Burrows*, 1127; 2 *M. & S.*, 381. The facts of the crime must be stated with as much certainty as the nature of the case will admit. *Cowper*, 682; 5 *T. R.*, 611, 623.—Therefore it has been held that an indictment charging the defendant with obtaining money by false pretences, without stating what were the particular pretences, is insufficient. 3 *T. R.*, 481.

To the general rule there are some exceptions, as in the cases of indictment for being a common scold or barrator, or for keeping a disorderly house, or for conspiracy—and perhaps some others. 2 *T. R.*, 586; 1 *T. R.*, 754; 2 *B. & A.*, 205. But if the sense be clear, nice objections ought not to be regarded. 5 *East.*, 259; *Chitty's C. L.*, 163. Every indictment ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; and in particular cases where precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use; or that in indictments, or other pleadings, a different sense is to be put upon them than what they bear in ordinary acceptation, and if, when the sense may be ambiguous, it is sufficiently marked by the context or other means, in what sense they are intended to be used, no objection can be made on the ground of repugnancy. *Rex* vs. *Stevens*, 5 *East*, 244.

The first section of the act of 1829 (*Digest*, p. 205) enacts, "That if any person or persons shall be *guilty of betting any money or other valuable thing* on any of the games named in the second section of this act, or on or at any kind of gambling table of any name, description, or denomination whatever, on being convicted thereof, shall pay a fine, *not less than one hundred dollars, and not more than two hundred dollars;* and on default of paying such fine, shall be committed to prison, there to remain until such fine and costs of prosecution shall be paid, or otherwise discharged by law; *Provided, however*, That all such persons shall be at liberty to confess guilt, and to be fined in the manner prescribed by the second section of this act."

The games named in said second section referred to in the third section above recited, are those "commonly called A. B. C., or E. O., roulette, or rouge et noir, or any *faro*, or any other gaming table or bank of the same kind;" and the manner therein prescribed for the confession of judgment referred to in the proviso to the second section, is the following: "*Provided*, That if any person or persons arrested and brought before a Justice of the Peace under the provisions of this

act, shall plead guilty to the charge, the said Justice shall proceed to fine such person or persons in any sum not less than thirty dollars, nor more than fifty dollars; but no plea of guilty, under this proviso, shall bar an indictment, unless the party so fined shall, previous to the next ensuing term of the Circuit Court of the county where said fine may be assessed, file with the Clerk of the said Court a receipt of the Justice of the Peace before whom the fine was assessed, or the Sheriff of the county."

The object of that certainty required in an indictment, is to notify the accused of the specific charge made against him, and to show the court that the offence charged is indictable. The phraseology should therefore be so explicit and unambiguous as to be intelligible to the accused and to the court, and prevent another prosecution for the same offence, in the event of a conviction or acquittal on the merits.

In this case it is necessary to show that *John E. Graham* was *guilty of betting money or some other valuable thing*, on some one of the games named in the second section of the act of 1829, with the time when, and the place where, he was so guilty.

The plaintiff insists that it is not alleged in the indictment that he bet, or was guilty of betting money or any thing valuable at or on the game commonly called *faro*, within the language of the statute or ordinance, (the same language being used in both), but simply that "*by playing at*," instead of "*betting on*," said game, he lost and won money, &c., and therefore, he is not charged with any offence comprehended by the statute.

This argument, although plausible and ingenious, is not, in our opinion, well sustained by the facts; for it is charged substantially, though not in the literal language af the act, that *John E. Graham*, on the 1st day of October, 1836, did game, play, and bet with cards with certain persons at a certain unlawful game commonly called *faro;* and that he, the said *John E. Graham*, did then and there, by playing at the said unlawful game commonly called *faro, with the said persons*, at one time and sitting, *win of the said persons* a large sum of money, to wit: one dollar of lawful money, &c.

The language used, as before remarked, is not as explicit as it might have been; yet it does in substance, and with such precision and certainty as to be easily comprehended and understood, in terms not at all calculated to mislead or deceive either the accused, the court, or the jury, charge the accused with betting with certain per-

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sons to the jurors unknown, at a game commonly called *faro;* and at the same time and place, by playing at the same game, with the same persons, unlawfully winning of the same persons one dollar of the lawful money of the United States. This is the substance of the charge as stated in the first count, and the language of each count, as to the present question, is substantially the same—hence it results that if this is sufficient, each count is good.

No rational mind can hear the charge read without understanding from it that *John E. Graham* was guilty of betting money, or pieces of ivory of some value, at an unlawful game commonly called faro, at a specified place, and on a designated day, contrary to the letter and policy of the statute and ordinance.

It is also contended that the City Court is a court of special and limited jurisdiction, and therefore it should have been charged in the indictment, "that the offence was committed within the jurisdiction of the court."

The City Court had by law jurisdiction of all offences less than felony at common law committed within the chartered limits of the city in violation of the bye-laws, ordinances, or regulations of the city. The indictment charges the offence to have been committed "at the City of Little Rock, and this allegation, like most of the others found in this indictment, is not as explicit as it might have been; and it certainly would have been more in conformity with the approved precedents, to have charged the acts constituting the offence, to have occurred "in" or "within," instead of "at" the city of Little Rock aforesaid; and although we are not prepared to say that this form of stating the venue would be sufficient in indictments for crimes of higher grade, where the consequences of a conviction might be the forfeiture of life, or the infliction of some corporal or infamous punishment, in which class of cases the law requires more exactness and greater certainty than it does in indictments for mere misdemeanors where upon conviction, a pecuniary fine only is imposed. 1 *Chit. C. L.*, 199, *Marg. Cro. Jac.*, 345.

The offence charged in this indictment is of the latter kind, the punishment extending only to a pecuniary mulct, which cannot exceed two hundred dollars. The word *at*, in common parlance, is frequently used as noting the situation or place where a person or thing is, or something transpired. Thus, in speaking of a place where a person resides, it is commonly said, *he resides at Washington City*, or

at New Orleans, or at Little Rock, conveying distinctly in each instance, the idea that the person spoken of resides *in* the place named. It is also used by the Legislature to convey the same idea when they say the Superior Court should be holden "at Little Rock, the seat of government of this State." Many illustrations of a similar character might be stated, but we think enough has been said already to show that the words *at* and *in* are often used as synonimous, as well in the laws as in the ordinary language in common use in the country, and in that sense it was evidently used in the indictment before us, and might with propriety be so understood or regarded. We are therefore satisfied that the venue as laid, is sufficient, the indictment being for a misdemeanor only.

The plaintiff in error also insists that the indictment is insufficient for this, that it concludes against the "laws and statutes of the State of Arkansas, and the ordinances of the city of Little Rock," in the plural, when it ought to have been in the singular, there being no such laws, statutes, or ordinances, as in said indictment is supposed.

This objection is not fully sustained by the facts, for there are two independent statutes prohibiting the offence charged in the indictment, one passed in 1813, and the other in 1829. See *Geyer's Digest*, p. 427, and *Steele & McCampbell's Digest*, p. 205. Where there are two statutes which relate to the offence, there have been various distinctions taken respecting the conclusion against the form of the *statutes* in the plural, or *statute* in the singular only. Thus it was formerly holden by several authorities, that where an offence is prohibited by several *independent statutes*, it was *necessary* to conclude in the plural. But now the better opinion seems to be that a conclusion in the singular will suffice, and it will be construed to refer to that enactment which is most for the public benefit. 1 *Chit. C. L.*, 291.—Also, a distinction was formerly taken between the case where an offence is *prohibited by two statutes, and where the indictment cannot be supported upon one singly;* as where by a subsequent provision it is enacted that a former statute shall be executed in a new case, or an additional penalty inflicted; but according to the later opinions, even in this case, a conclusion in the *singular* will be valid; and where one statute continues a former in part, or explains what was doubtful, or regulates its operation, the conclusion should be in the singular, and this will be more important as it is laid down that when the *plural* is used instead of the *singular*, the mistake will be fatal. 1 *Chit. C. L.*,

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292. However, as to the last instance, there appear to be conflicting decisions. See 2 *Hale*, 173, and no reason is perceived why the unnecessary allegation in the plural may not be rejected, as in cases where an indictment concluding against the *Statute* is held good at common law—1 *Chit. C. L.* 238, 9; or why the conclusion in the singular, where the indictment depends upon more statutes than one, should be adjudged sufficient, and the conclusion in the *plural*, when there is but one statute, fatal. The rule being thus unsettled, and without any uniform current of decisions, on either side, we feel at liberty to adopt that which, in our opinion, is the best calculated to promote the ends of justice, and the practical administration of the criminal and penal laws of the country. This object, we think, may be accomplished without in the least prejudicing the legal rights of the accused, by disallowing the objection to an indictment for a mere misdemeanor, founded upon a single statute, that the conclusion thereof is in the *plural*, instead of the *singular* number. We are, therefore, of the opinion that this objection is not in this case fatal to the indictment.

Having thus examined the several parts of the indictment before us, and seen that all the essential facts are stated, which constitute an offence within the letter and spirit of the statute and ordinance,—therefore if it be not good, the declaration of *Lord Hale* may, with propriety, be applied to the law and criminal jurisprudence of our own country, that "the strictness required in indictments has grown to be a blemish and inconvenience in the law and the administration thereof; and that more offenders escape by the over-easy ear given to exceptions to indictments, than by the manifestation of their innocence; and the grossest crimes have gone unpunished by reason of these unseemly niceties."

We also fully agree with Lord Mansfield, "that tenderness ought always to prevail in criminal cases, so far at least, as take care that a man may not suffer otherwise than by due course of law;" but "that tenderness does not require such a construction of words, (perhaps not absolutely clear and express) as would tend to render the law nugatory and ineffectual, and destroy and evade the very end of it; nor does it require of us, that we should give in to such nice, strained and critical objections as are contrary to its true meaning and spirit." And especially in this country, where the laws are so liberal and benign, and administered with so much mildness, the court should lean against the

technicalities and niceties of ancient times, when more ignorance and greater rigor prevailed. We consider the rule laid down in *Chitty* to be the most safe and just one. "If the sense be clear, nice objections ought not to be regarded." 1 *Chitty, C. L.* 117. 173.

The indictment tested by the above principles and reasoning, will be found to be good and valid.

The third question presents very little difficulty. The plaintiff in error appeared in Court, and pleaded to the indictment, "*that he was guilty of playing at faro, as charged in the indictment.*" This plea having been received and recorded was equivalent at least, to a verdict of guilty by a jury; and the accused thereupon stood before the Court legally convicted of the offence of unlawfully betting money, or some other valuable thing on the game of faro, contrary to law.

The laws declare that on conviction for this offence the person convicted "shall pay a fine not less than one hundred dollars, and not more than two hundred dollars," leaving the precise sum to be determined by the court, or agreeably to the provisions of the act, approved the 26th day of October, 1831, which provides—"That when any person charged with any criminal offence, shall plead guilty, he may at his election, submit the quantum of punishment to the court, or he may have a jury to assess and determine the same. *Dig.* p. 204. The record in this case fails to show any election made by the defendant below, but represents the court as having proceeded upon the confession made, to adjudicate the fine and pronounce judgment therefor. Whatever the fact may have been, certainly in correct practice, the record ought to show the election of the party; and this should appear, whether he waived or demanded his right to a jury, or submitted the matter to the court to assess and determine the quantum of punishment or amount of fine. In either case, however, the assessment to be valid must conform to the law, as well in regard to the quantum, as the quality of the punishment prescribed; and a departure therefrom, in either case, makes the assessment illegal;—and having no foundation in the law, no valid legal judgment can be pronounced upon it. In this case, the court assessed the fine at thirty dollars, and pronounced judgment therefor, with costs, against the defendant below.

To justify or sustain such a proceeding, would be ascribing to the courts and juries in criminal and penal cases, a discretionary power, paramount to all legal restraint, and alike subversive of public justice and the laws of the land. A practice so illegal, and so liable

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to be abused, and perverted to the purposes of persecution and injustice, can never receive the sanction of this court, or the approbation of a just and intelligent community.

To what good purpose has the Legislature defined punishment, and prescribed the quantum thereof, if the courts and juries are at liberty to disregard the former, or, in their discretion, pass the limits prescribed for the latter? Certainly not any. In this view of the subject, (and we think it is the only correct view of it which can be taken,) it is unimportant whether they undertake to mitigate or increase the punishment or fine: the one is as much a departure from the legal standard as the other. The former tends to favor, the latter to oppress, the person upon whom it is to operate. In either case, the law is violated, and public justice impaired or refused.

But if there remained any doubt upon this question, so far as it regards the present case, it is removed by a proviso in the 7th section of the City charter, where the question is fully met and answered. Said proviso is in these words: "Provided, that no person shall be deprived of his or her liberty, *or be fined except, for contempts, in any sum exceeding twenty dollars by said City Court*, unless previously convicted by a jury of twelve men, citizens of said City, qualified to vote at the elections of mayor and aldermen of said City."

It may, however, be supposed by some, that a fine of thirty dollars is authorized by the proviso to the 2d section of the act of 1829, the defendant below having plead guilty to the indictment. A simple reference to that proviso will show that it never was designed to apply to any case in the court, after indictment found. Its only object manifestly was, to authorize the Justice of the Peace, before whom any person was arrested, and brought under the provisions of said act, to impose a fine of not less than thirty nor more than fifty dollars, by way of summary conviction and punishment, without any regular or formal prosecution, in the usual and ordinary course of law; and cases prosecuted in the court are evidently not within the letter or spirit of its provisions.

We are, therefore, of the opinion, that the fine assessed in this case was illegal; and, the judgment of the court pronounced thereupon, erroneous. The judgment must, therefore, be reversed with costs, to be paid by the mayor and aldermen of the City of Little Rock; and inasmuch as the jurisdiction of said City Court, in criminal and penal cases, has been divested and transferred to the Circuit Court of the

county of Pulaski, by an act of the General Assembly, approved the 21st day of February, 1838, this case must be remanded to said Circuit Court of the county of Pulaski, for further proceedings therein to be had agreeably to law, and in conformity with this opinion.

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ANDREWS vs. FENTER.

MARTIN ANDREWS *against* CHRISTIAN FENTER.

APPEAL *from Hot Spring Circuit Court.*

To authorize a party to be relieved in Chancery against a judgment at law, it must conclusively appear that the judgment was obtained by fraud, accident, or mistake, unmixed with any negligence or fault on his part.

The defendant at law cannot come into a Court of Chancery for a new trial or relief, when there is no special ground of surprise or ignorance of important facts suggested, or where no equitable circumstances have arisen since the trial, and when he has neglected to defend himself with due diligence in the proper place.

If a party becomes remediless at law by negligence, he shall not be relieved in equity. To entitle him to relief, he must show that he has lost his remedy at law by fraud, accident, casualty, misfortune, or misrepresentation.

Where courts of law and equity have concurrent jurisdiction, and the facts alleged are all examined at law, after the case has been decided, equity will not interfere. To give to equity jurisdiction in such cases, it is indispensable to show that the party having the law in his favor, was prevented by some unavoidable occurrence from bringing his case fairly and fully before the court at law.

The refusal of the court of law to grant a continuance, when applied for on the ground that after March Term, 1834, the defendant had obtained a subpœna *for the only witness by whom he could prove* certain material facts, which subpœna he sent by mail in due time before the next term of the court, to the Sheriff of the adjoining county, where the witness resided; that the subpœna was returned without service, of which return the defendant was ignorant, and that such witness was not in attendance at March Term, 1835, when the application was made and overruled, is no foundation for the interference of equity.

The appellee filed his bill in Chancery in the Hot Spring Circuit Court, on the 21st September, 1835, in which he set forth that on the 17th of March, 1827, he executed his writing obligatory to the appellant, at thirty days, for $192 63 cents, with interest at 10 per cent. per annum from time due till paid; that on the 3d of June, 1828, he executed to the appellant a second writing obligatory, at three months, for $71 82 cents, also to bear interest at 10 per cent; and that on the 13th of April, 1825, he and one Andrew Fenter executed to the appellant their promissory note, at eight months, for $29 37½ cents. He further alleged, that when the first writing obligatory was executed there was a contract between him and one Joseph Henderson, partner of the appellant, for the delivery to them by him, at Little Rock, of a quantity of oil-stones; that on the day when the first writing obligatory was executed, he agreed with Henderson, partner and agent of the appellant, that if he should deliver the oil-stones in Little Rock by the 1st of April, 1829, in case there should be a steam-boat at Little Rock, the appellant would receive them at 7½ cents per pound, in pay-

ment of the first writing obligatory; that before the day appointed, the oil-stones were delivered according to the contract, and that a steam-boat was then lying at Little Rock; that the oil-stones were received in payment of the first writing obligatory, to wit, 3873 pounds or upward, at 7¼ cents per pound, amounting to $281 15½ cents, leaving a balance due the appellee of $88 50 cents; that when he executed the second writing obligatory he did not know that the oil-stones had been received in payment as aforesaid, but supposed them to have been shipped by the appellant, on his, the appellee's account, and that he was indebted to the appellant in the amount of the second writing obligatory, for freightage on the oil-stones to Little Rock, and under that supposition, and upon Henderson's representation to that effect, he executed the second writing obligatory for that amount; and further that the promissory note had long been barred by the statute of limitations.

He further alleged that on the 10th of January, 1834, the appellant commenced an action of debt against him in Hot Spring Circuit Court, on the two writings obligatory and the promissory note, to which he pleaded payment of the writings obligatory, and the statute of limitations as to the note; that after a continuance at March Term, 1834, he obtained a subpœna for a witness by whom alone he could prove the number and price of the oil-stones; that the subpœna was sent by mail, in due time before the next term of the court, to the Sheriff of Pulaski county, where the witness then resided, but was returned by the said Sheriff without service, of which return the appellee was wholly ignorant; that at March Term, 1835, he, by attorney, moved the court for a continuance, on the ground of the absence of said witness, which motion was overruled, and judgment went against him for $293 82½ debt and $215 47 damages, and costs of suit.

Upon this bill he prayed an injunction to restrain the appellant from further proceeding on his judgment at law, which was granted.

On the 27th of April, 1836, *Andrews* filed his answer, by which he alleged that the pleas filed by *Fenter* in the action at law were voluntarily withdrawn by him on the trial; that Joseph Henderson never was his partner, but his clerk, and as such, his agent; that no such agreement was ever made, as stated by *Fenter* in his bill, nor any agreement to receive oil-stones in payment, as he had been informed by Henderson, and believed to be true; but that he had been informed by Henderson, and believed it to be true, that the agreement was that

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the oil-stones should be shipped and carried to different points for sale, on the account and at the risk of *Fenter;* that *Fenter* was to bear the expense, and that the nett proceeds were to be applied to the payment of the debts: and that the sale of the oil-stones had not covered the expenses incurred on them, and that he had never received one cent from the sale of them.

The answer set up as a defence, that *Fenter* had a clear and adequate remedy in the premises at law, of which he endeavored, and was bound, to avail himself there, and that he was entitled to no relief in chancery.

At May Term, 1837, *Andrews* moved to dissolve the injunction on the face of the bill and answer, which motion was overruled.

The following evidence was filed in the case: Jared McCarty, for the appellee, deposed, that in the spring of 1827 he was living with James Lockhart, who was employed by *Fenter* to haul to Little Rock the oil-stones; that he went in with every load, and attended to them; that Henderson was urging him to hasten with them, and that when he hauled in the two last loads he told him that if he had been two hours later he would not have received them; that the oil-stones were taken from his wagon on board the steam-boat. He estimated the quantity delivered at over 3500 pounds.

Philip S. Physic deposed, that after *Fenter* delivered the oil-stones to *Andrews*, *Andrews* told him that he had bought them of *Fenter* at either 7¾ or 7½ cents a pound.

Samuel Williams deposed, that he heard *Fenter* ask *Andrews* if he would take oil-stones for the amount he owed him; that *Andrews* agreed to do so if he would have them at Little Rock by a certain time, when a steam-boat would be there: that *Fenter* then employed the deponent to polish the oil-stones, which he did, and they were hauled in, in due time, by James Lockhart's wagons; that while engaged in polishing them, he again saw *Andrews* and asked him to buy some oil-stones of him, which *Andrews* declined, saying that he had bought a quantity of *Fenter*, and did not wish to purchase any more until he saw what he could do with them, that he did not know whether he would realise any profit from them. He stated the quantity of oil-stones sent to Little Rock at between 3500 and 4000 pounds, at 7¼ cents a pound. He further deposed that *Fenter* had given his note to *Andrews*, at 10 per cent. interest, and the agreement was that if the oil-stones got there by the time spoken of, *Andrews* would receive them

in payment of the note; and further, that the oil-stones were started for Little Rock soon enough to have reached there in time—whether they did so, he did not know.

A letter of Henderson was also filed, by which he agreed to take as many oil-stones as he would take goods for, until *Andrews* arrived, which would be in December, 1826.

The deposition of Henderson stated that in the spring of 1827 he agreed with *Fenter* to ship oil-stones for him to different points, to be sold at *Fenter's* expense and on his account and risk, the nett profits to be applied to the payment of *Fenter's* debt to *Andrews*, due on certain notes or obligations; that the oil-stones were shipped, but enough of them have never been sold to pay expenses; and that there never was any agreement to receive oil-stones as an absolute payment on said notes or obligations.

The court below thereupon decreed that the injunction should be made perpetual for the sum of $268 88 cents, part of the debt, and $203 62 cents, part of the damages recovered at law; that the complainant should recover his costs in his suit in chancery, and the defendant below should have the benefit of his judgment for 24¼ cents, residue of the debt, and $11 85 cents, residue of the damages, and costs of his suit at law. From this decree *Andrews* appealed.

TRAPNALL, COCKE, and WATKINS, for the appellant:

1. The groundwork of chancery jurisdiction running through all the books is, *that the party hath no adequate remedy at law.* The pleas of the statute of limitations, and payment, are both peculiarly defences at law, and afford as adequate relief at law as they could do in chancery. 4 *Inst.* 36; 3 *Inst.* 33; *Cro. Jac.* 335; *Cro. Car.* 595; 1 *Mod.* 60.

2. The doctrine in the old books is, that "a cause shall not be examined in chancery, or other court of equity, after judgment at the common law." But the severity of this general rule has been modified by later decisions. The general principle running through those decisions, is, that where any equitable matter of defence arises subsequent to a trial at law, *of which the party could not have availed himself on the trial*, or any newly discovered evidence *which the party had not the means of discovering before the trial at law*, equity will interfere and relieve against the judgment. A party who has mistaken or misshapen his defence at law, cannot require relief in equity. 1 *Vernon*, 71; 3

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Atkyns, 223; 1 *Chan. Rep.*, 47; *Penny* vs. *Martin*, 4 *Johnson Chan. Rep.*, 556; *Foster* vs. *Wood*, 6 *John. Chan. Rep*, 87; *Floyd* vs. *Jayne*, 6 *John. Chan. Rep.*, 479; 1 *Bibb*, 173, 252, 354; 2 *Bibb*, 5, 192; 3 *Monroe*, 299; *Evans* vs. *Solly*, 9 *Price*, 525.

Where there is a remedy at common law, none can be given in chancery. Where a party in an action at law had notice of a defence in time to avail himself of it, but neglected to do so, he will not be allowed to litigate the matter in chancery, but is forever excluded by the judgment. *Cutting* vs. *Shackford*, *Cary Rep.* 15, 201; *Le Guer* vs. *Governeur* et al., 1 *Johns. Cas.*, 436; 5 *Pet. Con. Rep.*

Where a defendant neglects to set up matters of defence at law, either before arbitrators or a jury, he cannot afterwards make such matters the basis of a suit in equity, unless there was some accident or fraud of which the party could not avail himself at law.

The court will not relieve a party on the ground of his having proceeded to trial at law without sufficient evidence, when it was in his power to have obtained that evidence by bill of discovery. *McVicar* vs. *Wolcott*, 4 *John. Rep.*, 510; 2 *J. J. Marshall*, p. 356; *same* p. 573; 2 *Bibb*, 336, *Veech* vs. *Pennybacker*; 1 *Marshall*, 155.

Quere, whether a person who has neglected at law to plead his discharge under an insolvent act, can avail himself of it in equity.—*Reily* vs. *Lamar*, 2 *Cranch*, 344; *Mason arguendo*, 353.

What jurisdiction a court of equity may exercise after a trial at law. If the defence be purely legal, it should be made on the trial at law. *Barrett* vs. *Floyd*, 3 *Call.* 531; *Maupin* vs. *Whiting*, 1 *Call. Rep.* 224.

3. The reasons why a matter peculiarly cognizable in a court of law, and there adjudicated upon, shall not be afterwards examinable in chancery, are,

1st. That the whole jurisdiction of courts of chancery, and their mode of proceedings are in derogation and subversive of the common law, which is the birthright of every Saxon, and were originally exercised only by sufferance.

2. A matter in controversy should not be drawn out of a court of law into a court of chancery, because it will be subjected, *ad aliud examen*, to a trial by witnesses, and the conscience of a single Judge, instead of the trial by jury, where the testimony is by depositions, and not oral, in the face of the court and the parties.

3. Where a matter hath once been adjudicated upon and decided

in a court of law, that matter should not be renewed between the same parties, but one party should be quiet and make no more clamor, else there would be no end to litigation, and every defendant would neglect or refuse to obey process of law, and then set up his own *laches* as ground of relief in chancery, to the utter subversion of the courts of common law.

4. In a court of law after judgment, if there be any newly discovered matter of defence, or any manifest error, either of fact or of law, ample redress may be had by *audita querela*, motion in arrest, or new trial, or by appeal, or writ of error. The Circuit Court in chancery hath no authority to erect itself into an appellate court, to revise the proceedings or correct the errors of a Circuit Court at common law.

4. The appellee in his bill does not *allege* even, any equitable ground for the interference of chancery—no fraud—no accident—no newly discovered matter of defence or matter of evidence—nothing but his own *laches* in not taking the proper steps to procure his testimony, before the third appplication for continuance.

5. The appellant insists, independent of every other consideration, that the weight of evidence is in his favor, from the bill and answer, and the depositions, and that the decree is against equity and good conscience.

6. But the decree should be reversed and set aside, because it is vague, inconclusive, and uncertain. In one part of the decree, the chancellor says, that the plea of the statute of limitations is purely a legal defence, and that the appellee acted clearly in his own wrong when he withdrew that plea on the trial at law as to the promissory note, amounting to $20 37½, and interest from the 13th December, 1825; but instead of allowing the appellant to have the benefit of his judgment at law for the amount of the promissory note, with interest by way of damages, the decree goes on to say that the injunction shall be perpetual as to the sum of $268 88, part of the debt, and $203 62, part of the damages, and that the appellant have the benefit of his judgment at law for 24 cents, residue of his debt, and $11 85, residue of his damages. So that it is uncertain, and the appellant is utterly ignorant of the amount which the decree entitles him to sue out execution for upon his judgment at law.

RINGO, *Chief Justice*, having been of counsel in this case, did not sit therein.

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The case being submitted by the appellee without argument, LACY, *Judge*, delivered the opinion of the court:

The appellee, *Christian Fenter*, exhibited his bill of complaint, to be delivered of a judgment at law, obtained against him by *Martin Andrews*, in the Hot Spring Circuit Court.

The bill charged that he executed two writings obligatory, and one promissory note, payable to the respondent; and that at the time of the execution of the first writing obligatory, the complainant entered into a contract with Joseph Henderson, (who is represented to be the partner and agent of the appellant,) for the purchase and delivery of a certain quantity of oil stones, and which were agreed by Henderson to be taken and accepted in discharge of the respondent's obligation, at the rate of seven and a fourth cents per pound. That he delivered the quantity or number of pounds of oil stones agreed upon, in discharge of his obligation; and that after paying off the full amount due upon the first obligation, there was a balance still remaining in favor of the respondent. That at the time he executed his second obligation to *Martin Andrews*, he was ignorant of the fact that the oil stones had been delivered and accepted; but believed from the representation and misstatements of Henderson, that he was indebted to them for freight and charges; and consequently he agreed and did execute his second obligation. The bill further alleges, that both obligations were fully paid off, and discharged by the purchase and delivery of the oil stones, before the respondent commenced his suit at law in January, 1834, on the writings obligatory and promissory note. It further alleges, that the complainant put in the plea of payment to the writings obligatory, and the statute of limitations to the promissory note in bar of the action of debt. That after the case was continued at the March Term, 1834, he caused a subpœna to issue for Samuel Williams, the only witness by whom he could prove the price of the oil-stones agreed to be purchased, or the amount or quantity delivered. That he forwarded the summons to the Sheriff of Pulaski county, where the witness resided, and the writ was returned, not executed.—That at the March Term, 1835, when he moved the court by his attorney, for a continuance of the case, he was ignorant of the fact that the subpœna had not been served on the witness. That the bill further charges, that the complainant's motion for a continuance was overruled, and that the plaintiff had judgment against him for the amount of the

debt, in the declaration mentioned, and for damages and costs. The complainant prays that a writ of injunction be granted to him to stay and restrain the proceedings upon the judgment at law, and that, on the final hearing of the cause, that the balance due him from *Martin Andrews*, for the purchase and delivery of the oil-stones, be decreed in his favor, and that the injunction be made perpetual.

The bill further alleges, that the note sued on was barred by the statute of limitations; and it contains a prayer for general relief. The injunction was granted, and the proceedings on the judgment at law, were restrained and superseded by the writ issued on chancery. The answer denies all the material allegations of the bill. It admits the execution of the writings obligatory and promissory note, and that judgment was obtained upon them. It alleges that the plea of payment, and the statute of limitation, were withdrawn, and that judgment was given by *nil dicit*. It denies that Henderson ever was a partner with the respondent; but states that he was a clerk in his store, and that the contract pretended to be set up by the complainant, is wholly unfounded; but that Henderson agreed to receive for the respondent whatever oil-stones he might think proper to deliver and to ship them for sale, and after deducting the expenses for freight, charges, and commission, to apply the nett proceeds in discharge of the complainant's obligations. That on these express conditions, the oil-stones were delivered to Henderson for the respondent, at the risk and loss of the complainant. That according to the agreement, a quantity of oil-stones were delivered to different points, for the benefit of the complainant, and that the profit arising from the sales had not been sufficient to defray the expenses of the shipment and commission.

The answer sets up another matter in defence: It alleges that the complainant had a full and adequate remedy at law, and having failed to make his defence at a proper time, and before a competent tribunal, that a court of chancery has not jurisdiction of the case, and prays that the bill may be dismissed with costs.

The depositions taken in the cause, do not, in express terms, or by any legal or just interpretation, prove the material allegations in the bill. One of the witnesses states, that the oil-stones were delivered, and that Henderson, the agent or the partner of *Andrews*, paid him for the hauling. Two other witnesses proved that, in a conversation with *Martin Andrews*, that he spoke of having purchased oil-stones from the complainant, and one of them gives the amount and price;

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but neither of the witnesses denied the nature of the contract, nor do they state in express terms, that the oil-stones were delivered in payment of the obligations. One of them says he polished the stones, and that in a conversation with the respondent, he understood they would be delivered in discharge of his obligations, and he was paid in the store of *Andrews* for his labor. A letter from Henderson was introduced, which states that he had concluded not to make any other contract for more oil-stones, than the complainant was willing to take goods for, until Maj. *Andrews* wrote him further on the subject. The deposition of Henderson expressly disproves the allegations of the bill, and states that the agreement between *Fenter* and himself to be literally such, as is set forth in the respondent's answer: that the oil-stones were not received, or taken in payment of the obligations; but that a quantity of them were delivered at the risk and loss of the complainant: that it was the express understanding between the parties, that *Andrews* was to ship the stones for complainant's benefit; and after deducting all that was due for freight and charges, he was to apply the nett proceeds, if any was remaining, to the payment of his debt: that the sales of the stones, he believed, has not paid the freight, charges and costs of shipment. This is, in substance, the whole proof in the cause. On this state of the case, the Circuit Court rendered a decree that the injunction be made perpetual for the amount of the proceeds of the sale of the oil-stones, and interest thereon, from the time of the delivery; and that the complainant be forever released from so much of the judgment at law, had and obtained against him by the respondent, and that the balance remaining on the judgment unpaid and due, was decreed in favor of the respondent, and that he pay the costs of the suit. And it was further decreed, that the note executed by the complainant to the respondent, was not barred by the statute of limitations. From this decree, the respondent prayed an appeal.—Admitting that a court of chancery has jurisdiction of the cause, (which is by no means conceded in this case,) the question then arises, does the bill upon its face show any equity, or are its material and important allegations sustained by the proof. The contract charged is not established by the depositions, and if it were, it would form no ground for relief in equity. The injury the party complains of is, that judgment was rendered against him, when it ought not to have been, in the absence of a material witness, and when the debt was fully paid off and discharged. The subpœna was sued out for the

witness in March, 1834, and the trial was not had until March, 1835. It does not appear that, on the motion for the continuance of the cause, the defendant ever filed an affidavit, or that he swore to it. The bill simply charges, that by attorney, he moved the court to continue the case, which motion was overruled. Admitting the proper affidavit was made, did the court err in continuing the cause? The only excuse that is given for the absence of the witness, is, that the subpœna was returned by the Sheriff, not served; and the defendant alleges, that he was ignorant of that fact at the trial, though it must have been returnable to the term preceding; for it issued in March, 1834, and judgment was not rendered until March, 1835. Can a judgment at law be impeached in chancery, when, by the party's own showing, he is guilty of gross negligence or laches, and that too, in a case where his remedy was complete and adequate at law. We are not aware that equity has ever interfered to set aside a judgment at law, for mere irregularity. In this case the judgment was perfectly regular, and the continuance properly refused. To authorize a party to be relieved against a judgment at law, it must appear conclusively that the judgment was obtained by fraud, accident or mistake, unmixed with any negligence or fault on his part. The defendant cannot come into a court of chancery for a new trial or relief, when there is no special ground of surprise, or ignorance of important facts suggested, or where no equitable circumstances have arisen since the trial, and where he has neglected to defend himself with due negligence in the proper place.

This principle is settled in the case of *Scotland* vs. *Wheeler*, 3 *Johnson's Rep.* 238; *Dekemer* vs. *DeChatillon*, 4 *Johnson*, 92; *and Baker* vs. *Elking*, 1 *Johnson's Rep.* 444; *Smith* vs. *Lowrie*, 3 *Johnson's Rep.* 322. In the case now before the court, has the party shown that he was taken by surprise? or has he suggested that he was ignorant of any important fact that has since come to his knowledge, and which he could not have discovered before, by due diligence? Or has he alleged that the judgment was obtained by fraud? It is most manifest that none of these equitable grounds are charged in the bill; and it is equally evident, from his own showing, that he was guilty of very gross negligence, in not preparing his case for trial. Upon this allegation of the bill, it is clear that the complainant has not the slightest claim or pretext to the interposition of a court of equity for relief. Is the contract set up by the bill admitted by the answer, or established by the proof? The answer expressly denies it. The proof is vague and

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uncertain, and does not legally establish the allegations of the bill.—The witnesses speak of a purchase of oil-stones made by *Andrews* from the complainant; but they neither define or illustrate the nature or condition of the contract, nor do they say that the purchase thus made was to go in discharge of the complainant's obligation. The letter of Henderson does not state that the oil-stones were so received or accepted. It merely says that he was unwilling to make a contract for the delivery of any more oil-stones, until he heard from *Andrews*, and it clearly intimates what had already been delivered was paid for in goods.

If this testimony stood uncontradicted, it would be wholly inconclusive and unsatisfactory, and would not authorize a decree upon the bill. The answer denies that any contract was made, or any purchase entered into, for the delivery of any quantity of oil-stones, in payment of the obligations and note held upon the complainant.

It admits a quantity of oil-stones were received on commission, and states, after deducting the amount due for freight, charges, and shipment, that the nett proceeds arising from the sales, were to be applied to the payment of his debt, and that no profit or balance is due to the complainant on that account, as the sum for which they sold is not sufficient to pay the amount with which they are charged. Henderson, the witness who made the contract with the complainant, and who acted as the agent of the parties and factor in the business, expressly disproves the whole contract charged in the complainant's bill, and establishes the agreement fully and completely, as set up by the answer. The bill, then, containing no equity upon its face, and all its material allegations being denied by the answer, and expressly disproved by the testimony, should have been dismissed with costs. The court might here close their inquiries, but as there is another important question raised by the answer, which is directly before us, we consider it our duty to examine and decide it. The answer alleges that the plaintiff had a full and ample remedy at law, and having failed to make his defence before the proper tribunal, he cannot now come into a Court of Equity. The pleas to the action of debt in this case, were payment and the statute of limitations. It is obvious that the defence set up is entirely legal, and the pleas, if proved, formed a good bar to the action.

"The concurrent jurisdiction of equity," says Justice Story, "has its true origin in one of two sources, either the courts of law, though

they have general jurisdiction in the matter, cannot give adequate, specific, and perfect relief, or under the actual circumstances of the case, they cannot give any relief at all." *Story's Com. on Equity*, 93. Equity will embrace all cases of legal rights under peculiar circumstances, where there does not exist a complete, adequate and plain remedy at law. See *Jeremy on Equity Jurisprudence*, 292 and 297.

The ancient doctrine upon the subject was, that a cause shall not be examined in Equity, after it has been tried and determined at law. *Cro. Jac.* 335, *Cro. Car.* 595; 3 *Inst.* 33, 4 *Inst.* 36; *Atkyns* 323.—But the severity of the rule has been greatly relieved by very many recent decisions. In the case of *Perry* vs. *Martin*, 4 *Johnson's Chan. Rep.* 536 and *Foster* vs. *Wood*, 4 *Johnson's Chan. Rep.* 67; *Floyd* vs. *Jayne*, 6 *Johnson's Rep.* 479, the doctrine is clearly laid down, and the chancellor in giving his opinion remarks—"That he does not know of any principle that will authorize equity to take jurisdiction of a case where the remedy was in the first instance full and adequate at law; because the party may have lost that remedy, founded on negligence, and not on accident, misfortune, misrepresentation or fraud." If a party becomes remediless at law by negligence, he shall not be relieved in Equity. To entitle him to relief, he must show that he has lost his remedy at law, by fraud, accident, casualty, misfortune, or misrepresentation. *Fonblanque on Equity*, p. 30, and the cases there cited; 2 *Cran.* 334; 4 *Cran.* 531; 1 *Call*, 224. Where courts of law and equity have concurrent jurisdictions, and the facts alleged are all examined at law, after the case has been decided, Equity will not interfere. To give to Equity jurisdiction in such cases, it is indispensable to show that the party having the law in his favor, was prevented by some unavailable occurrence from bringing his case fairly and fully before the court.

The question has been fully examined and settled in the case of *Smith* vs. *McIwer*, 9 *Wheaton*, 534. "Admitting," says Chief Justice Marshall, "the concurrent jurisdictions of Equity and Law, in matters of fraud, we think the cause must be decided by the tribunal which first obtained possession of it, and that each court must respect the judgment and decree of the other. A question decided at law cannot be reversed in a Court of Equity without the suggestion of some equitable circumstances of which the party could not avail himself at law." In the case now before us, does the bill charge any

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equitable circumstances that the complainant could not have availed himself of on the trial at law?

Does it allege surprise or the discovery of new evidence since the trial, which by due diligence he could not have procured before? Or does it charge either accident, mistake, misrepresentation, misfortune, or fraud? None of these things are alleged in the bill, and as the complainant's remedy was full and adquate at law, and he failed to make it through negligence or ignorance, he cannot now be relieved in Equity.

In every respect in which this case presents itself to our minds, either on its merits, or the question of jurisdiction, we are clearly of the opinion, that the decree of the court below was evidently erroneous. The judgment of the Circuit Court in entering up the decree, must, therefore, be reversed with costs; the cause remanded to be proceeded in agreeably to the opinion here delivered, with instructions that the complainant's bill be dismissed for want of jurisdiction, with costs, and that the writ of injunction be dissolved, and that the appellant have the full benefit of his judgment at law, with six per centum damages on the amount released from the injunction.

REUBEN W. REYNOLDS *against* SEBRON G. SNEED.

APPEAL *from Washington Circuit Court.*

In order to give this court jurisdiction, the amount in controversy must be one hundred dollars or upwards.

If the complainant claims more by his bill than one hundred dollars, and a decree is given in his favor for less than one hundred dollars, he is entitled to appeal, but the defendant is not.

This was a suit in chancery, commenced in the court below by the appellee against the appellant, where the appellee obtained a decree for the sum of ninety dollars and fifty cents. The case being disposed of here on the question of jurisdiction, it is not necessary to state the particular facts of the case or the arguments of counsel on the main questions.

TAYLOR, for the appellant:

WALKER, *contra:*

LACY, *Judge*, delivered the opinion of the court:

This case comes up by an appeal from the Washington Circuit Court. The decree was entered in favor of the complainant and against the defendant, on the final hearing of the case, for the sum of ninety dollars and fifty cents. The defendant prayed an appeal, which was allowed, and regularly executed his bond with surety for its prosecution.

The first question presented by the record is, was the appeal rightfully allowed, or has this court jurisdiction of the case? By the organic law, (*Digest*, p. 39, sec. 7), it is declared "that the Superior Court shall have and exercise exclusive appellate jurisdiction in all civil cases in which the amount in controversy shall be one hundred dollars or upwards." And by the act of the Legislature, approved July 3d, 1807 (*Digest*, 334, sec. 58) "if any person shall feel himself or herself aggrieved by any final decision or judgment given in any of the courts of common pleas (Circuit Courts) in any cause wherein the matter in dispute exceeds, exclusive of costs, the sum or value of one hundred dollars, it shall and may be lawful for such person at the term in which such judgment is given to enter his or her appeal to the general (Superior Court.") In order to give this court jurisdiction, the amount in "controversy must be one hundred dollars or upwards."

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The right of appeal is only given by the act "where the sum or value in dispute exceeds one hundred dollars, exclusive of costs." In the case now before us it is apparent that had the decree been rendered in favor of the complainant for a sum less than one hundred dollars, he would still have been entitled to his appeal, for the matter in controversy, or sum in dispute, as alleged by his bill, is greater than the sum necessary to confer jurisdiction on this court. In this instance, however, the defendant has appealed, and seeks to reverse a decree had against him for a less sum than one hundred dollars. What, then, is the matter in controversy, or sum in dispute? It is certainly less than one hundred dollars, for the object in prosecuting the appeal is to reduce the amount of the decree to a less sum than is now entered up against him. Consequently the appeal in this cause must be dismissed for want of jurisdiction. 7 *Cranch, Wise & Sims* vs. *The Columbia Turnpike Company*, 276; 4 *Cranch, United States* vs. *McDowell*, 316; *Henry's executor* vs. *Elcan;* 2d *Mon.*, 541, 542.

SAMUEL S. HALL *against* THE STATE OF ARKANSAS.

ERROR *to the City Court of Little Rock.*

A judgment of the City Court in a civil case cannot be removed directly into this court for revision by writ of error, any more than a judgment of a Justice, and is placed precisely on the same footing.

The jurisdiction of the City Court and Justices of the Peace is concurrent in such case, and the right of appeal being secured in like manner, and to the same tribunal, the parties are restricted to that remedy.

But where the judgment in the City Court was for one hundred dollars, founded upon a sci. fa. on a recognizance in the sum of two hundred dollars, it was a civil cause, the amount in controversy exceeded one hundred dollars, the City Court had no jurisdiction, and a supersedeas granted by one of the Judges of this court in vacation will be allowed to stand, though the writ of error is dismissed as improvidently issued.

The question was disposed of on a question of jurisdiction, and all the facts appear in the opinion.

TAYLOR, for plaintiff in error:

CLENDENIN, *Pros. Att'y, contra:*

RINGO, *Chief Justice*, delivered the opinion of the court:

This is a writ of error, with supersedeas, to the City Court of Little Rock, prosecuted by the plaintiff to reverse a judgment of said court against him in favor of the State. The suit was commenced by *scire facias*, against the plaintiff in error and one *John R. Conway* jointly, on a recognizance which is thus described and recited in the scire facias, to wit: "Whereas, on the 13th day of October, in the year of our Lord one thousand eight hundred and thirty-six, a certain *John R. Conway*, as principal, and *Samuel S. Hall*, as his security, made their personal appearance before the City Court of the City of Little Rock, in the State of Arkansas, and then and there acknowledged themselves to owe and be indebted to the said State of Arkansas in the sum of two hundred dollars, good and lawful money of the United States, to be void on condition that said *John R. Conway* should appear before our City Court at our November Term, 1836, on the first day of said term, to answer unto the said *State of Arkansas*, for the said *John R. Conway*, on the 20th day of September, 1836, did bet at faro, and committed an offence in the city of Little Rock, and should not depart therefrom without the leave of said court." The scire facias then recites, that the said *John R. Conway* being solemnly called on the first day of said court, came not, but made default in forfeiture of his recognizance,

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and commands the City Constable to make known to the said *John R. Conway* and *Samuel S. Hall* that they be and appear before said City Court at the city court house in the city of Little Rock, on the first Monday of June, 1837, to show cause why the said sum of *two hundred dollars* ought not to be levied on their respective bodies, goods and chattels, lands and tenements, to the use of said city of Little Rock, according to the force, form, and effect, of the recognizance aforesaid.

The scire facias was duly served on *Hall*, on the 28th day of May, 1837, and returned *non est*, as to *Conway*, and an alias scire facias issued against both, returnable to the August Term, 1837, of said City Court, which was also personally served on *Hall*, and returned *non est* as to *Conway*. And on the 7th of August, 1837, a several judgment by default was rendered against the said *Conway* and *Hall*, for one hundred dollars each, with costs, and this proceeding and judgment against *Hall* forms the subject of the present controversy.

Before we proceed to examine the questions presented by the assignment of errors to which this is a joinder, it will be proper to dispose of a preliminary question, which though not urged by the parties, is presented by the record, and must be necessarily first decided; for if we have no jurisdiction of the case, it is not competent for us to decide upon its merits, and we conceive it to be our first duty in every case to see that we have jurisdiction, before we attempt to adjudicate upon the merits of the controversy.

The question here presented is this: Does a writ of error lie from this court to the City Court of Little Rock, to revise the judgment of that court in a civil suit?

The jurisdiction of this court is appellate only, except in cases otherwise directed in the constitution, and it is co-extensive with the state, *under such restrictions and regulations as may from time to time be prescribed by law.*

The act of the Legislature, approved October 29th, 1836, entitled, "An act to regulate the practice in the Supreme Court, in appeals and writs of error in civil cases," provides, "That writs of error upon any final judgment or decision of any *Circuit Court*, are writs of right, and shall issue of course out of the Supreme Court, as well in vacation as in term time, *subject to the regulations prescribed by law.*" The Legislature, in the 7th section of the act approved November 2d, 1835, after defining the jurisdiction of the City Court in criminal and penal cases, and expressly prohibiting any appeal from the decision and judgment

thereof in such cases, provides "that any person aggrieved may have the right to sue a writ of error out of the Superior Court of said Territory, and there have his case examined according to law, and confirmed or reversed, and awarded for trial *de novo*, as in civil cases, in the Circuit Court," proceeds to enact that "the said City Court shall have concurrent jurisdiction with the Justices of the Peace in all civil cases under the laws of the Territory, where the amount in controversy *does not exceed one hundred dollars*, reserving to the party or parties aggrieved by the decision of said court the right of appeal in such civil cases, as from ordinary judgments of Justices of the peace."

By the provisions of an act approved November 3d, 1831, an appeal was allowed in all cases within the jurisdiction of a Justice of the Peace, from his judgment or decision, to the Circuit Court of the county where such judgment was rendered.

From an attentive consideration of the several statutory provisions on this subject, we are well satisfied that the Legislature never intended to authorize a judgment of the City Court in civil cases, to be removed directly into this court for revision, upon a writ of error, any more than they did a judgment of a Justice of the Peace; and that it was designed to place them precisely upon the same footing as judgments of Justices of the Peace. Their jurisdiction was concurrent, and the right of appeal secured in like manner and to the same tribunal. This being the case, the same construction should be applied to this statute, which has been uniformly to the other; and the maxim, *expressio unius est exclusio alterius*, applies in its full force, and restricts the parties to the remedy mentioned in the Statute.

We are, therefore, of opinion that a writ of error does not lie in civil cases, from this, to the City Court, the legal remedy of the plaintiff in error being an appeal to the Circuit Court; and that he cannot pass by that intermediate jurisdiction, and remove his case directly into this court. The writ of error was, therefore, improvidently issued, and must be dismissed with costs.

In thus disposing of the case before us, so far as it depends upon the writ of error, we do not design to impair the efficacy of the supersedeas, which has been awarded by one of the Judges of this court, in vacation; or release the parties from their obligation to observe its injunctions. For, after a careful examination of the record, we are satisfied that the City Court had no jurisdiction of the subject matter

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in controversy, as the same is disclosed and set out, in the transcript of the record, and the proceedings against *Hall*, now before us.

The jurisdiction of the City Court in civil controversies, was concurrent with that of the Justices of the Peace, and expressly restricted to cases where the amount in controversy did not exceed one hundred dollars. This was a civil cause, and the amount in controversy, as disclosed by the scire facias, was two hundred dollars. Consequently, the City Court could not legally take cognizances of it; and as the supersedeas was properly granted, it must be permitted to stand.

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JANE ELLIS, ADMINISTRATRIX, &c. *against* SAMUEL G. MCHENRY.

ERROR *to Conway Circuit Court.*

In a case originally commenced before a Justice of the Peace, if no appeal was prayed or granted, the Circuit Court has no authority to take or exercise jurisdiction thereof.

This case was argued upon the merits, but disposed of upon a preliminary question. The facts of the case, therefore, need not be stated.

TRAPNALL and COCKE, for the plaintiff in error.

FOWLER, *contra:*

DICKINSON, *Judge*, delivered the opinion of the court:

This suit was instituted before a Justice of the Peace of Conway county, and judgment entered in favor of the administratrix, on the 17th of February, 1835. At the Circuit Court in May following, it appears to have been placed upon the docket of that court, and then, on motion of *McHenry*, dismissed, because the warrant of the Justice was insufficient and defective.

The plaintiff excepted to the opinion of the court, and now presents her writ of error, to reverse the judgment against her.

In looking into the proceedings, we find no authority whatever, for the Circuit Court to have taken and exercised any jurisdiction in this case, as there is no evidence in the record, of an appeal having ever been granted to, or prayed for by, either party.

The judgment of the Circuit Court must, therefore, be reversed with costs, with instructions that the case be stricken from the docket, and no other or farther proceedings to be had therein.

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LITTLE ROCK, July, 1838.

LEE and RECTOR vs. ONSTOTT, adm'r.

LEE AND RECTOR *against* ONSTOTT, ADM. OF COLLINS.

ERROR *to Pulaski Circuit Court.*

Every award must be final, and so plainly expressed that there may be no uncertainty in what manner and when the parties are to put it in execution, but that they may certainly know what it is they are ordered to do.

The award must be in accordance with the submission, and final and conclusive.

One partner cannot bind another by deed, even in commercial dealings. But this rule does not apply where one partner, by the authority of his co-partner, and in his presence, executes a deed for both of them, under one seal.

A bond executed by one partner to bind his co-partner to comply with an award, will be binding on such co-partner, if the award be accepted or ratified by him.

On the 26th day of November, 1832, Doctors *Cocke* and *Lee* of the one part, and *Pratt Collins*, the defendant's intestate, of the other, entered into an agreement in substance as follows: That having theretofore entered into an agreement to keep and furnish a livery stable in partnership, and being unable to effect a settlement, they did, in order to accomplish that object, and to avoid all difficulty, "mutually agreed to submit for arbitration, and award all matters of controversy between them, to final hearing and decision," of two arbitrators named therein, with liberty to call in an umpire. The agreement then provided that the arbitrators should take into their possession the books relating to the business of the stable and all accounts due the stable, and ascertain what was due from the stable; and should hear the statements of the parties, and any evidence produced, and the statements of the parties should be on oath, and each be subject to answer interrogatories propounded by the other. The arbitrators were then "to make a full and final settlement, and if they give up the books to "*Pratt Collins*, they are to say what amount he should pay or secure "to *Cocke* and *Lee*, deducting a reasonable compensation for his trouble "in collecting: On the other hand, if they give the books to *Cocke* "and *Lee*, they are to say what amount said *Cocke* and *Lee* shall pay "or secure to be paid to said *Pratt Collins*." And the agreement concluded with declaring that "every power necessary to enable them to do ample and complete justice" between the parties, was vested in the arbitrators and umpire, if any; that they should meet at such time and place as they should think proper, and examine, &c, and retire to consider of their award. And whatever the award should be, they bound themselves in honor to abide by it, and to comply forthwith

with its requisitions. All private accounts between the parties were also to be taken into the estimate and settled. The agreement concluded—"Given under our hands and seals;" and was signed "*Cocke* and *Lee*, (*L. S.*) *Pratt Collins*, (*L. S.*) Immediately thereunder was another brief instrument of writing, by which each party agreed that, if either refused to abide by and perform the award, he would pay the other party the sum of fifty dollars, "as compensation covering time, trouble, and expense," which was signed, but not sealed by the two parties, as before.

On the 15th of December, 1832, the arbitrators made their award, in substance as follows: That the books and accounts should be given up to *Collins*, who should proceed to collect them, without charging any commission, and to pay, out of such collections, the debts due by the firm, and by *Cocke* and *Lee* to himself; and that he should keep an account of collections and disbursements, and submit it to the arbitrators, verified by his affidavit, for approval, alteration, or rejection.—And finally, after some matters which have no bearing on the case, they awarded, that, "so soon as the collections should be completed, and the accounts settled and approved by the arbitrators, the parties should execute general releases, &c.

On the 3d of April, 1833, *Collins* exhibited to the arbitrators an account, verified by affidavit, by which he made *Cocke* and *Lee* to be indebted to him in the sum of $76 09 cents, without stating whether he had completed the collections or not; and the arbitrators endorsed upon the account to the following effect: that, pursuant to the award before made, the account had been submitted to them, and being supported by affidavit was approved and allowed. No further award was made.

Three days afterward *Collins* commenced suit against *Cocke* and *Lee* before a Justice of the Peace, by summons "to answer an action of account founded on award." The Justice rendered judgment against *Cocke* and *Lee* for seventy-six dollars, nine and one-fourth cents debt, and cost, and they appealed to the Circuit Court, with Rector as their security in appeal. After the suit was brought into the Circuit Court, *Collins* died, and the suit was revived in the name of *Onstott*, his administrator.

At the October Term, A. D. 1837, no jury being required, the case was tried before the court below and judgment rendered for the defendant; but a new trial was granted, and at October Term, 1837, it was

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tried by a jury, who found for the plaintiff, and judgment was rendered in his favor for the same amount before rendered by the Justice. On the trial the plaintiff offered in evidence the submission before referred to, the award and the supplemental award, to each of which the defendant objected, and moved the court to exclude them from going in evidence, each of which motions the court overruled, and the defendant excepted to each decision. The plaintiff, also, having neglected to prove the handwriting of either of the arbitrators to the award or the supplement, upon the trial, moved the court to be allowed to do so, after he had rested his case, and the defendant's counsel were arguing the case before the jury, which was permitted by the court; to which decision, also, the defendants excepted;—and *Cocke* having died after judgment below, *Lee*, and *Rector*, his security in appeal, sued their writ of error, and assigned for error the decisions of the court below, which were excepted to.

FOWLER, for the plaintiff in error: The plaintiffs in error contend, that a submission *under seal*, to an award, could not be admitted in that form of action. *Kyd on Awards*, 280, *et seq.*

That one partner cannot in any instance, without a power of attorney under seal, bind his copartner by a writing under seal. *Watson on Part.* 223.

That one partner by submission to an award cannot bind his copartner in any instance. *Watson on Part.* 445; *Kyd on Awards*, 42.

That the name of the firm, "*Cocke & Lee*," signed to an instrument under seal, and a single seal affixed thereto, could not bind the firm. *Watson on Part.* 223.

That the papers purporting to be an award, *are no award;* because the authority supposed to be given *is transcended;* because it is uncertain, indefinite, unfinished, and not final. *Watson on Part.* 446; *Kyd on Awards*, 121 *et seq.*—140 *et seq.*—194 *et seq.*—208 *et seq.*—262 *et seq.*—276 *et seq.*—216 *et seq.*

That such an award could not be binding on *Cocke* and *Lee*, or made the foundation of an action, until approved by them, which never has been done.

That it was necessary to prove the hand-writing or signing of the arbitrators. *Kyd on Awards*, 262 *et seq.*—*Peake. Evi.* p. 109.

That after said *Onstott* had rested his case, after the argument had commenced, and when the attorney of *Cocke* and *Lee* was concluding their argument in defence, before the jury, it was too late to admit

evidence of any kind;—and in *then* admitting proof of the handwriting of the arbitrators was error in the court below.

That the *execution* of the submission to arbitrators ought to have been proved (before it was admissible in evidence) as executed by *both Cocke* and *Lee*. Even supposing it to be the deed of *one* of them, it is uncertain which. *Peak. Evi.* p. 109.

That upon the supposition that submission, award, and all the proceedings are regular and valid, between the parties; yet it is such an award as can only be enforced in chancery, and cannot be made the foundation for an action at law.

ASHLEY and WATKINS, *contra:*

Can one partner bind his copartner by seal? that is to say, sign the partnership name to a sealed instrument?

Suppose the other partner is by, and sees the signature of the partnership name, or afterwards owns or suffers any act to be done, by which he recognizes it to be his act and deed, is it not the same, and equally binding upon him, as if the individual names of the firm had been signed? *Gow on Part*, 75, 6, 7; 9 *J. R.* 285; 17 *J. R.* 38.

Cannot a party, by his subsequent acts, to be established by parol testimony, render a sealed instrument binding upon him, as his act and deed, which he neither executed himself, nor gave to another any power under seal to execute for him? 2 *Marsh.* 119; 19 *J. R.* 154; 2 *J. R.* 168.

But it does not appear, either in the submission or in the award, that Doctors *Cocke* and *Lee* were partners. They and *Pratt Collins* had been in partnership in the livery stable; but the partnership had been dissolved, and it was to settle the accounts of that concern, that this submission was made. But suppose Doctors *Cocke* and *Lee* were partners in the practice of medicine, or any other thing, that does not make them partners still as to the livery stable, because that partnership had been broken up and dissolved; and it does not appear that *Pratt Collins* retired, or that they carried it on together afterwards.

Now, it matters not by what name, style, or description, a party or person executes a sealed instrument, or whether he stands by and lets a friend execute it for him: it is equally binding. Nor does it matter whether the parties to a submission are described in the award by their full christian names, or by a wrong christian name, provided it be well understood who is the person meant. The award does not speak of

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the firm of *Cocke & Lee*, or of *Messrs. Cocke & Lee*, but of *Doctors Cocke & Lee*, as two individuals well known in society by that appellation.

The submission is as broad as it could be, of all matters in controversy between the parties; that is to say, the party of the one part and the parties of the other part: it was general as to the time and place, when and where the award was to be made, and therefore to be made at a reasonable time and place. The account submitted by *Pratt Collins* was approved of the arbitrators within a reasonable time, and became immediately a good foundation for an action, if the party did not choose to resort to the submission (arbitration) *bond;* nor does the award in any respect exceed the submission; nor is the award indefinite and inconclusive.

Under our practice, when does the plaintiff rest his cause in evidence?—when does the defendant rest his cause in evidence?

After the plaintiff has rested his cause in evidence and opened the the cause in argument, and the defendant is going on with his argument, how far should the court indulge either party to introduce further testimony? clearly nothing which would tend to introduce new matter to surprise the other party; but this was no new matter, nor could surprise the other party. It only enabled one party to complete the proof of what he had already introduced, and of which the other party had full knowledge. It is a mere technical objection—a rule of practice which the Circuit Court had a right to regulate; and if there had been any thing serious in it, it was rather ground for a new trial, or motion in arrest. See 1 *Mon.* 117, 118; 2 *Littell*, 232.

In trials before Justices of the Peace, no form of pleading is necessary: they are in fact by parol, and vary according to the circumstances and the intrinsic merits and justice of each particular case. There is no distinction between the different forms of action, and all the statute requires in that respect is, that the defendant should be informed in the summons or warrant, upon what the action against him is founded. When a Justice's case gets up into the Circuit Court by appeal, it is then to be tried according to the civil law understanding of the term appeal—that is to say *de novo* upon the merits of facts as well as of law; in the same manner as if a trial had never been before the Justice.

Upon the ground of public policy, no writ of error ought to be allowed from the Superior Court to the Circuit Court in a cause under

a hundred dollars, which came up to the Circuit Court from a Justice's Court. The first appeal is nothing but a new trial: the latter appeal, or writ of error, is for matters apparent upon the record.

But the broad language of the Statute does allow an appeal or writ of error, in a Justice's case from the Circuit Court to the Supreme Court. For what errors apparent on the record will the Supreme Court reverse a judgment, in such a case? Only for errors which affect the justice and merits of the case, and not for errors, if any there be, which only affect the mode of procedure. Such a case is different from one commenced in the Circuit Court, where the common rules of pleading and rules of evidence are strictly adhered to.

Cummins and Pike, for the plaintiffs in error: The plaintiffs in error still contend that the court below erred in permitting the submission to be read in evidence, when objected to; for the following reasons:

First—It is a submission under seal, and therefore cannot be offered in evidence in such an action, nor can this action be sustained upon an award made in pursuance of such a submission.

The action having been commenced before a Justice of the Peace, this court must look to the original summons to determine the nature of action. It is there described as "an action on account founded on award." An action of account is in the nature of an action of assumpsit; and a distinction is drawn by our Statutes between actions on account, and actions of debt: particularly by the Statutes of Limitations. See *Digest*, p. 381.

If the case, then, came before the Circuit Court as an action of assumpsit, it is a settled principle of law, that a submission under seal cannot be given in evidence in such actions. The point has been expressly decided in the Supreme Court of the State of Ohio, and it was declared, that the action originates in the submission, and ought to correspond in character with it; and if the submission be by deed the action should be debt or covenant;—and upon this ground it was ruled that the submission could not be given in evidence. See *Hammond's Condensed Rep.* 653, *Tullis* vs. *Sewal;* 1 *Saunders Pl. and Ev.* 179, 180.

Second—The submission ought not to have been allowed to go in evidence to the jury, because it was absolutely void *ab. initio.* If it be in fact a sealed instrument, it is void; because a partnership cannot

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execute a sealed instrument in the partnership name so as to hold the firm. Let it be even admitted that the partner who signs and seals the instrument may himself be bound by it; yet in this case *both* were not bound, and both were sued. If *Cocke* signed it, *Lee* was not bound: if *Lee* signed it, *Cocke* was not bound. It could not, therefore, be evidence in an action against both; because it fixed no liabilities upon both. Nor can one partner bind the firm by submission to arbitration nor by an award; and, therefore, on this ground, also, the submission is not evidence in the present case. See 2*d Saunders on Pl. and Ev.* 706, 711; 1*st Saunders on Pl. and Ev.* 185; 2*d Chitty's Gen. Practice*, 77.

The plaintiffs in error also conceive that the court below erred in permitting the two papers purporting to constitute the award to be read in evidence to the jury; for the following reasons:

First—that the said award was not made in pursuance of the terms of the submission, and the power thereby conferred upon the arbitrators; but the arbitrators in making the award, exceeded and went beyond the authority conferred by the submission.

The award must be strictly according to the terms of the submission, and must in no way exceed the powers conferred thereby.—*Watson on Awards*, 227; 2*d Chitty's Prac.* 105; *Watson*, 105; 2*d Johns. Rep.* 14, *Hardin*, 201.

It seems that *Collins*, *Cocke*, and *Lee* had been keeping a livery stable in partnership—that *Collins* had been attending the stable exclusively, and had made many bad debts, but that it was supposed by both parties that more was due to them from the stable. The parties, therefore, in order to settle and finally adjust the whole business, agreed by the submission that the arbitrators should say to whom the books should be given up, in order that the accounts due the stable should be collected; and that if they awarded the books to *Collins*, they should also award what amount of money he should pay *Cocke* and *Lee*, and *vice versa*. The arbitrators, however, not only awarded the books to *Collins*, but that *Cocke* and *Lee* should pay him seventy-six dollars, nine and three fourths cents—a most palpable and manifest exceedure of their authority.

Second—the award is not final and conclusive, nor does it determine the matters submitted The first paper, which is a part of the award, reserved to the arbitrators a further power, going to the whole justice

of the award, and an indefinite time in which to conclude the award, which time does not appear even yet to have elapsed.

Every award must be final, certain, and conclusive, or it is void.—See *Watson*, 127; *Hardin*, 411; *2d Chitty's Prac.* 107, 108. And any reservation of future powers by the arbitrators, if it affect the entire justice of the thing awarded, renders the whole void; and an award of a certain sum to be paid, &c. to be reduced to a smaller sum, if the party should make oath, &c. is void. See *Watson*, 66, 129. The first part of the award, after awarding the books to *Collins*, provided that he should go on and collect the debts, due the stable, &c. and present his accounts to the arbitrators, verified by affidavit, for approval, alteration, or rejection; and that so soon as the collections should be completed, and the accounts settled and approved, then general releases should be executed. This part of the award was made on the 15th of Dec. 1832. On the 3d day of April, 1833, *Collins* submitted an account, charging the stable with $322 93¼ cents, and crediting it with $170 75 collected since the date of the first part of the award, and this account was approved and allowed by the arbitrators. It apppears, therefore, that the award was not to be final until the collections were completed. Does it any where appear that they had been, or yet have been completed? Does it appear that the arbitrators ever finally adjudicated upon the matter, and definitively settled how much was due from *Cocke* and *Lee* to *Collins?* Does it appear that they ever awarded that any thing was due? None of the papers in the case state, or even enable the court to imagine what amount of debts in favor of the stable were outstanding. It may be that *Collins* at the date of the last part of the award, had not collected one half —nay, one tenth part of the outstanding debts. He presented his account and it was allowed, but the matter was not closed: no final award was made, nor is there any such award as will sustain an action. When the collections were completed, and the accounts settled and approved, then there was to be a final award, and general releases to be executed; but it no where appears that the collections had been completed, or the accounts all settled and allowed. The award, therefore, is not final. There is no award: it is void.

Were it not so, it would still be void on the other ground: that of the reservation of future power. The arbitrators were chosen for the speedy settlement of the matters in controversy. The books were given up to one party, to say what he should pay the other, and

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there was to be an end of the matter. They chose to depart from and exceed this delegated authority. They give up the books to *Collins*, and tell him to go on and complete the collections, and when that is done they will make a final award. Was this complying with the intentions of the parties? They reserve to themselves the power, for an indefinite period of time, which does not appear to have as yet elapsed, to fix liabilities upon one party by the oath of the other; and instead of settling the business, they open the door to long and tedious procrastination and litigation.

The submission, also, provides that each party should make his statements on oath, and be subject to answer any interrogatory propounded by the other party. Yet the arbitrators assume the power of receiving the statement of *Collins*, verified by affidavit, without the other party being present, and allow and approve his accounts *ex parte*. Undoubtedly this was such a reservation of power as renders the award void. If arbitrators even examine a witness in the absence of a party, the award is rendered void. *Watson*, 74. And the award must be made in a reasonable time. *Watson*, 227. Nor must it be delivered to one party only. *Watson*, 80.

Thus, the award was not binding upon *Cocke* and *Lee*, until ratified by them, which ratification never took place; and it, therefore, cannot be the foundation of an action. A clause added to the submission, and which must be taken as a part of it, provides that if either party should refuse to abide by the award, he should pay his opponent the sum of fifty dollars as compensation, &c. This can only be considered as an express declaration of each party's right to refuse to abide by the award if he chose. If such right was reserved, the award did not become binding until the parties agreed thereto. If *Cocke* and *Lee* refused to abide by it, *Collins* had his action for the penalty, and assumpsit would lie for a revocation of the submission. *Watson*, 23.

The plaintiffs in error, also, conceive that the court below erred in permitting the plaintiff below to introduce further testimony, after he had rested his case, and to the interruption of the counsel of the plaintiffs in error, while in the final argument of their defence to the jury. That it was necessary to prove the hand-writing of the arbitrators to the award, admits of no doubt. See *Watson*, 227; *Saunders on Pl. & Ev.* 185.

There is no rule of practice better settled, and more firmly established, than that parties should go through their evidence at the proper

time, and not produce it piece meal. If it were not so, inextricable confusion would result, and all the ends of justice be defeated. And more especially, it cannot be allowed that one party should interrupt opposite counsel, and introduce new testimony, while he is addressing the jury. After parties have closed their evidence, they should abide by it, unless some good cause exists why further testimony should be adduced. *2d Littell*, 231. Testimony cannot be introduced at such a time, and in such a manner, unless he shows a sufficient excuse for having failed to introduce it at the proper time. *Litt. Sel. Cas.* 269.

Should the court, however, conceive the admission of the evidence of handwriting at such time to have been but matter of discretion in the court below, the plaintiff in error still contends that for the reasons above assigned, the court below erred in admitting both the submission and the award.

DICKINSON, *Judge*, delivered the opinion of the court:

This suit was commenced before a Justice of the Peace, by the intestate, against *Cocke* and *Lee*, on an account founded upon an award. Judgment was rendered against them, from which they appealed to the Circuit Court of Pulaski county. After the appeal, *Collins* died, and the suit was revived in the name of *Onstott*, his administrator, a new trial had, and judgment rendered against the defendants, and *Elias Rector* as their security in appeal. After judgment in the Circuit Court, *Cocke* died; and this cause is now brought up by *Lee* and *Rector* as his security. Various causes for reversal are assigned, but the principal and main question is, whether the award is final and conclusive, and determines all matters submitted. The award itself, upon which this action was brought, and which forms a part of the record, states that, whereas, there are several accounts depending, and divers controversies having arisen between Doctors *Cocke* and *Lee*, of the one part, and *Pratt Collins* of the other part, who were lately associated as joint partners, in keeping and furnishing a livery stable in the town of Little Rock; that, for putting an end to the said differences, they, Doctors *Cocke* and *Lee* and *Pratt Collins*, by their certain agreement in writing, bearing date the 22d day of November, 1832, each was reciprocally bound to the other in honor, to stand to, abide and perform and keep the award and final determination of them, the said Field and Badgett, or of an umpire, in case of

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their disagreement; and thereupon the said Field and Badgett farther state that, having taken upon themselves the burthen of an award, and having fully examined and duly considered the proof and allegations of both parties, award "that the books and accounts relating to the said livery stable shall be given up to *Pratt Collins*, who shall proceed without delay, to collect the same; that out of the collections aforesaid he shall first pay all claims against the said firm, for attendance and necessaries furnished for the use of the stable, and deduct his own claims for advances made for the use of the stable, over and above his proportion; and, also, deduct any private claims he may have against *Cocke* and *Lee*." The said *Collins* was, also, to make out an account of all moneys collected by him, and all payments made, to be supported by affidavit made, and submitted to the said arbitrators for their approval, alteration, or rejection. They, also, award that *Cocke* and *Lee* shall pay Mr. Stephenson for a saddle taken by them from the stable, and which Stephenson had left there for sale; and they farther awarded and ordered, that so soon as the collections aforesaid should be completed, and the accounts settled and approved by them, *Cocke* and *Lee* and *Pratt Collins* should execute each to the other, general releases, sufficient in law, for releasing by each to the other of them, of all actions, suits, &c. concerning the premises aforesaid.

The agreement of submission, which was offered and received in evidence, and which forms a part of the record, purports to be executed by *Cocke* and *Lee*, of the one part, under their joint seal, and *Pratt Collins* of the other, also under his seal, but dated the 26th day of November, 1832, and states "that, on the 9th day of March preceding, the parties made and signed an agreement to keep a livery stable in partnership, on the terms set forth in the agreement; that the partnership was dissolved, but that they could not effect a settlement between themselves; that to accomplish this object, and avoid all difficulties, they agreed to submit for arbitration, and award, all matters of controversy between them, to the final hearing and decision of Messrs. Field and Badgett, with liberty to call in witnesses; that they, the arbitrators, should take possession of all books, relating to the business of the stable, of the said *Cocke* and *Lee* and *Pratt Collins*, on account of the stable; that they should ascertain, as well as they could from the parties, or otherwise, what was due from the stable to individuals on acount of the concern; that the arbitrators were to make a full and final settlement. And they further authorize the arbitrators

to sit when and where they thought proper; and directed that all private accounts between them, should be taken into the enstimate, and settled."

The object in submitting matters of controversy to arbitratiors, is for the purpose of obtaining a final and speedy determination of the dispute, with less delay and expense, than by having recourse to the ordinary tribunals of the country. Is this award final? In the submission upon which the arbitrators acted the parties were to stand to, abide and perform and keep the final determination of the arbitrators, and the submission here set forth is, that "to obviate all difficulty and effect a settlement between themselves, they agree to submit for arbitration and award all matters in controversy between them, to final hearing and decision." The award states that, after having fully examined, and duly considered the proof and the allegations of the parties, the books and accounts should be delivered to *Collins*, and that he should collect the moneys due, and pay all claims on account of the stable, and after deducting payments due him therefor, and by *Cocke* and *Lee*, make an account of all moneys collected, and all payments made. Has he done so? It is true, that on the 3d of April, 1833, he presented an account of moneys received, and struck a balance, and made affidavit that the account was just and true; but it does not appear, nor does he state, that it is an account of all moneys collected, or that he has paid all the claims due, as by the award he was bound to do. And though the account was on the 15th of April following, approved by the arbitrators; yet it does not appear from the record, that they have ever proceeded to make a final adjustment of the matters in controversy between the parties. As the intention of parties in submitting their disputes, is to have something ascertained which was uncertain before, it is a general rule, that the award ought to be so plainly expressed, that there may be no uncertainty in what manner and when the parties are to put it in execution, but that they may certainly know what it is they are ordered to do. It is to no purpose, says the civil law, that the arbitrator should pronounce an uncertain award, and the English law has, in this respect, adopted the same language. Therefore, an award that one of the parties shall pay the other for certain task work and day's work, without mentioning the sum, is void. And again: the plaintiff and defendant having certain disputes concerning a piece of land, submitted them to arbitration. The arbitrators awarded, amongst other things, that

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the defendant should enter into a bond to the plaintiff, that the plaintiff and his wife should enjoy the land. This was held to be void, because the arbitrators had fixed no certain sum for the penalty of the bond, and there were no means by which the same could be ascertained; for it was held that they did not resemble the case of a covenant by the party himself, to enter into a bond for the enjoyment of land, in which, if no sum be expressed in the covenant, it is implied that the penalty shall be equal to the amount of the lands. See *Kyd on Awards*, 208, 194, 5th ch. 71; 2 *Saunders*, 292. The authorities are numerous and conclusive, that the award shall be in accordance with the submission, and shall be final and conclusive. This award is not final and conclusive; and the date of the submission set forth in the award, as the one from which they derived their authority to act, is different in date from the one set forth as part of the record in this case. As to the other objection, that the submission is under but one seal, being the joint seal of *Cocke* and *Lee*, the general doctrine is well settled, that one partner cannot bind another by deed, even in commercial dealings; and the reason of the rule is obvious and salutary. Sealing and delivery are indispensable requisites to the validity of a deed; and these requisites must be complied with by both, or by some one expressly authorized by the party, who does not sign, seal, and deliver. And if this was not the case, as the want of consideration under seal, cannot be inquired into, it would enable a party to give a favorite creditor a lien upon the estate of the other partner, to the great injury of the firm. This principle has been ruled in the case of *Harriss* vs. *Jackson* and *Thompson* vs. *Fearn*, 7 *Term Rep.* 207 and 10*th East*, 418; but it does not apply where one partner, by the authority of his copartner, and in his presence, executes a deed for both of them, under but one seal; for the fact of his presence, at the time of his signing, and the circumstance of treating the deed as his own, raises the inference of a construction and legal delivery against both, and under any circumstances would be valid against him who executed; for he cannot avail himself of its non-execution. A bond executed by one partner to bind his copartner to comply with an award, will be binding on such copartner, if the award should be accepted or ratified by him.

Whether the testimony before the Circuit Court was sufficient to bind both *Cocke* and *Lee*, it is unnecessary for us to determine; but that the award is uncertain, and not final or conclusive, as between the

parties, we have no doubt. We are, therefore, of the opinion that the court below erred in permitting the award to be read in evidence to the jury; and consequently the judgment must be reversed with costs, and this case remanded to the Circuit Court of Pulaski, for further proceedings to be had therein, not inconsistent with this opinion.

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GAMBLIN, and others vs. WALKER

THOMAS GAMBLIN, AND OTHERS, *against* JAMES H. WALKER, FOR THE USE OF, &c.

APPEAL *from Hempstead Circuit Court.*

The law of assignments in the territorial digest is not declaratory of the law, but introductory of a new rule.

It creates a privity of contract between the assignee and obligor or promisor.

The assignor of a bond negotiable by statute, is not competent to sue in his own name, to the use of the assignee, and in such suit a plea alleging that the bond was assigned before the institution of the suit is good, and this is the law, whether the bond be payable to order or not.

This was an action of debt brought in the court below by *James H. Walker*, for the use of *Nicholas T. Perkins*, against *Thomas Gamblin*, *Abner Moren*, and *William McAtee*, on a writing obligatory for the sum of one hundred and thirty dollars.

After a motion to quash the writ, the defendants below craved oyer of the writing declared on, and on oyer it appeared that there was an endorsement on the writing, assigning the same to *N. T. Perkins*. The defendants then pleaded two pleas, substantially the same, and alleging that after the making of the writing, and before the commencement of the suit, the plaintiff had assigned the same, and thereby parted with all his interest therein. To each plea the plaintiff demurred, and each demurrer being overruled, judgment was thereupon rendered for the plaintiff upon the demurrer, and from this judgment the defendants below appealed.

TRAPNALL and COCKE, for the appellants:

The statute of assignments will be found in McCampbell's Digest, p. 74, and is analogous in its provisions, to the statutes of other states. By the assignment, the assignor conveys the legal interest, as well as the legal right to prosecute the action, to the assignee. This is a well settled principle. *Hardin*, 561, *Nayfing* vs. *Wells*. This case covers the whole ground, and is conclusive as to every point in the cause. If the assignment be made before trial, the plaintiff and assignor will be nonsuited. 1 *Marshall*, 555, *E. Hall* vs. *Gentry*. The pleas are in bar, and show the plaintiff had no right of action, but that it was communicated by the assignment to the assignee. The assignor of a writing by law made assignable, has no interest in law or equity. The suit

must be brought in the name of the person who holds the legal interest. See 1 *Chitty*, p. 2 and 3.

It may be said the words of the statute are not compulsory but permissive; that the assignee may sue in his own name. But the statute does not say the assignee may sue in his own name. See *Hardin*, 564.

SCOTT, *contra.*

The question which presents itself for the consideration of the court, is, whether the present action should be carried on, in the name of *James H. Walker*, he having no interest at present, in the claim or demand for which this suit was instituted. There was no such assignment, transfer or endorsement, as is required by our statute, upon the cause of action in this case, as to enable *Perkins* to bring suit in his own name. See *Digest, title assignments.* The transfer or assignment, as appears from the record of the cause of action, was by parol, and vested in *Perkins* a mere equitable interest, which could only be sued for in the name of the assignor. See *Johnson's Reports, vol.* 19, *p.* 95, as to the effect of parol assignments. See also, *Chitty on Bills, p.* 7, 8, *Note* 1; *Chitty's pleading, vol.* 1, *p.* 16; *Selwyn's nisi prius, vol.* 1, *p.* 242, *Note a*; *Johnson's Digest, vol.* 1, *p.* 53, as to equitable assignments.

The cause of action in this case is not transferable so as to vest the legal interest in the assignee; it is payable to *Walker* alone, and wants the operative words of transfer. *Chitty on Bills, p.* 66–108.

If this action is not well brought in the name of *Walker*, still the appellants' pleas are defective. The declaration on its face exhibits an assignment of the cause of action to *Perkins*. If he erred in bringing his suit in the name of *Walker*, advantage could only have been taken of it by demurrer, or by a plea in abatement, alleging the disability of *Perkins* to sue in the name of *Walker*, he, *Perkins*, being the actual plaintiff in the case. The appellants cannot defeat this action by showing a want of interest in the nominal plaintiff. *Chitty's Pleadings, vol.* 1, *p.* 17, *note* 2, referring to *Alsop* vs. *Cains;* 10 *Johnson*, 400; *Raymond* vs. *Johnson*, 10 *Johnson*, 488.

The statute of July 3, 1807, which gives to the assignee of bonds, &c., the right to sue in his own name, is enlarging in its operations, and does not take from him the right to sue in the name of his assignor. Its object is to guard against the inconvenience which might fall upon the assignee by the death of his assignor. It leaves it still optional with the assignee

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to sue in his own or in the name of his assignor as may best subserve his interest. Such, at least, have been the decisions upon a similar statute in Virginia. See *Henning's Statutes, vol.* 12, *p.* 359; *American Digest, vol.* 5. *p.* 39.

The assignment of a bond to pass the legal interest therein must be by writing under seal.

DICKINSON, *Judge*, delivered the opinion of the court:

This is an action of debt brought by *Walker* for the use of *Perkins*, on a writing obligatory. The defendants put in two pleas: that the writing declared on had been assigned to *Perkins*, before the institution of the suit, to which there was a demurrer sustained, and judgment given for the appellee, from which the defendants below appealed.

The error assigned, questions the correctness of the opinion of the court in sustaining the demurrer.

As the demurrer brings before the court the whole state of the pleadings, at least as far as is necessary, it is proper to enquire into the sufficiency of the pleas, as a bar to the action. And as the writing declared on, was not payable to order, the enquiry involves the consideration of the statutory provision, which authorizes the asssignment, and which declares "that all bonds, bills and promissory notes, for money or property, shall be assignable, and the assignee may sue for them in the same manner as the original holder may do, and it shall and may be lawful for the person to whom the said bonds, bills, or notes are assigned, made over, and endorsed, in his own name, to commence and prosecute his action at law, for the recovery of the money mentioned in such bond, bill or note;" and the act further declares that, "it shall not be in the power of the assignee after assignment made as aforesaid, to release any part of the debt or sum really due by the same bonds, bills or notes." See *McCampbell's Digest*. This act does not profess to be declaratory of what was the law, but plainly importing to be introductory of a new rule. We must so consider it, and ascertain whether this is a case in which it can, and ought to have effect. In determining this question it is only necessary to enquire in whom the legal interest is vested, for if *Walker* is permitted to sue in his own name, he can control the obligation, release the claim, and place himself in such a position that notwithstanding he has passed away his interest, he could in the face of the statute, release "any part of the debt or sum really due." And the plaintiff, by demurring to the defendant's pleas,

admits the fact of the assignment. The statute creates a privity of contract between the parties, and *Walker*, by his demurrer, admits the legal right to be in another, and sueing as trustee, places him in no better situation. We cannot perceive that any injury can arise from requiring the real owner to bring his suit, and stand bound for the consequences. And great inconvenience might result from permitting an action to be brought in the name of a nominal plaintiff, who may or may not be responsible for costs. It is clear, that the assignor of a bond, negotiable by the statute, is not competent to sue in his own name to the use of the assignee. See 1 *Marshall*, 555; 1 *Chitty*, 2, 3; *Hardin's Rep.*, 564.

If the defendants below were prepared to support their pleas, and show that the plaintiff had parted with his interest, they had a right to do so.

We are of opinion, that the court erred, in sustaining the demurrer. The judgment of the Circuit Court of Hempstead County, must therefore be reversed with costs, and this case be remanded for farther proceedings to be had, not inconsistent with this opinion.

The same opinion was given in the cases of *William M. Burton* and *Abraham Block* against *Walker*, for the use of *Perkins; McAtee and Others* against *the Same;* and *Lowe and Others* against *the Same;* these cases being precisely similar to that reported above.

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WILLIAM GAGE *against* REUBEN MELTON.

APPEAL *from Carroll Circuit Court.*

A party cannot be permitted to avail himself of the advantages of an issue at law, and an issue of fact, to the same pleading, at one and the same time; or to return to, and revive the questions decided on demurrer, after he has acquiesced in the decision thereof and voluntarily proceeded to a trial of the issues of fact.

A party, therefore, when he has amended his pleading demurred to, or pleaded over after his demurrer overruled, cannot again return to and revive the questions decided upon the demurrer, and in such cases, the demurrer and the decision thereon are as completely superseded as if the demurrer had never been filed.

If evidence is offered by one party in the court below, and no objection appears from the record to have been there made to its admission by the other party, it is too late to assign in this court its admission there for error.

Where suit was brought in the court below on a promissory note, and the defendant pleaded want of consideration, and a failure of consideration, and the following evidence was offered by him in support of his pleas, to wit—that the consideration for which the note was executed, was the assignment of a patent for a tract of land; that the patent, at the time of the execution of the note, was assigned by the plaintiff to the defendant by endorsement in writing, and received by the defendant; and that the plaintiff then represented to the defendant, that the land granted by the patent was situated within five or six miles of Little Rock, and that if it was not of the description set forth in the patent and endorsements, he would make it as good, and that he had a title to the land, and a right to sell it;—further, that, in conversation with another witness, the plaintiff said that he had long ago known that said land had been sold for taxes.

The patent to John Baxter, being also in evidence, with the following endorsements upon it: "For value received I assign the within deed to William Gage, this 29th day of September, 1835. *Signed* "Joseph O. Carroll, agent for John Baxter." "For value received I assign the within deed to Reuben Melton, this 13th day of October, 1835." *Signed* "Wm. ⋈ (HIS MARK) Gage." *Test: Henry B. Smith,*" this evidence was not sufficient to support the plea, either of want or failure of consideration. It expressly disproves the first, and fails to sustain the second.

So far as ragards the question presented on these pleas, it is wholly immaterial whether a specific execution of the agreement proved by this evidence, could be enforced or not.

This was an action of debt commenced in the court below by *Gage* against *Melton*, by a declaration in the usual form, upon an instrument in writing, described in the declaration as a promissory note, but being in reality a writing obligatory, executed to him by *Melton* on the 12th of October, 1835, due December 25th, 1835, for $206.

At the return term, the defendants filed two pleas, which, on motion of the plaintiff, were stricken out, as nullities, at October Term, 1837, and leave was given the defendant to plead. He then filed his first

and second pleas, to which the plaintiff filed his separate demurrers. Joinders in demurrer being filed, the demurrer to the first plea was sustained, and to the second overruled. The defendant then filed his amended first plea, to which the plaintiff demurred and his demurrer was overruled. The pleas as amended, and finally sustained by the court, were, 1st, that "the said plaintiff gave no consideration in law for the "said promissory note in wrinting, to wit, on &c. at, &c." And, 2d, that "the consideration for which the said promissory note in writing "and the promise therein contained were made and executed, has to-"tally failed, to wit, &c."

The plaintiff then filed his replications: To the first plea, that "he did give a consideration in law for the note sued on." And to the second plea, that "the consideration did not totally fail, &c." concluding each to the country—to each of which the defendant joined issue, and the cause was submitted to the court, sitting as a jury. The following evidence was then introduced in the case:

The plaintiff gave in evidence the writing sued on.

The defendant proved, that the writing sued on was drawn by the witness, and that it was executed by the defendant in consideration of the assignment to him by the plaintiff of a patent for a tract of land, which patent, with the endorsements, was also in evidence. The patent was in the common form, to *John Baxter*, grantee, and the endorsements as follows: "For value received I assign the within deed to *William Gage*, this 29th day of September, 1835," signed Joseph O. Carroll, agent for John Baxter;" and "For value received I assign the within deed to *Reuben Melton*, this 12th day of October, 1835," signed *William* HIS ⋈ MARK. *Gage*," and tested by "Henry B. Smith."

The witness further stated that the patent was received by the defendant, and that the plaintiff represented to the defendant that the tract of land described in the patent lay within five or six miles of Little Rock, and that if it was not of the description set forth in the patent, and the endorsements thereon, (to wit "Land rolling, second rate soil, part woodland, timber, oak and hickory, a part prairie,") he would make it as good, that he had a title to the land, and a right to sell it.

Another witness for the defendant proved, that he had heard the plaintiff say, upon being asked if he had heard that said land was

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sold for taxes, that he had long ago known that it was sold for taxes. Upon this evidence the court found the issues for the defendant, and gave judgment that he be acquitted and discharged of the action, and for his costs. From which judgment the plaintiff appealed.

WALKER and FOWLER, for the appellant:

The appellant insists that the second plea is defective in this; that it does not show what the consideration was, nor how it failed, nor when; and that if aptly pleaded, the plea of failure, or want of consideration, cannot be pleaded in this action. See *Marshall's Reports*, p. 602; *Coleman* vs. *Humper*, p. 538; *Stap* vs. *Anderson's* executors, p. 332; *Buntlett* vs. *Ralston*; *3rd J. J. Marshall's Rep.* p. 475; *Coles*, executors, vs. *Fisher; 4th Mon.* 531, *Reed* vs. *Haund; 2 Marshall's Rep.* p. 545, *Wise* vs. *Kelly; Chitty on Contracts*, p. 27; *Saunder's Pleading & Evidence*, p. 406 and 407—in support of the positions assumed by appellants.

No counsel appeared for the appellee.

RINGO, *Chief Justice*, delivered the opinion of the court:

This is an action of debt commenced by the appellant against the appellee, in the Carroll Circuit Court. The cause of action as described and set forth in the declaration and pleadings, is a promissory note in writing, executed by *Melton*, and made payable directly to *Gage*.

To this action *Melton* filed two pleas in bar, which the court, on the plaintiff's motion, directed to be treated as a nullity, and granted to the defendant leave to plead. Whereupon he filed two other pleas in bar: First, "that the said plaintiff gave no consideration in law for the said promissory note in writing, to wit, on the 12th day of October, 1835." Second "that the consideration for which the said promissory note in writing, and the promise therein contained, were made and executed, has totally failed."

To these pleas the plaintiff demurred severally, and his demurrers being joined, were, after argument, overruled by the court. The plaintiff then replied severally to said pleas: To the first "that he did give a consideration in law for the said note sued on." And to the second, "that the consideration for which the said promissory note was given, and the promises therein contained, did not totally fail, on the 12th day of October, 1835;" and concluded by tendering an issue to the country, which was joined by the defendant, when, by

consent of the parties, the cause was submitted to the court upon the issues joined. And the court after hearing the evidence and arguments of counsel, found upon the issues joined, in favor of the defendant, and thereupon entered up a final judgment for the defendant, from which the plaintiff prayed an appeal, which was granted, and has been duly prosecuted in this court.

On the trial, a bill of exceeptions was taken by the plaintiff, setting forth all of the evidence in the cause, which, being signed and sealed by the court, was made a part of the record.

The appellant assigns for error, first, that the court erred in overruling the demurrer to the second plea. Second, that the court erred in overruling his demurrer to the first plea of the defendant as lastly pleaded. Third, that the court erred in receiving the proof offered by the defendant as evidence of the issue joined. Fourth, that the court erred in deciding the evidence sufficient to sustain the issues joined, when, in truth there was no sufficient evidence to sustain said issues. Fifth, that the judgment is for the defendant; whereas, by the law of the land, it ought to have been for the plaintiff.

As to the questions sought to be raised by the first and second assignments of error, the authorities are full and conclusive, that when a party amends his pleadings or pleads over after judgment against him on demurrer, the demurrer and decision thereon are as completely superseded as if the demurrer had never been filed. *Crozier* vs. *Gano and wife*, 1 *Bibb* 257; *Peate* vs. *Craig* 1 *Bibb*, 320; *Violett* vs. *Dale*, 1 *Bibb* 144; *Hancock* vs. *Vatwer*, *Hardin*, 513; *Patrick* vs. *Conrad &c. Littell's Selected Cases*, 508.

In the courts of England, a party was never permitted to amend his pleading, or plead over after a demurrer, without the leave of the court, and when the demurrer was overruled, such leave was never granted, until it was by leave of the court, formally withdrawn.—2 *Tidd*, 766, 767.

And although in the loose and liberal practice indulged in, in some of the courts in the United States, amendments and other pleadings have been received, after demurrer, without any formal order for leave to withdraw it; yet the simple fact of amending or pleading over, has in such cases, been generally held to be equivalent thereto, and the parties subjected to the like consequences.

To permit a party to avail himself of the advantages of an issue at law, and an issue of fact, to the same pleading at one and the same

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time, or to suffer him to return to and revive the questions decided on demurrer, after he had acquiesced in the decision thereof, and voluntarily proceeded to a trial of the issues of fact, would be to confound and unsettle the most plain and salutary, and best established rules of practice, without the sanction of law, or the support of reason.

We are, therefore, of the opinion that a party, when he has amended his pleading demurred to, or pleaded over after his demurrer overruled, cannot again return to and revive the questions decided upon the demurrer, and that in such cases the demurrer and the decision thereon are as completely superseded as if the demurrer had never been filed. Tested by this rule, the first and second assignments of error present no question upon the record, of which the appellant can now avail himself. The validity of the pleas cannot, therefore, in the present aspect of the case, be questioned.

The third assignment is equally unauthorized; for it does not appear by the record, that the evidence received by the court was objected to in the court below. It must therefore be considered as having been received by the court, with the consent of the plaintiff, whose duty it was to have objected, if he considered it incompetent, irrelevant, or illegal. Having failed to do so, his objection in this court, now made for the first time, comes entirely too late to be regarded.

The fourth and fifth assignments of error, question the decision of the court, that the evidence adduced was sufficient to sustain the issues joined, and the judgment thereupon given in favor of the defendant. The latter depends upon the former, and both may be well considered together.

The pleas of the defendant were affirmative, and from the character of the issues joined, the burthen of proof devolved upon him; to support the issues on his part it was incumbent on him to prove, either that the plaintiff did not give any consideration in law, for the instrument or obligation upon which the suit was founded, or that the consideration upon which it was made, had entirely failed.

The instrument itself furnishing *prima facie* evidence of a consideration, was produced by the plaintiff, and read in evidence without objection. The defendant then proved by a witness, that the writing sued on was drawn by him and executed by the defendant: that the consideration for which it was executed, was the assignment of a patent for a tract of land: that the said patent at the time of the execution of the instrument sued on, was assigned by the plaintiff, by

endorsement in writing, and received by the defendant: that at the time when the assignment was made and the note executed, the plaintiff represented to the defendant that the tract of land particularly described in the patent, was situate within five or six miles of the city of Little Rock, in the State of Arkansas, and that if it was not of the description set forth in the patent and the endorsements thereon, he would make it as good, and said he had a title to the land and a right to sell it: the patent and the endorsements thereon were also read in evidence, and, by the bill of exceptions, are made a part of the record. The defendant also proved, by another witness, that he had heard the plaintiff in conversation, upon being asked if he had heard that said land was sold for taxes, say that he had long ago known that it was sold for taxes—which was all the evidence given in the case.

This evidence, the court acting in the place of a jury, considered as sustaining the issues joined, and therefore determined the same for the defendant; and the only question presented by the bill of exceptions and assignments of error, now under consideration, is this: was the decision, or finding of the court upon the issues joined, warranted by the evidence adduced on the trial?

To decide this question correctly, it must be seen what constitutes a consideration in law, sufficient to uphold a contract. In the case of a specialty no consideration is necessary to give it validity even in a Court of Equity. *Chitty on Contracts*, 2.

In the case of a contract or agreement not under seal, the consideration may arise, either by reason of a benefit resulting to the party promising, or to a third person at the request of the former, by the act of the promisee; or on account of the latter sustaining any loss or inconvenience at the instance of the person making the promise. It is not essential that the consideration should be adequate in point of actual value, the law having no means of deciding on this matter; and it would be unwise to interfere with the facility of contracting, and the free exercise of the judgment and will of the parties, by not allowing them to be the sole judges of the benefits to be derived from their bargains; provided there be no incompetency to contract and the agreement violate no rule of law. It is sufficient that a slight benefit be conferred by the plaintiff on the defendant, or a third person, or even if the plaintiff sustain the least injury, inconvenience or detriment; or subject himself to any obligation without benefitting the defendant, or any other person. *Chitty on Contracts*, 7. Also, where the

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defendant agreed in writing to pay the plaintiff a sum of money for the benefit of a third person, for the purchase of a house, and which was accordingly effected. It was held that the defendant was liable, although the execution of a conveyance could not have been enforced, as against the third party, as the agreement with him was not in writing. *Chitty on Contracts*, 14.

According to the principles above stated, the evidence adduced on the trial, so far from supporting the issues on the part of the defendant, expressly disproves the first, and wholly fails to sustain the second. The evidence introduced by the defendant proves a parol agreement between the parties for the sale and purchase of a tract of military bounty land, and that the plaintiff in pursuance and part performance thereof, by his endorsement thereon in writing, assigned to the defendant, the patent issued by the President of the United States, to one John Baxter, for said tract of land, containing one hundred and sixty acres, being the N. E. qr. of sec. 8, T. 2 N., R. 7 W. in the tract appropriated for military bounties in the Territory of Arkansas, which was received by the defendant. The plaintiff also assured the defendant, that he had a title to said land and a right to sell it; that it was situated within five or six miles of the city of Little Rock, and if the land was not of the description set forth in the patent, and the endorsements thereon, he would make it as good. This, so far as we can discover from the evidence, as set out in the bill of exceptions, constituted the consideration upon which the instrument in question was made.

It was a legal consideration sufficient to uphold the contract, and so far as it regards the present question, it is wholly immaterial whether a specific execution thereof could be enforced or not: therefore, upon that question we give no opinion.

The defendant himself having thus proved a consideration in law, for which the instrument in question was executed, proved by another witness that he had heard the plaintiff in conversation upon being asked if he had heard that said land was sold for taxes, say that he had long ago known that it was sold for taxes. This, if it was designed to show that the plaintiff had no title to the land, was not only wholly incompetent for that purpose, but admitting the truth of every thing proved to have been said by the plaintiff, failed entirely to show that he was not the purchaser at the sale for taxes, or that he had not afterwards redeemed the land or acquired a complete title to it, and so his

right thereto may have been good at the date of his contract with the defendant. Therefore, allowing it to have its full weight as evidence, it neither proved, or conduced to prove, either a want of consideration, or a failure of consideration. The other evidence adduced by the defendant has not the slightest tendency to prove a failure of consideration; for, giving to it the utmost latitude, and indulging every legitimate presumption authorized by it, no other conclusion can be drawn from it than this—that the plaintiff sold to the defendant a tract of 160 acres of land, and endorsed, assigned, and delivered to him the patent therefor, which he received and yet holds; but whether the defendant is or ever has been in the possession and enjoyment of the land, or has been evicted therefrom, or whether the land was in the adverse possession of another, or his right acquired by the purchase from the plaintiff had proved unavailing and worthless, is not even attempted to be shown, and every fact proven in the case may be true, and yet the defendant be in the full, peaceable and uninterupted enjoyment of the land, by virtue of said contract with the plaintiff. We are, therefore, clearly of the opinion, that the decision and finding of the Circuit Court upon the issues joined, was contrary to, and unauthorized by the evidence, and consequently it was erroneous, and for that error the judgment thereupon given must be reversed with costs, and a new trial granted; and as this case may progress on its return to the court below, the parties, if they desire to do so, must be allowed to amend their respective pleadings, so as to set forth and describe truly the contract in writing upon which this action is founded.

The cause is, therefore, remanded to the Carroll Circuit Court for further proceedings to be there had according to law, and in conformity with this opinion.

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BROWN vs. HICKS.

BROWN, EXECUTOR OF PHILLIPS *against* HICKS, ADM. OF PHILLIPS.

1 232
1 366

APPEAL *from Crawford Circuit Court.*

In a suit against a person in a particular capacity, as for example, against him in the capacity of sheriff, guardian, executor, or administrator, it is necessary to be stated in the declaration that he is sued "*as* executor, *as* administrator, &c."

The expression in a declaration "the plaintiff *being* the executor as aforesaid" is not a substantive averment of his suing AS *such*, or in his representative capacity, and nothing by intendment can supply the allegation "AS executor as aforesaid."

A declaration against "A. B. executor of C. D." and refering to him afterwards solely by the expression "A. B. executor as aforesaid" is not a declaration against him *as* such executor, nor will he be liable in such action in his representative capacity.

The term "executor as aforesaid" or "*being* executor as aforesaid" are mere words of description; the term "*as* executor aforesaid" has but one meaning, which is fixed by law, and is, that the party sued is sued in his representative capacity.

It was error to permit a bill of sale of a slave to be read in evidence, upon proof of the hand writing of an attesting witness, when it appeared that such witness resided in the county where the suit was brought, and that he was at home a short time before the term at which the cause was decided, that he was absent on necessary business, and expected to return in a few months, no subpœna having been issued or served upon him, nor any effort made to take his deposition, and no other facts being proven to warrant the admission of proof of his hand writing.

It was error to permit the reading in evidence of a copy of a record of a bill of sale for a slave, executed and recorded in Kentucky, upon the testimony of the subscribing witness to such bill of sale, who stated simply that he believed the copy to be substantially the same with the original, but that he had not seen the original for many years, and when it did not appear that he had ever compared the copy with the original, nor did he pretend to say that it was an exact or sworn copy.

A bill of sale for a slave, is not of such a nature as is authorized or required by law to be recorded, in order to give validity or effect to the instrument, and to make it a part of the public documents and records of the country, and therefore the record of such a bill of sale is incompetent to prove the existence or execution of the original.

In an action brought by an administrator to recover a slave of his intestate, a legal distributee of the estate of such intestate is not a competent witness. He is legally interested in the event of the suit, although upon his *voir dire* he swears that he has received his portion of the estate, and receipted the administrator therefor, the receipt not being produced, or its non-production accounted for.

This was an action of detinue, brought, as the parties were described in the declaration by "*Arthur Hicks*, administrator &c. of John Phillips, deceased, against "*Richard C. S. Brown*, executor of the last will and testament of Thomas Phillips, deceased," for a mulatto woman slave. The defendant pleaded two pleas, *non detinet*, and the statute of limitations. The plaintiff took issue on the first, and replied to the

second that the action did accrue within five years, to which the defendant joined issue, and on the two issues, the case went to trial before a jury.

On the trial, the plaintiff offered in evidence a bill of sale for the slave in question, from Ellender Phillips to Thomas Phillips, and proposed to prove the execution and delivery of said bill of sale, by proving the hand writing of J. D. McGee, subscribing witness thereto. In order to warrant the admission of this evidence, the plaintiff proved, that one of the three subscribing witnesses was dead, that the second was the plaintiff in the action, and disqualified as a distributee, and that McGee, the other witness, whose place of residence was in the county of Crawford, had left the county and gone to Washington City, about a week before the commencement of that term of the court, and so was absent from the state. No subpœna had been taken out for him, no commission issued, or applied for to take his testimony, and no attempt made to postpone the cause, on account of his absence. Upon this testimony the court below, permitted the bill of sale to be proven, by proving the hand writing of McGee, and it was read in evidence.

The plaintiff then offered Samuel Phillips as a witness, who being sworn on his *voir dire* to ascertain his competency, stated that he was the son of John Phillips, the plaintiff's intestate, and had been as one of his children entitled to a distributive share in his estate, but that he was not interested in the event of the suit, because he had received his share of said estate from Thomas Phillips, when the latter was administrator of said estate, and given his receipt for the same. The receipt was not produced, nor shown to the court. Upon this showing the witness was permitted to be sworn and to testify.

The plaintiff then offered to read in evidence what purported to be a bill of sale for the negro in controversy, from Thomas Phillips to John Phillips and Nelly his wife, executed in Franklin county, Kentucky on the 14th May, 1822, and witnessed by Samuel Phillips. Appended to the copy offered in evidence was the certificate of Willis H. Lee, Clerk of the County Court of Franklin County, that "the within bill of sale" was acknowledged before him by Thomas Phillips, and duly recorded, dated Oct. 27, 1823, and the certificate of A. H. Rennick, clerk of the same court, dated Feb. 17, 1837, that the said copy is truly copied from the records of my office, as wholly as the same remains of record in my office," as also the certificate of Edward S. Coleman, "presiding justice of the peace in and for the

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county of Franklin," that Rennick was clerk of said county court at the time he signed the certificate, and that his certificate was in due form of law. The court below determined that this authentication was not sufficient to authorize the copy to be read in evidence, and the plaintiff then examined the said Samuel Phillips to prove it to be a true copy of the original. He stated that he believed that it was a copy of the bill of sale, or the record thereof in Kentucky, but that he had not copied it from either, nor had he ever compared it with either, or seen any person copy it; that he had read the original bill of sale once *before* and several times *after*, he signed it as a witness, but that he had not seen it since 1823. He said, however, that the paper produced was a true copy of it, and had been sent him by mail from Kentucky, and that the person who sent it to him stated that it was a copy either of the bill of sale, or the record, but which he could not say, but believed it had been taken from the record. The plaintiff was also sworn, and stated, that he did not know where the original bill of sale was, and that he had never had or seen it, or made any enquiry for it. Upon this testimony the court permitted the paper to be read in evidence.

The jury found for the plaintiff on both issues, and judgment was rendered for the slave, or seven hundred and fifty dollars. The defendant then moved for a new trial and an arrest of judgment, which motions were overruled, and he appealed.

TAYLOR, for the appellant:

1st. Detinue may be supported against an executor, upon a bailment to the testator, where the goods have come to the executor's possession. But in no other case. In every other case he must be sued individually. 1 *Chit.* 81, 82, 122, 123; 1 *Saunders*, 216, a; *Com. Dig. Administrator* B 15; *Cowp.* 371, 374.

2d. Samuel Phillips, an heir and distributee of the estate, was not a competent witness. This is the general rule. 1 *Phil. Ev.*, 50, 51. 1 *Mawle*, and *Selwyn*, 9; 2 *Day*, 399. So a residuary legatee is incompetent even with a release. 1 *Phil. Ev.* 101. 4 *Camb.* 27.

The interest of the witness, when it appears or is admitted upon the *voir dire*, disqualifies, unless it is shown to have been removed by release, and the release be produced in court. 2 *Stark. Ev.* 755, 756, 760. *Corking* vs. *Gerard*, 1 *Camb.* 37. And the witness having acknowledged that he was interested, his own statement that his interest had been removed, or no longer existed, could not render him competent. 1 *Con. Rep.* 46; 2 *Stark. Ev.* 756, *in note* 1.

But a release to the administrator could be a discharge or acquittance only for so much of the effects of the estate as were then in the hands of the administrator, and were then due and payable. It could not by any language that could be used discharge subsequently accruing effects. 7 *Com. Dig. Release of personal things*, 229, 230, 231, 232; 4 *Maul. & Sel.* 423; 1 *N. R.*, 113; 9 *Mass*, 235; *Salk.* 575. And when the suit is for accumulating interest, to be added to the general fund of the personal estate, the release must be specifically of the witness's proportion or part of what is to be recovered in that suit, to render him competent. 3 *Stark. Ev.* 756, 758, in note 1; 9 *John.* 123; 13 *Mass R.* 391.

But a *receipt* is not a *release*. A release does and must in such a case as this operate as an estoppel. A receipt never does. A receipt leaves the party at liberty to show in any subsequent proceedings (in a suit, for instance, which he may bring to recover the very sum mentioned in the receipt itself,) that he has not received an amount corresponding with the import of the receipt, or any thing at all. But whenever an interested witness is rendered competent, by the interposition of a release, it must have the effect of producing a final and conclusive extinguishment of his interest. 3 *Stark. Ev.* 1044, 1272; 2 *T. R.* 366, 369.

But it was not in the power of the distributee while the estate was in a course of administration, to extinguish his interest by a release. Because that interest consisted not only of a right to receive from the estate, as it appears had in this case, but in a liability to refund. That was an interest which no person, but some or all of the other distributees or heirs could release. *Camp. Dig.* 68; *Sect.* 46.

3d. The bill of sale from Ellender Phillips was not admissible. First, for the want of relevancy. Second, want of proof.

The hand writing of a witness cannot be proved if the party have been guilty of any negligence, in not producing the witness. 7 *Com. Dig.* 447, and the authorities there cited. 8 *John. Rep.* 94; 5 *Cranch.* 13, 14; *Cock* vs. *Woodrow*, and *Spring* vs. *South Carolina Ins. Co.* 8 *Wheat.* 268. There was no attempt to produce the witness, before the resort to proof of his hand writing. If the witness can be produced he must. 1 *Phil. Ev.* 178, 179, 199, 219.

4th. The paper purporting to be a copy of a bill of sale from Thomas Phillips, to John and Ally Phillips, was improperly allowed to go in evidence. There was no attempt made to produce the original bill of

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sale, before they resorted to a copy, or copy of a copy. Such a course is inadmissible. The plaintiff must have used every reasonable degree of diligence to obtain the original, and failed in his attempts, before such evidence could be received. 1 *Phil. Ev.* 399, 400; 6 *T. R.* 236, *Rex* vs. *Castleton.*

But a copy of a copy of any document can never be received in evidence, unless the first, from which the last is taken, be made a record by public authority, as enroled deeds. 1 *Phil. Ev.* 408, 410.

A copy of a copy can be admitted only under an authentication by the proper officer or its proof by comparison with the original. In this case there was neither authentication nor proof of comparison *Gilb. Ev.*; 1 *Stark. Ev.* 155, 158.

The original was neither searched nor accounted for in any way.

The document, if proved, would not have been relevant.

WALKER AND FOWLER, *contra:*

The court correctly permitted Samuel Phillips to testify. It is true he was one of the heirs of John Phillips, dec'd, but on his oath he stated that he had no interest whatever in the issue formed, nor had he any interest in the estate, that he had released his interest, and given a receipt. See *Archbold's Practice, p.* 171, where it is laid down clearly that it is not necessary to produce the release.

The bill of sale was correctly recorded and certified in the state of Kentucky. It needed no additional proof to give it authenticity, and the court below, improperly as it is conceived, excluded the certified copy of the bill of sale, until it was proven by one who had read and examined the original before it was recorded, and swore that it was a true and perfect copy from the original. The only other exception taken, is relative to the exclusion of evidence in the admission of the bill of sale from Elenor Phillips to Thomas Phillips. This bill of sale was proven by establishing the signature of the grantor after accounting for the absence or incapacity of the subscribing witnesses. 2 *Call.* 574; 4 *Johnson's Reports*, 461. Upon examination of the bill of sale it will be found that the evidence it afforded was not prejudicial to the appellant's interest, and could not have affected the decision of the jury. See 4 *Hening & Munford*, 550; 2 ditto, 55.

Unless the exception is to the authentication of the bill of sale, the court will presume that objection waived. See 2 *Littell*, 194.

LACY, *Judge*, delivered the opinion of the Court: This is an action of detinue brought by the appellee, administrator of John Phillips, deceased, against the appellant, executor of the last will and testament of Thomas Phillips, deceased, for the recovery of the slave in the declaration mentioned.

The declaration contains but one count, founded on a supposed case of bailment, and the unlawful detention of property. The defendant pleaded two pleas in bar of the action. The first was a plea of *non detinet*, and the second, a plea of the statute of limitations. The plaintiff took issue on the first plea, and put in his replication to the second —to which there was a joinder and issue. The parties went to trial on the issues thus formed, and the plaintiff to support his cause of action, read in evidence a bill of sale from Ellender Phillips, and a copy of a bill of sale from Thomas Phillips to John Phillips for the slave in controversy; and, also, called Samuel Phillips as a witness, who testified in the case. The defendant objected to the reception of the bills of sale, and the testimony of Samuel Phillips as inadmissible evidence, but the court overruled his objections, and suffered the testimony to go to the jury. He then filed three several bills of exceptions to the opinion of the court, setting forth the nature and character of the testimony received, and the circumstances under which it was offered, spreading the whole matter upon the record. The case was then submitted to the jury, who found the issues for the plaintiff, and judgment was accordingly entered up in his favor for the slave in question.

The defendant then filed a motion for a new trial, and one in arrest of judgment. The court overruled both motions. He then prayed an appeal to the Supreme Court, which was granted.

The assignment of errors presents several highly interesting and important questions for our consideration and decision.

The first is, that detinue will not lie against an executor or administrator, except where goods are bailed to the testator or intestate upon a contract to redeliver them, or where he sells and agrees to deliver specific goods at a future day, and the goods come to the hands of the executor or administrator. It is insisted, on behalf of the defendant, that the present action does not fall within either class of these cases, and therefore cannot be maintained.

This question we do not consider as now properly before us, because the record shows no such state of facts as would legally give rise to it. By a critical analysis of the declaration, it will be perceived that the

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first object of our enquiry ought to be, to ascertain in what character the defendant is charged. In order that this matter may be put in a clear point of view, we shall have to copy the declaration:

"*Richard C. S. Brown, executor of the last will and testament of Thomas Phillips*, deceased, was summoned to answer *Arthur Hicks*, administrator of all and singular the goods and chattels, rights and credits of John Phillips, deceased, heretofore unadministered upon, of a plea that he render unto the said *Arthur Hicks*, administrator as aforesaid, a certain mulatto woman slave named Sylvia, about 35 years of age; and thereupon the said *Arthur Hicks*, administrator as aforesaid, by attorney complains. For that, whereas the said *Arthur Hicks*, administrator as aforesaid heretofore, to wit, upon the 1st day of May, 1837, at the county of Crawford, and within the jurisdiction of this court, delivered to the said *Richard C. S. Brown, executor as aforesaid*, a certain mulatto slave named Sylvia, about 35 years of age, belonging to and being part of the estate of John Phillips, deceased, heretofore unadministered upon, of great value, to wit, of the value of one thousand dollars, good and lawful money, to be delivered by the said *Richard C. S. Brown, executor as aforesaid*, to the said *Arthur Hicks*, administrator as aforesaid, when he, the said *Richard C. S. Brown, executor as aforesaid*, should be thereunto afterwards requested; yet the said *Richard C. S. Brown, executor as aforesaid*, although he was afterwards, to wit, on the day and year last aforesaid, at the county of Crawford aforesaid, requested by the said *Arthur Hicks*, administrator as aforesaid, so to do, hath not yet delivered the said mulatto slave named Sylvia, about 35 years of age, to the said *Arthur Hicks*, administrator as aforesaid, but hath hitherto wholly refused and still doth refuse, and unjustly detains the same from the said *Arthur Hicks*, administrator as aforesaid, to wit, at the county aforesaid, to the damage of the said *Arthur Hicks*, administrator as aforesaid, fifteen hundred dollars; therefore he brings his suit." The plaintiff in conclusion of his declaration, made profert of his letters testamentary on the estate of John Phillips, deceased.

Is the defendant here charged in his representative, or in his individual character? Wherever his name appears in the declaration, it will be seen that he is described "*executor as aforesaid.*" Do these terms charge him *as executor?* or are they any thing more than a mere personal description?

The court is well aware that there exists a very general and deep

rooted repugnance in the minds of a number of distinguished jurists against what may be termed legal subtleties or technicalities, and that many of the more modern decisions have gone very far to free the rules of practice and evidence from these over nice distinctions and unmeaning absurdities. It is worthy of being remembered that all the higher and more enlightened judicial tribunals of our own country, as well as in England, have been extremely cautious in introducing these improvements, and have displayed a laudable zeal and resolution in guarding the science of correct pleading from all improper innovations and unwarrantable encroachments, well knowing that proper legal forms and their corresponding appropriate remedies have their true origin in the highest sources of inductive philosophy, and lie at the very foundation of all the great and essential principles of political liberty, as well as of civil justice;—and whenever they are lost sight of, or totally disregarded, the spirit and substance of things cannot and will not be long continued or preserved.

The object of all judicial proceedings is to arrive at legal certainty, and by this is meant certainty in general, in the names and characters of the parties that sue or are sued; certainty in the cause of action and breaches assigned, certainty in the issues and verdict, and certainty in the judgment and its incidents. This can only be arrived at by a fair and reasonable interpretation of the words used and their intendment, of the context and subject matter in dispute, of the supreme will or intention of the law, of the evils complained of, and of the remedies to be applied. It follows from these rules that the demandant or plaintiff, and the tenant or defendant, should be therefore well named, that the court may see in what character or capacity the parties sue or are sued, in order that they may be able to pronounce a valid judgment.

If a plaintiff sue a defendant and his cause of action arises against him out of his office, he should be named or described in the declaration by his title of office. For instance, a suit against a sheriff or collector. So, if land be demanded of a person held in right of his church, or if dower be demanded against a guardian, or an action brought against an heir. In all these cases the defendant should be charged, *as sheriff, as collector, as parson, as guardian, and as heir;* for without such an allegation, or one of equal certainty, a party cannot be held responsible in his representative character. 15 *Edd.* 4, 27; *T. H.* 1, 6, 64; *S.* 4. And in an action against an executor, the

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plaintiff ought to name the defendant *as executor*, and if he fail to do so, unless it somewhere appear in the pleadings, or by the assignment of the defendant, that there is a substantive allegation charging him *as such*, he cannot be considered as sued in his representative character. 1 *Salk.* 296; 2 *Bos. & Pull. Brigden* vs. *Parkers*, 424; 1 *Com. Dig. Abatement*, 89 (*F.* 20,) *Ibid*, *Pleader* (2 *D.* 2.) If the rule was different, the defendant could not plead *ne unques executor;* or that he was not an administrator, or any thing else that would abate the suit or writ. *Rattoon* vs. *Overacker*, 8 *Johnson's Rep.* 97: 2 *Call*, 49.

Where the process is to answer the plaintiff in a special character or right, as if it describe him as suing *qui tan*, or *as executor*, or *as assignee of a bankrupt*, the declaration can only be in the same character or right; and if the plaintiff declare generally, the court will set aside the proceedings.

And if it has been ruled that, although the process describe the plaintiff "*being the executor*, or *administrator*, or *the assignee of a bankrupt*," without introducing any words that showed that he was *sued as such*, the plaintiff might nevertheless declare generally, treating the description as a mere superfluous addition, just as if any other idle, or unmeaning word had been in the declaration. 1 *Chit. Pleadings*, 284; *Tidd's Prac.* 450; 8 *T. R.* 414; 3 *Wils*, 616; 4 *Bur.* 24, 17; 3 *Chit. Prac.* 182.

In the case of *the Dean and Chapter of Bristol* vs. *Guyse*, reported in 1*st Saunders*, 112, it was objected upon demurrer that the plaintiff had mistaken his cause of action, for the defendant is sued in his own right, and not as executor, as he ought to have been. *Fitz. Brief*, 111, 940. The counsel for the plaintiff said if it was not on the roll, that he would ask leave to discontinue. But on examining the roll it was found that although the defendant was not named *as executor* in the beginning of the declaration, yet in the subsequent part of it, he was so declared against, and consequently the averment was held to be good. For in the declaration it was expressly averred that William Guyse made his will and appointed the defendant executor, and entered, and was possessed *as executor*. This averment, the defendant might have traversed, and this was the reason why the allegation that he entered and was possessed *as executor*, was deemed sufficiently certain to charge him in his representative character. *Holiday* vs. *Fletcher*, 2 *Ld. Raym.* 1510; *Kamns* vs. *Hughes*, 7 *Bro. Prac. Cas.* 550.

The principle here decided is directly in point, and the case cer-

tainly a very strong one. But it is not altogether so conclusive as the case of *Hempstall* vs. *Roberts and others*, reported in *5th East*, 154.

That case is a counterpart of the present one, and essentially the same in all in facts and allegations. There the action was upon a promise alleged to have been made to the plaintiffs, *Executrix and Executors as aforesaid*, and a profert was made of the letters testamentary; and there were also other counts in the declaration, showing that the plaintiffs sued in their representative character. Upon this state of case, it was argued that by a necessary implication, as the promise was alleged to have been made to the plaintiffs themselves, *Executrix and Executors*, it must be taken to be made to them in their representative character, and meant the same thing as if it had been said *as Executrix and Executor as aforesaid*; and more especially as the latter words *as aforesaid* had reference to the antecedent counts, in which it is admitted that they sued in their representative characters. This position was, however, deemed untenable, and Lord Ellenborough in delivering the opinion of the court, said that the allegation in the declaration, the plaintiffs *being the Executrix and Executors as aforesaid*, is not a substantive averment of their suing *as such* or in *their representative capacity*, and that nothing by intendment can supply the allegation *as Executrix and Executors* as aforesaid.

The case there decided is similarly situated in all its features and proceedings, with the one now under consideration, and the allegations in the two declarations are identically the same.

In both cases the letters testamentary were brought into court, but there the plaintiffs were suing, and the action founded on a promise made to themselves. Here the defendant is sought to be charged on a supposed case of bailment. In that case there were other counts in the declaration, which showed conclusively they sued in their representative characters. Here there is but one count, and it no where appears, either in the beginning, the body, or conclusion of the declaration, that the defendant is charged *as Executor*.

The allegations in each declaration are precisely the same, and even the terms of expression exactly similar. How, then, does the present case stand?

It is evident that there is no allegation or averment in the plaintiff's declaration, charging the defendant *as Executor*, or any words tantamount or equivalent thereto; and it is equally certain that, unless there is some such allegation, he cannot be held responsible in his rep-

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resentative character. The term "*as Executor*" is not words of form, but of *substance*, essentially entering into the nature of the averment, and constituting the substance or gravamen of the action.

There is a striking and wide difference between the averment in a declaration "*Executor, or being Executor as aforesaid,*" and the direct allegation "*as Executor aforesaid.*" In one instance, *Executor, or being Executor as aforesaid,*" are mere words of description, having exclusive reference to personal identity: In the other, the term "*as Executor aforesaid,*" has but one meaning, which is fixed by law, and that is the party against whom the charge is made, is sued in his representative character.

This being the case, the defendant in the action is not charged *as the Executor of Thomas Phillips, deceased;* for the declaration no where alleges that he was sued *as such*, and the words used, *Executor as aforesaid*, are mere matter of description and surplusage; and the antecedent *as aforesaid* refers only to the personal description of the defendant. Indeed, it is very questionable whether the plaintiff himself any where shows that he sues in his representative character, and certainly he does not, unless the declaration and subsequent pleadings clearly establish that fact. The questions still remaining to be decided by the assignment of errors, we will now proceed to dispose of in the order they have been made.

The bills of exceptions furnish a concise statement of the proceedings of the court below, and they set forth with certainty and perspicuity the grade and nature of the evidence received, and the circumstances under which it was admitted. That the court erred in permitting the bill of sale from Ellender Phillips to Thomas Phillips to be read in evidence, is most certain. It was admitted upon the proof of the hand-writing of J. D. McGee, the only attesting witness that was examined as to its execution, or that was sworn upon that subject. It was not shown that the witness had become interested after his attestation, or that he had become infamous by the conviction of a felony, or that he was dead, insane, or that he was beyond the jurisdiction of the Court, or that it was utterly impossible, by due diligence or inquiry, to obtain his testimony, or to procure his personal attendance. It is stated that the witness resided in the county where the suit was brought, and that he was at home a short time before the term at which the cause was decided; and that he was absent on necessary business, and expected to return in a few months.

No subpœna was issued, or served upon him; nor was there any effort made to take his deposition, or to secure his personal attendance.— Such being the state of the case, it was clearly inadmissible to suffer the hand-writing of the attesting witness to the bill of sale, to be proved, and thereby establish the execution of the instrument itself by secondary evidence. This assignment of errors is, therefore, well founded. 1 *Stark*, 337; 5 *Tr. Rep.* 371, *Gross* vs. *Stacker;* 1 *P. W.* 289, *Cunriffe* vs. *Sifton;* 2 *East*, 183; *Strange*, 34.

It is apparent that a paper offered by the plaintiff in evidence and which purported to be a copy of a bill of sale from Thomas Phillips to John Phillips and wife, was clearly inadmissible as evidence. Should this court regard it as a private instrument between the parties, still the loss or destruction of the original is not satisfactorily accounted for upon any principle of evidence, or rule of action. It does not appear that the subscribing witness ever compared or examined the supposed copy with the original, nor did he pretend to say that he knew it to be an exact or sworn copy. All he states is, that he believes the contents of the two instruments are substantially the same, but he has not seen the original for many years. He is the only subscribing witness, as appears from the copy, and his testimony constituted all the proof that was taken as to the execution, or contents of the original bill of sale.

Again: Is the bill of sale of such a nature as is authorized or required by law to be recorded, in order to give validity and effect to the instrument, and to make it a part of the public documents, or records of the country? We are clearly of opinion that it is not. And such being the case, the supposed copy was inadmissible to prove the existence of the original, or its execution. As the instrument was not legally authorized to be recorded, the record itself would have been insufficient to establish that fact; and, therefore, much less can a supposed copy of a copy be allowed as competent evidence for the same purpose. 1 *Stark*, 154; 156 *Bac. A. & T.* 333, *A.* 8; 1*st Mod.* 117; *Stark.* 225; *Gilb*, 89; 5 *Mass.* 547.

It is a universal rule of practice, that a party will never be permitted to resort to secondary or inferior evidence, while it is in his power to adduce a higher grade, or more conclusive testimony. The best attainable evidence shall be adduced to prove every disputed fact.— 1 *Stark.* 389. This rule of evidence is founded upon a supposition of fraud, and its operation is every way highly salutary and important,

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and it applies with peculiar force to the proof adduced in support of both bills of sale. 1 *Stark.* 380. If a deed be lost, a copy is not evidence, if the deed itself be in existence or attainable. The subscribing witness that proves the bill of sale, or the supposed copy of a bill of sale from Thomas Phillips to John Phillips, is clearly incompetent, and ought not to have been permitted to give testimony in the cause. It is admitted that the witness, Samuel Phillips, is the son of the plaintiff's intestate, and that he is the legal distributee of the estate.

The plaintiff endeavored to restore his competency by swearing him upon his *voir dire*, and proving that he had received from, and receipted to the administrator for his portion of the estate. The receipt was not produced in court, nor was its non-production attempted to be accounted for in a legal manner. That the witness had a direct, certain, and vested interest in the event of the suit, cannot be denied, and that his interest was never relinquished or released, is equally evident. Where a witness, under a mistaken belief, supposed he had released all demands and claims against the estate; but upon his own showing it appeared that he was, nevertheless, clearly entitled to his distributive share, he is still held to be incompetent.

This suit is instituted for the recovery of assets, and consequently the witness is legally interested in its event, and wholly incompetent. 1 *Stark.* 125, *Matthews* vs. *Smith;* 2 *Y. & S.* 426; 2 *Dall.* 124; *Strange*, 829.

If the view the court has taken of this subject be correct, and that it is they do not doubt, it follows as a necessary consequence, that all the material evidence relied on by the plaintiff to support his cause of action, was illegal and incompetent, and had it been excluded from the jury, as it ought to have been, a verdict of course must have been rendered in favor of the defendant. The admission by the court of improper or illegal testimony, is a good cause for a new trial. The Circuit Court, therefore, erred in not awarding a new trial in the case.

The opinion of the court below upon all the points reserved on the trial, must be reversed, the judgment set aside with costs, the cause remanded to be proceeded in agreeably to the decision of this court, a new trial awarded, and leave granted to the parties, to amend the pleadings, if asked for or desired.

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PHILLIPS *vs.* HICKS.

DANIEL PHILLIPS *against* ARTHUR HICKS, ADM'R.

APPEAL *from Crawford Circuit Court.*

The same decision made in this case as to proving the hand-writing of the attesting witness to a bill of sale, and as to the incompetency of a distributee to testify, as in the case of Brown, executor, *vs.* Hicks, administrator, reported at page 232.

This was an action of detinue for a slave, brought in the court below by *Arthur Hicks*, administrator, &c. of John Phillips, dec'd, against *Daniel Phillips*. The declaration was in the common form, with one count. The pleadings and issues were the same as in the case of *Hicks*, adm'r of Phillips in the court below against Brown, executor of Phillips, reported at page 232. On the trial the same bill of sale from Ellender Phillips, to Thomas Phillips, was admitted in evidence on the same showing as in that case, and Samuel Phillips admitted to testify under the same circumstances, and a verdict was rendered against the defendant for the slave, or his value—from which judgment the defendant appealed.

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TAYLOR, for the appellant:

WALKER and FOWLER, *contra:*

LACY, *Judge*, delivered the opinion of the court: This is an action of detinue for the recovery of a slave. The declaration contains but one count, which is in the ordinary form, as on a case of bailment.—The defendant put in two pleas to the action: The first, a plea of non-detinet, and secondly the plea of the statute of limitations. Issues were formed on both pleas, and on the trial, the plaintiff, in order to support his cause of action, read in evidence a bill of sale from Ellender Phillips to Thomas Phillips, of the slave in controversy under which the defendant claimed. He also called Samuel Phillips as witness, who was sworn and permitted to give testimony in the cause. The defendant objected to the bill of sale, and to the competency of Samuel Phillips, but the court overruled the objection, and suffered the testimony to be received as evidence. Whereupon, the jury found a verdict for the plaintiff, and the court pronounced judgment

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in his favor. The defendant then prayed an appeal, which was granted him.

The only questions presented for the court to determine, were decided in the case of *Richard C. S. Brown*, executor of Thomas Phillips, dec'd, against *Arthur Hicks*, administrator of John Phillips, dec'd, during the present term. And as the assignment of errors raises but two points, and as both these were directly settled against the plaintiff in the case above referred to, and the reasons and authorities are there given at length, we deem it unnecessary to enter again into the examination of the questions, and we shall therefore content ourselves with simply pronouncing judgment in this case, and giving the proper instructions to the court below.

The opinion of the Circuit Court in permitting the testimony of Samuel Phillips, and the bill of sale from Ellender Phillips, to be read in evidence upon the trial, was evidently erroneous; and the decision is, therefore, reversed. The judgment of the court below must be set aside with costs, the cause remanded to be proceeded in agreeably to the opinion here delivered, a new trial awarded, and leave given to the parties to amend their pleadings if desired.

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MEANS *vs.* CROMWELL and GUTHREY.

WILLIAM B. MEANS *against* CROMWELL AND GUTHREY.

APPEAL *from Jackson Circuit Court.*

By the laws of this State, if a non-resident plaintiff fails to file a bond for costs when he institutes his suit, or if a resident plaintiff becomes non-resident after the institution of his suit, and fails to file a bond for costs, after the defendant or the officer of the court has taken the proper steps to compel him to do so, the defendant may take advantage of it, either by plea in abatement, or motion founded upon the affidavit and notice mentioned in the Statute: And the clerk or sheriff may move to dismiss on notice without affidavit.

When the objection is taken by a motion, the plaintiff may file his bond at any time before the motion is actually made in court, and proceed with his suit.

The omission to file a bond for costs, is matter in abatement only, where a non-resident sues. If the plaintiff becomes non-resident after the commencement of his suit, it may be pleaded in abatement *puis darrein continuance.* And when such plea in abatement is filed, the plaintiff cannot subsequently file his bond for costs, but must take issue on the plea.

The want of a bond for costs cannot be taken advantage of by motion, without affidavit or notice.

This was an action of debt commenced in the court below by the appellant against the appellees, to May Term, 1838. At the return term the appellees moved to dismiss the suit, because the plaintiff was a non-resident of the State at the time of commencing the suit, and no bond for costs was filed at or before the commencement of the suit. These facts being proven, the court sustained the motion, and the suit was dismissed, from which judgment of dismissal an appeal was taken.

HAGGARD, for the appellant:

It will be seen that any lawyer may issue writs, &c. See *McCampbell's Digest*, 324, at top of page; and section 5, 6, 7, and 7, Judicial Proceedings, that if costs are secured to officers, &c. the object of the law is complied with. The statute as to costs is remedial, and, therefore, should be construed liberally. It is wholly immaterial whether the bond is filed or dated, provided it is in time for an indemnity, and a recovery can be had upon it. That a recovery could be effected upon the bond taken in this cause, seems to the counsel most clear.—Then, it was error in the court to dismiss the suit. The record is very inartificially made out: no date given to the judgment. The bond is made a part of the record. If the judgment should be affirmed the

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costs will be collected from the obligors in the bond for costs. The bond should be either available, or void *in toto*. If void *ab initio*, it is no office paper, and no recovery can be effected on it. It would be no answer to an action on said bond, to say that it was dated and filed after the impetration of the suit, and therefore void. Such bonds are recognized; and while they are in full force, the suit cannot be dismissed on account of the date of them. *Haerat in litera; haerat in cortice.* The judgment should be reversed.

RINGO, *Chief Justice*, delivered the opinion of the court: This is an action of debt brought by *Means* against *Cromwell* and *Guthrey*, in the Jackson Circuit Court.

The declaration was filed, and writ issued on the 26th day of April, 1838, returnable to the next May Term of said court. At the return of the writ, the defendants moved the court to dismiss the suit, on the ground that the plaintiff was a non-resident of this State, at the time the suit was instituted, and did not file with the Clerk before the institution thereof, a bond with security for costs, as required by law. This motion the court entertained, and the facts being established, dismissed the case, and rendered judgment for costs against the plaintiff:—whereupon the plaintiff appealed, and has prosecuted his appeal to this court.

The errors assigned by the appellant present two questions for the consideration and decision of this court: 1st, Did the court err in dismissing the suit *on motion, without either plea or affidavit?* 2d, Did the court err in deciding that a bond for costs, filed and dated after the institution of the suit, but before the trial, did not entitle the plaintiff to maintain his suit against the defendant?

The act of July 3d, 1807, provides that "in all cases where the "plaintiff resides out of this Territory, in *qui tam* actions, in suits on administration bonds, office bonds, and the *defendant making affidavit* that he has a just cause of defence against the whole of the plaintiff's demand, the court in which such suit is commenced may grant a rule that the plaintiff give security for costs at the next term; and for want of security the court may, on motion, order judgment of non-suit to be entered." *Arkansas Dig.* 315.

The act of the 7th November, 1808, contains the following provisions—that "every person who shall not be resident within this Territory shall, before he institutes any suit in the courts of this Territory,

file, or cause to be filed, a bond with sufficient security, with the Clerks of the court where his suit is instituted, for the payment of all costs which may accrue in said suit; and if at any time after the commencement of a suit by a resident, he should become non-resident of this Territory, it shall be the duty of such suitor to file his bond as aforesaid;—and it shall be lawful for the defendant, or the Clerk or Sheriff in the court in which such suit is brought, to give at least one month's notice to the plaintiff aforesaid, his known agent or attorney, that a motion will be made to dismiss the suit from the docket, provided bond and security for costs is not filed, and in case of neglect or refusal to comply with such notice, it shall be the duty of every court *on motion* to dismiss such suit.

"If, at any time, a court shall be satisfied that the plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, it shall be lawful for the court to direct that a notice should be served on such plaintiff, his attorney, or agent, requiring him to file a bond with security for costs, on default of which his suit shall be dismissed." *Arkansas Dig.* 315.

These provisions of law are obviously intended to accomplish the double purpose of securing the defendant, and the Clerk and the Sheriff, in the court where the suit is instituted, against hazard or loss, arising either from the fact of the plaintiff's non-residence in the State, at or after the time of the institution of the suit, or from his unsettled condition, or his inability at any time to pay the costs of suit, for which he may be liable; and protecting the plaintiff from vexation or surprise, by imposing upon the defendant, if he makes the motion, the necessity of supporting his motion by affidavit, stating that he has just cause of defence to the whole of the plaintiff's demands, and requiring in all cases, at least one month's notice of the motion, to be given to the plaintiff, his known agent, or attorney.

With a view to the former, every non-resident plaintiff at the time of the institution of his suit, is expressly required to file a bond, with sufficient security for the payment of all costs which may accrue in the suit, before he institutes any suit in the courts of this State. And a resident plaintiff becoming non-resident after the institution of his suit, is in like manner expressly required to file a similar bond. And in either case, upon the failure of the plaintiff to comply with the requisitions of the Statute, the defendant may avail himself of the default,

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either by a regular plea in abatement, setting forth the facts on oath, and filed in due time, or by a motion to dismiss the suit from the docket, founded on his affidavit stating "that he has a just cause of defence against the whole of the plaintiff's demands," and a notice of such motion served on the plaintiff, or his known agent, or attorney, at least one month previous to the motion being made; and the Clerk or Sheriff may, upon the like notice, without affidavit, make a motion to dismiss; but in either case, when the objection is taken by a motion to dismiss, the plaintiff is authorized by a just and liberal construction of the statutory provisions before recited, to file his bond with security, at any time before the motion is actually made in court, and if the bond be good and the security sufficient, the court is bound to receive it, and the plaintiff is at liberty to proceed with his suit; but if no bond is filed, or the bond or security, if one be filed, is insufficient, the suit may, upon affidavit and notice, or notice simply, if at the instance of the Clerk or Sheriff, be dismissed on motion.

By this construction, effect is given to the several provisions of the before recited acts of 1807 and 1808, passed in *pari materia*, and the apparent conflict between them obviated, and the policy and objects of both maintained and enforced.

The tribunals of justice are open equally to residents and non-residents, and although the language of the Statute is express and imperative, yet the disability imposed by it upon persons; non-residents in the State, is in its character, temporary and personal, it neither impairs his right of action, or prohibits the court from exercising jurisdicution in the case; but merely suspends his right to sue in the courts of the country, until he shall become a resident of the State, or file a bond with security for the payment of the costs of his suit.

In every point of view, therefore, in which it can be considered, it is matter in abatement only, and must be so regarded. *Hopkins* vs. *Chambers, &c.* 7 *Monroe*, 254; 1 *Chitty*, 479, 480. And, therefore, it is, that the defendant may take advantage of it by *plea in* abatement for, and on account of, the disability of the plaintiff to sue without having filed bond and security for costs, when he was non-resident, at the time of the institution of his suit; and for the like reason, if he was resident at the period of the institution of his suit, but afterwards becomes non-resident of the State, without filing bond with security for costs, as required by the Statute. This may be pleaded in abatement, *puis darreir continuance*, in like manner as the death of a sole plaintiff,

or any other disability to prosecute the suit arising after the commencement thereof; and this is, in the opinion of the court, the most certain, efficient, and approved method of taking advantage of the omission of the plaintiff to file bond with security for costs, as required by law.

By adopting this practice, the plaintiff would be deprived of the advantage of subsequently filing the bond, allowed him on the motion to dismiss, and would be driven necessarily to take issue, either upon the fact of his non-residence, or his having filed the bond, as required by the Statute before the institution of the suit, or before he removed from the State, if he was resident therein when the suit was commenced. *Jones* vs. *Lacy*, 3 *J. J. Marshall*, 543.

We are aware that a different practice has prevailed in this country, and that motions to dismiss, for the failure by non-resident plaintiffs to file bond with security for costs, before the institution of their suits have been generally entertained, without either affidavit or notice; but this practice, however it may have been indulged, or permitted by the courts, is, in our opinion, repugnant to the letter as well as the spirit of the law, and entirely subversive of its most wise and salutary provisions.

We are, therefore, of opinion, that the Circuit Court did err in dismissing the suit, on the motion of the defendants, no affidavit having been made, or notice of the motion given to the plaintiff, his known agent or attorney, as required by law; and for this error, the judgment must be reversed with costs, the cause remanded to the Jackson Circuit Court, and reinstated on the docket of said court, for further proceedings to be there had, according to law, and not inconsistent with this opinion.

The same opinion and judgment were given in the case of *William B. Means* against *William Nall*, as in the foregoing case; the points in the case being precisely the same.

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BERRY vs. LINTON.

H. A. BERRY *against* JOHN LINTON.

ERROR *to Johnson Circuit Court.*

1	252
57	531
1	252
74	618
1	252
78	596
82	90

Justices of the peace having by law exclusive original jurisdiction in all matters of contract except covenant, where the sum in controversy is one hundred dollars or under, two or more separate causes of action, each less than one hundred dollars, but amounting in all to more than one hundred, cannot be joined together in one declaration so as to give the Circuit Court jurisdiction.

This principle does not interfere with the settled rule, that the plaintiff may join distinct causes of action in several counts of the same declaration.

The best criterion as to such joinder seems to be, that where the causes of action are of the same nature, and may properly be the subject of counts in the same species of action, they may be joined.

The question of jurisdiction is not glanced at in the rules or decisions upon this subject.

The case of *Laugham & Gentry*, vs. *Boggs*, 1 *Missouri Rep.* 474, overruled.

It is not the aggregate amount demanded in the declaration, but the amount of each separate demand or cause of action, which determines the jurisdiction.

This was an action of debt brought to March term, 1833, in the court below, by the plaintiff in error against the defendant in error. The declaration demanded the sum of $120 40 cts., and counted upon three writings obligatory, one for $44 25, one for $12 14, and the other for $66 25. At the return term the defendant moved the court to dismiss the suit, for want of jurisdiction apparent on the record, because the several writings sued on were each within the jurisdiction of a justice of the peace. This motion was sustained by the court below, the case dismissed, and the plaintiff sued his writ of error.

SCOTT, for plaintiff in error:

The Circuit Courts have jurisdiction in all matters of contract where the sum in controversy is over one hundred dollars. *Const. Art.* 6; *Sec.* 3.

Where the plaintiff has several distinct causes of action, he is allowed to pursue them accumulatively in the same writ. *Stephen on Pleading, p.* 279. It is a rule in law that several counts may be joined in the same declaration for different causes, provided they are of the same nature; in an action upon contract the plaintiff may join as many different counts as he has causes of action. 1 *Tidd. p.* 8, 9. Indeed, if several actions are brought by the same plaintiff vs. the same defendant, at the same time for causes of action which may be joined, the court will compel the plaintiff to consolidate them, and if the defend-

ant be holden to bail to pay the costs of application. *Chitty's Pleadings, Vol.* 1. *p.* 228.

LINTON, *contra:*

The Circuit Courts of Arkansas are courts not of general jurisdiction, only having jurisdiction of contracts where the sum exceeds one hundred dollars, such is the jurisdiction of the Circuit Court of the U. S.; and it is well settled that sums cannot be added to give that court jurisdiction.

By the Constitution of Arkansas, all sums not exceeding one hundred dollars and by express statute, (See *McCampbell's Digest, p.* 281; *Sec.* 81,) it is expressly provided that no plaintiff shall institute his suit in the Circuit Court where the sum is in the jurisdiction of a justice of the peace. It is believed that each and every of the sums set out in plaintiff's declaration at the time made and when declared on, was within the jurisdiction of a justice of the peace; and jurisdiction when once fixed cannot be altered, it being a maxim that consent can do away error but cannot give jurisdiction.

LACY, *Judge*, delivered the opinion of the court:

This is an action of debt brought by the plaintiff against the defendant on several writings obligatory. The defendant moved the court to dismiss the cause for want of jurisdiction, which motion was sustained. To reverse the judgment given on this point, the plaintiff now prosecutes his writ of error.

This suit is founded on several distinct causes of action, none of which taken separately, amount to the sum of one hundred dollars, or upwards, but all of them taken collectively, is equal to the sum of one hundred and twenty dollars and sixty-four cents. By an act of the legislature approved October 24th, 1820, (*Digest*, 360, *Sec.* 26,) "the jurisdiction of the justice of the peace was extended from ninety to one hundred dollars." And by an act of the legislature passed January 11th, 1814, "the several courts of record shall take cognizance of no action, suit, or complaint made cognizable before a justice of the peace." *Digest, p.* 351. And by the schedule of the Constitution, (*Sec.* 2, *p.* 20,) "all laws now in force in the Territory of Arkansas, which are not repugnant to the constitution, shall remain in full force until they expire by their own limitations or be altered or repealed

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by the general assembly." And by the 3d section of the 6th article of the constitution, "the circuit court shall have original jurisdiction over all civil cases which shall not be cognizable before justices of the peace until otherwise directed by the general assembly, and original jurisdiction in all matters of contract where the sum in controversy is over one hundred dollars." And by the 15th section of the same article, "Justices of the peace shall have individually, or two or more of them jointly, *exclusive original jurisdiction* in all matters of contract, except in actions of covenant, where the sum in controversy is one hundred dollars or under. The constitution confers upon "the Circuit Court exclusive original jurisdiction of all crimes amounting to felony at common law;" and it declares that justices of the peace shall in no case have jurisdiction to try any criminal case or penal offence against the state, but may sit as examining courts, and commit, discharge or recognize to the court having jurisdiction, for further trial, offenders against the peace."

It will be perceived from an inspection and analysis of these clauses that the object and intention of the convention was to create two separate and distinct jurisdictions both in civil causes and in criminal offences, and that a certain class or denomination of causes is assigned to the justices of the peace, and a different class or denomination of causes was given to the Circuit Court.

The question now before us only embraces a single point, but it is one of magnitude and of some difficulty.

Has the Circuit Court jurisdiction of the case, or is it properly cognizable before a justice of the peace, or are the two jurisdictions concurrent and has the party sueing a right to his election.

The decision of this question depends upon the construction of the constitution and the principles of law applicable to that instrument.

The declaration contains but one count embracing several distinct causes of action, all accruing to the plaintiff in the same right and of the same dignity, and when the same are taken collectively, they amount to one hundred and twenty dollars and sixty-four cents, but taken separately from each other, no one sum or cause of action equals or exceeds one hundred dollars.

On the part of the plaintiff, it is contended that several distinct causes of action can be joined in one count or in different counts in the declaration, and if their united sum exceeds one hundred dollars,

the Circuit Court has jurisdiction of the subject matter in dispute; and to dismiss a case under such circumstances is manifest error.

To sustain this position it is said that the law abhors a multiplicity, or circuity of actions, and therefore the party may join in the same declaration one or several counts, but different and distinct causes of action, and where it appears a plaintiff has two or more causes of action, which may be joined, he ought to bring one action only, and if he does not, a rule will be entered against him to consolidate his action and compel him to pay the costs. That a plaintiff who has several distinct causes of action is allowed to pursue them accumulatively, cannot be denied. But then this principle has exclusive reference and application to joining distinct causes of action in several counts in the same declaration. Thus in an action upon contract in account, assumpsit, covenant, annuity, or *scire facias* the plaintiff may join as many different counts as he has causes of action. So in actions for cost independently of contract, the plaintiff may join in case or detinue, replevin or trespass. Counts in action upon contract cannot be joined with counts for wrongs independently of contracts, nor can counts in any one species of these actions be joined in counts of another. 1 *Bac. Abridg.* 30; 2 *Lutw.* 1449; 1 *Ld. Raym.* 83; 11 *Johnson*, 479; 9 *Johnson*, 246; *Thompson* vs. *Shepherd*; *Stephen on Plead.* 275.

There has been much dispute and considerable contrariety of opinion in regard to the true test to determine what different counts may, or may not be joined in the same declaration. LEE, *Ch. Justice*, contends that the true way to determine the matter is to see whether the process and judgment are the same on both counts, while *Justice* WILMOT insists that the better criterion is to consider whether the two counts, joined in the same declaration, would admit of the same judgment. But *Justice* BULLER holds the rule to be universal, that where the same plea is pled and the same judgment rendered in both counts, they may be joined in the same declaration, otherwise not; but *Tidd*, in his excellent treatise on practice, p. 9, 10, conclusively demonstrates, that none of those rules or tests are entirely free from objection. For instance, case and trespass cannot be generally joined, though the same plea and the same judgment may be given in both counts in the declaration. The best criterion seems to be that where the causes of action are of the same nature and may properly be the subject of counts

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in the same species of action they may be joined, otherwise they cannot. Then the nature of the cause of action is the best, though not an infallible test by which to decide as to the joinder or non-joinder of different counts or distinct causes of action in the same declaration. 1 *Chit. Plead.* 229. Several counts cannot be joined in the same declaration, unless the cause of action should in all of them, be in the same right, and upon this ground it is holden, that a plaintiff cannot join in the same declaration a demand as executor with another which accrued to him in his own right, and such misjoinder would be a defect in substance and fatal in general demurrer or in arrest of judgment, or in writ of error. 1 *Salk.* 102; *Strange*, 12, 71, 24; *Durn. & East.* 277; 2 *Saunders*, *William's note*, 117, *d. c.*

It will be seen in all these cases that the question of jurisdiction was never made or even glanced at, and the principles decided have entire and exclusive reference to the joinder and non-joinder of distinct causes of action in the same declaration, and the rules and tests by which the matter was determined. In the case of *Laugham & Gentry* vs. *Boggs*, (*Missouri Rep.* 474,) the point now before us was expressly decided, and that on a statute exactly similar to our own, the reasoning of the court is by no means satisfactory, and proceeds upon a mistaken view of the rule requiring different causes of action to be consolidated, in order that the defendant may not be harrassed by a multiplicity of suits or the payment of unnecessary costs.

The court take for granted the question they had to decide and the authorities they rely on in support of their opinion, prove nothing; for it cannot be shown that they possess the most remote applicability to the subject that was before them. Does it necessarily follow because separate and distinct causes of action may be joined in different counts in the same declaration, where they accrue in the same right, that therefore, when each of the causes of action taken separately is not within the jurisdiction of the Circuit Court that it is lawful to unite them and thereby confer jurisdiction upon that tribunal against the express intention and deliberate will of the Legislature. Such conclusions, if carried fully out or pushed to their legitimate consequences, would enable the court, by construction, to change the entire jurisdiction of the different legal tribunals, and that too in express violation of the laws and the constitution. The question now before us has been expressly decided in *Lightfoot* vs. *Peyton*, *Hardin*, *p.* 3; and in *Grant* vs. *Tams*

& Co., 7 *Monroe*, 221, the doctrine is again recognized and confirmed, that it is illegal to unite several demands in order to produce a sum that would give jurisdiction to the court, when without that union it had no cognizance of the matter. The court seem to consider the question so clear and familiar that no train of reasoning or authorities are cited in support of the principle.

The constitution puts this matter in a clear point of view. It declares that "the Circuit Court shall have original jurisdiction of all civil cases, which shall not be cognizable before a justice of the peace, where the sum in controversy is over one hundred dollars." Are the separate demands here cognizable before a justice of the peace, or is the sum in controversy over one hundred dollars. It is evident that taken separately, they fall within the jurisdiction of the justice of the peace, for the amount in controversy is less than one hundred dollars, and the constitution declares "that justices of the peace shall individually, or two or more of them jointly, have *exclusive original jurisdiction* in all matters of contract, except in actions of covenant, where the sum in controversy is one hundred dollars or under." Language cannot be more certain or explicit than the terms here used. It was the object and intention of the grant, not only to create two separate and distinct jurisdictions, but to mark their respective boundaries with the utmost accuracy and precision. The jurisdiction of each court in its own proper and peculiar sphere is original and exclusive, and it nowhere appears, either in the terms or nature of the instrument itself, that it was ever in the design or intention of the convention to confer concurrent jurisdiction upon both tribunals so far as the sum or demand in controversy was concerned. If the grant of the constitution does not constitute two separate and distinct jurisdictions, then no words or terms of expression are capable of creating such a power. As the separate sums or demands were each cognizable before a justice of the peace, then that court had exclusive jurisdiction of the matter in controversy, and that jurisdiction could not be wrested from it and the right conferred on the Circuit Court.

The injunction of the constitution is certain, positive and imperative, and its obligations cannot be defeated or annulled by indirection, or by uniting several separate sums in one demand to give jurisdiction. Can the joinder or non-joinder of distinct causes of action in one count in the same declaration oust one tribunal of its jurisdiction conferred by

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the constitution and give it to another in violation of its express provisions. If such should be the construction given to the instrument, the suitors by their mere election would have it in their power, not only wholly to disregard the positive injunctions of the grant, but to change and alter its meaning in one of its most essential provisions and thereby to create a concurrent jurisdiction in a certain class of cases unknown to the constitution.

As the jurisdiction of the Circuit Court and justices of the peace are kept separate and distinct in its creation and organization, by what rule of construction or upon what principle of justice can they be united for the purpose of defeating the will and objects of the grant.

The principle of separate and distinct jurisdictions pervades our whole judicial system, and it was the design of the constitution to preserve one unbroken and harmonious chain of action throughout the entire plan. For instance, the Supreme Court has appellate jurisdiction only, except in cases otherwise provided for by the constitution. The Circuit Court has exclusive original jurisdiction in all cases that amount to felony at common law. And justices of the peace have no jurisdiction to try and determine criminal or penal causes, but may examine, commit, discharge or recognize offenders to the court, having jurisdiction for further trial; they have no jurisdiction in civil cases except the sum in controversy is one hundred dollars or under. What is the true sum here in controversy? Is it the aggregate amount set forth in the declaration or writ, or is it the separate and distinct sums or causes of action? Can the plaintiff by uniting several demands in one count, not only evade the express provisions of the constitution, but commit what is termed in law a fraud upon the instrument itself, and thereby confer a jurisdiction upon the Circuit Court, which it was never intended to possess? Certainly not. Again, if the justice of the peace had exclusive jurisdiction of the subject matter, then the Circuit Court can have no part of that jurisdiction except by appeal or writ of error. It cannot originally take cognizance of the cause, for it has no original jurisdiction of any civil cause which is cognizable before a justice of the peace. This being the case, it is clear that the Circuit Court did right to dismiss the cause for want of jurisdiction. The judgment of the court below must therefore be affirmed with costs.

PALMER AND SOUTHMAYD *against* ASHLEY AND RINGO.

APPEAL *from Pulaski Circuit Court.*

The same points decided as in the case of *Means* vs. *Cromwell* and *Guthrey*, page 247

Palmer and *Southmayd*, merchants and partners, complained of *Ashley* and *Ringo*, partners in the practice of law, in the court below, "of a plea of trespass on the case." The declaration contained several counts for failure to collect demands entrusted to the defendants, as attorneys, each concluding with the form of words commonly used in assumpsit, and a breach in assumpsit, followed by a count and breach in indebitatus assumpsit. A bond for costs was filed by the plaintiffs, who were non-residents of the State, before the commencement of the suit, which purported in the body of it to be filed in an action of assumpsit. The writ was to answer to a plea of "Trespass on the case."

On the 18th of April, 1838, the defendants moved the court below to dismiss the case, on the ground that there was no bond for costs filed therein applicable to the case, and no sufficient bond for costs; and also moved the court to quash the writ, and dismiss the case on the ground of variance between the writ and declaration. On the same day the defendants filed their demurrer to the declaration. Upon this state of the case, the court dismissed the suit, for want of a sufficient bond for costs, and the plaintiffs appealed.

FOWLER, for the appellants:

This was an action of assumpsit instituted by the appellants, *Palmer* and *Southmayd*, against *Ashley* and *Ringo*, in the Pulaski Circuit Court. The appellants were non-residents, and *before* the institution of the suit, filed their bond for costs, for a suit about to be commenced in an action of *assumpsit*. *Vide Gey. Dig.* p. 244, sec. 5.

In the commencement of the declaration, the plaintiffs complained "*of a plea of trespass on the case*," without adding the words "or promises," or any phrase of like import. Each and every *count* in the declaration is *technically* and substantially in assumpsit, and so are the breaches and conclusion.

The writ corresponds with the declaration, requiring the defendants to answer to "*a plea of trespass on the case.*"

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PALMER, and SOUTHMAYD vs. ASHLEY and RINGO.

At the return term, the defendants, *Ashley* and *Ringo*, appeared by attorney, and moved to dismiss the suit, because there was no bond for costs filed *applicable* to the case, the one filed being for an action of *assumpsit*, and the existing suit one technically in *case*, and to quash the writ on account of its variance from the declaration; and, at the *same time*, filed their general demurrer to the declaration. No further notice was taken of the demurrer, or of that branch of the motion requiring the writ to be quashed; but the residue of the motion was sustained by the court, and the suit dismissed on the ground that the suit pending was in *case*, and the said bond for costs applied to a different species of action—*assumpsit*. And judgment was, therefore, given against the said appellants, for costs of the suit; from which final judgment this appeal was taken.

The appellants contend:

1st, That the whole proceedings on their part, including said bond and suit, strictly and technically correspond, and are in *assumpsit*.

2d, That the words in the beginning of the declaration "trespass on the case," are sufficiently descriptive, without adding those of "*upon promises*," in assumpsit, "or the like; that these phrases are, at best, but surplusage if inserted; and that an action "on the case," in its general meaning, includes *assumpsit*, and means assumpsit, unless the idea is controverted by the body of the declaration. *Vide* 1 *ch. Pl.* 135, 136; 1 *Saund. Pl. & Ev.* 415; *Plead. Asst.* 299; 11 *East.* 65; 1 *Saund. Pl. & Ev.* 335.

3d, *Every count* in the declaration is *in assumpsit*, and would conclusively fix the character or species of the action, even supposing that the beginning were not sufficiently definite. Each case is for dereliction of duty of the said *Ashley* and *Ringo*, as attorneys, as is properly laid in assumpsit. *Vide* 1 *ch. Pl.* 96, 139, 140; 2 *ch. Pl.* 96, 97; 1 *Saun. on Pl. & Ev.* 100, 415.

4th, Supposing the objection to the writ to be tenable, which is not because the declaration and writ under our laws are joined together, and must be taken together, as to the description of the suit, &c.; yet such objection was cured by the said *Ashley* and *Ringo's* appearing, and filing their demurrer to the declaration, which appearance cured all possible defects in the writ, had there been any—which brings us back to an isolated point: *what species of action is described in the declaration?* Can this court say that it is *not assumpsit?* This settled, and the decision of the Circuit Court must be reversed, as in direct

violation of law, and vexatious and oppressive to individual right.

WATKINS, TRAPNALL, and COCKE, *contra*:

The appellees rely upon the following points:

1. In the bond for costs in this case, the action is described to be a "a plea in assumpsit."

2. In the caption to the declaration and statement of the cause of action, wherefore the plaintiffs complain, the action is described and stated to be a plea of "trespass on the case."

3. In the writ in this case, the defendants were summoned to answer unto the plaintiffs, to "a trespass on the case."

There is at the present day as much difference between the action of trespass on the case and an action of assumpsit, as between any other two forms of action known to the common law.

One is an action *en contractu*—the other is an action *ex delicto*, and may as often be one sounding in cost as in damages. Where an action on the case is mentioned in a statute, it means an action *ex delicto*, and nothing else; and this, in England, is an important distinction as to actions bailable and not bailable.

The general issue in one is non-assumpsit—in the other, not guilty.

The two forms of action do not admit of being joined as may debt and detinue; debt upon specialty and debt upon simple contract.—1*st Ch. Pl.* 137, 8 & 9.

A declaration in case sounding in cost, should conclude *contra pacem*—in assumpsit it never does; and the old-fashioned phraseology, of "contriving and fraudulently intending, &c." has been adjudged to be unnecessary in the action of assumpsit, and indeed improper.

True, the action of assumpsit was originally, and still is, with the exception of the common counts an action on the case, and is frequently styled in the old books, "trespass on the case upon promises on non-assumpsit;" but never trespass on the case merely.

The statement of the nature and kind of action in the commencement of the declaration, is material as matter of description, as well to the court as to the other party; and a bail bond conditioned for the payment of costs in a different kind of action, would be insufficient and not applicable: for there might be several suits founded upon distinct causes of action, which could not be joined, pending in the same court, at the same time between the same parties; and for this reason, if for no other, great particularity is requisite in describing the kind of action

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in the bond for costs, in order that a breach of its conditions could be sustained. 1*st Ch. Pl.* 290.

But if the statement of the kind of action in the commencement of the declaration is not material, the nature of the action set forth in the writ surely is. The writ is the summons, which the defendant is bound to obey. This is the commencement of the action, and the service of it can alone give to the court cognizance of the case: it is a monition to the defendant, by which he is made to know what he is to answer, to whom he is to answer, and the term of the court at which he is to appear. It is the *institution* of the *suit*, upon which all subsequent proceedings before the court must rest.

It is unnecessary for the court here to enquire into the nature of this action, further than what the plaintiff hath himself averred it to be. In a case where his averments are material, and are to be taken most strongly against him, the court will not look behind the writ itself, which alone gives character to the action.

But there is a material variance between the cause of action as set forth in the declaration, and that set forth in this case; and if the court here, upon an examination of the record, should be satisfied that such is the fact, it would have itself constituted a sufficient ground for the court below to have quashed the writ upon motion.

A bond for costs is required in all cases previous to the institution of suits by non-residents. Experience shows how much securities in such bonds and recognizances are disposed to avail themselves of technical objections in avoiding penalties; and it is clearly just and proper that all the officers of a court should be made secure in their costs, before a suit shall have been instituted, or suffered to proceed where a bond or recognizance is required by Statute, and the mode of taking it and its conditions specified. If the bond or recognizance be not taken in strict conformity with the provisions of the Statute, it is wholly void; nor does it become a common law obligation, upon which the party injured would be entitled to recover. *Leigh*, 312.

A court will regard its own, as well as statutory rules of practice.—It will enforce all the rules of pleading, which tend to keep the boundaries of actions distinct, and conduce to the harmony and symmetry of the science; and ever bear in mind that, next to the definition and correct understanding of legal injuries, the distinctions between legal remedies are essential to the liberty and safety of the citizen.

LITTLE ROCK, July, 1838.

PALMER and SOUTHMAYD *vs.* ASHLEY and RINGO.

DICKINSON, *Judge*, delivered the opinion of the court:

At the return term of this case, *Ashley* and *Ringo* filed a motion to dismiss for want of sufficient bond for costs, (*Palmer* and *Southmayd*, being non-residents) and also for a material variance between the writ and declaration. No action was had upon the motions until after a demurrer was put into the declaration, when the motion for insufficiency in the appeal bond was reversed and sustained, the case dismissed, and judgment entered for costs, from which *Palmer* and *Southmayd* appealed.

The same question is presented in the case of Means *vs.* Cromwell and Guthrey, decided at the present term of this court. It is, therefore, unnecessary to investigate the subject anew, as the same reasoning applies in this as in the case referred to.

The judgment of the Circuit Court of Pulaski county must, therefore, be reversed with costs, and the case remanded for further proceedings to be had therein, in conformity with the opinion expressed in the case of Means *vs.* Guthrey.

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT JANUARY TERM, A. D. 1839.

THE STATE *against* JOSEPH J. SIMMONS.

MOTION *for rule to show cause why an attachment should not issue for a contempt.*

Under the statute of 1836, "to regulate the practice in the Supreme Court," it is necessary for the Clerk of the Circuit Court to whom a writ of error is directed, either to endorse upon the writ of error, or attach to it, his return, signed as clerk, and sealed with his seal of office.

A failure to make return, is a contempt of this court; and the clerk is not excused because he was ignorant of the law, nor although he states in his answer, that no contempt was intended.

This was a motion, in the case of *Lewis S. Tweedy* vs. *Benjamin Murphy*, in error to Conway Circuit Court, for a rule against the clerk of that court.

RINGO, *Chief Justice*, delivered the opinion of the Court:

On the motion of the plaintiff, a rule was made at the last term of this court, against *Joseph J. Simmons*, Clerk of the Circuit Court of Conway County, to show cause at the present term, why he should not be attached for failing to make due return of the writ of error issued, and addressed to him in this case.

At the present term, said *Simmons* personally appeared, in obedience to said rule, and filed his affidavit, by way of showing cause against the rule, stating "that he was clerk under the territorial government, and as such, made out and certified records to the Superior

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Court, and it was not then required, as he understood the law and practice, to attach the writ of error to the record, and he never knew before, that the law had been changed, and that the clerk was now required by law, to attach the writ of error by seal, to the transcript of the record; and that his omission to attach the writ of error, was not with a design to show contempt to the court or its authority, but from the fact that he was utterly ignorant that it was necessary or required," and thereupon moved the court to discharge the rule.

Is this showing sufficient? The ninth section of the act of 1836, "to regulate the practice in the Supreme Court in appeals and writs of error in civil cases," pamphlet laws, p. 131, provides that all writs of error shall be returned, signed by the clerk of the court to which such writ shall be addressed, under the seal thereof, and if any clerk shall fail to make due return of any writ to the Supreme Court, he shall be liable to be punished by such court on attachment for his contempt, in the same manner as officers of other courts, for disobeying the process or orders of such courts. In the present case, the writ of error had not the return of the Clerk of the Circuit Court, signed by him and sealed with the seal of the court of which he was clerk, either endorsed thereon or attached thereto, as required by the provisions of the statute, and although such return may not have been required by the law or practice under the territorial government of Arkansas, we think there cannot exist a reasonable doubt, that it is required by the above recited statute, and the failure of the clerk to make such return, is in contemplation of the statute, a contempt of the law, and the process and authority of the court, for which the clerk is liable to be attached and punished by this court.

Here ignorance of the law is the principal ground relied upon to discharge the rule, although in connection therewith, the clerk expressly disavows on oath, any "*design* to show contempt to the court or its authorities," notwithstanding the maxim *ignorantia legis non excusat*, which applies as forcibly to acts done or omitted, which amount in legal contemplation to a contempt of the process and authority of the court, as to acts committed or omitted in violation of the criminal or civil laws of the land. It cannot, in either case amount to a defence or justification.

In this case, facts amounting in law to a contempt being admitted, the respondent cannot avoid the legal consequence thereof by avowing simply that no contempt was thereby intended.

The practice on the subject not having been hitherto well established, the court deem it proper thus definitely to settle the rule, that the officers subject to its operation may understand distinctly the responsibility under which they act.

Wherefore it is the opinion of this court, that the cause shown by the respondent is not sufficient to discharge the rule, and the same must, therefore, be made absolute.

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MOORE vs. WATKINS, & OTHERS.

WILLIAM MOORE *against* W. W. WATKINS, AND OTHERS.

ERROR *to Crawford Circuit Court.*

It is error to enter judgment by default, without service of process. And such error is not cured by the defendant filing pleas after entry of judgment by default, without obtaining leave to do so, or applying to the court to set aside the judgment.

Assumpsit, by defendants in error against plaintiff in error. Writ issued January 26, 1837, returnable to June term, 1837, and served February 8, 1838. Return signed D. W. Bunch, Dep'y Sh'ff, for Jesse Miller, Sh'ff C. C. Ark. State." Judgment by default at June term, 1837, and writ of enquiry to next term, which was executed, and final judgment rendered, January 27, 1838. On the 24th January, 1838, the defendants filed three pleas, which were undisposed of.

TAYLOR, for plaintiff in error, presented the following points:

1. The judgment by default was premature and irregular, unless the three days allowed for pleading had elapsed. *Camp. Dig.* 320.

2. Every return of the sheriff to a writ must be in the name of the principal sheriff, either by himself or deputy; but it cannot be in the name of the deputy sheriff, by any other as his proxy, whether that proxy be the high sheriff or any other person.

3. This is a matter not cured by the statute of Jeofails.

4. The caption of the declaration and mandatory part of the writ and declaration are defective.

5. Pleas appear on the record to have been undisposed of at the term the verdict and judgment were rendered.

RINGO, *Chief Justice*, delivered the opinion of the court:

An action of assumpsit was brought by the present defendants against the plaintiff in the Circuit Court of Crawford County. The declaration appears to have been filed, and the writ thereupon issued on the 26th day of January, 1837, returnable to the June term of said court in the year 1837, but was not executed until the 8th day of February, 1838. Judgment by default was entered at the June term, 1837, and a writ of enquiry awarded, returnable to the next term, which appears to have been executed, and final judgment thereupon rendered, on the 27th day of January, 1838.

On the 24th day of January, 1838, an entry was made of record

in the case, in these words; "This day came the defendant by his attorney, and filed his pleas of non-assumpsit, judgment, and the statute of limitations," which pleas are all copied in the transcript of the record, certified to this court upon the writ of error prosecuted by the present plaintiff to reverse said judgment.

Several errors have been assigned, which the court deems it unnecessary to notice. The judgment by default having been entered without any service of process on the defendants below, before he had entered an appearance to the action, was wholly illegal, and the pleas by him subsequently filed, as they appear by the record, to have been filed after the judgment by default was taken, without leave, or any application to the court to set aside the judgment, were entirely irregular, and cannot be regarded as a defence to the action, or as affecting the case in any respect whatever.

The court, therefore, manifestly erred in rendering judgment by default, and awarding a writ of enquiry thereupon, and also in giving the final judgment for the plaintiff below, for the damages assessed upon the writ of enquiry, without any service of process upon, or valid appearance having been entered by the defendants below, and for this error the judgment of the Circuit Court of Crawford County, must be reversed, annulled, and set aside, and the cause remanded to said Circuit Court for further proceedings to be there had therein, according to law. And in conformity with the rule established by this court, in the case of *Gilbreath* against *Kuykendall*, the case upon the return thereof to the Circuit Court, must be proceeded in as if the defendants below were duly served with a regular process returnable thereto more than thirty days before the term of said Circuit Court to which the case shall be so returned.

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GRANTHAM vs. WILLIAMS.

ARAMINTA GRANTHAM *against* WILLIAM WILLIAMS, ADM'R.

PETITION *for Mandamus to Judge of Johnson County Court.*

Under the old statute, the privilege given to the husband, wife, or distributees of an intestate, to take out letters of administration, was limited to the term of *sixty* days, and that to the creditors, to *ninety* days after the death of the intestate; and on the failure of either to appear and take out letters within the time allowed, their right or privilege was lost and extinguished, and all other persons were placed on an equal footing with them.

It was not necessary for a citation to issue to the widow, but her right to administer was lost if not exercised within sixty days.

No one except a creditor was entitled to apply for a citation. It was a privilege given to the creditors for their protection against waste of the estate, and by exercising it, they could limit the time in which those first entitled might administer, to thirty days service of the citation.

The widow had no priority of right over a distributee. To elect between them was left to the sound discretion of the county court; and in the exercise of that discretion, this court will presume the county court acted correctly.

LACY, *Judge*, delivered the opinion of the court:

This is a motion in behalf of *Araminta Grantham* for a mandamus to issue against the Judge of the Johnson Probate Court, commanding him to grant to her letters of administration on the estate of her deceased husband. It appears from the petition and record filed in the case that the parties admitted on the trial before the court below, that Richard Grantham departed this life in the year 1834, that *Araminta Grantham* is his widow, and *William Williams* intermarried with his daughter, who is still a minor under the age of twenty-one years, that no administration was ever granted on the intestate's estate till the year 1838, when *William Williams* applied to the clerk in vacation to grant him letters, which was accordingly done, and that the letters of administration which were granted to him, were afterwards confirmed at the July term of the Johnson Probate Court; and that *Araminta Grantham* appeared and contested the matter, and filed her bill of exceptions to the opinion of the court, which was signed by the judge, and made part of the record.

On the part of the petitioner it is contended that *Araminta Grantham* being the widow of Richard Grantham, deceased, was entitled by law, to the administration; because no citation was ever issued, calling on her to appear and take out letters of administration on the estate of her deceased husband, which the statute regulating such proceedings requires. This question involves the true meaning or construction of

the act of the legislature upon the subject, and depends solely on that interpretation. Its provisions are somewhat loose and disconnected; but they are deemed sufficiently explicit to warrant the following conclusions. See *Digest*, *p.* 47, *s.* 4.

There are three separate and distinct classes of persons who are authorized to sue out letters of administration by applying to the clerk in vacation, or the court in term time, and complying with the requisitions of the statute. First, the husband or wife, or the distributees of the estate, provided they apply within sixty days after the death of the intestate; secondly, the creditors, who are required to apply within ninety days; and in the event that neither the husband, wife, or distributees, nor the creditors make their applications within the time prescribed, then, all other persons whatsoever, who lie under no legal disability, can apply, and take out letters of administration; the privilege or preference that is given to the husband, wife, or distributees is limited to sixty days, and that of the creditors to ninety days, and on their failure to appear and take out letters of administration within the time allowed therein, then their right and privilege is lost and extinguished by their own laches or neglect; and all other persons are placed on an equal footing with them. In the case now before us, it is insisted that the widow was entitled to a citation for her to appear and take out letters, and until that issued and was executed, her right or privilege was never destroyed.

It is a sufficient answer to the argument, to say, that she could have no privilege to administer after the lapse of sixty days, and in the present case, there was no application to sue out letters of administration, until upwards of two years after the death of the intestate. Besides, the court apprehend, that no one except creditors are entitled to apply for a citation, and as the defendant is a distributee, and not a creditor, she had no right to have a citation awarded her. The words of the act are, "On the application of any person interested, it shall be lawful for the clerk, or court to issue a citation to any person entitled to administration as aforesaid," which terms apply exclusively to creditors, and this privilege or right seems to have been given them by the legislature to protect the estate against the wasteful expenditure of the husband or wife, or distributees. Should the creditors apply, and obtain the citation, then those who were in the first instance entitled to sixty days to administer, would not be allowed that time to sue out letters, but would be confined to thirty days' service of the citation. This, in

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the opinion of the court, is the only sensible construction that can be given to the latter clause of the fourth section of the act, and to admit of any other, would be to make it inconsistent with itself, and with the object and intention of the legislature.

Again, it is clear, that at no time in the case now under consideration, had the widow any priority of right over the distributee in having the administration granted her, for the matter is expressly left by the statute, to the sound discretion of the court, and in its exercise of that discretion, we are bound to presume the court acted correctly. In no view of the subject that we have been able to take, can we perceive the court erred in granting letters of administration on the estate of Richard Grantham to *William Williams*.

The motion for mandamus must, therefore, be dismissed, with costs.

JAMES & WILLIAM TUCKER *against* JANE ELLIS, ADMINISTRATRIX.

APPEAL *from Conway Circuit Court.*

Errors must be assigned on or before the third day of the term to which a case on error or appeal is returnable in this court; and on a failure so to assign errors, unless good cause is shown, the appeal, or writ of error will be dismissed, or the judgment below affirmed.

LACY, *Judge*, delivered the opinion of the court:

This case stands on an appeal from the Conway Circuit Court. At a previous day of this term, a rule was entered on the motion of the appellee's attorney, for the appellants to show cause why the judgment of the court below should not be affirmed, by reason of a failure on their part to assign errors within the time prescribed by law. A copy of the rule was issued, and the attorney for the appellants acknowledged the service thereof, the motion now is to make the rule absolute, or to affirm the judgment with damages, because the party appealing has not shown any good cause for a failure to file his assignment of errors on or before the three first days of the present term, to which the appeal is returnable. This case depends upon the act of the general assembly, approved October the 29th, 1836, regulating the practice in cases of appeals and writs of error in the Supreme Court. By the 10th section of the act, all appeals taken thirty days before the first day of the next term of the Supreme Court shall be returnable in such next term. And all appeals taken less than thirty days before the first day of the next term, shall be returnable on the first day of the next term thereafter.

And by section 11th, it is declared "that in appeals, and writs of error, the appellant and plaintiff in error, shall assign errors on or before the third day of the term to which such appeal or writ of error is returnable, and in default of such assignment of errors, the appeal or writ of error may be dismissed or the judgment affirmed, unless good cause for such failure be shown. The statute is express and peremptory, that the appeal or writ of error may be dismissed, or the judgment affirmed unless good cause be shown for such failure.

In the case now before us, the appeal, as the record shows, was

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returnable to the present term; and the appellants acknowledged service of the rule, but have not even attempted to show any cause whatever for their laches and neglect in not assigning errors according to the requisitions of the statute. Let the judgment, therefore, with the costs, be affirmed, with six per centum damages.

CHARLES FISHER *against* HALL & CHILDRESS.

ERROR *to Washington Circuit Court.*

The Circuit Court has no jurisdiction of a suit upon a writing obligatory for one hundred dollars; and jurisdiction is not given though the plaintiff declares for principal and *interest*, and so claims more than a hundred dollars.

The legislature may change and modify the proceedings and practice of the courts, but cannot interfere with their constitutional powers or jurisdictions.

All the courts of this state, are courts of limited and prescribed jurisdiction. Therefore, if on the face, or from the construction of the record and proceedings, it appears that a court has no jurisdiction, the case must be dismissed on motion.

Debt, in the court below, against the plaintiff in error, on a writing obligatory for one hundred dollars. The declaration demanded for principal and interest. Motion to dismiss for want of jurisdiction overruled; and demurrer sustained to a plea to the jurisdiction.

WALKER, for plaintiff in error:

Has the circuit court jurisdiction of a writing obligatory for the sum of one hundred dollars? It is insisted by the plaintiff in error, that the court should have sustained his motion to dismiss the suit. That advantage may be taken of want of jurisdiction, by motion, is determined by the court in the case of *Berry* vs. *Linton*. It is also decided in that case, that the amount in controversy is determined by the contract set forth in the declaration, and not by the sum demanded. In addition to cases cited in *Berry* vs. *Linton* it is expressly decided in *J. J. Marshall, p.* 61, that interest forms no part of the contract, and that a justice of the peace may render judgment on a note or bond where the sum set forth in the note or bond is within the justice's jurisdiction, even though the interest when added to the principal, would make a sum exceeding the justice's jurisdiction. The want of jurisdiction may be reached by plea in abatement. The plea filed is defective in no particular unless the court had jurisdiction of that amount. The authorities referred to, together with the constitution, which declares that justices of the peace shall have exclusive jurisdiction in all such cases, where the sum in controversy is one hundred dollars and under, are clear on this point. This was a sum of one hundred dollars, and that was the sum in controversy. The pleader, by declaring "that he render the one hundred dollars and interest thereon," clearly betrays

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consciousness of the defect of jurisdiction. It is insisted that to have inserted the probable amount of costs, for the purpose of giving jurisdiction, would have availed just as much. They are both legal consequences, which follow the rendition of judgment.

LACY, *Judge*, delivered the opinion of the court:

This was an action of debt, founded on a writing obligatory. The declaration contains but one count, and is in the usual form, except it demands the interest together with the principal, thereby endeavoring to confer an original jurisdiction on the Circuit Court, which otherwise it does not possess.

At the return term of the writ, the defendant appeared in the court below, and filed a motion to dismiss the cause for want of jurisdiction, which motion was overruled. He then put in a plea to the jurisdiction of the court, to which there was a demurrer, and judgment entered up against the sufficiency of the plea, and in favor of the plaintiffs. To reverse the judgment thus rendered, the defendant now prosecutes his writ of error in this court. The record raises, and the assignment of errors presents but a single question for adjudication and and decision, which is, had the Circuit Court that tried the cause, original jurisdiction of the matter? This can only be determined by a reference to the constitutional provisions organizing and establishing the judicial department of the government, and defining and limiting the peculiar and special jurisdiction of each and all of the courts. The whole judicial power of the state is vested by the constitution in one Supreme Court, in Circuit Courts, in County Courts, in Probate Courts, and in Justices of the Peace. See ART. VI, Sec. 1, and Sec. 10. The jurisdiction of the Supreme Court is co-extensive with the State, and is declared to be appellate only, except in the enumerated cases specified in the constitution, and in that enumeration there are but few cases where their jurisdiction can be considered as strictly original. In every other instance, their jurisdiction has exclusive reference to their appellate powers, and is given in aid of them, with the view of correcting and controlling the errors and illegality of the other inferior tribunals for the purpose of enforcing its own authority or mandates. To enlarge or diminish its powers beyond the express grant of the constitution, or the necessary incidents that fall within the scope of its meaning, would be to substitute and create a new jurisdiction, unknown to the constitution itself, and in violation of its authority;

and such a construction would destroy the appellate character of the court; and confer upon it all original jurisdiction, which certainly never was the intention or design of the constitution. See ART. VI, Sec. 2, of the constitution.

The Circuit Courts possess original jurisdiction of all criminal cases not otherwise provided for by law, and exclusive original jurisdiction of all crimes amounting to felony at common law, and original jurisdiction in all matters of contracts where the sum in controversy is over one hundred dollars, and original jurisdiction in all civil cases which shall not be cognizable before the justices of the peace, unless otherwise directed by the general assembly. Sec. 3. ART. VI, of the constitution. Its original jurisdiction is by far more comprehensive and exclusive than that of any other court, for it extends to all criminal cases; and to civil cases, where the amount in dispute is over one hundred dollars.

To assume, then, for any legal tribunal, a jurisdiction greater, or less than is conferred upon it by the constitution, or than is given by its plain and obvious intent, is virtually to abrogate and destroy all the distinctions and divisions of each separate constitutional jurisdiction between the several and respective courts, and thus, by intendment and construction, *pro tanto*, to ordain and establish a wholly different will, or rule of action, from the one laid down and enjoined by the constitution.

To elucidate the principle by the case now under consideration: The declaration shows that the sum sued for was one hundred dollars; for the demand for the interest with the principal, cannot change or alter the jurisdiction of the Circuit Court, as it is the amount or character of the contract, and not interest, that enters into the controversy, and gives cognizance of the cause. If this be the case, and it most assuredly is, then to allow the Circuit Court to take and exercise original jurisdiction in the present case, is clearly to violate one of the most express provisions of the constitution, which declares it shall have no original jurisdiction in matters of contract, unless the sum is over one hundred dollars. Besides, such a construction would erase one of its clauses, which makes the matter now in controversy exclusively cognizable in the first instance before a justice or justices of the peace. See ART. VI, Sec. 15, of the constitution. It is deemed unnecessary to enlarge upon this branch of the subject, for such a mode of interpretation, if applied to the constitution, would virtually repeal it, and produce great confusion and injustice in all legal proceedings. The

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convention intended to erect separate legal tribunals for the trial of all causes, whether civil or criminal; and they have done so by clear and positive terms, and it has apportioned the whole judicial power among several sets of magistracy, and any legislative restrictions or limitations whereby their constitutional jurisdictions would be either impaired, altered, or abrogated, would be wholly void, being repugnant to the original grant of power.

The general assembly, doubtless has the right to change or modify the proceedings or practice of the courts, but in doing so, they cannot touch, or interfere with their constitutional powers or jurisdictions, for the moment they do, their acts become mere nullities, and the judiciary is bound by the most sacred and solemn obligations, so to consider and treat them. This position stands upon the highest authority, and is recognized by every principle of legal right and justice. If one court has the right by implication or legal inference of assuming a jurisdiction not warranted by the constitution, surely, all the rest have an equal right, and hence, in the exercise of their powers, we would have that confusion and conflict of jurisdictions, which was the special intention and care of the convention to guard against and prevent.

The judiciary designed to be established by that body, was a consistent and harmonious whole, each portion of it left free in the exercise of its lawful authority, and the subordinate parts only restrained by a superior jurisdiction, when they attempted to transcend the limits of their constitutional duties. From this view of the case, it is perfectly manifest that the Circuit Court had no original jurisdiction of the cause, and that the exercise of such power was in express violation of the constitution, and consequently null and void.

As all our courts are courts of limited and prescribed jurisdiction, if the record and proceedings show on their face or from their construction, that the court before whom the cause is pending had no jurisdiction of the matter, the defect may be taken advantage of, by a motion to dismiss, for if the court had no authority to try the case it can pronounce no valid judgment.

The court below, therefore erred in not sustaining the defendants' motion to dismiss, and consequently, the judgment must be reversed with costs, the cause remanded to be proceeded in according to the opinion here expressed, which is, that the case be dismissed, for want of jurisdiction.

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76 191

THE STATE *against* CHESTER ASHLEY AND OTHERS.

MOTION *for a rule to show cause why an information in nature of a quo warranto, should not be filed.*

The writ of quo warranto at common law, was a high prerogative writ, in the nature of a writ of right for the king, against him who claimed or usurped any office, franchise, or liberty of the crown; and also lay in case of *non-user*, or long neglect; *mis-user*, or abuse of a franchise.

It was a civil proceeding, prosecuted by the king's attorney general, at the suit of the king, without a *relation*, to try a civil right; and the judgment, if for the king, was of seizure into the king's hands. No fine was imposed, or punishment inflicted on the defendant.

Informations, as the basis of criminal prosecutions are said to have existed coeval with the common law itself; but, as a mode of determining civil rights between private parties, they seem to owe their origin to *St. Q. Anne.* Although informations in nature of quo warranto were exhibited by the attorney general long prior to the passage of that statute, yet the remedy given thereby, was never extended beyond the limits of the old writ. And that statute neither increased nor abridged the authority of the attorney general.

Informations were not allowed at the instance of a private person, before the Statute of 4th Anne, nor after, except in the cases mentioned in that statute.

The information was a criminal proceeding; although upon conviction or disclaimer there was also judgment of ouster, or seizure into the king's hands: and although it has long been applied to trying the mere civil right, the fine being nominal only.

Though the writ of quo warranto, and the information in the nature of a quo warranto, had a contemporaneous existence, yet their primary objects were essentially different; the mode of proceeding on them materially varied; they were, in some respects, attended with different results, and the form of judgment was never the same. One was strictly a civil, the other a criminal proceeding. They were, therefore, so different at common law, that they cannot, with propriety, be classed together, or comprehended by one common name or description.

The constitution has conferred upon the Supreme Court, as the final tribunal to interpret, pronounce, and execute the law, to decide controversies and enforce rights, powers, and jurisdiction of an appellate nature only.

It leaves with the inferior tribunals the original cognizance of all cases and controversies between private parties, as well as all controversies in which the State may be a party, or otherwise interested, in which the sovereignty, or sovereign rights, powers, and franchises of the state are not involved.

But in cases involving the civil rights of the sovereign power of the state, affecting vitally, its character, and the proper administration of the government itself; in which the whole people, and every individual member of the community has a direct, immediate, and most sacred interest; when the exercise of a public right, or public franchise is the subject of controversy, the Supreme Court has original jurisdiction, and is vested with power to issue, hear, and determine writs of *quo warranto.*

The information in nature of a quo warranto, being different, as before stated, from the writ of quo warranto, the Supreme Court has no jurisdiction in case of such information, under the clause of the constitution which authorizes it to issue the writ of *quo warranto.*

The power granted to this court by the constitution, to issue "*other remedial writs,*" embraces only such writs other than those specifically enumerated, as may be properly used in the exercise of appellate powers, or of the power of control over inferior, or other courts, expressly granted by the constitution.

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The Supreme Court has no original jurisdiction in any case where the proceeding is, or must necessarily be of a criminal nature. The proceeding by information in nature of a *quo warranto* is of a criminal nature, and the Supreme Court has therefore, no jurisdiction thereof.

This was a motion made by the attorney for the state, for a rule against *Chester Ashley*, *Roswell Beebe*, *Elijah A. More*, *Richard C. Byrd*, *James DeBaun*, *William W. Stevenson*, and *James L. Dawson*, to show cause why an information in the nature of a writ of quo warranto should not be filed in this court against them, for intruding into, and holding without grant or warrant, the office of directors of the Principal Bank of the Real Estate Bank of this State. *Chester Ashley*, one of the acting directors, on behalf of himself and the others, appeared, and was heard upon the motion. As this case was decided upon the question of jurisdiction, a statement of the facts is here omitted, and will be found *post*, in the case of the state against the same, upon writs of *quo warranto*.

TRAPNALL, for the motion:

This is a motion made by the State, through its legal representative, for a rule on the defendants to appear and show cause why an information should not be filed against them as usurpers of the directory of the principal bank of the Real Estate Bank of the State of Arkansas. The motion is based upon the affidavits of Charles Rapley, and William Cummins; the purport of which is, that by the sixth rule of the central board, the election of directors shall be conducted by three commissioners, appointed by each of the local boards, on the first Monday of January in each year; that when the polls are closed the commissioners shall certify to the president, immediately, the number of persons voted for, and the number of votes given to each, and that the president shall forthwith issue a certificate of election, countersigned by the cashier, to each of the seven persons who have the majority of the votes. The directors elected, shall immediately enter upon the discharge of their duties. That by a resolution of the local board of the principal bank at Little Rock, William E. Woodruff, James DeBaun, and James Erwin were appointed commissioners to hold the election, with instructions to receive all legal votes, and when the polls should be closed, to issue certificates of election to each of the seven persons who should have a majority of the votes polled. That the commissioners proceeded to hold the election, and during its progress, rejected several hundred legal votes, with a design to, and there-

by securing a majority of the votes to the above named defendants, and excluding others who would certainly have been elected, if the election had been conducted according to law. That they believe that, immediately after the polls were closed, the commissioners under the aforesaid resolution of the local board, a copy of which had been denied, issued certificates of election to the defendants, without "certifying the result of the poll to the president;" and the defendants forthwith took possession of the bank, and commenced a discharge of the duties of directors of the institution, without having a "certificate of election issued to them by the president, countersigned by the cashier;" and they still remain in the direction of the affairs of said bank.

If the showing made by the affidavits, be conclusive at this stage of the proceeding, or sufficiently satisfactory to show that the present position of the defendants in the bank has been gained by assumption, what is the appropriate remedy given by law, and to whom is it given? The right of banking is a public trust or franchise, conferred by a grant of the legislature: if this right is usurped or abused, the injury resulting from it is of a public nature, and therefore, the right of redress belongs exclusively to the State, as decided in the case of *The People* vs. *The Utica Insurance Company*, 15 *John. p.* 379, 386-7-8-9. See 5 *Wendell*, 331; 7 *Cowen*, 13.

Courts of chancery afford no remedy for the injury, because it is one of a criminal nature. See the case of the *Att. General* vs. *The Utica Ins. Co.*, 2 *John. Ch. Rep.*, 378-9; and because courts of law afford an immediate and ample remedy, by an information in the nature of a quo warranto; same case, decided by *Chancellor Kent*, 376-7-8.

Informations in the nature of a writ of quo warranto, are granted by the Courts of King's Bench, for the purpose of trying the rights of persons to any corporate, or other franchise into which they have intruded, for the pupose of removing them; *Esp. Dig.*, 688; 5 *Jacob, L. D.* 372; 2 *Wheaton Selwyn, title quo war.*

The writs of quo warranto, and informations in the nature of writs of quo warranto, are prerogative writs, and existing at common law, in the fourth year of James I.

By St. of Q. Anne, the proceeding was extended to other cases than embraced at common law, and permitted at the relation of private persons; and with these and some minor exceptions, the same course of pleading, trial, and judgment was pursued under the statute, that ob-

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tained at common law; 5 *Jacob*, 372,377; 2 *Kyd. on Corp.* 415; *Esp. Dig.* 664; *Buller N. P.* 211.

The cases in which informations in the nature of a quo warranto are granted by this act, are where a man exercises a corporate franchise, or acts as a corporate officer, without having been *duly elected*, and *sworn* or *admitted*; 5 *Jacob*, 378; *Kyd. Corp.* 424.

And though an officer has been legally elected, yet, if the swearing in has not been regular, he shall be removed by quo warranto: for the swearing in is as necessary to a complete investment of his office, as the election; *Esp. Dig.* 693; 1 *Stra.* 582; In the case of *The People* vs. *Directors of the N. Y. Ins. Co.*, 4 *Cowen*, 358; 4 *Cowen*, 98.

The defendants have not qualified according to the sixth rule of the central board, therefore, if the rule is valid, and binding upon the corporation, they are liable to an information in the nature of a *quo warranto*. The authority of the central board will be found in the 9th, 21st, and 22d sections of the charter. By the 9th section they are given a revising and controlling power over all the acts and proceedings of the corporation as far as may seem necessary and proper for procuring a common concert of operation, with a view to the credit and welfare of the several banks, that is, a right not only to revise whatever by-laws the several banks may pass, and correct them, but to control, direct, and dictate what laws they shall pass, and dictate and direct their conduct also.

They shall exercise such other powers for the well governing and ordering the affairs of said banks as may be deemed necessary and proper to advance the general interests, provided the same be not contrary to the provisions of the charter, or the laws of the state; and in the 21st section it is provided, that it shall have the right to ordain and establish such by-laws, rules, regulations, and ordinances as THEY shall deem necessary and suitable for the government of said corporation, not being contrary to this act, the constitution of the United States, or of this state.

They not only have the right expressly given to revise and *control* the conduct of the different banks, to exercise such powers as may be deemed necessary and proper to advance the general interests, subject to the charter and laws of the state, and to ordain and establish by-laws, &c., which they may deem necessary and suitable for the government of the corporation, subject alone to the charter, constitution of the United States, and of this state; but by the 22d section, the

principal bank and its branches are expressly prohibited from passing any by-law, rule, ordinance, or regulation contrary to the by-laws, &c. of the central board.

Such construction ought to be put upon the statute as may best answer the intention which the makers had in view; *People* vs. *Utica Ins. Co.* 15 *J. R.* 380; *Bac. Ab. Statutes* 1, 5, 10.

By the 25th section, it is enacted that the central board shall fix upon the time for holding the future elections, as well for the branches as for the principal bank; and the directors shall be elected by the stockholders, or their attornies, &c.; but how the election is to be conducted the act is entirely silent, and has not expressly said who is to prescribe the mode of the election, but it says that the central board shall ordain and establish all such by-laws, and so forth, as they should deem necessary and suitable for the government of the corporation, not contrary to the charter, the constitution of the U. States, or of this state.

A rule prescribing the mode of the election was both necessary and suitable for the government of the corporation, if it were not contrary to the charter, or the constitution of the United States, or of this state: and such a one is this.

The twenty-fifth section further provides, that the director who shall receive a majority of the votes given, shall be declared elected; but how he is to be declared elected this act does not say, but it clearly gives to the central board, the right of prescribing the rule and mode. A by-law, or ordinance was required for that purpose, a by-law that would govern the elections in the principal bank, and all its branches, a general ordinance for the regulation of the whole corporation. The local boards have not the power given them by the charter, because, if it were, each board might regulate its own election by a different rule, destroy concert of operation, and the ordinance was indispensibly necessary. Certainly, then, the revising and controling power in the corporation, invested with express and full authority to pass all by-laws, &c., that should seem to them necessary and suitable for its government, had the necessary, exclusive, and it seems to the undersigned, unquestionable right of regulating this proceeding by an ordinance.

If it is established that the central board had the power to pass this ordinance, it cannot be contended that it is contrary to the charter, or constitution, or laws, and therefore must be binding.

When by the charter, the mode of electing officers is not regulated,

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a power resides in the corporation to make by-laws for that purpose; *Esp. Dig.*, 695; 3 *T. R.*, 187; and when a by-law is made, the election must be made in pursuance of it, or it will be bad; *Esp. Dig.*, 695.

If the central board had the power, and the by-law is not contrary to the charter, constitution, or laws, the local board were expressly prohibited in the 22d section, from passing any by-law contrary to it. Therefore, the resolution of the local board was void, and the election not being conducted according to the charter, and sixth rule, was void; admitting, however, that the election was legal, the defendants have not been declared elected by the form prescribed by the sixth rule, to wit: a certificate signed by the president, and countersigned by the cashier.

The question seems too plain, and too well settled by authority, to admit of doubt; but say that it is doubtful, which is the strongest view of it in favor of the defendants, still the court must grant the rule.

Where the question is doubtful, the court will award the rule; 5 *Jacob.*, 379; *Cowp.*, 158; 3 *Burr.*, 1485; *Douglas*, 352, 397; *Buller, N. P.*, 210, 1, 2; when the question is one of new and doubtful law, *Cowp.*, 58.

ASHLEY & WATKINS, *Contra:*

The Supreme Court is a court of appellate jurisdiction only, coextensive with the state, under such regulations and restrictions, as may from time to time, be prescribed by law. The writ of quo warranto, is one which confers original jurisdiction, and if the Supreme Court is authorised to issue it, there is a palpable contradiction, and ambiguity apparent on the face of the constitution, which must first be reconciled, and gotten over.

The other remedial writs, expressed in the constitution, to be on the same footing with the writ of quo warranto; namely: writs of error and supersedeas, certiorari, habeas corpus, mandamus, and also, those that are perhaps implied, of prohibition, and procedendo, do all confer more or less of appellate jurisdiction, where the acts and proceedings of inferior courts are complained of, and sought to be corrected.

The question then presents itself on the threshold upon this motion, whether a writ of quo warranto, is one of "the cases otherwise directed by the constitution," wherein the Supreme Court shall exercise original jurisdiction; or whether, on the other hand, the Supreme Court can or will issue or take cognizance of a quo warranto, in any

other way than where the case comes up legitimately before it, upon error or appeal from the judgment of a circuit court?

It detracts nothing from the high dignity and paramount judicial authority of the Supreme Court, to claim for it ultimate appellate jurisdiction in all cases, and appellate jurisdiction only: on the contrary, it is in acordance with the genius and spirit of our constitution and form of government, that there should be, in all cases some judicial tribunal of the last resort, unawed by power, unbiassed by prejudice, uninfluenced by haste, the confusion and the passion, always attendant upon the investigation of questions purely of fact, in the exercise of original jurisdiction;—in whose breast, the law in its purity is preserved, and from whose matured judgment there is no appeal.

Under that clause of our Bill of Rights, inviolate and unalterable, declaring that the right of trial by jury shall remain inviolate, the difficulty presents itself, how will the Supreme Court dispose of the disputed matters of fact, usually, and almost necessarily arising upon the pleadings in quo warranto. If the case now under consideration should happen to come up before the court for trial, upon the inspection of record evidence, it would not effect the general principle, or meet the difficulty in the multitude of other cases, wherein the evidence would rest, wholly or in part, in testimony and in depositions; 2 *Harris Entries, p.* 133, 210; 1 *Woodeson Lect.* 493; 3 *Woodeson Lect.* 345.

But it is a well settled principle, that whether the jurisdiction of the Supreme Court be original or appellate, it cannot exercise that jurisdiction, without the intervention of an act of the legislature. Our constitution, in all its leading features, is similar to that of the United States, and the powers given to the judiciary department in each, will bear the same construction. The construction of powers vested in the federal, and of those remaining in the state legislatures is indeed different. In the one case, congress can pass no law, which it is not expressly, or by necessity of strong implication, authorized by the federal constitution to enact; on the other hand, all the sovereign power of the people of a state, rests and abides in the state legislature, to enact any law which they are not expressly or impliedly restrained from passing, either by any grant of powers to the general government, or by the constitution of the state, but both the federal and state courts are statutory courts, of limited jurisdiction, accurately defined by the constitution and legislative enactment, and possess no common law or pre-

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rogative jurisdiction whatever. There are numberless decisions going to show, that the courts of the United States, have not, and will not, exercise their constitutional jurisdiction, whether original or appellate, without the intervention of an act of congress, auxiliary to the provisions of the federal constitution. Mr. Justice Story, in the case of *Martin* vs. *Hunter's lessee*; 3 *Con. Rep. Sup. Court U. S. p.* 583, says of the federal constitution, that it unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. Hence the powers are expressed in general terms, leaving to the legislature from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interest should require. In the case of *Wheaton & Donaldson* vs. *Peters & Grigg*, 8 *Pet. Con. Rep. p.* 659; it was the opinion of the court, that the common law as it existed in England, has never been in force in all its provisions in any state in this Union. It was adopted, so far only, as its principles were suited to the condition of the colonies; and from this circumstance we see what is common law in one state is not so considered in another. And without going into minute detail, there is good reason in all this. In vain do we live under a written constitution, and a government of distinct legislative, executive, and judicial departments, if the judicial tribunals have the power, not only to expound and interpret, but to make the law, under the insidious distinction of declaring merely what the law is. It was the complaint of the olden time in England, that the judges of the king's bench, wherein were vested the vague prerogatives of the crown, and the boundless extent of common law jurisdiction not otherwise apportioned, and not the parliament, did make the law. In the case now under consideration, this court cannot take a step, without investigating the doctrine of quo warranto, as it existed prior to the fourth year of Jac. I.; and then fill up by judicial enactment the gaps in such portions as are found to be incompatible with our institutions. It must rake up the obsolete law learning that hath lain covered with the dust of centuries, and declare what the law is, of which we have heretofore lived in ignorance.

In the other departments of the government, the powers and duties of the governor, and all the executive officers, are clearly and specifically defined by statute, and the proceedings of the general assembly,

itself, are controlled by its own general rules. Is the judicial department then singular in being able to carry out the general powers conferred upon it by the constitution, without the aid of further legislation? Such a power is impliedly negatived by the various acts regulating judicial proceedings; by the fact that the general assembly has minutely provided for the exercise by the Supreme Court of its jurisdiction, in appeals, and writs of error and supersedeas, as cases of more general importance and pressing necessity, but through inattention or design has left it to subsequent legislatures and the revisors of our statutes from time to time, to make such regulations concerning the other subjects of its jurisdiction, as they may deem advisable and the public interests require. The refusal of all the judges of the Supreme Court to grant a writ of error or certiorari with supersedeas in the case of Moseley, where the record showed a conviction contrary to law, upon the ground that the legislature had made no provision for such a case, ought to be conclusive authority in this part of the argument. The writs of error, certiorari, and quo warranto, all stand upon the same footing in the constitution; and at common law the writs of error and certiorari, lay to all inferior criminal jurisdictions, and the judgment affirmed or reversed for error, in criminal or civil cases; 4 *Black. Com. p.* 391; 2 *H. P. C.*, 210. How much stronger then, is the exercise of original jurisdiction by the Supreme Court in the criminal proceeding of quo warranto, and in view of another clause of the constitution, which provides that *the circuit courts shall have original jurisdiction over all criminal cases which shall not be otherwise provided for by law;* obviously referring to such jurisdiction as the general assembly may deem it necessary to vest in corporation courts; *Const. Art.* VII, *Sec.* 2.

If the Supreme Court can exercise original jurisdiction, and can issue a quo warranto, under the general powers of the constitution in the absence of any legislative enactment, it must do so, by virtue of our statute law, declaring the common law and statutes of the British Parliament prior to the year 1607, not inconsistent or repugnant to our constitution and laws, to be in force; and of the constitution recognizing all existing laws, not inconsistent with itself, to be in force, until altered or repealed by the legislature. It behooves us then to enquire; what a quo warranto was under the laws of Great Britain, prior to the time I speak of. Ist: A quo warranto was in the nature of a writ of right for the king, (or sovereign power; 2 *Inst.* 282,) and by this I understand, that it is issued at the instance of the proper officer of the crown, and not

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at the discretion of the court. 2d: It lay only to individuals claiming or usurping a public corporate franchise or liberty, that is to say, such as emanated or ought to have emanated from the crown, and not in the case of private incorporations or liberties which did not affect or concern the royal prerogative. 3d: It was strictly a criminal proceeding; and accordingly, the determination of a quo warranto, if against the king, was final and conclusive; and further, that the defendant, if successful, was not entitled to costs; *Rex* vs. *Williams*, 1 *Bur.* 402. It seems to have been tedious in its progress, and oppressive to the subject. 4th: A quo warranto aimed at the existence of the corporation. If the franchise claimed, never had existed, or in other words, never had emanated from the crown, there the judgment was of ouster; if the franchise had once an existence, by grant or prescription which supposed a grant from the crown, but had become forfeit for misuser or nonuser, there was judgment of ouster and seizure into the hands of the king. 5th: By a quo warranto, the disputes or difficulties between the *individuals* composing a corporation, or exercising a franchise, though of a public nature, could not be litigated or determined. 6th: In a quo warranto there was no *relator*, at whose suggestion upon the record, the attorney general moved in the matter: the crown by its officer, was the real, as well as the nominal plaintiff. See *Selwyn's Nisi Prius by Wheaton*, and the authorities there collected on all these points: title, "*Quo Warranto*."

On the other hand, we find the information in the nature of a quo warranto to be a proceeding created and regulated by the statutes of Anne and Geo. II., *which have never been in force in this state.* It is a civil proceeding merely, and not a criminal proceeding; 2 *T. R.* 484. The successful party, whether plaintiff or defendant, is entitled to costs; the judgment is not final, for, though judgment be for the defendant, a new trial may be awarded; *King* vs. *Francis*, 2 *T. R.* 484. The officer of the government will institute the proceeding, subject to the sound discretion of the court, at the relation of any person aggrieved, and the court will enquire who are the real parties in the controversy, and if they deem it necessary, compel the plaintiff to give recognizance for costs; 1 *Salk.*, 376. The information in the nature of a quo warranto, does not necessarily affect the validity, or question the existence of the corporation, or franchise; by it the rights of an individual corporation are litigated, and if judgment be against the defendant, there is judgment of ouster. By the common law, and by the statute of Anne,

when the corporation or franchise had an existence, there could be no judgment of ouster merely; but the judgment was that the franchise *capiatur in manum domini regis; Sel. N. P. Tit. Quo War.* But there is one principle common to both, and in the end it will be found to sustain my argument; it is this. Lord *Kenyon*, so late as the thirty-second year of Geo. III. (*Rex* vs. *Shephered*, 4 *T. R.* 381; *King* vs. *Lowther*, 1 *Strange*, 637; 2 *Ld. Ray.*, 1409,) refused to grant even a rule to show cause, in a case then before the king's bench, because it was not a usurpation on the rights or prerogatives of the crown, for which only the old writ of quo warranto lay; and that an information in the nature of a quo warranto could only be granted in such cases. Same principle in *Rex* vs. *Ogden*, 10 *B. & C.* 230.

Should the judges of the Supreme Court be satisfied upon investigation, that a quo warranto, and an information in the nature of a quo warranto, are widely different; not only in form, and the mode of proceeding, but in substance and effect, they must presume that the framers of our constitution meant what they said when they used the term quo warranto, and cannot put a forced construction upon language of plain and obvious import.

I deem it unnecessary to argue, that the motion before the court, cannot now, or in any subsequent stage, involve any thing more than a controversy between a few individual members of a *private* corporation, in which, indeed, many citizens of the state are deeply and vitally interested, but in which the people of the state as the sovereign power, are not directly concerned, and over which they have no control. Because, as I understand the motion, and the affidavits upon which it is based, the relators so called, do not charge that we have usurped or intruded into any public office or franchise belonging to the state; or in the gift of the state; nor is it pretended that the sovereign power of the state, would have any authority to fill the vacancies which they claim this court might occasion by judgment of ouster against the present directory.

If, then, the motion before the court, is, what it purports to be, a motion based upon the affidavits of Charles Rapley and William Cummins for a rule upon *Chester Ashley and Others*, to show cause why an information in the nature of a quo warranto should not be filed, &c., the proceeding is not a quo warranto, but an information in the nature of a quo warranto: an entirely different proceeding, of which this court can take no cognizance whatever, and about a subject matter, which

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before and since the statute of Anne, could not be affected by a quo warranto, or an information in the nature of it.

Quere: Whether the proceeding ought not to have been against the defendants severally, in order that they might not be precluded and disabled from disclaiming, or severally pleading separate and different matters of defence? 2 *Maul. & Sel.* 75.

Hitherto, my whole argument has tended to show that the court ought not even to entertain the motion. But by the mode of proceeding which the relators have adopted, it is admitted to be in the sound discretion of the court, to sustain or overrule the motion, to grant or refuse the rule, as their better judgment shall dictate. It is then, legitimate and proper upon the consideration of the motion, to enquire, whether the affidavits of the relators, present a sufficient case to warrant the further action of the court.

I will not recapitulate the minute criticisms upon the affidavits, which I pressed in argument. But I submit to the examination of the court whether there is in either of the affidavits, throughout, one distinct material allegation of fact, much less any chain or connexion of facts, upon which the court can found any correct judgment. I assume it to be a settled principle, that a court can infer matters of law from facts which are correctly stated, but, that no court can infer one fact from another fact stated, unless the inference is *ex vi termini* obvious. If I may so speak, the affidavits are demurrable, for containing superfluous and irrelevant matter: See *Chitty's General Practice on the subject of Affidavits*; and the matters of fact of law and of argument are so blended together, that one part cannot be rejected as surplusage, without rejecting the whole. It is immaterial in this part of my argument, whether this be a criminal or a civil proceeding. In either case, the affidavits upon which the whole proceeding, fraught with the utmost consequence to the property of individuals, is sought to be founded, should be certain to a certain intent in general, and taken most strongly against the relators, who are indeed unfortunate if with a full knowledge of all the facts, their own showing is insufficient; *Rex* vs. *Meir*, 3 *T. R.* 507.

As to the supplemental affidavits, there is abundant authority going to show, that in a proceeding of this nature, after a party has taken his ground, the court will not permit him to shift it, or to amend his affidavit, unless under peculiar circumstances, and then only by allowing him to dismiss the proceedings and commence again *de novo*; *Rex* vs. *Osbourne* 4 *East.* 337.

Upon the whole view of the argument upon the motion, has the Supreme Court original *criminal* jurisdiction in any case. If it has jurisdiction, can it exercise it, unless the mode and means of exercising it are provided by law? If the court can so exercise jurisdiction, in a quo warranto, is the proceeding now before the court a quo warranto? If a quo warranto, and an information in the nature of a quo warranto be one and the same thing, have the relators made out a sufficient case in their affidavits, for the court to grant the rule?

The defendants, so far as their own acts, and the validity and fairness of the election in question is considered, do not shun a thorough investigation; but for the safety of the institution confided to their care, they do at this critical period of its existence avoid a public exposure of its affairs.

I respectfully invite the attention of the court to the papers which I have been permitted to file upon the argument of the motion. They are recorded evidences, and relate to matters, which are stated or alluded to in the affidavits themselves. Upon examination of these papers, or at least of the charter of the Bank, I trust the court will be satisfied, that by the charter of the Bank, the general delegation of power to the Central Board, after a specific enumeration of powers, was nugatory and void—that under it the Central Board had no authority to prescribe that the presidents of the principal Bank and branches, should give to the persons elected a certificate of their election, thereby enabling *him* to suspend or wholly defeat at his caprice, a valid election. That it was for the principal Bank, in all other respects than as to the *time* and *place*, to regulate the election of its own directors. That in point of fact, such a certificate could not be obtained; for asmuch as the President *pro. tem.* upon being left out as director, at the election in question, not only ceased to be President *pro. tem.* but ceased to be a director, and had not actually been a director for some three months previous to the election; because, by the requirements of the charter, the first directory elected on the day of October, 1837, were to continue in office for one year, and not for any longer period. The Relators were present at and concurred in the election, and voted for four of the seven directors, whom they are now seeking to remove. Vide case of the *King* vs. *Symmons*, 4 *T. R.* 223.

I trust the court will be satisfied, that the judges at the election

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acted properly in rejecting every vote which they did reject. That the commissioners appointed to *hold* the election at least acted properly in rejecting the votes offered for Ferrebe's estate, for Davies and Ware, for Cummins and Notrebe, which will leave the result wholly unchanged. That the transfer of stock from the Branch at Chicot, was in contravention of the charter, because it appears from the records of the Bank, that at the time of the transfer there was no *excess* at that Branch; but really more stock on the books of the principal Bank, than there was at the Chicot Branch; and that if the judges had admitted every vote, which the relators claim they ought to have received, it could by no possibility change the result, except on to *one* of the individuals elected. That the directors have complied so far as lay within their power, with the absurd regulation of the Central Board, by obtaining from the President *pro. tem.* of the principal Bank a certificate of their election.

Here I respectfully urge it upon the court, that if the revising and controlling power, vested by the charter, in the Central Board, over the *acts* and *proceedings* of the principal Bank and Branches, means any thing whatever, *there* is the place for the validity of this election to be examined into and contested; that is the tribunal to which the relators ought to have appealed, if perchance they have suffered injury. Vide information refused *Rex* vs. *Dawes; Rex* vs. *Marten*, 4 *Bur.* 2123. See also *King* vs. *Stacy*, 1 *T. R.* 3; 2 *B. B. & A. A.* 479.

But what is to be effected by this proceeding, should the relators prove successful? If the court gives judgment of ouster against the present directory, the old directory will not thereby be reinstated; *because their term of service by the charter has expired.* The Bank would be left without control, disorganized, discredited, ruined; and when your Honors render such a judgment, you should in mercy place the Bank in the hands of trustees, to take charge of the effects and wind up its affairs.

Then, will the Supreme Court grant the rule, or listen to an information, upon light and trivial grounds, wherein the only result can be, the rendition of an idle and nugatory judgment, to the ruin of an institution, whereon are anchored the hopes and prosperity of the State?

COCKE and PIKE, for the motion:

The counsel for the motion respectfully submit:

That the position assumed by the opposing counsel, that this court cannot take jurisdiction of this matter, inasmuch as it is no exercise

of *appellate* powers, is not warranted by the language of the Constitution. That instrument declares that the Supreme Court shall, "*except in cases otherwise directed by this Constitution*," have appellate powers only. The section in which this provision is contained, is the *only* one referring to or defining the jurisdiction of the Supreme Court; and if there are "cases otherwise directed," in which this court can exercise original jurisdiction, they must be looked for in that section; and clearly are no other than the issuing of the writs therein named, including writs of *quo warranto*, and the power of hearing and determining the same. *Rev. St. p.* 33—*s.* 2.

The objection that the exercise of this power by the court would abrogate the provision of the Constitution, that "the right of trial by jury shall remain inviolate," hardly merits serious notice. What right of trial by jury is to remain inviolate? Clearly the right of trial existing at the adoption of the Constitution. What that right is may be easily discovered. By the code of laws bearing the name of Henry 1st, compiled under his direction not long after A. D. 1100, it is provided that "every man shall be tried by his peers of the vicinage; and we wholly reject all foreign forms of trial:" And by Magna Charta, that "no free man shall be arrested or imprisoned, or deprived of his freehold, except by the regular judgment of his peers or the law of the land." See *Crabb's Hist. of Eng. Law*, 59, 139. And it has always been decided, both in England and America, that these provisions do not include proceedings in Chancery or Admiralty. And our Constitution, when it reiterates the clause of Magna Charta last quoted, means that every man shall be tried, and his rights determined, either by jury, or the mode of trial pointed out by Common Law: else why the phrase "law of the land." In the case of *Clark* v. *United States*, 2 *Washington*, 523, WASHINGTON Justice said, "What is there in the Constitution or laws of the United States, which requires the trial to be by jury, in the case of an information *in rem*, on the admiralty side of the District Court? The former preserves that mode of trial in suits at common law. But an information *in rem*, in a case of admiralty jurisdiction, is not a suit at common law, but an admiralty proceeding, where the trial never is by jury." See *State Bank* v. *State*, 1 *Black*, *p* 272.

It does not necessarily follow, therefore, that in every trial the accused is entitled to a jury. And if it did, still this court would, if governed by the common law practice, as we shall show it must be, direct

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the issues made up to be tried by a jury. *Willcock on Corp.* 497: *Rex.* v. *Amery*, 1 *T. R.* 363: *R. v. St. Mary*, 7 *T. R.* 735; *R. v. Whitchurch*, 8 *Mod.* 211.

Another position, and one on which reliance seems to be placed, is, that although the Constitution has given to this court the power to issue writs of *quo warranto*, and to hear and determine the same; yet that power cannot be exercised, and the grant thereof is inoperative, until the legislature shall have presented the mode and form of proceeding. And it is further discovered, that State Courts, like the Courts of the United States, have no common law jurisdiction.

No common law jurisdiction—when the common law and general statutes of Great Britain, up to 1607, are by positive enactment recognized as a part of the law of this land. But the forms and mode of proceeding, it is said, are no part of the common law—because they have been mere inventions of the judges. How much of the common law is contained in statutes and acts of Parliament—how much merely in decisions of courts, and maxims handed down from age to age, and recognized as part of the common law? Let us take as one example the method of trying title to land. We have till recently had no statute providing the mode of proceeding in such cases—but our courts have every day taken cognizance of actions of ejectment. Yet if the argument used by the opposing counsel be good, there is no such jurisdiction, because it is an action not known to the old common law—authorized and invented by English judges, and the mode and manner of proceeding wherein have not been directed by legislative enactment. The writs usually used to try the title to land were, writs of entry in the nature of an assize; writs of entry *sur disseizin en le per:* writs of entry *sur disseizin en le per et cui:* writs of entry *sur disseizin en le post:* and some forty others, of entry and assize.—These actions were all superseded, not by statutory provision, but by the practice of the courts, long before 1607. The action of ejectment was originally considered an action of trespass, which went for the recovery of damages only, but in the time of Edward IV, it was held that the plaintiff therein should restore what remained of the unexpired term, as well as the damages, as appears by the year book of 7 *Edw.* IV. *fol.* 6. And this opinion, says a writer upon the subject, *was confirmed into law*, by the decisions of the courts in the reign of Henry VII. See *Crabb.* 418, 448. 3 *Co. Litt.* 209 *N. L.* And it may safely be asserted that nearly all the forms of action now in use, and

the rules of proceeding therein, and nineteen twentieths of all the principles of the common law, have been adopted entirely by judicial decision, and not by legislative enactment.

The opposing counsel are equally mistaken as to the extent to which the common law has been adopted in the United States and this State. They have confounded two questions. It is true that in the courts of the United States, there being no provision in the National Constitution, adopting the common law, including equity and admiralty, as well as *legal* doctrines, it has been held that it is not the common law of the United States. But it never has been doubted that the constitution and laws of the United States were made with reference to the existence of the common law: that when an authority or a power is once given, the nature and extent of that authority, and the mode in which it should be exercised, *must be regulated by the rules of the common law. United States* v. *Cooledge*, 1 *Gallison* 488. The courts, it is said, cannot derive *their right to act* from the common law. But when the general jurisdiction is given, the *rules of action under* that jurisdiction, if not prescribed by Statute, may and must be taken from the common law, when they are applicable, *because they are necessary to give effect to the jurisdiction:* and it is a settled doctrine, both in common and civil law, that where the jurisdiction is given, every thing also would seem to be granted without which the jurisdiction cannot be exercised. See 1 *Kent*, 315 to 319. And chancellor Kent, after considering the whole subject, comes to the conclusion, that, "when the jurisdiction is once granted, the common law, under the correction of the constitution and Statute law of the United States, would seem to be a necessary and safe guide, in all cases, civil and criminal, arising under the exercise of that jurisdiction, and not especially provided for by statute. 1 *Kent*, 320, 321. *Robinson* v. *Campbell*, 3 *Wheaton* 212; 10 *Wheaton* 159. The court, therefore, would proceed in this case according to the rules of the common law, even were it not adopted by statute as the law of the land. Should the court decide even, that under the constitution alone, it could exercise no jurisdiction, except to issue a *writ* of *quo warranto*, still we contend, that the constitution having given this court power generally over the subject, we are entitled to the common law remedy, (as we shall show it to be,) by information. The common law is the common jurisprudence of the people of the United States, was brought with them as colonists, and adopted, so far as appeared applicable to our institutions

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and circumstances. It is our patrimony. It was claimed by the Congress of the United States in 1774, as a branch of those "indubitable rights and liberties to which the respective colonies are entitled." And to use still further the words of Kent: "It fills up every interstice, and occupies every wide space which the statute law cannot occupy." And we do assuredly claim that we have the same right to have leave to file our information, and have it proceeded on by the mode fixed by the common law, as we have to bring in an inferior court an action of ejectment; and the counsel opposing might as well object to our bringing such action, because the legislature had not adopted it, or fixed the mode of proceeding in it; and because it is an action invented by English judges; and that, therefore we should resort to our writ of assize, or any other obsolete and antiquated writ.

Some two days were consumed by the counsel opposing, in a dissertation upon the difference of a *writ* of quo warranto, and an information in the nature of a quo warranto; and he still seems not to have arrived at a clear understanding of the subject. In order to meet at once several of his objections, it may be as well to examine in the first place the nature of the writ of quo warranto, the proceedings upon it, and the time when it fell into disuse—and also the common law jurisdiction of the court of K. B. as to informations.

First, then, what is a *writ?* BRACTON defines it thus: "*breve quidem cum sit formatum adsimitlitudinem regulae juris: quia breviter et paucis ierais intentionem proferentis exponit, et explanat, set regala juris rem, quae slt, brerrer enaviat. Non tamen ita breve esse debeat quin rationem et tim intentionis convineat.*" 3 *Co. Lit.* 348. It was called *breve*, because it contained briefly *the matter of complaint* alleged by the plaintiff. An original writ is a mandatory letter, issuing out of the court of chancery, under the great seal, and in the King's name, directed to the sheriff, containing a summary statement of the cause of complaint, and commanding him in some cases, to command the defendant to do the thing required, or if he failed to do so, then to summon him to appear and show reason wherefore he had not done so—and in others, requiring the sheriff, if the plaintiff *should make him secure*, &c. to cause the defendant to appear without any option. The former was called a *pra ecipe*—the latter a *si te fecerit securum*. See *Crabb* 115: *Stephen* 5: *Tidd* 116: 3 *Co. Lit.* 349. One object of the original writ, therefore, is to compel the appearance of the defendant in court; but it is also necessary as authority for the institu-

tion of the suit: for it is a principle (subject only to the exception introduced by the practice of proceeding by bill) that no action can be maintained in any Superior Court without the sanction of the King's original writ: the effect of which is to give cognizance of the cause to the court in which it directs the defendant to appear. To sue out an original writ is consequently, the first step taken in the suit. It is the business of the plaintiff to sue it out, and he obtains it as a matter of course. *Steph. Plead. p.* 5, 6. The original writ of quo warranto was in the nature of a writ of right for the King. *Willcock*, 439. *Gilb R.* 151; *Rex* vs. *Staverton*, *Yelv. R.* 191. The original writ was never used as a process for compelling the appearance of the defendant. At a very early day it was the practice for the plaintiff to file a draft of the original writ with the proper officer of the court of chancery, and in the meantime without waiting for the original the capias or summons issued in the first instance, and the original was seldom or ever taken out of the office. *Steph: Plead.* 26, 27. There is a broad distinction drawn in the books between the original *writ* and the *process;* the former being the foundation of the suit, and the latter the means by which the defendant is compelled to appear.

A brief statement of the different kinds of process necessary to be issued before there could be any final determination of the matter, will show the court the cause of the great delay in proceedings anciently upon writs original, and the reason why many such suits have fallen into disuse. If the party did not appear on the summons, then he was attached by pledges, and afterwards by better pledges. If he still did not appear, the sheriff was commanded *quod habeas corpus*, to take the body. If the sheriff returned *non inventus* there issued a *distringas per terras et cetalla*, after that another *distringas* commanding him also to take the body; after that another *distringas ne manum apponat;* and lastly a writ to take the lands and chattels into the King's hands. Thus there might be one summons, two attachments, a capias (as it was afterwards called) and four distresses. *Crabb*, 280; *Tidd*, 125; 2 *Co. Lit.* 359, *N. H. Stephen's Plead.* 27. We will now proceed to consider the origin and nature of the writ of quo warranto, and to show that the writs of quo warranto and information were concurrent remedies at common law. The ancient writ of *quo warranto* was a writ by which the *mere right* was tried: it was a merely *civil* proceeding. The information in the nature of a quo warranto was a *criminal* proceeding, and formerly upon such information the party

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could only be punished for the usurpation, but now judgment of ouster may be pronounced: *Rex* vs. *Bennett*, 1 *Strange*, 102; 2*d Inst.* 282. *Yelv.* 190; *Cro. Jac.* 260; *Co. Ent.* from 527 to 564. *Rex* vs. *Ponsonby;* 1*st Vesey* 6. *Formerly before the Statute of Gloucester*, 18 *Ed. I*, the King exercised a power of sending commissioners to inquire into the right to franchises, and if no charters were produced the liberties were seized unto the King's hands without any formal trial. 1 *Inst.* 280. This being much complained of, the statute of quo warranto was made in order to remedy the grievance. It is said in some of the authorities, that this statute was the foundation of the proceedings in quo warranto; in others that it is merely the old common law writ and proceeding: *King* vs. *Amery*, 2*d Term R.* 540; *Crabb*, 175. This statute directs that such as had liberties should be permitted to use them so as they made no encroachments on the crown till the coming of the Justices in eyre: and directs the sheriff to make a proclamation that all those who claimed liberties should be before the Justices in eyre at the next assizes to show quo warranto they held them, &c. and they were allowed a certain time. But if the party came not before the justices in eyre the franchises should be seized into the King's hands nomine districtionis, which the party in the same eyre might replevy: but if he did not replevy them while eyre sat in that county, the franchises were lost and forfeited forever. 2 *Inst.* 282: And by *statute* 18 *Ed. I*, it was declared that if any should object that they were not bound to answer without an original writ; yet if it appeared that they had usurped any liberty upon the King or his ancestors, this objection would not avail them; but they would be compelled to answer without an original writ. *Crabb*, 175. These proceedings upon the writ of quo warranto were had before the justices in eye, or justices itinerant. The appointment of these justices took place as early as the 18th year of *Henry I*, by whom the kingdom was divided into circuits, and three justices in eyre appointed to each. *Crabb.* 103. The necessity of these justices was superseded, and their commissions not revived. according to Sir MATHEW HALE, after the 10th year of Ed. III; *Crabb*, 277, and informations in nature of quo warranto came into general use upon the cessation of eyres at t[illegible] *Gilb. R.* 153 Lord Coke says, 2d *Inst.* 498, that with justices in eyre, this branch lived, and with them it died. 1 *Str.* 105.

It is clear from these authorities, that the opposing counsel have entirely mistaken the nature of a *writ* of quo warranto. It was not, as

he asserts, a *criminal*, but a civil proceeding; and in the nature of a writ of right. It was not the *process*, but merely the foundation of the suit, and the party usurping was compelled, by statute of Edward I, to answer, *although* there was no regular writ.

Let us now inquire as to the origin of the proceeding by information. That, as we have already shown, was at first a merely criminal proceeding, whereby the defendant was punished for the usurpation, but no judgment of *ouster* could be pronounced. "Since the introduction of writs," says a standard writer upon English law, "it has become a maxim in law, that no suit should be commenced in the King's Courts without a writ; but this is to be understood only in reference to ordinary cases. "There were other modes of proceeding, *of more ancient date than that by writ*, which were more adapted to the extraordinary jurisdiction, exercised by our Kings at an early period, in the administration of justice." One of these was by *bill*, which was a sort of plaint made *personally* in court, in King's Bench, Exchequer and C. B. Another mode, of unknown antiquity, in the nature of a verbal complaint, was by suggestion or surmise, which at a very early day excited the jealousy of the Commons, with regard to the Council and Exchequer; but does not appear to have been resorted to in K. B. in common cases, so as to awaken any particular observation: and *in matters* affecting the King, suggestions were admitted without dispute, and were afterwards established under the name of informations.—*Crabb*, 294. The *Common Law* jurisdiction of the court of K. B. to grant leave to file an information of this kind, is broadly laid down in *Willcock*, 456, 7, and cases there cited. That power existed at *Common Law*, and the Statute of Anne only regulated the mode of proceeding.

We, therefore, deduce from this statement of the law, that by the common law in force at 1607, there was but one method of proceeding in quo warranto—that that method was by information—that there never had been any necessity for an original writ—and that the *process* against the defendant was as entirely different from the writ of quo warranto, as it was from the information. The Constitution has given this court jurisdiction over the subject matter—it has authorized them to hear and determine it—and if so, the common law being also adopted, this court can proceed in any method known to the common law. In 1607 what would have been understood by the expression, "a writ of quo warranto?" Undoubtedly a proceeding by quo war-

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ranto, whether by writ or information. In either case, the process would be a summons—and it is merely a question in what way the suit shall be brought into court.

But it is objected that a quo warranto is a *prerogative* writ—not a remedial one. What is a remedial writ? So a mandamus is defined to be a *prerogative* writ. It is not a writ of right, and to issue as a matter of course, but a *prerogative* writ, and so are writs of *prohibition* and *procedendo*. *Willcock*, 354; 2 *T. R.* 335. Yet all these are not the less *remedial*. *Cas. Temp. Hard.* 99.

The opposing counsel has laid great stress upon the point, that the writ of quo warranto lay only in cases of usurpation of *public* franchises. Admit the position to be true, and still it has been decided, in the case of *The People* v. *Utica Ins. Co.* 15 J. R. 336, that, every privilege or immunity *of a public nature*, which cannot legally be exercised without legislative grant, is a public franchise: and that *the right of banking* is a public franchise. We are therefore within the rule, admitting it to be as stated.

But the position that quo warranto only lay in cases of usurpation on some franchise of the crown, is not correct. See *R.* v. *Nicholson et al.* 1 *Str.* 299. In that case, by *private* act of Parliament, for enlarging and regulating the port of Whitehaven, several persons were appointed Trustees, and power given them to elect others, upon vacancy by death or otherwise. The defendants took upon them to act as trustees, without such an election as required by the statute, and upon a motion for an information in nature of a quo warranto against them it was objected by the counsel for the defendant, that the court never grants these informations, but in cases where there is a usurpation upon some franchise of the Crown. To this it was answered and resolved by the court, that the rule was laid down too general, *for that informations have been constantly granted*, where any new jurisdiction, *or a public trust* is exercised without authority. See also *R.* v. *Boyles*, 2 *Ld. Raym.* 1559. It is sufficient that it is a public office, and concerns the public. See also 5 *Mass.* 230. If merely private, it will be denied. *R.* v. *Lowther*, 2 *Ld. Ray*, 1409 & 1 *Str.* 637.

It is said, also, that a quo warranto is properly aimed against the *existence* of the corporation. Such is not the case. It is true, that in the time of Charles II, charters were taken away by this proceeding, but this has been denied to be law ever since. These proceedings were an illegal exercise of arbitrary power, by means of a corrupt

judge. A scire facias is the only proceeding by which a corporation can be deprived of its existence. A quo warranto aims at the existence of the franchise, but not of the corporation. The latter will still exist, though every franchise be stripped away. See *R.* v. *Amery*, 1 *T. R.* 515; *Willcock*, 334, 335, 336.

It is, also, said that by both the common law and the statute of Anne, there must be, in all cases where the corporation or franchise had an existence, a judgment of seizure into the hands of the King. This is not correct. Where the franchise usurped might be repossessed and enjoyed by the King, there he had judgment of seizure; in all other cases there was judgment merely of *ouster*. *R.* v. *Hertford* 1 *Ld. Raym.* 426; *Willcock*, 499; *Strata Marcella*, 9 *Co.* 25 b.; *R.* v. *Hearle*, 1 *Str.* 627; *Symmers* v. *R.*, *Cowp.* 510; *R.* v. *Amery*, 2 *T. R.* 566: *R.* v. *Pasmore*, 3 *T. R.* 244.

It is urged that the proceeding should have been several. See upon this point *Willcock*, p. 458, *Sec.* 343, 351, 425, 426, and cases there cited.

And the court will here remark, that this being merely a motion preliminary, and to show cause, the court may grant the rule in such shape as shall seem proper. The rule may be, either to show cause why a *writ* of quo warranto, an information in the nature thereof, or several informations, should not issue, as the court in their discretion may think proper.

As the question of jurisdiction is the most important one, and as that question is raised principally upon the difference between the writ of quo warranto, and the information in the nature of a quo warranto, we will briefly recapitulate the positions we have assumed on that point.

1st. Where an authority or power is once lawfully given, the nature and extent of that authority, and the mode in which it should be exercised, must be regulated by the rules of the common law. Where the jurisdiction is given, every thing is granted, without which the jurisdiction cannot be exercised.

2d. This court has original civil jurisdiction to issue writs of quo warranto, and hear, and determine the same.

3d. No original writ of quo warranto, or any other original writ, according to the definition thereof at common law, can be issued by this court; because original writs in England did not issue out of the same court in which the cause was to be tried, but out of chancery, under the great seal. So that in this State the whole system of original writs is abrogated and annulled.

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4th. That the writ original was not the process, but the *foundation* of the action; and long before the 4th year of James the I, it ceased to be issued in any case, and no objection could be taken for the want of it. And, therefore, when the Constitution speaks of issuing *writs* of quo warranto, it means merely to give the power of issuing the *process*, in proceedings of the kind, and does not dictate what shall be the foundation of the action.

5th. That the process at the 4th year of James I, was a summons, which is the writ of quo warranto, and that process or writ of quo warranto may issue upon an information.

6th. That at common law no writ of quo warranto was necessary, nor could the party object to the want of it, but was bound to answer upon the summons, whether there was a writ original or not.

7th. That the information in nature of a quo warranto came into use on the cessation of justices in eyre, and took the place of the writ of quo warranto, and thereby became a civil proceeding, although at first it was a criminal proceeding. So that since the establishment of the court of King's Bench, the procession the information has been in law and fact the *writ* of *quo warranto*.

In addition to these conclusions, we further refer the court, upon the question of jurisdiction to the case of the *Commonwealth* vs. *Sprenger et al*, 5 *Binney*, 353, in which an information of this kind was tried in the Supreme Court, although the St. 9 Anne had not then been adopted in Pennsylvania: also to 3 *Serg. & Rawle*, 52.

And the Supreme Court of Missouri, in a case in the 3d Volume of their Reports, under a clause in the Constitution, of which ours is an exact copy, has decided That as the Constitution gives that court the power to issue writs of quo warranto, and thereby confers the jurisdiction over the subject matter, that court would devise a method of proceeding, to effectuate the grant of power; and they therefore issued the writ, and determined the case upon the filing of an information.

Many objections have been taken to the affidavits filed in this case; but it is sufficient upon this motion if they show a reasonable ground for the rule. And if they do not, yet if it appears *from* the process filed by the defendant, that the election was illegal, the rule must go. This, as we shall hereafter show, *does* appear, from their own papers herein filed. See as to the sufficiency of affidavit, *Willcock*, Sec. 368, 376, 377, 378, 379—2 *East* 177.

And we contend that under these authorities the court should have required affidavits of the defendants, and heard nothing from them, until such affidavits were filed. And we further conclude that no affidavits on the part of the State are necessary, and that the court is bound to grant the rule, upon the mere motion of the State's attorney. The writ of quo warranto was the King's writ of right; the information was a criminal proceeding filed by the attorney or crown officer at his discretion; and even in cases where application has been made to the courts by *private* persons, for leave to file informations, the court has sometimes refused the leave, *but* referred them to the attorney general. See *R.* v. *Morgan*, 11 *Mod.* 309; *R.* v. *Lowther*, 2 *Ld. Raym.* 1409.

The objection that Messrs. Rapley and Cummins concurred in the election, is invalid. They are not *relators*. They have not *acquiesced* in the election. See *Willcock, Sec.* 406, *p.* 477; *R.* v. *Smith*, 3 *T. R.* 574; *R.* v. *Morris & Stewart*, 3 *East* 216; *R.* v. *Clarke*, 1 *East*, 47, *R.* v. *Binsted*, *Cowp.* 771.

RINGO, *Chief Justice*, delivered the opinion of the court:

On a former day of the present term, the attorney for the state and *ex-officio* attorney general, upon the affidavits of Charles Rapley and William Cummins, then read and filed with the clerk, moved the court for a rule on *Chester Ashley*, *Roswell Beebe*, *Elijah A. More*, *James DeBaun*, *Richard C. Byrd*, *William W. Stevenson*, and *James L. Dawson*, to appear and show cause why an information in the nature of a quo warranto should not be filed against them, for usurping the office of directors of the principal bank of the Real Estate Bank of the State of Arkansas.

After the motion was made, and the argument in support thereof commenced, *Chester Ashley*, one of the persons against whom said rule is asked, voluntarily appeared, and by leave of the court, was heard in opposition to the motion.

In considering this application, the first question to be decided, is, has this court original jurisdiction of an information in the nature of a quo warranto?

In support of the motion it is argued, that a writ of quo warranto and an information in the nature of a writ of quo warranto, are convertible terms, used in legal parlance to express the same thing; referring alike to the same proceeding, and prosecuted at common law to to accomplish precisely the same objects; that the convention, in adopting the

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terms used in the constitution, intended to embrace the proceeding by information in the nature of a quo warranto, as well as the proceeding by writ of quo warranto, and therefore the proceeding now sought to be instituted and prosecuted here is within the jurisdiction expressly granted to the constitution: and if it is not within the power expressly granted to issue writs of quo warranto, and to hear and determine the same; it it is a remedial writ, and is clearly within the terms "and other remedial writs," as used in the constitution.

In opposition to the motion it is insisted, that this is a court of exclusively appellate jurisdiction; that if it has original jurisdiction in any case, it does not extend to an information in the nature of a quo warranto, which is strictly a criminal proceeding. That such an information differs essentially from the ancient writ of quo warranto. That they were originally designed for different purposes, although in modern practice the same objects may in part be effected by either.

In the order in which the court has viewed this subject, it is first necessary to determine whether the proceeding by writ of quo warranto, and that of information in the nature of a quo warranto, are regarded by common law as being one and the same thing.

A writ of quo warranto at common law was a high prerogative writ, in the nature of a writ of right for the king, against him who obtained or usurped any office, franchise, or liberty of the crown. and also lay in case of nonuser or long neglect of a franchise, or misuser or abuse of it; 3 *Bl. Com.* 262.; *Sel. N. P.*, *4th Am. Ed.*, 322.

The authorities cited and referred to in the briefs, fully prove that it was a civil proceeding, prosecuted by the king's attorney general at the suit of the king, without any relation whatever, to try the mere civil right to some public office, franchise, or liberty of, or belonging to the crown; which was claimed or exercised by some person in opposition to, and in violation of the prerogative right of the sovereign; and in case of judgment for the defendant he was allowed the franchise, but when the king had judgment it was "that the franchise *capiatur in manum domini regis.*"

It results, therefore, from the nature of the proceeding, and the objects it was designed to accomplish, that it could only be prosecuted for the king, by his attorney general; the king, in his high corporate character, being alone interested or concerned in the only matter to be determined by it; that is, whether the mere right to the office, franchise, or liberty existed in the person claiming or exercising it by grant

or otherwise, or whether it belonged to the crown, no grant thereof ever having been made, or if granted being forfeited, and if the right was in the crown, the same never having been granted out, or the grant made being forfeited, the franchise was in either case restored to the king, that he might grant it out again to whomsoever he should please: and no fine was ever imposed, or punishment inflicted on the defendant.

As to the precise period of time when this ancient writ fell into disuse, or the more modern proceeding by information in the nature of a quo warranto was introduced, we are not informed, nor is it material.

Informations as the basis, or institution of a criminal prosecution, are said to have existed co-eval with the common law itself, but as a mode of investigating and determining civil rights between private parties, they seem to owe their origin and existence to the statute of 9th Anne, which expressly authorised the proceeding in all cases of *intrusion into, or usurpation of corporate offices in corporate places.* And although informations in the nature of a quo warranto, were exhibited by the king's attorney general long prior to that time, the remedy given thereby was never extended beyond the limits prescribed to the old writ, and could, therefore, only be granted for some usurpation on the prerogative rights of the crown, and it is said there is no precedent of such information having been filed or allowed at the instance, or on the relation of any private person previous to such statute of 9th Anne, nor could they be so exhibited afterwards, except in the cases mentioned in the statute, which neither increased or abridged the authority of the attorney general on that subject.

This proceeding by information, when originally introduced, like all other criminal informations of that period, was designed *principally* to punish offenders who were guilty of usurping the prerogative rights of the crown; yet upon conviction or disclaimer, the right of the crown being thereby established, there was, besides the fine, a judgment of ouster against the defendant, or that the franchise be seized into the king's hands, thus affording incidentally, a civil remedy for the king. And hence it is that all the authorities, ancient and modern, speak of the proceeding as being properly a criminal method of prosecution. It is, however, said to have been long since applied to the mere purpose of trying the mere civil right, seizing the franchise or ousting the wrongful possessor, the fine being nominal only. And, therefore, it

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was urged in the argument that it must be considered as a substitute for the ancient writ of quo warranto, which came into existence upon its disuse, and in 1607, fully occupied its place in the common law, and consequently, that the convention must be understood as referring to it, when they use the term writs of quo warranto, rather than the antiquated and obsolete proceeding by writ of quo warranto, which it cannot be supposed to have been their intention to revise.

To this argument we do not assent. The introduction of the latter, did not subvert or destroy the former; they may have had, and we do not doubt that they did have a contemporaneous existence; their primary objects were essentially different, and the mode of proceeding in them materially varied, while they were in some respects attended with different results, and the form of the judgment was never the same; one was strictly a civil, the other properly a criminal method of proceeding. We are, therefore, of the opinion that the proceeding by writ of quo warranto and information in the nature of a quo warranto as known to and regarded by the common law, are so different from each other, that they cannot with propriety be classed together, or comprehended by one common name or description.

This brings us to the first and most important question presented by the motion, that is, the question of jurisdiction. The duties of this court to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law are to be expounded without a leaning the one way or the other, according to those general principles which usually govern the construction of fundamental or other laws.

This court is created by the constitution, and its jurisdiction and powers specially declared and limited by the same authority. The constitution is the paramount law of the land, and the original jurisdiction conferred and restrictions imposed by it, can neither be increased or diminished by any legislative power in the state, and all laws contrary thereto are void.

The second section of the sixth article of the constitution declares, "that the Supreme Court, except in cases otherwise directed by this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, under such restrictions and regulations as may from time to time be prescribed by law. It shall have a general superintending control over all inferior and other courts of law and equity.

It shall have power to issue writs of error and supersedeas, certiorari and habeas corpus, mandamus, and quo warranto, and other remedial writs, and to hear and determine the same. Said judges shall be conservators of the peace throughout the state; and shall severally have power to issue any of the aforesaid writs."

It was obviously the intention of the constitution, by the first clause of the section above recited, to invest the Supreme Court with a general appellate jurisdiction, co-extensive with the state, and to confine its powers exclusively to subjects of this description; except in cases where it is directed by the constitution itself to exercise original jurisdiction.

The next clause confers upon the Supreme Court a general power of control over all inferior and other courts.

And the third clause gives to the Supreme Court, "power to issue writs of error and supersedeas, certiorari, and habeas corpus, mandamus, and quo warranto, and other remedial writs, and to hear and determine the same." And it is relied upon as vesting in this court original jurisdiction of the case now under consideration, and it is admitted by all, that there is no other provision to be found in the constitution, upon which any claim of original jurisdiction for this court can be based.

In construeing the powers conferred by this clause of the constitution, the objects and purposes for which these powers were conferred must be kept constantly in view; and it must not be forgotten that this is only part of a system, or frame, or fundamental law of government, established by the people of the state according to their own free pleasure and sovereign will. And that the powers, which are conferred, the restrictions, which are imposed, the authorities, which are exercised, the organization and distribution thereof, which are provided, are in each case for the same object, the common benefit of the governed, and not for the profit or dignity of the rulers.

In directing the organization of the judiciary department, it was the object of the convention to provide for the whole people of the state, through the several judicial tribunals, the most free, ample, speedy, cheap, and convenient administration of justice: for which purpose, various tribunals of different grades were ordained; and one or more of them established in every county and township in the state. And a jurisdiction was conferred upon each by the constitution corresponding in interest and magnitude with their respective grade and dignity, in

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such manner that the whole judicial power and authority of the government became vested in some one or another of the courts or justices of the peace.

The respective jurisdictions and powers thus conferred upon these several tribunals, is in every respect, special, limited and defined by the constitution; and so ordered, arranged, and distributed, as to avoid all conflict of authority between them, and to constitute a regular gradation of powers, each having a control and a revising authority over such others as are inferior to it; and to produce a harmonious action between the several branches of the whole system.

Having thus stated what we understand to have been the object and design of the convention in the arrangement and organization of the whole judiciary department of the government, as apparent from the structure of the constitution, and viewed as a whole, and also in its component parts: such construction must be put upon the powers which are conferred, and the restrictions which are imposed upon each of the several judicial tribunals, as is most consonant to the general intention and design of the framers of the constitution, and will be most effectual in enforcing and carrying into execution their expressed will.

That the will of the convention may be more apparent, we will here briefly state the jurisdiction and powers conferred and the restrictions imposed by the constitution upon each of the several tribunals, in which collectively is vested the whole judicial power of the state.

By the fifteenth section of the sixth article of the constitution, exclusive original jurisdiction of all matters of contract, (except in actions of covenant) where the sum in controversy is of one hundred dollars or under, is expresly conferred upon a justice or justices of the peace. And the justices of the peace are expressly prohibited from exercising jurisdiction in any case, "to try and determine any criminal case or penal offence against the state," but they may enquire of offences committed, and commit or admit to bail the offender, taking recognizance returnable to the proper court having jurisdiction of the case.

By the ninth section of the same article, jurisdiction is expressly given to the county courts, "in all matters relating to county taxes, disbursements of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties." And by the tenth section of the same article, "such jurisdiction in matters relative to the estates of deceased

persons, executors, administrators, and guardians, as may be prescribed by law, until otherwise directed by the general assembly, is given to the judge of probate."

The third, fourth, fifth, and sixth sections of the same article, prescribe and limit the jurisdiction and powers of the circuit courts, and bestow upon them "original jurisdiction over all criminal cases which shall not be otherwise provided for by law; and exclusive original jurisdiction of all crimes amounting to felony at common law; and exclusive original jurisdiction of all civil cases, which shall not be cognizable before justices of the peace, until otherwise directed by the general assembly; and original jurisdiction in all matters of contract, where the sum in controversy is over one hundred dollars," and give to them "superintending control over the county courts, and over justices of the peace," and declare that "they shall have power to issue all the necessary writs, to carry into effect their general and specific powers, and vest in them jurisdiction in matters of equity, until the general assembly shall deem it expedient to establish courts of chancery."

From this view of the structure and organization of the whole judiciary department, and also, of its component parts, and the distribution of jurisdiction and power to the several members or branches thereof, it appears manifestly, to have been the first great object of the convention, to confer upon the Supreme Court, as the final tribunal, to interpret, pronounce, and execute the law, to decide controversies, and enforce rights; powers and jurisdiction of an appellate nature only; and to leave with the inferior tribunals the first or original cognizance of cases and controversies between private parties, as well as all controversies in which the state might be a party, or otherwise interested, in which the sovereignty, or sovereign rights, powers, and franchises of the state are not involved; but in cases involving the civil rights of the sovereign power of the state, affecting vitally its character, and the proper administration of the government itself; in which the whole people, and every individual member of the community, has a direct, immediate, and most sacred interest, when the exercise of a public right or public franchise is the subject matter of controversy, the convention appears to have entertained a different view, and to have deemed it a proper subject to be investigated and determined in the first instance before the highest judicial tribunal in the

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state; and with this view they authorised the Supreme Court, to issue "writs of quo warranto," and to hear and determine the same, thereby conferring upon this court, in such cases, original jurisdiction.

It is conceded by all that this court cannot take original jurisdiction of the present controversy under the authority given to it to issue writs of error, supersedeas, certiorari, habeas corpus, and mandamus, they being wholly inapplicable to the case in the form in which it is now presented. And this court has already determined, in effect, that the present proceeding is not within the power granted to "issue writs of quo warranto;" this being a proceeding of a very different nature, not included in that description.

We will now examine what jurisdiction or power this court can derive from the term, "other remedial writs," as used in the constitution. The terms here used are general, and their application is left indefinite. Did the convention intend thereby to authorise this court to issue every writ of a remedial nature known to the law, and to hear and determine the same? If they did, their declaration that this court "shall have appellate jurisdiction only, except in cases otherwise directed by the constitution," as well as their special grant of powers, to issue certain enumerated writs, each of which is of a remedial nature, is wholly unmeaning, if not positively absurd; and beside that, it would produce a direct conflict of authority between the several judicial tribunals, and involve them in the utmost confusion. It would destroy every vestige of harmony in the whole system, and virtually repeal every other grant of judicial power made by the constitution. It would draw to this forum original jurisdiction co-extensive with the state, of every civil controversy; for it must be observed, that in respect to the sum or amount involved, there is no restriction whatever imposed by the constitution, in any case in which this court can exercise original jurisdiction; therefore, if it can, under any authority derived from this general grant, take original jurisdiction of any case, it may of all cases falling within the same general class. These consequences are clearly not within the object and intention of the convention, but in opposition to both. And it is a rule founded upon the dictates of common sense, admitted by all jurists, that in construing a constitution or fundamental law of government, no construction of a given power is to be allowed, which plainly defeats or impairs the avowed objects.

If, therefore, the words are fairly susceptible of two interpretations

according to their common sense and use, the one of which would defeat one or all of the objects for which it was obviously given, and the other of which would preserve and promote all, the former interpretation ought to be rejected, and the latter to be held the true interpretation.

The terms "other remedial writs," as before remarked, are indefinite, and may embrace a greater or less number, in proportion to the objects and purposes to which they are intended to be applied, and they might be applied to almost every purpose, with the single qualification, that it shall be in a proceeding of a remedial nature, as contradistinguished from proceedings of a criminal or penal character, which by the language used are expressly excluded. The terms used, must therefore, receive such a construction as will promote, rather than defeat the objects of the grant, or the general objects of the convention.

The context, and every other part of the whole instrument which relates to the organization of the judiciary, and the distribution of the judicial power, must be looked to in determining the power given by this general indefinite grant. These have all been carefully and critically examined by the court, and from them it appears satisfactorily, that it was the intention of the framers of the constitution to limit and restrict the Supreme Court in the exercise of original jurisdiction, to such cases as the writs therein specially enumerated would apply, and that the power to issue other remedial writs, was intended to embrace only such other writs as might be properly used in the exercise of appellate powers, or the power of control over inferior or other courts, expressly granted by the constitution. And such, in every point of view in which they can be considered, is in the opinion of the court, the only legitimate, true, consistent, sensible, and practicable interpretation which they can receive.

It therefore results from the view taken of this subject by the court, that the Supreme court cannot, under any power conferred upon it by the constitution, exercise original jurisdiction in any case where the proceeding is, or must necessarily be of a criminal nature; its original jurisdiction being expressly limited and restrained by the constitution, to such matters of a civil nature as may be properly brought before the court, by some one of the writs expressly enumerated in the constitution; and the proceeding by information in the nature of a quo warranto, being properly a criminal proceeding, this court cannot entertain origi-

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nal jurisdiction of it. And for this reason, the motion in this case must be denied and the rule refused.

The court does not, therefore, deem it necessary or proper, to express at this time, any opinion upon the question raised and argued at the bar, upon the facts presented in this case.

The motion is denied, and the rule refused.

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ROBERT A. LOGAN *against* LEWIS MOULDER.

ERROR *to Pope Circuit Court.*

Where a defendant at the return term craved oyer and demurred, and after demurrer sustained, filed his plea, to which a demurrer was sustained, and a writ of enquiry thereupon awarded; an entry of default made at the next term is idle and nugatory.

The evidence of a Lovely claim is the certificate of the Register and Receiver, usually endorsed on the back of the proof, showing that the conditions of the act of May 24, 1828, and the stipulations of the treaty of May 23, 1828, have been complied with. When the settler is able to adduce this certificate, his right of entry is complete.

The old covenants of warranty inserted in ancient deeds, and the action upon them have long since become obsolete in England, and never had a legal existence under our form of government.

The covenants of seisin, of right to convey, and against incumbrances, are personal covenants, not running with the land, nor passing to the assignee: They are mere *choses in action*, not assignable at common law.

The covenants of warranty, and for quiet enjoyment, are in the nature of real covenants, and run with the land.

When the grantor of a Lovely claim covenants that he has a good and valid claim, or full power and lawful authority to convey, he will be compelled to produce the evidence of his title, whenever it is legally demanded.

In such case, if the vendee suspect the title to be defective, he is not bound to wait till he is legally evicted, but may commence suit at any time, and maintain his action, unless the vendor show that he has performed the condition of his bond.

Where the plaintiff declares, therefore, on a covenant of seisin, or of good right, full power and lawful authority to convey, it is unnecessary to allege an eviction; for the covenant is broken, if at all, at the very moment it is made.

All covenants, not prospective, and that do not pass with the land, are strictly personal, and if there is no right or authority in the person making them, they are broken as soon as made.

But in order to charge a party on a covenant of warranty, or for quiet enjoyment, eviction must be alleged.

Where the breach in the declaration is that the defendant had no title to the claim he conveyed, and the plea answers thereto, that he "had *some* title;" the plea is no answer, and a demurrer to it is properly sustained.

The ultimate extent of the vendor's responsibility, under any and all of the usual covenants in a deed, is the purchase money, with interest, and the covenant or deed is evidence of that purchase money.

An instruction, therefore, that the measure of damages was the value of a Lovely claim at the date of the covenant, is erroneous.

This was an action of covenant commenced by *Moulder* in the court below, to September, A. D. 1831, upon an instrument of writing under seal, by which *Logan* conveyed to *Moulder* a claim to three hundred and twenty acres of land, commonly called a Lovely claim, of one Peter Mercer, and bound himself in the following words: "And

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the said *Logan* hereby warrants and defends said claim to be good agreeably to said act of Congress; and the said *Logan* further binds himself to make such other and further proofs as may be necessary to establish the aforesaid claim." The breach assigned was that the defendant had made no such other and further proof as were necessary to establish the claim; that said claim was not a good and *bona fide* one; that the defendant had no title to said claim, and had furnished no proof necessary to establish its validity.

At the return term the defendant below craved oyer of the writing declared on, and filed his general demurrer to the declaration, which was overruled; and he thereupon filed his plea in bar, in which he alleged that the "said claim of the said *Mercer* is and was a good claim, as covenanted by the defendant, and that the same was and has been proven up according to law, and all the necessary proof has been made, so far as the officers of the land office at Batesville required; and that there never has been any notice or demand given to or made on this defendant of any other or further proof being necessary to establish said claim; and that the said defendant had, at the time of making said covenant, some title and claim to the said settlement right of him the said *Mercer*."

To this plea the plaintiff demurred, and the order thereupon is as follows: "Whereupon, after hearing argument of counsel the court sustained the said demurrer. It is, therefore, considered by the court, that the said plaintiff have, and recover from the defendant the costs by him about demurrer expended, and a writ of enquiry awarded, returnable at the next term of this court." No further order was made at that term.

At the next term the defendant was defaulted, and interlocutory judgment entered against him, and the damages assessed immediately by jury, for which damages so assessed, judgment was rendered at that term. The defendant appeared before the jury in mitigation of damages, and offered to refer to all the stipulations, conditions, and covenants, contained in the writing declared to show that the plaintiff was entitled to small or nominal damages. This the court refused to permit, and instructed the jury that they had only to find the value of a Lovely claim, at the time the covenant was executed.

CUMMINS and PIKE, for the plaintiff in error:

The plaintiff in error contends that the demurrer to his plea was im-

properly sustained. The plea is a full answer to the whole breach, and every part of it. It alleges the claim was a good one, as covenanted by him—that it had been proven up according to law, and all the necessary proof made so far as required by the land officers—and further, that he had, when he made the covenant, some title and claim to the said settlement right.

It may be here observed, that although one good breach is sufficient, and, therefore, there being one such in the declaration, to wit, that the claim was not a good and *bona fide* claim, the demurrer to the declaration was rightly overruled; yet, if there are several bad breaches and one good one, and the plea answers only the good breach, it will be adjudged sufficient. In this case the plea, although perhaps defective in point of form, and containing superfluous averments, answers the only good breach, and is sufficient. The breach that *Logan* had made no other or further proof is bad, because it is not averred that such other or further proof had become necessary, without which there was no breach of the covenant. The plea, however, goes on to aver that all the proof which was necessary had been made, and that the land officers required no more. The averment in the breach, that *Logan* had no title to the claim, is insufficient. An eviction by better title is necessary even in chancery, to constitute a breach of warranty of title. *Greenby et al* v. *Willcox*, 2 *J. R.* 1.

If the allegation in the plea that he had "some title" is not a sufficient answer, where such answer is necessary; yet as it was unnecessary, the plea was notwithstanding good. A bad breach need not be noticed in the plea. *Wait* v. *Maxwell*, 4 *Pick.* 88.

But there is a still more fatal error, and that is, that no judgment being rendered at the return term, except simply for costs upon the demurrer, and the defendant still having the right to plead over, a writ of enquiry was awarded; and at the *next* term an interlocutory judgment was rendered by default, the damages assessed by a jury at the same term, and final judgment rendered therefor. By the law of the land, then, and still in force, it is provided—that "*all* writs of enquiry *shall* be executed at *the next succeeding term* after an interlocutory judgment is given." *Dig.* *p.* 322. The assessment of the damages in this case was, therefore in direct violation of law, and void, and the judgment based thereon invalid.

The plaintiff in error also contends that the court below erred in directing the jury that the measure of damages was the value of a

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Lovely claim at the time of executing the covenant; and submits that the true measure of damages was the consideration mentioned in the covenant, and interest thereon, unless there was something in the covenant itself to qualify it—(no other evidence being produced)—and that, therefore, his counsel were entitled to comment upon, and offer to the jury for their consideration in making up their verdict, the whole covenant, and all its various stipulations and conditions, inasmuch as the verdict might have been materially affected thereby.

The measure of damages in an action for breach of covenant of quiet enjoyment, and eviction, is the value of the land at the time of the sale; and the price agreed on by the parties is considered conclusive evidence of such value. *Kinney* v. *Watts*, 14 *Wend.* 41; 2 *Wend.* 405; *Staats* v. *Ten Eyck's Extrs*, 3 *Caines* 311; *Pitcher* v. *Livingston*, 4 *J. R.* 1; *Morris* v. *Phelps*, 5 *J. R.* 49; 5 *J. R.* 35; *Waldo* v. *Lacy*, 7 *J. R.* 173; *Caulkins* v. *Harris*, 9 *J. R.* 324; *Bennett* v. *Jenkins*, 13 *J. R.* 50; *Marston* v. *Hobbs*, 2 *Mass.* 433; *Bickford* v. *Page*, 2 *Mass.* 455; *Bender* v. *Fromberger*, 4 *Dallas*, 441; *Duvall* v. *Craig*, 2 *Wheat.* 62 *n. c.*; *Letcher et al* v. *Woodson*, 1 *Brock.* 212; *Shepherd et al* v. *Hampton*, 4 *Cond. R.* 233; *Hopkins* v. *Lee*, 6 *Cond. R.* 23.

In an action on covenants of *seisin* and *good right to convey*, the damages are the *consideration money and interest*. See cases above—and *Caswell* v. *Wendell*, 4 *Mass.* 103; *Sumner* v. *Williams*, 8 *Mass.* 162; *Nichols* v. *Walter*, 8 *Mass.* 243; *Harris* v. *Newell*, 8 *Mass.* 262; *Leland* v. *Stone*, 10 *Mass.* 459; *Gore* v. *Braizier*, 3 *Mass.* 523.

On covenants for warranty and quiet enjoyment, the value of damages is the same. See as above—and also in Virginia, *Lowther* v. *Commonwealth*, 1 *Hen. & Mun.* 202; *Nelson* v. *Matthews*, 2 *Hen. & Mun.* 164; *Bigelow* v. *Jones*, 4 *Mass.* 512:—So in *South Carolina*, *Liber* v. *Parsons*, 1 *Bay* 19; *Guerard* v. *Rivers*, 1 *Bay* 265—and in Connecticut, *Horsford* v. *Wright*, *Kirby* 3—and New Jersey, *Hulse* v. *White*, 1 *Coxe*, 173—So in Indiana, *Lindley* v. *Lukin*, 1 *Blackf.* 266; *Blackwell* v. *Board of Justices*, *&c.* 2 *Blackf.* 142—And in Kentucky, *Harland* v. *Eastland*, *Hardin*, 590; *Cox* v. *Strode*, 2 *Bibb* 273; *Cosby* v. *West*, 2 *Bibb*, 563; *Booker* v. *Bell*, 3 *Bibb*, 173; *Davis* v. *Hall*, 2 *Bibb*, 590. And the rule is the same on covenents to convey, as on covenants of seisin, where there is an inability to convey, not arising from fraud in the vendor. The rule of damages is in such case invariably the purchase money and interest. *Rutledge* v. *Lawrence*, 1 *Marsh.* 396; *Rankin* v. *Maxwell*, 2 *Marsh.* 488.

FOWLER, *contra:*

The defendant, in error, contends that the plea of the said *Logan* was wholly insufficient in law, and no answer to the averments contained in the declaration; and consequently the demurrer to the said plea was properly sustained. Said plea is bad for duplicity, setting up several defences:—each subject matter of defence should have been set out in a separate plea; unless said *Logan* had pleaded general performance of all the covenants, which is not pretended in said plea.—Some of the distinct parts of said plea contain matter, which would throw the burden of the proof upon the plaintiff below, by a conclusion to the country, whilst other parts thereof must necessarily conclude with a verification, and place the *onus probandi* on the said *Logan;* consequently such matter could not properly be included in the same plea —the different parts being wholly repugnant to each other. Said plea also wholly fails, in form and substance, to respond to the declaration; using terms which are not used, either in the covenant or declaration: and failing to use others, to which it was absolutely essential to respond.

The judgment for costs against *Logan*, upon the demurrer to this plea, and an award of a writ of enquiry to next term, is substantially good, and sufficient to justify the assessment of damages at the subsequent term. It is not contended that the interlocutory judgment at the return term is technically in form; but under the statute it is sufficient. *No judgment* shall be abated, arrested, quashed, or *reversed, for any defect or want of form.* See *Pope, Steele, McCampbell, Dig.* p. 322, sec. 25. There is sufficient on the record to show that a judgment upon the demurrer was given, and a writ of enquiry awarded, which is substantially sufficient; and such judgment was properly rendered, as a matter of course, against the said *Logan*, unless he had asked leave to plead over. If he has failed to ask such leave, it was his own *laches*, of which he cannot be permitted to take advantage in this court. The assessment of damages, therefore, at the subsequent term, under said judgment on demurrer and award of a writ of enquiry, was strictly legal. And this position, it is contended, cannot be shaken by the fact on the record, that a judgment by default was entered at said subsequent term; which is but surplusage, and can in no wise affect the case. After an appearance by *Logan*, a judgment by *default* could not be rendered; and there appearing one proper interlocutory judgment on the record, rendered at the return term,

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on said demurrer, this court will construe the record that the one properly rendered shall stand, and the one improperly entered and not material to the case shall be excluded as surplusage. The assessment of damages, then, was made at the next term after the awarding of the writ of enquiry, as the Statute directs.

The defendant in error also contends that the instruction given by the said Circuit Court to the jury, was in accordance with law, and that the value of a Lovely claim as specified in said covenant, was the true measure of damages, under the state of the evidence presented by the Bill of Exceptions.

LACY, *Judge*, delivered the opinion of the court:

This is an action of covenant founded on a writing under seal; by which *Logan* binds himself to convey to *Moulder*, the Lovely claim of one Peter Mercer, to three hundred and twenty acres of land, and warrants the same to be a good claim agreeably to the act of congress, and to make such other and further proof as may be found necessary to establish its validity. The breaches assigned negative the general terms of the covenant; and allege, that the covenantor did not make any other and further proof to establish the claim, that the claim is not a good and valid claim, and that at the time of executing the deed the defendant had no title to said claim.

At the return term of the writ, the defendant in the court below, appeared and craved oyer of the writing sued on, and filed a general demurrer to the declaration, to which there was a joinder, and judgment was thereon given against the demurrer. He then put in a plea of performance, averring that no other or further proof was necessary to establish the claim, that the claim was a good and valid claim, and that he had some title to the settlement right of him, the said Mercer.

To this plea there was a demurrer, joinder, and judgment against the sufficiency of the plea; and a writ of enquiry was thereupon awarded to the next succeeding term. At the return term of the writ, the entry is, that the defendant made default, and a jury was then called to execute the writ of enquiry; who assessed damages for the breach of the condition of the covenant against the defendant, and final judgment was thereon rendered. At the trial of the cause, the court instructed the jury that the measure of damages was the value of a Lovely claim at the time of executing the covenant, and refused to permit the attorney for the defendant to read its conditions as evidence in mitigation of damages.

To the opinion of the court a bill of exceptions was filed, and made part of the record, and the case is now brought up to this court, by a writ of error to reverse the judgment below.

The assignment of errors presents the following questions for our examination and decision, *First*, are the proceedings in the cause, in awarding and executing the writ of enquiry, illegal? *Secondly*, is there a good cause of action laid in the declaration, and are the breaches well assigned, or in other words, is the defendant's plea a sufficient answer to, or denial of the allegations charged? *Thirdly*, what is the true rule or measure of damages for a breach of covenant of seisin, warranty, or to convey a good and valid title. The first question presents no difficulty, and may be briefly disposed of. The writ was awarded and executed in strict conformity with our statute on the subject, the entry that the defendant made default at the return term of the writ, was wholly idle and nugatory, for the record shows that before that time, he had appeared and pleaded to the action; and such an entry being an improper and illegal one, surely cannot be permitted to set aside and annul both an interlocutory and final judgment properly rendered, and regularly entered up in the cause. See *Dig.*, *p*, 322.

Before the court proceeds further in their investigation, it is necessary to define what is meant by the term *Lovely claim*. It is a donation made by the general government, of two quarter-sections of the public lands, according to the legal subdivisions of the public surveys, to a particular class of persons, who are embraced by the act of congress of the 24th of May, 1828, and who have complied with the conditions therein imposed, and also with the stipulations of the treaty ratified between the United States and the Cherokee Nation of Indians, on the 28th of May, 1828. See 2d *vol. Laws of the U. States relating to the public lands*, *p*. 233, *sec.* 8-9.; and *Indian Treaties*, *No.* 97, *p.* 52. The evidence of the claim, is the certificate of the register and receiver of the land office usually endorsed on the back of the proof taken before them, showing that the conditions of the act, and the stipulations of the treaty have been complied with. Whenever the settler is able to adduce the certificate of title, his right of entry, which in the first instance was inchoate, then becomes complete, and he is fully authorized to make a location or entry of the land claimed according to the provision of the law under which his interest accrues; and the government on the presentation of the certificate of the register of the land office to the secretary of the treasury, is bound to issue to him or his

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heirs a patent or grant for the land. The covenant declared on, warrants and defends such a claim to be a good and valid claim, agreeably to the act of congress, and purports to convey a good and lawful title under it. The declaration is not accurately or formally drawn, but is believed, however, to be substantially correct, if it contains a good cause of action. As there was a demurrer to the plea, if the declaration is defective, or the breach is not properly assigned, the court will go back to it, and give judgement against him who committed the first fault in the pleadings. This brings us to the consideration of the nature of the covenant sued on and the conditions it contains. It is a deed of bargain and sale to convey a Lovely claim, with a warranty of title. The breaches assigned negative the general words of the covenant; but the cause of action, if there be any, arises from the allegation, that at the time the defendant executed the covenant, he had no good or valid title to the claim in controversy. It is contended by the plaintiff in error, that this is an action founded on a warranty of title, and that no recovery can be had, because the declaration no where alleges an eviction. The old covenant of warranty usually inserted in ancient deeds, and the action upon them have long since become obsolete in England, and it is believed, they never had any legal existence under our form of government; they were real covenants running with the land, whereby the grantor of an estate in freehold warranted the title, and he and his heirs upon voucher, or judgment rendered against him in a writ *warrantia chartae*, were bound to give other lands to the value of those from which there had been eviction by a paramount title; the heir of the warrantor was liable only on the condition that he had other land of equal value cast on him by descent.

The introduction of personal covenants into modern deeds, has long since superseded this mode of conveyance, and the usual covenants in such case are: "*First*, that the grantor is lawfully seized; *Second*, that he has a good right to convey; *Third*, that the land is free from incumbrance; *Fourth*, that the grantee shall quietly enjoy; *Fifth*, that the grantor will warrant and defend the title against all lawful claims."

The covenants of seizin, and of right to convey, and against incumbrances are personal covenants, not running with the land, nor passing to the assignee, but are declared to be mere *choses in action*, not assignable at common law. The covenants of warranty, and of quiet enjoyment, are in the nature of a real covenant, and run with the land, and descend to the heirs, and are made transferable to the assignee.

In the present case the cause of action does not result from the covenant of warranty, nor on the defendant's failure to make other and further proof to establish the validity of the claim; for the plea fully answers both of these allegations; but it accrues on the substantial averment, that at the time of executing the deed, Logan had no right nor title to the donation claim of Peter Mercer.

What is the obligation imposed by the assignment of such breach? Must the vender allege an eviction to sustain his action, or if he avers that the vendor never had any title to convey, is the allegation of an eviction dispensed with? When was the covenant broken, or at what time did the cause of action accrue? This question is readily answered by attending to the nature of the pleadings in the cause, and the legal presumptions they raise.

The grantor is certainly bound by the deed. In that he has asserted he has a good and valid claim, or full power and lawful authority to convey, and consequently he has voluntarily taken upon himself the burden of proof, and as it was more properly in his own knowledge, what estate he had granted, than that of the grantee, who is presumed to be a stranger to it, the court will compel him to produce the evidence of his title, whenever it is legally demanded; so that they may see whether at the time he executed the covenant, he had a good and valid claim, or full power and lawful authority to convey; the vendee is supposed to rely on the vendor's deed, and if he suspect the title to be defective, he is not bound to wait until he is lawfully evicted, but may commence suit at any time, and maintain his action unless the vendor show he has performed the condition of his bond. What is that condition? "The vendor has covenanted he had a good right and lawful authority to convey, which is equivalent to a covenant of seizin; and that being the case, the law will not permit him to shift the responsibility from his own shoulders on to those of the vendee." It is immaterial in whom the title is vested; the grantor has declared that it vests in him, and he is bound by his deed and the legal presumption arising from it, to show what title he possessed, when his grantee questions it in a court of justice. His authority to execute the covenant is derived from the legal interest he had in the claim, and where there is no right or title there can be no authority to sell. It is, therefore, unnecessary for a plaintiff in declaring on a covenant of seizin, where a defendant binds himself that he has good right, full power, or lawful authority to grant, to allege an eviction, in order to maintain the action, for

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the covenant is broken if at all, at the very moment it is executed, and a right of action accrues instantly upon the breach of it. All covenants that are not prospective, and that do not pass with the land, are strictly personal covenants, and if there is no right or authority in the party executing them, they are declared to be broken so soon as made; and may be sued on at any time, and a recovery had without alleging an eviction, or an interruption in the title. The leading case on this subject is that of *Bradshaw*, 9 *Co. Rep.* 60; where the true rule was laid down by all the judges, which has been followed up ever since. In the case of *Muscot* vs. *Ballet*, *Cro. Jac.*, 369; and *Glinister* vs. *Audley*, *Sir T. Raym.* 14; the question was again brought under discussion, and the decision in *Bradshaw's* case fully sustained. The doctrine settled by those authorities has been repeatedly approved in many recent cases by the court of king's bench, and it has been expressly recognized and reasserted by most, if not all of the American decisions on the subject, 2 *Saund.* 181, *n. b.*; 8 *East.* 80; 8 *T. R.* 459; *Bac. Ab. Cov.* 15; *Pullin* vs. *Nicholas*, 1 *Lev.* 83; *Cro. Eliz.* 749, 916; *Greenby* vs. *Willcocks*, 2 *J. R.* 1; *Hamilton* vs. *Wilson*, 4 *J. R.* 72; *Abbott* vs. *Allen*, 14 *J. R.* 248; *Com. Dig. Pleader C.* 45, 49; *Marston* vs. *Hobbs*, 2 *Mass.* 433; 2 *Root's Rep.* 4; *Sug. on Vend.* 415; *Morris* vs. *Phelps*, 5 *J. R.* 49; *Delavergne* vs. *Norris*, 7 *J. R.* 348; *S. P. Stanard* vs. *Eldridge*, 16 *J. R.* 254. The rule is different in covenants that run with the land; at common law upon voucher, or upon the writ of warrantia chartæ, the demandant recovered of the warrantor to have other land of equal value with the lands of which feoffee is evicted; and when personal covenants were introduced as a substitute for the remedy on the vouchers and warrantia, the established measure of damages was not at all varied or affected. In order to charge a party on a covenant of warranty, an eviction must be alleged by a paramount legal title, and so on a covenant for quiet enjoyment, for in both of these cases there is no breach of the condition, unless an eviction be had, for it is that which constitutes the breach, and gives a good cause of action; 2 *Saund.* 178, *a. n.* 9, 181 *a. n.* 10; *Dudley* vs. *Folleatt*, 3 *T. R.* 584; *Johnson* vs. *Smith*, 1 *H. Blackstone*, 34; *Greenby* vs. *Wilcocks*, 2 *J. R.* 1; 3 *Marsh.* 324; *Marston* vs. *Hobbs*, 2 *Mass.* 439; 2 *Kent*, 475. This principle may be considered conclusively settled; that in all personal covenants, where the grantor has no right or title to convey, the breach of the covenant happens, if at all, at the very moment of time the deed is executed; and in declaring on such a covenant, the

plaintiff need not aver an eviction, but the burden of proof is with the defendant, and it devolves on him to show what interest he had in the estate or chattels, in order that the court may judge what authority he had to make the grant or agreement. This being the case, it necessarily follows, that the declaration in the present case, sets out a good cause of action, and that the breaches are there properly assigned. It has already been observed that the plea answers fully every part of the declaration except the averment, the defendant had no title to the Lovely claim of Peter Mercer. In regard to that breach, which constitutes the real cause of action, it wholly avoids the issue; and hence as the breach is well assigned, the plea must of course, be defective. The allegation is, that the defendant in the court below has no right nor title to the claim he conveyed. The plea avers that "he had some title to the said settlement right of the said Mercer." What kind of interest or title had he to the claim as set forth in his plea? Was it an estate for life or for years, or was he seized of an indefeasible estate of inheritance in fee. It certainly cannot be pretended that the words "some title," mean any one or all of these estates. If they mean any thing, it is, that the defendant had no title at all, and his plea negatively establishes the charge made in the declaration, which is, that at the time the defendant executed the covenant sued on, he had no right, title or interest in the Lovely claim of Peter Mercer. The court, therefore, rightfully sustained the demurrer to the plea.

The only remaining question to be decided is, what constitutes the true value or measure of damages in actions for a breach of personal covenant where there is no fraud alleged. This question can scarcely any longer be regarded as open for investigation; the adjudications on the subject have been so frequent and conclusive upon the point, that nothing can be said in support of the justice or policy of the rule.

It may now be asserted that the ultimate extent of the vendor's responsibility, under all and any of the usual covenants in his deed, is the purchase money with interest. This is believed to be the general rule throughout the United States, and is particularly applicable to the condition and situation of our country; *Staats* vs. *Ex't'rs of Ten. Eyck Caines* 112; *Pitcher* vs. *Livingston*, 4 *Johnson R.* 1; *Caswell* vs. *Wendall*, 4 *Mass. R.* 108; 4 *Dallas*, 441; *Marston* vs. *Hobbs*, 2 *Mass. Rep.* 434, 455; *Dowsale* vs. *Crains*, 2 *Wheaton*, 62, *n. c.*; *Letcher & Arnold* vs. *Woodson*, 1 *Brock.*, 212; *Shepherd & Others* vs.

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Hampton, 4 *Cond. Rep.*, 233; *Hopkins* vs. *Lee*, 6 *Cond. Rep.*, 23; *Sumner* vs. *Williams*, 8 *Mass. Rep.* 162; *Nichols* vs. *Walter*, 8 *Mass. Rep.* 243;

The consideration money and interest is the compensation in damages that the vendee is entitled to recover, and the covenant, or deed, is evidence of that value. "The interest is given to countervail the mense profits that the grantor is liable for, and is, or ought to be commensurate in point of time, with the legal claim of the mense profits." The consideration money is the amount agreed on by the parties themselves. What is it that the vendee has parted with, or the vendor received? Merely the purchase money with interest; certainly then, the vendor should not be liable where there is no intention or evidence of fraud, to a greater extent than his vendee has been injured; and that is the consideration money and interest. To establish any other principle would be to commit, in most cases, great and palpable injustice, and in many, certain and speedy ruin. In the instructions given by the circuit court to the jury on that point, the principle here laid down as to the measure of damages was clearly departed from, and of course, that decision is manifestly erroneous.

The instructions are, that the value of a Lovely claim at the date of the execution of the covenant, and not the consideration money and interest was the correct measure of damages. The judgment of the court below must therefore be reversed with costs, and the cause remanded to be proceeded in agreeably to the opinion here expressed.

STEPHEN GASTER *against* CHESTER ASHLEY.

ERROR *to Pulaski Circuit Court.*

In an action of debt or covenant against the assignor, upon a personal, collateral guarantee, on an assigned note or bond, it is indispensably necessary to allege in the declaration, that the plaintiff has used due diligence in prosecuting his suit against the original obligor, or that he is wholly insolvent and unable to pay.

No particular form, or technical words are necessary to create a covenant, but any words, which show the intention of the parties, will be sufficient. It may be by any words, and on any part of the agreement. The enquiry always is, what was the intention of the parties, and that is to be collected from the context of the instrument itself, which is to be construed according to the obvious meaning, and reasonable sense of the words; and if there be any ambiguity in the words, such a construction is to be given as will militate most strongly against the covenantor.

An endorsement upon a bond for a Lovely claim, assigning, and setting over the bond, and containing the further clause, "and I hereby guarantee that the said claim shall be confirmed at the Land Office at Helena, within a reasonable time, and that the said claim to a donation is a legal and valid claim," is an original covenant, and not a collateral guarantee.

A breach in such case, that the claim was, at the time of making such endorsement, a bad, illegal, and invalid claim, is good.

One good breach in covenant is sufficient.

The facts of this case are fully stated in the opinion of the court.

CUMMINS and PIKE, *for the plaintiff in error:*

The plaintiff in error conceives that the court below erred in sustaining the demurrer. Upon argument of the demurrer, but two grounds were assumed by the defendant, nor does the plaintiff anticipate that other grounds will be taken in this court. The defendant based his demurrer upon the point that the plaintiff should have averred a demand upon the original covenantor for a confirmation of the claim mentioned in the covenant, and a refusal by him to claim a confirmation. And in arguing this point, it was also assumed that the endorsement of the defendant was not a covenant, but merely a guarantee that the original covenantor should do certain acts; from which it was deduced that a demand upon the original covenantor to perform was necessary in order to fix the liability of the defendant.

The plaintiff in error respectfully submits that the endorsement of the defendant, which is the foundation of this action, is a covenant to

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all intents and purposes, and that the word "guarantee," when used in an obligation under seal, is synonimous with the word "covenant." A guarantee by parol will sustain an action of assumpsit; but a guarantee under seal will sustain no action unless it can be the foundation of the action of covenant. But the argument of the defendant assumed more than the case warranted. The guarantee of the defendant was, not only that Mayes should do certain acts—not only that the claim should be confirmed within a reasonable time—but that the said claim was, at the time of making such covenant, a legal and valid claim. This guarantee, that the claim was a legal and valid one, was precisely such a covenant as the covenants of title in a general deed, and was broken as soon as made, if the claim was not at that time a legal and valid one. See 2 *J. J. Marsh.* 430; 2 *Johns. R.* 1; 4 *J. R.* 72; 4 *Cranch*, 429; 2 *Saunders*, 171, *c.*; 5 *J. R.* 53.

So far, therefore, as the argument of the defendant was founded upon the distinction between a guarantee and a covenant, it was based upon imagination; for it is well settled that no particular words are necessary to make a covenant. 1 *Bibb*, 379; 2 *Bibb*, 614; 1 *Marsh.* 476; 3 *Johns. Rep.* 44; *Lit. Sels Cas.* 134.

It only remains to consider the necessity of averring a demand of confirmation upon the original covenantor. The breach in each count of the declaration is, not only that the said claim "has not been confirmed at said land office, although a reasonable time has elapsed;" but also "that said claim was, at the time of making said covenant, a bad, illegal, and invalid claim." If the claim was an illegal and invalid claim, the covenant was broken as soon as made. See *ut sup.*

In a declaration in covenant it is enough to assign one good breach. See 3 *Yerger* 463; 4 *Littell*, 432; 5 *Mon.* 11, 34. Where there are some good and some bad breaches, a general demurrer cannot be sustained; and if there is enough assigned to show a subsisting cause of action, the demurrer will be overruled. 4 *Litt.* 432 *ut sup.*

There being, then, one good breach, to wit, that the claim was an illegal and invalid one at the time of making the covenant, the declaration was good and sufficient. See 1 *Chitty's Pl.* 325, 6, 9; 3 *Bibb*, 332. And therefore, even allowing the necessity of averring a demand, had the covenant been only that the claim should be confirmed; yet as it was coupled with a further warranty, that the claim was then a legal and valid one, a breach of the latter was sufficient to fix the liability. 6 *J. R.* 65; 13 *J. R.* 264.

Another principle in pleading, which applies to this case, is, that where there is a condition precedent, performance of the condition, or an excuse for non-performance, must be averred. If the claim was illegal and invalid, that fact was sufficient excuse for not making a demand; for to what end demand a confirmation, when such confirmation was impossible?

But a breach of the latter covenant included in itself a breach of the former, for if the claim was not a valid one, it never could be confirmed. It was, therefore, not in fact necessary to aver that the claim had not been confirmed. An averment that the claim was not a legal and valid one, was a complete breach. Yet the plaintiff risked nothing by negativing every part of the covenant. The breach may be as large as the contract, because the plaintiff may recover, though he only prove a part of the breach as laid. 1 *Chitty's Pl.* 329.

Nor is the plaintiff in error left to rely upon these arguments alone. The premises and positions of the defendant are incorrect, and not sustained by law. The very point here in dispute has been often adjudicated and definitely settled in the courts of Kentucky, and those decisions fully sustain the position that in this case there was no need of averring a demand even in the breach of the former part of the covenant. Where a thing to be done is *local*, he must do it in a reasonable time. 3 *Bibb*, 105. And if he fail in the performance, although there may have been no special request, he will be liable for a breach of his contract. *Same ut sup.* This case is like those where the thing to be done is transitory in its nature, because the defendant guaranteed that the claim should be confirmed "in a reasonable time." And even in local acts, if the concurrence of the obligor and obligee is not necessary, the duty accrues presently. 1 *Bibb* 461; 3 *Bibb* 329; 3 *Monr.* 446—which declare that where that which is stipulated to be done is transitory in its nature, and no time is specified for the performance, the covenantor is bound, without being hastened by request, to an immediate performance; and also where concurrrence of the covenantee is not necessary, as in this case. On a covenant to convey lands, to be valued by a third person, it is neither necessary to aver a demand of conveyance, nor a request of valuation. 4 *Bibb*, 300; 2 *Yerger*, 127.

These cases, decided by the courts of Kentucky and Tennessee, bear directly upon the present case. Nor does the reason of the law conflict with the law itself. To what purpose aver a demand of con-

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firmation of title, when it is already averred that the covenantor never had, and never will have it in his power to obtain such confirmation, because the claim was, at the time of making the covenant, illegal and invalid. The words of the court, in a parallel case, *Williams* vs. *Casey*, 4 *Bibb*, 309, apply with peculiar force: "As a breach is alleged, not in the *failure* of the defendant only, but in his total inability to convey, it would be preposterous to require of the plaintiff, before he could maintain his action, to make a special demand of the title."

Upon the point that the breach, that "the claim was bad, illegal and invalid," is sufficient, see *Holder* vs. *Taylor*, *Hobart* 12 *a*, where it was holden, that where a lease for years was made by the *demisi*, that word imported a covenant, and that the averment, that, at the time of making the lease, the lessor *was not seized of the land*, but a stranger was, and so the covenant in law was broken, was a sufficient breach: That it was not necessary to aver an expulsion, because the breach of the covenant was in that the lessor had taken upon him to demise that which he could not.

So in *Lancashire* v. *Glover*, 2 *Shower*, 460, in debt on bond for non-performance of a covenant, "that the defendant had a good and rightful authority to convey;" a breach assigned in the direct negative that he had not a good and rightful authority, &c. is good. So in *Robert Bradshaw's* case, 9 *Co.* 60, and same case in *Cro. Jac.* 304, named there *Salmon* v. *Bradshaw*: So in *Plomer* v. *Plaisted*, 2 *Shower*, 472; *Hancock* v. *Field*, *Cro. Jac.* 170; *Johnson* v. *Proctor*, *Yelverton*, 175; 1 *Saund.* 322, *a n.* (2); *Grannis* v. *Clark*, 8 *Cowen* 35.

See further as to what words are necessary to make a covenant—*Brett* v. *Cumberland*, *Cro. Jac.* 399, 521.

ASHLEY and WATKINS, *contra:*

The question arising in this case is, whether an assignment of a covenant can be sued, without an averment in the declaration, of due diligence on the part of the plaintiff, in prosecuting the covenant, or to insolvency; or that he has at least made demand upon him to perform his covenant.

The law upon this point is the same, in the States of Virginia, Kentucky, and Missouri, as well as of Arkansas, under statutes of assignment nearly or precisely similar, and the authorities are numerous:—1 *Call's Virginia Rep.* 497, *Brinker* v. *Perry*, 5*th Littell*, 194; *Camp-*

Bell v. *Hopson*, 1st *Marshall*, 229; *Lemmons* v. *Choteau*, *Sup. Court Ark.* See *Rec.*

The Statute makes no difference between bonds and covenants for the payment of money or property, which are made assignable and the course of decisions has been uniform. *Digest. Title Assignments.*

As to liability of assignor on bonds, notes, and covenants, see also, 3 *J. J. Marsh.* 636; 4 *ib.* 304; 7 *ib.* 343; *Murdock* v. *Rawlings*, 3d *Monroe* 75; *Bedal* v. *Smith*, *Same vol.* p. 290.

LACY, *Judge*, delivered the opinion of the court:

This is an action of covenant, founded on an endorsement, under the seal of *Chester Ashley* to *Stephen Gaster*, upon a deed of bargain and sale for the conveyance of a donation claim to three hundred and twenty acres of land, executed by Robert Mays to the defendant in error.

The declaration contains three counts, each averring the same cause of action; but charging the defendant in different ways. The deed from Mays to *Ashley* is for the consideration of four hundred dollars, and recites the usual covenants in such conveyances. That the grantor has a good and valid claim, agreeable to the act of Congress —that the claim is properly proved up before the Land Officers, and that if any other proof is necessary to establish its validity, he will furnish the same—that the grantee shall have full power and authority to enter the said claim on any of the public lands, as his agent and his attorney in fact, and upon demand or without it, as soon as the President of the United States shall issue patents on the said entry—that he will execute a deed with general warrantee in fee simple, to the grantee and his heirs for the land previously located, and upon which the grant has emanated. On the back of this deed is the following endorsement: "Know all men by these presents, that I, Chester Ashley, for and in consideration of eight hundred dollars, to me in hand paid by *Stephen Gaster*, the receipt whereof is hereby acknowledged, have assigned, transferred, and set over to the said *Gaster* the within bond, and hereby guarantee that the said claim shall be confirmed at the land office at Helena, within a reasonable time; and that the said claim to a donation is a legal and valid claim. Witness my hand and seal, this 6th day of July, 1835.

CHESTER ASHLEY. (L. S.)

The defendant is only sought to be charged by the latter clause in

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the covenant, and the breaches assigned are, that he did not cause to be confirmed at the land office at Helena, the said claim of the said Robert Mays within a reasonable time; and that the said claim to a donation was not a legal and valid claim at the time of making the agreement, but a wholly illegal and invalid claim. At the return term of the writ, the defendant appeared, and craved oyer of the writings declared on, which was granted. He then filed a general demurrer to the declaration, to which there was a joinder; and judgment was thereupon rendered in favor of the demurrer, and against the sufficiency of the declaration.

The cause now stands on a writ of error sued out and prosecuted by the plaintiff to reverse the judgment of the court below. The record and the assignment of errors present but a single question, which is, does the declaration contain a good cause of action, and are the breaches properly assigned? It is contended on behalf of the defendant, that the present action cannot be maintained, nor are the breaches well laid. The instrument sued on is said to be a mere assignment of a *chose in action*, coupled with a personal guarantee for the ultimate performance of the original obligor's bond. On the other hand, it is insisted for the plaintiff in error, that the defendant's writing obligatory is a covenant to all intents and purposes, and that it is an original, and not a collateral liability. If the first proposition be true, the declaration is fatally defective, and was rightfully adjudged bad on demurrer; for no position is more clearly and incontestibly established by all the authorities, or more consonant to reason and justice, than that in action of debt or covenant, against the assignor upon a personal, collateral guarantee on an assigned note or bond, it is indispensably necessary that the plaintiff should allege in his declaration he has used due diligence in prosecuting his suit against the original obligor, or that he is wholly insolvent and unable to pay. Without some such averment, no cause of action accrues; for the breach entirely depends on the happening of the precedent conditions, and therefore in every instance of the kind such an allegation is one essential prerequisite to the maintainance of the action. The cases cited at the bar in favor of the defendant unquestionably prove the principle here stated, and have exclusive reference to it. 3 *J. J. Marshall*, 360; 4 *J. J. Marshall*, 304; 3 *Monroe*, 75; *Call*, 497.

Before these principles can be considered as applicable to the case

now before the court, the defendant must show from the deed itself, or the legal inference fairly deducible from the contract, that he only intended to bind himself by his assigament and guarantee, for the performance by the obligor of the condition of his bond. The court, in examining the question, do not deem it very material to determine whether the deed of bargain and sale from Mays to *Chester Ashley*, is assignable under our Statute, or not; for, be that as it may, the defendant would still be held liable, if the latter clause in the assignment contained within itself a distinct and independant covenant, separate and apart from the agreement on the bond; and he can in no way he made responsible in this action, if he is only bound as collateral security.

So far, however, as the covenant of Mays, and the entire assignment of it can throw light on the real intention and design of the parties, it should be looked to, and regarded as furnishing no ordinary evidence, by which the contract may be rightfully interpreted. The enquiry then is, what is the character or nature of the agreement declared on. Is it a covenant, or a collateral guarantee? A covenant is an agreement, or consent of two or more persons by deed, in writing, sealed and delivered, whereby either the one or the other of the parties doth promise that something is done already, or shall be done afterwards. And this is either express or in deed, *i. e.* when the covenant is express in the deed, or it is implied, or in law, *i. e.* when the deed doth not express; but the law doth make and supply it. See *Shepherd's Touch Stone, C. VII.* No particular form or technical words are necessary to create a covenant; but any words which show the intention of the parties, will be sufficient for the purpose. *Hollis* vs. *Carr*, 2 *Mod.* 88. For a covenant may be by any words, and upon any part of the agreement, in writing. 1 *Leon*, 324. The word covenant is not necessary to make a covenant. 1 *Rolle Abr.* 518; 1 *Burr* 299; *Hallet* vs. *Willis*, 3 *J. R.* 44. In *Bull* vs. *Follett*, 5 *Cow.* 170, it is said that no precise or formal terms are necessary to constitute a covenant. The enquiry always is, what was the intention of the parties. In construing a covenant, it must be considered in reference to the context, and be performed according to the spirit and intention of the parties. *Marvin* vs. *Stone*, 2 *Cow.* 781; *Quackenboss* vs. *Lansing* 6 *J. R.* 49. In the case of *Iggulden* vs. *May*, (7 *East*, 242; *Plowdon*, 329,) it declared that the intention of the parties is to be collected from the context of the instrument itself, which is to be construed

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according to the obvious meaning and reasonable sense of the words; and if there be any ambiguity in the terms, such a construction shall be given as will militate most strongly against the covenantor. By applying these rules to the case under discussion, we shall find little or no difficulty in discovering the real intention of the parties, the true nature and object of the contract sued on. It is said that the fact of the signing of the bond demonstates what was the intention of the parties; for why assign it, if the defendant intended to make himself responsible in the first instance. There are two obvious answers to this question: In the first place it is exceedingly questionable whether such a deed of bargain and sale can pass, by assignment at law. The equity may be assigned—the legal estate probably cannot be assigned. Secondly, admitting that it can, which is by means conceded, still the peculiar character of the claim conveyed, would induce the assignee to wish to have the title papers in his possession, that he might be able to make the locations in the claimant's own name, as the law required; and as these muniments of title would be wholly useless to the assignor, and he of course would be willing to transfer them, or part with them, by assignment. Again: if the original obligor is answerable to the assignee, to what amount is he bound? Certainly for nothing more than the consideration money and interest, expressed in his deed, which is four hundred dollars; whereas, the assignee has paid to the assignor just double that sum, as their agreement on its face shows, so that the responsibility of the original obligor would be no adequate indemnity for the loss that the present plaintiff sustained, by reason of the defendant's assignment. He cannot have at one and the same time a divided responsibility, for one and the same cause of action. The very idea involves a legal contradiction, and it proves if true, that he has a perfect legal right, without any adequate or legal remedy. This view of the case goes far to prove that the plaintiff never looked to the obligor's original bond, in the event he should be damnified; but that he regards the defendant as alone answerable to him on his assignment of warranty. If any thing should be wanting to strengthen this conclusion, the intention of the parties may be fairly collected and inferred from considering to whom was the purchase money paid, and to whom was full faith and credit given. Certainly not to the original covenantor, but to the defendant in this action. He received the consideration money, and on his deed the plaintiff implicitly relied. For any thing that appears, the original claimant

was an entire stranger to the contract. The plaintiff might be very willing to trust to the responsibility and guarantee of the defendant, but wholly unwilling to place any confidence or reliance upon the ultimate security of the claimant. Besides, the agreement between the parties has all the essential requisites of a covenant. It is in writing, signed, sealed and delivered by the assignor, with a promise to do a particular act. If there should still be any doubt or uncertainty as to the intention or meaning of the contract, the latter clause of the instrument will place the matter beyond all controversy or dispute. The defendant, after reciting the assignment on the bond, further adds:—"I hereby guarantee that the said claim to a donation, is a legal and valid claim." What is the meaning of the word guarantee, as used in this agreement? Does it purport to be a collateral or an original undertaking? In what sense did the parties use it? All words or terms used are more or less arbitary. and the same word or term frequently has several wholly different and distinct meanings. This is one of the imperfections that essentially belong to the nature of all written or spoken language, and the evil, if it can be called one, is remedied by the governing words in the sentence, that precede and follow the doubtful term, by the embodied form and proportions of the ideas sought to be conveyed; and, above all, from the sense and intention of the parties, that define and limit these meanings, which is principally to be gathered from the context of the whole instrument and every part of it, and from the subject matter about which it treats. That the word "guarantee" is very generally employed to signify a remote liability, is admitted; but it does not thence follow, that it is not frequently used to mean a direct or positive engagement. Its ordinary acceptation is to secure, promise, to bind, agree, to warrant, and to defend. It is often inserted in deeds of conveyance, and when it is used, unless its sense is limited or extended by the context of the writing, or the legal consequence of the act, it is synonymous with promise, agree, with warrant, or defend. And in this sense it is used in the deed or assignment executed by the defendant. If it was even doubtful, how it was intended to be employed, still the court is bound to give it such meaning as is most natural and obvious, and which would best carry out the true intention of the parties, and promote the objects of the agreement. The deed should be so construed as to be made to stand if practicable; for it is under the authority and solemnity of a seal; and hence the legal presumption, that if words be used in a cove-

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nant or deed, which will admit of two interpretations, or are in any manner doubtful, they shall be taken to operate most strongly against him who made the grant. To guarantee a title is to warrant that title. To guarantee a right is to defend that right; to guarantee the validity of a claim is to covenant that the party making the deed is seised of an indefeasible estate, of inheritance in fee; for what is a valid and lawful title, but covenant of seisin, and in declaring on such an instrument, the plaintiff need not aver that he was legally evicted: for the deed is a personal covenant—the breach of it happens, if at all, at the very moment of its execution. The authorities upon this point, and the reason upon which they proceed, were fully collected and analyzed in the case of *Logan* vs. *Moulder*, decided during the present term of this court. It is, therefore, deemed unnecessary and inappropriate to go again into the investigation of that subject. See *Greenby* vs. *Wilcocks*, 2 *J. R.* 1; *Abbot* vs. *Allen*, 14 *J. R.* 248.

It was unnecessary for the plaintiff to have averred in his declaration, that the claim was not confirmed within a reasonable time.—This allegation is surplusage. The cause of action did not depend on any subsequent failure of title, but on the assignor's total inability to convey any right or title.

And as there is clearly one good breach assigned, to wit, that the claim at the time of make the endorsement, was a bad, illegal, and invalid claim, the action is well founded, and the breaches properly laid. See 4 *Bibb*, 300; 3 *Bibb*, 332; 1 *Chitty*, 325, 6, 9. In every point of view in which we are capable of considering this subject, we are clearly of opinion, that the agreement of the defendant is a covenant to all intents and purposes for which it was executed.—That it contains all the essential ingredients of a deed of such an assignment, that it was so understood by the parties themselves, and that intention is manifest and demonstrable from the nature and character of the whole transaction. The agreement itself contains apt and appropriate terms to constitute a covenant. It consists of two parts: the first is a new assignment of the original obligor's bond, which is one thing; the second is a personal guarantee or covenant of title, which is wholly a distinct and different matter.

In all probability the vendee would never have purchased, or the vendor parted with the title, had it not been for the assignor's express and declared warranty. To the faith of that he alone trusted, and upon it paid the purchase money; and it would be, therefore, both un-

reasonable and unjust to compel him to resort to any other or wholly different liability. This being the case, the judgment of the Circuit Court was evidently erroneous in sustaining the demurrer. It must, therefore, be reversed with costs, and the cause remanded, to be proceeded in agreeably to the opinion here pronounced, and leave granted to the defendant, if he ask it, to withdraw his demurrer, and plead over to the action.

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THE STATE vs. BROWN.

THE STATE *against* R. C. S. BROWN.

MOTION *for an information, for usurping the office of Judge of the Seventh Judicial Circuit.*

Same points decided as in *the State* vs. *Ashley et al;* ante.

RINGO, *Chief Justice,* delivered the opinion of the court:

This is a relation made by *Albert Pike* and *Bennet H. Martin,* praying that the attorney prosecuting for the state in this court, may have leave, and be required to file in this court an information in the nature of a quo warranto, against said *Richard C. S. Brown,* for usurping, intruding into, and unlawfully holding the office of judge of the seventh judicial circuit in this state.

It has been decided at the present term, on a motion made by the attorney for the state, for a rule on *Chester Ashley and Others,* to show cause why an information in the nature of a quo warranto should not be exhibited against them, that this court has no original jurisdiction of any case prosecuted by and upon such information. The present application is clearly within the rule established on said motion, and is not in every respect so strong a case as that was, therefore the prayer of the relators must be, and is denied.

The same decision was made, in the case of *The State* vs. *Asa Thompson, James Trigg, & Hogan Moss.*

ALANSON HOOPER *against* WATERMAN ET AL.

ERROR *to Pulaski Circuit Court.*

Same point decided as in *Tucker* vs. *Ellis;* ante.

DICKINSON, *Judge*, delivered the opinion of the court:

This case comes up on a writ of error from Pulaski Circuit Court. At a previous day of this term a rule was entered on the motion of the defendants, for the plaintiff to appear and show cause why the judgment of the circuit court in the case should not be affirmed with damages for want of an assignment of errors within the time prescribed by law. A copy of the rule was issued, and the attorney for the plaintiff acknowledged the service thereof. The motion is now to make the rule absolute, or to affirm the judgment with damages, because the plaintiff has not shown any good cause for a failure to file his assignment of error on or before the three first days of this term, to which the writ is returnable.

The rule which governed the court in the case of *James* and *William Tucker* against *Ellis*, *Administrator*, decided at the present term of this court is applicable to this case. The judgment of the Pulaski Circuit Court must therefore be affirmed with six per centum damages.

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HESTER vs. MURPHY.

JOHN B. HESTER *against* BENJAMIN MURPHY.

ERROR *to Conway Circuit Court.*

In action of debt on writing obligatory, evidence that the plaintiff had borrowed a wagon of the defendant, which was to have been returned in four or five days, is not admissible to sustain a plea of payment.

TRAPNALL & COCKE, for plaintiff in error.

DICKINSON, *Judge*, delivered the opinion of the court:

This was an action commenced by *Hester* against *Murphy*, in the justice's court, founded upon a writing obligatory. Judgment was entered in favor of the plaintiff, from which *Murphy* appealed. On the trial *de novo* in the circuit court, *Murphy* pleaded payment, and the only evidence offered in support of his plea, was "that about the first of November or December, 1833, *Hester* borrowed of *Murphy*, a wagon, worth about eighty dollars, which was to have been returned in four or five days, but witness did not know whether the wagon had ever been returned or not." The counsel for *Hester* moved the court to exclude this testimony, upon the ground that it was inappropriate under the plea, because, if the wagon was not returned, *Hester* was responsible in cost, but not in contract; which motion was overruled by the court, and judgment rendered in favor of *Murphy*, for seventeen dollars, to reverse which, *Hester* now brings up the case by writ of error; the only question presented is, whether the evidence was proper under the plea of payment. We have looked into the cases, and can find no authority founded upon either reason or justice, by which a party would be permitted under this plea, to give in evidence a claim wholly uncertain and unliquidated; and although the common law rule has been somewhat changed by our statute, by permitting in some instances, counter demands to be off set under this plea, yet it is only where the plaintiff is indebted to the defendant by bond, bill, note, or book account, or other contract, *McCampbell's Dig. p.* 371; which evidently and clearly refers only to cases where there is an actual indebtedness arising *ex contractu*, not partaking of the character of torts. The judgment of the circuit court of Conway county must therefore be reversed, and this case remanded for further proceedings to be had therein, not inconsistent with this opinion.

GEORGE DYER *against* GEORGE J. HATCH.

ERROR *to Jackson Circuit Court.*

Where the defendant below moved to abate the writ (which was a capias,) and dismiss the cause, for the several reasons—1st, that there was no order of the Judge for the capias; 2nd, that there was no sufficient affidavit to hold bail; and 3rd, that the defendant was held to bail out of his own county: this was merely matter in abatement of the writ; and the defendant, by pleading generally, after his motion was overruled, waived all objections to the writ, and cannot in this court assign for error the overruling of his motion.

The rule would have been the same, if he had pleaded the same matters in abatement.

Where the court below, in process of the cause, rendered judgment for the costs of the motion to abate the writ, such judgment was not warranted by law; yet the remedy thereof cannot be assigned for error when the case is brought here by the writ of error to the final judgment. The validity of the final judgment on the merits, is not affected by such an incidental judgment.

Where in trespass, upon the general issue of not guilty, the jury found "for the plaintiff," and assessed his damages, the verdict is good.

Where the verdict is for one hundred and seventy-five dollars, and the judgment is for "one hundred and seventy-five, the amount of his damages assessed as aforesaid," with costs, the judgment is good, and does not vary from the verdict.

Where a motion for a new trial is made, "because the finding of the jury is contrary to law; and because the damages are excessive and unreasonable, and exceed the amount sworn to by the plaintiff in his affidavit to hold to bail;" if the evidence given on the trial is not brought before this court; if it is not shown that illegal or incompetent testimony was admitted, or legal and competent testimony excluded; or the instructions given or refused by the court below do not appear, this court is bound to presume that the decision of the court below was correct.

And this court, in such case, will presume the decision of the court below, in overruling the motion for a new trial, to have been correct, although an insufficient reason was assigned for such decision.

This was an action of trespass in the circuit court of Jackson county, by *Hatch* against *Dyer*. Before issuing the writ, *Hatch* made an affidavit before the judge of said circuit court, that he had "an actual subsisting demand against the defendant amounting to the sum of one hundred and ten dollars, and that the said defendant now lives in the state of Missouri, and is now about to leave the state of Arkansas, and that he is in danger of losing his demand against him, and he believes that the said defendant ought to be held to bail, &c." Upon which, a *capias ad respondendum* was issued, and the said *Dyer* held to bail in the sum of two hundred dollars. At the return term of the writ, *Dyer*, by attorney, moved the court to abate the writ, and dismiss the cause, because the judge had made no order to hold to bail, filed in the

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clerk's office; because the affidavit to hold to bail was insufficient; and because the defendant had been held to bail in a county of which he was not a resident, which motion was overruled by the said circuit court; and the cause ordered to progress, on a statement of the clerk of said circuit court that he was "conscious" that there was an order from the judge directing him to issue a writ of *capias ad respondendum.* No order to hold to bail was filed *nunc pro tunc;* and upon said *Dyer's* motion to abate the writ, &c., the said circuit court rendered judgment formally against him for the costs of such motion. A plea was then interposed, a trial had, and judgment final rendered against *Dyer.*

FOWLER, for plaintiff in error:

It is contended in behalf of the plaintiff in error, that pleading over in the case could not cure a proceeding, which is void in its inception, and irregular throughout. By a statute law now in force, no writ of *capias ad respondendum,* can be legally issued in such a case as this, unless upon a "proper affidavit or affirmation, it shall appear proper" to the judge that "the defendant be held to bail," then the judge shall make an order, which shall be filed in the clerk's office before the writ issues. Vide *Pope, Steele,* and *McCampbell's Dig., p.* 316, *sec.* 10. The affidavit, it is believed, is not substantially sufficient, being applicable to a case in contract rather than in tort; and if sufficient, no order appears by the record and proceedings to have been filed in the clerk's office. This was attempted to be supplied by a statement of the clerk that he had been directed to issue a *capias,* which falls far short of showing that a *proper order* ever had been filed. If the defect could have been supplied at all, it could only be done by filing an order *nunc pro tunc:* and such filing must have been predicated on some memorandum in writing preserved by the clerk to amend or file the order by, and not supplied by a verbal statement alone, based upon the frail memory of the clerk or any other person.

It is further insisted that *Dyer* could not legally be held to bail in the county of Jackson, upon any affidavit, however strong; and that any order for that purpose, or any writ issued in pursuance thereof, would be not only voidable but void; and consequently any judgment rendered thereon must be erroneous. No person shall be held to bail in a county in which he does not reside. Vide *Pope, Steele,* and *McCampbell, p.* 318, *sec.* 12.

It is also believed to be a general rule, to which the formal judgment for costs on the motion to abate the writ in this case is not an exception, that but one judgment can be rendered in any one case; and that to enter a formal judgment for costs on any motion or interlocutory order in the progress of a cause, is error, and cannot be enforced by execution; a *rule*, and *attachment* being the only legal mode of collecting such costs. Vide 1 *Pirt. Dig.* 194, 198; 2 *Bibb. Rep.* 243; 1 *Bibb. Rep.* 555; 4 *Littell Rep.* 234.

It is also submitted to the consideration of the court, (without expressing a belief in the proposition,) whether the verdict be good unless it had expressly found the defendant below "guilty" &c. If so, the verdict of the jury is erroneous.

The plaintiff in error also insists that the judgment given by the court below wholly varies from, and is unauthorized by the verdict; being for an amount wholly different from that specified in the verdict.

It is also contended that the court below erred in overruling *Dyer's* motion for a new trial, *because it was not sworn to*, or *supported by affidavit*. *Dyer* insists that no affidavit was necessary.

WALKER, *contra:*

The numerous errors assigned in this case, present but two substantial points. *First*, did the circuit court err in overruling the defendant's motion to dismiss the suit? *Second*, is the verdict of the jury sufficiently certain? The affidavit of the defendant complies with the statute. See *p.* 316, *sec.* 10. By the statute the judge who grants the order judges of the sufficiency of the affidavit; and if it does not, or if the judges be adjudged insufficient, the same act provides that the defendant shall be discharged from bail, enter his common appearance, and that the suit shall progress. And if the defendant be held to bail in a county in which he does not reside, by the same statute sec. 12, it is provided, that although the defendant be discharged from bail, the suit shall progress as if no bail was required. In this case, however, it is contended for defendant that the affidavit of the clerk, "*that such order had been filed*," supplies the place of the order itself. The lost paper, (if on file) would but be evidence that the law had been complied. If the order had been filed *nunc pro tunc*, it would but be matter of form; the affidavit of the clerk alone gives evidence of the pre-existence of the order. It is further contended by the defendant, that the defendant in the circuit court by pleading, waived his right to contest the

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sufficiency of the writ or the decisions thereof. The writ has performed its office; the defendant admitted himself in court by pleading to the action, and cannot go back to enquire whether he travelled a legal highway in getting there. See 1 *Bibb. p.* 473.

It is assigned for error that the circuit court gave judgment for costs upon a motion in the progress of the suit. The judgment on that motion is no more a final judgment than judgment for costs of continuance or amendments. There is no error in this respect, but if there had been, no exception was taken to it in the court below, and this court for that cause, will not investigate it.

The verdict is substantially a good verdict; the issue was "not guilty." The verdict "found for the plaintiff and assessed his damages to $——." What is understood by "finding for the plaintiff?" Most clearly, *the issue.* See 2 *Bibb.* 178; 1 *Bibb.* 251.

There is no variance in amount between the verdict and judgment. The error for that cause resuscitates the record.

Ringo, *Chief Justice,* delivered the opinion of the court:

This is an action of trespass *vi et armis,* instituted by *Hatch* against *Dyer,* in the circuit court of Jackson county. The plaintiff below filed his declaration and affidavit, and sued out a capias ad respondendum thereon against the defendant, *Dyer;* at the term to which the writ was returnable, the defendant moved the court to abate the writ and dismiss the suit, upon the following grounds: *First,* that there is no order by the judge for the capias ad respondendum. *Second,* that there is not a sufficient and proper affidavit. *Third,* that the defendant was held to bail out of the county where he resides; and *Fourth,* that the whole proceedings are irregular, illegal, informal, and insufficient. While this motion was pending, the plaintiff filed an affidavit with the clerk of the circuit caurt, in relation to the order for bail, and thereupon obtained a rule on the clerk to bring into court the judge's order for a capias ad respondendum filed in this case, to which the clerk, by his affidavit filed, answered that he had made diligent search for the order specified in the above rule, and that it could not be found in his office, and he was of *opinion* that it had been lost or destroyed; whereupon the court overruled the motion to abate the writ, and dismiss the suit, and ordered the parties to proceed in the cause, and the defendant excepted to these opinions and orders of the court, and filed his bill of exceptions, which is made a part of the record,

and then filed his plea of not guilty, to which the plaintiff joined issue, and a jury was sworn to try the issue, and found a verdict for the plaintiff, upon which judgment was rendered. The defendant then moved the court for a new trial, which being overruled, he has brought his case before this court, by writ of error to reverse said judgment.

There is an assignment of errors and joinder. The matters relied upon as stated in the first five assignments of error, are to the following effect: *First*, that the affidavit to hold to bail was wholly insufficient. *Second*, that there was no order of any judge for bail filed in the clerk's office. *Third*, that the court overruled the defendant's motion to abate the writ and dismiss the suit. *Fourth*, that the court received the affidavit of the clerk to supply a fatal defect in the record, of the existence whereof there was no memorandum in writing. *Fifth*, that the court ordered the parties to proceed in the case, without any original order, or any order *nunc pro tunc*, of any judge for bail, being on file in the clerk's office.

The several matters presented by these assignments, refer to the same subject, that is, to the validity of the writ, and the propriety of issuing it, and raise but a single question for the consideration of this court; in disposing of which, the nature and effect of the motion to abate the writ and dismiss the suit, upon the grounds set forth in the motion, must be first considered and decided. Matters of fact, the non-existence of which was asserted by the defendant, and denied by the plaintiff, as appears by the record, formed no inconsiderable part of the case, as presented by the motion upon which the court was called to decide. Their effect upon the suit, if admitted or proven, as stated in the motion, would be to abate the writ, or discharge the bail, or both, and nothing more; they are, therefore, strictly matters in abatement of the writ, of which the defendant had a legal right to avail himself, in any manner authorized by law: but whether the law will permit a defendant to have the same advantage of them on motion, that he could have by a regular and formal plea on oath, is a question not necessarily to be decided in this case, and therefore, we express no opinion upon it; yet considering them as matters in abatement of the writ only, and allowing them the only effect in law which they could have if shown by a formal plea, (and they certainly are not entitled to a more favorable consideration,) they must, upon well settled legal principles, be deemed to have been waived by the defendant himself, by subsequently pleading the general issue in bar of the action;

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for if he relied upon them as a defence, he was bound by law to have rested his case upon the decision against him on the motion; and he was not at liberty to put the plaintiff to the hazard and expense of contesting and litigating the matter with him, in a trial upon the merits, and after being defeated upon the trial, to return to, and base himself upon a position which he had previously voluntarily abandoned as untenable. Upon this point, *Co. Litt.* 303, *a; Ld. Raym.* 970; *Longueville* vs. *Thistleworth*, 1 *Tidd.* 680, 8 *edit.; Bac. Ab. Pl. &c. (A.); Stephen's Pleading*, 477; and 1 *Chitty Pl.* 425, are authorities full and conclusive, and the rule is believed to be as old as the science of pleading itself, as regulated by the common law. It is a rule founded on reason, and in its practical operation is attended with many beneficial results; but if there could be any doubt as to the character of the defence made by the defendant's motion to abate the writ, they must be dispelled by reference to the statute of 1807, *Ark. Dig. p.* 316, 5, 10; which prescribes that the original process in all actions of trespass, shall be a writ of summons; but also provides, that upon proper affidavit, or affirmation, any judge may, if it shall appear to him proper that the defendant be held to bail in any such case, make an order, whereupon a capias ad respondendum may issue, such order being filed in the clerk's office, and declares that if the plaintiff shall in any such case, issue any other proofs whereby the defendant may be held to bail, *the court shall abate the writ*, and allow the defendant his costs and four dollars, to be paid by him or them who procured such writ; and also provides further, that the defendant may appeal from the order of the judge, to the court; and if the court shall overrule the judge's order, the bail bond shall be cancelled, and the defendant's appearance accepted; and the same statute, *Ark. Dig., p.* 318, *sec.* 12, contains this proviso, "that in civil cases, no person shall be held to bail in a district (county) in which he does not reside; and if any person shall be arrested and imprisoned or held to bail in a civil case in a district (county) in which he is not an inhabitant, he, or she may be discharged from his, or her imprisonment, or bail; and the suit may progress as if bail was not required." The object and intention of these provisions, are so obviously plain, as not to admit of a doubt; they embrace every ground taken in the motion, and show conclusively, that they are, collectively, matters in abatement of the writ, only, and some of them can only be resorted to, to discharge the bail, leaving the suit to progress, as if bail was not required.

But suppose the objections here made in the motion, had been embodied in, and presented by a regular and formal plea in abatement of the writ; to which the plaintiff had demurred, and the judgment of the court had been given for him on the demurrer, and a *respondeat ouster* had been awarded, as it must have been, and the defendant had afterwards pled the general issue in bar of the action, as he has done in this case, upon the overruling of his motion, could any one insist for a moment, that he could afterwards take advantage of any error in the judgment pronounced upon his plea? Certainly not. And the reason is, that by electing to plead over, instead of abiding by his first defence, he shall be considered as having acquiesced in, and admitted the propriety and justice of the decision against him, or waived any legal objection which he may have had thereto. And we do not perceive, as before remarked, any reason why the rule should not apply to the like defence, when it is made by motion, as in this case; we are, therefore, of opinion, that the facts assigned as error, in the first five specifications in the assignment of errors, were waived by the defendant below, by pleading over, and therefore, they are not matters for which error will lie to reverse the final judgment in this cause. And therefore, we express no opinion as to their legality or sufficiency.

The sixth assignment is, that the court erred in rendering judgment for the costs of the motion to abate the writ against the plaintiff in error.

The practice of entering up a final judgment for costs, upon the decision of incidental questions, or motions in the progress of a suit, is certainly not warranted by law, and is in itself improper, as subjecting the party against whom it is rendered, to an additional charge for entering up the judgment and issuing execution thereon, as well as the fees of the officer collecting the same on execution. Besides this, it may, perhaps, enable the party against whom it is rendered, to prosecute a writ of error to reverse it, thereby creating a foundation for an unnecessary and vexatious increase of litigation, contrary to every object and policy of the law; but notwithstanding this we are clearly of the opinion that this incidental judgment is not brought before us for adjudication, or revision, by the present writ of error, and that it is not a matter which can be assigned as error in the judgment now before us. The present writ of error extends only to the judgment given on the final trial of the case, the validity of which is not in any wise affected by the incidental judgment for costs, on the motion. The seventh assignment questions the sufficiency of the verdict, because it

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does not expressly find the defendant (*Dyer*,) *guilty*, in manner and form as charged in the declaration.

The verdict is in these words, "we the jury find for the plaintiff and assess his damages at one hundred and seventy-five dollars." The issue was simply upon the plea of *not guilty*, and the general rule is, the verdict must respond to the issue joined, and find as to every fact thereby put in issue, but as much certainty is not required in a general verdict, as is required in the pleadings, and if the court can collect the matters in issue from the verdict, it is sufficient, and although informal, it may be moulded into proper form by the court.

The cases of *Hawks* vs. *Crofton*, 2 *Burr*, 698; and *Woolford et al.* vs. *Isbel*, 1 *Bibb*. 247, are in point. In both cases the action was trespass, assault and battery, and the general issue was plead with special pleas in justification, and the verdict found the defendant guilty, and assessed damages, but without any notice of the special pleas of justification; and the verdict in each case, though objected to for that cause, was held sufficient, upon the ground that the fact of guilt being found, and the damages assessed, negatived the justification, and the issue upon these pleas must therefore, be considered as embraced in the general finding by the jury. The objection there was more forcible than it is in the present case; for here there is but a single issue, which the jury was sworn to try, and the defendant's guilt is the only fact directly in issue; the plaintiff affirms his guilt, and the defendant denies it; and upon this issue the jury expressly finds for the plaintiff. What do they find for the plaintiff? Certainly it is the issue, for there is nothing else before them; this they were sworn to try, and the law will not presume them guilty of doing a mere idle act, contrary to their sworn duty, and solemn obligation; when they had thus determined the issue against the defendant, by finding him guilty of the trespass laid to his charge, they proceeded to assess the plaintiff's damages sustained by reason thereof; the verdict is, therefore, sufficient in law, to enable the court to collect and understand the meaning of the jury, and to pronounce a proper, valid, and legal judgment upon the premises.

The eighth specification in the assignment of errors, asserts that the judgment of the court is given for a sum different from that found by the verdict of the jury, and is therefore wholly unauthorized by the verdict.

The verdict is for one hundred and seventy-five dollars damages, and the judgment is, that the plaintiff have and recover of and from the

defendant, the sum of one hundred and seventy-five, the amount of his damages assessed as aforesaid, together with all costs, &c.; omitting the word dollars; it appears of record in the preceding part of the same entry, that his damage was assessed by the jury, and the amount thereof so assessed, is clearly set out; the judgment refers to "the amount of his damages assessed as aforesaid," and excluding therefrom the whole expression of "the sum of one hundred and seventy-five," reads thus, "*that the plaintiff have and recover of and from the defendant the amount of his damage assessed as aforesaid,*" which is sufficiently certain, for no one can misapprehend the amount for which the judgment is given; and being for the sum stated in the verdict, it is of course supported by the verdict.

The ninth and last matter specified in the assignment of errors, questions the decision of the court in overruling the defendant's motion for a new trial.

This motion was predicated upon two grounds. *First*, that the finding of the jury is contrary to law; and *Second*, that the damages are excessive and unreasonable, and exceed the amount sworn to. The evidence given on the trial does not appear in the record, by bill of exceptions, or otherwise; nor is it shown that illegal, or incompetent testimony was admitted, or competent legal evidence excluded on the trial; or what instructions, if any, were given or refused by the court; therefore, we are bound by every principle of right and justice, to presume that the decision of the court was right, and that a new trial ought to have been refused.

If the defendant was dissatisfied with the decision, and desired the action of the Supreme Court upon it, he should have excepted to the decision of the court when it was given, and embodied the whole of the facts and evidence in his bill of exceptions, and thereby made them a part of the record, so that this court, seeing them, could determine thereupon whether the court did or did not err, in deciding against the motion. This he entirely failed to do, and his case must be governed by the legal presumption, that every decision of the court is right until the contrary thereof be shown, either by some fact in the record, or other matter of which the court is bound to take judicial notice; but neither the fact that the damage found by the verdict exceeds the sum stated in the plaintiff's affidavit for bail, or the insufficient reason assigned by the judge for overruling the motion, shows the decision to be wrong; the former is wholly immaterial, and the latter

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can have no influence whatever upon the question; for the decision may be strictly and legally right, and the reason assigned by the court entirely insufficient.

Therefore, it is the opinion of this court, that there is no error in the judgment of the circuit court of Jackson county, given in this case, and the same ought to be, and is hereby affirmed with costs.

GOV. FOR USE OF LYON, ADM. *against* LEWIS EVANS AND OTHERS.

ERROR *to Washington Circuit Court.*

All bills of exceptions must be tendered at the trial—not that they need be drawn up in form, but the substance must be reduced to writing, while the thing is transacting.

A bill of exceptions can only be considered part of the record, when it contains in itself intrinsic evidence that the exception was taken and reserved while the thing was transacting, or the matter excepted to was passing before the court; and that it was reduced to form and signed by the judge or judges presiding, at some time during the term.

Facts not excepted to when they are transacting in the court, or not properly before the court at the time the exception is taken, or over which the court has no control at the time, although incorporated into the bill of exceptions, cannot be regarded as legally comprising part thereof, or as composing any part of the record of the court, and consequently are not entitled by law to any credit, as facts appearing of record in the cause.

The plea of *ne unques administrator* is a plea in bar.

But if it begin and conclude in abatement, it will be considered as a plea in abatement.

The established rule in England now is, that when a suit is brought by an executor or administrator as such, and the money when recovered would be assets, counts may be joined upon causes of action accruing to the testator or intestate in his lifetime, and to the executor or administrator after death.

But in such cases it must be stated that the cause of action accrued to the plaintiff as "*as* executor" or "*as* administrator."

The act of 1831, with regard to the actions on bonds, &c. for a penalty, is substantially the same in most respects, with *St.* 8 *&* 9, *Wm.* 3, *ch.* 11, *sec.* 8; and the provisions thereof are compulsory on the plaintiff to assign or suggest breaches. If they are not assigned, in cases within the Statute, the plaintiff cannot recover; and unless the condition and breach appear on the record, the proceedings will be erroneous.

Where Statutory bonds are payable to the Governor, in his official character, he holds the legal interest therein, merely as a naked trust; and in suits upon such bonds, the persons for whose use such suits are prosecuted are regarded as the real plaintiffs in the case.

The breaches assigned in such cases must, therefore, have all the essential requisites of so many different counts in the same declaration, whether they are assigned in the declaration, or in the replication, or appear on the record; and they are subject to the same rule as to the joinder of different and distinct rights and causes of action, as are applicable to such joinder in different Acounts, or a single count of a declaration.

A misjoinder of causes of action which cannot be joined, in different breaches in such suits, cannot be aided by entering a nol. pros. after demurrer, and is fatal on general demurrer, in arrest of judgment or on error.

Where, therefore, in the first breach a cause of action is assigned which accrued to plaintiff's intestate in his lifetime; in the second breach the defendant is charged, as Sheriff, with permitting a prisoner to escape, after the death of the intestate; but where in the third breach it is merely alleged that the plaintiff administrator of P. H. recovered judgment; and does not show that such judgment was recovered by him *as* administrator, or that it was founded on any debt or duty to the intestate, or any liability which had accrued to the plaintiff *as* administrator, this must be considered as setting

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forth a cause of action belonging to the plaintiff in his private, individual right; and there is, therefore, a misjoinder of breaches, which is fatal.

The plea of *ne unques adm.* is, therefore, no answer to the third breach, and as it claims to answer the whole declaration, it is invalid as to any part thereof.

But the plaintiff having, after his demurrer to that plea was overruled, replied to the plea, and tendered an issue thereon, he is now precluded from assigning the judgment on the demurrer as error, as he waived his demurrer by replying.

But the issue upon the plea is immaterial—because a finding upon it would not determine the right to recover on the third breach—and therefore judgment on a verdict upon the issue to the plea of ne unques adm. is erroneous, and must be reversed.

And although the plaintiff committed the first error, by the misjoinder of breaches in his declaration; yet, as no objection was made to the declaration by the defendants, and as the defendants were permitted to file an amended plea in abatement after pleas in bar had been filed and demurrer to one of them overruled, which plea in abatement the plaintiff might have treated as a nullity, but was precluded by the decision of the court below; and as all the pleas in law were permitted to be withdrawn, which left no valid defence in the case—for these reasons, and under the Statute of 1807, which authorises a repleader after arrest of judgment, this judgment is not affirmed; but a repleader is awarded, to commence with the declaration.

This is not a case, in which the proceedings on the part of the plaintiff are so entirely defective and erroneous, that the judgment against him would not bar another action properly brought for the same cause.

The facts of this case are so fully stated in the opinion of the court, that it is unnecessary here to repeat them, and the reader, therefore, is referred to the opinion.

FOWLER, for the plaintiff in error:

The plaintiff contends,

1st. That a plea in abatement must be filed within the *four first days* of the return term, or it is a *nullity*. In this case it was filed on the TENTH day. *Arch. Pr. p.* 1, *et seq.* 1 *ch. p.* 489, 490.

2ndly. That any plea or defence to the merits of the case—even a prayer of oyer—*precludes* a defendant from pleading *afterwards* in abatement. 1 *Ch. Pl.* 471 *et seq.*; 474 *et seq.*

3rdly. Where pleas *in abatement* and *in bar* are filed together, and at the same time, the pleas in *abatement* are, and must be treated as, *nullities*—the pleas in bar being a legal *waiver* of the right to plead in abatement. Defendants could not plead both at the same time.—1 *Ch. Pl.* 491.

4thly. A plea in abatement, if imperfect or void, cannot be amended; and even if amendable, the amendment in this case was made *after* pleas in bar had been filed, and could only be considered a plea from the time it was made perfect by amendment; consequently it was precluded by the pleas to the merits. 1 *Ch. Pl.* 500; *Tidd. Pr.* 638.

5thly. A plea in abatement, filed without affidavit, is void, and can-

not be amended. *Pope, Steele, McCampbell's Dig.* 321; 1 *Ch. Pl.* 500.

6thly. The plea in abatement was insufficient, extending to the whole, when it ought to have extended only to a part of the declaration, and the demurrer thereto ought to have been sustained. 1 *Ch. Pl.* 493.

7thly. The pleas in bar could not be withdrawn, to be let in or sustain a plea in abatement. They were *not nullities*—the law is precisely the reverse.

8thly. The withdrawal of said pleas in bar, was giving the defendants an undue and illegal advantage, which no court should permit. It was injustice and error.

9thly. The letters offered were competent evidence.

10thly. The judgment offered in evidence, in favor of said *Lyon*, as such administrator, against said Robinson, being the same judgment set out in the declaration, and upon which the action was mainly predicated, as assigned in the third and principal breach, was competent to show said plaintiff's right to sue, and ought to have been permitted to go to the jury. 1 *Saund. Pl. & Ev.* 503 *et seq.*

11thly. The issue upon which the case was determined, and judgment rendered, was an *immaterial issue*, and the defendants can have no benefit from it. 1 *Ch. Pl.* 691.

On the argument of a demurrer to a plea in abatement, or to a replication thereto, the defendant cannot take any objection to the declaration. 1 *Ch. Pl.* 500, and references there.

WALKER, *contra:*

The plaintiff in error assigns for error that the plea in abatement was filed too late, and that the court erred in overruling the demurrer. Defendant insists that the plea was filed in good time. If filed with other pleas, the court should have disregarded them until this was disposed of. See 1 *Littell*, 4; 5 *Munford*, 1; 1 *Monroe*, 55.

It came too late; the plaintiff should have moved the court to disregard it. See 1 *Ch. Pl.* 491 & 492. By demurring, he waived the time, admitted the facts, but denied the law. The plea was a good plea—if it was not, by replying he waived his right to question the law; for an issue of law and fact cannot exist at the same time.—See 2 *Marshall*, 496; 3 *Marshall*, 613; 1 *Chitty's Pl.* 707.

But if a doubt could arise on this point, still the declaration is defective, and it was the duty of the court to render judgment against

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him who committed the first error. See 1 *Saunders' Pl. & Ev.* 431; 4 *Bibb*, 27; 4 *Monroe*, 176.

The other positions assumed in error are entirely untenable; for there is nothing in the record which will authorise an investigation of either of them. This court will not, I am sure, decide that the court below erred in rejecting evidence, unless they could see what that evidence was; nor upon the finding of the jury for the same reason. See 4 *Mon.* 42; 1 *Bibb*, 340.

The assignment of error based upon the supposition that the declaration is good in part, is untenable: the demurrer to the plea reaches the whole declaration. See 1 *Chitty*, 525.

The declaration is wholly defective: there is clearly a misjoinder of causes of action. See 1 *Chitty*, 234.

The plea, although called in the pleadings a plea in abatement, is properly a plea in bar. See *Lord Raym.* 1207; 1 *Chitty*, 491.

CUMMINS and PIKE, for the same:

There is some contradiction between the bill of exceptions, and the remainder of the record; but, from both taken together, it may be collected that *four* pleas were filed at the first term, to two of which neither demurrer nor replication was filed—and that in this situation the demurrer to the first plea, *ne unques administrator*, was taken under advisement, and the case continued; another plea also was demurred to, and the demurrer overruled, and that plea also remained unanswered.

At the next term the court below sustained the demurrer to the first plea, treating it as a plea in abatement, and therefore defective, because not sworn to. Yet the want of affidavit, even had it been a plea in abatement, could only be taken advantage of by motion to strike out, or treat the plea as a nullity, was no ground for demurrer, and was waived by demurrer. See 2 *Marsh.* 44, *Patrick* vs. *Conrad, et al.*

The defendants then amended the plea by swearing to it, and the plaintiff demurred to it, as amended. On the argument of this demurrer, the court below decided that it was a plea in abatement, and that while it was pending, all the pleas should be treated as nullities, and permitted the other pleas to be withdrawn. The demurrer was then overruled, and the plaintiff filed his replication to the plea of *ne unques administrator*. The issue thus made was tried by a jury, who found for the defendants, and judgment was rendered accordingly.

In order to determine the questions involved in this case, it is ne-

cessary, first, to ascertain the character of this plea. It is called on the record a plea in abatement, was so treated in the court below, and is claimed to be such by the plaintiff here. The defendants filed it there as a plea in bar, and still contend that it is one. The plea as originally filed, commenced and concluded in *bar*, and averred, in precise technical form, that *Lyon* never was administrator, in manner and form, &c. As amended, it commenced and concluded with praying judgment of the writ and declaration, but contained the same positive allegation as before, in the same words.

That *ne unques adm.* is a plea in bar; see 1 *Ch. Pl.* 485; 2 *Maule & S.* 555—matter which shows that the plaintiff cannot maintain any action, for the same cause of action, is proper for a plea in bar. A plea in abatement should give a better writ or bill. 1 *Ch. Pl.* 445; *Stephen*, 483. If *Lyon* is not the administrator of Hancock, he can maintain no action in the premises; nor could the defendant, by pleading that matter in abatement, by any possibility give him a better bill or writ.

And even where a plea which contains matter in bar, commences and concludes in abatement, it is considered a plea in bar. *Ch. Pl.* 446; 2 *Saund.* 209, *n. c.* (1)—1 *Arch.* 304.

A plea in bar is sufficient, which prays judgment generally, and the court will award the proper, legal consequence. 1 *Lev.* 222, *Pit* vs. *Knight*; 2 *Lev.* 19, *Barnes* vs. *Gladman*; *Str.* 520, *Curwen* vs. *Fletcher*. At all events, the want of proper form could only be objected to by special demurrer.

This being settled, the first, second, and third assignments of error at once disappear as unfounded in fact. The fourth assigns for error the decision of the court below, overruling the demurrer to the amended plea.

Of this, even if it were error, the plaintiff cannot now avail himself. It is settled by adjudications of this court, as well as of others, that having *replied* to the plea after demurrer overruled, he waived the demurrer and the decision thereon, and can now take no advantage thereby. See *Gage* vs. *Melton*, decided in this court at the July term, 1838.

As to the position that the court below erred in deciding that while a plea in abatement is pending, all other pleas are to be treated as nullities, that decision, although it may be wrong, is on an abstract point, not existing in this case, inasmuch as no plea in abatement was pending; and it does not follow that because it was wrong, therefore

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the court erred in permitting the other pleas to be withdrawn. It decided rightly in granting that permission, though perhaps on wrong grounds.

The withdrawal of pleas is always a matter within the sound discretion of the court, and will not be denied, unless it is asked for with intent to harass and vex the plaintiff. 1 *Bibb*, 412, *Rochester* vs. *Dunn*; 2 *Bibb*, 22, *Eastland* vs. *Caldwell*; *Hardin*, 490, *Kennedy* vs. *Terrill*; 2 *J. J. Marsh.* 540, *Robbins* vs. *Treadway*.

In the present case, where the defendant chose to withdraw three grounds of defence, and rest upon one alone, certainly the plaintiff has no right to complain. It is lightening, not increasing his burthen of proof. It is even doubtful whether the pleas had been filed, as required by law, so as to have become a part of the record.

We now arrive at the question, whether the court below erred in refusing to permit the letters of administration, and the judgment offered by the plaintiff, to be read as evidence. Before this court can adjudge the rejection of them to be error, it must appear, first, that they were relevant to the issue, and second, that they corresponded with and sustained the allegations in the declaration.

The issue, and the sole issue was on the replication to the plea of *ne unques adm.* To this issue the letters offered were relevant, if they corresponded with and sustained the declaration, and were duly authenticated. Was this the case? The profert of them in the declaration is as follows: "Granted by the *County Court* of Pope county, A. T. in due form of law, which letters of administration bears date the 18th of October, 1830, and now here to the court shown." The plaintiff has neglected to make the letters exhibited and offered in evidence, a part of the record, and has merely said in his bill of exceptions, that he "offered in evidence the latters of administration granted by the judge of the County Court for Pope county in vacation to the said *A. W. Lyon*; and the defendants objected, because the letters were granted by the judge in vacation." This court is now bound to presume that the court below decided correctly, until the contrary appears. On what grounds did the court below reject the letters?—Perhaps they did not correspond in date, or names, or otherwise, with the profert. Perhaps they were not properly authenticated. Can this court say that they did correspond—that they were properly authenticated? Even upon the point mentioned in the bill of exceptions, the court below decided properly. The profert is of letters granted by

the *County Court*. Letters granted, not by the County Court, but by the *Judge*, in vacation, are offered in evidence. The judge in vacation is not the court; nor had the judge power to grant them in vacation, and they were void. *Dig. p.* 47.

With regard to the rejection of the judgment, the court is equally uninformed. It is not made a part of the record, and is merely described in the bill of exceptions as "the judgment obtained in the Circuit Court of Washington, in favor of *A. W. Lyon*, as administrator of the estate of Peter Hancock, deceased, against George Robinson." What judgment? Did it correspond in date, amount, or any other particular with the judgment mentioned in the declaration? Does this court know on what grounds the court below rejected it? If not, this court cannot decide that there was error in its rejection. Even had it corresponded, it was not relevant to the issue.

There remains but one other point; and that is, that the issue on which the case was tried, was immaterial. By what process of reasoning this conclusion is arrived at, we are ignorant. Most certainly an issue upon a plea in bar, when that plea is properly pleaded and utterly denies that the plaintiff has any interest whatever in the cause of action, or any right to sue therefor, cannot be immaterial. Perhaps the plaintiff considers John Pope, Governor, to be the real, and *Lyon*, adm. only the nominal plaintiff. If not, no reason can be imagined why he should hold the plea to be a plea in abatement, or the issue immaterial. The law is directly the reverse. *Lyon* is the actual plaintiff, responsible for the costs, and subject to the same rules of pleading, as though he had brought an action on the case against *Evans*, in his own official character as administrator, for the same official neglect. Pope, Governor, is but a nominal party. Suppose Pope had ceased to be Governor during the pendency of the suit below, would the suit have abated? Yet such a person as John Pope, Governor, would no longer have existed; and if he had been the real plaintiff, upon his official decease there would have been no plaintiff. Could that fact have been pleaded in abatement, *puis darrein continuance?* If Pope, Governor, was the real plaintiff, how is this suit now proceeding in his name, when he is no longer in existence? See 3 *Lit.* 9, *Thomas* vs. *Thomas*.

RINGO, *Chief Justice*, delivered the opinion of the court:

This is an action of debt commenced by the plaintiff against the defendants in error, in the Circuit Court of Washington county, found-

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ed on the official bond of the defendant *Evans*, as sheriff of said county. The plaintiff in his declaration set forth the bond and the condition thereof in *haec verba*, and assigned three several breaches of the condition: The 1st charges the escape of one George Robinson, out of the custody of said *Evans*, as sheriff of Washington county, in the lifetime of said Hancock, after he had been arrested and held in his custody on a capias ad respondendum issued at the suit of said Hancock, for a subsisting demand for $3000, and only endorsed for bail in that sum.

The 2nd also charges the escape of one George Robinson, out of the custody of said *Evans*, as sheriff of Washington county, after the death of said Hancock, and after he had been arrested and held in his custody, in the lifetime of said Hancock, on a capias ad respondendum, issued at his suit for a debt of $250, and duly endorsed for bail in the sum of $300, and avers the same to have been to the injury of said *Aaron W. Lyon*, as administrator as aforesaid.

And the 3rd alleges the escape of one George Robinson, out of the custody of said *Evans*, as sheriff of Washington county, after he had arrested and taken his body in execution, and held him in his custody, in execution, upon, and by virtue of an execution, duly issued upon a judgment of the Circuit Court of said county, in favor of *A. W. Lyon*, administrator of the estate of Peter Hancock, deceased, against the said George Robinson, for a debt of $271, and $36 64-100 costs—the said debt and costs being wholly unsatisfied to the said *A. W. Lyon, administrator as aforesaid*.

The declaration also contains a general breach as follows: "Yet the said defendants, although often requested to do so, hath not yet paid the said sum of six thousand dollars, above demanded, or any part thereof to the said Peter Hancock in his lifetime, or to *A. W. Lyon*, administrator of said Peter since his death, to whom letters of administration were granted by the county court of Pope county, A. T. in due form of law, which letters of administration bear date the 18th day of October, 1830, and now here to the court shown, the date whereof is the day and year aforesaid; but hath hitherto wholly neglected and refused so to do, and still doth neglect and refuse to pay the same, or any part thereof to the plaintiff, to the damages of the said plaintiff, one thousand dollars, and therefore suit is brought, &c."

At the return term all of the defendants named in the declaration, (except *Estes* who was not served with the process to appear,) appear-

ed, and moved the court to dismiss the suit, and to quash the writ, for a variance between it and the declaration, which motion being sustained by the court, was afterwards set aside, on the application of the plaintiff, and the case reinstated "on the docket:" whereupon the defendants craved oyer of the writing obligatory declared on, and also of the letters of administration set forth in the declaration, but without oyer having been either granted or refused, filed several pleas, to wit:

First, "That the said *Aaron W. Lyon* never has been the legal administrator of the goods or chattles, rights or credits, which were of the said Peter Hancock, deceased, in manner, &c.," commencing and concluding in bar of the action.

Second, "That the said *Lewis Evans*, sheriff, as aforesaid, did not permit the said George Robinson to go at large, and escape from his custody in manner," &c.

Third, "That the said *Lewis Evans*, sheriff, as aforesaid, did not take the said George Robinson in execution in manner and form as set forth in the plaintiff's declaration."

Fourth, "*nul tiel record* of the recovery in favor of said *Lyon*, administrator as aforesaid, against said George Robinson, in manner and form, &c."

The first, second, and third of said pleas appear to have been filed together, at the return term of said writ, on the 18th day of June, 1835; but it does not appear from the record at what time the said fourth plea was filed.

In the record of the proceedings of said term is the following entry: "And now on this day came the parties by their attorneys, and the plaintiff demurs to the first and second pleas filed by the defendant, to which the defendant joins issue, and the matters of law arising on said demurrer being argued, it seems to the court that the law is for the plaintiff; therefore, it is considered that the said demurrer be sustained as to the first plea, and overruled as to the second plea."

It also appears that the said first plea to which the demurrer was sustained, was then amended in the commencement and conclusion thereof, so as to give it the form and prayer of a plea in abatement;—containing, however, in form and substance the same defence, interposed by it in the first instance, which being thus amended, an affidavit of the truth thereof, sworn to by the defendant, *Evans*, was endorsed on, or attached to it, and being again filed as amended, was demurred to and the demurrer joined, and the question raised thereby taken under advisement by the court and the case continued.

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The record of the next term states that the demurrer filed at the previous term, was sustained, and the plea again amended and demurred to and the demurrer overruled, and that upon the overruling of the demurrer, *leave was granted to the defendants to* withdraw *all their pleas filed in the case, except the plea in* abatement, to which opinion of the court, granting the leave to withdraw said pleas, the plaintiff excepted, and tendered his bill of exceptions, which was signed by the judge, and ordered to be made a part of the record. The plaintiff then filed his replication to the plea remaining in the cause, to which issue was joined, and thereupon a verdict and judgment given in favor of the defendants; and the plaintiff has brought the case before this court by a writ of error.

The bill of exceptions, as transcribed in the record, states; "that there were filed, or marked filed by the clerk, three papers, two to the merits, one in abatement, which pleas were filed together at the June term, A. D. 1835, and on the tenth day of the term; which pleas were severally demurred to, and the demurrer sustained to the pleas to the merits of the case, and the plea in abatement was taken under advisement to this term of the court, and the demurrer was sustained by the court, because there was no affidavit to the plea, but the court permitted the defendant to amend his plea in abatement"—"and that there were other pleas to the merits of the case filed at the previous term of this court, and which were not disposed of either by demurrer or replication, and the court permitted the defendants to amend their pleas in abatement by swearing to the truth of the same, and the plaintiff demurred to the plea as amended in abatement, which was joined by the defendants; and on the argument of the demurrer to the plea in abatement, the court decided that while the plea in abatement was pending all other pleas should be treated as a nullity, and permitted the defendants to withdraw their other pleas, and the court overruled the demurrer to the plea in abatement, to all of which the plaintiff excepted." "That on the trial of the case, the plaintiff offered the letters of administration granted by the judge of the county court of Pope county, in vacation, to the said *A. W. Lyon*, and the defendants objected because the letters were granted by the judge in vacation, and the court sustained the objection, and the plaintiff excepted. The plaintiff also "offered to introduce the judgment obtained in the Circuit Court of Washington county in favor of *A. W. Lyon*,

as administrator of the estate of Peter Hancock, deceased, against George Robinson, which was also rejected by the court," and the plaintiff excepted.

The plaintiff also assigns as error:

1st. That the court permitted a plea in abatement, and pleas to the merits, to be filed together, and at the same time.

2nd. That the court sustained a plea in abatement in defence, after pleas in bar had been filed to the merits of the action.

3rd. That the court permitted the defendants to amend their plea in abatement, after a demurrer thereto had been sustained.

4th. In overruling the demurrer to the amended plea in abatement filed by the defendants.

5th. In sustaining the plea in abatement, filed by the defendants, which only responded or applied to a part of the plaintiff's declaratoion.

6th. In declaring that, while a plea in abatement was pending, all other pleas should be treated as a nullity.

7th. That pending the demurrer to the amended plea in abatement, the court permitted the defendants to withdraw all their pleas to the merits, which had been previously filed in bar, and defend upon their plea in abatement.

8th. In rejecting and excluding the letters of administration offered in evidence by the plaintiff.

9th. In rejecting and excluding a judgment recovered by the plaintiff as administrator, &c., as set forth in the declaration, when offered in evidence by the plaintiff, showing that he had recovered the same judgment as such administrator upon which he had instituted this suit; and

10th. The general assignment that judgment was given for the defendants; whereas, by the law of the land, it ought to have been given for the plaintiff, against the defendants.

To which there is a joinder by the defendants.

Previously to examining the questions presented by the assignment of errors, and for the purpose of disincumbering the case of the most obvious inconsistencies appearing upon the face of the record; and presenting the points legitimately arising for adjudication in a view less confused, it may not be improper to declare the opinion of the court, in regard to such repugnancies and inconsistencies.

Shall the facts presented by the entries in the record, made and

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kept by the court, or those stated in the bill of exceptions, prevail when they are pointedly inconsistent with each other, as they appear in this case, is the question to be decided. The Circuit Courts are courts of record, and are required by law to make and keep a record of their proceedings in books provided for that purpose; which, by the uniform usage and practice in the courts of this country, from the time of its first organization as a territorial government, to the present period, now confirmed and enjoined by statutary regulations, are always publicly read in open court, and signed by the court, or judge presiding; and the records so made are required by law to be kept, by the clerk of the court, in his office, whole, safe and undefaced, as a perpetual and infallible memorial of the facts therein recorded. And the law attaches to them such uncontrolable and incontrovertible sanctity, that it will not suffer them to be in anywise controverted or denied, except upon the ground of fraud. And the court itself, after the term in which the proceedings are so recorded has passed by, loses all control over them, and is not permitted to change or alter them, except in cases where there appears to have been manifestly a misprision of the clerk, and then only to correct such misprision by a new entry in the record, which, in some cases, may be considered and taken to operate *nunc pro tunc.*

A bill of exceptions is founded upon some objection in point of law, to the opinion and direction of the court, upon a trial at law, either as to the competency of witnesses, the admissibility of evidence, or the legal effect of it, or for overruling a challenge or refusing a demurrer to evidence, and the like. *Tidd*, 786. The object of bills of exceptions is to preserve the evidence of facts, which, in the ordinary course of proceeding in the courts, would not otherwise appear of record in the case. The bill of exceptions must be tendered at the trial; for, if the party then acquiesce, he waives it, and shall not resort back to his exceptions, after a verdict against him, when, perhaps, if he had stood upon his exception, the other party had more evidence, and need not have put the cause on that point; not that it need be drawn up in form, but the substance must be reduced to writing, while the thing is transacting; because it is to become a record. *Tidd*, 788. And when the bill of exceptions is signed, the truth of the facts contained in it can never afterwards be disputed. *Tidd*, 790. It then becomes a part of the record and proceedings in the cause, and is emphatically a part of the record of the court, and as such, it is deemed in law to

be entitled to the same faith and credit; but it can only be so considered when the bill of exceptions contains in itself intrinsic evidence, that the exception was taken and reserved while the thing was transacting, or the matter excepted to was passing before the court, and that it was reduced to form and signed by the judge or judges presiding in, or holding the court, at some time during the term of the court, at which the exception was taken and reserved; and no facts, other than those transacting in the court, or properly before it when the exceptions were taken and reserved, can be legally the subject of an exception, or inserted in the bill of exceptions. It results, therefore, from the nature and objects of bills of exceptions, that facts not excepted to when they were transacting in the court, or not properly before the court at the time the exception is taken, or over which the court has no control at the time, although incorporated into the bill of exceptions, cannot be regarded as legally comprising part thereof, or as composing any part of the record of the court; and consequently they are not entitled by law to any credit, as facts appearing of record in the cause.

By applying these tests to the bill of exceptions before us, it is manifest that almost every fact therein stated must be considered as forming no part of the record, and therefore be entirely disregarded.

This question being thus disposed of, we will proceed to examine the questions presented by the record, and raised upon the assignment of errors.

The first question to be decided is, whether the plea of *ne unques administrator*, is properly a plea in abatement, or a plea in bar? In the record it is styled a plea in abatement, and appears to have been so considered and treated by the Circuit Court, and it is urged by the plaintiff in error that this is its true character; but the plea appears in the record, and we are at liberty to determine its character. In every treatise on the subject of pleading to which we have had an opportunity of referring, the plea of *ne unques administrator* is classed with pleas in bar, and treated of as a plea belonging appropriately to that class, and the effect thereof would not be, in the opinion of this court, to suspend the plaintiff's right of action merely, but to defeat it absolutely, by establishing the fact that he is not in fact the representative of the intestate Hancock. And it is stated in 1*st Chitty's Pleading*, 434, to be a general rule, "that whenever the subject matter of the plea or defence is, that the plaintiff cannot maintain any action, at

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any time in respect of the supposed cause of action, it may and usually should be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement: there are, however, some matters which may be pleaded in abatement, or in bar; but where the plaintiff's disability merely suspends the right of action, and does not destroy it, it can only be pleaded in abatement." Here *Lyon* sues in his representative character as administrator of the estate of Hancock, deceased, for causes of action, a part of which at least could only have accrued to him in that right. How then could he, at any time, maintain an action upon these causes of action, if he was not the administrator? And what better writ therefor could the defendants have given him, or the law permitted him to have? Certainly none. It follows, therefore, that if the plea did not set forth facts, which merely suspended his right of action, but destroyed it altogether, and if he could have no better writ therefor, it must, whenever it commences and concludes in bar, be regarded as a plea in bar, and not as a plea in abatement. And it has been held that where the action is by an administrator, stating a grant of administration from a bishop, of a peculiar diocese, a plea of *bona notabilia* should be in bar, and not in abatement; because it shows that the plaintiff has no right to sue at all in the character of administrator. 1 *Saund.* 274, n. 3; 1 *Chitty*, 446.

The general rule which prevails in pleading is, that a mere prayer of judgment, without pointing out the appropriate judgment, is sufficient; because, the facts being shown, the court are bound to pronounce the proper judgment; and upon that principle it has been held that if a plea which contains matter in bar of an action, conclude in abatement, it is a plea in bar, and final judgment shall be given upon it; for if the plaintiff have no cause of action, he can have no writ, notwithstanding the conclusion. 1 *Chitty*, 446.

But it has also been held, according to the maxim, *conclusio facit placitum*, that the class and character of a plea depend upon its formular parts; and therefore if a plea commence and conclude as in abatement, and show matter in bar, it is a plea in abatement, and not in bar, the commencement and conclusion being in such form as to indicate the view in which it is pleaded, and to mark its object and tendency, as being either to the jurisdiction, in suspension, in abatement, or in bar. And upon this principle, Lord Holt, in the case of *Medina* vs. *Stoughton*, 1 *Ld. Raym.* 593, laid it down as a

rule that "if a man pleads matter which goes in bar, but begins and concludes his plea in abatement, it will be a plea in abatement; but if he begins in bar, though he concludes in abatement, or concludes in bar, though he begins in abatement, it will be a plea in bar." And in conformity to the first part of this rule, the case of *Godson* vs. *Good*, 6 *Taunt.* 587, was decided. There the action was against the defendant as administratrix of her husband, on a contract entered into by him; her plea began and concluded in abatement: the substance of it was in bar, viz: that the intestate made the supposed contract jointly with others, (naming them,) who were yet living, and so the action survived against them. The plaintiff took issue on this, and at the trial it appeared that the contract was in fact joint; but that others besides those named by the defendant in her plea joined in it, and were alive. If, then, the plea was to be considered as one in abatement, such proof was an answer to it, because the plea has failed to give the plaintiff a better writ; for if he had sued out a writ according to the plea, he might have been again foiled by another plea in abatement; and accordingly, as the court on the authority of the above case, held the plea, a plea in abatement, the rule to enter a verdict for the defendant was discharged. This appears, therefore, to be the settled rule, and we are not aware of any decision in direct conflict with the rule, although principles sometimes stated in the books appear rather to militate against it. We feel therefore bound to consider the amended plea of *ne unques administrator*, as pleaded in this case, a plea in abatement, notwithstanding the facts stated in the plea is matter in bar.

Having thus ascertained the character of the plea, the next question presented by the record and assignment of errors, is, whether the several causes of action set out in the declaration are such as may be joined in the same action by the administrator. On the part of the plaintiff in error, it is contended that the plea purports to answer the whole declaration, when it is only responsive to a part thereof; the cause of action set forth in the third assignment of a breach in the declaration being for an escape out of the sheriff's custody, on an execution issued on a judgment recovered by *Lyon* in his representative capacity after the death of Hancock, upon which he could sue without naming himself administrator; and therefore the plea is no answer to that part of the declaration, and the issue thereupon joined is immaterial. And on the part of the defendants, it is insisted that if the plea

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does not answer the whole declaration, causes of action are joined therein, which cannot by law be joined in the same action; and therefore the plaintiff, having committed the first error, which is fatal to his action, cannot complain of the insufficiency of the plea.

To determine these questions, it is necessary to ascertain what cause of action may be joined, when the suit is brought by an executor, or administrator as such. The rule first laid down in the case of *Bull* vs. *Palmer*, 2 *Lev.* 165, "That whenever the money when recovered would be assitts the counts may be joined," was, by a series of decisions, subsequently made in the courts of England, for a time, greatly shaken, if not entirely overthrown; and it was held in the cases of *Herreden* vs. *Palmer*, *Hob.* 88; *Rogers* vs. *Cook*, 1 *Salk.* 10; *Bettes* vs. *Witchett*, 10 *Mod.* 316; *Hosier* vs. *Lord Arundel*, 3 *Bos. & Pul.* 7; and *Nicholas* vs. *Killigrew*, 1 *Ld. Raym.* 437, "That money received to the use of an executor after the death of the testator, gives a different cause of action to the executor, from that which accrued to the testator by the receipt of the money in his lifetime; that in the latter case the executor must necessarily sue as such, and is not liable to cost if he fail in the action; but in the former case, he need not sue as executor, but may bring the action in his own name: and if he does sue as executor, he is liable to costs as any other person is."

But this rule, like that in the case of *Bull* vs. *Palmer*, was doomed to have but a temporary existence; and upon much consideration has been overruled by the same courts which established it, and the former rule, as laid down in the case of *Bull* vs. *Palmer*, has been established, and, by a series of more modern decisions, is declared to be the true rule, and appears to be at this time the settled law in England. See *Ord* vs. *Fenwick*, 3 *East.* 104; *Foxwist* vs. *Fremaine*, 2 *Saund. Rep.* 207; *Cowell* vs. *Watts*, 6 *East.* 405; *King* vs. *Thorn*, 1 *T. R.* 487; *Partridge* vs. *Court*, 5 *Price*, 412; *Court* vs. *Partridge*, 7 *Price*, 591; *Catherwood* vs. *Chaband*, 1 *Barn. & Cross*, 150; *Thompson* vs. *Stent*, 1 *Taunt.* 322; *Powley* vs. *Newton*, 6 *Taunt.* 453; 2 *Saund. Rep.* 117, *d. n.* (*e.*) *. But it must be stated in the count that the duty accrued to the plaintiff in his representative capacity of executor or administrator. It is not enough to say that it accrued to him, *executor* or *being executor*, it must be averred that it accrued to him *as executor* or *as administrator*; and therefore in the case of *Henshall* vs. *Roberts*, 5 *East.* 150, where a count, upon an account stated with the plaintiff, *executrix*,

* See note *A.* at end of case.

(not saying *as* executrix,) was joined with a count on a promise to the testator, it was held in error, after a judgment by nil dicit; and a writ of enquiry and final judgment that those two counts could not be joined, although it was urged that by necessary implication, where the parties to whom the promise was alleged to be made, named themselves "executrix and executors," it must be taken to have been made to them in their representative capacity, and meant the same as if it had been said "as executrix," &c., more especially when it is said "executrix, &c., as aforesaid," which refers to the antecedent counts, in which it was admitted they sued in their representative character. But to this argument Ld. ELLENBOROUGH, C. J. answered, "we cannot import any thing from the other counts, we must look to this upon the account stated, and see whether it can be joined with the rest;" and the court held that there was no allegation of their suing in their representative character, and that nothing could be supplied by intendment, and for the misjoinder adjudged the decaration bad.

This question was incidently discussed in the case of *Brown* vs. *Hicks*, decided by this court at the last term; and it was then held that in actions by or against executors or administrators in their representative character, the allegation that the duty accrued to, or against them "as executors," or "as administrators," was essential in the pleading, to fix and determine the character in which they were sued or suing. And when there is no such allegation, they must be regarded as being sued, or suing in their private, individual character, and not *as executor* or *as administrator;* and this, from the authorities then cited, appears to be the settled rule.

In the case before us, the first breach assigned shows a cause of action which accrued to the plaintiff's intestate in his lifetime; and in the second breach assigned, it is expressly stated that the defendant *Evans*, as sheriff of Washington county "contriving and intending to wrong the said *A. W. Lyon*, administrator of the estate of Peter Hancock, deceased, and to delay and hinder him from the recovery of his said debt *as administrator as aforesaid*," permitted a certain George Robinson to escape and go at large out of his custody after he had been arrested, and held in custody by him, on a capias ad respondendum issued out by the plaintiff's intestate against him, without taking any bail, &c.; clearly showing the arrest to have been made in the lifetime, and the escape to have taken place after the death of the plaintiff's intestate; but the third breach assigned wholly fails to state that

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the judgment therein mentioned was recovered by the plaintiff as administrator, or that it was founded on any debt or duty to Hancock in his lifetime, or any liability which had accrued to the plaintiff *as administrator* of the Estate of Hancock after his death, or that it was not for some debt or liability which had accrued to the plaintiff in his private, individual character; but it is therein simply alleged, "that *A. W. Lyon*, administrator of the Estate of Peter Hancock, heretofore, to-wit, on the 7th day of June, in the year A. D. 1831, in the circuit court in and for said county of Washington, by the consideration and judgment of the same court recovered," &c. $271, and also the sum of thirty-six dollars and sixty-four cents, which were adjudged to the said *A. W. Lyon*, administrator as aforesaid, for his costs," &c., giving to the plaintiff throughout the said third breach assigned, the description of "*A. W. Lyon*, administrator as aforesaid," therefore this assignment of a breach comes expressly within the rule adjudged by the court of king's bench in the case of *Cowell & wife, adm'x. &c.* vs. *Watts*, before recited, and by this court in the case of *Brown* vs. *Hicks;* and the cause of action therein stated, must be considered as belonging to the plaintiff in his private, individual right, and not as administrator of the Estate of Hancock, deceased.

It is, therefore, expressly within the rule established, in the case of *Henshall* vs. *Roberts*, 5 *East.* 150, before recited, and unless there is something in the case which exempts it from the operation of that rule, the misjoinder will be fatal to the declaration.

The action is prosecuted in the name of the Governor, by, and for the use and benefit of *Lyon*, in his representative character, as administrator of the Estate of Hancock, by virtue of the statute which provides that the sheriff's official bond "may be sued on from time to time, for the use of any person who may think himself, herself, or themselves aggrieved; *Provided*, however, that the person or persons, at whose instance suit shall be commenced as aforesaid, shall be liable for payment of costs as plaintiffs in all other cases, *Ark's Dig. p.* 518; and several breaches are assigned in the declaration in pursuance, and under the provisions of the act of 1831, *Ark's Dig. p.* 348, *sec.* 95, which declares that "in all actions upon any bond, or on any penal sum for non-performance of covenants and agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit." This latter act, though not a literal copy, contains in most respects, substantially the same provisions as the act of 8 and 9

W. 3, *C.* 11, *S.* 8, and the decisions upon that statute are nearly all applicable to this: upon that statute it has been held that the provisions thereof are compulsory on the plaintiff to assign or suggest breaches, and if they are not assigned in cases within the statute, the plaintiff cannot recover; and unless the condition and breach appear on the record, the proceedings will be erroneous, 5 *T. R.* 636, 538; 2 *Wils.* 377, and such we apprehend would be the legal and legitimate operation of said act of 1831, which also further provides that "the jury upon the trial of such action or actions shall and may assess damages for each of the breaches that the plaintiff shall prove to have been broken," thereby plainly showing that the cause of action set forth in the breaches assigned, are to be considered as the gravamen, or real foundation of the recovery: and therefore, in cases situated as the present, where the bond on which the suit is instituted, is payable to the governor, who holds the legal interest therein, in his official character only, merely as a naked trust, without any beneficiary interest whatever, exclusively for the benefit of all such persons as may be interested in, and damnified by a breach of the condition; to whom, and to no others, a right of action thereupon is given by the statute; and hence, there appears to be in such cases, a peculiar fitness and propriety in the rule; because the interest of those by whom and for whose use the suit is prosecuted, (who are in every respect regarded by the statute as the real plaintiffs in the action,) in the performance of the condition, or the injury resulting to them from the non-performance thereof does not appear, until some special breach is assigned, and such interest and damages specially shown; therefore, of necessity, every breach thus assigned, must state the facts upon which the plaintiff's right of action depends, with as much precision and certainty as is required in the several counts of a declaration.

Wherefore, we are of opinion, that the breaches assigned under the statute, must have all of the essential requisites of so many different counts in the same declaration; and in this respect, it makes no difference whether they are assigned at first in the declaration, or subsequently in the replication, or on the record. They appear in every point of view designed to answer the same purposes only, for which several different counts are introduced in other cases, where the form and order of proceeding is different; we do not, therefore, perceive any substantial reason why they should receive a different consideration, or be excepted out of the general rule, as to the joinder of differ-

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ent and distinct rights or causes of action in several counts, or in a single count of the same declaration, and this we understand to be in effect, the principle decided in the case of *Kingston* vs. *Nottle*, 1 *M. & S.* 355, where it is held that "where there is a misjoinder, either of parties or causes of action, *or breaches, the demurrer must be to the whole.*" And the plaintiff cannot, if the declaration be demurred to, aid the mistake by entering a nolle prosequi, so as to prevent the operation of the demurrer, and however perfect, the counts may respectively be in themselves, the declaration will be bad on a general demurrer, or in arrest of judgment, or upon error, 1 *Ch. Pl.* 206.

From this view of the case it results, that the plea of *ne unques* administrator, is no answer to the plaintiff's right of action, claimed in the third breach, and claiming as it does to answer the whole declaration, is therefore, entirely invalid as to any part thereof, and ought to have been held insufficient on the plaintiff's demurrer. But that question, so far as it depends on the judgment or the demurrer, is waived by the plaintiff himself, by replying to the plea, and tendering an issue of fact thereupon, after his demurrer was overruled, and he is now, by the well settled rules of law, precluded from assigning the error in that judgment upon his demurrer, as a ground for reversing the final judgment against him in the cause, yet the issue found thereupon is immaterial, upon the same principle that the plea itself is vicious, that is, because it professes to decide the whole action, a part of which is not in any manner affected by it; and consequently it cannot be the foundation of any valid legal judgment in favor of either party, because if found for either, the plaintiff's right to recover on the third breach assigned remains undetermined, and the court is left in doubt as to the party in whose favor the judgment ought to be given; the court, therefore, instead of rendering a final judgment on the verdict, as the case then stood before it, ought to have awarded a repleader, notwithstanding the defect in the declaration, and for this error the judgment must be reversed.

And although the plaintiff committed the first error, for which his declaration ought to have been judged insufficient on his demurrer to the defendant's second plea, which was a plea in bar, and judgment thereupon given for the defendants, if the plaintiff declined withdrawing his demurrer, and amending his declaration; yet, as it was not so determined, and no objection appears to have been made to the declaration by the defendants, and as the defendants were afterwards permitted by

the court, to file their amended plea of *ne unques* administrator, in abatement, (after they had filed pleas in bar, to one of which the plaintiff had demurred, and his demurrer had been overruled,) contrary to the long established and well settled order of pleading, which therefore the plaintiff might legally have disregarded, and treated as a nullity, if he had desired to do so; if he had not been precluded from adopting this course by the decision of the court, "that while the plea in abatement was pending all other pleas should be treated as a nullity," which, together with the permission granted the defendants, to withdraw all their pleas in bar, which were accordingly withdrawn, left in fact no valid defence in the case.

These circumstances, although the plaintiff is, by his own acts and situation, precluded from assigning them as error, together with the provisions of the statute of 1807, *Ark's Dig. p.* 333, *S.* 58, which declares that "when a judgment is arrested the plaintiff shall not be obliged to bring a new suit, provided the first writ be sufficient, but the court may order new pleadings to commence where the error causing the arrest began," furnish, in the opinion of the court, a sufficient reason why the general rule that the judgment must be affirmed, notwithstanding the error in the record, when the party claiming the reversal thereof, committed the first error, which is fatal to his case, although judgment is afterwards given against him, upon other grounds, which are altogether erroneous, ought not to govern the decision of this case, if indeed it can be considered as coming within the rule.—But we think it does not strictly fall within this, or any other rule by which the judgment ought to be affirmed. The case is not one in which the proceedings on the part of the plaintiff are so entirely defective and erroneous, that the judgment against him would not bar another action, properly brought for the same cause; if they were so defective the judgment should be affirmed; but when such consequences would result to the plaintiff: to affirm the judgment, founded upon an immaterial issue, produced by the misdirection and wrong judgment and opinions of the court upon the pleadings, for the error of the plaintiff in joining in his declaration causes of action which cannot by law be joined in the form therein stated, which appear to have passed unheeded by the defendants and the court, cannot, in our opinion, be correct. (See note *B.*)

The case being thus disposed of, the court deems it wholly unnecessary to express any opinion as to the other points made in the as-

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signment of errors, or presented by the record. And it may be proper to add, that we would be distinctly understood as not deciding any thing in regard to the question whether the judgment mentioned in the third special breach is or is not such a right or cause of action as may, by proper averments in the pleadings, be joined in the same action with those stated in other breaches; that question not being presented by the pleadings as they appear in the record before us.

Wherefore, upon the whole case, it is the opinion of this court, that the judgment of the Circuit Court of Washington county ought to be, and the same is hereby reversed, annulled, and set aside with costs; and that a repleader ought to be, and is hereby awarded, to commence with the declaration, where the first error appears to have been committed, the writ being sufficient; therefore the plaintiff, if he shall shall ask leave for that purpose, must be permitted to amend his declaration, so as to cure the defect therein, arising from the misjoinder of causes of action therein, which cannot by law be joined, and in such other respects as may be proper; but if no such leave be asked the suit must be dismissed. And that this case be, and the same is hereby remanded to said Circuit Court for further proceedings to be had therein according to law, and not inconsistent with this opinion.

Note A.

The rule laid down in the text is undoubtedly settled by authority, but I would venture to suggest, with great difidence, that perhaps it is not in itself sufficiently definite. It is, that where there are several causes of action accruing to an executor or administrator, and the money when recovered *would be assets*, they may be joined, in a suit by him as executor or administrator. Yet would not the question arise—"in what cases would the money when recovered be assets?" In order to restore this last question, I have thought it might not be unacceptable to review the cases quoted in the text, as well as others bearing upon the subject, and extract from them the rule, if there be any upon that point.

I would remark, though with much deference, that the case of *Bull* vs. *Palmer*, is not stated in the text with complete accuracy, though the same doctrine might be deduced from it. It was assumpsit: plaintiff declares that debt accounted with him, being executor to J. S. as executor, upon which account so much was due, and he promised to pay it. Upon *non assumpsit*, the plaintiff was nonsuit, and the question was, if he should pay costs? *Wytebe* held he should pay costs, because he does not sue as executor, nor produce the will, but founds the action upon an account with himself. *Rainsford*, chief

justice, *Tuysden* and *Jones*, justices *contra:* for the action is in the right of his executorship, and the money recovered will be the assets; and they gave judgment accordingly.

It will be seen by the above statement of the case, as it is reported in 2 *Levine*, 165, that there was no question or rule as to joinder of counts, though the doctrine inferred in the text may well be deduced from the decision.

The case of *Herreden* vs. *Palmer*, *Hob.* 88, is also different from what is above stated in the text—and does not conflict with the case of *Bull* vs. *Palmer*, nor has it in later days been overruled. *Herreden* brought assumpsit against *Margaret Palmer*, administratrix of her husband, and declared that her husband had bought of him gold and silver and pearl, and was indebted unto him for them 200 pounds, and she, after his death, had likewise bought of him pearl, for 27 pounds, and that upon accompt she was found indebted both these sums unto him, and promised payment. Judgment for pl. and assigned for error, that the defendant was to be charged in two manners, one in her own right, and the other as administratrix; and therefore the judgment was reversed. The principle here decided is sustained in *Jennings* vs. *Newman*, 4 *T. R.* 347; *Rose* vs. *Bowler*, 1 *H. Bla.* 108; *Brigden* vs. *Parkes*, 2 *Bos. & Pul.* 424; *Myer* vs. *Cole*, 12 *J. R.* 340; and *Wigley* vs. *Ashton*, 3 *B. & A.* 101.

The case of *Rogers* vs. *Cook*, 1 *Salk.* 10, does not, it is respectfully conceived, conflict with the case of *Bull* vs. *Palmer*, nor has it been overruled. It was a suit brought by *Rogers* as administrator. He declares on an indebtatris assumpsit to the intestate, and a second count on an *insimul computasset* between the *plaintiff* and *defendant* for money due the plaintiff *himself*. Upon demurrer the declaration was holden bad—and the reason given is, "for the plaintiff in one action cannot prosecute *his own right* and another—because the costs to be recovered are entire, and then the plaintiff can never distinguish how much he is to have as administrator, and how much he is to hold as his own." It will be seen that this decision in no way conflicts with that in *Bull* vs. *Palmer*, nor does it bear upon the question discussed in the text.—The same case will also be found in 1 *Shower*, 366, where it is stated as in *Salkeld*. It is sustained by *Hooker, extr'x.* vs. *Quilter*, 1 *Wils.* 171; and S. C. as *Hookin* vs. *Quilter*, 2 *Str.* 1271.

The case of *Hosier et al. extrs.* vs. *Lord Arundel*, 3 *Bos. & Pul.* 7 was decided in 1802, subsequent to *Ring et al. extrs.* vs. *Thorn* and *Foxwist* vs. *Fremaine*. The case of *Hosier et al. extrs.* vs. *Arundel*, was an action in two bonds, one to the plaintiffs' testator, and the other to the plaintiffs as executors. There was a demurrer to the declaration, and the case of *Ring et al. extrs.* vs. *Thorn* was cited against the demurrer, which was a case where the first count was on a bill of exchange, endorsed to the plaintiffs, who were surviving executors of Stevenson, in right of the plaintiffs, as surviving executors as aforesaid: the second count was for money had and received by the defendant to the use of the plaintiffs as executors; and the third on an account stated with the plaintiffs as executors; in which case the action was supported; and BUTLER said, that "it is clear that a plaintiff cannot join two counts, one on a debt to himself, and another to him in the character of executor"—but that "the only question is whether the sum, when recovered, will be considered as assets of the testator."

The correctness of this decision was admitted in *Hosier* vs. *Arundel*, but ALVANLEY, C. J. said that if the executor to whom a bond was given as executor, were to die before the debt due on such bond was recovered, the administrator *de bonis non* would not be able to put that bond in suit. It would go to the administrator of the executor. ROOKE, *Judge*, said that this case fell within the words used by BUTLER in *Ring* vs. *Thorn*, to wit—"it is clear that the plaintiff cannot join two counts, one on a debt to himself, and another to him in the character of executor;" and CHAMBRE, Judge, said "if executors take a note or bond from a debtor to the estate of their testator, the old debt is thereby extinguished, and a new one created, which must be declared upon as such." And he referred to the cases of *Bettes* vs. *Mitchell*, and *Rogers vs. Cook*, as in point. The case of *Bettes* vs. *Mitchell*, 10 *Mod.* 315, was

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on several premises made to the *testator*, and a promissory note to the executor, *ut executori*, and the court decided that the latter could not be joined with the former.

The case of *Nicholas, adm.* vs. *Killigrew*, 1 *Ld. Raym.* 437, was *indebitatus assumpsit*, and the plaintiff declared for so much money due to the intestate, paid to the defendant after the death of the intestate, to the use of the plaintiff his administrator. The pl. was nonsuit, and the question was, as in *Bull* vs. *Palmer*, if he should pay costs. But remark that here the action was not, as in *Bull* vs. *Palmer*, *against a debtor to the testator, but against a third* person who had received the money *from the debtor*, after the testator's death, and to the administrator's use. TREBY, C. J. said, and POWELL, *Justice*, agreed with him, that "if A be indebted to the intestate before his death, and after his death A pays the same to B, by direction of the administrator, there the administrator may sue B without naming himself administrator, and though he does name himself administrator, it is void, and he must pay costs, if the action be found against him." Why? Because, by directing the money to be paid to a third person, he has become responsible to the estate for it, and it is already reduced into assets. The court said further—"or if A pay it to B to the use of the administrator without his direction, yet the administrator *may* have an action against B in his own name, and he shall pay costs. *But* in such case he hath election, to bring an action against B or A, *the first debtor* —and if he brings it against A it must be *as administrator*, and he shall not pay costs. For in all cases where an executor or administrator sues for a debt or other thing belonging to the testator, &c. and grounds his action upon the same contract that was to the testator, he shall not pay costs if he fail in the suit; but if he grounds his action upon a contract expressed, or by implication and operation of law, which accrues to him after the death of the testator, there the action lies in his own name, and the naming executor, &c. is void, and he shall pay costs." So far as this decision applied to the case then before the court, it is undoubtedly law at the present day, though the *obiter dicta* are not.

The rule in *Bull* vs. *Palmer* does not appear, therefore, to have been shaken by any of the cases referred to in the text, except *Hosier* vs. *Arundel*, and *Bettes* vs. *Mitchell:* and the decision in *Hosier* vs. *Arundel* is subsequent to some of the cases which are said to have overruled it. And this case, and that of *Bettes* vs. *Mitchell*, which are said in the text to have been overruled by the cases there cited, and among them by *Ord* vs. *Fenwick*, 3 *East*. 104, *were expressly sustained by* Lord ELLENBOROUGH, in that case. The case of *Bettes* vs. *Mitchell* being cited, that eminent judge said—"There the security itself was created after the death of the testator, and therefore the executor must have sued upon it *in his own right*, whatever the original consideration might have been."

The decision in *Ord* vs. *Fenwick* was, that where there was a count in assumpsit to the plaintiff *as executrix*, for money *paid* by her to the defendant's use, it might be joined with a count on promises to the testator—and the court assigned as a reason, that "*non constat* but she might have been compelled to pay the money upon an obligation by the testator as security for the defendant, and then the law would raise an assumpsit in him *to reimburse the estate*, and the money recovered by the executrix would be assets. The court was referred to the case of *Ring* vs. *Thorn*, 1 *T. R.* 489, and *Cockerill* vs. *Rynaston*, 4 *T. R.* 277, as establishing the rule that the only question was, "whether the sum when recovered would be assets;" and seemed to recognize it. *Ord* vs. *Fenwick* is supported by *Mowry* vs. *Adams*, 11 *Mass.* 327, and *Williams* vs. *Moore*, 9 *Pick.* 432.

In *Ring* vs. *Thorn*, it was decided, that where the endorser of a bill of exchange was indebted to the testator, and endorsed a bill to pay the debt, to the plaintiffs *as executors*, they could sue him in their representative character —and BUTLER said the only question was, whether the sum would be assets.

And in *Cockerill* vs. *Rynaston*, which was trover, Justice BUTLER said that though the conversion was made after the testator's death, yet it was a cause of action which accrued to the executrix, *as executrix*, if she never had pos-

session of the goods, and these goods when recovered would be assets, and so she must sue in her representative capacity. And the same decision had been previously made in *Mason* vs. *Jackson*, 3 *Lev.* 60, which is usually referred to as establishing the same rule which is laid down in *Bull* vs. *Palmer*.

But in *Bollard* vs. *Spencer*, 7 *T. R.* 354, Lord Renyon said that there must have been some mistake in *Cockerill* vs. *Rynaston*, and declared the law to be, that where the conversion was in the time of the administratrix, she could not sue as such, but must sue in her own right.

In the case of *Foxwist* vs. *Fremaine*, 2 *Saund.* 212, the point discussed in the text was not raised. The only points raised in that case were, whether infant executors should be joined in an action; and whether, if so, they should sue by attorney.

In *Cowell* vs. *Watts*. 6 *East*. 409, which was an action of assumpsit, with one count upon a promise to the plaintiff as administratrix, and one upon an account stated with her as administratrix, Lord Ellenborough, and the whole court held that the counts might be joined; and the test was declared to be, whether the sum when recovered would be assets.

LAWRENCE, *Judge*, said—"The reason why an executor suing in his representative character shall not be liable to costs if he fail, is, because he is supposed not to be cognizant of the contracts made by his testator; but as he must be cognizant of all contracts made by himself personally, though in his representative character, and as he might declare upon them in his own right, there is reason why he should not be exempt from costs in case he fail in his action.

The case of *Partridge & Wife, admtrx.* to some extent overruled the case of *Beltes* vs. *Mitchell*, and *Hosier* vs. *Arundel*, and decided, that counts, or promises to an intestate, may be joined, in declaration by an administrator, in assumpsit, with counts on *promissory notes* given to the plaintiff *as administrator*, because the amount, when recovered, would be assets in the hands of the administrator. But it was admitted, that if a *bond*, or other higher security had been given, it would be different, *because* the effect of such new and higher security would be an extinction of the simple contract debt. *Partridge et ux, adm'x* vs. *Court*, 5 *Price Exch. R.* 412.

In *Thompson* vs. *Stent*, there was a count on account stated with plaintiff as executor, and one for goods sold by testator. It was decided that they might be joined, because the money recovered would be assets. 1 *Taun.* 322, and *Secar* vs. *Atkinson*, 1 *H. Bla.* 102, was of the same nature.

The case of *Rowley et al. extrs.* vs. *Newton*, 6 *Taun.* 453, was on counts upon notes given the testator, and an account stated with the plaintiff as executors: and the rule was laid down as by BUTLER, *Judge*, in *Ring* vs. *Thorn*.

In 7 *Price* 591, the judgment in *Partridge et ux, adm.* vs. *Court*, *Price*, 412, was affirmed. And see *Fry* vs. *Evans*, 3 *Wendell*, 500.

Catherwood vs. *Chabaud*, 1 *B. & C.* 150, was a suit by the administrator *de bonis non*, on *a bill of exchange* endorsed to the original administratrix, as administratrix; and the rule was laid down by all the judges: by ABBETT C. J. that an administrator may sue *as such*, under a *promise* made to him in his representative character: by BAYLEY, *Judge*, that an administrator may sue *as such*, upon *promises* made to himself, where the money will be assets when recovered: and by BOLROYD, *Judge*, that the older cases have received a qualification, and are not now to be considered law *to their full extent*.

These authorities show the law to be settled in England, that where the executor takes a *bond* to himself *as executor*, for a debt originally due the testator, he cannot sue on it *as executor*, but must sue on it in his own name; but where he takes a *promissory note*, it is different, and the reason as appears in 5 *Price*, 412, is, that the note is not a security of a higher nature than the simple contract debt—it does not extinguish the simple contract debt, and it is only a different kind of evidence taken in order to prove the same debt. It is therefore suggested whether, in this state, where a note may be the *foundation* of an action, where its execution can only be denied by plea under oath, and where bonds and notes are placed in many respects on the same footing, the law would not be the same with regard to a note taken by the executor, as with regard to a bond.

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I would therefore suggest, as before with great deference, that the rule laid down in the text needs some explanation or restriction. For the same question, *in fact*, arises under the rule, when are moneys recovered assets? The rule would therefore seem to be, *that whenever the executor takes a security of a higher nature, he becomes responsible for the debt—and if he sue upon the higher security taken, the money recovered is not assets, and he must sue on it in his own name, and not as executor.*

In *Baker* vs. *Baker and Cook*, 4 *Bibb*, 346, the Supreme Court of Kentucky said that where a note was given to the plaintiffs below, executors, &c. yet their being styled executors could only operate as a *descriptio personarum:* for as the note was given to them, and not to their testator, they could only maintain the action in their own right; and this case can only be reconciled with *Partridge* vs. *Court*, upon the ground that a note is in Kentucky, as in this State, a higher and different evidence of the debt, than the pre-existing verbal contract, as well as the *foundation* of an action like a bond.

Note B.

May it not be doubted whether the awarding a repleader and refusing to affirm the judgment in this case, is not contrary to established principles?

One rule with regard to repleader is stated to be, "That a repleader will never be awarded, for faults in the issue, when it is apparent *that no useful end* can be attained by so doing. *Gould Pl.* 513—that is, where the party cannot amend his pleadings so as to make them good, without *substantially* changing them—because if there is a plea or declaration bad in substance, the cause must be finally decided upon it.

In *Rex* vs. *Phillips*, 1 *Str.* 397, the *Chief Justice* said—"We are moved on behalf of the defendant, that we will grant a repleader: now consider that if we should grant it, the defendant cannot mend his case; *for the plea* will stand, and *after the formality of a demurrer*, we must give judgment upon the goodness or badness of the plea.

So in *Clears* vs. *Stevens*, 8 *Taunton*, 420, the plea omitted a material fact, necessary to make a full defence, and Gibbs, C. J. said, "it is true that the defendant in his replication, selects an immaterial fact, and takes issue thereon, but an immaterial issue taken on a bad plea will not make that plea good;" and the court refused a repleader on that issue.

The rule is further laid down—that "if the declaration is good, the plea in bar totally void of substance, and issue joined on any part or the whole of the plea, and verdict for the plaintiff; he is entitled to judgment—as no possible issue tendered on such a plea or the matter of it, in whatever manner alleged, could decide the merits of the case. *Gould. Pl.* 513; *Jones* vs. *Bodinham*, 1 *Salk.* 173.

So in *Crane* vs. *Newell*, 2 *Pick.* 614, it was held that a repleader would not be awarded, where the facts stated in the plea were not a sufficient bar to the action.

Furthermore it is laid down—that "if there be a *radical* defect in any of the previous stages of the pleadings; and if the *first* defect of this kind, is on the part of him who moves in arrest of judgment, the motion cannot prevail. *Gould*, 516; *Kempe* vs. *Crewes*, 1 *Lord Raym.* 170; *Foster* vs. *Jackson*, *Hob.* 56 *and note*; *Tasker* vs. *Salter*, *Hob.* 113; *Brickhead* vs. *Arch. of York*, *Hob.* 199.

So in *Harrison* vs. *F. and M. Bank of Logan*, 4 *Lit.* 275, the court said—"It is an established rule, that a repleader is never awarded at the instance of him who has committed the fault."

So in *Gerrish* vs. *Train*, 3 *Pick.* 124, the same rule was laid down in almost the same words. See *Kiotley* vs. *Deck*, 3 *Hen. and Mun.* 388; *Hammett* vs. *Bullitt*, 1 *Call*, 567; *Kerr* vs. *Dixon*, 2 *Call*, 379.

The case in the text falls, it is respectfully believed, within the very letter, as well as reason of the rule. The first defect is in the declaration—it is a

radical defect—fatal on error or in arrest of judgment—a misjoinder of counts, in one of which the plaintiff is decided to sue in his own right; and therefore the declaration cannot be amended, without changing the nature of the demand, and bringing forward a new case.

But there is a more weighty objection still. In *Witts* vs. *Polehampton*, 3 *Salk.* 305, *Hort*, C. J. said that "a repleader *was never yet allowed after a demurrer*—so it was reported by Mr. *Lutch*, (147) but since his time it hath never been allowed." And again—"since this last case, (*Stephens* vs. *Cooper*, 3 *Lev.* 440), it hath been ruled that a repleader can never be awarded after a *demurrer*, nor after a *writ of error*, but only after issue joined. The same decision is found *Crosse* vs. *Bilson*, 6 *Mod.* 102; 2 *Rebic*, 769, 789, 225, 2 *Saund.* 319, *b.* (*n.* 6.)

So in *Holbech* vs. *Bennett*, 2 *Lev.* 12, HALE, C. J. said "The court cannot at this day award a repleader upon a writ of error, if they reverse the judgment, as was used anciently. This cause has been disused for above these hundred years, and cannot be practised now."

And this is equally the case at this day, and in this country. Justice STORY, in the *United States* vs. *Burnham*, 1 *Mason*, 66, which was a case brought by writ of error from the District Court of Massachusetts to the Circuit Court, says, "If this were a case originally depending in this court, a repleader might perhaps have been proper to be awarded; for, although in general, a repleader is not grantable in form of the person, who made the first fault in pleading, nor where the court can give judgment upon the whole record; yet if it appear that substantial justice will not otherwise be done, the court might otherwise award it. *But this court sits in this cause as a court of error, and although the practice was anciently otherwise, a repleader is now never awarded by a court of error.*"

If this be, as it is with deference believed, it is the true doctrine upon the subject, it is most assuredly not changed by the statute quoted in the text, which allows a repleader *after arrest of judgment.*

So in *Wells* vs. *Lain*, 15 *Wend.* 102, it is stated by the chancellor, that "no repleader can be awarded upon a writ of error, where it has not been asked for in the court below."

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BENJAMIN MURPHY *against* JENKINS WILLIAMS.

APPEAL *from Conway Circuit Court.*

A writ which bears date Sept. 8, 1837, and is returnable to the *next* September term is bad, and a judgment by default rendered upon it at September term, 1837, is erroneous.

There is no provision of law by which a writ can be extended beyond the second term from its date.

An entry upon the record, that "this day the parties appeared by their attorneys, and the defendant having failed to file any plea to the plaintiff's declaration, it is considered by the court that judgment is rendered against the defendant for want of a plea," is not such an appearance as makes the writ good.

In order to constitute an appearance in the legal sense of the term, there must be some substantive act done by the defendant which constitutes him a party to the suit.

An appearance of the appellant, makes him a party to the proceedings below, and he is bound to appear in the circuit court, when the case returns there, as though he had been served with a valid process.

This was an action of covenant brought by the defendant in error against the plaintiff in error upon a lost bond, stated in the declaration to be lost by time or accident; and profert was made of a record copy thereof. The writ bore date Sept. 8th, 1837, and commanded the officer to summon the defendant to appear at "the next September term," to be holden "on the fourth Monday of September next." At the September term, 1837, an interlocutory judgment was taken in the following words: "This day the parties appeared by their attorneys, and the defendant having failed to file any plea, &c.;" and at the next term the plaintiff's damages were assessed, upon a writ of enquiry, to the sum of $624; for which amount final judgment was rendered; and the defendant appealed.

FOWLER, for the appellant:

It is contended by the appellant that the declaration is wholly insufficient in law to authorize a judgment; and that the defects being matters of substance, are not cured by the judgment by default, under the statute of *jeofails*, or amendments. Vide *Hard. Rep.*, 79, 80; *Letcher* vs. *Taylor*; 2 *Bibb. Rep.* 17; 2 *Burr. Rep.* 833.

The declaration, consisting of only one count, is contradictory and repugnant to itself in its different parts; in the material allegations, for instance, in one part it alleges that the *bond is lost* by *time and accident*, &c.; in another it makes profert of the bond itself; and lastly, makes

profert of an authenticated copy thereof. Each count must be consistent with itself, and no repugnance in material parts, will be tolerated.

Profert is matter of *substance*. Vide *Hardin's Rep.* 64, *Scott* v. *Curd;* 1 *Wils. Rep.* 16.

No action at law can be sustained on a lost deed; and such averment having been once made in the declaration, no subsequent profert in the same court will be permitted to cure or nullify such allegation.

The process is void. All writs should be made returnable to the *next* term after issued, except when they are issued within fifteen days of the commencement of the next term, and then they shall be made returnable to the *second* term next ensuing the date of such writ. Vide *Pope, Steele, and McCamp. Dig. p.* 314, *sec.* 4, *p.* 316, *sec.* 10. The writ, in this case is returnable to the *next* September term to be held in *September next*, after the date of the writ, which can only be construed to mean the *September term, A. D.* 1838, the *third* term after the issuing of the writ; consequently the interlocutory judgment by default, was rendered in the case *twelve months prior* to the time at which the writ was made returnable; and the damages assessed, and final judgment rendered *six months before* said writ was returnable. The judgment against *Murphy* is therefore erroneous, and ought to be reversed.

CUMMINS & PIKE, *contra:*

The appellee in this case contends that an action at law can be sustained upon a lost bond or covenant.

The position assumed by the appellant, is no doubt, partially sustained by some of the older authorities, but we shall be able to show that both the English and American courts in later days have decided differently, and otherwise settled the common law on this subject.

It is true, also, that the Supreme Court of Kentucky, in *Helm* vs. *Eastland*, 2 *Bibb*, 193; and that of Missouri, in *Edwards* vs. *McKee*, 1 *Mo. Rep.* 123, have without much reflection or examination, decided according to the older authorities, and go the full extent of sustaining the appellant's position.

It therefore becomes necessary first to examine those decisions, and to ascertain on what reason or authority they are based. The former placed its decision on two grounds. 1st, That the tearing off of the seal, or any other material alteration annulled a deed; and 2d, that

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there can be no declaration on a bond or deed, without profert; and the appellant also assumes that profert is matter of substance. The Supreme Court of Missouri based their decision upon the case of *Read* vs. *Brookman*, 3 *T. R.* 151.

The consequences deduced by the Supreme Court of Kentucky, from the first position assumed by them, are, that as a material alteration in a deed annuls it, so that *non est factum* can be pleaded to it, much more when the deed is lost or utterly destroyed, no remedy at law can be had on it. But this position depends upon the second, and the reason given is that where the party would declare on a deed, he must make profert, and he cannot do so if the deed has ceased to be a deed by erasure or interlineation. We may, therefore, examine both portions together.

The Supreme Court of Kentucky made no very diligent examination of the authorities upon the point they were deciding; but they state that *Gilbert*, in his Law of Evidence, and *Whelpdale's* case, in 5 *Co.* 119, decide that *non est factum* may be pleaded where the seal is broken off, and they therefore assume this to be the general, broad doctrine, without any limitation or qualification.

The second resolution in *Pigot's* case, 11 *Co.* 27, is, "that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing a pen through a line, or through the midst of any material word, the deed thereby becomes void."

In *Whelpdale's* case, 5 *Co.* 119, it is said "that in all cases where the bond was once the deed of the defendant, and afterwards, before the action brought, becomes no deed, either by erasure or addition, or other alteration of the deed; *or by* breaking off the seal, the defendant may safely plead *non est factum*, for, without question, at the time of the plea, which is the present tense, it was not his deed." And the case of *Haywood* is mentioned, where *after non est factum* pleaded, the deed being in custody of the clerk, rats ate the label, by which the seal was fixed, and there the jury found it was defendant's deed at time of plea pleaded, and plaintiff had judgment.

The first resolution in *Pigot's* case, as found in *Rolle's Rep.* 40, is, "*Fuit resolve que un rasure on interlina d'un obligation per un estranger de un chose material fit l'obligation void, come le divulsion del seal per estranger, &c.*" See *Michael* vs. *Scockwith*, *Cro. Eliz.* 120. The case of *Haywood* above quoted will be found in *Dyer*, 59.

But the whole of this ancient doctrine, as is remarked by SUTHERLAND, *Judge*, in 6 *Cowen*, 748, *Rees* vs. *Overbaugh*, has been materially modified, if not substantially exploded, by modern decisions. The Supreme Court of Kentucky seem not to have been aware of this, although in one part of their opinion they refer to "a late decision in England," without taking the trouble to inform us to what particular decision they allude.

Mr. *Justice Buller*, in *Master* vs. *Miller*, 4 *T. R.* 338, considers this doctrine to have owed its origin very much, as we have stated before, to the necessity of making profert; and he remarks, that it is not universally true that a deed is destroyed by an alteration, or by tearing off the seal. In *Palmer* 403, a deed which had erasures in it, and from which the seal was torn, was held good, it apppearing that the seal was torn off by a little boy. So, when torn off by accident, after plea pleaded, as authorities already cited. And he then remarks, that "in these days, I think, even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration which would obviate every doubt upon that point, by stating the truth of the case."

In *Henfree* vs. *Bromly*, 6 *East.* 309, *Lord Ellenborough* decided that an alteration in an award made by the umpire after his authority was at an end, was the same *as if it were made by a stranger, a mere spoliator*; and that it would not avoid the award, any more than if *it had been obliterated or cancelled by accident.*

In *Cutts* vs. *the United States* it was held that a deed is not avoided by the seal being torn off, whether innocently or fraudulently, but it may be declared on as a subsisting deed, 1 *Gallis.* 69. And in *Rees* vs. *Overbaugh*, 6 *Cowen* 746, the Supreme Court of New York, after reviewing all the authorities decided, that if the seal were torn off by one with whom it had been left for safe keeping, or by a stranger, it did not vitiate the deed; and this was on the express ground that the old doctrine as to profert had been exploded, and an action at law could be maintained on a bond or deed lost or destroyed.

The only case left standing, where tearing off the seal will avoid the bond, is, where it has been done by the obligee himself: and it so held in that case, not on the old doctrine, but on the ground that it is his own voluntary act, and in the nature of a surrender.

Upon the second position, the Supreme Court of Kentucky, in stating that "by a late decision in England, the courts of common law there

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have *assumed* a concurrent jurisdiction in cases of this kind with the courts of equity," must have referred to the case of *Read* vs. *Brookman*. They declare it to be "no authority in Kentucky, unwarranted upon principle, a most flagrant violation of all the acknowledged forms of proceeding, and a departure from the best settled authorities." This is pretty strong language, and will appear on examination, to be mere declamation, "to round a period withal."

The Supreme Court of Missouri overrule the case of *Read* vs. *Brookman*, 3 *T. R.* 151, though, as they say, "with much diffidence." They state the facts of that case to be, that *Lord Kenyon*, in giving his opinion, relied almost exclusively on the reason of the thing; and on the case of *Totty* vs. *Nesbet*, which the Supreme Court of Missouri does not think sufficient to overturn the ancient established. They further say, that *Lord Kenyon* admitted the old law to be opposed to his decision; that *Ashhurst* relied on *Leyfield's* case; and that *Buller* proceeded on the ground that grants, &c. may be presumed from length of time.

If we now examine the case of *Read* vs. *Brookman*, we shall find that the Missouri Tribunal must have referred to and agreed upon that case without examining it; and probably quoted it at second hand.

In that case there was a plea in bar, and demurrer to it, and it was contended that the plea in bar was bad, because it set up a deed of release, and made no profert of it, but alleged it to be lost by time and accident. The counsel in support of the demurrer quoted *Wymark's* case, 5 *Co.* 74 *b.* 75 *a*, to the point that the only two cases where profert was dispensed with, were, where the deed had been pleaded in, and remained in another court, or where it was in the possession of the adverse party. But that case merely excepts those two cases out of the common rule, and does not say that there is no other exception. *Leyfield's* case, 10 *Co.* 93 *b.* was also referred to; but, in that case, *Lord Coke* admitted that in cases of extreme necessity, profert is dispensed with; "in great and notorious extremities, as by casualty of fire, he may prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction." *Thoresby* vs. *Sparrow*, 2 *Str.* 1186; 1 *Wils.* 16, was also relied on, but it will be found that in that case, profert was made of the original, and also that the court expressly said, as the case is reported in *Wilson*, that under that state of case the original must be produced; and added, "if any thing can be done for the plaintiff in this case, it must be by helping plaintiff *in declaring;*

and that, upon proof that the original lease is lost, a copy may be given in evidence."

The only other case relied on was *Whitfield* vs. *Faussett*, 1 *Ves.* 337, and even there *Lord Hardwicke* said, "the loss of a deed is not always ground to come into a court of equity for relief;" and, "courts of law admit evidence of the loss of a deed, proving the loss of it, and the contents, just as a court of equity does."

On the other side were cited the case of *Totty* vs. *Nesbit*, and *Martin* vs. *Atkinson*, in each of which the court permitted the declaration to be amended, so as to show an excuse for not making profert.

The court, after a full consideration of the cases and dicta referred to, overruled the demurrer, and decided that *the authorities were not sufficient to show* that the law was, that an action at law could not be maintained on a lost bond.

Lord Kenyon did argue that the doctrine contended for was unreasonable, but he further said that "however unreasonable we might think it, we would not be warranted in trampling on a series of decided cases to overturn it." He says further, that he "*did not feel the weight*" of any authority adduced, except that of *Lord Hardwicke;* and that that great judge only intimated his doubts, but did not give his judicial opinion; that he stated the question to be then *sub judice* in a court of law, and therefore he would relieve in equity, because it was *doubtful* whether the law would relieve or not. And *Lord Kenyon* stated the principle to be, as is perfectly well settled, that it is not always to be inferred from a court of equity interfering, that the law can give no relief: and he further broadly stated, that where a deed is lost, it is extreme necessity, as meant by *Coke* in *Leyfield's* case. It is true that he says he would have been glad to have found one direct authority on this point in later times; but he also adds that he has heard no answer to the case of *Totty* vs. *Nesbitt*. And he finally concludes that what was supposed to be the old law, was founded on a mistake; and that the law in later times had been better adapted to general convenience.

Ashhurst said that if the demurrer had been warranted by a long series of precedents, he would have held himself bound by them, and adds, "but that is not the case, and the sense and reason of the thing, together with the established practice in modern times, militate strongly against it." He says further: "No case has expressly determined that this demurrer can be supported; and *Dr. Leyfield's* case rather

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leaves an opening for a contrary determination." Loss by fire, in that case, he says, "is only put by way of instance; for if the deed be destroyed by any other accident, it falls within the same reason."

Buller said, in reference to the same case, "whenever a similar necessity exists, the same rule holds. That the case in *Vesey* is not an authority against this mode of pleading; and that courts of law had frequently before dispensed with the necessity of giving *oyer*, as where an original lease was lost. And he finally says: "*No authority is against this mode of pleading*; but on the contrary it has the sanction of modern practice, which in a case like this has great weight."

GROSE, *Judge*, dissented, but from the time of that decision, notwithstanding *Lord Hardwicke's* doubts; arising probably from his jealousy of what he considered an encroachment of the common law upon the realms of equity, the question has been at rest, and conclusively settled in England. See *Exparte Greenway*, 6 *Ves.* 812; *E. Ind. Comp.* vs. *Boddam*, 9 *Ves.* 466; *Smith et al* vs. *Woodward*, 4 *T. R.* 586; *Jevens* vs. *Harridge et ux*, 1 *Saund.* 9 *a*; *Doxon* vs. *Haigh et al*, 1 *Esp.* 409.

The Supreme Court of New York in *Jansen* vs. *Ball et al*, 6 *Cow.* 628, has decided in comformity with the case of *Reed* vs. *Brookman*, and so has the Supreme Court of Indiana in *Pence* vs. *Smock*, 2 *Blackf.* 316.

That a copy of an instrument required by law to be recorded, is evidence equally with the original—See *Patterson* vs. *Winn, et al*, 5 *Peters*, 232; *Wells* vs. *Wilson*, 3 *Bibb* 264; *Tebos* vs. *White*, 4 *Bibb* 42; *Sharp* vs. *Wickliffe*, 3 *Litt.* 12.

The authorities above referred to meet all the points except that with regard to the summons, and the rendering of judgment.

The summons is undoubtedly defective, but the appellant appeared in the court below, and thereby cured all defects in the original process.

Judgment by default for want of a plea, was rendered at the first term, upon service made more than fifteen, and less than thirty days before the term. The defendant is required by law to plead to the merits on or before the third day of the term. The writ is returnable to the first term, if served more than fifteen days before court; and if he is required, to plead on or before the third day, the court may of course default him if he fails to do it, or else the requisition to plead is inoperative, as the court can have no means to enforce it, nor can the defendant risk any thing by failure to plead. *Dig.* 319, 320.

The provision of law, that where the writ is served thirty days before

court, the pleadings shall be made up, and the cause tried at the first term, (*Dig.* 193) did not repeal the provisions before in force, which required the defendant to plead within the three first days, when the writ was served fifteen days before court. It only repealed the provision which allowed either party to continue at the first term, (*Dig.* 327,) and left the other provisions untouched. The defendant in this case was therefore required to plead within the three first days. If he did so he was entitled to a continuance. If he neglected it, he was in default, and liable of course to a judgment.

Dickinson, *Judge*, delivered the opinion of the court:

This was an action of covenant brought by the appellee against the appellant on a bond to perfect title to a tract of land; the writ bearing date September the 8th, 1837; and is in the following words, viz: The State of Arkansas to the Sheriff of Conway County, greeting—You are hereby commanded to summon *Benjamin Murphy*, if he be found within your baliwick, to appear before the Judge of our Circuit Court, at the court house in the county aforesaid, on the first day of our *next* September term, it being the fourth Monday of September *next*, then and there to answer unto *Jenkins Williams* in a plea of breach of covenant, damages one thousand dollars; and that you make due return of this writ. In testimony, &c.

On the twenty-eighth day of the same month in which the writ was issued, being the September term of the court, judgment by default was entered against *Murphy*, and a writ of enquiry awarded, returnable to the May term thereof, when the damages were assessed by a jury, and judgment entered for six hundred and twenty-four dollars, from which Murphy appeals to this court.

The fourth assignment of errors, and the only one which we deem it necessary to look into, is, that the writ of summons bears date in September, 1837, returnable to the next September term, in September next, (A. D. 1838,) and judgment was rendered by default in September, 1837. By reference to the *Arkansas Digest* page 313, it is declared that all writs issued by any courts in this State shall be made returnable to the next term after the date of such writ; this act, however, was so far modified by the general assembly, in 1838, *same Digest*, 314, as provides that where a suit is brought within fifteen days immediately preceding the term of the court in which it is issued, the writ shall be made returnable to the second

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term of said court ensuing the date of the writ; but there is no provision by which a writ can be extended beyond the second term. It is evident, that where the writ, as in this instance, is returnable to the 4th Monday of September next, it has reference the term of the court to be held in 1838, more than one year from the date of the writ, nor does the appellee contend that the writ is good, but insists that the record shows that *Murphy* appeared in the court below, and thereby waived any advantage which he might have derived from such defect.

What is this statement upon which the appellee relies? On the 28th day of September, 1837, in the same month in which the writ is issued, there was an entry made on the record in the following words: "This day came the parties by their attorneys, and the defendant having failed to file any plea to the plaintiff's declaration, it is considered by the court that judgment be rendered against the defendant for want of a plea." Does this constitute an appearance; or is it binding on the defendant. The object in resorting to a court of justice, is to seek redress for some injury; to do this the act of the parties, and the act of law must co-operate. Has there been any such a co-operation in this instance as would authorize the court to proceed? In the examination of this subject we do not deem it necessary to review and trace up the mode of bringing writs as known to the common law. By our Statute actions are commenced by filing the declaration, and issuing the writ or process at the same time. The object of this process is to compel the defendant to appear in court, in order to contest the suit, and abide the determination of the law. If he fail to appear and plead within the three first days of the return term, the plaintiff may cause judgment to be entered up against him at any time during the last day of the term; which judgment shall be final, except when the damages are not liquidated and reduced to writing, in which event a writ of enquiry shall be executed at the next succeeding term after the interlocutory judgment is entered, (*Ark's Dig.* 320.) Thus we see that if the defendant does not *appear and plead*, or make an excuse for not so doing, the plaintiff has a full and adequate remedy. In order to constitute an appearance in a legal sense of the term, there must be some substantive act by the defendant that constitutes him a party to the suit. For what purpose did *Murphy* come into court? If for any ostensible purpose it ought to be shown, for it would be absurd to suppose that he presented himself in the court below simply to waive all defence and permit judgment to go against him one year before the

writ was returnable, for he neither confesses the cause of action, nor makes any defence: we are clear, therefore, that the entry made on the record, ought not to compromit the parties' rights, and that the court erred in permitting proceedings to be had against *Murphy* in this suit at the September term thereof in 1837; *Delam* vs. *Hopkins*, 1 4 *Hill's R.*, 118; *Hard. Rep.*, 169; 1 *Chitty*, 583, 710; but as the appellant has appeared here and assigned his errors, he has become a party to the proceedings, and consequently, *Murphy*, in accordance with the rule laid down in the case of *Gilbreath* vs. *Kuykendall*, is bound to appear in the circuit court, when the same proceedings will be had in this suit as though he was served with a valid process requiring his appearance there more than thirty days before the first term of the court next ensuing, to which the case is remanded.

The judgment of the Circuit Court of Conway County, is therefore hereby reversed and set aside with costs, and the case remanded to said court for further proceedings to be had therein according to law, and not inconsistent with this opinion.

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HUGHES vs. MARTIN.

ISAAC HUGHES *against* BENNETT H. MARTIN.

ERROR *to Johnson Circuit Court.*

An affidavit that the defendant is justly indebted to the plaintiff in the sum of three hundred and seventy-six dollars, and that the plaintiff verily believes that said defendant is about to remove his effects out of the State, is sufficient to authorize the issuing of an attachment, without inserting that the defendant is indebted in a sum over fifty dollars.

The parties in civil proceedings are seldom, if ever, bound to adopt the precise language used in a Statute.

The service by a coroner of a writ directed to the sheriff is not ground for dismissing the suit--though it is matter which will excuse the defendant from answering.

A writ directed to an officer or person prohibited by law from executing it, may be abated: and perhaps it might be set aside on motion, if the fact appear on the face of the proceedings.

But a writ regularly and legally issued, and directed to the proper officer, cannot be avoided, or made void, by matter subsequent, or by having a return endorsed on it by an officer or person not authorized by law to serve it.

Such an endorsement is a mere nullity, and imposes no obligation on the defendant to appear, nor does it subject him to any legal consequences as for a default.

The rule in *Gilbreath* vs. *Kuykendall* renewed

This was an action commenced by the plaintiff above, by writ of attachment. The affidavit on which writ issued was that the defendant "is justly indebted to the plaintiff in the sum of three hundred and seventy-six dollars 50-100, and that he verily believes that the said *Martin* is about to remove his effects out of this State."

The writ was directed to the Sheriff, and returned served by the Coroner.

At the return term the court below dismissed the cause, on the defendant's motion, and gave judgment against the plaintiff—to reverse which he brings his writ of error.

TAYLOR, for the plaintiff in error.

CUMMINS & PIKE, *contra:*

The defendant in error contends that the decision of the court below was correct. By the general provisions of our law, all process is to be directed to the Sheriff. *Dig. p.* 316, 317. The coroner is authorized to serve writs and process, when the office of sheriff is vacant, or when the sheriff is a party to the suit, interested in the suit,

related to either party, or prejudiced against either party. *Dig. p.* 136. And when both the sheriff and coroner are disqualified, the court is to direct the process to *Elisors.*

Process can only be served by the officer to whom it is directed, or his deputy. *Howe's Pr.* 93, 94: and authorities referred to below.

If the sheriff be disqualified, the process must be directed to the coroner. *Howe's Pr.* 94; *Colby* vs. *Dillingham et al.* 7 *Mass.* 475; *Weston* vs. *Coulson*, 1 *Black. R.* 596; *Wood* vs. *Ross*, 11 *Mass.* 271; *Brice* vs. *Woodbury et al.* 1 *Pick.* 362.

There being in this case no showing of any kind which under the law would authorize the issuing of the writ to the coroner, this court is now bound to presume that the sheriff was neither dead, out of office or disqualified. A service by the coroner in such case is no more than a service by any private person, and such mistake is fatal; for a coroner cannot serve a writ, if the sheriff or his deputy may. *Gage* vs. *Graffam*, 11 *Mass.* 181; *Merchants' Bank* vs. *Cook*, 4 *Pick.* 405.

This defect may be taken advantage of, either by plea in abatement, or motion to dismiss the action, if made before appearance entered. *Campbell* vs. *Stites*, 9 *Mass.* 217; *Gage* vs. *Graffam*, 11 *Mass.* 181; *Poliard et al.* vs. *Dwight et al.* 4 *Cranch*, 421.

There was no error therefore in sustaining the motion to dismiss.

RINGO, *Chief Justice*, delivered the opinion of the court:

The plaintiff filed in the office of the clerk of the Circuit Court of Johnson county, his declaration against the defendant in an action of debt, setting out a writing obligatory, for the sum of $365 50-100;—and therewith also filed his affidavit, stating that *Bennett H. Martin* in the above declaration mentioned, is justly indebted to him in the sum of *three hundred and seventy-six dollars, and fifty hundredths;* and that he verily believes the said *Bennett H. Martin* is about to remove his effects out of this State; which was subscribed and sworn to by the plaintiff, before the clerk of said Circuit Court, and thereupon sued out of the office of said clerk, a writ of attachment against the lands, tenements, goods, chattels, moneys, credits, and effects of the defendant, directed to the sheriff of Johnson county, but which appears to have been executed and returned by the *coroner*, instead of the sheriff of said county.

At the term to which the writ was returnable, the defendant without entering his his appearance to the action, moved the court to quash the proceedings had in the case for the following reasons:

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1st. Because there is no affidavit, as required by law, to authorize the issuing of said writ of attachment.

2nd. The writ is directed to the sheriff, and served by the coroner of said county, without the warrant of law; and

3rd. There is no valid legal service of said writ of attachment.

The court sustained this motion, dismissed the case, and gave final judgment against the plaintiff for costs of suit. The plaintiff excepted to the order dismissing the suit, and filed his bill of exceptions, which is signed and sealed by the court, and thereupon the plaintiff prosecutes this writ of error to reverse said judgment.

The only question presented by the record and assignment of errors, is, did the court err in dismissing the suit, and giving final judgment against the plaintiff on the defendant's motion?

The affidavit verifies every fact required by the Statute to be stated therein, unless the omission to insert the words, "in a sum exceeding fifty dollars," as mentioned in the Statute, shall be deemed essential to its sufficiency.

The language of the Statute under which this proceeding is instituted is that "in all cases where any creditor or creditors shall file or cause to be filed, in the office of the clerk of the Circuit Court, of any county in this Territory, a declaration or other statement in writing, against his, her, or their debtor, containing a true statement of the nature of his, her, or their demand, together with an affidavit on his, her, or their oath, or affirmation, or on the oath, or affirmation, of any other creditable person, for him, her, or them stating that the defendant in the declaration mentioned is justly indebted to such plaintiff or plaintiffs *in a sum exceeding the sum of fifty dollars*, (which sum shall be specified in such affidavit,) and that the said affiant verily believes that such defendant is not a resident of, or residing within this Territory, or that the ordinary process of law cannot be served on him, or that he is about to remove his effects out of this Territory, it shall be lawful for such plaintiff or plaintiffs to sue or cause to be sued, out of the office of the said clerk, a writ of attachment," &c. *Ark. Dig. p. 7 S. 1.*

Proceedings by attachment in civil cases are authorized by statutory provisions, in derogation of the common law, and must in every essential part conform to, and pursue strictly the provisions of the Statutes, by which they are authorized. The affidavit, for instance, must state that the defendant is justly indebted to the plaintiff, and specify

the sum or amount of such indebtedness, and show that it exceeds the sum of fifty dollars: but where the defendant's indebtedness, and the amount thereof, are stated, as in this case, showing that the amount thereof is more than fifty dollars; without the precise language of the Statute we are not aware of any principle of law, of reason, or of justice, upon which it ought for that reason alone, to be held insufficient.

The parties in civil proceedings are seldom, if ever, bound to adopt the precise language of the Statute; therefore the affidavit in this case containing every essential requisite under the Statute, is, in our opinion, sufficient.

The objections to the service of the writ, admitting the execution thereof to be wholly illegal, and entirely insufficient, cannot be a ground for dismissing the suit. It is a matter which excuses the defendant from answering the action; but we are at a loss to conceive how it can so operate as to make void or voidable, a writ which, independant of it, is good: a writ directed to an officer, or person prohibited by law from executing it, may be abated; and perhaps it might be set aside on motion, if the fact appears on the face of the proceedings: but a writ regularly and legally issued, and directed to the proper officer or person, authorized by law to execute it, cannot, in our opinion, be avoided or made void, by matter subsequent, as by having a return endorsed on it, by an officer or person not authorized by law to serve it. Such an endorsement being a mere nullity, can have no effect in law, either upon the parties, or upon the suit, it imposes no obligation on the defendant to appear, nor does it subject him to any legal consequences, as for a default, and if he omits to appear, no valid judgment can be given against him; consequently it must in every view of the subject, be regarded as a mere nullity, and the case be considered as standing in the same situation as though no effort had been made to have the process executed. And hence in ordinary cases, when the first writ is not executed, it forms the basis upon which an alias, and if that is not served, a pluries may issue, and nothing is more common in practice, than to take an alias and pluries, when the former writ is not executed, and we presume that no one ever thought of questioning, either the legality or propriety of the practice; and yet if a motion to dismiss the suit upon the ground that there is no service of the writ, or that the execution thereof is illegal, or insufficient, is authorized by law, it follows as a legitimate consequence, that no

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alias, or pluries writ can legally issue. We are therefore of the opinion that the court erred in dismissing the case, and giving a final judgment for the costs of the suit against the plaintiff, on the motion of the defendant, and for this error the judgment must be reversed.

The case being thus disposed of, the necessity of expressing any opinion as to the legality or sufficiency of the execution of the writ, as the same appears in the record, is dispensed with—that question being wholly immaterial, as to any matter now involved in the further disposition of the case, to be directed by this court; inasmuch as the defendant, by appearing here and filing his joinder to the assignment of errors, has made himself a party to the proceedings, and according to the rule established in the case of *Gilbreath* vs. *Kuykendall*, he is bound to appear, and the case upon the return thereof to the Circuit Court, must be considered as though the defendant was duly served with a valid process, requiring his appearance to the action more than thirty days before the first term of the court, to which the case is remanded.

Wherefore, the judgment of the Circuit Court of Johnson county, in this case given upon the defendant's motion, is hereby reversed, annulled, and set aside, with costs; and the cause is remanded to said court with directions to overrule the motion of the defendant to dismiss this suit, and for further proceedings, to be had therein according to law, and not inconsistent with this opinion.

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JAMES B. KEATTS *against* ELIAS RECTOR.

APPEAL *from Pulaski Circuit Court, in Chancery.*

A judgment or decree is final, when it concludes the whole matters in the cause, and when the term at which it was pronounced has expired, and must be so considered as against the whole world.

But *as to the defendant* under the Territorial Statute, a decree is not final, or ready for execution, if he except to the decree, on or before the third day of the next term after it is rendered. The defendant is therefore entitled to appeal after he has filed his exceptions, and they have been disallowed.

But on such appeal, he will be confined to the exceptions which he took in the court below: for if there were other errors, he waives them by not pointing them out in his exceptions.

These exceptions are like an argument for rehearing, and may go to the whole equity of the case; and are not restricted to errors on the face of the decree.

The clause in the Territorial Statute, which required cases in chancery to be set down for final hearing at the term previous to the trial, is only directory to the parties themselves: and if they proceed to trial, and neither party objects that the causes have not been set for final hearing, the objection will be deemed to be waived, and cannot be insisted in the court above.

If the defendant elects to demur, plead and answer to the same bill, care must be taken that the plea does not cover the ground of the demurrer, nor the answer that of the plea.

Where the defendant first pleaded the Statute of Fraud, and after his plea was overruled, presented the same plea in his answer, the court below properly sustained exceptions to so much of his answer as set up the Statute of Frauds as a defence, and ordered it to be stricken out.

But by this decision of the court below, the whole answer was not annulled—although the defendant did not ask leave to amend;—but so much of the answer as was good, remained in the case, and should have been considered by the court in rendering the decree.

When a plea of the Statute of Frands is overruled, if the defendant then files his answer, he waives and withdraws his plea; and has no longer any right to insist on the Statute as a defence.

Upon appeal, in such case, the Statute is not, legitimately speaking, before the court of appeals, and it would be entirely proper to determine the case independent of it.

The doctrine of specific performance examined.

Although it is to be regretted that the Statute has been virtually set aside by the doctrine of part performance, yet that doctrine is so well established that this court is bound to be governed by the decisions.

Nothing can be considered part performance, which does not put the party in such a situation that a fraud can be practised upon him by the other, unless the agreement is performed throughout.

Acts, to constitute part performance, must clearly appear to have been done solely with a view to the contract being performed.

Possession, if delivered and obtained solely under the contract, and in reference exclusively to it, will take the case out of the Statute; and especially if the party has made repairs and improvements.

So where the party seeking relief has been placed by the contract in such a situation that he cannot be put *in Statu quo* without injury, by reason of

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his having performed his part; there the case is taken out of the Statute. Courts of Equity have regard to time, so far as respects good faith and diligence; but if circumstances of a remarkable nature have prevented a party from complying strictly with his contract; still if he has acted only negligently and not culpably, his case will be treated with indulgence, and even favor.

Payment of purchase money is not such part performance as takes a case out of the Statute.

Where A. bought lands at auction, and after they were struck off to him, agreed to permit B. to become equally interested in the land, and that B. should receive the deed in his own name, *upon the condition* that he should pay the purchase money, and should re-convey to A. an undivided moiety of the land, upon A's applying therefor in a reasonable time, and paying half the purchase money and interest, and half the value of all improvements—B. will be compelled to re-convey, though the whole contract rests in *part*, and he pleads the Statute of Frauds.

The Statute of Frauds can never be so used or construed as to be a means of fraud.

This is a bill in chancery for the specific execution of a parol agreement in relation to the sale of land.

The bill charges that the lands granted by an act of Congress to the Territory of Arkansas, for the purpose of building a court house and jail, and also for the purpose of establishing a seminary of learning, were, in pursuance of the proclamation of the governor, offered and exposed to public sale in the month of November, in the year of our Lord one thousand eight hundred and thirty-three; and that the complainant *Elias Rector*, being the highest bidder, purchased lot number eight, on the south side of Arkansas river, containing by actual survey sixty-seven acres, for the sum of six and a fourth dollars per acre, and that he, being the highest bidder, also purchased the north east and south east quarter of north west fractional quarter of fractional section seven in township one north of range eleven west, containing eighty acres, and adjoining lot number eight, for the sum of two dollars and twenty-five cents per acre; and that both of the said tracts or parcels of land, were a part of the lands granted by the government of the United States for the purposes aforesaid, and that the Governor had full power and authority vested in him by law to make the sale, and execute deeds of conveyance. That the terms of the sale agreed on, was one fourth of the purchase money to be paid in hand, one fourth in six months from the date of the sale, one fourth in twelve months thereafter, and the remaining one fourth in eighteen months from the day of sale. The bill further states, that the deeds from the Governor to the complainant were regularly made out and ready for execution, and were in this complainant's name; but at the special instance and request of *James B. Keatts*, (who is made defendant,) it

was agreed between the parties, that they should be both equally and jointly interested in the purchase of the land, and that the title should pass and vest in them, making them partners and joint owners of the same. That this agreement or contract was entered into upon the express condition, that *Keatts* should pay all the purchase money as it became due; and for the advances thus made by him for the use and benefit of the complainant, it was further stipulated between them, that the complainant should have a reasonable time allowed him, to pay back his part of the purchase money with interest. The bill further charges that, at the earnest solicitation and request of the defendant, the complainant permitted the deeds that were made out in his name, to be changed or destroyed, and caused other deeds to be made out and executed by the Governor, conveying all the right, title, and interest in the land to the defendant; and that upon the execution and delivery of these deeds, the defendant took actual possession of the land, and has enjoyed it ever since; and that he has erected valuable improvements upon it, and had it in cultivation at the time of filing this bill. It further states that the defendant never claimed to be the entire owner of the land, but always spoke of it, as the joint property of himself and the complainant, and admitted and averred it so to, until its value had greatly increased; and it was not until 1835, he ever pretended to be the sole and lawful proprietor of the same.—The bill further represents that, before the institution of this suit, the complainant tendered to the defendant one half of the purchase money and interest from the time of payment, and also one half of the value of the improvements put upon the land, and demanded a deed from him of one equal and undivided moiety of the land, which he refused to execute, alleging that he was the sole and real owner of the premises. It then concludes by praying for a specific execution of the contract, and that the defendant be compelled to execute to the complainant a deed in fee simple, conveying to him and his heirs forever, one undivided moiety of the land, with all of its appurtenances, and that a writ of injunction issue restraining the defendant from selling, or in any manner disposing of it; and also staying him from the commission of waste, and that such other and further relief be granted as justice and equity may require.

By the order of the Circuit Court an injunction was granted to the complainant, and a summons was issued out of chancery, in conformity to the writ, and the prayer of the bill.

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At the December term, 1836, the cause was continued by consent, and this entry put of record: "That either party have leave to take depositions of witnesses before any justice of the peace without a rule or dedimus of the court; and it is further agreed that either party may demur, answer, or amend bill of complaint as the case may require."

On 9th day of March, 1837, the complainant filed his amended bill of complaint. It simply recites and reasserts all the charges in his original bill, and contains the further and additional allegation—That the complainant permitted the deeds drawn to himself and in his name to be cancelled, and other deeds of conveyance for the land to be purchased and executed by the Governor to the defendant on the express agreement between the parties, that the deeds, although absolute on their face, were only to be considered and taken as a mortgage, and as an indemnity to secure the defendant in the payment of the one half of the purchase money, he was to advance for the complainant. It further states that, shortly after the defendant had made the last payment for the land, the complainant made a tender of his part of the purchase money, with interest; and it then prays as in the original bill.

On the 10th day of April, 1837, the defendant appeared, and by way of defence as an answer, put in the plea of the Statute of frauds and perjuries, in bar to the complainant's bill for relief. The plea sets out the Statute in the exact words of the act, and is signed by the defendant's solicitor, and sworn to by himself. This plea was overruled, and afterwards, and on the 5th day of May, 1837, the respondent filed his answer to the complainant's bill.

The answer admits the sale of the land; the Governor's authority to make it, and to execute the deeds of conveyance. It then proceeds to state, that the respondent was prevented from attending the sale, and as he was desirous to become the purchaser of the lots described in the bill, he requested the complainant to bid them off, provided they did not exceed five dollars per acre. It further states that the complainant did bid off the lots, and he paid for the lot number eight, seven dollars and twenty-five cents per acre, and for the other lot, two dollars and twenty-five cents per acre; and that after the sale the complainant proposed to the respondent to take the land on speculation, and to be equally and jointly interested with him, to which he consented; confidently believing that the complainant undertook jointly with him to comply with the terms of the sale, which was to pay one

half of the purchase money in hand, and to execute their joint bonds or notes for the payment of the other instalments as they became due. It further avers that the complainant never did comply with his part of the agreement, but utterly failed so to do; though he was often solicited to come forward and perform his contract. It further states that the respondent was at last prevailed on by the Governor to comply with the terms of the sale, rather than lose the benefit of the purchase, and that about that time the complainant came to the respondent, and informed him that he was about to leave the country, and assured him, if he would make the first payment, that the complainant would pay the other instalments. It alleges that the respondent did make the first payment, and complied in all respects with the agreement of the sale, and that he heard nothing more of the transaction until he had paid all the purchase money, and had received a deed and certificate regularly executed by the Governor to him for the land. The answer further states that the respondent was put to great inconvenience and loss in raising the purchase money, and that he considers any agreement he might have made with the complainant not binding, by reason of the neglect, or non-performance of the complainant's part of the contract. It denies there was any such agreement as is alleged in the bill, and if there was any such he insists it was a parol agreement, not reduced to writing and signed by the respondent, nor by any other person lawfully authorized by him; and it alleges that such an agreement as the one set up by the complainant in his bill is not binding, by reason of the Statute of frauds and perjuries. The answer then pleads the Statute formally in bar of the complainant's right to the specific execution of the contracts, and prays for the bill to be dismissed with costs.

At the April term, 1837, the defendant's plea of the Statute of frauds and perjuries was set down to be heard, and after argument, was adjudged to be insufficient.

At the October term, 1837, the complainant filed exceptions to so much of the respondent's answer as pleads the Statute of frauds and perjuries, in bar to the equity of his bill, and prayed that the defendant may be compelled to amend his answer by striking out that part of it, which relies on the Statute as constituting a good defence; and after argument upon the point, the court adjudged the exceptions were well taken, and held the answer to be insufficient. The record does not show that the defendant offered to amend his answer, though leave

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was given him. The court then proceeded to enter a final decree in the case. The decree on its face contains a formal recital of the allegations in the bill, and the proof taken in the cause; and then affirms it is ordered, adjudged, and decreed, that the title to an undivided moiety, or half of the land described in the bill, together with all the appurtenances thereto belonging, do pass to, and vest absolutely in the complainant in fee simple, and to him and his heirs and assigns forever; and that the said land, with the hereditaments, be henceforth held jointly by the said *Keatts* and *Rector*, their heirs and assigns, as joint tenants; and that the complainant recover his costs by him in his behalf expended.

This decree was entered up on 23rd of November, 1837.

On the third day of January, 1837, there is an agreement entered of record by the parties, which recites the previous order in relation to taking depositions and the manner of pleading. This agreement is signed by the complainant, and the solicitor of the defendant; and it declares that no exceptions shall be taken to the reading of any of the depositions on account of want of notice, time, or manner, or place of taking them; and it extends to all depositions that were taken previous to the making of the entry, as well as to those that should subsequently come in.

On the 1st day of March, 1838, the respondent appeared and filed his exceptions to the decree of the court, a copy of which was served on the solicitor for the complainant, one month before the commencement of the term at which the exceptions were overruled, and from the judgment and decree of the court, disallowing the exceptions—the defendant has brought up this case by appeal to the Supreme Court.

The case was argued at the July Term, 1838, by HALL & SCOTT.

FOWLER, for the appellant:

Appellant contends that said plea was properly interposed, and improperly overruled; that the Statute upon which it is founded is broad and comprehends every degree and character of contract for the sale of lands, "or about any in or concerning them." And every contract in relation thereto is invalid, unless the "agreement or some memorandum, or note thereof, shall be in writing, and signed by the party, to be charged therewith," &c. No memorandum of this contract was reduced to writing, or signed; therefore could not be enforced either

in law or chancery. Nor was such agreement to be performed within one year from the time of making it. Vide *Gey. Dig.* 126; *Pope, Steele & McCampb. Dig.* 135.

If such plea was overruled by the Court, and *Keatts* obtained leave to answer over as he did, he had a right according to strict chancery practice to set up the Statute in his answer in bar. 1 *Fonb. Eq.* top page, 148, 149, in notes; 1 *Pet. Cond. Rep.* 338; 1 *Hen. & Munf.* 91; 3 *Hen. & Munf.* 161; 1 *Marsh.* 436; 3 *Marsh.* 445; *Sugden on Vend.* 76 *et seq.*; 1 *Johns. Ch. Rep.* 143; *Mad. Ch.* 382; 14 *Ves.* 375; 6 *Ves.* 39; 12 *Ves.* 471; *Price Ch.* 208.

He was entitled to the defence, either by plea alone, or by insisting on the defence in his answer, and having availed himself regularly of both modes, he must be entitled to it under one or the other.—His answering over did not surrender his right under the plea; and if it did amount to a waiver of the plea, still upon answer he had a right to insist on it. *Bibb's Rep.* 590, *Greenup* vs. *Strong*; 2 *Pirt. Dig* 418; 1 *Marsh.* 436; 1 *Mad. Ch.* 378, 382, *et seq.*

In order to take the case out of the Statute, according to the English decisions, *Rector* ought to have alleged and proved a part performance. Such part performance was not set up in the bill; therefore the plea was a bar to the action. To entitle *Rector* to this position, he must have done some act to his own prejudice in furtherance of the agreement, which he had not alleged. He neither paid money or took possession of the lands, and made improvements thereon. *Com. on Con.* 81; *Fonbl. Eq.* 175, *et seq.* 1 *Mad.* 376; *Sug. on Vend.* 79, *et seq.*

Rector having under a parol agreement with *Keatts*, desisted from the purchase, towards which he had made some advances, and permitted *Keatts* to purchase, although upon condition that he, *Rector*, was in future to derive a benefit therefrom, yet equity will not relieve.—The Statute of Frauds, &c. is a bar. Vide *Vern. Rep.* 627, *Lamas* vs. *Bayly*; 2 *Pirt. Dig.* 417; 4 *Bibb Rep.* 102.

A parol contract, to authorize its enforcement, must be definite and certain in its terms, and as to time, &c. This was not, and if *Rector* even had rights he slept upon them until they were lost. *Lex, vigilantibus, non domientibus, est.* 1 *Fonbl. Eq.* 150 *in notes*; 14 *Ves.* 519; 10 *Ves.* 311; 1 *Peters' Rep.* 388; 1 *Mad. Ch.* 376, *et seq.* 382 *et seq. Sug. on Vend.* 78, *et seq.*; 1 *Mad. Ch.* 371.

The allegation that *Rector* tendered one half of the value of the

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improvements, is too uncertain. He should have designated some amount that they were worth specifically, and tendered that. The statement that he tendered no certain amount, is conclusive against himself, that he made no tender at all; and the decree on this ground was improperly rendered. The same objection applies to his alleged tender of the purchase money and interest. 1 *Bibb's Rep.* 590, *Green-up* vs. *Strong.*

The Bill is also defective in this, and should have been dismissed on final hearing, because Governor Pope was not made a party, which was indispensably necessary to a full and final adjudication; because *Rector* did not bring, or offer to bring the money into court, the tender was only partial; and because the bill did not pray a final adjudication; leaving the whole matter after decree subjected necessarily to another chancery suit for *partition.* A bill for want of Equity may be dismissed on final hearing. Equty abhors circuity of action.

The court should not have proceeded to final hearing and decree, without first directing *Keatts* to file an amended answer, and without having first, at a *previous Term,* set down the cause for final hearing. Vide *Gey. Dig.* 107, *sec.* 8: 112; *Pope, Steele, & McCamp. Dig.* 110, *sec.* 8. 116, *p.* 109, *sec* 4.

But a single clause of *Keatts'* answer was stricken out—that setting up the Statute of Frauds, &c. in defence—the residue of the answer remained in full force, and should have been taken into consideration by the court, in rendering the decree.

That portion of the answer not excepted to, denies all the material allegations of the bill, and sets out a contract *wholly different.* Taking the answer as a full rebutter against the evidence of the strongest witness in favor of the bill, the residue of the evidence preponderates in favor of the answer. Besides the answer *positively denies* that *Rector* ever complied with his contract, or made *any tender whatever* of *money,* as alleged in the bill, or otherwise. Those statements in the answer stand *wholly uncontradicted by the evidence;* and upon them the bill ought to have been dismissed on final hearing. 1 *Johns. Ch. Rep.* 146, *Phillips vs. Thompson.*

The decree is founded in error, and contains fatal errors on its face. It alleges that the bill is wholly unanswered, which is not true by the residue of the record, which shows an answer on file, and in full force. It also states that all the allegations of the bill are fully proved; whereas there is no evidence on record to show that *Rector* had performed

his contract, or tendered any money, as alleged in his bill. Decree mentions no deposit of money for the one half of the improvements made by *Keatts*, which was absolutely necessary before any decree could be rendered. It is not final and conclusive between the parties; a bill for partition is yet necessary to put an end to litigation. "Expedit reipublicae sit finis litium." Nor does the decree make any disposition of the money said to have been deposited, which was also necessary to make the decree final and conclusive.

It is the frauds of *plaintiffs*, *not* of defendants, against which the Statute is designed to provide; and should always be construed with that view. 1 *Bibb Rep.* 205, *Grant's Heirs* vs. *Craigmiles*.

The old English doctrine, that allegation of *part performance* takes the case out of the Statute, is exploded, and should not receive countenance in this country. It is as much *necessary* that the evidence of part performance should be reduced *to writing, &c.*, as it is that the *contract itself* should. Otherwise the Statute would be either a *dead* letter, or would be opening the door to frauds and perjuries, instead of preventing them. 1 *Bibb Rep.* 205; 2 *Fonbl. Eq. top page*, 150, *in notes;* 1 *Serg. & Rawle.* 83; 1 *Johns. Ch. Rep.* 283, 284; 1 *Binn*, 218; 4 *Desaus. Rep.* 77; 4 *Bibb*, 59; 2 *Pirt Dig.* 416; 3 *Marshall*, 445, *lit. sel. ca.* 193; 2 *Marshall*, 106; 3 *Marshall*, 246; 3 *Monroe*, 170, 5 *Lit. Rep.* 98; 3 *Marsh.* 57; 5 *Monroe*, 408; 4 *Bibb*, 102; 1 *Munf.* 510; 1 *Mod. Ch.* 384; 1 *Johns. Ch. Rep.* 105; *Jeremy's Equity, passim.*

Cummins & Pike, for the appellee:

The appellee contends that the decree was properly entered, upon three grounds. First, by the Statute of frauds was no defence against the relief prayed that the bill, either when set up as a plea, or in the answer. Second, because if it were a defence, the appellant should have rested his case when the plea was overruled, and by answering over he waived his right to insist upon the Statute as a defence. And third, because he was not at liberty by the rules of chancery practice to set up the Statute anew in his answer after it had been overruled in the shape of a plea.

First, the Statute of frauds is not a bar to this action.

The case must be distinguished from the cases where specific performance is sought of a parol contract for the sale and purchase of lands. It is not the fact that any such contract existed. The bill sets up a state of case which shows, and it also directly alleges, it to be the fact that the conveyance to *Keatts* was in the nature of an equitable mort-

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gage to secure the repayment of one half the purchase money, with interest. When the land was struck off to *Rector* by the auctioneer, his title to the land became fixed, and he then permitted the deed for it to be made to the appellant upon certain conditions of reconveyance. 4 *Johns. Ch. Rep.* 659. So it is *Keatts* himself who claims by parol contract.

The land having been stricken off by the auctioneer to the appellee, and the deed of conveyance thereto made out in his name, he was the real owner of the land, because either he or the seller might have maintained an action for the specific performance of such contract of sale. *Chit. on Con.* 208. The appellant thinking the purchase made by the appellee an advantageous one, applied to him to be admitted to an interest therein. To this the appellant agreed, on the conditions aforesaid; and as he was about leaving the country, he agreed that the deeds to the land, then the joint property of himself and the appellant, should be drawn in the name of the appellant, and it was done. Here was no sale from the appellee to the appellant, of the undivided half now in dispute. It was openly declared, and well understood, that the appellant took the deed, as to the one half, only as trustee for the appellee. These are the clear and distinct allegations of the bill. Is parol evidence admissible to sustain such a state of case? If it be, then the plea of the Statute of Frauds was no bar. A brief examination of authorities will show the admissibility of parol proof in a case like the present.

Many cases may be found in which parol proof has been admitted, notwithstanding writings have been signed between the parties. For instance, when a declaration is made *before* a deed is executed, *showing the design with which it was executed*, the decisions in the court of chancery have been grounded upon parol proof. 1 *Dallas*, 426. And in the case of *Harvey* vs. *Harvey*, 2 *Chan. Cas.* 180, three successive chancellors decided, on the parol proof of a single witness, against a deed of settlement. In cases of fraud and of *trust*, though no trust was declared in writing, exceptions have likewise taken place. 1 *Dallas*, 426; *Thynn* vs. *Thynn;* 1 *Vern.* 296. As where an absolute deed was given, but intended to be in *trust*, on parol proof of the party's intention, the trust was decreed. 1 *Dall.* 426, *Hampton* vs. *Spencer*, 2 *Vern.* 288; *Bellasis* vs. *Campton*, 2 *Vern.* 294; *Hosir* vs. *Reed*, 9 *Mod.* 88.

The court will remark that the question whether a case is one of trust, mortgage, or fraud, must of course depend entirely on the bill

and the statements therein, when that question is raised on the plea of the Statute. In the present case the bill explicitly declares that the deed to the appellant was only meant as a mortgage, as to the one half, and that the appellant held and still holds that half in trust for the appellee. Parol evidence is therefore admitted. See also, as to this point, 7 *Serg. & R.* 114.

That parol evidence is admissible to show that a mortgage only, and not an absolute sale was intended, see 5 *Strong* vs. *Stewart*, 4 *J. C. R.* 167; *James* vs. *Johnson*, 6 *J. C. R.* 417; *Young* vs. *Peachy*, 2 *Atkyns*, 454; *Joyces* vs. *Statham*, 3 *Ark.* 388; *Murphy* vs. *Trigg*, 1 *Lit.* 72; *Hughes* vs. *Edwards*, 9 *Wheat.* 489; *Skinner* vs. *Miller*, 5 *Lit.* 84; 3 *Mon.* 409; *Blanchard* vs. *Kenton*, 4 *Bibb*, 451; 5 *Binney*, 490.

Another point in this case is, that the agreement for reconveyance of one half of the land to the appellant, is but a portion of the parol agreement entered into by the parties. It was under and by that parol agreement alone, that the appellant obtained possession of, and title to the land in question. The right of the appellant to receive a deed from the seller rested entirely on that parol agreement. Under it, he has had possession of the land for several years, until, as he at first expected, it has increased ten fold in value. He went into that possession under that parol agreement. Possession, delivered in consequence and pursuance of an agreement, is such a degree of performance as is sufficient to take a contract out of the Statute. *Powell on Contracts*, 180; *Butcher* vs. *Stasseley*, 1 *Vernon*, 363, and *Lamas* vs. *Bayley*, 2 *Vern.* 627; *Powel on Contr.* 187.

The contract of the appellee with the appellant having been fully performed, and the appellant having thereby received great benefit, it is such a part performance as will take the case out of the Statute. 2 *Johns. Rep.* 587, 1 *Fonblanque*, 182, and cases there cited.

There is still another principle which proves the *plea* of the Statute of Frauds, to have been rightly overruled: It is, "that if there is any charge in the bill which is an equitable circumstance in favor of the plaintiff's case, against the matter pleaded, as fraud, &c. that charge must be denied by way of answer, as well as by averment in the plea." In this case, the the averment that the deed was meant as a mortgage, and that the appellant held only as a trustee, are such charges of equitable circumstances. Yet the plea was filed alone, and was therefore insufficient. *Beames Pl. in Eq.* 22, 31, 176, 184;

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1 *Fonb.* 181 *note*; 1 *Cond. Eng. Ch. Rep.* 3; *Goodrich* vs. *Pendleton*, 3 *J. C. R.* 384

With one other remark the appellant will leave this point: That a deposite of title deeds to land creates a mortgage, is too well settled to need authority quoted. 2 *Hovenden*, 204. In what does this case differ from such an one? Did not the appellee in fact deposit the title deeds to one half the land in the hands of the appellant? *Bick* vs. *Ellames, et al.* 2 *Ans.* 431; *Plumb* vs. *Fluitt*, *id.* 438.

Second—That the appellant, by submitting to answer after plea overruled, waived his right to insist upon the matter set up in the plea, and can now have no advantage of the Statute of Frauds. Such a plea is like a demurrer to the bill. It admits every thing to be true, which it does not expressly controvert, and claims to be excused from answering to the bill. *Blake's Ch. Prac.* 112; *Beames Pl.* 9. Nor is the general protestation considered a denial of the facts in the bill. It is but the exclusion of a conclusion, and as in a demurrer at law, it merely prevents the effect of such allegation in another action. It would seem at once to follow that the appellant, having by his plea admitted the bill to be true, he could not, after his plea was overruled, answer over and *deny* the facts in the bill, as he has done, without withdrawing his plea. If he did withdraw it in the contemplation of law, he can now have no advantage of it. A demurrer in an action at law must be withdrawn before the party can plead over.

Third—The appellant was not at liberty to set up the Statute anew in his answer, after it had been overruled in the shape of a plea.—Matters of fact may be set up twice, but when an issue of law has been once made up, and finally adjudicated by the court, it cannot be again presented to the same court in an answer. *Coster* vs. *Murray*, 7 *J. C. R.* 167; *Freeland* vs. *Johnson*, 2 *Ans.* 407.

Trapnall & Cocke, upon the same side:

The bill is filed by the complainant to enforce a parol contract for land. The defendant pleads, and relies upon the Statute of Frauds.

The appellee contends that this case is taken out of the Statute by part performance, and consequently the Statute is no bar.

Rector had bid off the land at public sale, and the deeds were drawn to him. He agreed with the appellant that he might take the deeds to himself, and pay the purchase money upon the understanding that he should make the appellant a deed to one half upon the payment of one half the purchase money, with interest.

How did *Keatts* get into the possession of the land in dispute?— Undoubtedly by part performance of the parol contract. How did he get the deeds to himself? By purchase from the Governor? No. He obtained the deeds by part performance of the parol contract;— consequently the record presents a part performance of the parol contract.

For the rule in equity in relation to part performance of contract, the counsel for the appellee refers to the *2nd Vol. Story's Equity p.* 63, 4, *note* 1, and cases cited, in which Judge Story has extracted the principle with great accuracy from the reported cases, and illustrated it with great force. It is obvious, he says, that when one party has executed his part of the agreement in the confidence that the other party would do the same, if the latter should refuse, it would be a fraud on the former to suffer it to be done to his prejudice. By this simple rule, it would be fraud in *Rector* to let *Keatts* get into possession, under parol contract, by part performance, and then betray the confidence of *Keatts* by refusing to complete the contract, by which he is entitled to the possession of his place.

The court, therefore, properly overruled the plea. The Statute being insufficient as a defence, and so adjudged, it was improper to incorporate it into his answer. The court determined correctly in maintaining the exceptions to his answer; and refusing to amend, he had certainly no answer in court. Upon refusal to amend the answer, the court were authorized, (see 8 *Campbell Dig. p.* 110,) to proceed forthwith to a decree, and did so.

Exceptions to a decree go only to errors on the face of the decree. See 3*d Vol. Williams*, 371; 2 *Atkyns* 177, 533, 3*rd* 27, 809. There are no errors apparent on the face of the decree; therefore the court correctly overruled them. Pope was not a necessary party. He had made a deed to *Keatts*, and had divested himself of all interest. If he should be made a party, it should be done by the defendant alone; for it is not material for the claim of *Rector*, that Pope should be a party

All parties who are materially interested ought to be made parties. 2 *Bibb*, 184; 2 *Marshall*, 545.

Pope holds no title, and has no interest; and therefore was not a necessary party.

And at the present term, the court having requested the counsel to furnish a brief of the authorities on the subject of part performance;

and what relief other than the particular relief, could be granted under the prayer for general relief.

CUMMINS & PIKE filed the following:

We contend in this case that all the rights of *Keatts* to any part of the premises in question, rest upon the parol agreement between him and *Rector*. That *Rector*, when the land was struck off to him, and a memorandum made thereof by the auctioneer, had a title to the land, within the Statute of Frauds. See *Sudg. on Vend.* 76, 77; *Emmerson* vs. *Heelis*, 2 *Taun.* 38; *White* vs. *Rector*, 4 *Taun.* 209; *Kenrys* vs. *Proctor*, 3 *Ves. & Bea.* 57.

If the deed had been made to *Keatts* by Governor Pope, without the parol agreement between *Keatts* and *Rector*, the deed would have been of no avail. Should *Rector* now file his bill against Governor Pope, or whomsoever might be the proper party, for title to the whole tract, and set up the facts, (which the bill in this shows to exist,) that he was the purchaser at the sale, and that he was so noted by the auctioneer; and making *Keatts* a party, pray for the cancelling of the deed to *Keatts*, it would not be enough for *Keatts* to produce the deed, but he would be compelled to fall back upon the parol agreement, and show that *Rector*, being in law the owner of the land, had waived and transferred his right to *Keatts* by parol,—by this agreement, the whole of which we now attempt to enforce. *Rector* has performed his part, by permitting *Keatts* to take the conveyance in his own name. *Keatts* holds under, and has received the whole benefit of the parol agreement, and we contend that there is such a part performance as takes the case out of the Statute. Suppose *Rector* were to file such a bill as we have mentioned. Could *Keatts* set up the parol agreement? Of course—and if so, we can do it, and are entitled to have it enforced throughout.

Having premised so much, we proceed to refer the court to the authorities upon the subject of part performance:

For the general doctrine, the court is referred to, *Roberts on Frauds*, 140, 153, 162; 1 *Maddocks*, 363, 381; 2 *Hov.* 3; 1 *Sugden on Vendors*, 133, 145, 151; *Fonbl.* 182; 2 *Story's Eq.* 62, 76, 740; *Gunter* vs. *Halsey*, *Amb.* 386; *Hollis* vs. *Edwards*, 1 *Vern.* 158; *Walker* vs. *Walker*, 2 *Atk.* 100; *Owen* vs. *Davis*, 1 *Ves.* 85; *Seton* vs. *Slade*, 7 *Ves. Jr.* 265; *Hawkins* vs. *Holme*, 1 *P. Wms.* 771; *Wills* vs. *Stradling*, 3 *Ves.* 378; *Lacon* vs. *Mertins*, 3 *Atk.* 1; *Butcher* vs. *Stapely*, 1 *Vern.* 363; *Clerk* vs. *Wright*, 1 *Atk.* 12; *Buchmaster* vs. *Harriss*, 7 *Ves.* 341: *Allsop* vs. *Patterson*, 1 *Vern.* 472; *Pyke* vs. *Williams*, 2 *Vern.* 455; *Hales*

vs. *Vendcrheem*, 2 *Vern.* 617; *Taylor* vs. *Beech*, 1 *Ves. Sen.* 297; *Potter* vs. *Potter*, 1 *Ves. Sen.* 441; *Legal* vs. *Miller*, 2 *Ves.* 299; *Lindsay* vs. *Lynch*, 2 *Sch. & Lef.* 1; *Davis* vs. *Hone*, 2 *Sch. & Lef.* 347; *Hamett* vs *Yielding*, *Ib.* 548; *Legh* vs. *Haverfield*, 2 *Ves. Jr.* 452; *Clinan* vs. *Cooke*, 1 *Sch. & Lef.* 41; *Frame* vs. *Dawson*, 14 *Ves.* 386; *Forster* vs. *Hale*, 3 *Ves.* 712; *Calcraft* vs. *Roehick*, 1 *Ves. Jr.* 221; *Atts. Gen.* vs. *Day*, 1 *Ves. Sr.* 219; *Boardman* vs. *Mostyn*, 6 *Ves.* 470; *Cooth* vs. *Jackson*, 6 *Ves.* 27; *Prodie* vs. *St. Paul*, 1 *Ves.* 333; *Phillips* vs. *Thompson*, 1 *J. C. R.* 131; *Parkhurst* vs. *Van Cortlandt*, 1 *J. C. R.* 273; 14 *J. R.* 15; *Viren* vs. *Belknap*, 2 *J. R.* 587; *Morphett* vs. *Jones*, 1 *Swans.* 172; *Davenport* vs. *Mason*, 15 *Mass.* 85; *Ebert* vs. *Wood*, 1 *Bin.* 216; *Syler's lessee* vs. *Echhart*, *id.* 378; *Billington's lessee* vs. *Welsh*, 5 *Bin.* 129; *Smith* vs. *Patton's lessee*, 1 *Serg. & R* 80; *Thompson* vs. *Todd*, 1 *Peters*, 330; *Gordon* vs. *Gordon*, 3 *Swans.* 442 *Exparte Hooper*, 19 *Ves.* 479; *Harris* vs. *Knickerbocker*, 3 *Cowen* 638.

As to granting, under the prayer of general relief, a particular relief, different from that prayed for, see *Palk* vs. *Clinton*, 12 *Ves.* 48; *Cook* vs. *Martyn*, 2 *Atk.* 2; *Grimes* vs. *French*, 2 *Atk.* 141; *Hiern* vs. *Mill*, 13 *Ves.* 120; *Bailey* vs. *Burton*, 8 *Wendell*, 353; which establish the principle that any relief may be granted under the general prayer, which is not inconsistent with the facts stated in the bill.

LACY, *Judge*, delivered the opinion of the court:

The first question presented for our consideration is, was the appeal rightfully allowed?

The right of appeal from an inferior to a superior Jurisdiction, is an absolute and unqualified right; provided the party taking up it brings himself within the provision of the law regulating the practice in such cases.

The question then recurs, when is a decree in chancery to be considered final? It is certainly conclusive and final, when the judgment of the court is pronounced, disposing of the whole matter in controversy, and the time at which the judgment was rendered has in reality passed by. The law then affixes to the decree the seal and sanctity of truth, and constitutes it a complete judicial record; which can neither be set aside, or in any manner altered, or obliterated, except for fraud, or for some clerical misprison, apparent upon the face of the decree; or some new equity which has been discovered since the trial, and which by due diligence the party could not have availed himself of, before the cause came on to be heard. After the time at which the

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decree is given has expired, neither the court that pronounced it, nor the parties that are bound by it, have any right or authority to change, or in any manner alter, the record. The decree may be reversed by a superior tribunal, having competent jurisdiction of the matter; but the record itself stands entire and perfect, as it was when it was first made, and must ever remain so, as long as the public documents of the country are preserved from mutilation or destruction.

By the 5th section of the act of the Legislature passed 22d of January, 1816, it is declared, "after a decree is made the party shall have till the third day of the next term, to show cause why it shall not stand, at which time, if no cause is shown, *it shall be considered final and ready for execution;* but if the defendant will show cause, on or before the third day of the next term, he shall at least one month before the commencement of the term, leave a copy of his objections with the opposite party, or his solicitor; and if the objections are allowed, the court shall correct the error, and enter the decree, or otherwise dispose of the cause at the same time." See *Arkansas Digest*, *p.* 116

In the case now under consideration, it is evident that the exceptions were taken to the decree after it was entered, and one month before the commencement of the next succeeding term, at which they were returnable; and that a copy of them was regularly served on the solicitor of the defendant, agreeably to the requisitions of the Statute.—The exceptions upon the hearing were adjudged against the defendant, and he now claims the right of appeal from the decision. In determining this point, we must look at the Statute, and be governed by it. We have found no little difficulty in endeavoring to reconcile their provisions with the well known and long established principles of chancery practice; and after all we are free to admit that there is much seeming contradiction in the matter.

That a judgment or decree is final when it concludes the whole matters of the cause, and the time at which it was pronounced, has expired, is certainly and unquestionably true; and it must so be considered as against the whole world, upon the clearest principles of reason and the highest weight of authority. But under our Statute, as against the party who is the defendant in the cause, *it is not final or ready for execution*, if he excepted to the decree on or before the third day of the next term. *Quoad hoc as to him*, the right of appeal remains suspended till that time by the express words of the act, and the clear

and manifest design and intention of the Legislature. To give to the Statute any other rule of interpretation would be to abridge an invaluable right, instead of enlarging it, and might be the means of not only deceiving and misleading the defendant, but seriously affecting his interest, without any fault or laches of his own. This court would not be warranted in putting a strict and rigid construction on the cause in question; for if they did, it might, and probably would operate most prejudicially against the right of appeal; and besides, it is expressly declared in the act, that the party against whom the decree is entered shall have the right of exception at any time, on or before the third day of the next term, and at the term to which the exceptions are returnable they shall be heard, and the errors corrected, or the cause otherwise disposed of. These injunctions are clear and peremptory, and the court is bound to obey them. The record shows that the defendant has complied strictly with the requisitions of the Statute; and consequently, as that does not consider the decree *final and ready for execution*, till the exceptions are disposed of, the defendant in this case is entitled to the full benefit of his appeal. In prosecuting his appeal, the defendant will be confined to the exceptions taken to the decree below, and will not be permitted to travel out of them; for if there were any other errors in the decree, by not pointing them out, he is presumed to have waived them; and of course it is now too late to take advantage of them in this court. The exceptions that may be taken to a decree are in their nature and consequence an argument for the rehearing of the cause, and they have for their design and end the readjudication of the whole matter. While the party excepting in the court below will be confined strictly to his exceptions in this court; still those exceptions may go to the whole equity of the case; and if they do, we are bound to open the decree, and give such a judgment as the court below ought to have given. To restrict the defendant in his objections to errors upon the face of the decree, would be in effect to defeat the will of the Legislature, as well as the design and object of the exceptions themselves. A decree may be perfectly fair and just on its face, (and in fact most decrees are generally so), but the errors complained of lie behind it, and it is the false conclusions and premises that produce it, that the defendant is generally desirous of correcting and remedying by his exceptions.

We will now examine the exceptions taken to the decree below, and dispose of them in the order they are presented.

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The first exception is, that the decree states the defendant failed to amend his answer after the complainant's exceptions to its sufficiency were allowed; whereas, the exceptions only went to that part of the answer that set up the Statute of frauds and perjuries as a defence; and it was only that part of the answer that was adjudged insufficient, or to which the exceptions were sustained.

It is admitted that the record shows such a state of case; but how does that establish the fact that the decree was erroneous or illegal? How does such a case affect the merits of the case? The decree only states by way of recital, that the defendant did not amend his answer. The record supports that fact; for although the exceptions were only taken to that part of the answer set up the Statute of frauds and perjuries as defence, and only to that extent allowed; still the defendant, so far as appears from the pleading, did not amend his answer in that particular.

The second exception taken is, that the cause came on for final hearing on the bill and depositions; whereas, it was never set down for final hearing at all, either on the bill, depositions, or otherwise.

In what manner does this exception controvert the justice or equity of the decree? The Circuit Court in rendering the decree, evidently proceeded on the ground, that if an answer was adjudged insufficient as to a part, that the defect vitiated the whole answer; and therefore the cause is said to come up on the bill and depositions, and the bill is considered and taken as confessed; for it is imagined by the court below that there was no legitimate answer in the case. How far this opinion is right or wrong, this court will not at present determine. But in the course of investigation there will be an opportunity afforded of testing the matter, and the question will then be decided.

It is very clear that the cause was never set down for hearing by either party.

The third section of the act regulating the practice in courts of chancery, contains this provision, "after a cause is set for hearing, it shall not be heard till next term, and then it shall be heard, or as soon after as possible." See *Ark. Dig. p.* 116.

What is the effect of this provision? Is it mandatory to the court to set the cause for hearing before the case be tried? and is such an order necessary for the purpose of giving them jurisdiction and authority to hear and determine the case? The act does not declare how, or

in what manner the cause shall be set for hearing; nor does it define whose duty it is to set it down. To say that the direction to set the cause shall be absolutely binding on the court, and to make all its authority turn upon that simple point, would be manifestly inconsistent with the other provisions of the Statute, and absurd in itself; and therefore such a rule of construction cannot be admitted or allowed. The true interpretation of the clause is, that it is intended to be directory to the parties themselves, in order to prepare for trial and prevent surprise. If the parties proceed to trial, and neither object in the court below that the cause was not set for hearing, it is too late when it comes here, for the first time, to raise the objection. Besides, having failed to object at the proper time, and before the proper tribunal, the presumption is, that the objection was waived, and the parties by consent proceeded to the trial. The presumption becomes full and positive when it is borne in mind, that the parties in this instance have expressly agreed in the record, that no advantage shall be taken for any informality or irregularity in the proceedings. This objection to the decree, we therefore consider wholly untenable.

The third exception impeaches the decree on the ground that it states that the complainant tendered to the defendant one half of the purchase money, with interest, and also one half of the value of the improvements put upon the land, and that that amount was deposited in the clerk's office; whereas, the record presents no such state of case. There is some slight mistake in the exception; for the bill states a tender, and one witness goes far to prove it. Besides the decree affirms on its face, that a deposite was made, and that is certainly a record of the fact; whether true or conclusive is a wholly different matter. Take the case, however, as it is intended to be presented by the exception, and what does it amount to? Why simply to this: that the complainant is not entitled to relief, unless he first make a tender or deposite of one half of the purchase money, with interest, and a sufficient sum to cover one half of the improvements. We are by no means prepared to admit the truth of the proposition; but be that as it may, such an enquiry is wholly foreign to the question now before the court, and we shall of course pass it by.

The fourth exception questions the validity of the decree, in stating that the allegations of the bill were fully proven by the depositions. This objection will be treated in examining the proof. The fact that the court below considered that there was properly no answer in the cause;

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and that the bill was taken as confessed is a sufficient reply for the present to the objection. Whether the record will justify such a conclusion or not, we shall see as we progress in the examination.

The fifth and sixth exceptions were the last that were assigned in relation to the decree, and they embrace any question of law, or of fact that can be properly raised upon the record; and they present the subject in a wholly different light, from the one in which we have been considering it.

Before the court proceed to take up, and dispose of these questions, it may not be amiss to state a few of the most prominent and general rules, that prevail in courts of equity in regard to the pleadings.

The entire jurisdiction of courts of equity is assumed upon the ground that when the common law, by reason of universality, cannot afford the injured party adequate and complete redress, courts of equity step in and supply the defect by administering such relief. They do not profess to change or alter the rules of the common law, but to afford peculiar and appropriate remedies for each particular class of cases. The judgments or decrees of courts of equity are supposed to act on the conscience of the offending party, and to compel him to do what is right in the discharge of his obligations. Notwithstanding this, still there is as much accuracy and precision required in their pleadings as in courts of common law. The rules themselves are doubtless far more liberal and comprehensive in their character, and in many respects infinitely more just and equitable; but they are not on that account less obligatory upon the parties or the court. For if the rules of proceeding in courts of equity were mere arbitrary and capricious regulations, then indeed might it be said, that equity resides alone in the breast of the judge, and that it was not founded in those immutable principles of moral and original justice, which are declared to be its true origin and aim. Having stated these general principles, we will now endeavor to apply them to the case before the court.

When the complainant has filed his bill for relief and called on the defendant to answer, he may come in, and either demur, plead, or answer to the bill. It is best and most advisable to put in his whole defence at one and the same time; but should the defendant not elect to do so, the court may give him leave to file his defence at different times, and so to amend his pleadings as will reach the true merits of the case. If the defendant elects to demur, plead and answer to the same bill, care must be taken that the plea does not cover the ground of the demur-

rer, or the answer that of the plea. The object in giving the defendant all these modes of defence, is, that his whole case may be brought fully and fairly before the court. A demurrer only extends to the facts or charges made in the bill, as appears on its face, and admits them to be legally true, if rightly pleaded. A plea may also reach the same facts, and take issue on them, or it may aver any other new matter *in pais*, and plead it in bar of the equity of the bill. An answer is a response to all the material allegations of the bill, and either admits or denies them in whole or in part; or it may set up any new matter by way of defence to defeat or avoid the complainant's equity.

The defendant is always presumed to understand his own case, and to know in what manner it is best to insist on his defence. When he has made his election, how and in what manner he will defend, he is concluded by his own acts, and will not be permitted to deny or traverse them, or avoid their legal consequence. And in this instance courts of equity and courts of law adopt the same rules of practice, and proceed upon the same reasoning.

If these positions be true—and that they are cannot be doubted, for they stand upon the highest ground, both of reason and authority—then it necessarily follows, that the decision of the court below, in sustaining the exceptions to the defendant's answer, was correct. The exceptions only went to the part of the answer which again set up the Statute of frauds and perjuries as a defence; and which, in the first instance, was pleaded in bar of the equity of the complainant's bill.—The answer covered the exact ground that was occupied by the plea, so far as it attempted to bring the same subject matter before the court; and consequently that part of the answer was properly ordered to be stricken from the rolls.

But does it necessarily result that because an answer has been adjudged insufficient in part, that therefore the whole answer is vitiated and annulled? The court in entering up the decree evidently proceeded upon this principle, for the decree on its face shows that the court below considered that there was no legitimate answer remaining on file. Is that opinion correct and in conformity to the practice and proceedings in courts of chancery? It certainly is not: an answer may be good in part, and defective in part; and its insufficiency can never be made so to operate as to destroy that portion of it which is valid in itself, and which, if true and properly pleaded, may be a complete response or denial of the equity of the bill. For what

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is an amended answer, but an answer appendant to the original and connected with it, and forming a part of the original. Again—why put the party to the expense and costs of pleading the same matter over again in an amended answer, when, if it was properly set forth in the original answer, it fully met and controverted the allegations in the bill. The authorities upon this subject are clear and explicit, and can neither be controverted or denied. Lord Redesdale remarks that a "further answer is considered in many respects as similar to, and forming a part of the first answer. Again—that if the exceptions taken by the master to the answer for insufficiency be sustained," then the defendant must answer again to those parts of the bill in which the master conceives the answer is insufficient; or he must except to the master's report, and bring the question of the insufficiency of the answer before the court: thereby clearly showing, that it is only to those parts which are deemed insufficient, that the defendant is compelled to amend his pleading. See *Mitford Pl.* 225; *Story on Equity Pl. from p.* 591 *to* 665, 6 *&* 7; *Beams' Treatise on Equity Pleading.*

How far this mistake, or the error in the court, will affect the merits of the case, we shall in the sequel of this examination determine.

It will be seen from an inspection of the record, that the defendant first interposed his plea of the Statute of frauds and perjuries, and after that was adjudged against him, he then put in his answer, setting up in part of it the same defence, which was ordered stricken from the rolls; and finally set up new matter in his answer by way of avoiding the equity of the bill. By pleading over in his answer, he took issue upon the equity of the bill, and staked his cause upon that point.

After voluntarily withdrawing his plea and answering over, he has no right to claim any benefit that he might otherwise have derived from the judgment of the court in overruling his plea. The court could not rightfully return and examine the question, either of law or of fact, put in issue by the plea; for the defendant himself had voluntarily waived and withdrawn his plea. It necessarily results from these plain and important principles, that the defendant had no longer any right to insist on the Statute of frauds and perjuries, as a defence to the complainant's cause of action, in his answer. The case then properly stands on the mere equity of the bill, answer and depositions; and this court might proceed to consider and determine it alone upon the questions presented by that state of pleadings.

Legitimately speaking, the plea of the Statute of frauds and perjuries is not before us, and therefore it would be entirely proper to determine the cause independent of it.

But as the question presented by the plea is of vital interest and importance to the whole community, we are disposed to consider and determine, whether a part performance of a parol contract on the sale of lands will take the cause out of the Statute of frauds and perjuries. In deciding this question, we shall give the defendant the full benefit, not only of his plea setting up the Statute, but also whatever advantage he can derive from the answer, and the proof in the case.

And when we have gone through the whole subject, we shall have disposed of the entire equity of the case.

The Statute declares "no action shall be brought whereby to charge any executor or administrator, upon any special promise to answer for any debt or damage out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another; or to charge any person upon an agreement made in consideration of marriage; or *upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them*; or any lease for a longer term than one year from the making thereof; *unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith; or by some other person by him thereunto properly authorized.* See *Arkansas Dig. p.* 135, *sec.* 1.

This section is an exact and literal copy of the 4th Section of the celebrated Statute of 29 *Charles* II, *C.* 3; and therefore the decisions of the English courts upon it are entitled to great weight and authority.

At common law every contract for the sale and transfer of property where there was no actual delivery, was treated as a personal covenant; and as such, if it was not performed by the party making the agreement, no redress could be had except in damages. This was in effect to allow the party in all cases, either to perform his covenant, or pay damages for the breach of it. See *Story's Commentaries on Equity*, 21, *sec.* 714. The non-performance of an agreement upon a valid consideration, is a clear violation not only of a legal, but of a moral and equitable duty; and hence courts of equity have interposed their authority, and compelled the offending party to perform specifically his contract. They proceed upon the principle, that whatever

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a party stipulates to do, in good faith and conscience, he is bound to perform; and if he fails to do so, he is guilty of injustice and wrong, for which an adequate and full compensation ought to be given. It is because courts of law cannot afford this relief, that the jurisdiction of courts of equity attaches; and that jurisdiction, if not coeval with the common law itself, extends to a very remote period of time, and is now in daily and constant operation for the most useful and beneficial purposes. *Story*, 23; *Madd. Ch. Pr.* 287; *Fonbl. Equity*, *B.* 1, *C.* 1.

Where, therefore, the party wants the thing in specie, and he cannot be fully compensated at law in damages, courts of equity will grant him a specific performance. *Bettsworth* vs. *Dean of St. Paul*, *Sel. Cas. in Ch.* 68, 69. And this constitutes the true and leading distinction in the exercise of equity jurisdiction in decreeing a specific performance; because damages at law, in the particular case, cannot afford complete and adequate redress. There can be no reasonable objections in allowing the party aggrieved by a breach of contract, to have an election, either to take damages at law, or to have a specific performance in Equity: "The remedies being concurrent, but not coextensive with each other." It was so expressly ruled in *Hasley* vs. *Grant* (13 *Ves.* 76, 77); and *Alley* vs. *Deschamps*, (13 *Ves* 228.)—It is a general rule, that courts of equity will not decree a specific performance of a mere chattel interest. But when this is the case, the courts go upon the ground, that there is not a particular nor intrinsic value attached to the chattel, and of course the like article can be purchased in the market; and if there is a breach of the contract, full and adequate compensation can be recovered in an action at law.—But whenever the thing itself possesses peculiar excellence or value, and the owner cannot at law be fully compensated; then the courts of equity interpose and decree a specific performance—such, for instance, as a covenant for a lease, a contract for the sale of a valuable secret in trade. And in like manner, covenants between landlord and tenant, when injunctions in the nature of a specific performance often are decreed to stay waste. *Furnival* vs. *Crew*, 3 *Atkyns*, 83, 87; *Fulton* vs. *Foot*, 2 *Bro. Ch. R.* 636; *Buxton* vs. *Lister*, 3 *Atkyns*, 381; 2 *Ves.* 629; *Bricket* vs. *Bolling*, 2 *Munf.* 442.

Even in regard to bank stock, a specific performance is sometimes decreed in equity. *Forrest* vs. *Elwes*, 4 *Ves.* 479.

In cases of covenants and other contracts where a specific execution is sought, it is often material to consider how far the obligations of the

parties are mutual and reciprocal; and whether the party seeking relief has fairly and equitably performed his part of the agreement. All contracts to be binding must be mutual, though the obligations they impose may be independent of each other, and in some respects essentially different.

Formerly it was the practice to send the party to law, for a breach of his contract; and if he recovered any thing by way of damage, then the courts of chancery entertained jurisdiction of the case: otherwise they dismissed the bill. 1 *Fonbl. Eq. B.* 1 *C. & note* 5; *Dodsley* vs. *Kinnersly*, *Ambler*, *R.* 401; *Normander* vs. *Duke of Devonshire*, 2 *Freem.* 217; *Jeremy on Eq. Jurisd. B.* 3; *Madd. Ch. Pr.* 288.—Hence it was said, no suit could be maintained in equity, unless an action at law would lie for damages. This opinion was subsequently overruled in *Carnal* vs. *Bucke*, and in that case Lord Macclesfield denied the existence of the rule altogether. And the doctrine may now be considered well settled, that damages may sometimes be recovered at law, where a court of equity would not decree a specific performance; and on the other hand, damages might not be recoverable at law, and yet equity might interpose and decree a specific execution. *Weale* vs. *West*, *Mid. Waterw. Comp.* 1 *Jac. & Walk. R.* 370.

"In truth," says Justice Story, "the exercise of this whole tract of equity jurisprudence, respecting the rescision or the specific performance of contracts, is not matter of right in either party, but a matter of sound and reasonable discretion in the court, which governs itself as far as it may by general rules and principles; but which at the same time withholds and grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties."

Courts of equity are in the habit of interposing to grant relief in cases of contracts respecting real property to a far greater extent than in cases respecting personal property. Not upon the ground, as as is sometimes alleged, of an intrinsic distinction between real and personal property, though that may be entitled to some consideration; but upon the ground, that in contracts for personal chattels the injured party, if the covenant is not specifically performed, may generally be amply compensated in damages. Whereas it often happens that the locality, character, and properties of the sale, give to real estate a peculiar and special value; and therefore a compensation in damages would furnish to the purchaser no adequate relief for the loss or depriva-

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tion. *Story* 51; *Aderley* vs. *Dickson*, 1 *Sim & Stu.* 607. And in cases affecting real property courts of equity have administered relief to a party who has acted fairly, but negligently. *Lennox* vs. *Napple*, 1 *Sch. & Lef.* 684. "They will never interfere to decree a specific performance, except in cases where it would be strictly equitable to make such a decree."

If in any case the parties should so deal with each other in relation to the subject matter of the contract, that the intention of the one party is defeated, while that of the other is carried into effect; and if the case itself shows that there is such a state of case, as that one party may enforce, and the other cannot, courts of equity will decree a specific execution of the contract. With these general principles in view, we will now proceed to consider the object and intention of the Statute of frauds and perjuries.

The title of the act of 29 *Charles*, 11 *C.* 3; of which ours is a literal copy, declares it is to prevent the fraudulent setting up of pretended agreements, and then attempting to support them by perjury. Besides, there is much wisdom and sound policy in that clause in the Statute, which requires all contracts in relation to the sale of land to be in writing. To trust so high and important an interest to the uncertain and fleeting memory of man, is in many, if not in most cases to put to hazard that interest, and to expose both witnessess and parties to greater temptation than human virtue can ordinarily resist.

It is greatly to be regretted that courts of equity ever interposed their power to take a particular class of cases, of part performance, out of the operation of the Statute; for in so doing, they have virtually repealed it, and have established a rule of construction, not in subordination to the act, but in direct conflict with its authority, and its most important and salutary provisions.

In this sentiment we are fully sustained by the whole judiciary of our own country, as well as that of Great Britain. But notwithstanding this, courts and judges have still gone on to decree specific execution; for they consider themselves bound by the doctrine as established, and have yielded to it implicit obedience, though they have often expressed much solicitude to see the rule changed by those who are competent to do so. This court does not consider itself at liberty to disregard the whole current of English and American decisions that have been made upon the Statute, however much they may question the policy or the propriety of their adjudications. As the law is written

and expounded, so they must take it, and it is their duty to follow its precepts, and obey its authorities; and not to set up their imperfect and solitary opinion against the deliberate opinion of centuries.

Courts of equity are as much bound by the Statute as courts of law, and therefore they are not at liberty to dispense with its provisions.—That they do interfere, and sometimes dispense with what may appear its plain and obvious meaning, cannot be disguised or controverted; but then they do so on the ground of protecting the equities subservient to the Statute, and independent of it. For instance, courts of equity will never enforce the specific performance of a parol agreement, in relation to the sale of land, where the contract is set forth in the bill, and admitted by the answer; and the reason given for the decision is, that the Statute was designed to guard against fraud and perjury, and in such a case there is no danger of it. Another reason is, as the party has not thought proper to avail themselves of the benefit of the Statute, it may fairly be presumed, he intended to waive it. The case is then considered as taken entirely out of the mischief intended to be prevented, and of course out of the operation of the Statute. *Story* 755; *Attorney General* vs. *Day*, 1 *Ves.* 221; *Lacon* vs. *Mertins*, 3 *Atk.* 3. Courts of equity will enforce the specific performance of a contract within the Statute, when the parol agreement has been partly carried into effect. The distinct ground upon which they interpose in cases of this sort, is, that one party would be able to perpetrate a fraud upon the other; and it could never have been the intention of the Statute to suffer one party to commit a fraud on the other with impunity. Indeed in all cases fraud vitiates the most solemn acts and conveyances; and in the case of *the Attorney General* vs. *Day*, it is said that the objects of the Statute are promoted instead of being suppressed by such a jurisdiction for discovery and relief. "And it is obvious, where one party has executed his part of the agreement, in confidence that the other party would do the same, if the latter should refuse, it would be a fraud on the former to suffer it to be done to his prejudice." *Buckmaster* vs. *Harrop*, 7 *Ves.* 347; *Hawkins* vs. *Holmes*, *P. Wms.* 770; *Wells* vs. *Sahdling*, 3 *Ves.* 378; *Marpeth* vs. *Jones*, *Swanst. R.* 181; *Fonbl. Eq. B.* 1 *C.* 38, *and Gilb. Lex. Pretoria*, *p.* 239, 240; *Clinan* vs. *Cook*, 1 *Sch. & Lef.* 22.

The enquiry still remains, what constitutes such part performance of the agreement, as will take the case out of the reach of the Statute? In the application of the rule the difficulty lies, and it is that we shall

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now attempt to solve. Nothing can be considered as a part performance, that does not put the party in such a situation that a fraud can be perpetrated upon him, unless the agreement can be specifically enforced. For instance, if, upon a parol agreement, a man is put in possession of land, he is made a trespasser and liable for damages as such, if there be no agreement valid in law or equity. In *Foxcraft* vs. *Lester*, (*Prec. Ch.* 71, 519,) and in *Pengal* vs. *Ross*, (*Eq. Abr.* 46, *Pl.* 12,) it is declared for the purpose of the party defending himself against the charge as trespasser, and to account for the profits in such a case, the evidence of a parol agreement is admissible for his protection; and if admissible for such a purpose, there seems to be no reason why it should not be admissible throughout. A case still more cogent might be put where a vendee, upon a parol agreement for a sale of land should proceed to build a house on the premises in confidence of the completion of the contract. In such a case there would be a manifest fraud, if the vendor was permitted to escape from a strict fulfilment of his contract. This doctrine is expressly recognized and established in *Whitmore* vs. *White*, *Caines Cas. in Er.* 87, and *Parkhurst* vs. *Van Cortlandt*, 14 *John. Rep.* 15—and in such a number and variety of other cases as put the question finally to rest, and beyond all dispute.

In order to make the acts such as a court of equity will deem part performance of a contract, it is essential that they should clearly appear to be done solely with a view to the contract being performed. For if they are acts that might have been done with other views, they will not take the case out of the Statute. *Gunter* vs. *Halsey*, *Ambler*, 536; *Phillips* vs. *Thompson*, 1 *John. Ch. R.* 149; 2 *Ves.* 456. Therefore, giving an abstract of the title, going to view the estate, making out deeds of conveyance, and the like, do not constitute such a part performance, as will take the case out of the Statute; for they are acts of an equivocal and doubtful character. But acts that are clear, certain, and definite in the object and design, and which refer exclusively to the completion of the agreement, of which they constitute a part execution, will take the case out of the operation of the Statute. *Hawkins* vs. *Holmes*, 1 *P. Will.* 770; *Pembroke* vs. *Thorpe*, 3 *Swanst.* 437; *Clark* vs. *Wright*, 1 *Atk.* 12; *Coath* vs. *Jackson*, 6 *Ves.* 14; *Sugden on Vendors*, *Ch.* 3, *p.* 104, *Cioke* vs. *More*, 1 *Cox. R.* 219.

Mere possession of the land, if obtained wrongly, and wholly independent of the contract, will not be deemed part performance of the agreement. But if possession be delivered and obtained solely under

the contract, and in reference exclusively to it, then the possession will take the case out of the Statute; and especially will be held so to do, where the party has made repairs or improvements. And in such a case, not to decree specific performance would be to practice a fraud upon him. *Butcher* vs. *Stapeley*, 1 *Vern.* 365; *Pyke* vs. *Williams*, 2 *Vern.* 455.

Another class of cases is, where the party seeking relief has been placed by the contract in such a situation that he cannot be put in *statu quo* without injury, by reason of performing his part of the agreement; and whenever that is the case, courts of equity will interfere for the purpose of preventing a fraud, and decree a specific execution. If this was not the case, courts of equity would permit the forms of the law to be made instruments of injustice for the unconscientious purpose of committing a fraud upon a confiding and innocent person. *Merideth* vs. *Wynn*, 1 *Eq. abr.* 75, *s. c. Prec. Ch.* 312; *Adderly* vs. *Dickson*, *Sim. & Stu.* 607; *Story*, 82, 351.

The application of the principles here stated will test the case now under consideration.

By reference to the bill it will be seen that the plaintiff stakes his whole equity upon the following allegations: 1st, That he was the original purchaser of the land in controversy. 2nd, That the deeds were made out in his name, and subsequently changed and cancelled, and others executed by the Governor to the respondent, at his special instance and request. 3rd, That the deeds on their face, although absolute, were only to be considered as a mortgage or lien upon the property for his part of the original purchase money and interest. 4th, That the defendant purchased from him, and that he took possession under, and by virtue of the sale made to him by the complainant, and went on and improved the property in consequence of such sale. 5th, That he always admitted and allowed that the land was the joint and equal partnership property of himself and the complainant, and so treated and spoke of it up to a short time previous to the institution of this suit: all these allegations are fully and substantially proved by the depositions in the case.

F. A. McWilliams, who acted as auctioneer in the selling of the land, proves that it was bid off by *Rector*, and that the deeds and notes were drawn by him in *Rector's* name, and afterwards cancelled, and other deeds executed to *Keatts*; and that *Keatts* agreed to take half of the purchase from *Rector*, and to become equally interested in the

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land, upon the express condition that he would pay in the first instance all the purchase money; and that *Rector*, for the advances thus made, should refund his part back with interest from the time of payments; and that *Keatts*, on the execution of the contract, and the reception of the deeds to himself from the Governor, took possession of the land, and has held it ever since, and that the witness often heard both of the parties say, that they were joint and equal owners in the property; and that *Keatts* always so treated and considered it, until a short time before the beginning of this suit. Samuel M. Rutherford also proves the contract, possession, and the manner of taking it; and that both complainant and defendant always told him they were jointly interested in the land; and that the fact of their joint ownership was a matter of public notoriety; and the witness was present when the deeds were made to *Keatts*, and that they were changed at the suggestion and special request of *Rector;* and although absolute upon their face, it was expressly agreed between the parties that they should in no way affect or alter their joint and equal interest in the land, and they were only taken in *Keatts'* name for the purpose of securing him in the payment of the purchase money he had advanced for *Rector*. The depositions of Field, Cotter, Thorn, and Gould establish all the essential parts of the contract as set forth in the bill; and the answer itself, although it denies it in terms, does, in effect and in substance, admit all the facts that are necessary for the complainant, if he is entitled to relief. It considers the contract that the defendant made with the complainant, in the first instance, not binding; because the complainant did not pay one half of the purchase money; and as the defendant paid the whole amount, and the deeds were executed to him, he therefore claims to be the sole purchaser from the Governor, and entitled to all and every interest in the purchase. This is a legal conclusion, and does not materially contradict the charges of the bill. Whether right or wrong will be shortly determined. The answer in express terms admits that, in the first place, *Rector* bid off the land, and of course was the lawful purchaser; that the parties agreed to take the land jointly and equally upon speculation; that the defendant went in possession, upon the execution of the deed, and has continued his possession ever since, claiming it as his own property; and that it was not until the complainant failed to comply with his part of the agreement, that the defendant deemed the purchase of the property no longer a joint purchase, but accruing and appertaining to

him solely and alone in his individual capacity. These facts are set up in the answer, and with the plea of frauds and perjuries constitute the respondent's whole ground of defence.

The only remaining question now to be decided, is, do the facts and and circumstances of the case prove such a part performance of the parol agreement, as will take the case out of the Statute of frauds and perjuries? or is the plea of that Statute a complete bar to the complainant's relief? The facts relied on in the answer, and urged in argument, that the case falls within the operation of the Statute, are, that the defendant paid all the purchase money, and the complainant, if he originally possessed any equity, has failed to assert it in a reasonable time. The last of these objections will be examined first.—It is true that courts of equity have regard to time, so far as respects good faith and diligence; but if circumstances of a reasonable nature have prevented a party from complying strictly with his contract; still if he has only acted negligently, and not culpably, his case will be treated with indulgence, and even with favor. In this case, time constituted no part of the contract; and if it did, the complainant has performed in the first place his part of the agreement; and the defendant being secured by a lien on the land for the payment of the purchase money, he will not be permitted to allege that the complainant has lost his rights by failing to prosecute them in due season.—Besides, as the defendant never until recently claimed the land to be exclusively his own property; but on the contrary always admitted it to be the joint and equal property of himself and the complainant; and that being the case, the complainant has used a proper diligence in asserting his claim. No adverse interest was set up to his right until August, 1835, so the bill alleges, and depositions prove; and having brought his suit the next succeeding year, certainly it cannot be contended he slept on his rights, or that time in this case is an essential and important enquiry in regard to the contract. *Story*, 88, *sec.* 776; *More* vs. *Black*, 1 *B. & Beat.* 68, 69; *Newland on Contracts*, *Ch.* 12, *p.* 42 *to* 48.

Much reliance is placed on the fact, that the purchase money was paid by the defendant; and the complainant's bill must therefore be dismissed. It was formerly held that the payment of the purchase money took the case out of the Statute; but this doctrine was for a long time in much controversy, and is now entirely overthrown, upon the ground that the money can be recovered back at law, and that the

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case admits of a full and direct compensation in damages. *Story*, 65, 66. In *Buck* vs. *Buck*, Sir William Grant lays down the true rule on this subject. *Sugden on Vendors, Ch.* 353, *p.* 112.

The cases here cited are where the vendee is seeking for a specific execution, and as the contract is mutual, they certainly apply with as much force and conclusion in cases where the vendor is the injured or aggrieved party. If the vendee would not be entitled to a specific performance, merely on the ground that he had paid the purchase money, certainly he cannot protect himself from performing his part of the contract, where the vendor has executed his part in good faith, and where the very agreement set up for relief is, that the vendee was bound to pay the purchase money, and that was the moving consideration that induced the vendor to let him into the contract or purchase. Again—the defendant has full and adequate compensation at law, for the payment of the purchase money he has advanced.

This view of the subject seems to the court to be conclusive upon this point, and leaves the case to be decided on other grounds or considerations. In reference to the Statute, it must be conceded that the contract in this case is mutual, and that is equally binding on both parties, or it is obligatory upon neither. The present position of the contracting parties cannot change or alter the nature or character of the agreement. We will now attempt to test this agreement by reversing their situations, and see how far the Statute of frauds and perjuries would protect the complainant, if the deeds had been executed to him, and the defendant had still taken possession of the lands, and had erected valuable improvements. Suppose the complainant had brought his action of ejectment or trespass, and had attempted to distress him, or to have made him answerable in damages for the trespass, could he have succeeded in either action, if the defendant had proved on the trial that he came lawfully into possession under their contract and agreement; and that he was the joint and equal owner of the property? Would not a plea setting forth these facts bar the complainant's right of recovery? or would the Statute of frauds and perjuries be a good replication to it? The authorities are clear and conclusive upon the question. For to allow the Statute to operate in favor of the complainant, would in effect and reality enable him to perpetrate a fraud which the Statute was intended to prevent.

To illustrate this view of the subject still further, suppose, in this case, the complainant had been clothed with a legal estate, and the

defendant had brought his bill for a specific execution, would a court of equity have enforced the parol agreement? Most certainly they would. For the authorities conclude the question, and neither admit of contradiction or denial. They proceed upon the ground, that the possession and improvement are conclusive acts of part performance of the defendant's agreement, and not specifically to enforce the contract, would be to commit manifest injustice by permitting the complainant at his own election to perpetrate a fraud. The object and design of the Statute, was to suppress, not encourage fraud; and that being admitted, the case does not fall within the mischief intended to be remedied, and consequently is without the operation of the Statute.—Again—if courts of equity did not decree specific performance of such agreements, then not only might the party commit a fraud on another with impunity, but the Statute would be so made to operate, that the forms of the law would become instruments of injustice for unjust and fraudulent purposes. If *Rector* was vested with the legal title, and *Keatts* could enforce a specific execution, certainly it will be conceded, when the title is in *Keatts*, that *Rector* must have the same right to specific performance. Again—where did *Keatts* acquire possession, and under whom does he hold? Is his possession lawful or unlawful? He certainly acquired possession by his purchase from *Rector*, and the nature and character of that possession was never changed or altered by any subsequent contract. Then his contract or purchase from *Rector* put him in possession. That his possession is lawful, is evident; for he held under a valid deed, and was put in possession by the original and rightful owner. He could not then be treated as a trespasser by *Rector*, or any one else; neither could he in any manner be deprived of his possession. The fact that *Rector* admitted *Keatts* to take possession under the contract, and in virtue of it, and to continue that possession in an uninterrupted and peaceable manner up to the time of filing the bill, shows conclusively what was *Rector's* design and object in executing his part of the agreement. Is it to be supposed he would have let *Keatts* into the contract, or have suffered him to have taken the deeds in his (*Keatts'*) name, unless he had confidently believed the defendant would in good faith have performed his part of the agreement, and have conveyed to him one undivided moiety of the land? Would *Rector* have ever agreed to cancel his deeds, and procure others to be executed to *Keatts*, if *Keatts* had informed him at the time, that he did not consider the contract binding; and that while they seemed to be

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joint and equal partners, that he (*Keatts*) was the only lawful and true proprietor of the land? Had he disclosed this fact, would *Rector* ever have permitted him to take an equal interest in the purchase?

Had the Governor authority to execute the deeds to *Keatts*, if *Rector* had not directed him so to do? Most assuredly not. The Governor possessed no such power for such a purpose. By the terms of the sale, all right and title had passed out of the grantor to the grantee. Neither had *Keatts* the right or authority to accept the deeds, but as coming through *Rector*, and acquired by him in virtue of his contract. Shall *Keatts* then be permitted to reap the reward and profits of *Rector's* purchase, and not render any adequate compensation for the benefit he may have received. Will a court of equity compel *Rector* to perform his part of the agreement, and at the same time deny him all manner of relief? How can he be placed in *statu quo*, in regard to the agreement, if he has no relief in equity, or the court refuses to decree him a specific performance? The land may possess a peculiar and intrinsic value in his eyes, and therefore he desires a specific performance. Be that as it may, if his acts of part performance take the case out of the Statute, he is clearly entitled to it.

If *Rector* had failed to comply with his part of the agreement, still he was liable for damages on the contract, or for a specific execution of it; and *Keatts'* remedy in whatever mode he might elect to prosecute it, could not have been defeated by setting up the Statute.—Suppose, for instance, the land had fallen, instead of having risen in value, and *Keatts* had sued *Rector* for his part of the purchase money, can it be contended that *Rector* would not be liable. If he is liable, then *Keatts* is equally so. Or suppose he had filed a bill to make *Rector's* part of the land liable for the purchase money he had advanced, would not the land be responsible for the debt and interest. Can *Rector* be bound in all these ways for his part of the purchase money, and *Keatts* be wholly exempted from all responsibility. How does it vary the case because *Rector* is now seeking relief. Is not the equity something stronger than if he was only a vendee in possession. He made the contract with the Governor, became the rightful owner of the property, put the defendant in possession, clothed him with the legal title, not for his own advantage, but for greater security to the defendant, always claiming to be part and joint owner with him, which was fully admitted and recognized. If all these clear, certain and definite acts, taken apart and collectively, do not conclusively

demonstrate that *Rector*, in good faith and full confidence, executed his part of the agreement; then it is difficult to conceive what constitutes such a part performance, as would take the case out of the Statute. Courts of equity have decreed over and over again, a specific performance alone upon possession of the vendee where that was exclusively taken with reference to the contract; and in no instance have they refused to do so, when the party went on and improved. The case now before the court is infinitely stronger than any one of the cases that have been cited, and in which a specific performance has been decreed. *Sugden*, in his excellent treatise upon *Vendors*, p. 78, says "when agreements have been carried partly into execution, the court will decree the performance of them, in order that one side may not take advantage of the Statute, to be guilty of a fraud."—This doctrine pervades all the authorities, and determines the class of cases in which a specific performance will be enforced. 2 *Johnson's Rep.* 578; *McFerren* vs. *Taylor*, 3 *Cranch*, 270, 281; *Hepburn* vs. *Orr*, 5 *Cranch*, 232; *Davenport* vs. *Mason*, 15 *Mass. R.* 92; *Smith* vs. *Patton*, *Serg. & Raule*, 80.

An agreement will not be considered partly executed, unless the acts done could have been performed with no other view than to the completion of the contract. Apply this principle to the case now under consideration, and what will be the result? Did *Rector* conceal his deeds and have others executed to *Keatts* with no other view than for the purpose of performing his part of the contract? He alleges, and proves that he did so, and the answer, although not in express terms, does in effect admit it. It is said, if possession be merely delivered that the agreement will be considered in part executed, and it will certainly be so treated, if the party go on improving according to the agreement; and that a parol contract in such case will not be within the Statute; for the Statute can never be so termed, construed, or used, as to protect, or be a means of fraud. The delivery of possession by a person having lawful possession to one claiming under the agreement, is held by all the authorities to be astrong and marked circumstance, if not absolutely conclusive, that the agreement itself will be considered as partly executed, and be taken out of the Statute.—In the case now before us, such a delivery of possession is made. The possession was in the complainant, and as it was passed from him, and was accepted by the defendant exclusively in reference to carrying the contract into execution; and a court of equity in such a case is bound

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to grant relief, and decree a specific performance. *Sugden on Vendors*, 80—*note and authorities.*

This is held to be conclusive of the case, especially when the possession so delivered continued for a number of years, both parties treating the agreement as if it was actually executed in part by the complainant; and when the party who delivered the possession can never be put in the same situation that he was in before he parted with it, and would be placed by the acts of the defendant in such a situation that a fraud could be readily perpetrated upon him with impunity, and when his remedy would be wholly incomplete and inadequate at law.

If each and all these equitable circumstances do not entitle the complainant to a specific execution, then the whole series of decisions on the subject of part performance must be disregarded and overturned, and manifest injustice and wrong be done in the premises.

From an attentive examination of all the authorities upon the subject, and of the principle upon which those decisions are based, this court is clearly of the opinion that the case made out is not within the Statute of frauds and perjuries; and consequently the defendant's plea of that Statute, if he could have been permitted to avail himself of it, was no answer to the equity of the complainant's bill.

In arriving at these conclusions, they confidently assert that they have fallen far short of many of the American and English decisions on the subject of part performance, and in the present case they are at least not chargeable with having extended or enlarged the rule beyond the policy or equity of the Statute.

Having disposed of the plea and the Statute of frauds and perjuries, the cause is then left standing on the bill, answer and depositions, and they clearly show that the complainant is entitled to one equal half or undivided moiety of the land; and after having first paid one half of the purchase money with interest, and one half of the value of the improvements put upon the land; and as the decree of the Circuit Court allowed the defendant nothing for his improvements, in that particular, it is evidently erroneous, and must therefore be reversed and set aside with costs, and the cause remanded to be proceeded in agreeably to the opinion here expressed; which is, that it be ordered, adjudged, and decreed, that the defendant be compelled to execute a deed in fee simple, conveying to the complainant one equal half or undivided moiety of the land contained in lot number eight—being

sixty-seven acres lying on the south side of the Arkansas river; and also one equal half or undivided moiety of the north east and south east quarters of the north west fractional quarter of fractional section seven, in township one north of range eleven west, being eighty acres; and upon the signing, sealing, and delivery of the deeds, that it be further ordered, adjudged, and decreed, that the complainant pay to the defendant one half of the purchase money with interest, up to the commencement of this suit; and also that he pay one half of the permanent improvements made upon the land up to the same time, to be estimated and ascertained by an auditor appointed for the purpose, and according to law. And that it be further ordered, adjudged, and decreed, that the defendant be charged with one equal half of the rents, or mense profits arising from the cultivation of the land from the time that it came into his possession, up to the final decree in the case, and delivery, of possession; to be estimated and ascertained in the same manner as the value of the improvements are directed to be; and that one half of the value of the rents or mense profits so ascertained, and fixed be ordered, be adjudged and decreed in favor of the complainant.

And that it be further ordered, adjudged, and decreed, that the writ of injunction heretofore granted, be continued until there be a partition or division of the land; and that the defendant pay all the costs in the court below that has already accrued, or that may accrue hereafter.

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THE STATE *against* JOHN E. GRAHAM.

ERROR *to Pulaski Circuit Court.*

Prior to the adoption of the constitution of this state, the jurisdiction of the Circuit Courts, in all criminal cases of which they had cognizance was exclusive.

The constitution confirms in the Circuit Court a part of the powers with which they were then invested by the statute, without divesting them of any other power conferred upon them by law.

There is no conflict between the provisions of the statute conferring on the Circuit Courts exclusive jurisdiction in criminal cases, and the appellate jurisdiction conferred by the Constitution on the Supreme Court.

The appellate jurisdiction of the Supreme Court, though co-extensive with the state, is no where defined in the constitution. It depends upon the law as it stood when the constitution was adopted, subject to such alterations as the legislature prescribe by law.

The legislature may therefore, by law, at any time change or modify the different subject matters to which the appellate power of the Supreme Court shall extend, *making it cover more or less space*, as they shall think proper.

The provisions in the schedule of the constitution, and the act of 1836, leave the jurisdiction and powers of the Circuit Court over criminal cases, precisely as they stood when the constitution was adopted.

RINGO, *Chief Justice*, delivered the following opinion in two cases, the two being precisely alike in every respect:

This is an indictment originally prosecuted in the City Court of Little Rock, against the defendant, for betting at a prohibited game commonly called faro; upon which the defendant was convicted on his own confession of guilt, and a fine imposed upon him, and judgment therefor given in the City Court. To reverse which the defendant prosecuted a writ of error out of this court, whereby a transcript of the record, proceedings and judgment against him in the City Court, was brought before this court, and the judgment reversed, and the case remanded to the Circuit Court of Palaski county, to be there proceeded in according to law, and the opinion of this court delivered therein. The Circuit Court on the appearance of the case therein, ordered and permitted the mandate of this court to be filed and entered on the record; and afterwards permitted the defendant to plead to the jurisdiction of the court, and upon the issue formed thereupon, decided that the Circuit Court had no jurisdiction of the case, and gave a final judgment, "that the defendant be discharged, and go hence without day."

To this opinion and judgment the attorney prosecuting for the State excepted and filed his bill of exceptions, which was made a part of the record; and thereupon prosecutes this writ of error, in the name of the State, to reverse said judgment.

The first question presented is this: Is the State entitled by law to the writ of error. This right is denied by the defendant, and will be examined by the court. The case originated in the city court, but as to the present question, it must be governed by the same principles and laws as if it had been originally prosecuted in the Circuit Court; the question therefore, from the extent of its appreciation, is one of interest and importance, and is not free from difficulty.

Prior to the adoption of the constitution, the jurisdiction of the Circuit Court in all criminal cases of which they had cognizance, was "exclusive."

The 5th section of the act of Congress approved April 17, 1828, *Ark. Dig. p.* 42, expressly prohibited the right of appeal in criminal cases, from the Circuit Court to the Superior Court; and the Legislature by an act approved October 22, 1828, *Ark. Dig. p.* 122, *S.* 2, provided that the Circuit Courts should have "*the exclusive cognizance* of all criminal cases within their respective circuits," whereby the whole jurisdiction of criminal cases became vested in the Circuit Court.

These Statutory provisions were in force when the constitution was adopted, and the change from a Territorial to a State form of Government, took place, except so far as the latter act, was modified by the act of 1835, in conferring upon the City Court of Little Rock, the exclusive original of all criminal cases, less than felony at common law, arising within the incorporated limits of said city; a modification which has no influence on the question now under consideration.

The constitution in section 3rd of artitle VI, provides that "the Circuit Court shall have original jurisdiction over all criminal cases which shall not be otherwise provided for by law; and exclusive original jurisdiction of all crimes amounting to felony at the common law."

And in section 2, of the same article, it is provided that "the Supreme Court, except in cases otherwise directed by this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations as may from time to time be presented by law."

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These are believed to be the only provisions in the constitution which have any relation to the subject; and they do not direct the Circuit Courts of their "*exclusive*" jurisdiction in criminal matters; for between the grant of original jurisdiction conferred by the constitution, and the grant of "exclusive" jurisdiction given by the Statute, there is no conflict: because it is obviously true, that the same tribunal may have the original, sole, and final adjudication of any given case or class of cases, and whenever this is the case, the jurisdiction of such tribunal over such case or class of cases, is exclusive; but whenever the jurisdiction of any case or class of cases, is distributed between different tribunals, as where one has original, and another appellate jurisdiction over the same case, neither tribunal has the exclusive jurisdiction thereof. The grant in the constitution confirms in the Circuit Courts, a part of the powers with which they were then invested by the Statute, without divesting them of any other power, conferred upon them by law.

Nor is there any conflict between the provisions of the Statute conferring on the Circuit Courts exclusive jurisdiction in criminal cases, and the appellate jurisdiction conferred by the constitution on the Supreme Court. The latter, although it is declared to be co-extensive with the State, is no where defined in the constitution, that is, the constitution wholly omits to point out the subjects to which the appellate jurisdiction of the Supreme Court shall extend, or to indicate in any manner whether it shall be exercised over the decisions of the Circuit Courts, the county courts, the probate courts, corporation courts, or justices of the peace, or all, any or either of them: therefore the whole appellate power and jurisdiction of the Supreme Court is made by the constitution itself to depend upon the law as it stood when the constitution was adopted; subject, however, to such alterations as the legislature should from time to time prescribe by law—thereby confiding to the law and the legislature without any restraint whatever, the whole right and the exclusive privilege of specifying the particular subject to which the appellate power of the Supreme Court shall extend, and regulating and prescribing the manner in which they shall be brought before the court, whether by appeal, writ of error, or otherwise; also at what time, by whom, and from the decision of what court they shall or may be so brought up; consequently the legislature may by law at any time change or modify the different subject matters to which the appellate power of this court shall extend, *making it cover more or less space*, as they

shall think proper. If this view of the appellate jurisdiction of the Supreme Court be correct, as from a careful examination of the whole judiciary system and every branch thereof, and of the powers of each, as conferred or limited by the Constitution, we are induced to believe it is, it follows as a necessary consequence, that the exclusive jurisdiction of the Circuit Courts over criminal matters is not affected or impaired by any thing contained in the constitution. The schedule in the constitution, section 2, declares, "that all laws now in force in the Territory of Arkansas, which are not repugnant to the constitution, shall remain in full force until they expire by their own limitations, or be altered or repealed by the General Assembly."

And the act approved 7th November, 1836, section 3, provides that the Circuit Courts "shall have cognizance and legal jurisdiction" "of all pleas in the State, and criminal matters of what nature or denomination soever," and declares that said courts shall "have full powers and authority to give judgment and award execution and other process necessary to the action of said Courts thereupon, as heretofore belonged to the Circuit Courts in the late Territory of Arkansas, and have use exclusive and enjoy the same powers, authorities, rights, and privileges, as were, had, used, and enjoyed, by the said Circuit Courts heretofore existing, except where it is otherwise directed by this or some other act; or where such powers, authorities, rights, or privileges, or any of them, may be inconsistent or repugnant to the present form of government.

These provisions in the schedule contained in the constitution, and the act of 1836, were evidently intended to leave the jurisdiction and powers of the Circuit Courts, over criminal cases, precisely as they stood when the constitution was adopted; and we think it is shown satisfactorily, from the concise view of the subject already presented, that they are not in conflict with the constitution, or "inconsistent or repugnant to the present form of government,"—and of course the jurisdiction of criminal matters, in the Circuit Courts, remained "exclusive" after the change of government, precisely as it stood before the change: and the powers vested in the Supreme Court, and the judges thereof in vacation, to issue writs of error and supersedeas, does not, in our opinion, have the least influence upon the present question; because if we are right in the conclusion, that the appellate jurisdiction of the Supreme Court is made by the constitution to depend upon the law for its application to, and exercise over, any specified subject, it

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necessarily results that it can never be exercised in any case, without the aid of the law, in ascertaining and defining the particular case, class of cases, or subject matter, to which it shall extend, which being thus ascertained, but no provision made by law, whereby the subject may be brought before the Supreme Court, the court under the authority expressly given to it, to issue writs of error, supersedeas, &c., can, by means of some of the writs which it is authorized to issue, cause the case to be brought before it, to enable it to exercise appellate jurisdiction over the subject; and the court is therefore, notwithstanding the omission in the law, authorized to hear and determine the cause; and this we understand to be the extent of the power conferred by the constitution, in the clause which empowers the Supreme Court, or the judges thereof in vacation, to issue the writs therein enumerated, or thereby authorized, so far as they relate to, or can be applied in, the exercise of the appellate power by this court, unless they may be also used to bring before the court cases which are directed by law, to be brought up in some different manner, prescribed by law;—a proposition, the truth of which we doubt, and do not decide, as it can have have no influence on the question before us. And therefore we say, a fortiori, the Supreme Court cannot exercise appellate jurisdiction in any case, over which it is provided by law, that another tribunal shall have "the exclusive jurisdiction;" and upon this ground the judges of this court have uniformly refused to take jurisdiction of, or exercise any appellate power in regard to criminal matters prosecuted in the Circuit Courts, prior to the taking effect of the act to regulate criminal proceedings, approved February 13, 1838, by refusing to issue writs of error or supersedeas upon application therefor made, without looking into the case further than to see that the Circuit Court had jurisdiction thereof.

The act of 1838, above mentioned, contains the following provisions: "Sec. 213. In all cases of final judgment, rendered upon any indictment, an appeal to the Supreme Court shall be allowed, if applied for at the term at which such judgment may be rendered. Sec. 214. Writs of error on application therefor shall issue, of course, in vacation, as well as in term time, out of the Supreme Court, on final judgment in criminal matters.

These provisions are broad and comprehensive as language can make them. They refer as appropriately to one party as to the other, and embrace every criminal matter upon which a final judgment is

rendered; and authorize an appeal to the Supreme Court if applied for at the term at which the judgment is given, or a writ of error out of the Supreme Court, which shall issue of course, on application, in vacation, as well as in term time.

These provisions confer valuable legal rights; but upon whom are they conferred? The language of the grant is general, and may apply, as well to the State as to the defendant, unless they are restrained by the context, or some other part of the law, or prohibited by the constitution. We have looked attentively into the whole law upon this subject, as well as the constitution, without being able to discover any thing by which the right is, or was designed to be, restricted to either party, in exclusion of the other, or prohibited to either. And there appears to us to be as much propriety in extending it to the one as to the other. It certainly was not designed to impair the existing rights of either, or to place them on unequal ground, by a discrimination between them, the policy and justice of which would be at least questionable; for it must be conceded that the claims of public justice occupy in morals and in political economy, as elevated a position as any considerations of mere private right, and demand of the constituted authorities of the country, equal favor and protection; and the law as stood when the enactments under consideration were made, so regarded them, and denied both parties the right of appeal. What, then, was the object of the legislature in enacting the provisions before us? The evil thought to exist, and which it was the principal design to remedy, by these provisions, it is confidently believed, consisted in the great uncertainty and contrarity of decision, in the different courts in criminal matters, arising from the fact of their being no superior tribunal authorized by law to reverse their adjudications, and thereby establish a uniform rule of decision in that class of cases throughout the State; and therefore with a view to the accomplishment of this most desirable object, the appellate power of the Supreme Court was extended by the act under consideration, to this class of cases. If this was not the great object and design of these provisions, we are wholly at a loss to discover what they could have been: for no one who is familiar with the various provisions of our criminal laws, and acquainted with the history of the country at the period of its passage, can entertain the opinion that there existed in the mind of any rational person, the least apprehension of any exercise of any undue rigor or oppression towards the accused, either on the part of the

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courts or juries, to which their trial was then exclusively confided; but on the contrary, it is a notrious fact, amounting almost, if not altogether, to a reproach upon the authorities entrusted with the administration of criminal justice, that from their great lenity and indulgence to the accused, and the too easy ear given to slight excuses, and frivolous exceptions, not extending to, or affecting the merits of the accusation, or tending to establish the guilt or confirm the innocence of the accused, many wicked and notorious offenders against the criminal laws but too often escaped the richly merited punishment demanded against them for the violation of law which they had committed. And independently of this, the constitution and laws, by investing the accused with the right of a speedy public trial, by an impartial jury of his own selection, and the right of challenge, and of changing the venue, with the privilege of a new trial, whenever a verdict should be obtained against him by any mistake, either of law or the facts, or by any improper conduct on the part of the jury; besides numerous other privileges conferred by law, in addition to the ultimate right of appeal to the executive authority for a pardon, had thrown around him such ample means of security and protection, that no one ever apprehended the least danger of any innocent person suffering punishment from any maladministration of the criminal laws of the country; consequently, if the facts existed as we have stated them, and that they did so exist cannot, in our opinion, be denied; because they comprise a part of the public history of the country, and are known to every observing member of the community; and therefore the object of the enactment under consideration, could not have been to obviate the evil, of any real or supposed danger of oppression or injustice towards the defendant in criminal prosecutions: wherefore it is legitimate to presume that the legislature did not intend to restrict the right of appeal, and have a writ of error in criminal matters to the defendant only; and the object which we have supposed they intended to accomplish thereby will be more fully answered by extending the right equally to both parties, according to the evident intention of the Legislature.

We are therefore of the opinion that the State is by law entitled to the writ of error in this case.

We are aware of an objection which may urged against the exercise of this right, on the part of the State, in a different class of cases, where the punishment may extend to life or limb; because of the

provision contained in the constitution of the United States, as well as the constitution of this State—"that no person shall, for the same offence, be twice put in jeopardy of life or limb;" but however that class of cases may be effected by the provision just recited, is not a question now before us; and we do not therefore express or even intimate any opinion upon it. The provision can have no application to, or influence upon, the right claimed for the State in this case; because the legal punishment for the offence charged in the indictment does not affect either the life or limb of the defendant—it being a pecuniary mulct only.

Having disposed of the preliminary question raised in this case, we will now proceed to dispose of the only remaining question presented by the record and assignment of errors: that is, did the Circuit Court err in refusing to take jurisdiction of, and dismissing the case, and rendering judgment, that the defendant be discharged, and go hence without day. This question was in effect decided by the court, at the last term, when it was adjudged, "that this case be remanded to the Circuit Court of Pulaski county, to be there proceeded in according to law, and in comformity with the opinion" of this court, then delivered in this cause.

We have now, again, carefully re-examined this question, and entertain no doubt of the correctness of the judgment in this respect, then pronounced. It is a question depending solely on the act of the Legislature, approved February 21, 1838, entitled "An act supplementary and amendatory to an act, entitled 'an act to incorporate the City of Little Rock,' approved November 2, 1835," in the 8th section of which, it is among other things provided "that the jurisdiction of all offences heretofore given to, and extended by, the City Court of Little Rock, which is not by this act given to the justices of the peace therein, is hereby transferred to the Circuit Court of the County of Pulaski, which shall hereafter have and entertain full and complete jurisdiction of all such offences." The language here used by the Legislature is clear, perspicuous, and comprehensive, admitting of no doubt, and incapable of receiving a different interpretation from that put upon it by this court at the last term. The case is embraced within the express letter of the law, and it was not given to the justices of the peace mentioned in the act, or any or either of them. The Circuit Court therefore unquestionably had jurisdiction thereof, and erred in refusing to exercise its jurisdic tion over the case,

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and in dismissing the case and giving final judgment, that the defendant be discharged and go hence without day; and for this error the judgment must be, and the same is hereby reversed, annulled, and set aside.

But suppose this court had mistaken the law, and pronounced an erroneous judgment in remanding the case to the Circuit Court of Pulaski county, and in requiring that court to take cognizance thereof, and proceed to adjudicate the case, was it competent for the court to question the correctness of the decision and judgment, and refuse obedience to the mandate? Certainly it was not. For if that court disregard the judgment and mandate in this case, it could, with equal propriety in every other case, and thus by the usurpation of powers belonging exclusively to a superior, constitute itself into a tribunal of su-supervision over the proceedings, judgments, and decrees of the Supreme Court, in direct violation of the constitution and laws of the, land.

Wherefore the judgment of the Circuit Court of Pulaski county given in the case of the defendant, ought to be, and the same is hereby reversed, annulled, and set aside with costs, and the case remanded to said Circuit Court; and the said Circuit Court is hereby ordered and directed to take cognizance of this case, and proceed thereupon, to adjudicate this case upon the matters in controversy between the parties, according to law, and in a manner not inconsistent with this opinion, or the opinion of this court pronounced in this case at the last term thereof.

JAMES DANLEY *against* ALFRED EDWARDS *et al.*

APPEAL *from Pulaski Circuit Court.*

Where instructions upon abstract questions of law are given or refused by the court below, these instructions will not be noticed in this Court, unless by bill of exceptions so much of the evidence in the case as presented the questions of law or testimony to which the instructions applied, is brought before to this court.

It is the duty of the party excepting, to set out so much of the testimony as raises the question of law or evidence contained in the bill of exceptions.

The plaintiffs were described as A. B. and C. B. his wife, and D. E. and F. G. infants, &c., all heirs and legal representatives of H. L. It would be a good replication to the statute of limitations, that D. E., F. G. and C. B., were infants within five years, and that A. B. claimed in right of his said wife.

But if the replication is that all were infants, the plaintiffs are bound to prove that the husband, as well as the wife, was an infant, within five years next before the institution of the suit. And if the court below instructs the jury that they are not bound to prove it, it is error.

In such case, upon the return of the case to the court below, the parties will be permitted to amend their pleadings.

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This was an action of detinue, brought by *Alfred Edwards* and Martha his wife, late Martha Robbins, and John R. Robbins, and William Robbins, infants by their next friend Polly Robbins, all heirs and legal representatives of William Robbins, deceased, against *James Danley*, for a slave. The defendant below pleaded *non detinet*, and *actio non infara* five years. The plaintiffs took issue on the first plea, and filed a replication to the second, which was demurred to, and the demurrer sustained; and they then pled an amended replication, averring that when the cause of action occurred, *all* the plaintiffs were infants, and so continued till within five years next before the institution of the suit: To this replication the defendant rejoined, that *all* the plaintiffs were not infants, &c. To the rejoinder the plaintiffs demurred, and their demrurer being overruled, they took issue upon it.

The cause was tried by a jury, and upon the trial the defendant moved the court for the following instructions to the jury.

1st. That *all* the plaintiffs must have been infants, under age, at the time the cause of action accrued, and so continued till within five years next before the commencement of the suit, to entitle the plaintiffs to record.

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2d. That to entitle the plaintiffs to a verdict, it must have been proven that the defendant had possession of the slave at the commencement of the suit.

3d. That if the slave belongs to the administration of William Robbins, deceased, and never was in the possession of the plaintiffs, with the assent of the administration, the plaintiffs cannot recover.

4th. That all the personal property of an intestate belongs to the administrator of an intestate, until he parts with it, either by sale or distribution made with his assent, or by the decreee of a court of justice.

These instructions were all refused by the court; and the court instructed the jury, on motion of the plaintiff:

1st. That it was not necessary to prove that *Alfred Edwards* or Polly Robbins were within the age of twenty-one years, within five years next before the commencement of this suit.

2d. That it was not necessary to prove that the defendant had possession of the slave at the commencement of the suit.

3d. That the fact of Mary Robbins, former administratrix of William Robbins, acting as next friend to the infant plaintiffs in this case, is full evidence of her assent to this suit.

The jury thereupon found a verdict for the plaintiffs and from the judgment rendered thereon, the defendant appealed. No part of the evidence was incorporated in the record.

FOWLER, HALL, and CUMMINS & PIKE, for appellant:

Appellees instituted an action of replevy against appellant, in said Circuit Court, for a *negro man*. Appellant pleaded *non detinet*, to which plea appellees joined issue. Appellant also pleaded the statute of limitations, that said cause of action did not accrue within five years, &c., to which appellees replied that they were "*all*" infants under 21 at the time the cause of action accrued, and so continued infants as aforesaid, up to the day of in the year of and within five years before the institution of this suit, &c. a demurrer to this replication was sustained; and replication amended, to which the appellant filed his joinder. His joinder was demurred to; but the demurrer overruled, a jury came, and a verdict and judgment was rendered against the appellant. The appellant insists that said judgment should be reversed.

1st. Because the declaration was insufficient, containing no allega-

tion that the negro was a *slave* or the *property of the plaintiffs*, or property *at all*, or even was in *possession* of said plaintiffs. That on demurrer said declaration should have been adjudged bad. That the defects therein are not such as are cured by pleading thereto, or by verdict, either at common law, or by the statute of *jeofails*, *Vide* 3 *Bibb Rep.* 517, *Morton* vs. *Israel—Hardin's Rep.* 79, *Letcher* vs. *Taylor*.

2dly. Because the said Circuit Court, on said appellant's motion, on trial, ought to have instructed the jury, that it was necessary in order to justify a verdict for the plaintiffs, that they should have proved that they were *all* infants under twenty-one years, *as allegee in their replication*. The proof must correspond with the allegations.

3dly. Because said Circuit Court, on said appellant's motion, ought to have instructed the jury that if the property in controversy belonged to the administration of said deceased, and was never in the possession of the said appellees, with the assent of said administratrix, the said appellees could not recover; and that the personal property of an intestate belongs to his administrator, and the legal title and right to possession is in such administrator, and no other person, until parted with by sale, or distribution, under a decree of some competent court.

4thly. Because the said Circuit Court instructed the jury that it was not necessary for said appellees to prove *Alfred Edwards* and *Polly Robbins*, (two of said appellees) were under 21, &c.

5thly. Because the court instructed the jury that the fact of Mary Robbins, administratrix of the said William Robbins, deceased, acting in this suit as next friend to the infant plaintiffs, was full evidence of her assent to this suit; and consequently of property in the plaintiffs.

6thly. The record no where shows that the said Mary Robbins *was acknowledged in open court* by said minors as their next friend, or assented herself for her name to be used as such. *Vide Gey. Dig. p.* 106, *sec.* 1.

7thly. The jury was not sworn according to law. 3 *B. Com.* 365.

8thly. Their verdict does not respond to the issues. It finds the *negro man* to be the *property of the plaintiffs*, when no such fact is in issue; and it is in other respects variant and discordant.

9thly. The *issues themselves* were both *immaterial;* upon which no final judgment could legally be given, and from which the said appellees are entitled to no benefit. *Hard. Rep.* 79; 3 *Bibb. Rep.* 577.

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ADDITIONAL AUTHORITIES.—*Pope, Steele, & McCamp. Dig.* 382; *see also page* 216, *sec.* 12; *see* 1 *Bibb. Rep.* 604; showing that slaves pass to executors. 1 *Ch. Pl.* 120 *et seq.*

If heirs labor under disability, the statute ceases to run against them, *so long as they continue to hold the estate*, until these disabilities are removed; but on the qualifying of an executor, the privilege does not extend to him. The statute shall be construed to run from the adverse entry. *May's heirs* vs. *Slaughter*, 3 *Marsh.* 512.

Part of co-partners laboring under disability at the time of an adverse entry and possession of their lands, will not prevent the general statute from running against all. *McIntire's heirs* vs. *Funk's heirs*, 5 *Litt.* 36.

The infancy of one tenant in common, will not prevent the statute from running against his co-tenant. *Thomas* vs. *Machir*, 4 *Bibb.* 412.

In cases of joint rights, *all* the complainants must have labored under some legal disability provided for by the statute, to prevent the act from operating as a bar to all. *Smith &c.* vs. *Carney &c.*, 1 *Litt.* 297; *Dickey* vs. *Armstrong*, 1 *Marsh.* 39; *Allen et al* vs. *Beall's heir's*, 3 *Marsh.* 555; *Robertson* vs. *Smith's heir's*, *Litt. Sel. Cas.* 299; *Robert's heir's* vs. *Bridgway*, *Slid.* 394; *Milner* vs. *Davis*, *Slid.* 436; *Floyd's heir's* vs. *Johnson*, 2 *Litt.* 113; *South's heir's* vs. *Thomas' heir's*, 7 *Mon.* 61.

TRAPNALL & COCKE, for appellees:

The first error assigned is, that the "declaration does not show that the negro was a slave, or that he was the property of the plaintiffs."

The second count distinctly alledges the negro to be the property of the plaintiffs, but it is not necessary to alledge in so many words, that the negro was the property of the plaintiffs. They alledge they delived the negro to the defendant to be re-delivered, &c. They could have made no other allegation of property in them, if it had been a horse, or a bag of money, which was the subject of the suit. The declaration is a literal copy of the precedent in Chitty. There is no error in this assignment. If there were, it is cured by the statute of jeofails, and amendment. They could not have obtained the judgment without the proof of property.

It is assigned secondly for error that the court wrongfully overruled the defendant's demurrer, to the rejoinder of the plaintiffs. The de-

fendants withdrew their demurrer, and rejoined, and now cannot assign the judgment of the court upon the demurrer as error.

Third, that the court instructed the jury, that it was not necessary to prove the defendant was in possession at the institution of the suit. In this instruction there is certainly no error. See 2 *Starkie*, 494; 3 *Monroe*, 103; 1 *Wash.*, 308; 3 *Marsh.*, 278.

So he may prove judgment though the negro died before the demand. 2 *Starkie*, 474, *note* 2; *Martin's Rep.* 74.

The instructions are abstract; there is no evidence in the record, to which the instructions would apply.

The appellant assigns for error that the court overruled their motion to instruct the jury that the property belonged to the administration of the estate &c., until &c., This is all abstract, and had nothing to do with the case. The principle is correct in some respects, but there is no evidence in the record, and there was none in the case to which it could apply, and therefore was properly overruled by the court.—A party has no right to demand the opinion of the court upon abstract questions of law. 1 *Bibb*, 369; 4 *Bibb*, 100; 1 *Littell*, 232.

The jury were duly elected, empanneled, and sworn, as the record shows, in this certainly was no error. If there was, the verdict by twelve men cures it, under the stature of jeofails.

The verdict is explicitly given for the boy defendant sued for, and could not have been more certain.

The appellant assigns for error, that the court instructed that it was not necessary to prove that Polly Robbins, the guardian ad litem, or that *Alfred Edwards* the husband, one of the heirs, was under 21 years of age, five years before the institution of the suit.

The appellant pleaded the statute of limitations. The appellee replied that the plaintiffs were without the provisions and exceptions of the statute.

What was the proof in the case does not appear. Were any of the plaintiffs proven to be infants—is not shown. Did the proof show or conduce to show, that *Alfred Edwards* was under twenty-one years of age?

To this the record makes no response.

The law is, that the judgment of the court below is correct, until the contrary appears. 2 *Bibb*, 222; *Harper* vs. *Bell*, 4 *Monroe* 42; 1 *Bibb*, 3 *Marshall*, 322; 1 *Marshall*, *vol.*, — 233; 2 *Marshall*, 197.

The heirs of W. Robbins were in fact the plaintiffs, and they alone were entitled to the exception in the statute of limitations.

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The rights of an infant wife are certainly not barred by her marrying an old man. Here Edwards was only interested through his wife, and had no right to the negro, as he was a chose in action until reduced into possession.

It was only necessary to prove that the heirs of William Robbins were under 21 years of age within 5 years previous to the institution of the suit, and that the negro belonged to them, to entitle them to the judgment given. The court will presume this fact was proven.

LACY, JUDGE, delivered the opinion of the Court:

This is an action of detinue for the recovery of a slave. The plaintiffs in the court below claim title under their ancestor, William Robbins. The declaration contains two counts. The first count is founded on a supposed case of bailment, and the second upon possession of property in the plaintiffs, and conversion of it by the defendant. Upon the return of the writ, the defendant applied, and filed two pleas in bar of the action. The first was a plea of non-detinet, and the second plea of the Statute of limitations. An issue was taken by the plaintiffs upon the plea of non-detinet, and a replication put in to the plea of the Statute of limitations. The defendant demurred to the replication, and the demurrer was sustained. The plaintiffs then asked leave to plead over, which was granted; and they then filed an amended replication, to which there was a rejoinder, demurrer, and issue, and judgment entered up against the demurrer, and in favor of the joinder to the replication. Upon the issue thus formed the parties went to trial, and there was a verdict and judgment rendered for the plaintiffs, from which an appeal was prayed and taken by the defendant, and which he now prosecutes in this court. During the progress of the trial, the defendant filed several bills of exceptions to the opinion of the court below. In giving to the jury the instructions asked for by the plaintiffs, and in refusing to give them the instructions that were asked for on behalf of himself.—These bills of exceptions are all regularly signed by the judge, and made part of the record. All the exceptions except two were given by the court upon mere abstract questions that were raised during the trial. The bills of exceptions do not contain, nor incorporate any part of the evidence, or testimony that was adduced upon the trial, this court is wholly unable to see the relevancy or applicability of the instructions given or refused. In this stage of the enquiry, it becomes

important to determine whose duty it was to incorporate such part or portions of the evidence as were essentially necessary to present the questions of law or testimony that were drawn in controversy by the proof or pleadings. In deciding this point, we necessarily dispose of all the questions raised by the assignment of errors. The science of correct, special pleading has heretofore been fully explained by this court, and it is deemed unnecessary at present to enter again upon that subject. In every legal enquiry, he who holds the affirmative of the proposition voluntarily takes upon himself the burden of proof, and he is bound to establish his proposition, or fail in his action. The party holding the affirmative must prove it; and this presumption arises not only by intendment and operation of law, but by the voluntary act and choice of the party himself. By applying these plain and obvious principles to the case now under consideration, we shall readily perceive whose duty it was to set out so much of the testimony or proof as would properly raise the question of law or evidence contained in the bill of exceptions. In *Whitside* vs. *Jackson* (1 *Wen.* 418) it is decided that the court cannot take notice of any matter that is not specially stated in the ground of the exceptions. And in *Jackson* vs. *Caldwell*, (1 *Crow.* 622,) it is held that a bill of exceptions does not draw the whole matter into examination, but only the the points upon which it was taken; and that the party excepting must lay his finger upon the points which arise either in admitting or refusing evidence, or in a matter of law arising from a fact not denied, in which he is overruled by the court. *Frier* vs. *Jackson*, 8 *John. Rep.* 495.

This is an action of detinue for the recovery of a slave mentioned in the declaration, and the writ lieth, saith my Lord Coke, where any man comes to the goods by delivery or finding. 2 *Co. Lit.* 286, *b.* The plaintiff shall recover the thing detained, and therefore it must be certain that it may be known. *Coke entries*, 170, *b.*; 10 *Rep.* 119, *b.*; *Glanville*, *title* 10, *chapter* 13; 3 *Black. Com.* 151. "In order to ground an action of detinue which consists in detaining, four things are necessary: First, that the defendant came into possession of the goods; second, that the plaintiff have property; third, that the goods themselves be of some value; Fourthly, that they be ascertained in point of identity." In detinue, the plaintiff must prove a general or special property in the goods, and a detainer by the defendant. 2*d Starkie on Evidence*, 493. Under the plea of non-detinet the defendant may give in evidence any matter which shows he is not guilty of the de-

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tainer. 1 *Salkeld*, 223. Actual possession by the plaintiff is not necessary to maintain detinue. *Tunstall* vs. *McClelland*, 1 *Bibb*, 186. To entitle the plaintiff a verdict proof of possession in the defendant, anterior to the bringing of the suit, is sufficient, unless he has been lawfully dispossessed; and that is, for him to show. *Burnly* vs. *Lambert*, 1*st Washington*, 308, Formerly, it was held that detinue did not lie, unless the defendant came lawfully into possession; but that opinion is now overruled, and the action can be maintined on a tortious taking. *Kettle* vs. *Brunson*, *Willes*, 120, the reason assigned is, if that was not the case, a party might be greatly injured, and have no adequate remedy; for in tresspass or trover damages alone can be recovered, and the thing detained may be of such a description that a judgment for damages would not be complete compensation, &c. *Jackson* vs. *Preston*, *Cameron & Norwood*, 464. In detinue the plaintiff may have judgment for damages and costs, even though the property be restored to him. So he may have judgment, though the slave for which the action is brought die after demand. 1*st Martin R.* 18; *Shippen* vs. *Hargrove*, 1*Martin*, 74; *Carrel* vs. *Early*, 4 *Bibb*, 270.

This action was formerly very little used in England, because the defendant was permitted to wage his law; that is, to exculpate himself on oath, and thereby defeat the plaintiff of his remedy, which privilege was originally grounded on the confidence that the bailor reposed in the bailee, and the like, from which arose a strong presumption that the defendant was worthy of credit. 3 *Black. Com.* 152.—Since the Statute 3*rd* & 4*th William* IV, *c.* 42, *sec.* 13, abolishing wager of law in all cases, the section is now freqently adopted, and in very general use. 1 *Ch. Pl.* 140, 1, 2. It has already been observed that the declaration contains two counts: one upon bailment, and the other upon possession of propety by the plaintiffs, and a supposed conversion by the defendant; and the plea of non-detinent goes to the whole cause of action, and puts in issue the detainer of the property. The plea of the Statute of limitations goes to defeat the plaintiffs' right to recover, upon the ground that if the right of property, whether general or special, ever existed in the plaintiffs; that the remedy by which that right could be enforced is barred and cut off. And consequently, that they have no good cause of action now remaining.

To the plea of the Statute of limitations, the plaintiff put in his replication, which alleges "that their right of action is not barred by the Statute of limitations, because they fall within its express saving.

The defendant's plea of the Statute of limitations, is, "that the plaintiffs ought not to have or maintain their aforesaid action thereof against him; because he says the said several supposed causes of action, in the said declaration mentioned, did not, nor did either of them accrue to the said plaintiffs at any time, within five years next before the commencement of this suit, and this he is ready to verify, wherefore, &c. The replication to this plea asserts, "that the plaintiffs ought not to be precluded, because they say that, at the time the cause of action did accrue, all the plaintiffs were infants, and under the age of 21 years, and so continued infants as aforesaid up to the day of in the year of and within five next years before the institution of this suit; and this they are ready to verify wherefore, &c."—upon which replication there was an issue taken.

The declaration shows that the plaintiffs who brought the action, were *Alfred Edwards*, and Martha his wife, late Martha Robbins, John R. Robbins, and William Robbins, infants who sued by their next friend, Polly Robbins, all heirs and legal representatives of William Robbins, deceased. The replication avers that all these plaintiffs were infants, at the time, and under the age of 21 years, within five years next before the institution of this suit. The defendant denies this fact, and that is the issue to be tried by the jury.

The plaintiffs have taken upon themselves the burden of proof, and they are bound to prove that all the persons who sued were infants, when the cause of action accrued to them; and their right of action depends upon establishing that fact. It is true, that the plaintiffs might have put in a special replication, and have averred that Martha Edwards, late Martha Robbins, and the two other infants heirs of William Robbins, deceased, were under the age of 21 years, within five years next before the institution of this suit; and that *Alfred Edwards* claimed though the right of his wife. This they did not, however, choose to do. The replication asserts that all the plaintiffs were infants, and issue is taken on that fact; and of course the plaintiffs are bound to prove the allegations as laid. They hold the affirmative of the issue, and cannot be permitted to escape from the legal presumption that it imposes. What now was the instruction the court gave upon this point? On motion of the plaintiffs the court instructed the jury, that it was not necessary to prove that *Alfred Edwards* or Polly Robbins were infants within the age of 21 years, within five years next before the commencement of this suit.

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The declaration avers that Polly Robbins sued as the next friend of John R. Robbins, and William Robbins, infant heirs and legal representatives of William Robbins, deceased, and of course she was a mere nominal plaintiff; but it does not show that *Alfred Edwards* sued in the right of his wife: it merely avers that Martha, his wife, was late Martha Robbins. Therefore, the instruction of the court, that it was not necessary to prove that Polly Robbins was an infant under the age of 21 years, was correct; because the declaration shows in what capacity she sued, and her infancy was not put in issue by the replication; neither was it necessary to put in issue the infancy of *Alfred Edwards*, but the replication has expressly done so; and consequently the plaintiffs had no right to recover unless *Alfred Edwards*, together with the other infant heirs was saved by the exception in the Statute. The court, however, expressly say, that it was not necessary to prove the infancy of all the plaintiffs; whereas, that was the express point in issue, as averred in the replication; and therefore the instruction upon the point was evidently erroneous. The right of the plaintiffs to recover depended upon the fact of the infancy of all of them, and this they voluntarily assumed to prove. The instruction of the court directly contradicts the facts asserted in the replication, and releases the plaintiffs from the affirmative issue, which they held, and were bound to establish. If it was not necessary to prove the infancy of all of them, then why prove the infancy of any one of them? For if it was not necessary to prove that *Alfred Edwards* was an infant, neither was it necessary to prove that Martha Edwards, late Martha Robbins, or that John R. Robbins, or William Robbins, were infants; consequently, the defendant's plea of the Statute of limitations did not form a valid bar to the plaintiffs' right of action.

The Statute of limitations is a good plea, and if the plaintiffs' cause of action comes within the operation, the remedy by which that right can be enforced is forever destroyed and extinguished.

It necessarily follows, from these positions, that the opinion of the Circuit Court was manifestly erroneous in refusing, first, to give the instruction asked for by the defendant, which was, that to entitle the plaintiffs to recover, it was necessary to prove that they were all infants, and the opinion was equally erroneous in giving the instructions applied for by the plaintiffs, that it was not necessary to prove that *Alfred Edwards* was under the age of 21 years, within five years next before the institution of this suit.

As the decision of this point disposes of the whole case, the court does not deem it necessary to examine the other questions raised upon the assignment of errors. They would barely remark that all the other instructions, either given or refused, are mere abstract propositions, and, whether wright or wrong, could have had no effect upon the verdict, so far as the record shows. There is no proof embodied in the bills of exceptions taken by the defendant, and consequently the judgment of the court below upon these points must be presumed to be in accordance with the testimony adduced upon the trial; for the rule is that every thing is to be taken in support of the verdict, and judgment of the court below; and nothing is to be presumed against its legality, except what affirmatively appears upon the record, or which the court above is bound judicially to take notice of. It is because the pleading affirmatively shows that the opinion of the court below was erroneous upon the issue made up by the parties, that it is now declared to be erroneous.

The judgment of the court below must therefore be reversed with costs, the cause remanded to be proceeded in agreeably to the opinion here delivered; and that the parties respectively, if they shall ask leave so to do, be permitted to amend their pleading.

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LEDBETTER *vs.* FITZGERALD.

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BENJAMIN M. LEDBETTER *against* JESSE FITZGERALD.

APPEAL *from Pulaski Circuit Court.*

Actual seizin is not necessary in this country, to maintain trespass or ejectment.

If a man enter into lands, having title, his seizin is not bounded by his occupancy, but is to be considered co-extensive with his title or grant. If he enter without title, his seizin is confined to his possession by metes and bounds.

A party who has title to lands may maintain trespass, although not in actual possession, against another not in actual possession of the premises. Either actual or constructive possession is sufficient to maintain trespass.

In trespass, it is not necessary to prove the boundaries and locality of the premises on which the trespass was committed, by a survey of the county surveyor or his deputy. The Territorial law, which provides that no other survey shall be evidence, applies only to suits where the *title* to land is in dispute.

The identity of the close, and the possession, are capable of being established by any person who knows the lines and corners, or who can prove the plaintiff's possession.

This was an action of trespass *g. c. f.* The plaintiff below, (*Ledbetter*,) produced on the trial two witenesses to prove the identity of the premises mentioned in the declaration, and his possession thereof. Walker testified, that *Ledbetter* there lived, and had for a year or two continuously lived on the premises mentioned; that the places described by other witnesses, where the timber was cut, were on the same quarter section; that he knew it to be the same quarter section, from the marks and numbers made by the surveyors at the corners, to designate the numbers of the section, &c., and from plats furnished him from the office of the Surveyor General, which agreed with the numbers and marks found on the trees at the corners; that he had been much in the habit of tracing lines and examining corners of the public surveys in the vicinity of said tract; that he used a pocket compass; and was satisfied in his own mind, that the section upon which said *Ledbetter* lived, was the same described in the declaration.

Graham stated that he was a regular surveyor, and followed surveying as an occupation; and that about three months before the trial, he was called upon by said *Ledbetter* to lay off a race track, which he did, and that at that time *Ledbetter* was residing on the quarter section described in the declaration, on which quarter section the said

race track was laid off; that he surveyed the northern and eastern boundary lines of said quarter section, at the same time, on the request of said *Ledbetter*. He further stated that he was not the county surveyor of the county of Pulaski or his deputy, nor did he make the survey under the authority of the United States, nor by mutual consent of the parties to the suit.

On motion of the defendant below, all this evidence was excluded; and the plaintiff offering no further proof of identity or possession, the case went to the jury, who found for the defendant, and the plaintiff appealed to this court.

FOWLER, for the appellant:

It is contended by the plaintiff that the evidence offered by him was strictly legal, and ought to have been admitted; and on its exclusion, there being no other evidence given, to establish his possession of the land, the jury, under the instructions of the court and from the evidence before them, were bound to find against him. Had this evidence been admitted, a recovery in his favor would have been certain. The only color or pretence to sustain its decision, by the court below, was a Statute of 1813, found in *Pope, Steele & McCamp. Dig. p.* 540, *sec.* 8, which only applies to cases where the *title to land is in dispute before the Court*; and could possibly have no application to this case. In this case, *no title was in dispute; Fitzgerald* had pleaded no plea of *liberum tenementum*, or other plea of justification; he had rested his case upon the single plea of *not guilty;* and upon that could not question the plaintiff's *title*. Proof of bare *possession* was sufficient to authorize *Ledbetter* to recover: his title had been admitted by the plea. And it is only in cases of *title contested*, that the Statute could be interposed. The common law, in all other cases, standing unchanged; consequently *any evidence* showing *Ledbetter's possession* satisfactorily to the jury, and the commission of the trespass, would entitle him to a verdict. All Statutes in derogation of the common law must be strictly construed; this Statute is in dergation thereof, limiting and restricting the known rules of evidence, in force "time out of mind;" and therefore it cannot be construed by any rules of construction recognized by the laws, to any character of case or question whatever, except where *title is in dispute*.

CUMMINS & PIKE, *contra:*

The appellee contends that the evidence of Walker and Graham

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was properly excluded. The Statute of Missouri, of 1813, in force in this State, provides that "the county surveyor shall perform all orders directed to him by any court of record for surveying or resurveying any tract of land, the title of which is in dispute or litigation before said court, &c."—and that he shall "keep a record of all surveys made by him, and furnish a copy of any survey when required." *Dig. p.* 539. It is further provided, that "no survey or resurvey, hereafter made by any person except the county surveyor or his deputy, shall be considered as legal evidence in any court of law or equity within this Territory, except such surveys as are made by authority of the United States, or by mutual consent of parties."

Walker made no survey, but his testimony is derived altogether from information furnished him by others. And had Graham surveyed the whole quarter section, and produced in court a plan of such survey, under the law it would not have been legal evidence. How much less the evidence which he did give?

In the case of *Blake et al* vs. *Doherty et al*, 4 *Cond. Rep.* 632, the Supreme Court of the United States decided, that a demarkation or private survey, made by directions of a party interested under a grant, is not admissible as evidence.

Lines can only be proved by record, and not by parol evidence of any kind, further than to ascertain that the marks on the land correspond with the calls contained in the record. *Cherry & Steele* vs. *Boyd*, *Lit. Sel. Cas.*

A surveyor's report of the complainant's claim, as laid down according to his directions, without a copy of his patent, or original survey, is no evidence of his boundary. 1 *Lit.* 76, *Rice's devisees* vs. *Welch.*

DICKINSON, *Judge*, delivered the opinion of the Court:

This is an action of trespass *quare clansum fregit*. The declaration is in the usual form, and contains but one count. On the return of the writ the defendant appeared, and plead NOT GUILTY, on which there was an issue taken, and judgment rendered for the defendant, from which the plaintiff appealed to this court. During the trial of the cause the plaintiff, in support of his action, introduced John H. Walker and John E. Graham, two witnesses, to testify as to the possession of the premises described in the declaration, whose testimony was objected to by the defendant upon the ground that none but the county surveyor, or the surveyor who originally run off and

marked the tract, was competent to prove the identity of the land upon which the trespasses were alleged to have been committed. The court, on motion of the defendant, excluded the testimony, and would not permit it to go to the jury, to which the plaintiff excepted, and filed his bill of exceptions, spreading his proof upon the record. One of the witnesses stated he never surveyed the said tract of land, or assisted in its survey; but that he knew it from the lines and corners, to be the same tract or parcel of land upon which the plaintiff lived, and upon which the trespasses were alleged to have been committed; and that the places described by the other witnesses, where the timber was cut by the defendant, are upon the same quarter section, and that he knew it was the same from the marks and numbers made by the surveyors at the corners to designate the numbers of the section; and also from the plats furnished him from the office of the surveyor general, which agreed with the numbers and marks found on the trees: that he had been much in the habit of tracing lines and examing corners in the vicinity of said land, and that he used a pocket compass, and was satisfied that the quarter section upon which the plaintiff lived was the same as described in the declaration. The other witness testified that he was a regular surveyor, and that about three months ago he was called on by the plaintiff to lay off a race track, which he did, which is upon the same quarter section above described, and upon which the plaintiff was residing. The witness further stated that he surveyed the northern and eastern boundary lines of the same land at the request of the plaintiff: he further stated that he was not the county surveyor of the said county of Pulaski nor his deputy, nor did he make the survey under the authority of the United States, or by the mutual consent of the parties of this suit. This was all the evidence offered in the cause, showing that the plaintiff resided upon the land, upon which the trespasses were alleged to have been committed. In order to entitle the plaintiff to a verdict in an action of trespass, possession is essential to be proved; possession alone is sufficient against a wrong doer without regard to the title. *Chambers* vs. *Donaldson*, 11 *East*. 63; and 5 *Bing*. 9. And again—a person who has a right to enter and take possession, may maintain trespass against one who being wrongfully in possession at the time of the entry continues in such possession. See *Butcher* vs. *Butcher*, 7 *B. & C.* 390; *Starkie*, 803.

Every unwarrantable entry on another's soil, the law entitles a trespass by breaking his close; for the words of the writ of trespass, com-

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manding the defendant to show cause, are *quare clansum querentis fregit*. Every man's land is in the eye of the law inclosed, and set apart from his neighbor's, either by a material or an invisible boundary; and every such entry, or breach of another's close, carries with it some damages. It is evident from these authorities that the plaintiff must have proved possession in the land upon which the trespasses were committed before he was entitled to his action.

This is the ancient doctrine of the common law, and it was founded upon the union of title of seizin in the deed, either by actual entry and delivery of seizin, or by intendment of law, as by conveyances under the Statute of uses; but the principle here established is unapplicable to the condition and situation of our country, as has been repeatedly ruled by the Supreme Court of the United States, and most of the Supreme Courts of the Union. So far as regards trespass, ejectment, or the like actions, actual entry or possession in many cases is declared to be wholly impracticable and impossible, especially as regards the possession of the grantee of wild and uncultivated land; and the entry in such cases, if it were practicable, could answer no beneficial purpose. It would create no notoriety: it could be evidence of vicinage of a change of property. An entry therefore would be a vain and useless, and in many instances a perilous act, and the law does not require a party to do a vain and impossible thing. It is held in *Green* vs. *Liter*, 102, *Peters' Cond. R. vol.* 3, that if a man enter into lands having title, his seizin is not bounded by his occupancy, but is to be held to be co-extensive with his title or grant.

If a man enter without title his seizin is confined to his possession by metes and bounds. A party having title to land, although not in actual possession thereof, may maintain trespass against another not in actual possession of the premises. *Van Rensalear* vs. *Radcliff*, 10 *Wendell*, 639. Trespass may be supported by the owner of wild lands, although he is not in actual possession. *Kenedy* vs. *Wheatley*, 2 *Haywood*, 402. These authorities abundantly prove that a party need not be in actual possession to maintain trespass—a construction possession is sufficient for that purpose; and therefore a party having either actual or constructive possession in the premises, may maintain trespass; for the cause of action or injury is founded upon the wrong or force committed upon the land without regard to the title.

The only question submitted for our decision is, whether the court properly excluded the testimony that was offered by the plaintiff to

prove his possession. The witnesses both testify that he was in actual possession of the premises. One of them knows the fact from an examination of the lines and corners of the public survey; and the other run off the land, and is a surveyor by occupation.

It is difficult to perceive upon what ground the court excluded the evidence, for it unquestionably proves the possession of the plaintiff, and was all the evidence offered as to that fact. It is contended for the appellee, that the testimony was properly excluded upon the ground that neither of the witnesses were shown to be either the county surveyor or the deputy of such surveyor, or that they had run off the land under the authority of the United States, or that the survey was made by the mutual consent of the parties. To support this position, the 4th section of an Act, in relation to the duties of county surveyor, approved December, 1813—*Arkansas Digest*, 639—is referred to, which declares, that it shall be the duty of the said county surveyor to execute and perform all orders to him directed by any court of record, for resurveying any tract of land, the *title* of which is in dispute or litigation before said court: also all orders of survey for the partition of real estate. By the 8th section of the same act, it is declared no survey or resurvey, hereafter made by any person except the county surveyor or his deputy, shall be considered as legal evidence in any court of law or equity within this territory, (State) except such surveys are made by the United States, or by the mutual consent of the parties." It is admitted that these are all the provisions of the Statute bearing upon the title.

To what do they relate? and what was the object of the Legislature in enacting them? It is simply defining and regulating the duties of the county surveyor, and enjoining it upon him to execute and perform all orders to him directed by any court of record, for surveying or resurveying any tract of land, the title of which was in dispute or litigation before such court; and when he has thus executed the order, it is declared to be legal evidence in law or equity: but both of these provisions clearly and expressly relate to that class of cases where the title is in dispute or in litigation, and have no reference to cases where the injury complained of is done to the possession, the title of which, as in this instance, is in no way involved in the pleadings. In trespass the party is entitled to maintain his action if he holds possession, and it is for the injury done to that possession, that he seeks redress.

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If the position contended for by the defendant be correct, then no one could maintain an action of trespass, unless there was an order expressly made by the court to have the land surveyed; and upon the return of that survey the possession alone could be proved—a doctrine which we are by no means prepared to admit; for the identity of the close and the possession is capable of being established by any person who knows the lines and corners, or who can prove the plaintiff's possession.

These facts were clearly proved upon the trial, and to have excluded such testimony from the jury was depriving the plaintiff of all right to recover, although injury was clearly established; and consequently the decision of the court, in excluding the testimony offered by the plaintiff, was evidently erroneous.

The judgment of the Circuit Court of Pulaski county must therefore be reversed, and set aside with costs; and this case remanded for further proceedings to be had according to law, and not inconsistent with this opinion.

ISAAC HUGHES *against* BENNETT H. MARTIN AND OTHERS.

ERROR *to Johnson Circuit Court.*

Where the affidavit to hold to bail, in an action of debt on writing obligatory, states that the action "is founded on a real subsisting debt, and this affiant verily believes that the sum of six thousand dollars as bail, will not be more than satisfy the debt and costs," it is sufficient, under the Territorial statute.

Where a writ is directed to the sheriff and served by the coroner, it is not a legal ground to dismiss the suit on motion.

Where a suit is brought against persons residing in different counties, if one of the defendants resides in the county where the suit is brought, it is sufficient; and if not, it must be taken advantage of by plea to the jurisdiction, and not by motion to dismiss.

This was an action of debt, upon a writing obligatory, brought by the plaintiff in error against the defendants in error; and a capias ad respondendum issued on the following affidavit, made the plaintiff, to wit: "That the action of debt that he is now about to institute, against the defendants, is founded on a real subsisting debt, and this affiant verily believes that the sum of six thousand dollars as bail, will not be more than will satisfy debt and costs."

A capias thereupon issued to the sheriff of Johnson county, which was served on *Wooster*, one of the defendants, by the coroner of said county; and a counterpart issued to Pope county, which was served on the other defendants.

At the return term, *Wooster* separately, and the other defendants jointly, moved to dismiss the suit, for reasons filed in writing, which motions were sustained, the suit dismissed, and judgment for costs given against the plaintiff, from which he appealed.

LINTON, for the appellant:

No cause alleged in either of the written motions can be sustained. It is believed from the declaration and writing obligatory there set out, no affidavit was necessary to hold to bail, and the filing an affidavit was *ex abundante cautela* and therefore could not vitiate, but if the affidavit was necessary it was both good in form and substance. *Digest* page 317, sec. 11 and 12. As to the writ issuing contrary to law, it is only necessary in addition to sections last referred, to refer to sec. 18;

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also page 312, *of the same book.* Be that as it may it is contended that if the court below had jurisdiction of the subject matter, but no jurisdiction of the persons of the defendants, the defendants could only have availed themselves of their privilege by a plea in abatement and that sworn to. See *McKee* vs. *Murphy* and the authorities there cited, *ante* page 56. It is further contended that if the court dismissed said suit for want of jurisdiction, the court below erred in giving judgment for cost—see case last referred to.

It is contended that if a writ should irregularly issue, or the sheriff should make a defective return on a good writ, it would be error or defective writ. The court could only quash the return or award an alias writ: the court will always go back to the first error, but if any thing remains that is good, the party will not be driven out of court, but will be left to mature his case from that which is good: in England the original writ was the inception of the action; in Arkansas the declaration: See digest, page 319, sec 18.

CUMMINS & PIKE, *contra.*

The defendants in error contend that the decision of the court below was correct. The plaintiff in error admits that perhaps the affidavit is defective, but contends that an affidavit was altogether unnecessary, and therefore the writ properly issued.

The first question therefore presented to the court is, is it necessary, in an action of debt upon a bond, that an affidavit should be filed, to au thorize the issuance of a *capias ad respondendum*

The statute upon which the practice in this respect must be founded, is in the following words: "In all actions of debt founded on any judgment, writing obligatory, bill, or note in writing, for the payment of money or other property, in actions of covenant, and in actions on the case where the plaintiff makes affidavit or affirmation of a real subsisting debt, and of the sum in which he verily believes the defendant ought to give bail to secure such debt and costs," he may sue out a capias ad respondendum. *Dig.*, page 317.

It is admitted that according to the common practice of the country, a capias has constantly issued in actions of debt upon notes or bonds, without affidavit, and the true construction of the law has been consided to be that an affidavit is only required in actions on the case. Common error, however, does not create law, and the defendants contend that by the true and natural construction of the whole sentence an affidavit is required in every action mentioned in it.

Wherever the statute law of any of these free states or territories had innovated upon the English law, it is proper to construe the statute by which the change is made, with reference to its bearing upon the rights of the citizen. It is not to be imagined that the common law or statutes of England, were more tender and careful of the rights of the *subject*, than those of our free government are of the rights of the citizen. The spirit of our laws is to liberalize—to guarantee the freedom of all, and to put no man without good reason, in the power of another.

In England no arrest was allowed except for *crimes* and in actions of *trespass*, until the *statute of Marlbridge*, 52 Henry III, c. 23, which allowed the writ of capias in actions of account; 25 Edw. III, sec. 5, c. 17, first gave it in *debt* and *detinue*: 19 Henry VII, ch. 9, in *case* and *assumpsit*: 12 Geo. I, c. 29, required an affidavit of a cause of action of £10 or upwards; increased by 7th and 8th Geo. IV, c. 71, to £20. See 1 *Tidd.* 145; 3 *Ch. Prac.* 323, 4, 5.

In England an arrest without an affidavit is utterly void, and no supplementary affidavit is allowed: 3 *Ch. Prac.* 332. The affidavit must be *certain to every intent*—of a subsisting debt—of the *equitable* and not the legal debt—and so worded that it would support an indictment for perjury: *Ch. Prac.* 334; 1 *Tidd.* 194, 195.

There must be an affidavit where the suit is on a note or bond, and it must state the sum *actually due* thereon: *Ch. Prac.* 334; 1 *Tidd.* 195.

It certainly was not intended by the legislature that our statute should be less regardful of the right of personal freedom, than the statutes of England—and if the statute under consideration will bear two constructions, the court will incline to interpret it in such a way as shall be most consistent with the general spirit of our laws and institutions. The different clauses of the sentence are only separated by *commas*, and manifestly there is no impropriety in construing the last clause as applying equally to each of the three preceding. There are obvious reasons why it should be so construed. The mere fact of a party being indebted, cannot subject him to imprisonment before judgment. Two things are required by the affidavit—first, a showing of indebtedness—second, of the sum in which the plaintiff verily believes he should be held to bail, *in order to secure the debt*. It must appear from the affidavit, that there is reason to fear that without the capias the debt will be lost. It is this showing, not the allegation of indebtedness, which warrants the arrest. Is there any reason why this showing

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should not be made as well in actions on bonds as on simple contracts? Did the legislature intend to declare that so soon as the creditor should obtain from his debtor a written acknowledgment of his debt, he should have the power to imprison him, or did they not rather intend that the debtor should be incarcerated only when the creditor has good ground to apprehend fraud or evasion? Clearly the latter. And by the constitution even a judgment gives no right to imprison.

Grant that a capias may issue without affidavit, and what consequences result? The note by our law is not required to be filed, and the only evidence submitted to the clerk is the declaration. It is urged that the note or bond is evidence of the debt or duty, not to be controverted or denied except on oath. But we have already shown that indebtedness is not sufficient—and the note or bond is not evidence that the plaintiff is in danger of losing his debt. Admit that the note or bond is evidence of the debt, which it is not except in certain cases—yet the note or bond not being filed, the declaration, on which alone the capias issues, is not evidence of the debt.

Admit this construction, and a declaration may be filed with ten counts, all fictitious but one, and if each count is on a note for a thousand dollars, the defendant may be held to bail in the sum of ten thousand dollars. The plaintiff may declare on a penal bond, for the penalty of a hundred thousand dollars, and demand bail in that sum, while the damages he has sustained, the equitable debt due him, may not be a hundred.

The law might always be evaded—for I might join with a count on a real subsisting simple contract debt, a count on a fictitious note, and so hold to bail on my simple contract debt.

I would have in my power the liberty of every man—for it would be only necessary to file a declaration on a fictitious note, for a million of dollars, or as much more as I pleased, and demand bail on that amount. What remedy would there be? None. I am not required to file the note until court—and the bail is not exorbitant, from the face of the declaration.

That the note is evidence of the debt is no reason why a capias should issue, because it is as much evidence in assumpsit as in debt—and a bond is as much evidence in covenant as in debt. Assumpsit and debt, and covenant and debt, are concurrent remedies on many writings. Did the law intend that the plaintiff should have the right

to imprison in one form of action, when in another form of action on the same instrument he has it not?

No reason can be urged why if an affidavit is required in case, it should not also be in covenant. They both sound in damages—and it is not possible to decide from the face of the instrument, what is "*the real subsisting debt.*" Connect the clause requiring an affidavit with the clause mentioning actions of covenant and by all the rules of construction you must also connect it with the first clause. Nor in an action on a penal bond does the "real subsisting debt" appear on the face of the bond, for it is in reality an action for damages, bearing generally a very small proportion to the penalty. Nor does the face of any bond or note show "the real subsisting debt," because it may be wholly or in greater part paid.

The defendants therefore conceive that in the suit below, it *was* necessary for the plaintiff to file an affidavit, in order to warrant the issuing of a capias.

Does the affidavit filed comply with the requisitions of the law? Is it one upon which a capias could issue?

The substance of the affidavit filed is as follows; "That the action of debt that he is now about to institute is founded on a real subsisting debt, and this defendant verily believes that the sum of six thousand dollars as bail, will not be more than will satisfy debt and costs." The affidavit required by the statute is, of "a real subsisting debt, and of the sum in which he verily believes the defendant *ought* to give bail to secure such debt and costs." The affidavit filed does not follow the statute, nor does it show, even by implication or reference, that bail was *necessary*, "in order *to secure* the debt and costs." It is a mere affidavit of indebtedness, and wants the very requisite which alone gives the right to abridge the personal liberty of the debtor.

That the objection was properly made by motion, see 1 *Tidd.* 181; 3*d Ch. Pr.* 368. It is not matter in abatement, but shows the writ to be unauthorized and wholly void. The motion to dismiss was therefore properly sustained.

Upon *Wooster*, even if the issuing of the writ had been authorized by law, there was no legal service. The writ against him was directed to the *sheriff*, and served by the *coroner*. By the general provisions of our law, all process is to be directed to the *sheriff*. *Dig. p.* 316, 317. The coroner is authorized to serve writs and process, when the office of sheriff is vacant, or when the sheriff is a party to the suit, interested

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in the suit, related to either party, or prejudiced against either party. *Dig. p.* 136. And when both sheriff and coroner are disqualified, the court is to direct the process to elisors.

Process can only be served by the officer to whom it is directed, or his deputy. *Howe's Pr.* 93, 94; and authorities referred to below.

If the sheriff is disqualified, the process must be *directed* to the coroner. *Howe's Pr.* 94; *Colby* vs. *Dillingham et al.* 7 *Mass.* 475; *Weston* vs. *Coulson*, 1 *Black. Rep.* 506; *Wood* vs. *Ross*, 11 *Mass.* 271; *Brice* vs. *Woodbury et al.*, 1 *Pick.* 362.

There being in this case no showing of any kind, which under the law would authorize the issuing of the writ to the coroner, this court is now bound to presume that the sheriff was neither dead, out of office, or disqualified. A service by the coroner in such case is no more than a service by any private person, and such mistake is fatal—for a coroner cannot serve a writ, if the sheriff or his deputy may. *Gage* vs. *Graffam*, 11 *Mass.* 181; *Merchants' Bank* vs. *Cook*, 4 *Pick.* 405.

This fault may be taken advantage of, either by plea in abatement, or motion to dismiss the action, if made before appearance entered.—*Campbell* vs. *Stiles*, 9 *Mass.* 217; *Gage* vs. *Graffam*, 11 *Mass.* 181; *Pollard et al.* vs. *Dwight et al.* 4 *Cranch* 421.

The motion to dismiss therefore, as to *Wooster*, on this ground also, was properly sustained: And the suit being pending in Johnson county, and dismissed, as to the defendant residing in that county, the court had no jurisdiction of the defendants residing in Pope. The case stood, after the dismsssal as to *Wooster*, precisely on the same footing as though it had been originally commenced in Johnson county, against defendants residing in Pope, and by process only directed to the sheriff of Pope, in which case the Circuit Court of Johnson county would clearly have had no jurisdiction. But the case being dismissed properly on other grounds than want of jurisdiction, costs were properly adjudged.

RINGO, *Chief Justice*, delivered the opinion of the court:

This is an action of debt founded upon a writing obligatory, instituted by the plaintiff in error against the defendants, in the Circuit Court of Johnson county. The plaintiff filed in the clerk's office his affidavit, which is subscribed and sworn to before the clerk, stating "that the action of debt that he is now about to institute against *Bennett H. Martin*, *Andrew Scott*, *John Macbeth*, *Thomas Strickland*, and *Sheldon Wooster*, is founded on a real subsisting debt; and this affiant

verily believes that the sum of six hundred dollars as bail will not be more than will satisfy the debt and costs." Whereupon a writ of capias ad respondendum was issued, directed to the Sheriff of Johnson county; endorsed for bail in said sum, and a counterpart thereof was regularly issued, directed to the Sheriff of Pope county, which appears to have been regularly executed on all of the defendants except *Wooster*, upon whom the former writ appears to have been executed by the Coroner, instead of the Sheriff of Johnson county, to whom it was directed.

At the return term of said writs, the defendant *Wooster* without appearing to the action, filed a separate motion to dismiss the suit on the following grounds:

1st, That there is no such affidavit filed as is required by law, to authorize the issuing of a capias in this suit.

2nd, That said writ hath not issued by authority of law, but contrary to, and in violation thereof.

3rd, That the writ of capias issued against this defendant is issued by the Sheriff of Johnson county, and served by the Coroner of said county without warrant of law.

4th, That there is no legal and valid service of said writ on defendant.

5th, The court has no jurisdiction of the case.

The other defendants also filed their motion jointly to dismiss the suit on the following grounds:

1st, That there is no such affidavit filed as is required by law to authorize the the issuing of the writ of capias in this suit.

2nd, That said writ hath not issued by authority of law, but contrary to, and in violation thereof.

3rd, That the court has obtained no jurisdiction of the case.

Upon the hearing of said motions, the court dismissed the suit, and gave final judgment for the defendants, that they go hence thereof without day, and recover of the plaintiff their costs of suit. The plaintiff excepted to the opinion of the court sustaining said motions, and filed his bill of exceptions, which composes a part of the record, and prosecutes this writ of error to reverse said judgment.

There is an assignment of errors by the plaintiff, which is joined by the defendants.

The first question presented by the record and assignment of errors,

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is this: Is the affidavit of the plaintiff sufficient to authorize the issuing of the capias ad respondendum against the defendants?

The act of 1807, *Ark. Dig.* 317, *S.* 12, contains this provision—"In all actions of debt founded on any judgment, writing obligatory, bill or note in writing, for the payment of money or other property, in actions of covenant, and in actions on the case, where the plaintiff makes affidavit or affirmation of a real subsisting debt, and of the sum in which he verily believes the defendant ought to give bail to secure such debt and cost, (which affidavit may be taken before any justice of the peace in this Territory, and before the clerk of the court from which the writ is to issue, and filed in his office,) it shall, and may be lawful for the plaintiff to sue out of the clerk's office of the proper court, a writ of summons, as is prescribed in the preceding section, or a writ of capias ad respondendum; on which capias the true species of action, and the sum for which bail is demanded, shall be endorsed on said writ."

The plaintiff in his affidavit filed in this case states that this action is founded upon a real subsisting debt, and he verily believes that the sum of six thousand dollars as bail, will not be more than will satisfy the debt and costs; and although it is not in the very phraseology of the Statute, in our opinion it comprehends every thing required to be stated; for as no person can hear it read without understanding from it that the plaintiff has sworn that he believes the defendants ought to be held to bail, in the sum of $6,000, to secure his debt mentioned in the declaration and costs of suit, and this is all that is required by the Statute; and it has been held by this court that the affidavit for a writ of attachment, which is a stronger case than the present, need not be in the very words of the Statute, and if it contains a statement of every essential fact required by the Statute to be sworn to, it is sufficient. We are therefore of the opinion that the affidavit in this case is sufficient in law to authorize the issuing of the capias ad respondendum, and consequently that the same did not issue contrary to, but in accordance with law. This question being thus determined dispenses with the necessity of our deciding the question principally argued in the defendant's brief, whether a capias ad respondendum can lawfully issue in any action founded on a writing obligatory without such affidavit or affirmation being made and filed by the plaintiff.—Therefore upon that question we give no opinion.

The next and only remaining question relates to the service of the

writ on *Wooster*, who appears to have been the only defendant served in the county where the suit was instituted. The writ was directed to the Sheriff and served by the Coroner, and therefore the execution is said to be illegal and not valid; but according to the principle acted upon by this court at the present term in the case of *Hughes* vs. *Martin*, where the reason thereof is stated, it is not considered a legal ground upon which the suit could be rightfully dismissed, on the motion of the defendants; although it should be conceded that the service is illegal and wholly insufficient, and imposed no legal obligation on the defendant to appear and answer the plaintiff's action: and no valid judgment founded thereupon could be given against him, if he had failed to appear; and therefore it is not necessary to decide any thing in relation to the service of the writ on *Wooster*, as it could have no effect upon the present decision, whatever way it might be determined, and consequently we express no opinion upon it.

From any thing appearing in the record, we do not perceive any ground for the objection that the court had no jurisdiction of the case; for if one of the defendants resided in the county where the suit was instititutted when it was commenced, that was sufficient to confer on the court jurisdiction of the case; and it is not usual in practice, where the suit is prosecuted against defendants residing in different counties, to allege the fact in the declaration, or to state in what county each defendant resides. Although this would, in our opinion, be the correct practice, yet it is not deemed material to the question before us, because it is a matter in pais, which the court cannot judicially know; and therefore the party objecting to the jurisdiction were, if they relied upon the fact, bound to shew that none of the defendants were resident in the county where the venue is laid, when the suit was instituted: and they, having wholly failed to shew that fact on the record, cannot avail themselves of it. And it appears by the record that the court had jurisdiction of the matter in controversy in the suit. The right of being sued in the county where some one of the defendants reside, when they reside in different counties, is a personal privilege of which the defendants may avail themselves by a proper plea to the jurisdiction of the court; but we are not aware of any law, or settled rule of practice, which permits them to have the same advantage thereof on mere motion, and more especially where the motion is general, as in this case, and does not even pretend to state any facts which if true would deprive the court of its apparently rightful, legal jurisdiction of the cause.

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We are, therefore, of the opinion that the Circuit Court did err in dismissing this suit on the said motions of the defendants; and for this error the judgment ought to be, and the same is hereby reversed, annulled, and set aside with costs, and the cause remanded to said Circuit Court of Johnson county; and according to the settled practice, the case must, upon the return term thereof to the said court, be proceeded in as though the original process was returnable thereto, and all of the defendants regularly and legally served therewith: they having made themselves parties to the proceedings, by joining to the assignment of errors filed in this court. The motions of the defendants to dismiss the suit must be overruled, and leave be granted to the parties to plead over, or amend their pleadings, in the same manner as they would be authorized by law and the rules of practice to do, at the return term of the process, and such further proceedings be had in the case, as are authorized by law, and are not inconsistent with this opinion.

EMZY WILSON *against* LESTER BUSHNELL.

ERROR *to Pulaski Circuit Court.*

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20	120
1	465
65	600

It is not necessary to prove actual possession by the plaintiff of the premises at the time the trespasses were alleged to have been committed, to maintain trespass *q. c. f.*

Upon the general issue in trespass, and a special plea, a general finding for the plaintiff covers both issues, and is good.

A general verdict is good on two issues, where the finding necessarily shows that the subject matter of both issues was determined by the court.

This was an action of trespass *q. c. f.* brought by *Bushnell* in the court below, for entering upon his close, and cutting trees, splitting them into cord wood, selling and conveying away cord wood, and keeping a woodyard there. The defendant below pleaded two pleas—first, not guilty—second, not guilty as to all the trespasses except carrying away the cord wood, and as to that justifying that he cut and split up the cord wood on the land while it was the public land of the United States; and that after it was sold to the plaintiff below he had entered peaceably, and taken away the cord wood as he lawfully might do.—To the general issue the plaintiff below filed his similiter, and to the special plea he replied *de injuria*, to which the defendant joined issue.

A jury being called to try these issues, after hearing the evidence, the defendant below moved the court to instruct the jury, that in order to entitle the plaintiff to a verdict, he must have been in actual possession of the premises at the time the alleged trespasses were committed—which instructions the court refused, and instructed the jury that such proof was unnecessary.

The jury then found for the plaintiff in the general words, "We, the jury, find for the plaintiff," and assessed the damages at eighty dollars.

The defendant then filed his motion in arrest of judgment, because the verdict was not responsive to the issues, which motion was overruled.

CUMMINS & PIKE, for plaintiff in error:

The plaintiff in error conceives that the court below erred in refu-

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sing to give the instruction asked for, and in overruling the motion in arrest.

The rule appears to have been long and well established, that "there must be a possession *in fact* of the real property to which the injury was done, in order to entitle a party to maintain an action of trespass *q. c. f.* A *general property* is not sufficient." *Campbell* vs. *Arnold*, 1 *J. R.* 511; 3 *Lev.* 209." It is settled law that to maintain trespass the plaintiff must be in possession. Pr. RADCLIFF, *Judge*, in *Dunham* vs. *Stuyvesant*, 11 *J. R.* 569: The action of trespass may be maintained by a person in possession, though he have not the legal title; and though the legal title may come in question, it is not necessary it should. *Harker* vs. *Birbeck*, 3 *Burr*, 1563; *Cary* vs. *Holt*, 2 *Str.* 1238; 2 *Saund. on Pl. & Ev.* 866; *Lambert* vs *Strother*, *Willes*, 221; *Graham* vs. *Peat*, 1 *East*, 244.

The legal owner oftentimes cannot maintain trespass—as when lessee for years, tenant at will or sufferance is in possession under him—and they may maintain it against him. *Saund. on Pl. & Ev.* 866; 1 *East*, 245, *n. a.* 1 *Saund.* 325, *n.* 2; 11 *Mod.* 209; 1 *Bingh.* 158, *s. c.* *Taunton* vs. *Costar*, 7 *T. R.* 431, *s. p.*

"The party must have *actual* and *lawful* possession of real property to enable him to maintain trespass." *Stuyvesant* vs. *Dunham*, 9 *J. R.* 61; *Smith* vs. *Milles*, 1 *T. R.* 480; *Taylor* vs. *Townsend*, 8 *Mass.* 411; *Cooke* vs. *Thornton*, 6 *Rand.* 8; *Truss* vs. *Old*, 6 *Rand.* 556. The same rule is broadly laid down in 6 *Bac. Ab.* 566: A plaintiff cannot maintain trespass *q. c. f.* if he have not *actual* possession, though he has the freehold in law. 6 *Com. Dig. Tres. B.* 3; 5 *East.* 485.

A patentee cannot maintain trespass before entry. *Walton* vs. *Clarke*, 4 *Bibb*, 213. See also *Plowd.* 142; *Cro. Jac.* 604; *Carrine* vs. *Westerfield*, 3 *Marsh.* 333.

In the case of *Lutwych* vs. *Milton*, above referred to, *Cro. Jac.* 604, it was resolved by HOBART and MONTAGUE, *Chief Justices*, and TANFIELD, *Ch. Baron*, that an estate for years might absolutely and actually vest in a lessee, as the use, but that he could not have, without entry and actual possession. 2 *Phil. on Ev.* 182.

As to the second point, the general principle with regard to the verdict, where there are several issues, is laid down in the case of *Foster* vs. *Jackson*, *Hobart*, 54 *a.* and recognized in *Hawks* vs. *Crofton*, 2 *Burr*, 698, and *Porter* vs. *Rummery*, 10 *Mass.* 64. It is this: that when the general issue and special pleas are pleaded, and a verdict is found for

the plaintiff on the general issue only, without regarding the other issues, if it is apparent that the verdict could not have been so found if the special pleas had been supported, the omission is merely matter of form, and no ground for impeaching the verdict. Thus in *Hawks* vs. *Crofton*, above referred to, the pleas to the action, which was trespass, were *non cul.* and *son assault demesne.* So also in replevin where the pleas are *non cepit*, and property in a stranger with an avowry for return. *Thompson* vs. *Button*, 14 *J. R.* 84; because in both these cases a finding on one issue was a finding on the other.

But if there be several issues and a verdict good as to one, but imperfect as to others, a *venire facias de novo* goes as to all. *Com. Dig. Pleader, S.* 20; *Porter* vs. *Rummery*, 10 *Mass.* 68; where to debt on bond the pleas were *non est factum*, and conditions performed—verdict on the first issue, but nothing said as to the second, the verdict was overruled; *Van Benthuysen* vs. *De Witt*, 4 *J. R.* 213; *Easton* vs. *Collier*, 1 *Missouri Rep.* 422; *Brockway* vs. *Kinney*, 2 *J. R.* 210. In the present case the second issue might well be found for, and the first against the defendant below. See *Patterson* vs. *United States*, 4 *Cond. Rep.* 98. If the verdict be defective, and omits finding any thing within the province of the jury to find, no judgment can be given, and there must be a *ven. fac. de novo. Rex* vs. *St. Asaph*, 3 *T. R.* 428 *in notis.* 2 *Cro.* 210. See 4 *Munf.* 492; 2 *Saund.* 171.

In this case the *quantum* of damages depended almost altogether upon the finding on the second issue; for if the jury found that the defendant did not cut the cord wood before the plaintiff purchased the land of the United States, they were bound to render damages for the whole amount of the wood taken away. It was therefore of the utmost importance that they should find on each issue, as they were sworn.

FOWLER & BLACKBURN, *contra:*

The defendant in error insists that the instructions given by the court, were upon an abstract point, which the record does not show to have been material to the issue joined. Testimony applicable to such instructions should have been spread out in the bill of exceptions to show that the said *Wilson* was prejudiced thereby: otherwise such instructions should be treated as a nullity, and disregarded by this court—or, at any rate, construed most favorably to the party obtaining the judgment below, and strongly against the party excepting.—

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In order to entitle *Wilson* to any benefit from such instructions, he should show in his bill of exceptions that *no evidence of actual possession* was given; or if any was given, *what the purport of that evidence was:* otherwise it must be presumed that sufficient evidence of that fact was before the jury, or they would not have found in *Bushnell's* favor. 1 *Bibb Rep.* 371, *White* vs. *Fox.*

Even upon the supposition that no proof of *actual* possession was made by the plaintiff, (which is not admitted here, or shown by the record,) *Bushnell* still contends that the verdict and judgment were legally rendered. It may be true, that by the rigid rules of the old law, as enforced in England, proof of *actual* possession by the plaintiff was necessary; but such doctrine, it is contended, has been deviated from in modern decisions, particularly those made in America, as being unfounded in reason, and wholly inapplicable to the condition of the wild lands in our country. And the action of trespass may now be sustained by the owner of wild lands, of which he has not *actual* possession. And in the case before the court, the plaintiff's title to the land in question is not controverted by the defendant's plea; consequently the *title* is admitted: and under the state of the pleadings no such proof of *actual* possession was necessary. This doctrine is fully sustained by the Statute law of Arkansas, which subjects every person to an action of trespass, who cuts down, injures, destroys, or carries away, any tree or trees, &c. or any timber, wood, or underwood, standing, laying, or growing "*on the land of any other person,*" *&c.*—See *Pope, Steele. & McCamp. Dig. p.* 547, 548, *sec.* 12.* Therefore the title, not being controverted by the plea, it is admitted that said trespasses were committed on said *Bushnell's land*, which, under the Statute, is sufficient to justify the instructions and judgment of the court below. And if proof of *actual* possession were necessary prior to the passage of this Statute, it is not so now—proof of *ownership* being all that is necessary under the Statute.

The verdict was amply sufficient to authorize a judgment, and was responsive to the issue, even under the technical decisions of the common law courts of England. It is not necessary that a jury should find upon each issue separately; a general finding is sufficient. The finding in this case was general for the plaintiff, as shown by the record. And even if not *technically in form*, it is in *substance* clearly

* Revised Statutes Ark. p. 346, Sec. 19; 11 J. R. 385, 3 J. R. 270, 15 J. R. 117.

sufficient; and it was the duty of the court below, and the province of this court, to collect the *meaning* of the jury, and render judgment accordingly. Verdicts are not to be taken *strictly*, or scrutinized *strictly*, as pleadings are; but, on the other hand, must be construed *liberally*, and effect given to them, where their meaning can be ascertained. Vide 1 *Bibb Rep.* 247 *et seq.* 251, *Worford* vs. *Isbel*; 337, *Hatcher* vs. *Fowler*; 2 *Burr Rep.* 698, *Hawks* vs. *Crofton*; *Hobart*, 54; *Cro. Eliz.* 854; 2 *Bibb Rep.* 428; 2 *Bibb Rep.* 257, *Crozier* vs. *Gano & wife.*

The court did not err in overruling *Wilson's* motion in arrest of judgment.

See 2 *Haywood's Rep.* 402; *Stark. Ev.* 1437, *n.* 1; *Saund. on Pl. & Ev.* 866; 1 *Burr Rep.* 383; 1 *J. J. Marsh.* 314 *et seq*; *Gould's Ed. of Esp. N. P. vol.* 1, *p.* 384.

The owner of wild land is so in possession as to maintain trespass until an adverse possession is clearly made out. *Mathew* vs. *Trinity Church*, 3 *S. & R.* 531; *Stambaugh* vs. *Hollabaugh*, 10 *S. & R.* 357; *Gambling* vs. *Prince*, 2 *Nott & McC.* 138; 2 *Wh. Selwyn*, 483, *N. C.*

LACY, *Judge*, delivered the opinion of the court:

This case comes up on a writ of error sued out to the Pulaski Circuit Court. The plaintiff in the court below brought an action of trespass quare clausum fregit against the defendant for entering his close, cutting down his trees, splitting them into cord wood, selling and carrying away the same, and keeping a woodyard on the premises described in the declaration.

The declaration contains two counts, and though somewhat inaccurately and informally drawn, is deemed nevertheless to be substantially correct. The defendant filed two pleas in bar of the action.—The first was a plea of the general issue, and the second, a special plea of not guilty to all the trespasses alleged to have been committed in the declaration, except that of carrying away the cord wood, and as to that, justifying that he cut and split the cord wood on the land while it was a part of the public domain of the United States; and that after it was sold to the plaintiff, he had specially entered and taken it away as of right he might lawfully do. The plaintiff took issue on the general plea of not guilty; and to the second plea he put in a demurrer, and the demurrer after argument was overruled and the plea adjudged sufficient. Whereupon the plaintiff replied generally, and the defendant joined issue. The parties then proceeded to trial

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upon the issues thus found, and after hearing the evidence, the jury found for the plaintiff, and assessed his damages at eighty dollars.—Thereupon judgment was entered up for the plaintiff, and the defendant then moved the court to arrest the judgment, which motion was overruled, and to the opinion thus given he excepted, and placed his bill of exceptions upon the record. During the progress of the trial, the defendant moved the court to instruct the jury, that in order to entitle the plaintiff to a verdict, he must have been in actual possession of the premises at the time the trespasses were alleged to have been committed, which instructions the court refused to give, but instructed the jury that such proof was not necessary to enable the plaintiff to maintain his action. To this decision of the court the defendant also excepted, and filed his bill of exceptions, which was regularly signed by the judge and made a part of the record. The assignment of errors questions the correctness of the decision of the court below upon the grounds—1st, in giving to the jury improper instructions; 2nd, in pronouncing judgment on an invalid verdict; 3rd, in not arresting the judgment on the defendant's motion. These questions we will now severally examine in the order they are presented. The instruction given to the jury is, that it is not necessary for the plaintiff to prove actual possession of the premises at the time the trespasses are alleged to have been committed in order to enable him to maintain his action. The doctrine in relation to this subject has been fully examined during the present term, in the case of *Ledbetter* vs. *Fitzgerald*, and the rule as there laid down is considered perfectly correct, and entirely applicable to the case now under consideration. It is true that by the common law actual possession or constructive possession by operation of law as by conveyances under the Statute of uses, was necessary to be proved to maintain trespass; for before entry and actual possession, one could not maintain an action of trespass, though he had the freehold in law. 3 *Black. Com.* 211, 12; 2 *Saunders on Pleading*, 868; 1 *Saund. Rep.* 322; 2 *T. R.* 13; 8 *East.* 109; *Bacon's Abrid. title C.* 3. But the doctrine is now wholly exploded by the courts of our own country, for as an actual entry into wild and uncultivated land would give no notoriety to the possession or the change of property, it is declared to be an impracticable and an utterly useless thing; and of course a plaintiff may maintain trespass in such cases without actual possession of the premises—without ever having made an entry upon the land. For not to give him such a right would be to expose his

possession to serious and destructive injury without any adequate remedy or redress. For if he is seized by a lawful estate of inheritance or in fee, the law presumes that he is rightfully in possession to the extent of his boundary, and his seizin is not confined to his mere occupancy, or actual cultivation; but if he enters without title, he is then confined by metes and bounds strictly to his actual possession.

It necessarily results from the position that a party may maintain trespass upon a mere constructive or legal possession, without ever having been actually in the possession of the premises, and as the title of the plaintiff is shown and admitted by the plea, that therefore it was unnecessary to adduce any evidence of it. The opinion of the court was therefore correct in the instructions given to the jury on this point.

Upon the second assignment of error, it is contended that the verdict is not responsive to the issues joined, and of course no valid judgment can be rendered in the case. The record shows that the jury were sworn to try the issues joined, and that they find for the plaintiff, and assess the damages by him sustained at the sum of eighty dollars. This finding evidently covers both issues, for they were sworn to try the issues made up by the pleadings; and the response is, they find for the plaintiff. A general verdict is held to be good on two issue, where the finding necessarily shows that the subject matter of both issues was determined by the verdict; and so it was ruled in the case of *Login* vs. *Elder*, 1st *Burrow*, 383; 1st *J. J. Marshall*, 314, 16, *Bates* vs. *Lewis*. And in the case of *Dyer* vs. *Hatch*, decided during the present term, the doctrine, as laid down in the cases above cited, is enforced and illustrated; and the case now under consideration clearly falls within the principle, and reason of the rule there stated. The verdict in this case is unquestionably good, for it finds the facts put in issue by the parties in such a manner that a valid judgment can be pronounced in the case. It is, therefore, believed there is no error in the assignment which questions the sufficiency of the verdict. The decision of the two first assignments necessarily disposes of the defendant's motion to arrest the judgment; for if the instructions given to the jury were correct, and the verdict sufficient, it is clear that there is no ground for arresting the judgment; for there are no other errors apparent upon the record as put in issue by the pleadings. The judgment of the court below must, therefore, be affirmed with costs.

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MARY BLACK *against* JOHN PERCIFIELD.

ERROR *to Pulaski Circuit Court.*

Where a purchaser at auditor's sale of land stricken off to the Territory of Arkansas for non-payment of taxes, filed his petition for confirmation of title to the land so purchased, under the 149th chapter of the Revised Code, a person will not be permitted to defend, who claims by answer to do so merely as "tenant in possession:" and a demurrer to such answer is properly sustained.

In such case the legal presumption is, that the person answering holds under the purchaser and is his tenant, or a mere tort feasor.

Unless the possession of such respondent is adverse to the purchaser, she has no right to oppose the confirmation.

In the court below, the defendant in error filed his petition, praying for a confirmation to him of the title to a certain tract of land purchased by him at a sale made by the Auditor of the Territory of Arkansas, in pursuance of an Act of the General Assembly of said Territory, approved the 15th of November, A. D. 1833; which confirmation was asked under the provisions of chapter CXLIX of the Revised Statutes.

To this petition the plaintiff in error filed her answer, setting up the facts that she was in possession of said land, and that the said Auditor's sale was utterly void, and conveyed no title to the defendant in error for reasons therein stated. To this answer the defendant in error demurred; and the demurrer being sustained, a decree was entered for a confirmation of the title to said land to the defendant in error.

CUMMINS & PIKE, for the plaintiff in error:

The plaintiff in error conceives the court to have erred in sustaining said demurrer. The ground upon which it was sustained was, that the plaintiff in error, setting up no title to said land, and claiming only to be in possession thereof, she had no such interest in the land as entitled her to be heard in opposition to the motion of the defendant in error to confirm.

Possession is in law considered as an interest in land, and the lowest grade of title: The possessor can hold his possession against all the world, except the rightful owner; and whoever would evict him must be prepared with proof that indisputable title is in himself. The high-

est court in the country has declared that "any person who has an interest in land sold for taxes, is properly considered the owner thereof for the purposes of redemption;" that "any right which, in law or equity, amounts to an ownership in the land, any right of entry upon it, to its *possession* or *enjoyment*, or any part of it, which can be deemed an estate in it, makes the possessor the owner so far as is necessary to give him the right to redeem." 10 *Peters' Rep. Sup. Ct.* 1. The Supreme Court of New York has declared that "possession is an interest in the lands, within the Statute of frauds." 7 *Johns. Rep.* 205. The laws of this State provide that any person who has resided on public land for the term of one year, shall have such an interest therein as will enable him to maintain his action of forcible entry and detainer for its possession. The courts of Kentucky have declared that possession is always evidence of title. It may be explained away by extraneous evidence, but in the absence of all other evidence, the fact of a plaintiff in ejectment having been once in possession, will be sufficient *prima facie*, to authorize a recovery against an intruder. 3 *Marsh.* 394, 623. By the common law, possession *alone* communicated a good title. 2 *Tenn. Rep.* 185.

If it is admitted that a person in possession of land has such an interest and estate therein as gives him the right to redeem when it has been sold for taxes, it would seem to follow as of course that he has the right to oppose a confirmation of the title acquired by such sale for taxes, unless deprived of that right by positive and express statutory enactment. Is there such an enactment? Up to the time of the passage of the act of 1836, the plaintiff in error had the right to redeem the land in question. She had the undoubted right to defend an action of ejectment brought for it by the defendant in error, or any other person, against all the world but the true owner. She had a vested estate and interest in the land, a vested right under the laws of the land. Could a law be constitutionally enacted to wrest from her that right? If so, could not a law be enacted, divesting the patentee of absolute title acquired by purchase from the government? Is one right, one interest more sacred and inviolable than the other? If her possession had been adverse to the right owner for seven years, it gave her the absolute title in fee simple. A Statute may change a rule of evidence, or modify the remedy: can it divest a vested estate? An examination of the Statute will show that such was not the intention of the Legislature. It provides that any person who claims title to

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land by purchase at sales made by Sheriffs, Auditors, &c. for taxes, may obtain a confirmation of such title in the Circuit Court, by motion, having first given notice, in the shape of a publication, a certain time before making such motion, calling upon all persons "who can set up any title to said lands, in consequence of any irregularity, informality, &c. in the sale, to come forward, and oppose the motion for confirmation." What is the meaning of the expression, "who can set up any title to the land, in consequence of any irregularity or informality?"—Title to land cannot be acquired by A, B, or C, merely in consequence of an irregularity in the sale of it for the taxes; and therefore the expression, "title in consequence of irregularity, &c." is somewhat inaccurate. An irregularity or informality in the sale could not confer any title to the land upon an entire stranger. What, then, is the meaning of the law? Clearly, that any person who has a right to hold the possession of the land in case the purchaser has obtained no title, because of informality, &c. may come forward and defend his right of possession. The possessor can set up title to the land against the purchaser, as well as the actual owner could do; for, as against all the world beside, the possessor has as much right to keep possession as the actual owner has. The plaintiff in error, therefore, comes forward, and says, "I am in possession of the land in dispute. You claim to evict me, and the deed under which you claim is void." Can the court say that she shall not be permitted to show wherein the deed under which he claims is void?

Undoubtedly the Statute has changed the rule of evidence: until the passage of that Statute, the law of evidence as to tax titles was the same in this State as it still is in every other State in the Union.—The claimant under tax sales was bound to make out his claim of title, and to show that all the requisites of the law had been complied with. The mere deed of the Auditor or Sheriff was not even *prima facie* evidence of his title. By that Statute it is made so. It is thereby devolved upon the person holding in opposition to the tax title to show the irregularity or informality, if any there be, in the tax sale. This is somewhat hard. It is difficult to prove a negation that the requisites of the law have not been complied with.

But the Statute meant to go no farther. It only intended to throw the burden of the proof upon the defendant in ejectment for, or motion to confirm title to, lands sold for taxes. It did not take away from those defendants the right of defending. If it did so intend, manifest

injustice would result. A person in possession of one tract of land will be entitled to have possession until some person shows a good and valid title thereto. Of the possession of another tract, he may be ousted without any such showing of title; for, as in the present case, the title to the land may first be confirmed to the adverse claimant, after the person in possession has been denied the right of showing that the claimant has no title whatever, and then the claimant may bring his ejectment for the land. True, the possessor may then defend, but his defence would be but a mockery. The decree of the court, which had already confirmed the land absolutely to the claimant, would be conclusive upon him, and could not be contravened; for the court would at once say, "it has been made by a competent court under sanction of law. The title is by that court decreed to be in your opponent, and this court cannot look back into that adjudication.—*Then* was your time to have defended."

It would therefore result in this: The plaintiff in error is in the peaceable possession of a tract of land. A motion is made by a claimant under a tax sale for an absolute confirmation of the title to the land to himself. All persons who can set up *any* title to the land, are called on to come forward and oppose the confirmation. The plaintiff in error comes forward, shows that she is in possession, and avers that the claimant has no title to the land, because the sale was void. The court refuses to permit her to be heard. The title is confirmed. The defendant in error brings his action of ejectment, and upon this decree of confirmation, she is turned out of possession. Yet the defendant in error by his demurrer had allowed all the facts stated in the answer to be true, and if so he has no title.

If the Statute *has* declared that the person in the possession of land shall not be allowed to defend, could it not as well have declared that the actual owner, or original patentee, should not be allowed? One right is as sacred as another. Can any one in this country be divested of his rights, and his property taken from him by a procedure to which he is not permitted to be a party? Such is not the spirit of our fabric of laws. The *terre tenant* must as necessarily be made a party as the owner, for, as against every person but the owner, he had the right to maintain his possession, and the law infers him to be the owner till the contrary is shown.

If the plaintiff in error should have been made a party before her rights were jeopardized, the demurrer was wrongfully sustained. The

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defendant in error had made all persons who could set up *any* title, parties to his procedure by publication. Can he now be allowed to say that no person shall defend but the patentee, his heirs, or assigns. It may be that they are barred by the Statute of limitations. At all events, their rights are more peculiarly the care of the law, than the rights of the plaintiff in error—which is respectfully submitted.

TRAPNALL & COCKE, *contra:*

The demurrer was properly sustained, and judgment of confimation properly given; because the plaintiff in error did not show that she was the original patentee, or in anywise owner of the said tract of land; nor did she bring herself within the meaning of the act as a person who could appear, and contest the confirmation.

A large proportion of the land north-west of the Arkansas is owned by soldiers of the late War, the great majority of whom are non-residents. These lands had been sold for taxes, and in the absence of all other purchasers conveyed to the State. By the decisions of the Supreme Court of the United States, as well as many of the States, the tax title had become a precarious, if not untenable tenure; and therefore individuals would not purchase, and of course a considerable part of the revenue of the State became wholly unavailable: and from this fact some fifteen or twenty thousand dollars were annually lost to the government. Sound policy imperiously required that the Legislature should adopt some effective means to obviate this public difficulty, and therefore the act of 1836 was passed. This act supplies the presumption in favor of the acts of public officers, the want of which had previously overset the tax titles. The Supreme Court had decided that the Auditor's deed affords no presumption that the sale had been made according to law. This act says that the Auditor's deed hereafter shall be evidence prima facie that the public officers in making the sale, &c. had complied with the provisions of the law.—There can be no doubt of the constitutional right of the Legislature to pass this law; and having passed it, it is now the law of the land, and to be enforced accordingly. The owners of the land are called on to object to the confirmation of the tax title for any illegality or irregularity in the previous proceedings. It will be necessary to determine who is authorized by this act to make objections to the confirmation. Before the purchase by *Percefull* from the State, there could be but two claimants to the land, to wit: the original bounty

holder and his heirs or assigns, claiming under the patent of the United States, on the one hand, and the Territory, now the State of Arkansas, on the other. At the time of the sale and conveyance by the Sheriff to the State, no other person could have title. After the sale no other person could have acquired title adverse to the State. A person, therefore, to be owner of this land must have acquired their right either through the original patentee, or fraud the State. From which of these sources *Mary Black* acquired her claim, she has not thought proper to state. What right has she? It does not appear. There can be no presumption she has a claim or right to the land, and therefore she must show she has a legal interest in it. The mere fact that she is a squatter can give her none. Because she cannot hold adverse to the State, and the court ought not and will not entertain her objections until she shows a legal right to make them, she says she is tenant in possession. Whose tenant is she? If she is tenant under the State, she cannot object to the title of the State, or to that of *Percefull*, who has purchased from the State.

Dickinson, *Judge*, delivered the opinion of the Court:

The defendant in error filed his petition, praying for the confirmation of a certain tract of land, purchased by him at a sale made by the Auditor of the Territory of Arkansas, in pursuance of an act of the General Assembly, approved the 15th of November, A. D. 1833; which confirmation was prayed for under the provisions of an act of the Legislature of the State, passed November the 3rd, 1836. To to this petition the plaintiff in error filed her answer, stating that she was tenant in possession of the land sought to be confirmed by the defendant in error, and that the Auditor's sale was utterly void, and conveyed no title for the land for the reason therein stated. From this answer the defendant in error demurred. And the demurrer being sustained, a decree was entered up for a confimation of the land to the defendant in error. The only question presented for our consideration is—has the plaintiff in error showed such right or title as would authorize her to come in and be made party to the record, and defend against the confirmation of the petitioner. This question can alone be decided by reference to the act prescribing the mode of confirming the title to land sold under the laws of this State, and by the general rules of construction and interpretation, which are applicable to the Statute. Does her answer show such right and title as would authorize her to become a party to this suit, or as will enable her to come in and oppose the

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purchaser's confirmation? The petitioner or purchaser has set forth his title according to the requisitions of the Statute, and followed the rules and regulations, with precision and certainty.

The defendant in the court below simply avows in her plea that she is *tenant in possession.* Is this such an allegation as shows that she has such an interest in the matter as is contemplated by the act under which the confirmation is made? It is true, as contended by the plaintiff in error, that any person who has a legal or equitable interest in lands sold for taxes, is properly considered the owner thereof for purposes of redemption, and that any right which in law or equity amounts to an ownership in the land, or any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate, makes the possessor owner of it, so far as is necessary to give him a right to redeem. 10 *Peters's R. p.* 1. And that possession will constitute a a certain interest in land for particular purposes and objects, cannot be denied. For instance, he who holds the possession either *active* or constructive, may maintain trespass, ejectment, and forcible entry and detainer. But how do these principles affect the question now to be decided? What kind of possession does the plaintiff in error set up in her answer. Has she a freehold a term of years, is she tenant by will or by sufferance, or what kind of interest or right has she in the premises? It is presumed that every possession is lawful, and that it cannot be disturbed or interrupted without authority of law. A party has no right to be made a defendant upon the record, unless they have a legal or equitable interest in the matter in controversy, and that interest or right they are bound to show; for the facts being within their own knowledge they should state them fully, that the court may see what judgment to give. In the present case the plaintiff in error has wholly failed to show any right to the land in controversy, and unless she does show some right, she is not authorized to come in and defend against the confirmation; for the words of the act are, "That the purchaser or heirs and legal representatives of purchasers at all such sales, which have been, or may hereafter be made when such lands are not made redeemable by the laws of the State; or if redeemable, may at any time after the expiration of the term allowed for such redemption, publish six weeks in succession in some newspaper printed at the City of Little Rock, a notice calling upon persons who can set up any right to the land so purchased, in consequence of any informality or any irregularity connected with such sale, to show cause at

the first Circuit Court which may be held for the county in which such lands are situated, six months after the publication of such notice, why the sale so made should not be confirmed." See *Acts of* 1836, *p.* 200. In her plea, by way of answer, she does not aver how, or in what manner she came by the possession, or under whom she holds, or whether her possession is adverse to the petitioner's or not. The duty devolves upon her to show the kind and character of the possession, and if she has failed to do so, the legal presumption is, that she either holds under the petitioner, and is his tenant by lease and entry, or that she is a mere tort feasor, without any shadow or pretext of right; and in either event, she surely is not entitled to the privilege of opposing the confirmation. The defendant shows by his petition that he is the purchaser of the land, and of course its legal proprietor until his right is disputed and overthrown by a paramount title. How has the plaintiff in error contested her right? Has she shown or alleged any adverse possession? Or has she averred a peaceable or an uninterrupted possession of the premises for such a length of time as will raise the presumption of right? Neither of these facts are stated or averred: what then is the legal presumption? It is not pretended that she claims under a deed from the original patentee, or from any person having any previous claim or title to the land. And if her possession is not adverse to the petitioners, has she any right or authority to oppose the confirmation? Certainly not. It has been often ruled in this court, that the decision of the court must be presumed to be correct until the contrary is proved. That presumption must stand until it is overthrown affirmatively by some allegation in the record, as made up by the pleadings, or by some other fact which the court is bound judicially to take notice of. This being the case, it necessarily follows that the plaintiff in error has wholly failed to show any such title in the land purchased by the petitioner, as could authorize her to be made a party to the suit; and consequently the demurrer was rightfully sustained, and the decree of the Circuit Court confirming the land to the petitioner must, therefore, be affirmed with costs.

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THORN vs. REED.

THOMAS THORN *against* JOHN H. REED.

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ERROR *to Pulaski Circuit Court.*

Where there is irregularity in the proceedings of the justices in forcible entry and detainer under the Territorial Statute, the cause may be removed into the Circuit Court by *certiorari*, and there the proceedings set aside.

Such writ of certiorari may be issued by the clerk, upon the order of the Judge.

No bill of exceptions to any opinion or judgment of the justices, can be taken in an action of forcible entry and detainer before them.

The seventh section of the Territorial act concerning forcible entry and detainer, specifies two classes of cases of detainer, wholly distinct and independent, and the remedy applied to which is essentially different.

Where the defendant obtained possession "without force, by disseizin," he must have notice to quit; and the action of forcible detainer does not lie in such case, unless the plaintiff has a legal right to the possession.

The defendant may in such case traverse the plaintiff's right of possession;—and if he show that plaintiff's term has expired, or that he never had a lawful right to the possession, the action is barred.

The other class of cases is, where a tenant holds over, after the term for which the premises were let or demised to him has expired. In such a case the plaintiff is not required to show any title whatever, when as landlord he sues a tenant who holds over.

In such case he will recover if he show the possession to be his, though the *right* of possession may be in one person, and the right of property in another. His title is not in issue. The tenant is estopped from denying it.

Where, therefore, by a covenant between the parties, the defendant has bound himself to give up and surrender to the plaintiff the possession of the premises on a certain day, and he holds over, it is not competent for him, in an action of forcible detainer under the Territorial Statute, to prove that the plaintiff had but an estate *pue antre vie*, which had expired before the commencement of the suit.

Where an action of forcible entry and detainer is brought into the Circuit Court by certiorari, it cannot be remanded to the justices. The Justice's Court was dissolved after they had tried the cause.

This was an action of forcible entry and detanier. The suit was originally brought before two Justices of the Peace for the recovery of the possession of Lots No. 1 and 2, in block or square 31, in the City of Little Rock; wherein *Thomas Thorn* was plaintiff and *John H. Reed* defendant. On the trial before the Justices, the plaintiff, in order to support his action, introduced the following articles of agreement, signed by himself and defendant, bearing date the eighth day of August, 1837—"That whereas the said *Thomas Thorn* became purchaser at sheriff's sale on the 10th day of April, A. D. 1837, of all the right, title, interest, estate, and claim of John H. Cocke, in and to

lots of ground known, designated and numbered, on the plats of the City of Little Rock, as lots one and two in block or square No. thirty-one, together with the appurtenances; which said lots of ground were then, and now are in the possession of *John H. Reed*, under a verbal lease from the said John H. Cocke, made sometime in October, A. D. 1836, and to expire on the tenth day of October next succeeding: and further, that the said *Thorn* had previously instituted suit against said *Reed* for possession of said lots, and two Justices had been summoned thereon and disagreed, and that article was the result of an adjustment and compromise between the parties: and further, that each of said parties should pay one half of the costs of said prior suit: and further, that the said *Reed*, on or before the 10th day of October next, 1837, shall pay, &c. to the said *Thorn*, rent for the use and occupation of said lots, up to the said 10th day of October, 1837, to be computed as to time, from the 10th of July, 1837: *and further, that upon said 10th day of October, said Reed would yield and surrender possession of said lots to said Thorn; and the said Thorn guaranteed possession thereof to said Reed during such term.*"

This agreement, together with the proof of demand made in writing for the delivery of possession by the plaintiff, and that the defendant was in the possession of the premises, constituted all the evidence relied on to establish the plaintiff's right of action. The defendant then offered in evidence the record of a deed, duly authenticated and executed by William E. Woodruff and wife to John J. P. Cocke, infant son of John H. Cocke, in the year 1828, conveying to said son an estate in fee simple to said lots; and offered to prove that the said John H. Cocke died on the 10th day of October, 1837, and that his estate in the lots which had vested in him by the death of his son, *was one of life only*, and on his death had passed to and vested in his daughter, the full sister and legal heir of his son, after the father's death. And also offered in evidence a certificate, signed and sealed by the constable of the City of Little Rock, setting forth that, on the sixth day of November, 1837, the said constable had sold to the said *Reed*, at the court house door in said city, according to the manner and form prescribed by law, the lots mentioned as aforesaid, for the sum of eleven dollars, the amount of taxes due thereupon the year 1837; and the defendant being the last and only bidder for said lots, became the purchaser; all of which evidence was excluded by the Justices' Court, and not permitted to go to the jury. To which opinion

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the defendant excepted, and his bill of exceptions was signed and sealed by the Justices, who tried the cause, and placed on the record; whereupon the jury found a verdict for the plaintiff, and the court pronounced judgment for the restitution of the premises, and awarded him a writ of restitution for the possession. The defendant then applied to the Circuit Court for a writ of certiorari to bring up a record into the said Circuit Court, there to have the judgment of the Justices set aside for irregularity in the proceedings. At the November term, 1838, the cause came on to be tried before the Circuit Court; and after the court had inspected the record, and examined the errors assigned, judgment was pronounced, reversing and setting aside the judgment and proceedings of the Justices' Court for irregularity; and remanding the cause to the Justices' Court with directions to be proceeded in according to law; and that the defendant recover of the plaintiff his costs by him in said suit expended. The plaintiff then moved to set aside the judgment of the Circuit Court, which motion was overruled. Whereupon the plaintiff sued out a writ of error, and now prosecutes the same in this court, to reverse the judgment of the Circuit Court.

HEMPSTEAD & WATKINS, for plaintiff in error:

The Justices acted properly in rejecting any evidence going to show that *Thorn's* title had expired, and his estate determined by the death of John H. Cocke. The action or proceeding of forcible entry and detainer, is for the recovery of the *possession* merely, and nothing more. It is a trial between the plaintiff and defendant, and no other person. A person entitled to the immediate possession may maintain forcible entry and detainer, against another who has clearly the right of property. The law does not allow the *owner* of the land to enter with strong hand: if he does, (*Dig. Ark. p.* 260, *and following*,) the occupant so deforced may have this proceeding, and the rightful owner is compelled to resort to his lawful remedy. This proceeding then determines nothing but the bare, naked right of possession between the parties to the proceeding, and in no way or manner affects or precludes any subsequent action of ejectment, for mere profits, or for use and occupation. Then, as between the plaintiff and defendant, *Reed* was absolutely estopped and precluded from disputing the right of *Thorn* to the possession, and no evidence could be adduced against him clearer or stronger than that of his own deed.—

Supposing the legal right to be in the heirs of John T. P. Cocke, after the death of his father, John H. Cocke, their right could not be prejudiced by this decision between *Thorn* and *Reed*. If *Thorn* wrongfully, by decision, obtained possession of property to which he head no title, he could not only be turned out by ejectment, for instance, but would be liable for the mesne profits. Every case which can be adduced, going to show that the tenant in possession, having no title in himself, may show title in a third person, other than one plaintiff, applies to actions of ejectment, and not to proceedings of this nature. True, indeed, the action of ejectment involves the right of possession, but it involves something more: from its nature and object, it involves the right of property. A verdict in ejectment is held to be a bar to a subsequent action between the same parties and their privies, about the same subject matter, whether the parties, plaintiff or defendant, are reversed upon the record or not. Not so in this proceeding. But what could it have availed *Reed* to show title in the heirs of John T. P. Cocke? He was not their tenant; he offered to produce no lease showing that he held under them, nor did he even affect to be their tenant at sufferance. A lawless occupant himself, how could he show title in those under whom he did not pretend to claim?

The Justices also acted properly in rejecting the evidence offered about the tax title. It is contended by the defendant that for *Thorn* to have recovered in this proceeding, he was bound to show that he had the *legal right to the possession;* and that, on the other hand, it was sufficient for *Reed* to offer to show that the legal right to the possession was in himself. Now it is a principle of common law, and common sense, that the tenant is bound to keep down the taxes.—*Woodfall's Land & Tenant. Reed* was still the tenant of *Thorn*, though he wrongfully held over; for at the time of this tax sale, he was in by that right, and by no other. Under our laws the officer may distrain and sell a specific real property for the taxes due thereon, and the presumption is, that the tenant in possession will pay them. Because he may have a claim over against the landlord for all lawful taxes he may pay, does not vary the state of case. At the old common law it was an offence of the gravest nature for the tenant to disclaim or set up title in himself, in opposition to that of his lord. But laying all that aside, admitting that the city corporation of Little Rock had the power to take away a vested right for a trifling and insufficient consideration, that the ordinance of the council was rightfully enacted, that

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the proceedings under it, the assessment, the advertisement, the sale, were all strictly regular and legal, will not the court here take notice that under that same law or ordinance, the claimant could redeem, or at least save his rights, by tendering to the purchaser the amount of taxes and cost he had paid, with interest within one year from the day of sale? At the time of the trial before the Justices, it appears from the record, that year had not elapsed. What, then, was the nature of the title which *Reed* offered in evidence? It was not a deed, nor any evidence of legal title or right to the premises. It was nothing more than the constable's certificate of purchase. His right then was not only *barely equitable*, but *inchoate* and *imperfect;* because it was liable to be defeated at any time within the year. If *Reed* had not been in possession at the time of the tax sale, he could not by any possibility, in any action, have recovered possession before the year for redemption had elapsed, upon the bare evidence of such a certificate. That he was in possession at the time of sale does not vary the case, because he was in by his own wrongful act, and could acquire no rights thereby.

But there is a further reason why the Justices acted properly in rejecting *all* the evidence offered by the defendant, and that is, that it would have led, directly and indirectly, to an investigation and trial of the *title to real property*, which Justices are by Statute expressly prohibited from trying, and which can only be brought in question in the Circuit Court. The record does not show the evidence with which the plaintiff was prepared to rebut that offered by the defendant; but it shows enough to know that the character and tendency of the rejected evidence was to induce a trial and determination of the right of property, and not of the right of possession.

If, then, there is no irregularity in the process, no error in the proceedings of the two Justices, the Circuit Court hath erred in the giving the judgment of erroneous proceedings, and the argument of the case is here at an end.

But the judge of the Pulaski Circuit Court caused a writ of certiorari, with supersedeas, to be issued to the two justices. It was contended on the behalf of *Thorn* before the Circuit Court, that the writ of certiorari was not not rightfully issued in this case—that this case had not been rightfully and legally before the court there—and that the court there had no jurisdiction therein, or any authority to hear and determine the same. And we contend before this court that the

Circuit Court erred in overruling the motion on the part of *Thorn* to set aside the judgment upon those grounds.

Under our old Statute law, when writs of certiorari were allowed to a single justice of the peace, and to two justices, in the proceeding of forcible entry and detainer, they were in all respects similar to appeals, regulated in the same manner, and attended with the like results. But because it was at the option of a party to suffer the time to pass by for taking an appeal, and then harrass the opposite party with a certiorari, and to obviate the confusion attending two different remedies of the same nature and effect, the Legislature by act approved November 3, 1831, wholly abolished certioraris, and prohibited their being issued in any case by the clerks of the different Circuit Courts, and that same act went on to revise and remodel the system of appeals. Under the existing Statute laws, then, the writ in this case was not rightfully issued. *Pamphlet Acts*, 1831, *p.* 50.

But under our Constitution, the Circuit Courts exercise a superintending control over the County Courts, and over Justices of the Peace, and have power to issue all the necessary writs to carry into effect their general and specific powers. Under this clause of the Constitution, the question arises, can the Circuit Courts issue writs of certiorari, unless the mode is pointed out and regulated by Statute; and this question of grave and serious magnitude, if determined in the negative, will put an end to all further argument, in this branch of the case. And the refusal of *two* judges of the Supreme Court to grant a writ of error in the case of Moseley, was based upon the same ground, and clearly illustrates our position. Sec. 5, *Article* 6, *Const. Ark.*

If the writ of certiorari, in this case, was issued under this clause of the Constitution, then, in the absence of any statutory regulations, it must be tested by the same principles, and regulated by the same rules, that govern writs of certiorari at the common law. 6 *Bac. Abr. tit. Statute*, J. 383. What, then, is a certiorari? It is defined to be *an original writ, directed to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice.* 1 *Tidd. Prac.* 330.

First, the writ must issue to an inferior court. Under our Statute law, two Justices of the Peace could sit as examining courts and commit, hold to bail, or discharge in cases of felony. They had power, equally

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with the judges of the Circuit Court, to grant the benefit of the insolvent act; and also sit in the summary proceeding of forcible entry and detainer;—and in the proceeding of forcible entry and detainer, the process is directed to the sheriff of the county. Now the question very properly arises, whether, in either case, two Justices of the Peace are quo ad hoc, inferior to a Circuit Court.

Second, the writ must be directed to a court of *Record*, because at common law, if the proceedings of inferior courts not recorded were removed, it could only be done by another and a different writ.—1 *Tidd's Prac.* 330, *J.* Now, our courts of Justices of the Peace are not courts of record, as defined by the common law, and a court of two Justices, in the summary proceeding of forcible entry and detainer, stands on precisely the same footing. A Justice of the Peace has no clerk, no seal, and no continuance of office. When a Justice of the Peace dies, his court dies with him; another Justice may or may not be appointed, but it is not the same court. Neither does a Justice of the Peace, or any number of Justices, as such, have power to fine or imprison. Under the Constitution, "Justices of the Peace shall in no case have jurisdiction to try and determine any criminal or penal offence against the State; but may sit as examining courts, and commit, discharge, or recognize to the court having jurisdiction, for further trial, offenders against the peace. For the foregoing purposes, they have power to issue process, &c., and also have power to bind to keep the peace, or for good behavior." The power to fine or imprison for contempt merely, an incident of every court, whether of record or not, and without which no judicial tribunal could exist, is not of itself a correct criterion to determine the character of a court in this respect. And we ask the court here to observe, that the writ of certiorari under our old Statute law, was a peculiar remedy, in the nature of an appeal; and the Justice was thereby required to send up the *original process*, and a *copy* of the judgment, &c. and the court could not set aside the proceedings before the Justice for *irregularity* or *informality*, appearing, and should examine into the merits of the case, and give judgment as in other cases. Again—the writ of certiorari, at the common law, is almost universally used to remove the records of criminal or penal cases, and seldom or never of civil cases, except for the inspection of the record, or to use it as matter of evidence.

But when this case was gotten into the Circuit Court, whether rightfully or not, the Circuit Court took no proper action about it. The

Circuit Court did not set aside the proceedings of the Justices for irregularity, because no irregularity was alleged to appear. Nor did the Circuit Court proceed to hear and determine the case upon its merits, and *do sure and speedy justice between the parties*—but decided that there was *error* in the proceedings before the Justices, and ordered that the case be *remanded to the said Justices of the Peace, in order that such proceedings may be had thereon as the law might require.* Now, by what authority of common or Statute law, did the Circuit Court do this? To what court was the case remanded? The two Justices had long before separated, and their quasi court of brief duration had dissolved; for aught that had appeared, or any thing that court could judicially know, the said Justices were dead or removed from office; and from this nugatory and unauthorized judgment of the Circuit Court, it is manifest that the plaintiff in error hath suffered gross injustice, if in no other way than by the delay of justice. 1 *Tidd's Prac.* 349; 1 *Salk.* 352; 5 *Mod.* 177.

Upon the whole view of the case, it remaines to be enquired, what order the court here will take in it. If there was no error in the proceedings before the Justices, we pray that the writ of summary restitution awarded by them, and which hath been superseded and ever since lain dormant, may be revived and carried into immediate execution. But *if* there was error in the proceedings before the Justices, and the certiorari rightfully issued, we ask that the case be remanded with costs, to the Circuit Court, there to be heard and finally determined upon its merits.

FOWLER & PIKE, *contra:*

The distinction by the plaintiff's counsel attempted to be drawn between an action of ejectment, and one of forcible entry and detainer, has no foundation in law; and the consequences deduced would not follow, even if such a distinction could be drawn.

Both are mere *possessary* actions. The action of ejectment originally was considered a mere action of *trespass*, in which damages only could be recovered; but about the time of 7th *Edw.* IV, it was resolved by the judges that the unexpired term, as well as damages, might be recovered. 3*rd Thomas' Co. Lit.* 209, *n. L.*

A verdict in ejectment is *not* a bar to a subsequent action between the same parties. See *Adams on Eq.* 291—315, and cases cited *in notis*, 316.

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And in case of repeated actions being vexatiously brought, the only remedy is by application to chancery for injunction. 1 *P. Wm.* 671.

The rule which permits the tenant to show that his landlord's title has expired, is well settled, nor is it confined, as the plaintiff's counsel suppose, to the action of ejectment. "With the rule," it is said, "which forbids the tenant to deny the title of his landlord to make the demise under which he occupies, there is obviously nothing inconsistent in permitting him to show that that title has since determined. He is at liberty, in general, *in any action at law*, to show that the interest which the lessor had in the land at the commencement of the tenantcy, has since expired, whether by operation of law, by efflux of time, or by his own act." *England, exd. Syhern* vs. *Slade*, 4 *T. R.* 682; *Doe* vs. *Ramsbotham*, 3 *M. L.* 5, 516; *Doe* vs. *Watson*, 2 *Stark.* 230; *Adams* 247; *Jackson* vs. *Davis*, 5 *Cowen*, 135; 5 *Conn. Rep.* 201.

It is a good plea in bar, to an action of *covenant*, for not repairing, that the plaintiff was seized only in right of his wife, for her life, and that she died before covenant broken; or that the lessor under whom the plaintiff claims as heir, was tenant for life only. *Blake* vs. *Foster*, 8 *T. R.* 487; *Brudnell* vs. *Roberts*, 2 *Wils.* 143; *Doe* vs. *West*, 1 *Blackf.* 133.

In *Lon* vs. *Simms*, 9 *Wheat.* 515, it is decided that the tenant may always show the title to be out of his landlord, though he do not show it to be in himself. See also *Adams*, 29.

That ejectment is a mere possessary action, see *Taylor ex dem. Atkyns* vs. *Horde et al.* 1 *Burr.* 119; *Beck* vs. *Phillips*, 5 *Burr.* 2830; 3 *Dallas*, 457; *Fronblesome* vs. *Estill*, 1 *Bibb*, 129; *Rice's heirs* vs. *Lowan*, 2 *Bibb*, 150; *Adams*, 28.

That in all actions for the *possession*, the defendant, being tenant, may show that plaintiff's title has expired, see *Swan* vs. *Wilson*, 1 *Marsh.* 99; *Comyn on Landlord and Tenant*, 521.

It was error, therefore, in the Justices to reject the evidence of *Thorn's* title having expired.

The plaintiff in error denies the right of the judge of the Circuit Court to issue a certiorari in this case, and concedes that the power of issuing such a writ was abolished by the act of November 3rd, 1831. By the act of 1813, concerning forcible entry and detainer, it is provided that "no appeal shall be allowed from the judgment of the Justices aforesaid: *Provided, nevertheless*, that the proceedings may be

removed by certiorari, into the court of common pleas, holden in said county; and be there set aside for irregularity, if any such there be. By this act, a certiorari is made the *only* remedy. The act of 1831 simply takes from the *Clerks* the power of issuing such writs; and does not conflict with or repeal any part of the act of 1813. That act being in force, the Circuit Court rightly took and exercised jurisdiction in this case. And, as by the Statute, the only power given the court was to "set aside" the judgment of the Justices, the judgment of the Circuit Court is correct. It had no power to try the case *de novo*, on its merits. It was made by Statute, *quoad hoc*, a court of error; and whether the Justices are dead or not, is no question here; as indeed this court can know nothing about it. It is beyond the record.

LACY, *Judge*, delivered the opinion of the court:

The assignment of errors presents but two questions for our consideration and decision.

1st, Was there error in the judgment and proceedings of the justices court?

2d, Was the writ of certiorari rightfully issued, and had consequently the circuit court jurisdiction to try the cause.

We will examine and determine the last of these questions first.

By reference to the statute regulating the proceedings in actions of forcible entry and detainer, approved August 19th, 1813, Ark's D. 262, it will be seen that no appeal is allowed from the judgment of the justices, but that the proceedings may be removed by certiorari, into the circuit court holden for the county in which the cause is tried and may be there set aside for irregularity. It is very evident where there is any irregularity in the proceedings of the justices, that the cause may be removed by certiorari, for the words of the act, are express and positive upon the subject, and admit of no doubt or latitude of interpretation. In this case, the certiorari is issued by the clerk under the order and by the direction of the judge of the circuit court in vacation, and it must be conceded that a writ issued by the clerk under the express order, and by the authority of the judge, stands precisely in the same situation as if it was issued by the judge himself.—The record that was produced in the circuit court purports to be a bill of exceptions, filed in the trial before the justices, setting out the proof of the plaintiff's cause of action, which was admitted to go to the jury, and also the testimony offered by the defendant, which was ex-

cluded from their consideration. Although it is called a bill of exceptions, and is regularly signed by the justices, still the court can regard it in no other light, than a mere record of the facts that transpired during the trial, and as such the transcript was rightfully removed to the circuit court, but it is not a bill of exceptions according to the legal definition of that term, for the statute organizing the justices court gives no authority to take a bill of exceptions to the opinion or judgment of the justice's court.

The other assignment presents but one question, which is, was the decision of the Circuit Court right in reversing the judgment of the justices' court, and remanding the cause to the justices' court, to be proceeded in according to the instructions there given. Before entering into an examination of the question, it is considered necessary and proper to point out the similarity and difference between an action of ejectment, and that of a writ of forcible entry and detainer, as as regulated by our Statute. In every complete title to lands, two things are necessary—the possession or seizin, and the right or title to the property claimed; or, as Fleta expresses it, the *juris et cesinæ conjunctio*. Now, if the possession has been severed from the property, or the right of possession, the party injured, according to the circumstances of the case, has an appropriate remedy for the injury sustained.—The ancient remedy was by a writ of entry or assize, which were actions merely possessary, only serving to regain the possession whereof the demandant had been unlawfully disseized by the tenant in possession, and this without any prejudice to the right of ownership in the soil. A writ of entry only disproved the title in the tenant, by showing the unlawful commencement of his possession: Whereas, an assize proves the defendant's title, by showing his or his ancestors possession or title. To these remedies the writ of ejectment succeeded. A writ of *ejectio firmæ*, or an action of trespass in ejectment, lieth on lands or tenements that are let for a term of years, and afterwards the lessor, reversioner, remainder man or any stranger, doth eject or oust the lessee of his term. 3 *Black. Com.* 156. In this case he shall have his writ of ejection to call the defendant for entering on the lands so demised to the plaintiff for a term not yet expired, and ejecting him.

If the ouster was committed by a mere stranger, without any title to the land, the lessor might anciently by a real action recover possession of the freehold; but the lessee had no other remedy against the ejector but in damages, by the writ of ejectment for the trespass com-

mitted. And when the courts of equity began to oblige the ejector to make a specific restitution of the lands to the party immediately injured, courts of law also adopted the same method of doing complete justice; and, in the prosecution of the writ of ejectment, introtroduced a species of remedy not warranted by the original writ, and gave judgment to recover the term, as well as the damages, and issued a writ of possession. This remedy seems to have been settled early in the reign of Edward IV, though it first began to be applied to the principles of trying the title to lands about the time of Henry VII, and since the disuse of real actions, this mode of proceeding has become the usual method of determining the title to lands and tenements. When, therefore, a lessor hath a right of entry into lands, which is wrongfully withheld from him, he makes a formal and fictitious entry on the premises, and, being so in possession, seals and delivers the lease to some third person or lessee; and, having thus given him entry, leaves him in possession of the premises.

The lessee is presumed to stay upon the land till he who held the previous possession, enters and ousts him; and for this injury the lessee is entitled to his action of ejectment against the tenant or casual ejector: and in order to maintain the action the plaintiff, in case any defence is made, must make out his cause by proving title, lease, entry and ouster. First, he must show a good title in the lessee, which brings the matter of right before the court; secondly, that the lessor being seized, did make him the lease for the term; thirdly, that the lessee took possession in consequence of the lease; and lastly, that the defendant ousted or ejected him. And when these facts are proved, he shall have a judgment to recover his term and damages;—and also is entitled to his writ of possession, which the sheriff is bound to execute by delivering him peaceable possession of his term.

This is the regular method of bringing an ejectment in which the title of the lessor comes collaterally and incidentally before the court, in order to show the injury done to the lessee by the ouster committed; and as much trouble and formality were found to attend making actual lease, entry and ouster, and for a more easy and natural method of trying the title by writ of ejectment, where there is an actual tenant in possession, Lord Chief Justice Rolle, during the exile of Charles II, invented a string of legal fictions, which dispensed with the actual lease, entry by the plaintiff, and ouster by the defendant, and required the party, when he entered into the common consent rule on

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notice from the casual ejector, to admit these three essential requisites to have been complied with, and confined the proof generally to the mere title of the lessor. 2 *Starkie's Ev.* 289; *Morris* vs. *Landrum*, 1 *Dallas*, 67. It was resolved by all the judges in the court of King's Bench, that a writ of ejectment, and the proceedings under it, are judicially to be considered, as the fictitious form of action really brought for the lessor of the plaintiff against the tenant in possession, invented under the control and power of the court, in many respects to force the parties to go to trial upon the merits, without being entangled with the nicety of pleading on either side. It is founded on the same principle as the ancient writ of assize, being calculated to try the mere possessary title to an estate, and has succeeded to those of real actions, because the form of proceeding is entirely a fiction.

It is in the power of the court to direct its application to prevent fraud, and to ascertain the proof of the title. 3 *Black. Com.* 162.

It is true, as contended in argument for the defendant in error, that the action of ejectment is in its nature possessary, and in some instances it may be brought merely for the recovery of the possession; but then, in order to enable a party bringing it to recover, a right of entry or a right of possession, which are convertible, must be proved.

It is an inflexible rule that the lessor or the plaintiff must recover by the strength of his own legal title, and not by the weakness of his adversary's. And that an equitable estate will not enable the plaintiff to support an ejectment at common law; and that the tenant in possession may defeat the lessor's title by showing an outstanding, paramount title in a stranger, or third person. *Robertson* vs. *Campbell*, 3 *Wheat.* 212; *Carson* vs. *Boudinot*, 2 *Wash. C. C. R.* 35; *Adams on Ejectment from page* 294 *to* 315 *and notes*; 1 *P. Williams*, 671.

That the tenant in possession can show his landlord's term has expired, or his right of entry extinguished, is well settled, both upon reason and authority. And although the action is in many respects, and in its nature possessary only, still the right of possession depends on the right of property; and the title of the lessor in general constitutes the main ingredient in the action. The plaintiff has no right to the possession, if he cannot show title in the lessor; for upon proving that fact depends his right of recovery, and consequently his right of possession. He is at liberty in any action at law to show that the interest which the lessor had in the land at the commencement of the tenancy has since expired, "whether by operation of law, by effect of time, or by

his own act." *England* vs. *Slade*, 4 *T. R.* 682; *Doe* vs. *Ransbothane*, 3 *M. & S.* 516; *Adams*, 247.

The principles as laid down by the authorities here cited, are unquestionably true in regard to actions of ejectment. But the enquiry then naturally arises at this stage of the investigation, how far are they applicable to the proceedings in actions of forcible entry and detainer, as regulated by our Statute.

If one turns or keeps another out of possession forcibly, where the latter has title, it is an injury both of a civil and a criminal nature.—The evil was remedied by the Statute of 5th Richard II, *c.* 8, which authorized the party in a peaceable manner to enter upon the land, and reclaim the possession or immediate restitution. The criminal injury or public wrong was punishable with the penalty the law affixed for a breach of the peace.

And by the Statute of 8th Henry VI, *c.* 9, upon complaint made to any justice of the peace for a forcible entry with strong hand, on lands or tenements, or a forcible detainer after peaceable entry, he shall try the truth of the complaint by jury, and, upon force found, shall restore the possession to the party put out. And by 31*st of Elizabeth*, *c.* 11, this mode of redress does not extend to such persons as have continued in peaceable possession after three years or upwards. These several acts form the origin of the present remedy of forcible entry and detainer, as adopted in most of the States of the Union. These acts were passed to prevent individuals from doing themselves right by force, and to protect the persons in the peaceable possession without authority of law. 4 *Black. Com.* 148; 1 *Hank*, 274. The construction of the English Statutes by their courts, and which had been followed by some of the American decisions, confined the remedy to cases where the relater was ousted of his freehold or a term of years, or where he had lawful right to the possession; and the consequence was that in every other instance of forcible entry and detainer, the wrong-doer, though he entered with force and without right, was preferred to the quiet occupant thus dispossessed: for if the former could show on the trial of the cause, that the latter had no estate within perview of the acts, he was entitled to a verdict. These decisions proceed upon the ground, that as the Statute requires an estate in the pemises by express terms; that he who cannot show a right of entry, or a right of possession, cannot maintain the action. For the right of action is only given to the party having a lawful entry or right of possession.

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Hence it necessarily follows, that any thing that would show the term of the lessor had expired, or had terminated, would defeat the action of forcible entry and detainer. And in this instance it is like the writ of ejectment. In the actions under the English practice, it was necessary to show or prove title to enable the plaintiff to recover the possession. But our Statute is essentially different in this particular. After pointing out the manner of proceeding in the case, the act declares, among other things, "when any person shall wilfully, and without force, hold over any lands, tenements, or other possession, after the determination of the time for which they were demised or let to him, or the person under whom he claims; or when any person wrongfully and without force by disseizin shall obtain and continue in possession of any lands, tenements, or other possessions, and after demand made in writing for the delivery thereof by the person having the legal right to such possession, his agent or attorney shall refuse or neglect to quit such possession, upon complaint thereof in writing to two justices of the peace, as aforesaid, the said justices shall proceed to hear and determine the same in like manner as in cases of forcible entry and detainer, and issue a writ of restitution accordingly." See *Arkansas Dig. p.* 262, *sec.* 7. By a careful examination of the section, it will be seen that it embracess classes of cases, which are wholly distinct and independent of each other, and to which the remedy applied is essentially different in every important particular. The latter clause of the section has exclusive reference to cases where the defendant or tenant in possession has entered by disseizin, and in such cases, if he hold over, notice must be given by him to quit; and the action of forcible entry and detainer cannot be maintained unless the plaintiff has a legal right to the possession. This right of action is made to depend by the Statute upon his legal interest, and unless he can establish that fact, he has no right to the possession. And consequently, if the defendant can show that the term of the demise has expired before the commencement of the suit, or that the plaintiff never had any lawful right to the possession, it will form a complete bar to the action. It is perfectly competent for the defendant to traverse the plaintiff's right to the possession; and if, on the trial he disproves it, he of course destroys the lawfulness of his possession, or his right of entry. The writ of restitution is given by the Statute on the express condition of the right of property or possession, and if this right is not proved by the plaintiff, he cannot be invested with the possession. In this respect,

our Statute coincides with the rule of the common law in like cases, and also with the acts of many of our sister States on the subject.— The principle upon which the rule is founded is this: that the disseizor acquired by his disseizin a lawful possession, which the rule will not permit to be interrupted or overthrown, unless the party claiming possession can show he is rightfully entitled to it.

The first part of this clause of the seventh section applies solely and exclusively to persons, who without force wilfully held over any land, tenements, or other possession, after the term for which they were leased or let to them, has expired. This is the case where a tenant comes lawfully and peaceably into possession by lease or otherwise, and then refuses to deliver it up according to the terms or effect of the lease or agreement. In such a case, the Statute does not contemplate that the plaintiff shall show any title whatever; for the right to the possession does not collaterally or incidentally come into question.— The only matter of controversy between the parties is, to whom does the possession properly belong? It is not a trial as to the right of property, or right of entry, but is merely as to the possession; and if the plaintiff show the possession to be his, though the right of possession may be in one person, and the right of property in another, still he is entitled to a verdict, and to have his writ of restitution; for it is the possession he claims, and it was that the defendant agreed to surrender to him on the expiration of the lease. There are no words or terms in the act showing the plaintiff must prove an estate in the premises; but, on the contrary, the Statute both by express language, and by reasonable intendment, clearly indicates that possession alone, in the absence of all right, will entitle a party to maintain an action of forcible entry and detainer when there is a wilful holding over by the tenant who entered peaceably, and by virtue of a lease or agreement, into the land. A party peaceably in the possession at the time of the forcible entry, or in the constructive possession at the time of holding over, is entitled to proceed under the Statute in an action of forcible entry and detainer, although he is neither owner of a freehold, or possessed of a term of years, or has any lawful right of entry to the land.

The title of the land is not in issue where there is an unlawful holding over by a tenant put in possession by his landlord. This rule is founded both on policy and justice, and is sustained by the highest authority. The tenant who is put in possession, is estopped by his own act or deed from denying the landlord's title; for by accepting the

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lease or deed, he has admitted it, and it does not afterwards lay open to say the lessor had no title. For if the law permitted him to do so, the tenant might perpetrate a fraud in first obtaining the possession, and in afterwards transferring to another, to the prejudice of the rightful owner; for a mortgagor will not be allowed to question his own title at the time of the mortgage. In legal contemplation there is but one possession, which continues during the entire term, and which is the possession of the landlord, and that the tenant cannot be permitted to deny; for, by accepting the possession, he has estopped himself from that right. If these positions be true, and that they are seems self-evident to the court, then it necessarily follows that the decision of the Justices' Court, in excluding the defendant's testimony from the jury that went to show that the plaintiff had no right or title to the lots in question, was correct; and consequently the judgment improperly refused by the Circuit Court. The plaintiff proved on the trial that the defendant acknowledged his title to the property and his right of possession by a covenant, regularly executed between the parties, in which the defendant bound himself to give up and surrender the possession to the plaintiff by the 10th day of October, 1837; and that after his lease had expired, he wilfully held over the possession, and refused to surrender it up according to his agreement. This was all that was necessary for the plaintiff to prove, and when he had established the fact, the defendant was his tenant under a written agreement or covenant, his right of action accrued, and on the trial of the forcible entry and detainer, it was not competent for the defendant to give any testimony whatever in impeaching his title; for, by his own act, he was estopped from so doing.

The opinion of the Circuit Court is manifestly erroneous, not only in setting aside the judgment of the Justices' Court, but also in remanding the cause to be proceeded in according to law in that court.

The Circuit Court professes no power or authority to make such an order, and of course the entry was null and void. For the Justices' Court was dissolved after they had tried the cause and awarded the writ of restitution. It was a court of peculiar jurisdiction conceived for a special and given purpose; and when that object has been accomplished, the commissions of the justices, by their own limitation, expired. The judgment of the Circuit Court must, therefore, be reversed with costs, the cause remanded to be proceeded in according to law, which is, that the judgment of the Justices' Court be affirmed with costs.

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CYRUS T. SMITH *against* WILLIAM K. STINNETT.

ERROR *to Pope Circuit Court.*

Under the Territorial law, the prayer and grant of an appeal from the decision of a justice to the Circuit Court, conferred jurisdiction on the Circuit Court; and the jurisdiction did not depend upon the giving of bail in appeal, or the sufficiency of the bail given.

Where no special bail was given before the justice, or where such bail, being insufficient, is not perfected in the Circuit Court, the appeal will be dismissed, but not on the ground of want of jurisdiction.

This however is an objection which it rests with the appellee to make, and if he goes to trial in the Circuit Court, or takes judgment by default without making, he waives it, as expressly as if he had placed his waiver on the record.

If he does so waive it, the appellant cannot assign for error here that there was no special bail, and that the Circuit Court had no jurisdiction. He cannot take advantage of his own wrong.

Where a party appeals from a judgment of a justice, and afterwards brings his writ of error, he cannot assign for error any defect in the justice's writ, or the service thereof; or his non-appearance before the justice. By appealing, he makes himself a party to the proceedings, and must rest on such defence as he may lawfully make upon the merits.

And if the appellant fails to file in the Circuit Court a transcript of the justice's proceedings, or take steps to cause it to be filed, it is his own fault.

An order to set aside a final judgment by default, made at a term subsequent to the one at which such judgment is rendered, is wholly illegal; and no fact stated in such an order can be noticed in this court.

If it is stated in such an order, that no transcript of the justices' proceedings was filed in the Circuit Court; and if a transcript comes up to this court, though not certified by any authorized officer, but which is referred to in the assignment of errors, and not denied to be a correct transcript, this court will presume that such transcript *was* on file in the court below.

Where there were two defendants in the justice's court, and one only appealed, and judgment in the Circuit Court was rendered against "the said defendant," it will be considered as rendered against the appellant alone.

CUMMINS & PIKE, for the plaintiff in error.

TRAPNALL & COCKE, *contra.*

RINGO, *Chief Justice*, delivered the opinion of the court:

This was an action originally commenced before a justice of the peace in the name of *King Stinnett* against *Cyrus T. Smith* and *W. W. Rankin.* The summons was dated on the third and returnable on the 10th day of March, 1836—the service on the defendant was clearly insufficient, but a judgment was given by a justice of the peace in favor of *King Stinnett* against the defendant on the 9th day of March, 1836—without any appearance having been entered by them; from which the defendant *Smith* prayed an appeal, and an entry was thereupon made by the justice of the peace on his docket, as follows: "On this day came the defendant, and prays an appeal from

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the judgment of John M. Carley, justice of the peace, to the Circuit Court of Pope county, Illinois township. It is therefore granted this 2nd day of April, 1836.

CYRUS T. SMITH,
JOHN B. S. EWING.

"Witness,

"JOHN M. CARLEY, J. P."

The court, at the September term, 1837, affirmed the justice's judgment, and entered up final judgment by default, in favor of *W. K. Stinnett*, against the defendant; and at the March term, 1838, on the motion of *Smith*, the appellant ordered the clerk of said court, (into whose office the docket and papers of the said justice of the peace were then filed, he having resigned his office and removed out of the State,) to certify to the court at the next term, a transcript of the proceedings had in this case before the justice of the peace. At the September term, 1838, the record names the parties thus: "*William K. Stinnett, appellee*, vs. *Cyrus T. Smith, appellant*," and states that the parties appeared by their attornies, and on the plaintiff's motion the order made at the last term was set aside, and a judgment entered, "that the judgment in this case, rendered at the September term of this court, A. D. 1837, be, and remain in full force and virtue, and that the plaintiff have execution thereof, and have and recover of and from the defendant all costs in and about this motion and the order made at the last term of this court, laid out and expended, and the defendant in mercy," &c.

To reverse the judgment against him, *Smith* prosecutes this writ of error and assigns for error several matters, all of which will be noticed. The fifth error assigned questions and denies the jurisdiction of the Circuit Court, on the ground that no appeal was ever prayed for or taken by *Smith*, or allowed by the justice, according to law. That the whole of the proceedings in this case have been very irregular, is manifest. The summons is not in the form prescribed by the Statute; the service of it upon the defendants is invalid, and never imposed upon them any legal obligation to appear to the action, or authorized the plaintiff to take or the justice to give judgment against them by default. The summons was returnable on the tenth, and the judgment was given on the ninth day of March, 1836, without any appearance by either of the defendants, and was therefore incapable of being legally enforced against them, and must regularly have been

superseded, or the execution thereof prohibited, upon a proper application made for that purpose. Yet it was a decision of a justice of the peace made in a case within his jurisdiction, and by the provisions of the act approved November 3, 1830, *Ark. Dig. p.* 374, *sec.* 57, either party had a legal right to appeal therefrom, within thirty days after the rendition of the judgment, to the next Circuit Court of the county where the judgment was rendered, and *Smith* appears to have availed himself of this right; for the record shows that he prayed an appeal, which was granted within thirty days next after the judgment was given; but that he wholly failed to give special bail for the faithful prosecution of his appeal, and the payment of the costs and condemnation of the Circuit Court, as is required by the Statute; and therefore his appeal might have been dismissed on the motion of *Stinnett*, but he appears to have adopted a different course, and by appearing in the Circuit Court, and there proceeding in the cause, to have waived every objection which he was at liberty to have taken to the appeal, so far as it was in his power to waive them; and this presents the single question, whether the Circuit Court acquired jurisdiction of the case upon the appeal of *Smith* alone, without his giving any special bail, as is required by the Statute. For if the court could legally exercise jurisdiction over the case, *Smith* cannot be permitted to urge any objection to the irregularity of his own appeal, or his own omission to give the security required by law, which is intended and required solely for the benefit and safety of the opposite party, and could not by possibility prejudice the right of the appellant. Consequently, to permit him to have any advantage therefrom, when the objection has been waived by his adversary, and he has recovered every benefit which he could derive from an appeal regularly taken and perfected, would be to violate one of the most familiar and statutary principles of law—that no one shall take advantage of his own wrong. The case must therefore be regarded now in the same light as it would be if the appellee had in the first instance expressly waived his right to the security of special bail, guaranteed to him by law, and entered his consent on the record, that the appeal should be prosecuted without it; in which case we apprehend the Circuit Court would, by the prayer for and grant of the appeal, obtain jurisdiction of the case, and the appellee would be estopped by his consent appearing of record, from objecting that special bail had not been given as required by law, and this would, in our opinion, be the result, nothwithstanding the law

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imperatively enjoins it upon the appellant to give special bail, and prescribes the manner of taking it; for the same Statute also contains the provision, and should any exceptions be taken to the acknowledgment of special bail for said appeal, said appellant may perfect the same in the Circuit Court, showing clearly that the jurisdiction of the Circuit Court does not depend upon the fact of special bail having been given; but upon the fact of the appeal having been prayed for and granted, within the time prescribed by the Statute, which is believed to be all that is required by law to give the court jurisdiction of the case, although it is not enough to entitle the appellant to a trial on the merits of his case in the Circuit Court, when the appellee objects to it on that ground. And when the bail is insufficient the appellant may perfect it in the Circuit Court, and thereby entitle himself to a trial on the merits, notwithstanding the objection; but when special bail is not given at all before the justice, as in this case, or where it is insufficient and is not perfected in the Circuit Court, the objection must prevail, and the appeal be dismissed, not on the ground that the court has not jurisdiction of the case, but because the appellant has failed to comply with the terms imposed upon him by law, to the prejudice of his adversary, who insists upon his legal right to have the decision of the jury, or the judgment of the justice, stand as final, and not to be vexed and harrassed with another trial, when the party demanding it, is not legally entitled to have it. We are therefore satisfied that the Circuit Court had jurisdiction of the case, and that the plaintiff in error, who was the appellant, cannot avail himself of any irregularity or omission of his own, in taking the appeal, and bringing the case before the Circuit Court.

The first assignment of error assumes that the Circuit Court gave judgment by default against the defendant, when no transcript of the proceedings and judgment of the justice had been certified to or filed in court; and the second, third, and fourth assignments question the judgment on the ground of the insufficiency of the original summons, and the service thereof and the non-appearance of the defendants before the justice of the peace. Upon the principle settled, and uniformly observed and acted upon by this court, the plaintiff in error, by taking the appeal from the justice's judgment, voluntarily made himself a party to the proceedings against him, and thereby precluded himself from taking any objection to them, either on the ground of any defect in the writ or the service thereof, or his non-appearance before

the justice of the peace, and rested his case, as he was then bound to do, upon such defence as he might lawfully make, on the trial of the case on its merits before the Circuit Court; and if he afterwards failed to obtain and file in the Circuit Court a transcript of the proceedings before the justice, or to take such measures as the law prescribed to cause the same to be certified and filed, then it was his own fault. But there is nothing in the record, as certified here, showing the fact that no transcript of the justice's proceedings and judgment was certified and filed when the final judgment by default was given against the defendant. This fact is stated in an order of the court, entered at a subsequent term, when the case was not in court, and the parties had no day therein, and the court itself had no control over the record of the previous term, or of the judgment entered thereat; nor does it appear that *Stinnett* had any notice of the motion, or was in court when the entry, stating this fact, was made. And it appears that the court, at the next succeeding term, directed the order reciting that fact, to be set aside on the motion of *Stinnett;* but upon what ground it was ordered to be set aside, the record is silent: nor is it deemed at all material to know, because all these proceedings had in the case after the term at which the final judgment was given, are clearly illegal, and cannot be regarded as having any influence upon the final judgment, previously made, either to uphold, or to overthrow it. It must be considered as standing wholly independent of them. And the transcript certified upon the writ of error contains a copy of the proceedings and judgment of the justice, without any certificate of the justice, or any other officer, or any statement of the time when they were filed in the Circuit Court. No exception has been taken to this transcript by either party—no diminution has been suggested, and the plaintiff in error, by assigning for error matters which only appear in the proceedings before the justice, as contained in the transcript of the record, expressly recognizes them as composing a part of the record in this case; and, therefore, as it does not affirmatively appear that they were not on file, when the judgment by default was entered against the defendant, we are, in support of the judgment, bound to presume that they were on file in the Circuit Court when the judgment was given. *Smith* alone took the appeal, and brought the case before the Circuit Court, and as *Rankin* never was served with process to appear, and never did in fact appear to the action, or in any manner make himself a party thereto, so that he is in law bound by the pro-

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ceedings. *Smith* must in law be alone regarded as the appellant and defendant in the Circuit Court; and when the record says this day "came the plaintiff, by Martin his attorney, and the defendant, although solemnly called, came not, but made default," it must be understood as referring only to the parties legally before the court; and also when it states, "that the plaintiff have and recover of and from the said defendant, the sum of," &c. the operation thereof must upon the like reason be limited to the same parties: there being no other legally before the court, and the judgment be regarded as being in favor of *Stinnett* as the plaintiff, and against *Smith* only as the defendant. The same rule has been established and acted on in Kentucky and Virginia. See 2 *Bibb*, 388; *Morgan's executors, &c.* vs. *Morgan*, and 4 *Hen. & Munf.* 293.

Wherefore, we are of opinion that there is no error in the judgment of the Circuit Court, given in favor of *Stinnett*, against *Smith*, the plaintiff in error, at the September term, 1837, of which he has any legal right to complain; and that the said judgment ought to be and is hereby affirmed with costs;—but inasmuch as the Circuit Court had no jurisdiction of the case when the judgment entered at the September term, 1838, was given, the judgment then given must for that reason alone be and the same is hereby reversed.

JOHN RUDDELL *against* JOHN MOZER & BARNETT MOZER.

ERROR *to Independence Circuit Court.*

The rule that the allegations and proof must correspond, applies to cases commenced before a justice of the peace, so far as the plaintiff is bound to state the ground of his action, but no farther.

His evidence must in every case be of the same legal character and description, as that mentioned in the summons, which the defendant is called upon to answer.

In every other respect the proceedings are *ore tenus.*

No bill of exceptions can be taken before a justice; but either party may take them on the trial upon appeal in the Circuit Court; and will have the same advantage of them when improper testimony is admitted, or proper testimony is excluded, as though the pleading had been formally drawn out in form.

Where the action before the justice was founded on a parol agreement, and a written agreement was permitted to go in evidence on the part of the plaintiff, in the Circuit Court, which would have been inadmissible, in the foundation of the action, yet, if the record does not show that the agreement so offered in evidence was filed before the justice on or before the day of trial, nor in the clerk's office on the appeal being taken; in such case the record does not show it to be the foundation of the action. And the legal presumption is, that the suit was not based upon it, but on some other agreement by parol, as contradistinguished from a written agreement.

If such were not the fact, the defendant should have shown it by bill of exceptions. Not having done so, the legal presumption is, that sufficient legal proof was offered to warrant the verdict and judgment in the Circuit Court.

If therefore the case could have occupied such an attitude as to justify the introduction of the written agreement for any purpose whatever, the legal presumption is, that it was in such situation when the writing was admitted.

And it makes no difference, if the names of the plaintiffs are differently spelled in the summons, and in the agreement. The identity must be presumed to have been proven, or in other words, that the plaintiffs, as well as the defendant, executed the agreement.

Where the defendants were named "John Mozer and Barnett Mozer" in the summons; and in the agreement offered in evidence "*John Mousuer* and *Barnett Mosuser*," and their signatures to the agreement were "*John Mouseuer* and *Barnett Mouseur*," held that the names were *idem sonans.*

This was an action originally commenced before a justice of the peace, and the summons commanded the constable to summon "*John Ruddell*, surviving partner of John Ruddell and Aaron Gillett, partners under the style, &c. of *Ruddell & Gillett*, to appear and answer unto *John Mozer* and *Barnett Mozer* in an action *on a parol agreement.*"

The justice gave judgment against *Ruddell* for $33, and he appealed to the Circuit Court.

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When the case came on for trial in the Circuit Court, a jury was called to try the issue; and on the trial the plaintiffs offered in evidence a written agreeement, which was in the following words:

"Artickles of and agree ment maid and entered into by and between *John Ruddell* and *Aaron Gillett* on the one part, and *John Mousur* and *Barnett Mosusur* of the other part, all of the county of Independence county, and Territory of Arkansas, witnes that the said *Mouses* hais higerd to the said *John Ruddell* and *Aaron Gillett* ther 2 suns, Sam and Fedrick, for the sum of 22 dollars per mont, and is to let them goo to Crit ten county, and clear ground and make fence, on the land that they hav agreed to clear for Thomas P. Eskridge, and they bind themselves to let them work five months apeace, to commence about the first day of Febuary, or soner if called on, and they aint to leave them until the first day of July, this 12 day of January, 1835"—which agreement was signed "*John Ruddell & Gill.*" "*John Mouseuer, Barnett Mouseuer.*"

The defendants objected to its being read in evidence, which objection was overruled, and it went to the jury, who found for the plaintiffs $53 70 damages, for which, and costs, judgment was rendered. The defendant then moved for a new trial, which motion was overruled, and he sued his writ of error.

FOWLER & BLACKBURN, for the plaintiff in error:

In behalf of *Ruddell* it is contended, that the said writing was improperly admittted in evidence, and that the judgment predicated thereon must be erroneous.

Firstly, That it ought not to have been admitted, because the writ which was the foundation of the action, and in place of a declaration, called on *Ruddell* to answer "in an action on a *parol agreement;*" and the agreement given in evidence was *in writing*. The Statute governing such proceedings before justices of the peace, evidently draws a distinction; and under the Statute the precise cause of action should be stated in the summons. See *law and form of summons, in Geyer's Dig. p.* 382, 382, *sec.* 1. The *proof* must correspond with the *allegations*.

Secondly, There is no signature of *Aaron Gillett* appended to the contract, as the face of it in order to make it valid, shows that there should be; or there should be a showing that *Aaron Gillett's* usual signature, or the signature that he used in this case was "*Gill.*" There

is nothing showing that *Ruddell* and *Gillett* were partners, and in order to make it their individual contract, as it purports on its face, both of them should have signed: otherwise, it is misdescribed, and if the contract of *Ruddell* at all it is his own individual contract, and not that of him and Gillett, either individually or as partners; and does not make him responsible in manner and form, and in the character and name, by which he is described and called upon to answer in the summons. If *Ruddell's* contract at all, it is his individual liability, assigned by no other person but himself. Such variance is fatal, and the writing ought to have been excluded. *Archb. Civ. Pl.* 113; 1 *Peters' Rep. p.* 139; 3 *Stark. Ev.* 1575.

Thirdly, The said *John* and *Barnett Mozer* were entitled to no benefit from the contract produced in evidence, having no legal interest therein. It was a contract in favor of *John Mouseuer* and *Barnett Mouseuer*, persons of different name, both in *spelling* and *sound*, and could not be legal evidence for the plaintiffs below, unless it had been transferred to them by assignment. Therefore, being a contract between different persons, it was materially variant from the contract described in the summons, and ought to have been excluded for such gross and palpable variance.

Fourthly, The writing produced in evidence showed clearly a demand not within the jurisdiction of a justice of the peace. A contract for *five months* work at *twenty-two dollars per month*, (supposing the lowest even, that it was for their hire *jointly*,) amounts to *one hundred and ten dollars*—a sum for which suit should have been instituted in the Circuit Court originally, which, by the State Constitution, has *exclusive* jurisdiction thereof. Vide *Art.* — *Sec.* — The contract was an entirety, and could not be separated into different suits; and if suit had been brought for a balance due, the record should have shown the fact—if to be tolerated at all. Vide 15 *Johns. Rep.* 229, *Smith* vs. *Jones*.

Upon all these grounds, *Ruddell* contends that the case ought to be reversed.

As to *variance* see cases in point. *Peak. Ev.* 197; *Hardin's Rep.* 507, *Palmer, &c.* vs. *McGinnis;* 1 *J. J. Marsh.* 299; 5 *Taunt.* 814.

As to allegations, proof, &c. see *Ark. Sup. Courts Rep. p.* 118, *Jeffrey* vs. *Underwood*.

When a note was given by the name of Shirtleff, and declared in

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the declaration as made by Shutliff, the plaintiff was non-suited. 1 *Chit. Pl.* 307; *Gorden* vs. *Austen*, 4 *Tenn. Rep.* 611.

CLENDENIN, *contra:*

The action was well brought on a parol agreement, if the court should incline to the opinion that the writing copied in the plaintiff's bill of exceptions, was the basis of the action; for it is a well settled principle that all contracts not under seal are parol,—(see *Comyn on Con. Chap. 1st, Part 1st.*)—and there is no law in force in Arkansas that can be so construed as to abolish the well settled distinction between sealed instruments and parol contracts.

The paper transcribed in the record of this case, as the court will perceive, was not objected to as constituting the basis of the action; but merely as evidence in the cause, so that the Circuit Court did not err in admitting that in evidence, which both parties had made the highest and only evidence of their contract. If this court should believe that the paper copied in the bill of exceptions is not such a one as is described in the summons, and that therefore the action cannot be sustained upon it; yet they will be bound to presume that it was not regarded by the court below as the basis of the action, but that the action was founded upon other and different evidence, as nothing appears to the contrary in the bill of exceptions; nor does it say that there was no other testimony adduced before said Circuit Court. This court is bound to sustain the judgment of the court below, and to presume that it had sufficient and competent evidence to found its judgment upon, unless it shall be made to appear to the contrary by the bill of exceptions.—See 2 *Littell*, 182, 186; 5 *Littell*, 316, 221.

To the second assignment they answer that it no where appears in the record that their signature, so far as is necessary to be inquired into by this court, was disputed, either by the plea of *non est factum*, or any other plea. If the plaintiffs in error had intended to deny the execution of the paper, he should have done so in the Circuit Court, by the plea of *non est factum*—or if he had intended to deny that he was the identical person metioned in the summons, he should have pleaded the plea of misnomer: and since he has failed to plead either, this court is bound to presume that the Circuit Court had all the evidence necessary to authorize the judgment given in the case. This court will presume that every objection that could be made, was made, and that the plaintiff alone combatted and silenced them by compe-

tent and legal testimony, until the contrary clearly appears by the record. And this court is confined in its investigations to the points raised and adjudicated upon by the inferior court. See *Statutes of Arkansas, A. D.* 1836 *p.* 132, *sec.* 14, *regulating practice in Supreme Court.*

To the third assignment defendants answer that there is no variance between the names of the plaintiffs below, as described in the summons, and the paper copied in the bill of exceptions, as *Mozer* and *Mousur* are one and the same in sound; and in case the court should think otherwise, it is a point that they cannot take cognizance of, as no objections appear to have been made in the court below. This is a matter that could only be taken advantage of by the plea of misnomer filed in the Circuit Court, and since that does not appear this court will presume them to be the same name, or that they are known as well by the one as the other, and that the Circuit Court had ample evidence of that fact.

To the fourth error the defendants have already answered.

To the fifth error the defendants answer, and say that according to the contract of the parties, the defendants had a right of action on the expiration of each succeeding month, and had their option to institute fine, separate writs, or to postpone suit until the expiration of the whole five months, and then commence in the Circuit Court. The defendants hold it to be wholly immaterial in this case whether the contract be considered as an entirety, or capable of a separation, as they rest their case on a ground that will sustain them in either view of the case. Suppose the contract in this case to be entire, and that the defendants were prevented from performing the whole contract, either by the act of God, or by the act of the plaintiff, would this court say that these defendants could not recover a reasonable compensation for their labor? I presume not. If, then, that is the law, it does seem that this court can arrive at no other conclusion than that it was proven before the Circuit Court, that the defendants were prevented from doing so, as there is nothing in the record to the contrary; and if such proof be necessary to sustain the judgment, this court will presume that such was the case, as made out in the court below. Their defendants now insist that inasmuch as they have altered a judgment before a justice of the peace, and then again in the Circuit Court, that they are entitled to the benefit of all legal presumptions; and that this court will sustain the judgment of the court below, unless it shall be so fatally defective that it cannot by any possibility do so.

LITTLE ROCK, RUDDELL vs. MOZER and MOZER

RINGO, *Chief Justice*, delivered the opinion of the court:

This is a writ of error, prosecuted to reverse a judgment of the Circuit Court of Independence county. The action was commenced before a justice of the peace, by the defendants in error, against *John Ruddell*, as survivor of Aaron Gillett, late partners, &c. who were summoned to answer the plaintiffs "in an action on a parol agreement." On the trial before the justice, the plaintiff obtained a judgment for 33 dollars, from which the defendant appealed to the Circuit Court;—and for the prosecution thereof, Daniel C. Ruddell became his special bail.

A jury was empannelled and sworn to try the cause in the Circuit Court, and returned a verdict for the plaintiffs for $58 70-100 in damages, upon which the court rendered judgment in favor of the plaintiffs, against the defendant and Daniel C. Ruddell as his special bail, for the amount of damages found by the jury, and all of the costs of suit. On the trial before the jury in the Circuit Court, the plaintiffs offered as evidence a written agreement, to the introduction of which the defendant objected, and moved the court to exclude it, but the court overruled his objection, and admitted it to be read as evidence to the jury. The defendant excepted to the opinion of the court overruling his motion to exclude the written agreement, and admitting it as evidence in the case, and filed his bill of exceptions, setting out the agreement *in haec verba*, and making it a part of the record.

The defendant also moved the court for a new trial, upon the following grounds: 1st, That the jury found contrary to law and evidence. 2nd, That the jury found contrary to the instructions of the court.—3rd, That injustice has been done him in the case. 4th, That the action is misconceived. But the court overruled his motion. There is an assignment of error and joinder thereto. The first error assigned questions the judgment of the Circuit Court in admitting the agreement in writing as evidence on behalf of the plaintiffs below, on the following grounds: 1st, Because it varies from the cause of action described in the summons in this, that it is not a parol agreement, but an agreement in writing. 2nd, Because it does not purport to have been signed by Aaron Gillett, nor by *Ruddell*, as alleged in the summons. 3rd, Because the persons named in the agreement, are other and different persons from those named in this suit. 4th, Because the written agreement was made and signed by *John Mousuer* and *Barnett Mousuer* and not by, or in the names of the plaintiffs; the names be-

ing wholly different in spelling and sound. And 5th, Because the written agreement is evidence of a demand and amounts in controversy exclusively within the jurisdiction of the Circuit Court, and over which the justice of the peace had no jurisdiction. The second error assigned questions, the decision of the court overruling the defendant's motion for a new trial. And the third is the general assignment, that the judgment is for *John* and *Barnett Mousuer* against *John Ruddell*—whereas, by the law of the land, it ought to have been given for the latter against the former.

The questions raised by the assignment of errors will be disposed of in the order in which they are stated.

It is a general rule that the allegations and proof must correspond, and the facts put in issue by the former must be established by the latter, to enable the party holding the affirmative, to succeed in obtaining a judgment in his favor; and this rule has been held to apply in cases commenced before a justice of the peace, so far as the plaintiff is under the Statute, bound to state the ground of his action; but no farther: as for instance, where he states that his action is founded on a writing obligatory, evidence of a parol contract cannot be received, and so *vice versa*, and the plaintiffs' evidence must in every case be of the same legal character and description, as that mentioned in the summons, which the defendant is called upon to answer, and if it vary therefrom in this respect, it is inadmissible; but the pleadings are in every other respect, *ore tenus*, and neither the allegations nor proof appear of record, or comprise any part thereof, unless made to do so by being incorporated into a bill of exceptions, which cannot be taken by either party before the justice, but which it is the right of either party to have upon a trial of the case before the Circuit Court on an appeal; and if from the facts thus made of record, it appears that irrelevant, illegal, or incompetent evidence was admitted, or relevant, competent proof was excluded on the trial, the party prejudiced thereby is entitled to the same advantage thereof on a writ of error, as if the pleadings were regarded by law to be formally drawn out in writing. And where the action is founded on any bond, bill, or note, in writing, the plaintiff is required to file the same with the justice, on or before the day of trial; and where an appeal is taken from the judgment of a justice, it is by law made the duty of the justice to file with the clerk of the Circuit Court, on or before the first day of the next term therof, "the original papers and process, together with the recognizance and

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other papers appertaining to the case, and a copy of the entries made in his docket." And the law prescribes that the case shall be tried on its merits, without regard to any irregularity or want of form, on the trial or proceedings of the justice, and no exceptions shall be taken to any irregularity or want of form.

The action is founded on a parol agreement; and the record does not show that the agreement in writing offered in evidence on the trial in the Circuit Court, was filed in the case, on or before the day of trial before the justice of the peace, as it was required by law to have been, if it was the foundation of the action; nor does it appear that it was filed by the justice in the clerk's office on the appeal being taken, with the papers and process appertaining to the case, as the Statute requires, if the action was founded upon it: therefore, inasmuch as the record wholly fails to show that it constitutes the ground of the plaintiff's action, the legal presumption is that the suit is not based upon it, but upon some other agreement, by parol, as contradistinguished from a written agreement; and if such was not the fact, it was the duty of the defendant, when he objected to the evidence, and his objections were overruled, to have shown it by his bill of exceptions, which he has not thought proper to do; and thereby, and by failing to set forth all the evidence in the cause, he has subjected his case to the full operation of the legal presumption, that there was adduced on the trial other legal proof sufficient to warrant the jury in finding the verdict, and the court in rendering judgment thereupon in favor of the plaintiffs, and he by his bill of exceptions presents this isolated question:—whether the written agreement could legitimately be admitted as evidence to establish any fact in the claim of testimony requisite or proper to maintain the action upon the parol agreement. The bill of exceptions states simply that the plaintiffs offer to introduce as evidence a written agreement, to which the defendant, by his attorney, objected, and moved the court to exclude the same, which motion was overruled by the court; to which opinion of the court the defendant excepts, and prays the agreement in writing, a copy of which is here given to be made part of his bill of exceptions. Articles of agreement made and entered into by and between *John Ruddell* and *Aaron Gillett* of the one part, and *John Mousur* and *Barnett Mousuer* of the other part, all of the county of Independence, country and Territory of Arkansas, witnesseth that the said *Mozers* have hired to the said *John Ruddell* and *Aaron Gillett* their two sons, Sam and Fredrick, for the sum of 22 dol-

lars per month, and is to let them go to Crittenden county, clear ground, make fence on the land they have agreed to clear for Thomas P. Eskridge; and they bind themselves to let them work five months a *peace*—to commence about the first day of February or sooner if called on, and they AINT to leave them OUT TELL the first day of July, this 12th day of January, 1835.

JOHN RUDDELL, and
GILL,
JOHN MOUSUER,
BARNETT MOUSUER.

And the said defendant prays that the above copy of the agreement may be signed, sealed, and made a part of the evidence in this case. L. B. TULLY, [L. S.]

But this bill of exceptions wholly fails to show what evidence was before the court and jury, when this written agreement was offered and admitted, what fact it was designed to establish, or what the state of pleading between the parties was; consequently, if the case could have occupied such a situation as to justify the introduction of the written agreement, as evidence for any purpose whatever, the legal presumption is, that it was in such situation when the writing was admitted, and that the case may have occupied such an attitude that this written agreement would have been competent legal testimony, for the plaintiffs cannot, in our opinion, be denied. Suppose, for instance, that the parties to this very agreement, after it was entered into and had been partly executed on the part of the plaintiffs, had mutually agreed by parol to dispense with the further performance thereof by the plaintiffs, and that the written agreement should be cancelled, and that the defendant and Gillett, since deceased, should, in consideration thereof, pay them so much money as the service performed by them under said contract was reasonably worth; and the plaintiffs had sued the defendant on this parol agreement, and it became a question on the trial, whether such written agreement ever existed, or whether the plaintiffs had rendered any service under it. Would not the agreement in writing itself have been the best evidence of the fact, that such agreement had been entered into between the parties, and of the terms thereof, and the service to have been performed by the plaintiffs under it? We believe it would in such case have been the only legal evidence to establish these facts, unless the writing had been lost or destroyed; when, upon the proof of the loss or destruction

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thereof, secondary evidence could have been admitted. The party controverting the decision is, in every instance before he can succeed, bound by law to exhibit facts, the existence of which show affirmatively that the court decided wrong. By applying these well settled principles to the case before us, it manifestly appears that there is no error shown by the record in the judgment of the court below, overruling the defendants motion to exclude the written agreement, and admitting it as evidence in the cause; nor does the fact of the different spelling of the plaintiff's name in the summons, and in their signature to the written agreement, make any differance as to the question; because these evidently must now be presumed to have been proven, or in other language we are bound by law to presume, that there was full proof that the plaintiffs, as well as the defendant and Gillett, did execute the agreement; but independent of this legal presumption, we have no doubt that the name of the plaintiffs, as it is spelled both in the summons and their signature to the written agreement, may very properly be pronounced alike, and that they should be, and are in law required, as being idem sonus.

If we are right in the conclusion that the agreement in writing was legal testimony for the plaintiffs, and correctly admitted to go to the jury as evidence in the case, there is nothing in the record from which we can determine that the court erred in refusing the defendant a new trial. The whole evidence is not spread upon the record, and we cannot from any thing appearing in the record, see that the verdict of the jury is either contrary to law or evidence, or that it does not conform to the instructions of the court, as no instructions are shown to have been either given or refused; nor does it appear that injustice has been done the defendant, or that the plaintiff's action is misconceived.

Wherefore, we are of the opinion that the record does not show any error in the judgment of the Circuit Court, and that the same ought to be, and it is hereby affirmed with costs.

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THE STATE vs. ASHLEY & OTHERS

1	513	
13	590	
25	251	
1	513	
178	455	
82	587	

THE STATE *against* CHESTER ASHLEY AND OTHERS.

Writ of Quo Warranto.

The Supreme Court has power to issue writs of quo warranto, in a case in which the whole community is directly interested.

The office of a director of the Real Estate Bank is a public franchise.

There is a wide and striking difference between the Constitution of the United States, and of a State.

The former is an enumeration and delegation of certain specified powers, granted by the States, or the people of the States, for national objects and purposes.

A State Constitution is a bill of rights, declaratory of the great and essential principles of civil and political justice, imposed as so many duties, and enjoined as so many restrictions, both upon the departments of government, and upon the people.

A State Legislature can exercise all power that is not expressly or impliedly prohibited by the Constitution; for whatever powers are not limited or restricted they inherently possess as a portion of the sovereignty of the State.

A State Constitution, like all other deeds or charters, is to be construed according to the sense of the terms used, and the intention of its authors.

It is to be construed as a frame of laws, established by the people according to their own free pleasure and sovereign will.

It should receive a fair and liberal interpretation.

The clause in the Constitution of this State, which provides that the General Assembly may incorporate one State Bank, and Branches, and that "they shall have further power to incorporate *one other* banking institution, &c." is to be construed as a limitation and a prohibition against the establishment of more than one other banking institution.

The Legislature can no more establish two banking institutions in promotion of the agricultural interest of the country, than it can create two Supreme Courts, or make that tribunal consist of more than three Judges, or establish and organize more than three departments of the government.

But the Legislature has the power to establish one banking institution, with any number of agencies, or offices of discount and deposite to transact its business—and may locate these offices or agencies at as many points or places as they may deem advisable or proper.

The Legislature contemplated, by the charter, the establishment of only one banking institution.

That part of the 21st section of the charter which declares that the Principal Bank and Branches may severally sue, &c. and have a common seal, is inoperative and void, as it is directly and positively opposed to the incorporating clause in the same section, and to the general objects and designs of the charter.

A stockholder cannot be deprived of the right of voting for the entire directory of the whole institution.

The respective boards must, by the election of directors, be made to conform to the number expressed in the charter. The stockholders, in organizing the corporation, had the right to vote for the whole directory of the Principal Bank and each of the Branches. But this was a personal privilege, which might be waived at pleasure, according to the discretion of each individual stockholder.

The central board represents the unity, sovereignty, and indivisibilty of the

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corporation. The general interest of the Bank is committed to its custody, and it is invested with complete and plenary power for the well governing and ordering the affairs of the institution. It has complete and unlimited control over the acts and proceedings of the respective offices.

The duties enumerated in the charter, and imposed on the central board, cannot be transferred by the central board to any other body, without a violation of the charter.

The local boards are inferior, subordinate tribunals, possessing limited authority specially delegated to them by the charter. If they usurp powers conferred upon the central board, or if the central board attempts to delegate to them powers entrusted to itself, such act or acts are void, being repugnant to the charter.

The local boards cannot pass any by-law or ordinance affecting any other part of the corporation than that over which they respectively preside, and even then their authority is subjected to the control of the central board

The central board constitutes the revising and governing power of the corporation, and forms the bond of union which makes it *one common whole and one banking institution.*

The act of the Legislature, incorporating the Real Estate Bank, is therefore constitutional.

Upon the writ of quo warranto, the State is bound to show nothing.

The defendant must either disclaim or justify. If he disclaims, the State has judgment. If he justifies, he must show his title specially, and all the particulars on which it is founded.

The defendant, in his plea, should allege that he is a stockholder, and that the election under which he claims to have been chosen a director, was held under and in pursuance of an ordinance or direction of the central board of directors, fixing the time when, and the place where the same should be held, agreeably to the provisions and requirements of the charter. As the plea in this case does not do so, the demurrer to it is sustained.

The election for all the directors must be held at one and the same time, and at one and the same place; and the time and place must be ordained and appointed by the central board. The central board must also prescribe the rule by which directors shall be declared duly elected, and elections authenticated. These duties devolve on the central board, *and cannot be delegated* to the local boards.

On the application of the attorney for the State, separate writs issued, on the 20th day of February, A. D. 1839, out of this court against *Chester Ashley, Roswell Beebe, William W. Stevenson, E. A. More, R. C. Byrd, James De Baun,* and *James L. Dawson.* The writ against *Chester Ashley* was in the following form:

"STATE OF ARKANSAS, SCT.

The State of Arkansas, to the Sheriff of Pulaski County, GREETING:

"You are hereby commanded to summon *Chester Ashley* to appear personally before the Supreme Court of said State of Arkansas, at the court house in the city of Little Rock, in the county of Pulaski aforesaid, on the 21st day of February, in the year of Christ eighteen hundred and thirty-nine, then and there to answer unto the State of Arkansas aforesaid, and to show by what warrant he exercises the franchise of a director of the Principal Bank of the Real Estate Bank of the State of Arkansas, at Little Rock, and has entered into

and upon, and uses the powers, rights, and privileges, thereto appertaining: it being alleged that no legal or valid grant of said franchise, to said *Chester Ashley*, has ever been made by and under the authority of the said State of Arkansas, under the penalty prescribed by law, and that you certify to our said Supreme Court how you execute this precept, and at your peril have you then and there this writ.

IN TESTIMONY WHEREOF, &c.

On the 18th day of March, *Ashley* filed his plea in abatement, verified by affidavit, which was as follows:

"And the said *Chester Ashley*, in his own proper person, comes and prays judgment of the said writ of quo warranto; because he says, that the writ of quo warranto lieth only in case where one or more persons do unlawfully claim, hold, have, exercise, or enjoy some office, corporate power, liberty, or franchise, which is of a public and general nature, which emanates from the sovereign power of the State, and in the use, exercise, or enjoyment whereof the whole people of the State are directly interested and concerned; and that the office or franchise of a director of the Principal Bank of the Real Estate Bank of the State of Arkansas, at Little Rock, is not a public office, corporate power, liberty, or franchise, concerning which the court here hath jurisdiction, to hear and determine by writ of quo warranto.

Wherefore, the said *Chester Ashley* prays judgment of the said writ, that the court here will not hear and determine the same, and that the same be quashed and held for nought."

To this plea the attorney for the State demurred, and the demurrer was sustained; and the defendant *Ashley* then filed five several pleas in bar, which, as finally amended, were severally demurred to by the attorney for the State. The first plea, with which all the others substantially agreed, was as follows:

In the Supreme Court of the State of Arkansas, at January term, A. D. 1839.

CHESTER ASHLEY, defendant, *adsm.* THE STATE OF ARKANSAS, plaintiff,	*Writ of quo warranto.*

The said *Chester Ashley* personally appears before the court here, and answering unto the State aforesaid, and showing by what warrant he exercises the franchise of a director of the Principal Bank of the Real Estate Bank of the State of Arkansas, at Little Rock, and

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has entered into and upon, and uses the powers, rights, and privileges thereto appertaining, for plea in this behalf saith—

That in and by the sixth rule of an ordinance of the central board of directors of the Real Estate Bank of the State of Arkansas, in relation to the election of directors, adopted 9th November, 1838, it was, amongst other things, ordained, that the next election (thereafter) for directors of the Principal Bank and Branches, should be held on the first Monday of January, 1839, and annually thereafter on the same day; that thirty days' notice of the said election should be published by the President of the central board in all the newspapers published where said Principal Bank and Branches are located, in accordance with the 25th section of the charter, which charter was accepted by the subscribers, who, in conformity therewith, became stockholders in said Bank; that the respective boards should each appoint their commissioners, selected from the stockholders, to hold said election; that the polls should be kept open from 10 o'clock, A. M. to 4 o'clock, P. M.; that the said commissioners should immediately after the election of directors is completed, furnish the President of said Principal Bank or Branches with a certificate stating the persons voted for, and the number of votes given to each; that on receiving the said certificate the President should forthwith issue a certificate of election to the directors elected, countersigned by the cashier; and that the directors elected should immediately enter on the duties of their office. And the said *Chester Ashley* further saith, that by a resolution of the board of directors of the Principal Bank of said Real Estate Bank, at Little Rock, adopted 3rd of January, 1839, James De Baun, William E. Woodruff, and James Erwin, selected from among the stockholders, were appointed commissioners to hold the election for directors to said Principal Bank on the first Monday of January, 1839, and were by said resolution to receive and record the votes of all persons legally entitled to vote; and said commissioners, or a majority of them, were ordered thereafter to make due return thereof, to the Principal Bank aforesaid, and issue certificates of election to the persons elected, and were further directed to keep the polls for said election open from 10 o'clock, A. M. to 4 P. M. of said day.

And the said *Chester Ashley* further saith, that said election, due notice thereof having been first given, was holden by the said commissioners, on the said first Monday of January, at the banking house of said Principal Bank, between the hours of 10 o'clock, A. M. and

4 o'clock, P. M. and the polls being kept open from the first until the last mentioned hours of said day, for directors of said Principal Bank.

And the said *Chester Ashley* further saith, that upon said election two thousand and seven hundred and twenty-seven votes were offered to be given in, and this defendant received of the votes so offered seventeen hundred and thirty-nine votes, being a majority of all the votes offered to be given in, and so received by this defendant, were the votes of stockholders in said Bank.

And this defendant avers that the central board aforesaid had no authority of law to regulate the election aforesaid, in any other respect than to fix the time and place of holding the same; and that the board of directors of said Principal Bank had authority of law to regulate in all respects other than the time and place, the mode and manner of holding such election.

And the defendant further saith, that the said commissioners did, immediately after the election of directors at the time and place aforesaid was completed, furnish and make due return of said election to the Principal Bank aforesaid, and did issue certificates of election to the persons elected, and to this defendant, with others.

And this defendant further saith, that the said commissioners did, so far as in their power lay, comply with the sixth rule of the ordinance aforesaid, of the central board aforesaid, and did immediately after the election aforesaid was completed, furnish the President *pro tem.* of said Principal Bank, to wit, *Roswell Beebe*, who had been elected, and was then President *pro tem.* of said Principal Bank, by reason that Anthony H. Davies, the President thereof, had been, and continued to be up to and after that time absent, with a certificate stating that the persons voted for at said election, and the number of votes given to each; and that on receiving the said certificate, the said President *pro tem.* did forthwith issue a certificate of election, countersigned by the Cashier, and under the seal of the Bank, to the directors elected, and among them to this defendant; and this defendant being first sworn in, did thereupon immediately enter on the duties of his office as such director.

And so the said defendant saith that by the warrant aforesaid, he exercises the franchise of a director of the Principal Bank of the Real Estate Bank of the State of Arkansas, at Little Rock, and has entered into and upon, and uses the powers, rights, and privileges thereto appertaining, as he lawfully saith, for the reasons aforesaid.

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The following is a copy of the rule of the central board, fixing the time, place, and manner of the election under which the defendant claimed:

RULE 6. The next election for directors of the Principal Bank and Branches, shall be held on the first Monday of January, 1839, and annually thereafter on the same day. Thirty days' notice of said election shall be published by the President of the central board in all the newspapers published where said Principal Bank and Branches are located, in accordance with the 25th section of the charter. The respective boards shall each appoint three commissioners, selected from the stockholders, to hold said election, and the polls shall be kept open from 10 o'clock, A. M. to 4 o'clock, P. M. The said commissioners shall immediately after the election of directors is completed, furnish the President of said Principal Bank and Branches with a certificate, stating the persons voted for, and the number of votes given to each. On receiving the said certificate, the President shall forthwith issue a certificate of election to the directors elected, countersigned by the Cashier. The directors elected shall immediately enter on the duties of their office. The President of the central board shall, at least 30 days before every such election, notify the Governor of said election, and request him to appoint the directors on the part of the State. And each stockholder shall vote in the district in which he resides, which district until otherwise altered, shall be the same as adopted by the board of Managers, and the stockholders shall vote only for directors in the district in which they may reside.

ADOPTED: 9th November, 1838.

COCKE & PIKE, for the State, filed the following argument upon the points discussed in the case:

Two questions arise in this case, in anticipation of the trial upon its merits: 1st, Is the office of directors of the Real Estate Bank such a franchise as that this writ will lie for usurpation of it? and 2nd, what is the proper judgment, and the effect of such judgment in quo warranto, as applied to this particular case.

As to the first question, it is contended by the defendants that the writ of quo warranto lay only for such franchises as were granted by, and might be repossessed by the Crown; and that this is not such a public franchise. To this we answer that,

1st. Informations in nature of a quo warranto, under the Statute of

Anne, lie only in cases where the writ of quo warranto would originally lie. And in order to fully understand the similarity between the writ of quo warranto and the information, it will be needful first to trace briefly the history of the writ and information. Formerly, and before the Statute of Gloucester, 18 Ed. I, the King exercised a power of sending commissioners to inquire into the right to franchises, and if no characters were produced, the liberties were seized into the King's hands *without any formal trial.* This being much complained of, the Statute of quo warranto was made to remedy the grievance. By that Statute, (6 Ed. I, printed and proclaimed in 30 Ed. I, and therefore generally cited as of that year,) it was provided that all persons ought to enjoy their franchises, if not usurped over, till the coming of the King, or justices in *Eyre.* The sheriff was to make proclamation, forty days before the *Eyre*, that *all* appear to show *quo warranto* they claim their franchises. If any person made default, his franchise should be seized into the King's hands, *till he appear, nomine districtionis*, and if then replevied by him if he answered immediately. But if the party came not, and replevied while *Eyre* sat in the county, the franchises were lost and forfeited forever. If the party had *himself* committed the usurpation, he was bound to answer without writ original; but if he alleged that his ancestor had died seized of the franchise, then an original was to be sued, in the form: "REX, *&c. sum. per bonos summonitores a. quod sit, &c. ostensurus quo warranto tenet, &c. Com. Dig. title "quo war."* *C.* 1, 2. 2 *Inst.* 282; *Crabb*, 175.

By the same Statute, if the defendant whose ancestor had died seized, appeared upon the original, he was to answer, and replication and rejoinder to be made. If he did not appear, nor was epoigned, it was to be as in *Eyre. Com. Dig. title, quo war. C.* 2.

The appointment of justices in Eyre, or justices Itinerant, took place as early as the 18th year of Henry I, by whom the kingdom was divided into circuits, and three Justices in Eyre appointed to each. *Crabb*, 103. The necessity of these Justices was superseded, and their commissions not revived, (according to Sir Matthew Hale,) after the 10th year of Edward III. *Crabb*, 277. And informations in nature of quo warranto came into general use upon the cessation of Eyres. *Gilb. Rep.* 153. Lord COKE says, 2*nd Inst.* 498, that with justices in Eyre this branch lived, and with them it died. 1 *Str.* 105, *Rex* vs. *Bennett.*

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The writ of quo warranto was a *civil* writ, in the nature of a writ of right. The information was originally a *criminal* proceeding, used more frequently in the Exchequer than elsewhere; and the only judgment which could be given upon it was of fine for the usurpation; but when it was adopted in K. B. in place of the writ of quo warranto, it was adopted to answer all the ends and purposes of the old writ, and then judgment of ouster came to be the proper judgment upon it—so that it thereby became a *criminal* proceeding. See *Rex* vs. *Bennett*, 1 *Str.* 102; 2 *Inst.* 282; *Rex* vs. *Staverton*, *Yelv.* 190; *Rex* vs. *Stanton*, *Cro. Jac.* 260; *Co. Ent.* 527 *to* 564; *Rex* vs. *Ponsonby*, 1*st Ves.* 6.

It is broadly laid down, and is doubtless true, that "the courts will not extend the remedy by information beyond the limits prescribed to the old writ." 2 *Sel. N. P.* 323. The Statute of Anne does not purport to extend the remedy, or apply it to a new class of franchises or offices, but simply regulates the proceedings, and authorises private persons to interfere and file relations. *Rex* vs. *Frelawney*, 3 *Burr.* 1616; 2 *Uh. Sel. N. P.* 324; *Willcock*, 461.

Let us inquire then, what is a public franchise. In England, all public franchises emanated from the Crown. The information at common law, which came in to answer the ends and purposes of the old writ, lays for the usurpation, first, of franchises which the Crown had granted, and which were of such a nature that if the defendant had no title, they might be repossessed and enjoned by the King, as the franchise of *wrecks*, *waifs*, and *estrays:* Second, of franchises which the King had created, and which subsist in themselves, although there be no person in *esse*, who has a good title to them. Their nature is such that if the defendant be found to have no title to them, he must be ousted and forejudged of the enjoyment of them, but they are repossessed by the King: of this kind are corporate offices; so that if the officer, or all the officers be ousted, the franchise is not affected, but others may be appointed to fill their places, *either by* election by other persons, to whom the King has granted the power, or, if there are none capable of making such an election, by a new appointment of the Crown. *Willcock*, 454; *Strata Mercella*, 9 *Co. Rep.* 28; *Rex* vs. *Mayor of London*, 1 *Show.* 280.

A *corporate office*, then, which is created by Legislative grant, and is not merely *private* in its nature, is a public franchise. Is the present a merely private office? That it is not, is manifest from various considerations, to which we will hereafter advert. For the present,

let us proceed to consider what have in England been held public franchises.

The franchise of judge of a court of record; *R.* vs. *Williams*, 1 *Burr.* 407: of Steward or Bailiff of a Court Lett; *R.* vs. *Hulston*, 1 *Str.* 621; Bailiff of an incorporated town, *R.* vs. *Boyles*, 2 *Ld. Raym.* 1560; Chief Constable of a hundred—Mayor, Aldermen, or Burgesses of a City, *R.* vs. *Breton*, 4 *Burr.* 2261.

In the case of *The People* vs. *Utica, Ins. Co.* 15 *J. R.* 386, the Supreme Court of New York decided, that every privilege or immunity *of a public nature*, which cannot legally be exercised without legislative grant, *is a public franchise;* and *that the right of banking is a public* franchise. And this decision is broadly sustained by the decision given in England, in K. B. *Rex* vs. *Nicholson et al.* 1 *Str.* 299, where the court said that informations were frequently granted, where any new jurisdiction, or *a public trust* was exercised without authority; and that the rule, that it would not lie except where there was a usurpation on the Crown, was too general. See also *People* vs. *Niagara Bank*, 6 *Cowen*, 196; *People* vs. *Hudson Bank*, 6 *Cowen*, 217.

In Pennsylvania, where the Statute of Anne was not re-enacted so late as 1817, it was held that in *all* cases where a charter exists, and a question arises concerning the exercise of an office claimed under that charter, the court could grant leave to file an information. *Com.* vs. *Arrison*, 15 *S. & R.* 127.

There are other considerations showing this to be a public franchise. The Constitution of the State provides for the creation of this Bank. The charter secures to the State a voice in all its transactions for the State has two directors at each Branch, and a voice in the central board: and finally, it is upon the faith and bonds of the State that the capital of the Bank is based. It is therefore emphatically a *public* institution; and offices created by and held under the charter are *public* franchises.

We pass now to the second question. The second is, what is the proper judgment upon a writ of quo warranto.

In the case of the *King* vs. *Mayor and Aldermen of Hertford*, 1*st Salk.* 374, 1 *Ld. Raymond*, 426, leave was given to file an information against the defendants to know by what warrant they admit persons not residing within the borough to the freedom of the corporation. And HOLT, *Chief Justice*, said if they were found guilty, they should be fined; and the difference of the judgments in this case, and in the

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writs of quo warranto is, that in the latter case the judgment is to seize the franchise into the King's hands: and in the other case only an ouster of the particular franchise. This distinction of Lord Holt has been quoted in the elementary books ever since, as establishing the position that on the writ of quo warranto the only judgment was of seizure. Does it establish this position?

Remark, 1st, That it is a mere extra-judicial opinion—a hasty remark made without discussion, and in advance of the case—a declaration of what would be the punishment.

2nd, It may be well understood to mean simply that in such a case as the one before his Lordship, the judgment on the writ would be of seizure. That was a case of *misuser* of a franchise, and a proceeding against the whole corporation.

In *Reg.* vs. *Blagdon*, *Gilb. Rep.* 153, it was said by *Salkeld arg.* (and not contradicted by the counsel or court,) that "informations in nature of quo warranto are formed to answer the design and end of proceedings in *Eyre*," and that "as to such franchises *as the Crown may have*, the judgment is that they be seized into the Queen's hands: as to such as the Crown cannot have, the judgment must be that the defendant be arrested, and the franchise extinguished."

So Lord HOLT himself, in *King* vs. *Mayor of London*, 1 *Shower*, 280, said, "There are three sorts of *liberties:* a liberty granted from the Crown, which doth subsist in the Crown; a liberty created *de novo;* and doth exist, notwithstanding it be forfeited; and another, that cannot exist but in the persons to whom it is granted. In the first, judgment to seize or oust is proper, for then it belongs to the Crown: if the other be forfeited, judgment is for a seizure and no more; for, notwithstanding the forfeiture, it exists in the Crown: for the latter, judgment is proper to be given only for *ouster*, and that is the proper judgment."

So in the same case EYRES C. J. said, "for what the King cannot have, for that a judgment of seizure cannot be had," and instanced a Court Baron, where the judgment should be only of *ouster*.

In *Rex* vs. *Staverton*, *Yelv.* 190, reported in *Cro. Jac.* 259, as *Rex* vs. *Stanton*, which is stated to have been "*a quo warranto* by the King against the defendant for holding a *Court Leet* and *Court Baron*, within hundred and manor of Warfield in the county of Berks, &c., it is said, "This *quo warranto* is a writ of right in its nature:" and again—"by 15 *Edw.* IV, 7, if the party has continued possession of the liberty by wrong, the judgment is, that he shall be *ousted;* but if he had once

title, and loses it, the judgment is, that the liberty shall be seized.

Note here, that the proceeding in that case was called "a writ of right in its nature." If then it was an information, as undoubtedly it was, the court considered it precisely similar to a *writ* of quo warranto, which is every where declared to be a writ of right for the King—and then, it follows that if judgment of ouster could be pronounced in one case, so it can in the other.

In the same case it is said in Croke, *per cur*—"Here the judgment is not that the King *shall seize;* because it is not any such franchise as the King shall have—but it is, that the defendant shall be ousted of that liberty as 15 *Edw.* IV, pl. 7 is. And so it was cited to be adjudged in Chadwell's case, for the manor of Exon."

Much confusion will be found in the decisions on this point unless we keep in mind that they apply to franchises of different kinds.—Thus if the franchise of having wrecks, waifs, or estrays, was forfeited by misuser or abuse, or usurped by one having no right to them, then on quo warranto it was seized into the King's hands; for it was a flower of his prerogative, and on forfeiture for abuse or usurpation, it could be repossessed by him. As to a corporate franchise in general, or in other words, the whole franchise granted by the charter, we shall shortly see that there has been much discussion as to the judgment for misuser or usurpation of it. As to corporate offices, such as the present, or the office of mayor or aldermen, which were not originally flowers of the prerogative, but are *created* by Legislative grant, or grant from the Crown, and where, if they are usurped, they may be filled by election or otherwise, there the judgment never was of *seizure*, but simply of *ouster*. Where there was in effect no franchise, but one was pretented, without any actual grant, there the judgment was neither of seizure, nor ouster, but of forejudger and fine. This distinction will reconcile all the cases. *Willcock*, 454, 499, 500.

In *Sir James Smith's case*, 4 *Mod.* 52, the question to be decided depended upon the judgment in the famous quo warranto case against the city of London. 2 *Shower*, 263.

In the time of Charles II, that King, wishing to bring the corporations throughout the kingdom under his control through his Crown lawyers, filed informations in nature of quo warranto against sundry corporations, and in the case against the *City of London*, judgment was given for seizure of its franchises to be a corporation, into the King's hands, as forfeited; and it was held that by this judgment that

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corporation was dissolved. In order to obtain such a judgment, *Saunders*, who had drawn the pleadings and advised on the part of the Crown, and who, when made Sergeant, wore as a motto on his rings, "*Principi sic placuit*," was made Chief Justice of K. B. just before the judgment was given.

In Sir James Smith's case, by the counsel who held that the corpotion of the city of London was not dissolved by the judgment aforesaid, it was laid down as the law, "That though the King could create a corporation, yet he could not dissolve it, nor they dissolve themselves by any voluntary surrender; and that nothing can be seized into the King's hand, but such, which was part of the ancient inheritance of the Crown; and then 'tis immediately extinct—or else such things which have an existence, and may be restored, as *fairs, markets, &c.* That most of the authorities which seem to warrant a contrary opinion, happen in the latter part of the reign of *Henry* III, and between that and the reign of Richard II, which were tumultuous times, and then most of the corporations were seized by the King—and then, if the fault were in the Mayor, he seized the mayoralty, and put in a *Custos*, which was in order to preserve the corporation, and the writs of restitution were always according to the seizure.

They said farther—that "the judgments in quo warranto *are various*—as, when the franchises were totally usurped, then the judgment was *quod extinguantur;* but when they are abused, then 'tis *quod capiantur.*

Pemberton, e contra, argued, that in all concessions and grants of franchises there is a tacit condition implied that the persons to whom they are made shall use them justly, and that "'tis such a condition which, if broken, will determine the very grant itself. So likewise for misuser and abuse the whole franchises are forfeited forever. And he further argued that for such condition broken, the proper remedy was by a *quo warranto*, "which is called the King's writ of right, in which the supposed abuse of franchises is examined, and either the defendant is acquitted, or the franchises *capiantur*, which is the final judgment." "'Tis true," he admits, "there are other sorts of judgments upon the proceedings on this writ;" and instances the "*quod capiantur nomine districtionis*, on default."

The court said—"a corporation may be dissolved, for 'tis created upon a trust, and if that be broken, 'tis forfeited; but a judgment of seizure cannot be proper in such a case, for if it be dissolved, to

what purpose should it be seized?" Therefore they decided that by the judgment against the City of London, the corporation was not *dissolved*. And they said further: "wherever any judgment is given for the King for a liberty which is usurped, 'tis *quod extinguatur*—and that the person who usurped such a privilege *libertat. &c. nulla tenus intromittat, &c.* WHICH IS THE JUDGMENT OF OUSTER, but the *quo warranto* must be brought against particular persons." "But where 'tis for a liberty claimed by a corporation, there it must be brought against the body politick, in which case there may be a seizure of the *liberties; which will not warrant the seizure or dissolving of the corporation itself.* 4 *Mod.* 58. And be it remembered that Lord HOLT delivered this judgment.

The case of the *King* vs. *Amery*, and *The King* vs. *Monk*, 2 *T. R.* 515, is supposed to establish the principle against which we are contending, but it will be found not to apply to a corporate office.

It was an information in nature of *quo warranto*. Amery, in his defence claimed as alderman, and Monk as common councilman, of the City of Chester, (the offices which they were charged with usurping,) under a charter granted by Charles II. The prosecutor contending that the judgment in the reign of Charles II, by which the liberties, &c. of said City were seized into the King's hands, for the default of the Mayor, &c. in not appearing, was illegal; and consequently, the old charter not being thereby forfeited, the new one was void. The question therefore was, whether judgment of *seizure* was proper, on default of appearance; and if so, whether the corporation was dissolved? Ashhurst decided, that, as in Eyre, if the party did not appear there was judgment of seizure, *nomine districtionis;* and if he came not in during the Eyre, the franchise was forfeited forever. So in K. B. if the party came not in on *ven. fac.* and replevied his franchises, they were lost forever. That therefore the judgment of seizure on default was legal, and, by failure of the party to come in, a forfeiture was worked. It is manifest therefore that nothing was decided touching the form of judgment upon a trial, but only upon *default*: and note too, that the decision in this case was *reversed* in the House of Lords; and the judgment in the reign of Charles II held illegal.

The authorities cited by the counsel for the prosecution, have some bearing on this point. It was stated that Sir Robert Sawyer, in his argument in the London q. w. case, said that "what was intended by

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a judgment of *ouster* in that book, and in what cases by the course of the King's courts it ought to be, will best appear by an ancient rule, taken and agreed by the Judges in Edward IV's time, before they were promiscuously used. The rule is this: *where it clearly appears to the court that a liberty is usurped by wrong*, and upon no title, either by the King's grant or otherwise, judgment only of ouster shall be entered. But where it appears that the King or his ancestors have once granted a liberty, and the liberty is *misused*, judgment of seizure into the King's hands shall be given.

Seizure, it is also said, is in the nature of process to compel appearance. It is like a distress to bring in the party, by putting him out of possession of the liberty till he appear. When he appeared, he could, by 6 Edward I, *replevy* the liberty. *Seizure* is said not to be *forfeiture*, for "no man shall lose his land or his franchise, upon any default, if he has never appeared." So in *Ld. Raym.* 17, the court said, "if quo warranto be brought for usurping royal franchises, the court give their opinion that the defendant hath no title to them, *unless* they proceed and say, *ut abinde excludatur*, it avails *nothing*. *Rex et Reg.* vs. *Knollys*.

The opposing counsel, in *The King* vs. *Amery*, laid down the same principle, as having been decided in 15 Edward IV, 7—that "if the party held a market by *wrong*, and without title, then judgment should be of ouster. But if the King or his ancestors had it, and the party had misused it, then judgment should be of seizure. 2 *T. R.* 551.—The object of the counsel was to prove that a judgment of seizure was proper; and they define it to be, *taking it from the party holding it*.

Note here, that in many reported cases you may not distinguish whether the proceeding was by *writ* or *information*— inasmuch as it is merely stated to be a "*quo warranto*, against, &c." From this it would appear that they were looked upon as the same proceeding, brought only into court in a different manner—the same edifice upon different foundations.

It seems therefore to be clear that the judgment upon a writ of quo warranto differed, as it does upon the information, and was governed by the nature of the franchise, and the offence committed. The judgment here, as in other cases, is governed by the peculiar rights and interests involved. If a franchise was usurped, or by abuse, misuser or non-user forfeited, which might revert to and be possessed by the Crown, then the judgment was of seizure, and the King reclaimed

that portion of his prerogative which he had carved out, as it were, from the regal dignity, and conferred upon some individual or body corporate.

But an office in and under a corporation, filled by the election of the corporators, was not such a franchise. The King could not reposses himself of it. He could not exercise it. It was not, like the right to waifs, wrecks, or estrays, a power and right originally attached to the Crown, a part of the regal dignity, a flower of the prerogative.—There was no reason why, if an intruder seized upon it, his wrongful act should destroy the franchise. This franchise is but a part of the banking franchise conferred by the charter. Even if the charter could be forfeited, yet common sense at once indicates that a particular franchise cannot. The corporators here have performed no act which could forfeit either the whole charter, or any particular franchise; for the intrusion in this case is the act of but a few.

The charter is a contract. It cannot be violated; nor can it be forfeited except by act of the corporators. So is the charter of an incorporated town; and it might as well be contended that the usurpation by an individual of the office of bailiff, would forfeit the charter of the town. Evidently it is supposed by the opposing counsel that the writ of quo warranto was originally used only for the purpose of retaking into the King's hands such franchises as he had granted out, and which were flowers of the prerogative. This is clearly erroneous. From time immemorial, it was used in case of the usurpation of corporate offices. In the case of the City of London, and the other cases growing out of that case, this was admitted uniformly on all hands. Once admit this, and it is admitted also that the judgment of ouster was in a certain class of cases proper under the old writ.

For a corporate office is a franchise granted by the King or Commonwealth in perpetuity; not to revert to, and be again possessed by the power that created and granted it, but to exist so long as the charter exists: and unless by forfeiture of the charter, no forfeiture can be worked of the franchise growing out of, and dependant upon it.

In the present case a judgment of seizure, forejudger, or extinguishment, would be manifestly absurd. How shall this particular franchise be forfeited, forejudged, or extinguished, and still the charter subsist? How shall this particular franchise be seized into the hands of the Commonwealth? Can it exist and be exercised by the State, unless by revocation of the charter?

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But it is unnecessary further to pursue this argument—for if the distinction which we have heretofore laid down as to the different judgments, be correct, then all the cases are reconciled, and the judgment of ouster is plainly the only one which can be given in this case.

Having discussed, and, as we flatter ourselves, clearly demonstrated that this is a public franchise, and that the judgment on this writ will be of ouster, we will pass to the consideration of those questions which arise upon the construction of the charter. It is evident from the whole tenor of that instrument, that it was the design of the Legislature to invest the central board with the general superintending control over the interests of the Bank. It is the supervising and governing power. It alone looks to the interest of the whole, and to each of its several parts. It is, in short, the supreme legislative branch of the corporation empowered to ordain and establish such by-laws, rules, regulations, and ordinances as they may deem necessary and suitable for the well governing and ordering the affairs of the Bank, and necessary and proper to advance the general interests of the corporation; provided the same be not contrary to the provisions of the charter, or constitution or laws of the State. The board of directors elected for the Principal Bank and the several branches, are inferior, subordinate tribunals, appointed to conduct and superintend the local and individual interests of the respective Branches over which they preside, and are expressly and positively forbidden from doing any thing that may be contrary to any rule, by-law, ordinance, or regulation of the central board of direction. Their power does not extend to the making of general rules and ordinances for the government of the whole corporation. They can pass no by-law or ordinance binding upon any other part of the corporation, than the Bank or Branch over which they immediately preside, and not even then, if it should conflict with any law or ordinance of the central board. The central board, if we may be allowed so to speak, represents the unity and sovereignty of the corporation. It is the band of union which binds its separate, component parts together in one common whole. If the directors of the Principal Bank and its several Branches are co-ordinate and independent tribunals, amenable to no common superior, and united by no common band, they might in effect be so many independent Banks and the charter might, in the opinion of some, amount to a violation of the constitution. Such manifestly could not have been the intention of the Legislature, and the construction for which we contend escapes

this difficulty. Regarding the central board as the common head under which all the different members are united, and subjected to one common control, and it is in substance and effect but one institution, one whole of which each Branch is a part. By reference to the 9th, 21st, and 22nd sections of the charter, it will be seen that the positions we have assumed, and the view we have taken of the powers of the central board, and of the boards of directors, is fully sustained by the language of that instrument. The 9th section enumerates several specific powers and duties, specifically enjoined upon the central board. In regard to those enumerated duties the central board have no discretion; they are bound to perform them, and cannot confide their performance by any regulation or ordinance they may make to any other body of officers attached to the institution. They are duties of an important and prominent character, affecting the interest of the whole corporation, which the legislature could well foresee and provide for; and they have therefore distinctly set them out, and made it imperative upon the board to discharge them. But it surely cannot be urged for one moment, that this enumeration includes all the powers intended to be conferred by the charter upon the central board. That because the Legislature has thought proper to enjoin upon them the performance of certain specified duties, they thereby intended to deny them the right to exercise every other power. The whole tenor and spirit of the charter, as well as its express language, absolutely forbid such a construction. The Legislature well knew that it would be impossible to enter into a minute and precise detail of all the powers and duties which it might become necessary for the central board to exercise for the safety and welfare of the institution. They have therefore wisely conferred upon that board the right to exercise such other powers for the well-governing and ordering of the affairs of the Bank, as may be deemed necessary and proper to advance the general interest, subject only to the limitations to which we have already adverted. In the 21st section the subscribers to the capital stock of the Bank are created a corporation and body politic, with power to ordain and establish such by-laws, rules, regulations, and ordinances, as they shall deem necessary and suitable for the government of said corporation, not being contrary to this act, nor to the constitution of the United States, or of this State. By whom are those powers thus conferred upon the corporation to be exercised? By the stockholders en masse? Or by officers chosen by the company, and charged by law with the

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general control and government of the institution, and who represent the sovereignty of the corporation? Evidently the latter. All corporations consisting of numerous stockholders must necessarily act through those charged with the control and superintendence of its affairs, and powers given to the corporation are properly exercised by that tribunal, whatever may be its name, to which the general government of the company has been confided. The central board, we contend, is, in the Real Estate Bank, the tribunal that can alone exercise these general powers granted to the corporation. The board of directors for the Principal Bank and Branches, cannot exercise them; for they are in the very next section positively forbidden to pass any rule or ordinance in violation of any by-law, rule, ordinance, or regulation of the central board. To say therefore that the board of directors, and not the central board, is the proper tribunal to carry into effect this general grant of power to the corporation, involves the palpable absurdity of making the inferior greater than the superior. It is under the grants of power contained in the 9th and 21st sections we contend the central board had clearly and unquestionably the right to prescribe the manner in which the returns of the elections should be made and the result declared. It was a rule which they deemed necessary for the well ordering and governing of the affairs of the Bank. It is not only necessary that the directors should be elected, but they should have certain, legal evidences of the fact. The commissions which the sixth rule requires the President to issue upon the certificates of the commissioners appointed to hold the election, are the credentials which evidence to each director, and to the world, that he has been duly elected, and has a right to exercise the duties of his office. It is the public, legal, official declaration of the fact. We have examined the charter with some degree of vigilance and care, to ascertain whether any of its provisions are violated by this rule, and confess we have not met with any section or clause with which it in any degree conflicts, either directly or indirectly, according to any fair and just rule of construction. The 25th section of the charter is the one which relates to the election of directors, and in it the court will again find a recognition of the principle for which we have been contending—that it is the central board, and not the board of directors, to which are referred those subjects affecting the general rights and powers of the corporation. That section says that after the first appointment of directors, the central board shall fix upon the time

for holding the future elections, as well for the Branches as the Principal Bank. It farther says that the director who shall receive a majority of the votes given, shall be declared elected. But how, by whom, or in what manner shall he be declared elected? When a thing is commanded to be done, there must be some officer or agent to do it, and some mode or manner of doing it. Upon this subject the charter is wholly silent. It does not say by whom or in what manner this declaration shall be made. It provides no mode in which the evidence of election shall be officially and authoritatively made known to the person elected, or to the public. If the central board have no right to direct by whom, and the manner in which, the result of the election shall be declared, where, we would ask, since the charter is wholly silent in this respect, do the commissioners of the election derive the power to make this declaration, and issue to the persons chosen the certificate of election? The reasoning which would deprive the central board of this right, would apply with double force to its exercise by the commissioners. And yet we presume no man will say that it is not necessary and proper for the well governing and ordering of the affairs of the Bank, to give legal and official evidence of the fact, that certain persons were duly elected. Such a step is indispensably necessary, and the charter expressly says it shall be declared. But it does not say how or by whom. Whether by the viva voce proclamation of the commissioners, or their certificates delivered to the persons elected, or by commissions issuing from the President, and countersigned by the cashier. The charter, then, being silent in regard to this question, what tribunal is so proper to prescribe the rule as that to which a general and superintending control over the affairs of the corporation has been given. It is necessary that this declaration should be made by some one, and in some form; and if the central board has not the power to prescribe the rule, what person has?—Have the board of directors? Such a right given them, is no where to be found in the charter. On the contrary they are expressly forbidden to do any thing in violation of the by-laws, regulations, and ordinances of the central board. What tribunal, we again ask, shall prescribe the rule for making the authentic and official declaration of the election? Without some such notification, all would be confusion and doubt. It could not be known with certainty who were elected.—Men might enter upon the discharge of the duties of a high and responsible trust, involving deeply not only the interests of the stockhold-

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ers, but of the State at large, without any definite credentials of office, without any thing to show they had been legally chosen to exercise its functions.

Was it not right and proper, then, for the well governing of the affairs of the Bank, that the central board should have made some rule by which those receiving a majority of the votes might be officially notified of their election; that the stockholders, the public, and the officers of the Bank, might know and respect them as such. The rule of the central board, so far from violating the charter, is auxiliary to it. It aids and asssists in doing that very thing which the charter requires should be done, but for the doing of which it had prescribed no rule or regulation. Whether the mode pointed out by the central board is the wisest and best, is not, as we conceive, open to the investigation of the court. If they have the power to make a rule upon the subject, they have a right to make such an one as they think best. It is competent for the court to pass upon their legal and constitutional powers. But where they have the power, and do not overstep its limits, the matter rests peculiarly within the discretion of the board; and in the exercise of that discretion, this court cannot control them. If they have the right, as we think we have demonstrated, to make this rule, it must be adhered to. The local board can make no by-law or regulation in conflict with it. And those gentlemen who now claim to be directors under the late election, and have gone on to act as such in violation of this rule, can be regarded in no other light than as intruders into the office. The election is inchoate, and no right becomes vested in them until their election has been declared, and commissions issued in obedience to this rule. If the officers appointed to make this declaration, and issue the commissions, refuse to do so when they ought, the parties injured may have their redress, and compel them to do so by appealing to the courts of the country. If these gentlemen have been rightfully elected, and the President should refuse to issue the commissions, and declare them duly chosen, they could obtain a writ of Mandamus, and coerce him to do his duty. But until they have received the official credentials of their election, they have no right to enter upon and discharge the duties of the office, and in doing so they are guilty of flagrant intrusion and usurpation.

We farther contend that the commissioners in rejecting a large number of votes offered, were guilty, to say the least of it, of palpable wrong and injustice. They had no right to go behind the decision of

the board of managers, and of the central board, to enquire into the legal right of those claiming under the decision of those boards to be stockholders. We care not whether they be stockholders de jure or de facto. In either event the commissioners are bound to receive the votes. The only question for the decision of the commissioners and for this court, is, whether the persons, whose votes were rejected, were stockholders de facto at the time of election. If they were, their right to vote could not be denied until they have been ousted by the competent tribunal. In the case of *Symmers* vs. *Rex*, *Cowper*, 489, where the question was upon the legality of a certain election held by corporators, the court below refused to go into an examination of the right of certain electors to vote; and it was contended by counsel against the decision of the court below, that if the legality of these votes could not be entered into upon this information, a presiding officer at an election can have no power of examining whether the votes are legal or not. But in all elections, particularly of members to parliament, the presiding officer exercises his judgment whether a vote is good or not. If the presiding officer has no right to judge, there can be no action for a false return. To this argument of the counsel, Lord Mansfield, in delivering the opinion, gave a full and conclusive answer, which applies with peculiar force and point to the question in this case. He says "The next question, which is one of less difficulty, is, that the judge below has refused to go into the qualification and capacity of several freemen and common councilmen, who offered their votes. Let us state the objection as it is put, and examine it.—The proposition is, that the judge on this information should have done exactly what he ought to have done, if the title of those persons who were common-councilmen de facto, had actually been in question before him upon quo warranto. They were de facto members of the corporation, admitted, sworn, and in the actual enjoyment of the office. The question is, whether the judge, collaterally at the trial, ought to have gone into the validity of these men's titles. *Could the Mayor have gone into them at the time of election? I am very clear he could not.* There are modes sufficient open to the partiality of returning officers, without adding more. Whether the qualification is to be judged of by him, it cannot be avoided. In cases of elections in the city of London, certain qualifications are required at the polls. Therefore it must be seen, that in some degree the candidates have that qualification. So when an election is to be tried which may involve

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many other rights. But where the *right of election is in freemen in their corporate description, whether they were duly chosen or not, is not to be tried at the election of a third person. But they must be properly ousted.*" Of the same opinion were Justices Aston and Ashurst. To this we invite the attentive examination of the court.

We farther contend that the exclusion of those votes rendered the whole election illegal and void; for it is impossible to say what change in the result the admission of these votes might have made. In the *King* vs. *Mein*, it is said—"In corporation meetings it has been frequently held that when an act is to be done by the corporation, and one of the corporators had not been summoned, the acts of the meeting are void; and the reason given is because, though he could not have have formed a majority by himself, he might have influenced the others. In *Rex* vs. *May*, 5 *Burr.* 2681, this principle is more fully stated and illustrated. See also *Kynaston* vs. *The Mayor and Council of Shrewsbury*, 2 *Str.* 1051; *Sir Charles Musgrove* vs. *Nevison*, 1 *Str.* 584, 2*nd Ld. Raym.* 1358.

And the case being further argued by ASHLEY for the defendants, and CUMMINS for the State,

LACY, *Judge*, delivered the opinion of the court:

The pleadings in this case, present first, the question of jurisdiction; secondly, the constitutionality of the Real Estate Bank of the State of Arkansas; and lastly, the construction of the relative powers of the respective boards of direction.

The question involves principles of the highest moment, and of the most vital importance, and such as the whole community as well as the parties upon the record, have a direct and immediate interest in having conclusively and finally settled.

Their novelty, magnitude, and intrinsic difficulty, have induced this court to give to them the most mature examination and reflection; and have sensibly impressed them with the highly responsible and delicate duty they are called on to perform.

At a previous day of the present term of the Supreme Court, the Attorney for the State filed his motion in writing for a writ of quo warranto against the defendant.

The writ was ordered to be issued, and was made out under the direction and seal of the court. It is simply a citation directed to the Sheriff of Pulaski county, commanding him to summon. *Chester Ashley*

to appear before the Supreme Court, and show unto the State, the warrant by which he exercises the franchise of a director of the Principal Bank of the Real Estate Bank of the State of Arkansas, at the City of Little Rock; which it alleges was never lawfully granted to him. The writ was issued on the 12st day of February 1839, was executed the same day, and made returnable the day after; upon the return of it, the defendent came into court, and moved to have the writ set aside for want of jurisdiction; which motion was overuled. He then appeared, and put in a plea of abatement to the jurisdiction of the court, alleging the office of Director of the Principal Bank of the Real Estate Bank of the State of Arkansas was a private right, and not a public franchise. To this plea the Attorney for the State demurred, and the demurrer was sustained, and the plea held to be insufficient; and a judgment of *respondeat ouster* was entered up in the cause.

The defendent thereupon, put in five several pleas, justifying his title to the franchise in questio n, and showing the warrant by which he claimed to be elected to exercise the office of director. To these pleas there was also a demurrer, and after argument by counsel on the point, the demurrer was sustained and the pleas declared to be defective, in not setting forth a good and sufficient warrant, according to the provisions of the charter. The defendent then asked and obtained leave to amend his pleadings; whereupon he filed an amedment to each of his five several pleas previously put in, to which the Attorney for the State demurred, and there was joinder in the demurrer

The case now stands for trial upon the pleadings and issue thus made up by the parties.

The court have met with little or no difficulty in settling the question of jurisdiction. The point was fully discussed and directly decided, during the present term, in the case of *The State* against *Chester Ashley* and others, on a motion for an information in the nature of a writ of quo warranto. The Chief Justice, in delivering the opinion in that case, laid down the doctrine, that the Supreme Court had jurisdiction in cases of quo warranto, in which the whole community was directly interested, and that the ancient writ in such cases, (which was adopted by our constitution,) was wholly a civil proceeding, and that it could only be issued and prosecuted in the name and under the authority of the State, by her properly constituted legal officer.

The soundness and correctness of this opinion, it is believed, can neither be questioned nor controverted by any fair mode of reasoning,

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or upon any just or respectable weight of authority. In reviewing the principles, then, as heretofore established in the case above referred to, the question of jurisdiction, so far as regards the power of the Supreme Court to issue the writ, is conclusively settled. The constitution, by express grant, confers upon it "power to issue writs of error and supersedeas, certiorari, habeas corpus, mandamus, and quo warranto, and other remedial writs, and to hear and determine the same." See Art. VI, Sec. 2, of the Constitution.

It now remains to be seen, whether the office of director of the Principal Bank of the Real Estate Bank of the State of Arkansas, is a private right or a public franchise. This question was decided in overruling the defendant's plea in abatement to the jurisdiction of the court. But as that opinion was not committed to writing, it may not be amiss here to state the grounds upon which it was predicated. That the office of director is a public franchise and not a private right, is perfectly manifest; for the legislature in granting the charter, created the office and prescribed the manner of filling it. It is equally clear that the charter is a public law, and not a private act; for the privilege of banking cannot be exercised without authority of law, and in its very nature and essence it appertains and essentially belongs to the act of sovereignty. In the case of *The People* vs. *The Utica Insurance Company*, 15 *John. Rep.* 386, the Supreme Court of New York held this emphatic language: "That every privilege or immunity of a public nature, which cannot legally be exercised without a legislative grant, is a public franchise, and that the *right of banking is a public franchise.*" This principle is broadly asserted in the court of the King's Bench in the case of *The King* vs. *Nicholson, et al.* 1 *Str.* 297. See also the case of *The People* vs. *Niagara Bank*, 6 *Cow.* 296. Besides, by the express terms of the charter, the State has a voice in all the transactions of the Bank, by the appointment of two members in the board of directors of the Prncipal Bank and each of the Branches, and four directors in the central board. The capital of the Bank is raised upon her faith and credit, pledged in the form of bonds, regularly executed, and made payable to the Bank. If each and all of these facts and circumstances do not show that the State, and consequently the whole community have a direct and vital interest in the government and management of the corporation, then it is difficult to conceive a case in which she can be interested, or imagine a law of a more general and public nature.

If these positions be true, and that they are seems almost self-evident, then it necessarily follows, that the Supreme Court has jurisdiction of the case now under consideration; and that the office of director of the Principal Bank of the Real Estate Bank of Arkansas, is a public franchise and not a private right, and consequently the writ of quo warranto will well lie in behalf of the State, provided the defendant has unlawfully usurped or intruded into, and exercised the duties or franchises of the office.

Before we proceed to the examination of the second question, it is necessary to define what is meant by a constitution, and to lay down a few general rules of interpretation applicable to such instruments. An American constitution, according to the theory and practice of our peculiar systems, is the supreme, original, and written will of the people, acting in their highest sovereign capacity, creating and organizing the form of government, assigning to the different departments, their respective powers and duties, and restraining each and all of them, within their own proper and peculiar spheres. The powers, which are conferred, the restrictions, which are imposed, the authorities, which are exercised, and the organization and distribution of them, are all intended for the common benefit, and they are as essential to the maintenance and security of the entire plan, as they are to the protection and preservation of liberty itself. The principles which are thus declared by the sovereign will, must of necessity forever remain inviolate and fundamental, so long as the form of government under which they are established exists; or written constitutions, with all their boasted excellencies, are mere idle ceremonies or useless inventions. To deny their sovereignty and inviolability, is at once to impeach the right of self-government, and to destroy the only means by which that blessing can be perpetuated. The constitution of the State is, then, the supreme, paramount law of the land, except it comes in conflict with the constitution of the United States, or with the laws and treaties of the general government, made in pursuance of its authority; and the courts are bound so to treat and consider it. We are not aware that this doctrine has ever been impugned or denied by any respectable authority, since the decision in the case of *Marbury* vs. *Madison*. The Chief Justice of the United States then placed it upon such high and unquestionable ground, that since that time, it never has been attempted to be shaken, and it is now universally acquiesced in, and admitted by every intelligent man in

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the community. There is certainly a wide and striking difference between the constitution of the United States and of a State government. The one is an enumeration and a delegation of certain specified powers, granted by the States, or the people of the States, for national purposes and objects. Hence, Congress can exercise no power that is not specifically granted by the constitution, or incidentally included among some of its enumerated powers. By an inspection and examination of all the State constitutions of our own country, they will be found to be nothing more or less, than so many bills of rights, declaratory of the great and essential principles of civil and political justice, imposed as so many duties, and enjoined as so many restrictions, both upon the departments of the government, and upon the people. The legislature then can exercise all power that is not expressly or impliedly prohibited by the constitution; for whatever powers are not limited or restricted, they inherently possess as a portion of the sovereignty of the State.

The question then recurs, is there any prohibiting or restraining clause in the constitution, interdicting the legislature from incorporating the Real Estate Bank of the State of Arkansas? That this question is put directly in issue by the pleadings, is perfectly manifest; for admitting that the defendant has shown a good warrant, according to the provisions of the charter; yet if the charter itself has no validity or constitutional existence, it surely cannot be pretended that he is entitled to hold, or can be rightly inducted into an office created by an act which, in the nature of things, can have no legal entity or being. Therefore, whenever the attorney for the State applied for, and obtained the writ, the validity of the charter was unavoidably drawn in question, and the court was constrained to meet and decide it.

Before we proceed to consider the clause in the constitution bearing upon this question, we will lay down the following rules of interpretation for that instrument.

1st. The constitution, like all other deeds or charters, is to be construed according to the sense of the terms used, and the intention of its authors.

2nd. It is to be construed, says Judge Story, "as a frame of laws established by the people according to their own free pleasure and sovereign will."

3rd. It should receive a fair and liberal interpretation, so that the true objects of the grant may be promoted, and the government left

in the full and free exercise and enjoyment of all its rights, privileges, and immunities, which are not excepted out of its ordinary and general powers, and declared by the sovereign will to be inviolate and supreme.

The constitution declares "that the General Assembly may incorporate one State Bank, with such amount of capital as may be deemed necessary, and such number of branches as may be required for the public convenience; which shall become the repository of the funds belonging to, or under the control of the State, and shall be required to loan them out throughout the State, and in each county, in proportion to representation. And they shall have further power to incorporate *one other banking institution*, calculated to aid and promote the great agricultural interest of the country; and the faith and credit of the State may be pledged to raise the funds necessary to carry into operation, the *two Banks herein specified:* provided, such security can be given by the individual stockholders as will guarantee the State against loss or injury." See article 8, sec. 1, of the Constitution. It is contended that this clause imposes no restrictions upon the legislature, as to the number of Banks; but that they may establish as many as they deem necessary and proper, for the general interest or public convenience. It is said to be merely an affirmative grant of power, which the legislature was fully invested with, without any such declaration, and therefore it imposes no limitation on their authority.

The argument, although plausible and ingenious, cannot be admitted to be sound or logical, without virtually repealing the prohibition intended to be secured by the Convention. There are two ways of imposing a constitutional restriction or limitation. The grant may contain negative words, denying in express terms, the exercise of the power claimed or attempted to be usurped; or it may simply contain an affirmation, which amounts to as positive a negation of any other power upon the same subject, as if the grant itself had employed nagative, and not affirmative words in the declaration. The constitions of the United States and of the States, furnish satisfactory and conclusive proof of the truth and importance of the principle here stated. Indeed it will be found from an examination of those instruments, that the usual and more general mode of imposing restrictions, is by affirmative words, "which in their operation imply a negative of other objects, than those affirmed; and in such cases, a negative or exclusive sense must be given to the words, or they will have no operation at all."

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The general rule upon the subject is, "a specification of particulars is an exclusion of generals; or the expression of one thing is the exclusion of another." And Lord Bacon remarks, "that as exception strengthens the force of law, in cases not excepted, so enumeration weakens it, in cases not enumerated." Congress has power to regulate commerce with foreign nations, and with the Indian tribes, to declare war, to grant letters of marque and reprisal, to coin money, and regulate the the value thereof. These powers are given affirmatively by the grant, and yet they clearly and conclusively indicate a restrictive sense; for it never was imagined by any one, that the States could exercise any one of the powers here enumerated. They are as clearly prohibited from so doing, as from passing any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or making any thing but gold and silver a lawful tender in payment of debts; which latter restrictions are imposed by express negative terms. The constitution of this State divides the powers of government into three separate and distinct departments, and assigns those which are legislative to one, those which are executive to another, and those which are judicial to a third. Can it be contended, that the legislature has power to create another department of government? and yet this is a mere affirmation of power, without any express or positive words, negativing their authority.

But is not the prohibition as full and as explicit as if the constitution had declared that the legislature should have no power to organize any other department. Again, it declares that the supreme, executive power of the State, shall be vested in a chief magistrate, who shall be styled "the Governor of the State of Arkansas." Can the supreme executive power of the State, be vested in more than one chief magistrate, or can he be styled by any other name than "the Governor of the State?" Certainly not. The judicial power of the State is vested in one Supreme Court, in Circuit Courts, in County Courts, in Probate Courts, and Justices of the Peace. The Supreme Court is made to consist of three judges. Have the legislature power to create more than one Supreme Court, or to compose that tribunal of more than three judges? The simple statement of the question carries with it the answer. The grant, however, contains no express negative terms; but its affirmation implies as positive a negation, as if it had been expressly so declared. The legislative power of the State is vested in a Senate and House of Represenatives. Can there be

any other legislative branches of government? The Senate shall consist of members to be chosen every four years, and the House of Representatives, every two years. Can the Senate be directed to be chosen every two years, and the House of Representatives annually? In these instances, the legislative is only limited by affirmative words, which carry with them an exclusive or restrictive sense. The clause limiting the number of banks to two, is clear, explicit, and peremptory. The General Assembly has no more power to create two State Banks, than it has to create two executives, two senates, or two houses of representatives. The language in both cases is affirmative; but it is not on that account less restrictive or authoritative. Could they make any other bank than the State Bank contemplated in the constitution, the repository of the funds belonging to the State. Certainly not.—Why? Because the clause we are considering gives to that bank the custody or deposite of these funds. The legislature, then, has power to incorporate only one State Bank, with such a number of Branches as the public convenience may require. The latter part of the section declares, "*that they shall further have power to incorporate one other banking institution*, calculated to aid and promote the great agricultural interest of the country, and the faith and credit of the State may be pledged to raise the funds necessary to carry into operation the *two banks herein specified*. The term banking institution is somewhat indefinite; but it is nevertheless capable of receiving a proper legal construction. If it was even uncertain what was meant by it, still the sentence taken together, clearly defines its meaning; for it declares, that the faith and credit of the State may be pledged to carry into operation "the two banks herein specified;"—thus showing that the convention contemplated the establishment of two banks, one State Bank with Branches, and one other such Bank as that mentioned in the constitution. They have no more power to create or incorporate two banking institutions, in aid and in promotion of the agricultural interest of the country, than they have to create two Supreme Courts, or to make that tribunal consist of more than three judges, or to establish and organize more than three departments of government. Not to give to the clause we are considering a prohibitory and limited sense, is to render it wholly inoperative and void, and that too, in express violation of its restricted language, and the object and design of the convention. Whether the restriction sought to be imposed, will be found practical or salutary, or whether it will answer the pur-

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poses that its authors had in view, are questions which the court is not called on to decide. The motives and object of the convention in inserting this section, cannot be forgotten or mistaken by any one at all conversant with the transactions or proceedings of that body. The whole currency of the nation was then in a state of disorder and confusion, threatening serious and calamitous mischief to the community; and the evils apprehended, and which were attempted to be remedied, were an excessive issue and circulation of depreciated bank paper, created by the means of State institutions, which were rapidly springing up in every quarter of the country. This state of things, induced the convention to endeavor to limit the number of banks of our own State, hoping to mitigate the contagion of excessive banking that was then likely to fall upon every part of the Union; the existence and continuance of which has since so seriously affected all the great and flourishing interests of society. Whether they have done much, or little, to cure the evil, or whether they may have aggravated it, time and future events will alone determine.

If the convention, however, has limited the number to two banks, and that they have, seems to our minds clearly demonstrable, then, this court is bound to see the prohibition and injunction of the constitution strictly followed and obeyed. The legislature, then, unquestionably possesses the power to incorporate one banking institution calculated to aid and promote the agricultural interests of the country. The question then remaining to be determined, is, does the act of the General Assembly incorporating the Real Estate Bank, create such an institution, consisting of four integral parts or offices of discount and deposite, or does it establish four independent and separate banks?

It is to be regretted, that the charter is so exceedingly vague and uncertain, that it is almost impossible to apply to it any thing like legal accuracy. Many of its most important clauses are contradictory and irreconcilable with each other, and with the general objects and spirit of the act. The court, however, in considering it, must keep in view the nature and design of the grant, its general intention and scope, as they appear from the entire structure of the charter, regarded as a whole, as well as from all its component parts. The charter is a contract between the stockholders and the State, founded upon a valuable consideration, with all the powers and privileges conferred upon it by the act of incorporation. In the first instance the contract is executory, because certain precedent conditions are imposed upon the

stockholders, but it has been, or may become executed, whenever the conditions are complied with and the charter accepted; and the rights and franchises established by the act, become complete and vested in the corporation.

In the celebrated case of *Dart. Col.* vs. *Woodward*, a corporation is defined to be "an artificial being, invisible, intangible, and existing only in contemplation of law." As it is the mere creature of law, it can only possess those properties, which the charter of its creation, expressly or impliedly confer upon it. Among these are its immortality and individuality; properties by which a perpetual succession may be kept up, so that its members may act with the will of a single individual. This investiture of its personality by law, enables a succession of individuals to promote the general objects of the charter; for it endows them with certain powers and franchises, which, though they might be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it was a real person, or an immortal being. This artificial personage does not share in the civil government of the country, unless that be the purpose for which it was created; nor is it responsible in its corporate capacity for personal misdemeanors or crimes. "The objects for which a corporation is created, are universally such as the government wishes to promote. They are deemed beneficial, and that usually constitutes the consideration for which it is created." After a corporation is so formed, it necessarily and inseparably acquires certain incidental powers, as constituent parts of its corporate existence. Among these are, 1st, the power to have a perpetual succession, and of course the power of electing members in room of those removed by death or otherwise. 2nd, To sue and be sued, implead and be impleaded, to grant and receive by its corporate name. 3rd, To purchase and hold lands and chattels. 4th, To have a common seal.—5th, The power of amotion or removal of its members. 6th, To make by-laws for the government of the corporation. 4 *Wheaton Rep.* 515, *Dartmouth College* vs. *Woodward*; 1 *Bl. Com.* 469, 470, 471, 482; 1 *Kyd. Cor.* 25; 1 *Bur.* 200; *Porter's case*, 1 *Co.* 22, *b.* 23.

Those who contend, that the act of incorporation is not warranted by the constitution, must place their objections upon the ground that the local boards by the third, twenty-first, and twenty-second sections of the charter, possess all the powers and privileges of banking.—That the central board is by the seventh, eighth, and ninth sections of

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the charter, the mere creature of their will, and clothed with certain enumerated and delegated powers, given for the express purpose of preserving a common concert of operation, with a view to the credit and welfare of the several banks. That the enumeration of its particular powers excludes all general powers not enumerated; and from its very nature and organization, it is shown to be but a delegation of the directors of the Principal Bank and the respective Branches, formed for consultation and advisement. That it is not the mere words or name used in the incorporating act that creates the corporation, but it is the power, rights, capacities, and privileges conferred; and as all these are given by the charter, to the Principal Bank and Branches, consequently, they are four distinct and independent banking corporations. The charter often uses the term banks, instead of a bank, and it expressly declares the manner in which loans shall be negotiated and made by the Principal Bank and each of the Branches; and the latter clause of the twenty-first section then adds, "they may severally sue and be sued, plead and be impleaded, answer and be answered, in all courts having competent jurisdiction, and to have a common seal," thus endowing the Principal Bank and each of the Branches respectively with the properties of personality and immortality, which are of the very essence of a corporation. That these properties cannot exist at one and the same time in the Real Estate Bank of the State of Arkansas, considered as one institution, and in the Principal Bank and the respective Branches, is clearly manifest; and as the charter has conferred them upon the latter, and withheld them from the former, it thereby constitutes them so many separate and independent banks. That this position is not destroyed by denominating these separate banks, "the Real Estate Bank of the State of Arkansas," or by pledging the faith of the State, to raise capital stock to bank on, or by dividing the losses and profits after the twenty-second year of the charter, equally among the stockholders, according to their respective shares. This, it may be said, is only intended to facilitate or procure the necessary loans for banking by a common fund; and for greater security and profit among the respective banks themselves. It may be contended by those opposed to the bank, that this is but a pretext under the shadow of names, to endeavor to evade by indirection, the constitutional prohibition. To give to the charter any other construction, it may be said, would be to clothe the central board with arbitrary and despotic power; and therefore, it certainly

never could have been the intention of the legislature to have created any such corporation; and that too, without any affirmative declaration or expression.

It should be borne in mind, that the abuse of a power is a wholly different thing from an unwarranted usurpation of it. The one may be, and often is, agreeable to the letter and spirit of the constitution; the other always is, and of necessity, must be, in derogation of its authority. It must be confessed, that this view of the question is imposing and persuasive; and the court have found no ordinary difficulty in successfully meeting and answering the objection. They are deemed, however, not to be sound or tenable; and such as must yield to a fair and just construction of the charter. It surely cannot be contended that the power given in the constitution to incorporate one banking institution, is restricted or confined to a single point or place. The legislature unquestionably possess all power, not expressly or impliedly prohibited. If they have the power to create a bank, based upon the agricultural interest of the country, they certainly possess all the power that is necessary or requisite to put that bank into successful operation; and to make it administer to the wants, wishes, and convenience of the people. To give them power to incorporate a bank, and to confine its operation or management to a single point or place, would, in effect, be to clothe them with a power, and at the same time, to deny them all the essential and requisite means that would make the exercise of that power beneficial or useful. To suppose such a state of case, involves a manifest inconsistency, and such as no legal tribunal will ever countenance or allow.

The legislature, then, has the power to establish one banking institution with any number of agencies or offices of discount and deposit to transact its business; and they may locate these offices or agencies at as many points or places as they may deem advisable or proper.—The only question, then, is, have they done so? The idea of a bank does not presuppose that it shall be kept at one house or confined to one place; but that it shall be one entire corporation, represented by as many integral or constituent parts as may be considered necessary for the transaction of its business. These parts must, however, be inferior or subordinate, and they must be under the control and direction of a superior or governing head. The legislature may vest the governing power of the corporation in a select body of magistracy, chosen from among the stockholders, or from any other class, provided

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they make but one corporate body. In the case now before us, the first section of the charter declares, "that there shall be a bank under the name and title of the *Real Estate Bank of the State of Arkansas*, with an original cash capital of two millions of dollars to be raised by loans or negotiations on the security of real property at cash valuation, with the guarantee of the public faith and credit of the State, and that the institution shall consist of a Principal Bank and three Branches. The second section locates the different offices, and divides the capital stock equally between these offices. The twenty-first section creates the subscribers to the capital stock a corporation and body politic for the term of twenty-five years, *under the name of the Real Estate Bank of Arkansas*, and makes them capable of receiving and holding all kinds of property, and of granting, selling, and alienating the same; and empowers them to loan, negotiate, to take mortgages, and to discount on such terms and securities as they may judge proper. Here, then, is an express legislative declaration that there shall be one bank *under the style and name of the Real Estate Bank of the State of Arkansas*, and that the institution shall consist of the Principal Bank and three Branches, which are nothing more than so many integral parts or offices or agencies of discount belonging to the corporation. The subscribers to the capital stock compose the corporation; and it is the Real Estate Bank of the State of Arkansas that is endowed with all the essential and important properties of a corporation or a body politic; and it is the institution thus established, and not the Principal Bank and Branches, as they are called, that has the right to exercise all the powers and franchises of banking, and to do and perform every act that is necessary to continue its corporate existence. The faith and credit of the State is pledged to the Real Estate Bank, by the tenth section of the charter, and not to the Principal Bank or Branches.

This shows that the legislature only contemplated the establishment of one such banking institution. The form of the bonds is prescribed by the charter: they are made payable to the order of the Real Estate Bank, and assigned by the endorsement of the President and Cashier of that institution. The mortgages for the security of the stock, and for the final payment of the State bonds, are directed to be executed to the Real Estate Bank by the thirteenth section of the charter, and all their notes and liabilities are also directed to be issued and created in the same way. By the thirty-seventh section of the

charter, the losses and profits of the institution are equally divided among the entire stockholders according to their respective shares, after first paying all the liabilities of the corporation. These enacting clauses clearly indicate, that it was the design and object of the legislature to create and establish but one banking institution. For the act creates and calls it a unity, and preserves that feature through the entire charter, by means of the central board of direction.

That part of the twenty-first section of the charter, which declares that the Principal Bank and Branches, "may severally sue and be sued, plead and be impleaded, answer and be answered, in all courts having a competent jurisdiction, and to have a common seal, and the same to alter and renew at pleasure," must be considered wholly inoperative and void, as it is directly and positively opposed to the incorporating clause in the same section, and to the general objects and design of the charter. The powers and rights that are attempted to be conferred by this clause upon the Principal Bank and Branches, belong necessarily to the corporation itself, for if there is but one corporation, it alone is capable of exercising these important franchises, as necessary incidents of its power. They are possessed in as full a manner, and in as ample a degree, without being expressly granted, as if they had been directly conferred by the charter; for they are of the nature and essence of the corporation itself, and cannot be separated from it.—This view of the subject is strengthened and confirmed by comparing and analyzing the respective powers of the local and central boards of direction. The third section of the charter, in assigning to the local boards the business severally belonging to each respective office, so far as relates to signing and emitting of notes, the extent of loans to be made, the purchasing of exchange, and the deposite and direction of funds, contains express limitations on their authority, and declares, "that the rights and franchises conferred shall not be so construed as to extend powers and privileges beyond the control of the central board of directors."

The twenty-second section in conferring upon the several boards the power to make by-laws and regulations for the administration of the institution entrusted to them respectively, expressly prohibits them from making any ordinance or regulation contrary to the rules or by-laws of the central board. Here, then, are two express declarations of the charter, limiting the power of the several offices to the action of the central board; and declaring that in no instance shall their

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powers and privileges be extended beyond its control. The charter, then, clearly intended to make the local boards subordinate to the central board, and give to the latter the governing power of the institution. Besides the powers already enumerated, the local boards possess the right to elect their own officers, to constitute the central board, to appoint the commissioners to appraise the property of persons who apply for stock or loans, and to judge of the sufficiency of all mortgages offered for such stock or loans. This enumeration of their rights, constitutes by far the greater share of their power, if not the entire sum. The enumeration and specification of the whole mass of powers belonging to the central board, show that they are of the most important character, and that upon their due exercise mainly depends the existence of the corporation. It is unlimited, except so far as it is restrained in a few particulars by the charter, and by the laws of the land. It cannot create an additional office of discount and deposite, nor can it abolish any one of those already established, when after the first year of their organization and operation, they declare a dividend of six per cent. per annum, upon the capital invested. Nor can it deprive a stockholder of the right of voting for the entire directory of the whole institution, nor a director who shall have received a majority of all the votes so given, of being declared duly elected. These are the principal restraints imposed by the charter, and of course, they are obligatory and conclusive on those points. The seventh section directs the manner in which the Bank shall be organized:—"when it shall appear that eleven thousand two hundred and fifty shares of the capital stock have been subscribed, and that all mortgages intended to secure the subscription, have been perfected to the satisfaction of the managers," then it makes it the duty of the managers, "to cause a notice of the same to be given in all the newspapers published in the State; whereupon the stockholders are required to proceed, at the place appointed for the location of the Principal Bank and each of its Branches, to elect a board of directors to consist of seven members for each office, and the Governor shall appoint two members on the part of the State, to each of those respective boards, from among the stockholders. The boards thus formed, shall continue in office for the term of one year, and the directors so elected shall immediately thereafter elect one of said directors to be president of each respective branch, except the directors of the Principal Bank." The eighth section declares, "That upon the election and

organization of the boards of directors of the several branches, as provided for in the seventh section of this act, each of them shall select two of their members, (one being a State director,) who, with the president of said bank, and three members of the Principal Bank, shall become members of, and form the central board of directors." The bank must be organized agreeably to these provisions of the charter, and the principles therein contained. The number of the respective boards can neither be diminished or enlarged, beyond the provisions of the charter. In the first organization and formation of the several boards of direction, and in their subsequent continuance and election, their number can neither be in any manner altered, varied, or changed from the one fixed and specified in the charter.—For if they could, the local and central boards of direction would be deranged and disorganized; and made to consist of a number wholly different from that established by the act of incorporation, which would be clearly, not only irregular, but illegal.

The respective boards must, therefore, by the election of directors, be made to conform to the number expressed in the charter. The stockholders, in proceeding to organize the corporation, had unquestionably the right to vote for the whole directory of the Principal Bank and each of the Branches. This right was, however, a personal privilege, which might be waived at pleasure, according to the discretion of each individual stockholder. In voting at the time appointed by the managers, and at the places prescribed in the charter, the stockholders were not necessarily compelled to vote for the entire directors of the whole corporation; but they might make their election to waive their privilege, and only vote for the directors of each respective local board; and such an exercise of the right of suffrage in organizing the bank, would not be inconsistent or incompatible with the charter; provided all the other essential and indispensable requisites were complied with. The ninth section defines the power, and prescribes the duties of the central board, and makes it consist of twelve members, chosen from the Principal Bank and Branches. It declares "that it shall be the duty of the central board, immediately after their appointment, to meet at the city of Little Rock, and elect from among themselves, a president of said board, who shall be president of the Principal Bank, and hold his office for a term not less than four years. It is made their duty to apply for, and receive from the managers, all the books, the papers, and mortgages, belonging to the

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bank, and also from the Governor, the bonds of the State, and to appoint two commissioners to negotiate the sale of them, provided the same can be sold for par value. They are required to meet at the banking house of the Principal Bank, on the first Mondays in May and November, in each year; and in case of the absence of the President, they shall elect a President *pro tempore*, and the cashier of the Principal Bank shall be secretary of the board, and it shall be his duty to keep a regular account of all its acts and proceedings. This section further declares, "that the central board shall possess a revising and controlling power over all the acts and proceedings of the Principal Bank and Branches, so far as may seem necessary and proper, for preserving a common concert of operation, with the view to the credit and welfare of the several banks. It shall assign and transfer any excesses of subscription for stock, made at the Principal Bank or any of its Branches, to the office where there is a deficiency of subscription, and the stock not taken. It shall lessen or withdraw the capital of any of the offices of said bank, where the same cannot be employed to profit and advantage, and where, after the first year, a dividend of six per cent. per annum cannot be divided, and transfer the same to such bank, branch, or branches, as are deficient and in want of capital.— It shall attend to the payment of the interest, as it becomes due, on the State bonds, and all loans negotiated. It shall ascertain and strike the dividends of the profits, as well for the Principal Bank as for the Branches; and attend to the payment of them to the individual stockholders, as hereinafter provided. It shall settle and control all the general accounts of the institution, and, "*finally, it shall exercise such other power for the well governing and ordering the affairs of the said banks, as may be deemed necessary and proper to advance the general interest:* Provided, That the same be not contrary to the provisions of this charter, or the laws of the State." By the twenty-fifth section it is declared, that after the first appointment of directors, the central board shall fix upon the time for holding the future elections, as well for the Branches as the Principal Bank, and the directors of said Principal Bank and Branches, shall be elected by the stockholders or their attorneys, after public notice shall be given in all the newspapers published at the city of Little Rock, and such other newspapers as are published at the several places where the Branches of said Bank are located, at least thirty days previous to such elections, "*thereby appointing the time and place where the stockholders shall meet for that*

purpose," each stockholder being entitled to one vote for each share held by him, not exceeding one hundred; and no person, co-partnership, or firm, shall be entitled to a greater number than one hundred votes. The director who shall receive a majority of the votes so given, shall be declared elected; provided, the stockholder, to be entitled to vote, shall have held his shares three calendar months, previous to such election." The duties herein enjoined, and the powers conferred upon the central board, are of the most general and important character; and it is difficult to conceive how the legislature could have conferred a more widely extended authority. Complete and unlimited control is given to the central board, over the acts and proceedings of the respective offices, in order that the credit and welfare of the Bank may be kept up and preserved. This is done to preserve consistency and uniformity of action throughout the entire operations of the corporation. If the powers here given are not duly and properly exercised by the central board, the institution would speedily fall into the utmost confusion, if not into utter ruin. The central board is required to do much that is important and absolutely necessary, to organize the bank, and after it is put into operation, they are then commanded to perform certain other highly responsible duties, by which alone, its corporate existence can be maintained, and the general objects of the charter promoted. The general interest of the bank is committed to its custody and care, by express grant; and it is invested with complete and plenary power, for the well governing and ordering the affairs of the institution. The central board may be said to represent the unity, sovereignty, and indivisibility of the corporation, by means of its legislative powers; and hence the charter has made it their duty, to declare the dividends of the profits among the stockholders, to pay the interest upon the State bonds, and all loans negotiated, and to settle and control the general accounts of the institution. That this governing power may be respected and obeyed, the central board has express power given to it, by the twenty-first section, to establish by-laws, rules, and ordinances, for the well governing of the affairs of the corporation. Power is given to it, after the bank is organized, to appoint the time and place of holding the future elections, for the stockholders to vote for the directors of the Principal Bank and Branches. The unity of the corporation is thus clearly indicated, and kept up, by the charter, in giving to each stockholder the right to vote for all the directors of the corporation, one vote for each share, provided, the number does not exceed one hundred.

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In regard to those duties enumerated in the charter, and which are imposed upon the central board, they are bound to perform them, and cannot confide their execution to other hands. It is a delegation of power, and of course cannot be transferred to any other body without a violation of the charter. These duties concern the general interest of the corporation; therefore, the legislature has thought proper to confide them to the central board; and has made it imperative upon that board to exercise them.

The local boards are inferior, subordinate tribunals, possessing limited authority specially delegated to them by the charter; and if they usurp powers conferred upon the central board, or if the central board attempts to delegate to them powers entrusted to itself, such act or acts are void, being repugnant to the charter.

The local boards cannot pass any by-law or ordinance affecting any other part of the corporation than that over which they respectively preside, and even then, their authority is subjected to the control of the central board. It is the central board that constitutes the revising and governing power of the corporation, and forms the bond of union which binds its separate and components parts together, making it *one common whole, and one banking institution.* And if this be the case, then the legislature possessed the power to incorporate such a bank, and its charter is established agreeably to the constitution. In relation to the policy or propriety of the powers and privileges conferred on this corporation, it is neither the duty or intention of the court to express or intimate any opinion. Time and experience can alone solve that problem, and to those unerring and scrutinizing tests, the friends and enemies of the bank, are both equally constrained implicitly to submit their difference of opinion. It must, however, be admitted that the constitutional question is one of difficulty and embarrassment, about which enlightened jurists may differ, and in regard to which human reason may be induced to pause, and human judgment to stand in a state of suspense. And this being the case, according to the doctrine of the Supreme Court of the United States, in the case of *McCulloch* vs. *The State of Maryland*, and of *Osbourn* vs. *The Bank of the United States*, this court is bound to respect the law, and declare the act of the legislature in incorporating the Real Estate Bank, to be constitutional.

The only remaining question to be determined, is, whether the defence set up by the defendant, in his five several pleas, is a good

answer to the writ, or shows a valid warrant for exercising the duties of director of the Principal Bank of the Real Estate Bank of the State of Arkansas. The State is bound to show nothing, for if the office was lawfully granted, the defendant can show his warrant for exercising its duties. He must either disclaim or justify. If he disclaims, then the State must have judgment. If he justifies, he is bound to show his title specially, and all those particulars upon which it is founded. See *Willcock on Mun. Corporations*, 486, 487, 488. In this case the defendant has justified, and has pleaded five several pleas, showing his warrant or title to the office. All of the pleas aver, that he was elected director agreeably to the provisions of the charter, and according to the ordinances and regulations of the local and central boards, made in pursuance of its authority. They plead substantially the same matter in different ways. The defendant relies upon each plea, as showing a good and sufficient warrant. In order to determine this matter correctly, the court must look to those provisions of the charter, and the ordinances and regulations of the central and local boards relating to the subject. The inquiry, then, is, what constitutes a good and sufficient warrant for the election of director of the Principal Bank of the Real Estate Bank of the State of Arkansas?

The law incorporating the bank, is a public act, and therefore the court is bound judicially to take notice of it; consequently, it is not necessary for the defendant, in his pleas, to set out the entire charter of the bank.

There are certain precedent conditions required by the charter to be performed by the subscribers to the capital stock, before they can become stockholders, and hence it is necessary to aver, that the charter was accepted; for without such an allegation, the court cannot be informed of the legal existence of that fact. The defendant must aver, that he is a stockholder; for the charter prohibits any other person from being chosen a member of the board of directors, and, of course, it is indispensably necessary to make such an allegation. The defendant must allege, and set out the ordinance of the central board, fixing the time and place of holding the election for directors, agreeably to the twenty-fifth section of the charter, and he must aver that such election was held, at the time and place, appointed by the notice, prescribed by the central board, and in pursuance of its authority, and that he received a majority of the votes, of all the stockholders, who voted at such election.

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The whole power in regard to fixing the time and place for holding the future election for directors of the Principal Bank and Branches, is conferred expressly by the charter on the central board; and it is their duty to exercise it: consequently they have no authority to delegate that power to the local boards, or to any part or portion of the corporation, and if they make any such delegation to the directors of the Principal Bank or Branches, such act or acts are null and void; for they are not only wholly unauthorized, but positively prohibited by the charter. And if the local boards assume or usurp any such power in regard to the election of directors, such a proceeding on their part is equally null and void, being repugnant to the charter, and also to the authority of the central board. This being the case, it necessarily results that the election of directors for the Principal Bank and Branches, which has been held under the act of the central board, purporting to authorize the respective boards to appoint commissioners to hold such election, is nugatory and void; for the central board have no power to make such an ordinance upon the local boards, neither have those boards any authority to act under such an ordinance, or to prescribe any rule upon the subject. If the central board should fail to act, or to appoint commissioners to hold the election, or should act not in conformity to, but in disobedience of the charter, then, as there can be no valid election for directors of the Principal Bank and Branches, under such a proceeding, it necessarily follows, that no new central board can be legally appointed or chosen, by those claiming to derive their authority under, or by virtue of such illegal and invalid election. The corporation would not, on that account, be necessarily dissolved; provided, it is otherwise properly organized, according to the provisions of the charter. The former existing central board, if legally constituted, would continue in office, with full power and authority to meet, and to appoint the time and place of holding the future election for directors for the Principal Bank and Branches, and to prescribe the mode and manner of declaring the director, who should receive a majority of the votes of all the stockholders, duly elected. The central board possesses the sole and exclusive power of appointing the *time* and *place* of holding the election for directors of the Principal Bank and Branches, and of prescribing the rule of certifying such election, for the charter expressly confers it, by the twenty-fifth section. This power does not belong to the local boards as an incidental power, for they possess no incidental powers, and it certainly is not conferred by

the twenty-second section of the charter, giving authority to the local boards, "to make by-laws and regulations for the administration of the institution entrusted to them respectively." What right or authority have they, then, to make any by-law or regulation, respecting the general interest of the corporation? Is not that interest confided to the central board by express grant, and is it not enjoined upon it as an absolute and positive duty; which it can neither delegate nor fail to execute? Then it is not only the right, but the duty of the central board to appoint the *time and place for holding the election for all of the directory, and also to prescribe the mode and manner by which that election shall be legally declared, and duly certified.* Without some such rule or regulation, prescribed or ordained by the central board, the right of suffrage in the stockholders, and the right of being chosen a director, would be inchoate and incomplete; for these important and necessary franchises could not be exercised and carried into practical operation, unless there was some mode or means devised by the central board for that purpose. In laying down the rule upon the subject, the central board may adopt any regulation, that their discretion may dictate, provided such ordinance or by-law does not impair the right of the director, who receives a majority of the votes of all the stockholders of the corporation offered to be given, to be declared duly elected, or the right of each and every individual stockholder, to vote for all the directory of the Principal Bank, as well as each of the Branches. These rights they can neither touch or impair, in any manner, for they are secured and defined by the charter. It is as much the right of the director, who receives a majority of the votes of all the stockholders, to be declared duly elected, as it is the right of each and every stockholder to vote for all the directors of the Principal Bank and Branches. Whatever rules or regulations the central board may choose to adopt, in relation to this matter, must be in aid and confirmation of those rights, and not in derogation of their authority. The moment its action interferes in such a manner with these rights, as seriously to lessen and embarrass them, such ordinance or regulation becomes null and void, and the courts of justice, upon a case properly made out, would be bound to afford the injured party proper and adequate remedy and redress. The election for directors *must then be held at one and the same time, and at one and the same place, and the time and place must be ordained and appointed by an order of the central board,* agreeably to the directions of the twenty-fifth section of the

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charter. The central board must also prescribe the rule, by which the director who receives a majority of the votes of all the stockholders, shall be declared duly elected, and his election properly authenticated.

If these principles be correct, and that they are, the court have no doubt, then it follows that each and all of the defendant's five several pleas, are fatally defective, in not avering and showing such a state of facts, as constitutes a valid or sufficient warrant, for exercising the duties of the office of director of the Principal Bank of the Real Estate Bank of the State of Arkansas. They fail to show that the defendant is a stockholder, and that the election under which he claims to have been chosen a director, was held under, and in pursuance of an ordinance or direction of the central board of directors, *fixing the time when, and the place where*, the same should be held, agreeably to the provisions and requisitions of the charter. Nor do they exhibit any notice of said election, given by, and under the authority of the central board, as prescribed by the charter. The pleas, in not showing these important and indispensable requisites of a good and sufficient warrant, wholly fail to justify the defendant's title to the franchise.

This being the case, it follows as a necessary consequence, that the defendant must be regarded, as having unlawfully entered into, and exercised the office of director in question. He justifies his claim to the franchise, in each and all of his pleas, partly under an ordinance of the central board, purporting to authorize the Principal Bank and Branches to appoint commissioners to hold said election; and partly under a resolution adopted by the directory of the Principal Bank, acting under, and in conformity to, the authority attempted to be given them by the central board; and as both the ordinance and resolution have already been shown to be inconsistent with the charter, they are therefore null and void; consequently, the election of directors of the Principal Bank and Branches, held under such authority and direction, must be equally inoperative, and of no effect, and therefore the demurrer to each of the pleas of the defendant must be sustained.

Note.—It is above decided, that it was necessary for the defendants to state in their pleas that the charter of incorporation had been accepted by the stockholders.

I would suggest with great deference, that the Supreme Court of New York, in the case of *The People* vs. *Saratoga and Rensselaer Rail Road Co.* 15 *Wend.* 125, have decided that such an averment is unnecessary; upon the strength of *People* vs. *Niagara Bank*, 6 *Cow.* 196; *Bank of Auburn* vs. *Aikin*, 18 *J. R.* 137; *Wood* vs. *Jefferson Co. Bank*, 9 *Cow.* 194; *Utica Ins. Co.* vs. *Tillman*, 1 *Wend.* 555.—[*Rep.*

THOMAS W. GRAY ET AL *against* WILLIAM A. NATIONS.

APPEAL *from Pulaski Circuit Court.*

The rule that one co-defendant cannot be witness for his co-defendant, and that a party on the record cannot testify in the case, is subject to this exception—That if there is no evidence adduced against one of the defendants, where several are joined in an action of trespass, the court will direct the jury to find for the defendant, and then permit him to be introduced as a witness.

If several persons be proved to be co-trespassers, by competent evidence, the declarations of one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object.

Where the record shows that one co-defendant had possession of part of the goods taken, and that he was present when the pretended sale of the same goods was made, and when they were taken away, any admissions or statements made by him, showing a community of design to have existed among all the defendants, and that they were accomplices in the transaction, is legitimate proof.

And if such admissions were admitted in the court below, and the record does not show their nature and character, this court will presume that they were made in the presence of the other defendants, and were coupled with other circumstances and testimony, showing a community of design and concord of action on the part of the person making them, and his co-defendants.

Papers filed after an appeal prayed and taken, signed by the judge below, and purporting to contain statements of the testimony, will not be regarded in this court.

In replevin, any evidence which shows that the defendants obtained possession of the goods, from any person not authorized to sell, is sufficient evidence of an unlawful taking.

In replevin, under the Territorial Statute, the measure of damages for the plaintiff is all the damages sustained by the taking and detention of the goods.

At common law, the plaintiff could only recover damages for the wrongful detention of the goods, in replevin.

A Statute is not to be taken to be in derogation of the common law, unless the act itself shows such to have been the intention and object of the Legislature.

The Territorial Statute concerning replevin is an enlarging, and not a restraining Statute, and authorizes the recovery of damages, as well for the unlawful taking as the unlawful detention.

Where plaintiff takes judgment by default, and a writ of enquiry against some co-trespassers, and before his writ of enquiry is executed, he takes a verdict and final judgment against the others, he will be considered as having waived his remedy against those who are defaulted, and will be restrained from afterwards proceeding on the writ of enquiry.

This was an action of replevin for sundry goods, wares, and merchandise, instituted in the court below by the defendant in error against the plaintiffs in error and *Robert Magness* and *William McCraw*,

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The plaintiffs in error pleaded *non cepit*, and judgment by default was taken against *Magness* and *McCraw*, and a writ of inquiry awarded to assess the damages as to them. Nothing more was ever done as to *Magness* and *McCraw*. *Gray* filed his plea at the return term, and *Hinkson* at the term thereafter.

On the trial of *Gray* and *Hinkson*, as appears by the bills of exceptions, the plaintiff offered in evidence the statements and admissions of *McCraw*, to prove the unlawful taking by the said *Gray* and *Hinkson* of the property mentioned in the declaration, on the ground of community of design and action between the plaintiffs in error and *McCraw*, in obtaining possession of the property as accomplices. It had been previously proved that *McCraw* had in his possession a cap, and perhaps some other articles, part of the same property for which the suit was brought, and was at *Hinkson's* house in company with *Gray* and *Hinkson*, and with Davis and Curtis, (two men who had been employed by *Nations* as teamsters to haul the goods to Jackson county, and who sold the goods to *Gray* and *Hinkson*,) at the time when one of the witnesses went to haul away the goods for *Gray*, from *Hinkson's*, and when Davis and Curtis signed a receipt to *Gray* for the purchase money given them by *Gray* for the goods. Upon this state of case, the court below permitted the statements and confessions of *McCraw* to go in evidence to the jury.

The court below instructed the jury that any evidence showing that the defendants below obtained possession of the goods in controversy from any person not authorized to sell them, was sufficient evidence of an unlawful taking. The court below also refused to instruct the jury that the plaintiff's damages could only be assessed for the detention of the property, from the time it came into the possession of the defendants below, to the time of bringing suit; and instructed the jury, that if they found for the plaintiff below, they would assess all the damages which accrued to him by the *taking* and *detention* of the property.

The verdict of the jury was—"We, the jury, find for the plaintiff the sum of sixteen hundred and forty-five dollars"—for which sum the court gave judgment.

The defendants below then moved for a new trial, on the ground that the verdict was contrary to law and evidence, which motion was overruled, and they appealed on the ninth of October. On the 20th of October, the counsel for the plaintiff below filed a statement of the

evidence, which he prayed should be made a part of his motion to instruct the jury, and incorporated together with all the papers in the case. This statement was signed by the judge, and the defendants below filed a bill of exceptions to the opinion of the judge, permitting it to be filed.

WATKINS & FOWLER, for the appellants:

The first question which presents itself upon the record, is, whether the court below erred in admitting evidence of the statements and admissions of *Wm. McCraw*, who was not then a party to the trial, to prove the *unlawful taking* of the goods by the appellants.

The broad, general rule of law is, that no man is to be bound, precluded, or prejudiced by the acts or admissions of any other person;—the exceptions to this general rule are such as are founded on obvious reason and justice, and, without particularizing, may be reduced to cases of agency where the acts of the agent are the acts of the principal, or of arbitration or reference where a man agrees to be bound by what another does or says, or of partners where several persons make themselves one for the convenience of trade, and the acts or admissions of one partner, within the scope of the partnership business, are the acts or admissions of all. In indictments and actions on the case for a *conspiracy*, from the nature of the action, and the secrecy of such transactions, it becomes indispensable that the acts and admissions of one conspirator, should be introduced, to throw light upon the motives and intentions of the others; but even this cannot be done, until the fact of the conspiracy is proven by other and competent testimony, and we do not recognize this to be fairly an exception to the general rule of law above stated.

"Where there are sundry parties to a suit, the confessions of one cannot be given in evidence, nor allowed to operate against any but the party confessing; where there are several defendants and one of them suffers a default, and the others plead to the action, the confession of the defaulted defendant may be given in evidence on the trial to enhance the damages; though defaulted he is on trial as to the quantum of damages, for the verdict ascertains the damages as to all the defendants." *Swift's Evidence, p.* 128; 3 *Day's Con. Rep.* 33. Now, here is an authority precisely in point, with this difference only in our favor, that by our Statute when a defendant makes default, the writ of enquiry is returnable to the next term, instead of the damages being

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ascertained instanter; and in this case *McCraw* was not a party to the trial, nor did the verdict ascertain the damages as to him, at all. But be that as it may, the evidence of the statements and admissions of *Wm. McCraw*, were not admitted to *enhance the damages*, but to prove the very fact in issue, between the appellee and the appellants, who were the parties to the trial, to wit: *the taking of the goods.*

"In civil cases it seems that an accomplice, or joint wrong doer, who is not a party to the record, is a competent witness on either side, unless he is in some way answerable over to the defendant, for the consequences of his conduct," &c.; and the author goes on to say—"It seems now to be settled that a joint trespasser is a competent witness for the plaintiff, although a recovery against the defendant would discharge the action against himself;" and that the fact of his being a co-trespasser would tend to lessen his credit. In the next paragraph, the author says, "A co-trespasser, or other joint wrong doer, who is not a party to the record, is in general a competent witness for the defendant; for the record would not be evidence for him in another action, and his interest is rather on the other side, since if the plaintiff failed in obtaining compensation against the present defendant, he might afterwards attempt to recover it from the witness; and if the plaintiff recovered, the witness would not be liable to the defendant for contribution. Where, however, a co-trespasser is made a defendant, he is in general competent as a witness on either side. (And the authorities on this point are strong, numerous, and all tending to the same conclusion.) Where a co-trespasser lets judgment go by default, he is a competent witness for a co-defendant; but he is not a competent witness for the plaintiff. 1 *Starkie Ev.* 131, 2, 3; *Wakely* vs. *Hart et al.* 6 *Binney*, 319: *Brown et al.* vs. *Howard*, 14 *John.* 119; *Buller Nisi Pruis*, 285; *Gilbert's Ev.* 250; 2 *Esp.* 552. *Swift's Law of Evidence*, 73, 4; 2 *Starkie Ev.* 581; *Blackett* vs. *Weir*, 5 *B. & C.* 389; *Doe Dem. of Harrop* vs. *Green*, 5 *Esp. Ca.* 198; *Brown* vs. *Brown*, 2 *Taunton*, 752. And see particularly, the case of *Chapman* vs. *Graves, and two others*, 2 *Campbell*, 333—a case precisely in point, where the testimony of *Frost*, a co-trespasser, who had made default, was rejected, when offered to inculpate the other defendant, and the reasons of the rule given at large.

In view of all these authorities, if the testimony of a co-defendant in tort, who had suffered a default, could not be introduced against, (or even for,) his co-defendant on trial, *a fortiori* mediate and

secondary evidence of his statements and admissions cannot be admitted; for such evidence is always partial and of doubtful and suspicious character, and for that reason justly excluded, unless the nature of extreme cases will admit of no better testimony. If such secondary evidence could be admitted, then the condition of the appellants in the court below was indeed unfortunate: stabbed in the dark by the admissions and statements of a witness, who was vitally interested *against* them; saddled with the whole burthen of damages, without even an opportunity of confronting that witness by cross-examination. Better if the appellants, instead of pleading to the action, had abandoned the case, and awaited their fate. The court needs not to be reminded, that "against joint trespassers there can be but one satisfaction, and no apportionment of damages among the several defendants." *Brown* vs. *Allen and Oliver*, 4 *Esp. N. P. C.* 158. And "if separate suits be brought against several defendants for a joint trespass, the plaintiff may recover separate *judgments* against each; but he can have but one *satisfaction*—and he may elect *de melioribus damnis*, and issue his execution therefor against *one* of them. *Livingston* vs. *Bishop*, 1 *J. R.* 290. And thus it results that the statements and admissions of *McCraw*, who had suffered default, were inadmissible on account of his being vitally interested, for that damages would be assessed against him, though the defendants, pleading to issue, were acquitted. *Cressey* vs. *Webb and another*, 1 *Strange*, 1222.

But the evidence of the statements and admissions of *McCraw* were admitted on the ground of a community of interest and design, "it having been proven that *McCraw* had a *cap*, and perhaps some other small articles of the same lot of goods, at the time that Davis and Curtis signed a receipt to one of the appellants of the purchase money of the goods, (or to that effect; see bill of exceptions). Now we suggest that this bare, naked showing does not establish a community of interest and design; but if it shows any thing, it shows that *something* had been proven against one of the defendants whose testimony, or rather we should say, the evidence of whose testimony was sought to be introduced, and that according to all the rules of law above stated, such evidence was inadmissible. But all this is wholly immaterial; because by making default the defendants *McCraw* and *Magness*, *admitted the tort* laid in the declaration; and if, by any possibility, the appellee could avail himself of their testimony, he could only do so by entering a remitter of damages, which he did not do, but had

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judgment by default entered up, and a writ of enquiry of damages awarded against them.

The second assignment of errors we pass by in silence.

The third and fourth assignments of errors may be considered together. There is much barrenness in the decisions, as to the measure of damages in replevin, at the common law. But the appellee has waived any question which might arise here, by adopting in his whole proceeding our statutory regulation concerning the action of replevin, except in the one material matter of damages. Our Statute, after regulating the action of replevin at length, is clear and explicit, that "if judgment be for the plaintiff, he shall have his damages assessed by a jury, or the court; for the detention from the time the property came to the possession of the defendant to the time of bringing the action." *Dig. Tit. Replevin and Detinue, sec. 2.* In the face of this provision of law, the court below refused so to instruct the jury, but instructed them "that if they find for the plaintiff, they are to find for the plaintiff all the damages which accrued to the plaintiff by the taking and detention of the goods by the defendants."

We claim that our Statute, clear and explicit in its terms, is not so without reason. When the Statute gives the remedy by replevin, "in all cases where any goods or chattels shall be taken from the possession of any person lawfully possessed thereof, without his or her consent," it does not mean to give the plaintiff in replevin dangerous and unreasonable powers. We suggest whether the common law doctrine of distress for rent or damage feasant, is not to all intents and purpose abolished by disuse in this State; and that when the legislature so extended the remedy of replevin, it was clearly intended to make the the action of replevin similar in its operation to the action of detinue, except that in replevin the Statute requires an affidavit of the *unlawful taking*, as well as having been lawfully possessed of the chattel, before it will arbitrarily divest one man of property, and vest the possession of it in another, previous to any trial of the right of property. With the exception of the unlawful taking, replevin and detinue are co-extensive remedies; in both cases the Statute gives damages for the *detention*, but in neither, for the *taking*. If there are any peculiar circumstances attending the taking, the plaintiff hath adequate remedy, by action of trespass, and the alia enormia go in aggravation. As a further parallel between replevin and detinue, in both cases, the specific chattel may be restored to the plaintiff: in the one case, it is

restored to him on mesne process, n the other, on final process; and in either case, the party remaining in possession of the chattel pending the suit, gives bond to secure the other.

The action of replevin would of itself seem to imply, that the specific chattel sought to be replevied has been delivered to the plaintiff. *Selwyn, N. P. Tit. Replevin, p.* 1143. For the plaintiff has his election to bring *trover*, and recover the value of the goods in damages, and the presumption is, that he will elect the best form of action; but in the present case such speculations are needless, because the return of the sheriff shows that the goods were delivered to the plaintiff.—Suppose the goods to have been worth $2,000 cost and carriage, with an advance of 20 or 25 per cent. by way of profit: they are charged in the declaration to have come to the possession of the defendants, on the 15th of January, 1838; the writ was issued on the 22nd, and returned executed by the sheriff on the 23rd of the same month, showing that the defendants had possession of the goods for *one week*—yet the verdict of the jury gave the plaintiff $1644 damages, so that by this proceeding, the plaintiff has not only had a return of his goods, but has recovered nearly their value in damages for this brief *detention*. It moreover appears from the declaration, that the goods replevied were of such an inanimate nature, that the plaintiff, by their detention, for a short space of time, could not have been greatly damnified. If the property sought to be replevied were a steam boat, or the like, in good business, then the plaintiff would be clearly entitled to recover such reasonable damages for the detention, as he might have suffered, by being deprived of the use of the boat, while she was in the possession of the defendant.

These facts appearing in the record clearly show, that the verdict of the jury in this case was outrageous and oppressive, and that the instruction of the court and the refusal to instruct, set out in the third and fourth assignment of errors, is manifestly erroneous.

Of this motion the appellants took no notice, except to file their bill of exceptions by way of protest. It would be an insult to your Honors to argue that the evidence in a cause can never come up before this court, unless it is brought up legitimately by exceptions to evidence, demurrer to evidence, or for a variance, or by motion for a new trial upon the ground that the verdict is contrary to evidence.

We cannot travel out of the record to state the condition in life of the appellants; but we ask for the magnitude and importance of the

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case, as exhibited by the record, that patient and thorough investigation, which your Honors might not consider due to the principles involved.

TRAPNALL & COCKE, *contra:*

During the progress of the trial on the issue joined, the appellants took various exceptions to the opinions of the court. The jury returned a verdict in favor of the appellee for $1,645 in damages, and afterwards, at the same term, the counsel of the appellee presented a draft of the evidence given upon the trial, and the court upon his motion made it a part of the record, to which the appellants excepted.—In the absence of any principle or precedent denying the authority of the court, it is not perceived how the correctness or soundness of this opinion can be successfully controverted. The appellate court will be governed more by the actual merits and general result of a cause, than the propriety or impropriety of any interlocutory opinions given by the inferior court during the trial. An erroneous opinion is frequently rendered perfectly harmless by the subsequent admission of testimony, that supplies the deficiency and materially changes the complexion of a cause. A party may, and frequently does, present a view of the case by incorporating a partial abstract of the evidence into a bill of exceptions, which would be entirely changed by a survey of all the testimony. No injury can be done, but may sometimes be prevented, by making the whole evidence a part of the record;—and the Supreme Court will then be more enabled to understand and appreciate the opinions of the inferior court, and determine according to the justice of the cause. Vide *Givens* vs. *Bradley*, 3 *Bibb.* 195; 1 *Bibb.* 41; 1 *Littell*, 255; *Clarke* vs. *Castleman*, 1 *J. J. Marsh.* 70.

The admissions of a co-trespasser are evidence against every one who acted together and in concert with him in the commission of the trespass. 1 *Saunders on Pl. and Ev.* 59; *Rex.* vs. *Inhabitants of Hardwick*, 11 *East.* 585; 2 *Starkie*, 467; although made in the absence of the others. *Wright* vs. *Court*, 2 *Car. & Payne*, 232. As to what makes co-trespassers, see 2 *Starkie*, 401, 2, 3; 19 *Johnson*, 382; 10 *Wendall*, 654; 12 *Wendall*, 39.

The action of replevin is analogous to, and governed by, many of the same rules that regulate the action of trespass de bonis asportatis, and is co-extensive with it. 7 *John.* 140, 3; 14 *John.* 17; 1 *Chitty*, 159; 3 *J. J. Marsh.* 124.

Having the goods in possession is sufficient evidence of the taking in replevin. *Walton* vs. *Kersop*, 2 *Wils.* 355; 1 *Chitty Pl.* 159. It is sufficient to show that the defendants had the goods in possession at the place alleged. 2 *Saunders' Pl. and Ev.* 287; 3 *Starkie*, 1296.

Under the general issue in replevin, which admits property in the plaintiff, see 2 *Saunders' Pl. and Ev.* 281.

The defendant is a wrong doer, and his possession is unlawful, unless he takes the goods by the authority of the owner. 1 *Saunders' Rep.* 347, *c.*; *Chambers* vs. *Donaldson*, 11 *East.* 65; *Graham* vs. *Peat*, 1 *East.* 244; *Harker* vs. *Birkbeck*, 3 *Burrows*, 1556.

The plaintiff is entitled to judgment for the full amount of the injury, and all and each one of the co-trespassers, even if not tried at the same time. *Sodinsky* vs. *McCee*, 4 *J. J. Marshall*, 269.

The judgment is for the taking and detention of the goods.

The record shows a motion for a new trial of the cause still pending, and consequently on that ground the appeal must be dismissed.

Dickinson, *Judge*, delivered the opinion of the court:

This is an action of replevin. The declaration is in the usual form. On the return of the writ, the appellants appeared and pleaded non cepit, to which there was a replication and issue, and judgment rendered in favor of the appellee; to reverse which an appeal is now prosecuted in this court. On the trial of the cause at the October term, 1838, judgment was taken by default against *William McCraw* and *Robert Magness*, co-defendants, and a writ of enquiry awarded.—Whether the writ of enquiry was ever executed or not, we are at a loss to determine; for the record does not show that any further proceedings were afterwards had against them. During the progress of the trial, several bills of exceptions were filed to the opinion of the court by the appellants, and the assignment of errors presents the questions of law that were made in the court below. For the appellants, it is contended on the first assignment, that the evidence of *McCraw*, offered by the appellee in support of his action, was inadmissible; he being a co-defendant upon the record. The bills of exceptions set forth, that the testimony of *McCraw* consisted in statements and admissions that conduced to prove the unlawful taking by *Gray* and *Hinkson* of the property or goods mentioned in the declaration, on the ground of community of design between *Gray*, *Hinkson*, and *McCraw*, in obtaining possession of the goods; it being proved that

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McCraw had in his possession a cap and some other small articles belonging to the lot of goods for which the suit is brought, and that he was at *Hinkson's* in company with *Gray* and *Hinkson*, where Davis and Curtis signed a receipt to *Gray* for the purchase money given for said goods; and that he was also there when the goods were hauled away for *Gray*. It has been often ruled in this court, and the soundness of the doctrine cannnot be controverted or denied, that all legal presumptions operate in support of the verdict and judgment below, unless the same be manifestly erroneous by some affirmative matter contained in the record itself, or from some other facts and circumstances that the court is bound judicially to take notice of. This being the case, we are bound to presume every thing in favor of the verdict and judgment of the Circuit Court. The rule that one co-defendant cannot be witness for his co-defendant, or that a party on the record cannot testify in the case, is subject to this exception: For instance, if there is no evidence adduced against one of the defendants where several are joined in an action of trespass, the court will direct the jury to find a verdict for that defendant, and then permit him to be introduced as a witness; for if this was not the case, by joining several defendants in trespass or the like, the plaintiff would thereby exclude from the consideration of the jury evidence that was in every way important and competent. The issue in this case was non cepit, and therefore it was incumbent on the plaintiff to prove the taking of the goods, or part of them, in the place specified in the declaration; but it is sufficient under this issue to prove a detention of these goods by the defendant in that place. 2 *Starkie*, 1295. And what evidence could be more satisfactory than the admissions of the defendants themselves; for it is well settled that if several be proved to be co-trespassers by competent evidence, the declaration of one as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object. The record in this case shows that part of the goods were in possession of *McCraw*, that he was present when the pretended sale was made, and when they were taken away; and any admissions or statements that he made, showing a community of design to have existed among all the defendants, and that they were accomplices in the transaction, was legitimate proof. The bill of exceptions wholly fails to set out the extent and character of these admissions. We are bound therefore to presume that they were made in the presence of *Gray* and *Hinkson*,

and coupled with other circumstances and testimony showing a community of design and concert of action on the part of *McCraw* and the appellants, and therefore proper and legitimate evidence for the consideration of the jury. It may not be amiss to state in this stage of the examination, that there are two papers attached to the record, and which are signed by the judge, purporting to give a detailed statement of the evidence or testimony adduced on the trial. We cannot regard them as constituting any part of the record, for they were filed, one on 19th, the other on the 20th of October, 1838, and the record shows that prior to that time, to wit, on the 17th day of the same month, an appeal had been regularly prayed and taken; and it does not appear that these exceptions were taken during the trial, or upon any motion made previous to the granting of the appeal; consequently, they cannot be regarded as comprising a part of the record; and it is therefore improper to look into or give any opinion upon these statements. The second assignment questions the opinion of the court, in instructing the jury "that any evidence which showed that the appellants obtained possession of the goods from any person not authorized to sell, was sufficient evidence of an unlawful taking by the appellants."

It was certainly competent for the plaintiff to show that he had a general and special property in the goods, and that the defendant had obtained possession through the instrumentality of any person who had no authority to sell, or to deliver the possession. If the goods were the property of the appellee, and the appellants obtained possession of them without authority of law, surely these facts or circumstances were calculated to prove an unlawful taking by the appellants, and, when coupled with that testimony, would amount to full and conclusive proof of an unlawful taking. The court therefore rightly instructed the jury, that any evidence that showed an unlawful taking by the appellants, was competent proof in the cause. The third and fourth assignments may be considered together. 1st, In refusing to instruct the jury that if they find for the plaintiff, they are to assess his damages only for the detention of the property, from the time the same came into the defendant's possession, to the time of bringing the action; and in instructing them that they are to find for the plaintiff all the damages which he had sustained for the taking and detention of the goods. In order to determine the question correctly, it is necessary to consider the nature and character of the action of

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replevin, which is analogous to, and governed by many of the same rules that regulate the action of trespass, de bonis asportatis, and is co-extensive with it; for it is laid down by BLACKSTONE that the taking and detaining a man's goods are respectively trespasses. *Archbold's Prac.* 194. It is stated that in replevin a verdict for the plaintiff gives damages precisely as in trespass. At common law the action of replevin was brought only for the restitution of goods unlawfully taken, with damages for the loss sustained by the invasion of the parties' rights, and was generally founded upon a distress wrongfully taken, and without sufficient excuse; and as the goods were delivered to the owner, he could only recover damages for the unjust detention from the time the same came into his possession, until the bringing of the action, and not for the caption; because the original taking was unlawful.—This rule was based upon the principle, that as such original taking was lawful, it would be unjust that the plaintiff should recover any damages other than for such detention; for that is the gist of the action. *2nd Chitty's Blackstone*, 146, 151; *Chitty's Pl.* 146; *Coke Littleton*, 145, *b*. The question now recurs, does our Statute enlarge the common law, or is it in derogation of it? In determining this point, it necessarily tests the correctness of the instructions given to the jury in the court below. It is a rule of sound, legal construction, fortified by authority and reason, that a Statute shall not be taken in derogation of the common law, unless the act itself shows such to have been the intention and object of the Legislature. The proceeding in this case is prosecuted under our Statute, and that it is an enlarging and not a restraining Statute, the act itself clearly demonstrates; for it declares that in all cases where any goods or chattels shall be taken from the possession of any person lawfully possessed thereof, without his or her consent, it shall be lawful for such person to bring his action therefor against any person or persons in whose hands or possession they may be found, and that before any writ of replevin shall issue, the plaintiff shall file in the office of the clerk of the Circuit Court an affidavit, stating he was lawfully possessed of the property in the declaration mentioned, and that the same was unlawfully taken from his possession, and without his consent, within one year next preceding his application for such writ; and that he is lawfully entitled to the possession thereof. If he then complies with the other regulations of the act, he is entitled to prosecute his remedy in conformity therewith.

Here the action is clearly given for the unlawful taking, as well

as for an unlawful detention, and of course if the plaintiff is entitled to a verdict, he should be permitted to recover damages, as well for the unlawful taking, as for the unlawful detention, of the property. To give him a right to the action for an unlawful taking, and to afford him at the same time no remedy for such a taking, would be for the Legislature to clothe him with a right, and in effect to deny him any adequate redress for the injury sustained. By the common law, if he was entitled to a verdict, he was entitled to damages only for the detention of the property, and not for the caption;—and the principle is fully recognized and established by our Statute: and where the Statute, in addition to this, declares the action shall be for the unlawful and wrongful taking of the property out of the possession of him who is entitled to it, it certainly intended to extend to him the necessary redress for the injury it asserts he has sustained. If these positions be true, then the instructions of the court below are evidently correct. They merely assert that the jury are to find for the plaintiff all the damages which accrued to him by the taking and detention of the goods by the defendants, which is in strict conformity to our Statute. Before the examining of the record, as previously remarked, it does not appear that any further steps were taken upon the writ of enquiry awarded against the co-defendants, nor is any question raised in point.

There can have been no doubt but that the appellee had a right to prosecute his action to recover, as well against the appellants, as the other co-defendants; but he is entitled to one satisfaction: he should, after the verdict had been rendered in his favor against the appellants, have omitted to enter up judgment against them, until the damages had been awarded against the other co-defendants. He could then have made his election as to which of the parties he would have had judgment against, and relied upon for satifaction; but inasmuch as, upon the rendering of the verdict against the appellants, he proceeded to enter up final judgment, it must be considered that he had made his election to proceed against them alone, and the doing so operated as a restraint against the co-defendant, and detained him from any further proceeding upon the writ of enquiry. We are therefore of opinion, that there is no error in the proceedings, and that the judgment of the Circuit Court of Pulaski county be affirmed with costs.

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RICHARD C. HAWKINS *against* THE GOVERNOR.

PETITION *for rule to show cause, why a mandamus should not issue.*

The case of *Taylor* vs. *The Governor*, (*ante p.* 21,) does not decide that a mandamus can issue to the Governor.

The Governor of the State is not amenable to the judiciary for the manner in which he performs, or for his failure to perform his legal or constitutional duties.

His acts, being political, must of course be politically examined in the manner pointed out by the Constitution.

The Constitution assigns to him no *ministerial* duties to be performed, nor can the law enjoin upon him any such duty.

The principle, that, where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, the individual injured has a right to resort to the law for redress; applies only to such officers as have no legal or constitutional discretion left them. All the officers of the government, except the President of the United States, and the Executives of the different States, are liable to have their acts examined in a court of justice.

Whenever the heads or officers of a department are the political or confidential agents of the Executive, appointed merely to execute his will, it is clear that in such cases their acts are his acts—and whatever opinion may be entertained of the manner in which their discretion may be used, there is no power in the courts to compel that discretion.

But if the Governor had signed and sealed the commission of an officer, and delivered it to the Secretary of State to be attested and recorded, the duties of the Secretary being in that behalf purely ministerial, the court would, by mandamus, compel him to perform them.

Each department of the government has the right to judge of the Constitution for itself—but each is responsible for an abuse or usurpation of power, in the mode pointed out by the Constitution.

The Governor is placed under a double responsibility—that of the right of suffrage, and that of impeachment. He is answerable in no other way for his official conduct, while he continues in the exercise of his office.

All the duties imposed upon the Executive by the Constitution, including the issuing of commissions, are strictly and exclusively political.

The Supreme Court therefore has no power to award a mandamus to the Governor to compel him to grant a commission.

This case was disposed of on the question of jurisdiction. It is therefore only necessary to state that it was a petition for a rule upon James S. Conway, Governor of the State, to show cause why a peremptory mandamus should not be awarded against him, commanding him to issue a commission to the petitioner, Richard C. Hawkins, as Commissioner of Public Buildings.

CUMMINS & PIKE, for the application:

The first question in this case is, has this court the power to award a

mandamus to the Governor, where he wrongfully withholds a commission, which he is by law required to issue.

This, we conceive, has been settled by this court in the case of *Taylor* vs. *The Governor*, (*ante*, 21) where it was decided that this court had the power to award a mandamus—inasmuch as that case was of the same nature with the present; and it may well be concluded that the court meant to say that it had the power to award the mandamus to the Governor, in case the applicant was clearly entitled to his commission—as otherwise that case would have been disposed of for want of jurisdiction, without the elaborate investigation of the applicant's right into which the court went.

In the case of *Marbury* vs. *Madison*, 1 *Cond. Rep.* 267, the Supreme Court of the United States decided, that "where the Legislature proceeds to impose on that officer, (the Secretary,) other duties (than his political ones;) when he is directed peremptorily to perform certain acts, when the rights of individuals are dependant on the performance of those acts, *he is so far the officer of the law;* is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others." By the law creating the office of Commissioner of Public Buildings, the Governor is required to commission that officer. If that law was in force at the time of the election, all that the Governor is required to do, is to perform a *ministerial* act—and he thus comes within the reasoning above quoted. For—as that court further said—"where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for remedy." And the whole reasoning of the court in that case applies so directly to the present, that it is needless to do more than refer the court to it.

HEMPSTEAD, *contra:*

The first question is, can a mandamus be awarded against the Governor of the State?

The doctrine in the case of *Marbury* vs. *Madison* is usually referred to as authorizing such a procedure, and however vain it may appear, it can probably be shown that it does not possess the force of a judicial precedent, except as to one isolated point—of *jurisdiction alone.*

Upon a careful examination of the case as reported in 1 *Cond. Rep.* 267, it appears that one principle alone is settled by the court, and that

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is, "*the authority given to the Supreme Court, by the act establishing the Judicial Courts of the United States, to issue writs of mandamus to public officers, appears to be warranted by the constitution*," 283.

This one point comes undoubtedly within the doctrine of *stare decisis*, and so far is a precedent. But here the idea of a precedent ends, and the remainder is but an *obiter*—an opinion entitled to respect only, as the emanation of a towering and philosophic mind. No one can be more ready to admit, that as a man, Chief Justice Marshall embellished society—as a judge, illuminated the bench. But the most profound sagacity may err, and as said by Blackstone—the *law* and the *opinion of the Judge* are not always convertible terms, or one and the same thing, since it sometimes may happen that the Judge may *mistake* the law, and the decision is then not *bad law* merely, but *no law at all*. The court disclaimed the right to issue a mandamus, because the grant of power was unconstitutional. If there was no jurisdiction, how could it be rightfully determined whether a mandamus could be awarded in a supposed case? Does it not present a strange anomaly for a Judge to say that he has not jurisdiction, and still declare what the court *might* or *would* do if it had. Can any such opinion be a precedent fit to be referred to as binding, to say nothing of its indelicacy?

Questions of jurisdiction reach the very foundation of the authority of courts, to take judicial cognizance of a case, and if they cannot, in the appropriate language of the law, hear and determine it, the cause is *coram non judice*, and every thing done is a nullity. What principles can be settled except such as relate to the jurisdiction of the court? None. Every thing else is within the description of *obiter dictum*, and is not, therefore, to be regarded as evidence of the law.

The reasoning or facts of such an opinion may be looked to in the investigation of a similar subject, for the purpose of sharpening the intellect, but can never be cited in a court of law as a judicial precedent. Technically speaking, there are nothing like facts in issue, upon which the judgment of law can be rendered.

A mandamus cannot issue at all to the Executive of the State.

First: Because, by article third of the constitution of Arkansas, the powers of the State government are divided into three distinct departments, each of them to be confined to a separate body of magistracy —those which are legislative to one, those which are executive to another, and those which are judicial to another. Out of an abun-

dance of caution, a clause is annexed prohibiting any person, or collection of persons, being of one of those departments, from exercising any power belonging to either of the others, except in instances directed or permitted.

That a thing which cannot be done directly, can never be done by the agency of indirect means, is a principle too well established to be controverted, and its application will be readily seen.

If the power to do a thing is vested in the executive department by the constitution, how can the judiciary control the performance of it, without at the same time exercising a power belonging to another department? It is the court that requires and commands the act to be done, and the executive can have no volition, if it be true that this court hath jurisdiction over the executive department.

All jurisdiction implies superiority of power, and that it can exist without the means to enforce it, is an anomalous idea which nobody can understand. A court will surely be cautious of placing its authority in a situation to be disregarded, and a little examination will show how painful that situation would be found.

If the Executive will not commission the individual when *peremptorily commanded*, can he be punished for a contempt, incarcerated in a prison, for disobedience to the mandate of the court? His executive functions must then be suspended, and the will of the people daringly outraged. If that imprisonment can last for one hour, it may last for an indefinite time, depending upon discretion alone. Where is the limit to that discretion—where the revisory power? The judges are as liable to err as the executive, and how, it may be asked, was this frightful and tremendous jurisdiction obtained?

Is there any meaning in the constitution when it expressly prohibits one department from exercising the powers belonging to another? Is the executive any thing more than an automaton, the mere creature of this court, if such powers may be rightfully exercised?

What is there sacred in an election by the people, if the design and end of that election may be substantially annulled at any moment, by depriving the executive of his constitutional functions? Can the court appoint an individual to perform the duties of Governor *temporarily*, or will the judges themselves attend to execute the law, or, to speak more correctly, declare what it is, and then execute it?—Such an absurdity never entered the imagination.

To whom must the people look for the execution of a trust confided

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by their sovereign will to one man? Must they look to their rightful executive, immured within the walls of a dungeon for disobedience to the process of a court, commanding an act involving executive discretion; perhaps, too, against both policy and law?

The Governor solemnly swears to support the constitution, not as judges understand it, but as he himself understands it. Can any human tribunal force upon him the unpleasant dilemma of choosing between perjury, on the one hand, and punishment for resisting what he deems an unlawful mandate, on the other? He must construe the constitution for himself, independent of the opinion or authority of judges.

But it is said that the executive is sufficiently protected from any assumption of power by the judicial department, because nothing but mere *ministerial* acts can be controlled by judicial authority.

If the distinction between *political* and *ministerial* acts, as applied to the chief executive officer of the State, exists, and can be distinctly defined, let us see what sort of guard it furnishes.

Who is to decide the question between acts *ministerial* and *political*? Must not the court?

Is not the protection a fancied one, and may not the rights of the executive be as effectually taken away, with as without the distinction, especially when it is remembered that courts sometimes construe *may* to mean *shall*—or, in other words, mandatory language into language implying discretion; and so *vice versa?* If the province of construction did not rightfully belong to the courts, and to this court as the highest judicial tribunal in the State, the idea might deserve a more serious consideration than it can now receive.

The constitution declares that the Governor *shall* fill vacancies in offices, the election to which is vested in the General Assembly during the recess of the General Assembly, by granting commissions which shall expire at the end of the next session. What if he should fail to fill a vacancy?

This power might be called *ministerial;* and if any authority can be exercised over the executive, directly or indirectly, by a tribunal professedly co-ordinate, that tribunal might proceed to ascertain when and how the vacancy happened, and command the Governor to fill it by granting a commission.

If this could be legitimately done, why might not the Governor be required to commission a particular individual? It is putting an extreme

case, but one which portrays the fallacy of the idea, that the Governor of the State is subordinate to the Supreme, or any other Court, in the performance of any of his duties.

That the three departments in the State government are co-ordinate is beyond question; and it is a gross contradiction in language to say that each are co-ordinate, and *yet in some things, one is subordinate to another.*

To command is an attribute of sovereignty—to obey, the fate or duty of an inferior. A command carries along with it the notion of superiority, whether that superiority is acquired by compact or usurpation. It is not conferred upon the judiciary of the State, with regard to the executive department, by any compact, but on the contrary expressly denied.

If attempted at all, and no remedy could be found of a constitutional character, it would be high time to invoke, with the feelings and earnestness of a patriot, the interposition of a power behind the constitution, which can make and unmake governments, and will ever be found in readiness to resist any usurpation, from whatever source it may emanate.

To counterbalance such reasoning, it is significantly said by the advocates of this judicial power, that no safeguard is thrown around individual rights, and that the executive may trample them down with impunity.

It is a satisfactory answer to say, that the Governor is subject to impeachment for any mal-practice, or misdemeanor in office. The mode is prescribed and cannot be mistaken. In case of impeachment, among other contingencies, an officer is designated, who is to exercise the authority and duties of Governor, until another shall be elected and qualified, or until he shall be acquitted. This very provision against any suspension of the executive functions, is another strong argument to show that it could never have been the intention of the convention, to vest in the Supreme Court any original jurisdiction over the Governor, which would draw along the right of punishing the contempt of their mandate, and that punishment would ordinarily amount to, or induce a suspension of all the Governor's powers.

It cannot be reasonably supposed, that in some cases it was provided against with extreme caution, and that in others it rested on discretion alone—incapable of being known, impossible to be defined by legal landmarks, and without any remedy, save in the mercy of moderation.

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Putting all this out of view, and admitting, for a moment, that the courts do possess the power claimed for them by some, may it not also be asked, what safeguard the citizen can have against the oppression and tyranny of the judges, but their impeachment. What other punishment can he invoke, what other security from a repetition of wrongs? The Governor cannot remove but by the intervention of the Legislature. Judges have passions and prejudices like other men, and the ermine constitutes no exemption from error.

But such presumptions are never to be indulged with regard to public officers, for being possible only; and, deducible from the occasional wickedness of man, they can never furnish correct data for opinion, but form an exception, and therefore possess little or no weight as argument.

The truth is, that the Governor is placed at the head of the executive part of the government—responsible by way of impeachment, and is further politically responsible to the people, for the uprightness of his administration, and for a faithful execution of the laws. That responsibility is not a mere empty name, but solemn and substantial.—With a written constitution before him, bound to its support by the sacredness of an oath, if he wantonly disregards it, he cannot escape the vigilance of the people's representatives; and for a lame and inefficient performance of his trust, cannot fly the denunciations of the people themselves.

The object of the federal constitution, and of the State constitutions likewise, is a well balanced division of power among the different departments, making neither subordinate, but, on the contrary, independent of each other in the exercise of their several powers. The advantages of a mixed government are combined; but the very moment that one branch obtains an uncontrollable superiority over another, the beauty of the system has perished, the necessary equilibrium has gone, and society must be constantly agitated by the assertion of despotic power on the one hand, and manly resistance on the other. Anarchy and confusion must ensue, so that instead of providing ourselves with a form of civil polity, protective of the freedom of the citizens, we have entrusted its keeping to accident and uncertainty. The executive cannot *command* the judiciary to do a single act, nor the Legislature to pass or repeal a law; nor upon a parity of reasonning, can either of those branches *command* the executive, and punish him if he disobeys. In their appropriate spheres, they are certainly independ-

ent of each other, and only responsible in the mode designated in the constitution, and in no case accountable to each other.

CUMMINS & PIKE, *in response:*

It is contended that this court has no power, in any possible case which may arise, to issue a mandamus to the Governor of the State. To establish this proposition, it was first necessary to dispose of the case of *Marbury* vs. *Madison*, and that is effected in the most cavalier manner, by declaring so much of the decision in that case as has any reference to the present, to be an *obiter dictum*, and therefore not worthy of, or needing before this court an examination or refutation.—Chief Justice Marshall, it is admitted, embellished society and illuminated the bench, but his decision and that of the Supreme Court is not worth even a refutation here, because it is an *obiter dictum*. It occurs to us that the gentlemen would have done their cause more service by showing the fallacy of the argument, and the weakness of the conclusions of Chief Justice Marshall, than by setting the whole case aside as an *obiter dictum*.

The full authority of that case has been recognized by all the distinguished commentators—by Dane, Story, and Kent; and by the Supreme Court of the United States, in *McIntire* vs. *Wood*, 7 *Cranch*, 504; *McClung* vs. *Silliman*, 6 *Wheaton*, 598; and *ex parte Crane*, 5 *Peters*, 190. Why not show by what judicial tribunal that case has been overruled, modified, or doubted? In no one judical decision, in the elementary treatise of no jurist, has it been impugned or questioned.

It is contended that a mandamus connot issue in this case, 1st, Because the legislative department is independent of the judiciary, and one cannot exercise any power belonging to the other. This argument would apply as well to any executive officer, as to the Governor. If it means any thing, it means this, that the judiciary cannot compel the performance of any act which an executive officer ought to do under the law; nor can it prevent the performance of any act which any such officer may attempt to do, if he pretends to do it as an executive officer.

Yet executive officers have always been held amenable to courts of justice for their official acts. Anciently the King of England might be sued as a private person. In 2 *Salk.* 625, will be found a note of Lord Bellamont's case, who was prosecuted for an official act

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as Governor of the Province of New York. In *Mostyn* vs. *Fabrigas*, *Cowp.* 161, Lord Mansfield said that a citizen of Minorca might sustain an action against the Governor of that Island for an act of official misconduct. *Livingston* vs. *Jefferson*, 1 *Brock.* 203, was a case in which the defendant was sued for an act done by him as President of the United States. In *Marbury* vs. *Madison* the court decided that a mandamus could issue to the Secretary of State to enforce the issuance of a commission; and in *Kendall* vs. *United States*, 12 *Peters*, 524, the same court decided that a mandamus could issue to the Postmaster General to compel him to pay over a balance directed to be paid out by Congress.

The Circuit Court of the District of Columbia, whose judgment was in the latter case affirmed, say, "Every public officer who neglects or refuses to perform a mere ministerial duty, whereby an individual is injured, is legally responsible to that individual in some form or other; and a mandamus is one of the mildest forms of action that can be used." In *Marbury* vs. *Madison*, the court said that whether the writ should issue, "does not depend on the office, but the nature of the offence."

In the case of Kendall, the Attorney General, Butler, expressly admitted, that "as the ordinary character of an officer's functions would not always determine the true nature of a particular duty imposed by law, I further agree, that if an executive officer, the head of a department, or even the President himself, were required, by law, to perform an act merely ministerial, and necessary to the completion or enjoyment of the rights of individuals, he should be regarded, *quoad hoc*, not as an executive, but as a merely ministerial officer; and therefore liable to be directed and compelled to the performance of the act, by mandamus, if Congress saw fit to give the jurisdiction."

This admission was made by the counsel for the Postmaster, and the legal adviser of the executive of the United States. It is therefore entitled to some respect.

Again it is contended, that whenever the judiciary controls the performance of any executive act, it usurps the powers of the executive, and thereby violates the constitution. If we admit this to be true, it has nothing to do with the case, because the issuance of the commission is not an executive, but a ministerial act. It is has been so decided to be, in *Marbury* vs. *Madison*, and that decision has never been controverted.

But the judiciary might control the action of another department, or both departments, and that not directly but indirectly, by declaring a law which has passed the Legislature and received the signature of the executive, to be unconstitutional. If we had chosen to take a writ of quo warranto against the present occupant of the office here in dispute, and this court were clearly of the opinion that our client was entitled to the office, and that the appointment by the Governor was void, would they not *oust* the incumbent? It is a fallacious doctrine that the judiciary is not supreme to the other departments. It is the interpreter of the laws and the constitution, and has the power virtually to annul their acts, by declaring them unconstitutional, and so rendering them inoperative.

But the argument on which most reliance is placed, is, that as the court would have no power to enforce its mandate, it will issue none. The question is significantly asked, how can the executive be punished for contempt? Can he be imprisoned? If so, his executive functions are suspended, and the will of the people daringly outraged. What is there sacred in an election by the people, if this is the case? Can the court appoint an executive?—or will they act as the executive?

These are all very portentous questions—significant, and put with a very grave solemnity. But unfortunately, they will equally apply, and could just as pertinently be asked, if we were now debating whether a mandamus should issue to a Circuit Court Clerk. If he too were committed for contempt, "the will of the people would be daringly outraged"—and the wit of man cannot devise or discover a distinction between the two cases.

We are not aware of any power in the land superior to the laws.—We know of no power higher and stronger than the supreme Tribunals of justice. What if the Governor, being the commander in chief of the militia, were to enter this hall at the head of a file of men, and order your honors to vacate that bench!—Would you do so because the executive and judiciary are independent, and because you have no power to punish the Governor for contempt? Not so. The temple of justice could not be so closed; nor would you recognize in the lawless intruder the executive of the State—but an individual committing a gross contempt in your presence; and you would find the people sustaining you and enforcing your mandates. So in this case, if your mandate issues, the Governor is *sworn* to obey it. Nor is he sworn to support the constitution and execute the laws as *he* understands them. He is

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sworn to support the constitution. The constitution makes you the interpreters of the law; and when you have decided, the executive usurps judical power, and a judical power too above the powers of this tribunal of last resort, when he adopts any other construction of the laws than the one you have settled. If when your mandates issues, the Governor refuses to obey it, he does not act as Governor in so refusing; but he stands before you as any other private individual.

Nor is it necessary that you should have the power to compel obedience. When the Supreme Court of the United States reverses the judgment of the Supreme Court of a State, has it the power to *enforce* its judgment by ordering the Supreme Court to enter a new judgment in conformity with its opinion. It has not that power in the sense in which the gentleman uses the word. It cannot imprison the judges of the State Court for contempt for refusing to obey the mandate; nor can it order one of its own officers to expunge the old judgment, and enter the new. But it has a moral power; and it also has the power to make the judgment below inoperative.

What if you were called on to issue a mandamus to the Secretary of State—the Auditor or the Treasurer? Would you decline to do so, because they are executive officers—because you could not enforce your mandate—because you could not imprison them for contempt, without "defeating the election of the people," and committing "a daring outrage on their will?"

It is further contended, that if the court grant this application, they can with equal right issue a mandamus to the Governor to fill a vacancy in an office, between the sessions of the General Assembly. This is an ingenious attempt at the *reductio ad absurdum*, but unfortunately the case put by the gentleman has none of the features of the present one. We claim a mandamus here, because the issuing a commission is a ministerial act—because the applicant has been elected, and has a vested right to the office, and to the evidence of his office—and because it is a matter in which the executive has no discretion, but merely acts as a clerk or other ministerial officer. In the other case, the Governor although it would be his duty to fill the vacancy, would yet have a discretion as to the person on whom he should confer it: public rights, but not individual rights, would be involved: no person would have a vested right to the office, and the act of filling the office is part of the Governor's prerogative—an executive act.

The whole argument in regard to the three departments being

co-ordinate, co-equal, and independent, is an assumption. Does the constitution declare them so? Not at all. And that such is not the fact is apparent, because the judiciary can in effect annul an act of either or both the others.

It is manifest that all the arguments advanced by the gentleman are but secondary. The true ground is not touched upon, although without it the positions are of no more avail than if taken, as they could be, in a case where a mandamus should be asked to a clerk.—There is behind all these light-armed, subsidiary arguments, a main body, which consists in a vague, indefinite, shapeless idea of the innate and inherent majesty of the executive office. While we contend that neither power, exemption, privilege or impunity belongs to or attaches to the executive, other than such as is conferred upon and secured to him by the words or necessary intendment of the constitution, they, on the other hand, assimilate his office to the regal dignity of the Crown of England, and from the nature of the office infer his non-subjection to the process of the law. They contend that he cannot be arrested even for crime, until by impeachment he is disrobed of the garment of sanctity and immunity, thrown around him by the prerogative of his office. We, on the contrary, contend that he has no such exemption, and that he is as amenable to the process of the law as the humblest citizen. Story, the ablest commentator on the constitution, does not claim for the President any privilege from arrest except on civil process. *2nd Story, Com. on Const.* 419.

It is singular that in order to ascertain the powers or privileges of the Governor of a free republic, we should see a resort to the powers and privileges of a crowned head. Yet this is undeniably the case here. If the Governor cannot be punished for a contempt, it must be, either because he is exempted by some provision of the constitution, or because it would be inconsistent with the nature of his office. The nature of his office, we contend, is to be ascertained exclusively by reference to the provisions of the constitution. If there are other means of ascertaining its nature, it must be by assimilating it to the executive office elsewhere. And that this elsewhere is England, is apparent from the whole tenor of the argument.

The gentleman avers that this court did not in the case of Taylor, decide and settle this question. It is true that the question was not raised; but we contend that as it was a question of jurisdiction, this court did, in that case, when they went on to decide on the merits of

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Taylor's motion, and upon his claims to the office of sheriff, decide that they had the power to issue the mandamus to the Governor. If they had not the power, if they had no jurisdiction, they decided against Taylor's right to the office without having the right to decide, and are justly obnoxious to the same charge brought by the gentleman against Chief Justice Marshall.

It is not necessary to plead a question of jurisdiction like this. The court will notice it in any stage of the proceedings. Can it be imagined that in the case of Taylor, they proceeded to decide that he had forfeited his right to be elected sheriff, when, if they had decided for him, they could have afforded him no relief? To give a decision *against* Taylor, upon the merits, was to decide that the court could have relieved him by mandamus, if his case had been such as to warrant his claiming the office. Most assuredly the applicant in this case was warranted by that decision in concluding that the court here had decided that they would issue a mandamus to the Governor, and in making this application.

LACY, *Judge*, delivered the opinion of the court:

This a motion for a rule against the Governor of the State, to show cause, if any he has, why a peremptory mandamus should not issue, commanding him to make out and deliver to *Richard C. Hawkins*, his commission to the office of Commissioner of Public Buildings.

The application was made during the present session of the Supreme Court, and is founded upon a petition regularly sworn to, and other exhibits filed in the cause.

The applicant claims to be duly elected by a majority of all the votes of both houses of the General Assembly. The petition states that upon the 17th day of November, 1838, the applicant transmitted to the Governor of the State the certificate of the Speaker of the House of Representatives, and of the President of the Senate, officially notifying him of his election to fill the office of commissioner of of public buildings, and at the same time he addressed a letter to his Excellency, requesting him to grant the commission, which he was entitled to by law.

The Governor replied to the communication, refusing to issue the commission upon the ground, that at the time the election was held, there was no law in force authorizing the legislature to hold an election for the commissioner of public buildings. Copies of the corres-

pondence are attached to the petition, and from the letters of the applicant and the executive, it appears that the requisitions of the Statute, prescribing the manner of certifying the election to the Governor, were fully complied with on the part of the petitioner, and that the Governor withheld the commission under the belief that the election was illegal and invalid.

It is contended in behalf of the motion, that the law creating the office of commissioner, was in force from and after the time of its passage; and as the applicant has shown by virtue of his certificate of election that he has a vested right to the commission, the executive has no power or authority to withhold it.

The applicant's right is founded or originates under an act of the legislature, approved March 3, 1838, which declares, "that there shall be elected by the General Assembly a commissioner of public buildings."

That the commissioner so appointed shall be commissioned by the Governor, and shall hold his office for two years, and receive one thousand dollars per annum, in full compensation for all his services.—See *Pamphlet Act of the Legislature*, 1837, *p.* 84.

The first question, then, submitted for our consideration and decision, is, has the Supreme Court jurisdiction of the case? or is the Governor of the State such an officer, to whom the writ may be properly directed, upon legal or constitutional principles?

Should the question be answered in the affirmative, then it will become necessary for the court to determine the validity of the election of the commissioner. But should it be answered in the negative, it will be wholly useless to prosecute the enquiry farther; for if the court does not possess jurisdiction to try the cause, and award the writ, they can pronounce no valid judgment concerning the election.

The peculiar, constitutional delicacy and importance of this question, require of this court a full and complete exposition of the principles upon which this opinion is founded.

These principles enter into the composition of civil government itself, and vitally concern the balance of power established by the constitution.

It is contended that the case of *Taylor* vs. *The Governor*, decided by this court, and reported *ante p.* 21, fully settles the question of jurisdiction of the Supreme Court to award a mandamus against the chief executive of the State, compelling him to issue a commission

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whenever it appears that he has improperly withheld it. It certainly never was the intention or the design of this court to decide in that case, or in any other, that they had power to issue a mandamus against the Governor of the State, to compel him to perform his legal or constitutional duties; neither will the facts or circumstances of that case, or the reasoning upon which the court proceeded, justify any such conclusion. It is freely admitted that it would have been more appropriate and judicial for this court to have met, and to have decided the question of jurisdiction in the first instance. But they felt then as they do now the difficulty and delicacy of such an enquiry; and therefore they agreed to waive the question of jurisdiction, leaving it to be determined upon some future occasion, should a case ever arise indispensably calling for its decision. In the case of *Taylor* vs. *The Governor*, the applicant clearly proved by his own showing, that he was expressly disqualified and ineligible by the constitution from holding the office of sheriff; and therefore he had no shadow or pretext of right to the commission which he demanded. This being the case, the court could see no indispensable duty or necessity devolving upon them to look into, and decide the question of jurisdiction; for whether they possessed jurisdiction or not, it was perfectly manifest that the applicant was entitled to no redress, because, from his own showing, it was positively certain he had suffered no injury. The power of the Supreme Court to issue a mandamus, as stated in the case referred to, is made to depend and turn exclusively upon the express language of the constitution; and certainly that instrument no where countenances the doctrine, that the writ can be legally or constitutionally directed to the Executive. The case of *Taylor* vs. *The Governor* is, then, no authority upon the subject; for it only settles the principle that under our form of government a mandamus was a constitutional writ, secured to the citizen, which the Supreme Court was bound to issue upon a case properly made out, when the party applying for it, had shown that he had a specific, legal right, and no other adequate, specific, legal remedy. The court fully recognize the truth and importance of these principles; but they certainly do not show that the writ can issue against the executive in any possible or conceivable case.

It has been urged with much earnestness that the case of *Marbury* vs. *Madison*, 1 *Cranch*, 166, clearly establishes the jurisdiction contended for. A brief recapitulation of the facts and principles of that case, will test the truth of this position. William Marbury, with

others, was appointed a justice of the peace for the District of Columbia by President Adams, near the close of his administration, by and with the advice and consent of the Senate of the United States.

The commission was regularly signed by the President, and delivered to the Secretary of State, to be recorded. The Secretary refused to deliver the commission, and Marbury applied to the Supreme Court of the United States for a mandamus to compel him to deliver it, or to give him a copy from the record of his office.

The case produced no ordinary degree of interest or excitement, for it was regarded as involving questions of a high political character, and which no tribunal could decide without exposing itself to unmerited criticism and censure. No cause was probably ever more deliberately considered and examined, and none, in the opinion of this court, rests upon higher or more unshaken principles of constitutional law, or of legal duty. Many points were raised and discussed at the bar, and were decided by the court, which were not necessarily put in issue by the proceedings.

The opinion, then, in that justly celebrated case, may be deemed in some respects as extra judicial. But this court does not on that account regard it as less authoritative or binding. The case finally went off for want of jurisdiction in the Supreme Court to issue the writ. The act of Congress giving jurisdiction to that tribunal to award a mandamus, was declared unconstitutional; because it was inconsistent with that provision of the instrument, which defines and limits the original jurisdiction of the Supreme Court to a particular class of cases.

It will be seen from the facts above stated, that the application in the case of *Marbury* vs. *Madison* was for a mandamus to issue to the Secretary of State, and not to the President of the United States. So far as this case can be considered as authority at all, it goes to disprove the position that the writ can legally be directed to the executive of the State. An attentive consideration of the principles laid down by the Chief Justice in delivering the opinion, raises a strong inference, which almost amounts to positive proof, that the chief executive of the State, under the form of our government, is such an officer as can in no manner be held responsible to the judiciary for the exercise of his legal or constitutional discretion. It will be borne in mind that the office of President of the United States, and the office of Governor of our State, are in many respects like each other, with this

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essential difference, that the former is entrusted with the executive powers that relate exclusively to the General Government, and the latter is entrusted with the exclusive powers that belong to the State Government. The powers conferred, and the duties enjoined upon both of these officers by the respective constitutions of the two governments, are in most particulars identically the same, so far at least as regards their legal or constitutional discretion.

It is stated in the case of *Marbury* vs. *Madison*, "that the President is invested with certain important, political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." "To aid him in the performance of these duties, he is authorized to appoint certain officers who act by his authority, and in conformity with his orders." "In such cases their acts are his acts, and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist no power that can control that discretion. The subjects are political; they respect the nation, not individual rights; and being entrusted to the executive, the decision of the executive is conclusive."

If this is true in regard to the President, does not the same reasoning apply with equal force to the executive of the State? If there exists no power to control the will of the President in the exercise of his discretion, is not the executive of the State equally exempt from all control, except in the manner pointed out in the constitution. If all the powers and duties of the President are political, and concern the nation, and not individual rights, and if his decision is final and conclusive in regard to all constitutional or legal questions submitted to his judgment, so far as regards the performance of his own duty, are not the powers and duties of the executive of the State equally political? and do they not concern the State in her political capacity, and not individual rights? And is not his decision upon all legal, constitutional questions equally final and conclusive, so far as regards the performance of his own duties? If one of these positions be true, it necessarily follows that the other cannot be erroneous. Then the Governor of the State is not amenable to the judiciary for the manner in which he performs, or for his failure to perform, his legal or constitutional duties. His acts being political must of course be politically examined in the manner pointed out by the constitution. That instrument assigns to his office no ministerial acts to be performed, nor can the law enjoin upon him

any such duty. It is true, as contended, that when a specific duty is assigned by law, and individual rights depend upon the performance of that duty, "that the individual who considers himself injured has a right to resort to the laws for redress."

The doctrine here stated applies to such officers as have no legal or constitutional discretion left them; and consequently so far they are considered as the mere organs of the law, and are amenable to it for their conduct. This being the case, they are never permitted, "to sport away the vested rights of individuals." All the officers of the government, except the President of the United States, and the Executives of the States, are liable to have their acts examined in a court of justice.

The President and the Executives, by the theory and practice of our peculiar systems of government, are exempted upon the ground of political necessity, and of public policy. In the exercise of their legal or constitutional discretion, they are alone accountable to their country in their political character, and to their own conscience, according to the modes and manner of their respective constitutions.

Whenever the head or officers of a department are the political or confidential agents of the executive, appointed merely to execute his will, it is clear that in such cases their acts are his acts; and whatever opinion may be entertained of the manner in which their discretion may be used, still there is no power in the courts to control that discretion; for if there was, then would the executive will be put under the control and government of the judicial department, which is clearly and expressly forbidden by the constitution.

The act of Congress in relation to issuing patents for land, makes it the duty of the President to grant a patent to the purchaser whenever he produces the necessary certificate required by law. Should the President fail to execute this duty, and should individual rights be prejudiced by his non-performance of this legal duty, could the Supreme Court of the United States award a mandamus commanding him to issue the patent? Certainly not. Should Congress pass any act imposing a certain, specific duty upon that officer, and should he refuse or fail to execute it, could he be compelled to perform it by any mandate of the court? Most assuredly he could not. By way of testing this principle, suppose he was required to commission an officer chosen or appointed by an act of Congress, would a mandamus lie, compelling him to grant the commission? Certainly not.

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To give to the judiciary, power to award a mandamus against the President, compelling him to perform his legal or constitutional duties, would in effect destroy the political balance of the constitution, and thereby break down and destroy one of the three great departments of government.

A doctrine so extravagant and unconstitutional, it is clearly necessary for this court to disclaim. Still if the party was legally appointed to fill the office, he would surely have a constitutional right to the commission; for that is but the evidence of the office, and there is certainly a constitutional duty imposed upon the President to grant him the commision; for the instrument declares, "he shall commission all the officers of the United States." See *Constitution U. S. Sec.* 3, *Art.* 5. A declaration more peremptory and express than the clause in our constitution, which enacts, "that all the commissions shall be in the name and by the authority of the State of Arkansas, be sealed with the seal of the State, signed by the Governor, and tested by the Secretary of State." See *Constitution, Sec.* 13, *Art.* 5.

Had the Supreme Court of the United States possessed the jurisdiction in the case of *Marbury* vs. *Madison*, it is perfectly clear from the principles laid down in that decision, that they would have compelled the Secretary of State, by a mandamus, or some other legal process, to have delivered the commission, or to have furnished a copy of it. The acts of the Secretary were enjoined by law, and regarded by the court as strictly ministerial; and hence the withholding of the commission in such a case, was deemed a violation of the vested rights of the applicants. And in the case now under consideration, according the doctrine established by the Supreme Court of the United States, (which this court fully recognizes and believes,) had the Governor signed the commission of the present applicant, and affixed to it the seal of the State, and have placed it in the office of the Secretary of State to be attested and recorded by that officer; and should the Secretary of State, under such circumstances, have failed to do his duty, this court would have awarded a mandamus against him, and compelled him to attest and record the commission and deliver it, or to furnish a copy from the record of his office. Whenever the Governor has signed a commission, and affixed to it the seal of State, his legal or constitutional discretion may then be considered as having terminated, and he has then lost all power or control over the commission, and he never can lawfully reclaim or repossess it. The reason that

the court would compel the Secretary to attest and deliver the commission, is, that the law gives him no discretion upon the subject, and therefore his acts are strictly ministerial, and must be performed if they violate the vested rights of any individual. This principle does not reach or affect the executive, for all his official rights or duties are political; and consequently he is entrusted by the constitution with discretionary power.

The possession of the original commission is not indispensably necessary to authorize a person appointed to any office, to exercise the duties of that office; for if that was the case, the loss of the commission would lose the office, and "not only negligence, but accident, fraud, fire or theft, might deprive an individual of his office." In such cases a copy of the record from the office where the commission was directed to be recorded or kept, would be to all intents and purposes equal to the original. The case then of *Marbury* vs. *Madison* has not directly or indirectly decided any principle in favor of the present applicant's motion for a mandamus. The question now under consideration has never, that we are aware of, been decided by any tribunal. So far as we are informed, the case now comes up for the first time for investigation and decision. The very fact that it never has before been made in any of the courts of the United States, causes a very high, if not a conclusive presumption, that there has been no abuse of executive discretion in withholding commissions, or that it never was imagined by any one that the writ could be directed to the Chief Magistrate of the State.

The solution of this question depends mainly upon the construction to be given to the constitutional powers to be distributed among the three separate and distinct departments of the government. The constitution is the supreme, paramount law of the land, and its will is imperative and must be obeyed. The constitution is nothing more or less than the original and supreme will of the people, acting in convention and organizing the government, and assigning to the different departments their respective powers and duties. Their powers and duties are defined and limited; and, "that their limits may not be mistaken or forgotten, the constitution is written;" and all public officers are required to take an oath of office to support it.

The invention of a free, limited, and written constitution, may be justly said to have been a prodigy in the science of government, revealed and established by the American Revolution. Ours is a com-

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pound system of republics. "The power surrendered by the people is first divided between the General and State Governments, and then the portion allotted to each, is subdivided among distinct and separate departments." This constitutes a double security for the rights of the people, and for the maintenance and protection of the respective governments. The General and State Governments mutually act upon and control each other, and at the same time each is invested with sufficient power to control the governed, and to control itself.

This wise and beautiful system may safely be pronounced the highest invention of the human judgment; for it enlists interest on the side of patriotism, and appoints each of the governments with their respective and separate departments, as so many sentinels to guard the rights of the constitution, and to watch over the liberty of people. The basis of these invaluable systems rests upon the division, separation, and partition of the public will among these departments of the government; and upon these justly constituted and well balanced powers depend all our hopes for the continuance of regulated liberty.

The concentration of all power, legislative, executive, and judicial, in the same hands, constitutes the very definition of tyranny, that is given by all the early friends and founders of our free institutions.

There can be no liberty, says Montesquieu, where the legislative and executive powers are united in the same person or body of magistracy; or if the power of judging be not separated from the legislative and executive powers. This is a political axiom established by the deliberate judgment of centuries, and confirmed by the universal experience of mankind. The American constitutions have therefore made those departments as independent, and as separate from each other, as the nature of the case would admit of, or as their necessary connexion or bond of union would allow. Each department is made sovereign and supreme within its own sphere, and is left in the full and free exercise of all the powers and rights respectively belonging to it.—Each is a co-ordinate and equal branch of the government, and they all represent the sovereign will of the people, as embodied in the constitution.

The constitution makes and ordains them all, and appoints each department to guard the sacred and invaluable rights established by that instrument. The constitution is then above all the departments of the government; for it creates and preserves them. The will of the people must be greater than that of their agents, or there can be

no constitutional liberty or independence. All the departments of the government unquestionably have the right of judging of the constitution, and interpreting it for themselves. But they judge under the responsibilities imposed in that instrument, and are answerable in the manner pointed out by it. The duties of each department are such as belong peculiarly to it, and the boundaries between their respective powers or jurisdictions are explicitly marked out and defined. For any one department to assume powers or exercise a jurisdiction properly belonging to any other department, is a gross and palpable violation of its own constitutional duty.

The legislature, then, can exercise no power which properly belongs to the judiciary, or the judiciary, any power that rightly belongs to the executive. The duty of the legislature is, to prescribe the rule of action for the State; that of the judiciary, to interpret that rule, or to expound the law; and that of the executive, to see that the laws are faithfully executed.

But each has the right to judge of the constitution for itself; for without the exercise of such a right, there would not be three equal and co-ordinate departments of the government; neither would the constitution be placed under or entrusted to their respective guardianship and care. It is however the peculiar province and duty of this court to interpret and decide upon the laws and the constitution in the last resort. If two laws are opposed to each other, the court must determine which shall govern; so if the constitution and a statute stand in irreconcilable variance. Those whose duty it is to interpret the rule of action, must be of necessity left free to declare what that rule is, or we deprive the judiciary of the power of judgment and will, which are all the sovereign attributes they possess.

The constitution regards the judiciary as the final arbiter and interpreter of its will, and its language is in many instances directly addressed to the courts. It would be wholly impossible, without the agency or action of the courts, to preserve inviolate the rights of personal liberty, or of private property. How could the equality of taxation, the freedom of the press, liberty of conscience, the right of trial by jury, the writ of habeas corpus, or the sacred inviolability of the obligation of contracts, have been vindicated or maintained, unless the courts, whenever they were assailed by the legislature or executive encroachments, had interposed their authority and arrested the usurpation? It is their exposition and illustration of these principles and

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rights, that have taught the citizen in times of danger and commotion to look to that tribunal for safety and protection.

It is the duty of the judiciary, however, to judge, and in their judgments courts should be careful to not overstep the boundaries of their powers. To allow the judiciary to exercise powers not conferred upon it by the constitution, would have a tendency to draw to it all the powers of the government, and thereby to overthrow the balance of the constitution. Such a jurisdiction has, however, never been attempted, and probably never will be under our forms of government.

Liberty has nothing to fear from the judiciary, but every thing to hope. Neither the purse nor the sword is entrusted to it; nor does it possess any power or patronage to render it popular or dangerous.—Its only attributes are will and judgment, and these it cannot carry into execution without executive aid, or, in other words, without trusting to the moral and intellectual sense of the community to enforce its orders, judgments, and decrees. See *The Federalist*, 270, 275, 421, 422, 423, 424, *Washington's Correspondence.*

The legislative, executive, and judicial departments, are all responsible for an abuse or usurpation of power in the mode pointed out by the constitution. The constitution presupposes that they will all perform the duties enjoined upon them, and that they will not transcend the authority with which they are clothed. They are all jointly made to represent the sovereign will, and they are made responsible to that will, whenever they fail to perform that duty. Should the legislature pass an unconstitutional act, in moments of forgetfulness and ambition, it is not only the right, but the duty of the executive to arrest it, and return the bill to the House from which it emanated. Time for reflection is thus given to the popular branch of the Government to pause and to reconsider the measure. But should they, notwithstanding the objections of the executive, still be determined to pass the act, it cannot however generally be put into operation, except by means of the judiciary; and hence, if the act violates any constitutional guarantee or vested right, the court is bound to declare it null and void, and of course the law cannot be executed. The evil or abuse of any power is capable of being remedied by means of the elective franchise. Responsibility and representation are so intimately connected and blended with each other, that they cannot be separated and disconnected without political injury and detriment. Should the judiciary corruptly assume powers not belonging to that department, or

should they, from interested motives, and for wicked and nefarious purposes, refuse to exercise powers expressly enjoined by the constitution, then the judges are liable to an impeachment for malpractice or misdemeanor in office, and for reasonable cause, which does not furnish sufficient ground for impeachment, the Governor may, upon the joint address of two thirds of both Houses of the legislature, remove them from office. The judges are then held responsible to the people through the legislature in two ways: First, by impeachment for malpractice or misdemeanor in office; and, secondly, by address for any gross, flagrant, and palpable impropriety of official conduct, not amounting to corruption. In case the executive should prove unfaithful in the discharge of his legal or constitutional duties, he likewise may be held responsible to the people for malpractice or misdemeanor in office. Besides, he is amenable to the same tribunal, through the agency of the elective franchise. Thus it will be seen that the constitution places him in a double responsibility: First, the responsibility of the right of suffrage; and lastly, that of impeachment. He is only answerable in one or both of these ways, for his official conduct, while he continues in the exercise of his office. These are the only restrictions placed upon his discretion, and to them the people confided their rights and interests. To make him accountable in any other way, would be to create a responsibility unknown to the constitution, and in violation of its authority. It would be doing more, for it would destroy his legal and constitutional discretion, by an accumulation of undue power in the same hands, and thus it would annihilate a coordinate and independent part of the government.

It is no answer to this argument to say, that he may exercise his legal and constitutional duties in such a manner that individual injustice may be done without remedy or redress. So may the other departments. The convention, in forming and organizing the government, did not think so, or they would have placed some additional security around individual rights. They proceeded upon the principle that all the departments would do their duty. If in this they should be mistaken, they have provided an efficient remedy for every abuse of a political nature, and that remedy is in the hands of the people, and, we are bound to presume, will be properly used: otherwise, we are compelled to abandon all rational hope of the stability and continuance of our free institutions.

The legislature have made the General Assembly the judges of the

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qualifications, returns, and elections of their own members. They are required to keep a record of their acts, and to publish a journal of their proceedings, except such parts as may, in their opinion, require secrecy. No person shall be a member of the House of Representatives who shall not have attained the age of twenty-five years, and no person shall be a Senator who shall not have attained the age of thirty years. No person who is a public defaulter shall be eligible to a seat in either House of the General Assembly, nor shall hold any other office of profit or trust; nor shall any person convicted of any infamous crime be eligible to a seat in either House of the General Assembly.

Suppose the people should return a member to the Senate or the House of Representatives, who had not attained the requisite age, or who was a public defaulter, or who had been convicted of some infamous crime, to whom would the right belong to judge of his disqualification? To the judiciary, or to the legislature? Most assuredly to the latter; for to them the constitution has confided the right of judging, which implies the free exercise of discretion in such cases.

Suppose the legislature should refuse to record their proceedings, or to publish a journal of them, could the court issue a mandamus compelling them to perform their legal, constitutional duties? Most assurredly they could not; for in such cases, the whole matter is left to the discretion of the legislature; and that discretion is not subject to the government or control of the judiciary. A moment's examination of the structure and character of the executive department, will be sufficient to satisfy any one that all his legal or constitutional duties are political, and that he is only accountable for them to his country, and to his own conscience, in a political manner. The following enumeration includes most of his constitutional duties: He is required to issue writs of election to fill all vacancies that occur in either House of the General Assembly; he is made the commander in chief of the army and militia of the State, except when they are called into the service of the United States; he may, by proclamation on extraordinary occasions, convene the General Assembly, and in case of disagreement between the Houses, he may adjourn them until such time as he thinks proper, provided it be not beyond the day of the next meeting of the General Assembly; he is required to keep the seal of the State in his office, and to use it officially, and to sign all commissions, and have them attested by the Secretary of State; it is his duty

to give to the General Assembly information of the state of public affairs, and recommend to their consideration such measures as he deems expedient; and see that the laws are faithfully executed.

It will certainly be conceded that all the duties here enjoined upon the executive are strictly and exclusively political, except the granting of commissions; and if that is not a political duty, why is it inserted among other political obligations? or what reason is there for excepting it out of the general principle.

It is possible that individual injustice may be, and generally is produced by the non-performance of any one, or all of these duties; but it may be fairly presumed that it will not more frequently occur, in refusing to grant commissions, than in the other enumerated cases. Besides, if the court can issue a mandamus to compel him to grant a commission which he improperly, or from a mistaken sense of duty, withholds, why may they not award a process against him to issue writs of election, or to convene the legislature or adjourn it? If the writ can be legally directed to him in the first case, it certainly may in the latter; for they both rest upon the same principle, and may be attended with the same injury. It certainly cannot be pretended that the judiciary can compel him to assume the command of the army or militia, when they are called into the service of the state, or that it can command him to give information to the General Assembly, or that it can command him to see that the laws are faithfully executed. In all of these cases, he certainly possesses a political discretion, for the use of which he is alone answerable to his country. Why then is his discretion taken away or destroyed when his duty concerns the issuing of a commission? It certainly is not. His duty is as clearly political in that case, as in any of the other enumerations; and if the court have jurisdiction in that instance to prescribe the rule of his conduct, by a parity of reasoning they certainly possess it in regard to all the other cases. This would make the judges the interpreters, not only of the will of the executive, but of his conscience and reason; and his oath of office, upon such a supposition, would then be both a mockery and a delusion. See *Article V, Executive Department.*

Again the executive is bound to see that the laws are faithfully executed; and he has taken an oath of office to support the constitution. How can he perform this duty, if he has no discretion left him in regard to granting commissions? For should the legislature appoint a person constitutionally ineligible to hold any office of profit or trust,

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would the executive be bound to commission him? and that too when his ineligibility was clearly and positively proven? In such case, the exercise of his discretion must be admitted, or you make him, not the guardian, but the violator of the constitution. What, then, becomes of his oath of office?

If he has a legal, constitutional discretion in such a case, why is he divested of his judgment and reason, in regard to the legality of the election depending upon other principles, but which are as clear to his mind, and as binding upon his conscience? The analysis of his duties then, clearly proves that he is in no way amenable to the judiciary for the manner in which he shall exercise or discharge these duties. His responsibility rests with the people, and with the legislature. If he does an unconstitutional act, the judicary can annul it, and thereby assert and maintain the vested rights of the citizen. The writ asked for, however, does not proceed upon the ground that the Governor has done any illegal or unconstitutional act, but that he has refused to perform a legal or constitutional duty. In the first case, the court certainly has jurisdiction; and in the last, they unquestionably have not. The court can no more interfere with executive discretion, than the legislature or executive can with judicial discretion. The constitution marks the boundaries between the respective powers of the several departments, and to obliterate its limits would produce such a conflict of jurisdiction as would inevitably destroy our whole political fabric, and with it the principles of civil liberty itself. It would be an express violation of the constitution, which declares upon its face, "that there shall be three separate and independent departments of government, and that no person or persons, being of one of these departments, shall exercise any power belonging to either of the others." See *Constitution, Article II, Section* 2. This being the case, it is clearly demonstrable that the court has no jurisdiction of the cause now under consideration, and they have no power to award a mandamus to the Governor to compel him to grant the commission. The motion must, therefore, be dismissed for want of jurisdiction.

As the court is shown to have no jurisdiction in the case, it would be irregular and improper to proceed to deliver any judgment in regard to the legality of the election to the office of commissioner of public buildings.

ERRATA.

Page 5th line 4th of 3rd Rule for *appellant* read *defendants*.
" 20 " 12 from bottom, for *defendant* read *different*
" 35 " 7 from bottom, for *Little's* read *Littell's*.
" 48 " 12 from top, after *Ante P.* read 29.
" 62 " 2 from top, after *Myers vs. Edge*, read *7th Term R.* 250.
" " " 3 from top, after *Claggett and another*, read *ib.* 355.
" " " 6 from top, for *Shafton*, read *Shafloe*.
" " " 10 from top, for *Archibold*, read *Archbowle*.
" 87 " 1 at bottom, for *Halbert*, read *Hilbert*.
" 88 " 1 at top, after *Jun'r*, read 111.
" 88 " 1 at top for *Irons vs. Smallprice*, read *Irons vs. Smallpiece*, 2 *B. & A.* 551.
" 90 " 6 from top, *warrant*, read *want*.
" 94 " 5 from bottom, for *Mars*, read *Mass*.
" 96 " 6 from top, for *Braxdale*, read *Braxdale*.
" 97 " 1 at top, for *Rudwick*, read *Kendrick*.
Pages 101, 102, 5, 7, for *A. F. Greer*, read *A. J. Greer*.
Page 103 " 5 from top, for *have*, read *produce*.
" 104 " 1 at top, for *1st Str*, read *2nd Str*.
" 110 " 11 from top, for *for*, read *with*.
" " " 10 from bottom for *admitted*, read *objected to*.
" 111 " 17 from top, for *apposen*, read *apposui*.
" 114 " 4 from top, for *note*, read *rule*.
" " " 19 from top, for *specially*, read *specialty*.
" " " 12 from bottom, for *administrator*, read *administratrix*.
" 116 " 5 from top, after *it*, read *its*.
" " " 19 from top, for *him*, read *it*.
" 121 " for *Ringo, Chief Justice*, read *Lacy, Judge*.
" 131 " 8 from bottom, for *Bank*, read *Burk*.
" 148 " 11 from bottom, after *et al*, insert 14 *Mass.* 412.
" 150 " 5 from bottom, for *Ester*, read *Testar*.
" " " 5 from bottom, for 1 *Mad.* read 1 *Moore*.
" " " 4 from bottom, for 47, read 447.
" " " 4 from bottom, for *Sower vs. Winters*, 7 *Cowp.* 263, read *Lower vs. Winters*, 7 *Cowen*, 263.
" 159 " 16 from bottom, for *Beckley vs. Cotton*, read *Bulkley vs. Cotton*.
" " " 15 from bottom, for 503 read 515.
" 190 " 2 from top, for 556, read 566.
" 195 " 15 from bottom, for *Scotland* read *Shottenkirk*.
" " " 15 from bottom, for 3 *John. Rep.* 283, read 3 *J. C. R.* 275.
" " " 14 from bottom, for *Dekemer vs. Chatillon*, 4 *Johnson*, 92, read *De Reimer vs. De Cantillon*, 4 *J. C. R.* 85.
" " " " from bottom, for *Baker vs. Elking*, 1 *Johns. Rep.* 444, read *Barker vs. Elkins*, 1 *J. C. R.* 465.
" " " 13 from bottom, for 3 *Johns. R.* 322, read 1 *J. C. R.* 320.
" 197 " 12 from top, for *Perry* read *Penny*.
" " " 13 from top, for 536 read 566.
" " " " from top, for 4 *Johns. Chan. R.* 67 read 6 *J. C. R.* 87.
" " " 14 from top, for 6 *Johns. Rep.* read 6 *J. C. R.*

Page 213 line 14 from bottom, instead of cases cited, read *Harrison vs. Jackson*, 7 *T. R.* 203; *Thomason vs. Frere*, 10 *East*. 418.
" 221 " 6 from bottom, for 10 *Johnson*, read 11 *J. R.*
" 221 " 9 from top, for three first cases cited, read *Coleman vs. Harper*, 1 *Marsh.* 602; *Stapp vs. Anderson*, *ib.* 535; *Bullet vs. Ralston*, *ib.* 331.
" 227 " 16 from bottom, for *Peale* read *Piatt.*
" 234 " 4 from bottom, 1 *Camb.* read 1 *Camp.*
" 240 " 5 from top, for *Parkers*, read *Parkes.*
" " " 9 from top, for 97, read 136.
" " " 15 from top, after *and*, *dele if.*
" 241 " 2 from top, for *Hempstall* read *Henshall.*
" 243 " 7 from top, instead of cases cited, read 1 *Stark.* 337; *Swire vs. Bell*, 5 *T. R.* 371; *Goss vs. Tracy*, 1 *P. Wms.* 239; *Cunliffe vs. Sefton*, 2 *East*, 183; *Str.* 34.
" 255 " 18 from bottom, for 246 read 262.
" 256 " 11 from top, for *Durn. and East*, 277, read *Petrie vs. Hannay*, 3 *T. R.* 659.
" " " 18 from top, for 474, read 476.
" 282 " 11 from top, for *Directors N. Y. In. Co.* read *Tibbets et al.*
" 286 " 15 from top, for *Pet. Con. Rep.* read *Pet. Rep.*
" 292 " 11 from top, after except, for *or* read *as.*
" 294 " 2 from top, for 735, read 731.
" 296 " 26 from top, for *tim* read *vim.*
" " " " from top, for *convineat*, read *contineat.*
" 298 " 12 from bottom, for *Eye* read *Eyre.*
" 300 " 13 from top, for 336 read 358.
" 310 " 5 from top, for 1*st T. R.* read 2*nd T. R.*
" 303 " 16 from top, for 771, read 75.
" 316 " 13 from top, for 311, read 111.
" " " 14 from top, for *Lacy*, read *Long.*
" " " 18 from top, for 62 *n. c.* read 45 *n. c.*
" " " 19 from top, for 6 *Cond. R.* read 5 *Cond. R.*
" " " 22 from top, for 103, read 108.
" " " 8 from bottom, for 142 read 143.
" " " 6 from bottom, for 563, read 568.
" 321 " 8 from top, for *vender* read *vendee.*
" 322 " 21 from top, for 348 read 358.
" " " 6 from bottom, for *Johnson vs. Smith*, read *Noble vs. King and Smith.*
" 323 " 4 from bottom, for *Caines*, read 3 *Caines.*
" 324 " 1 from top, for 6 *Cond. Rep.* read 5 *Cond. Rep.*
" 328 " 13 from bottom, for 35, read 36.
" 330 " 2 from bottom, for *Call*, read 1 *Call.*
" 331 " 9 from bottom, for *Willis*, read *Wylie.*
" 339 " 13 from top, for *remedy*, read *rendering.*
" 341 " 13 from bottom, for *judges*, read *affidavit.*
" 346 " 11 from bottom, for *Woolford*, read *Worford.*
" 364 " 13 from top, for *Witchett*, read *Mitchell.*
" 364 " 11 from bottom, for *Fremaine*, read *Tremaine.*
" " " 10 from bottom, for *Thorn*, read *Thom.*
" 368 " 3 from top, for *Kingston*, read *Kingdon.*
" 370 " 12 from bottom, for *restore*, read *resolve.*
" " " 5 from bottom, for *debt*, read *deft.*
" " " 3 from bottom, for *Wytebe*, read *Wylde.*
" 371 " 1 at top, for *Tuysden*, read *Twysden.*
" " " 5 from top, *Levine*, read *Levinz.*
" " " 23 from top, for *indebtatris*, read *indebitatus.*
" " " 26 from bottom, for *Ring vs. Thorn*, read *King vs. Thom* throughout the note.

Page " line 26 from bottom, for *Fremaine*, read *Tremaine* throughout.
" " " 25 from bottom, for *in* read *on*.
" " " 16 from bottom, for *Butler*, read *Buller* throughout.
" 372 " 12 from bottom, for *Rynaston*, read *Kynaston* throughout.
" " " 9 from bottom, for 11 *Mass.* read 14 *Mass.*
" 373 " 5 from top, for *Renyon*, read *Kenyon*.
" " " 26 from top, for *or*, read *on*.
" " " 21 from bottom, for 3 *Wendell*, read 8 *Wendell*.
" " " 18 from bottom, for *Albett*, read *Abbott*.
" " " 14 from bottom, for *Bolroyd*, read *Holroyd*.
" " " 4 from bottom, for *Kiotley*, read *Kirtley*.
" 374 " 6 from top, for *Hort*, read *Holt*.
" " " 11 from top, for *Reble*, read *Keble*.
" " " 11 from top, for 225, read 825.
" " " 22 from top, for *form* read *favor*.
" " " 6 from bottom, after *believe*, *dele it is*.
" 378 " 4 from bottom, for *on interlina*, read *ou interliner*.
" " " 20 from top, for *Bromby*, read *Bromley*.
" 381 " 3 from top, for 337, read 387.
" 382 " 16 from top, for 4 *T. R.* read 4 *East*.
" " " 23 from top, for *Tebos*, read *Tebbs*.
" 385 " 5 from top, for first case cited, read *Delano vs. Jopling*, 1 *Lit.* 118.
" 387 " 9 from top, for *Brice*, read *Brier*.
" " " 19 from top, for *Stites*, read *Stiles*.
" " " 20 from top, for *Poliard*, read *Pollard*.
" 392 " 10 from top, for *part*, read *parol*.
" 397 " 16 from top, for *Bibb*, 590, read 1 *Bibb*, 590.
" " " 9 from bottom, for *Vern.* read 2 *Vern.*
" 400 " 6 from bottom, after *Thynn*, for *semicolon*, insert *a comma*.
" " " 3 from bottom, for *Hosir*, read *Hosier*.
" 401 " 8 from top, dele 5.
" " " 10 from top, for 454, read 254.
" " " 10 from top, for *Joyves*, read *Joynes*.
" " " 3 from top, for 3 *Ark.* read 3 *Aik.*
" " " 15 from bottom, for *Stassely*, read *Stapely*.
" 402 " 7 from top, for *Bick*, read *Birch*.
" " " 12 from bottom, for 3 *Vol. Williams*, read, 3 *P. Wms.*
" 404 " 9 from top, for *Rector*, read *Proctor*.
" " " 9 from top, for *Kenrys*, read *Kemys*.
" " " 6 from bottom, for 386, read 586.
" " " 6 from bottom, for 158 read 159.
" " " 5 from bottom, for 85 read 82.
" " " 4 from bottom, for 3 *Ves.* read 3 *Ves. Jr.*
" " " 2 from bottom, for *Buchmaster vs. Harriss*, read *Buckmaster vs. Harrop*.
" " " 1 from bottom, for *Patterson*, read *Patten*.
" 405 " 1 from top, for *Venderheem*, read *Van Berchem*.
" " " 2 from top, for 2 *Ves.* read 2 *Ves. Sr.*
" " " 4 from top, for *Hamett*, read *Harnett*.
" " " 4 from top, for 2 *Ves. Jr.* read 5 *Ves. Jr.*
" " " 6 from top, for 3 *Ves.* read 3 *Ves. Jr.*
" " " 6 from top, for *Roehick*, read *Roebuck*.
" " " 8 from top, for *Prodie*, read *Brodie*.
" " " 8 from top, for 1 *Ves.* read 1 *Ves. Jr.*
" " " 10 from top, for *Viren*, read *Niven*.
" " " 14 from top, for 1 *Pet.* read 1 *Pet. C. C. R.*
" " " 15 from top, for 3 *Cowen*, 638, read 5 *Wend.* 638.
" 414 " 6 from bottom, for 381, read 383.
" " " 3 from bottom, for 479, read 493.

Page 415 line 10 from top, for 401, read 403.
" " " 10 from top, for *Normander*. read *Normanby*.
" 416 " 3 from top, for 1 *Sch. & Lef.* read 2 *Sch. & Lef.*
" " " 4 from top, for *Lenox vs. Napple*, read *Lennon vs. Napper*.
" 417 " 6 from bottom, for *Sahdling*, read *Stradling*.
" " " 6 from bottom, for *Harpeth*, read *Morphett*.
" " " 5 from bottom, for *Swanst*, read 1 *Swans*.
" 422 " 2 from top, for *Buck vs. Buck*, read *Butcher vs. Butcher*, 9 *Ves*. 382.
" " " 3 from top, for *Ch*. 353 *p*. 112, read *p*. 79.
" 425 " 16 from top, for *Orr*, read *Auld*.
" " " 18 from top, for *Serg. and Rawle*, read 1 *Serg. and Rawle*.
" 438 " 14 from bottom, for *replevy*, read *replevin*.
" 440 " 20 from top, for *Bridgway*, read, *Ridgeway*.
" " " 20 from top, for *Slid*, read *ib*.
" " " 21 from top, for *Slid*, read *ib*.
" 444 " 9 from top, for *Brunson*, read *Bromsall*.
" " " 14 from top, for *Jackson vs. Preston*, read *Johnston vs. Pasteur*.
" 450 " 17 from top, for, 632, read 682.
" " " 24 from top, after *Cas*. insert 7.
" 451 " 6 from bottom, for 63, read 65.
" " " 3 from bottom, for 390, read 399.
" 460 " 9 from top, for *Brice*, read *Brier*.
" 466 " 19 from top, for 431, read 427.
" " " 12 from bottom, for 213, read 218.
" 469 " 8 from top, for 2 *Bibb*, 257, read 1 *Bibb* 256.
" 471 " 15 from bottom, for *Logan vs. Elder*, read *Cogan vs. Ebden*.
" 488 " 13 from top, for 3 *M. L*. 5, read 3 *M. & S*.
" " " 22 from top, for *Lon*, read *Love*.
" " " 13 from bottom, for *Fronblesome*, read *Troublesome*.
" 493 " 1 from top, for *Ransbothane*, read *Ramsbotham*.
" " " 14 from bottom, for 1 *Hank*. 274, read 2 *Hawk*. 29.
" 505 " 3 from bottom, for *Ark. Sup. Court Rep*. read *ante*.
" 519 " 7 from top, for *characters*, read *charters*.
" " " 12 from bottom, for *epoigned*, read *essoigned*.
" 520 " 16 from top, for *Frelawny*, read *Trelawney*.
" " " 17 from top, for *Uh*. read *Wh*.
" " " 11 from bottom, after *are* insert *not*.
" 521 " 4 from top, for *Lett*, read *Leet*.
" 534 " 9 from top, after *Hein*, read 4 *T. R*. 482.
" " " 17 from top. after 1358, insert *S. C*.
" 535 " 13 from bottom, for 297, read 299.
" " " 12 from bottom, for 296, read 196.
" 543 " 8 from bottom, for 515, read, 518.
" 560 " 9 from bottom, for 5 *Esp. ca*. read 4 *Esp. ca*.
" " " 8 from bottom, for 2 *Taunton*, read 4 *Taunton*.

AN

INDEX

TO

THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A

ABATEMENT.

See PLEAS AND PLEADINGS.

ABSCONDING AND NON-RESIDENT DEBTORS.

See ATTACHMENT.

ACTIONS IN GENERAL.

1. It is a general rule that all actions upon contracts, whether express or implied, by parol, under seal, or of record, must be brought in the name of all the parties legally interested. *Phillips* vs. *Pennywit*, 59

ADMINISTRATION.

1. Under the Territorial Statute, the privilege given to the husband, wife, or distributees of an intestate, to take out letters of administration, was limited to the term of sixty days; and that to the creditors, to ninety days, after the death of the intestate: and on the failure of either, to appear and take out letters within the time allowed, their right or privilege was lost and extinguished, and all other persons were placed on an equal footing with them. *Grantham* vs. *Williams*, 270

2. It was not necessary for a citation to issue to the widow; but her right to administer was lost, if not exercised within sixty days. *id*

3. No one except a creditor was entitled to apply for a citation. It was a privilege given to the creditors for their protection against waste of the estate, and by exercising it, they could limit the time in which those first entitled might administer, to thirty days' service of the citation. *id*

4. The widow had no priority of right over a distributee. To elect between them, was left to the sound discretion of the county court; and in the exercise of that discretion, the Supreme Court will presume that the county court acted correctly. *id*

ADMINISTATORS.

See EXECUTORS AND ADMINISTRATORS.

AFFIDAVIT.

1. An affidavit that the defendant is justly indebted to the plaintiff in the sum of three hundred dollars, and that the plaintiff verily believes that said defendant is about to remove his effects out of the State, is sufficient to authorize the issuing of an attachment; without inserting that the defendant is indebted in a sum over fifty dollars. *Hughes* vs. *Martin*, 386

2. The parties in civil proceedings are seldom, if ever, bound to adopt the precise language used in a Statute. *id*

3. Where the affidavit to hold to bail, in an action of debt on writing obligatory, states that the action is founded on a

real, subsisting debt, and "this affiant verily believes that the sum of six thousand dollars, as bail, will not be more than will satisfy the debt and costs;" it is sufficient under the Territorial Statute. *Hughes* vs. *Martin*, 455

AMENDMENTS.

1. A writ of error not directed to any particular clerk, cannot be amended. *Ellis* vs. *Brown*, 82

2. The plaintiffs were described as A. B. and C. B. his wife, and D. and E. infants, all heirs, &c. of G. It would have been a good replication to the plea of the Statute of limitations, that C. B. and D. and E. were infants within five years, and that A. B. claimed in right of his wife. But if the replication is, that the plaintiffs were *all* infants, though the case will be reversed because the court below instructed the jury that it was not necessary to prove the husband to have been an infant; yet, upon the return of the case to the court below, the parties will be permitted to amend their pleadings. *Danley* vs. *Edwards*, 437

APPEAL FROM JUSTICES OF PEACE.

1. An appeal granted from the judgment of a justice, after the lapse of thirty days from the rendition of the judgment, is unauthorized and void, and does not warrant the Circuit Court in assuming jurisdiction. *Goings* vs. *Mills*, 11

2. If the original process before a Justice of the Peace is correct, it makes no difference, on appeal, whether it is regularly served or not. *McKee* vs. *Murphy*, 55

3. If the defendant does not appear before the justice, and make his objection to the service, he admits the jurisdiction of the justice, and his right to try the cause. *id*

4. The defendant having appealed to the Circuit Court, the plaintiff must be permitted to sustain his action, on a new trial upon the merits. *id*

5. Where a court has no jurisdiction of the case, there can be no judgment for costs. *id*

6. Under the Territorial law, the prayer and grant of an appeal from the decision of a justice to the Circuit Court, conferred jurisdiction on the Circuit Court; and the jurisdiction did not depend upon the giving of bail on appeal, or the sufficiency of the bail given. *Smith* vs. *Stinnett*, 497

7. Where no special bail was given before the justice, or where such bail, being insufficient, is not perfected in the Circuit Court, the appeal will be dismissed, but not on the ground of want of jurisdiction. *id*

8. This, however, is an objection which it rests with the appellee to make, and if he goes to trial in the Circuit Court, or takes judgment by default without making, he waives it, as expressly as if he had placed his waiver on the record. *id*

9. If he does so waive it, the appellant cannot assign for error in the Supreme Court, that there was no special bail, and that the Circuit Court had no jurisdiction. He cannot take advantage of his own wrong. *id*

10. Where a party appeals from the judgment of a justice, and afterwards brings his writ of error, he cannot assign for error any defect in the justice's writ, or the service thereof, or his non-appearance before the justice. By appealing, he makes himself a party to the proceedings, and must rest on such defence as he may lawfully make upon the merits. *id*

11. And if the appellant fails to file in the Circuit Court a transcript of the justice's proceedings, or take steps to cause it to be filed, it is his own fault. *id*

12. If it is stated in an order of the Circuit Court, that no transcript of the justice's proceedings was filed there; and a transcript comes up to the Supreme Court, though not certified by any authorized officer, but which is referred to in the assignment of errors, and not denied to be a correct transcript, the Supreme Court will presume that such transcript *was* on file in the court below. *id*

13. Where there were two defendants in the Justice's Court, and one only appealed, and judgment in the Circuit Court was rendered against "*the said*

defendant," it will be considered as rendered against the appellant alone. *id*

See PRACTICE IN CIRCUIT COURT.

APPEAL TO SUPREME COURT.

1. If the complainant in chancery claim more by his bill than one hundred dollars, and a decree is given in his favor for less, he is entitled to appeal, but the defendant is not. *Reynolds* vs. *Sneed*, 169

See ERROR—PRACTICE IN ERROR.

APPEAL BOND.

1. An appeal bond must be conditioned, to pay the debt, damages and costs, in case the judgment of the inferior court be affirmed. *Ballard* vs. *Noaks*, 133

2. Yet, if not in exact conformity to the Statute, it would be good, if it comprehended every essential stipulation in the Statute. *id*

3. A stipulation to pay "such sum of money as shall be finally adjudged against the said defendants, or them," is not sufficient. *id*

APPEARANCE.

1. Where a party has appealed, or sued out a writ of error, from a judgment by default; after reversal in the Supreme Court, he must, upon the return of the case to the Circuit Court, be considered as regularly before the court, in like manner as if he had been duly served with process to appear at the term to which the cause is returned. *Gilbreath* vs. *Kuykendall*, 54
S. P. *Estill* vs. *Bailey*, 131; *Murphy* vs. *Williams*, 376; *Hughes* vs. *Martin*, 386; *Hughes* vs. *Martin*, 455.

2. In order to constitute an appearance, in the legal sense of the term, there must be some substantive act done by the defendant, which constitutes him a party to the suit. *Murphy* vs. *Williams*, 376

3. An entry upon the record, that "this day the parties appeared by their attorneys, and the defendant having failed to file any plea to the plaintiff's declaration, it is considered by the court that judgment is rendered against the defendant for want of a plea," does not show such an appearance as makes a bad writ good. *id*

ARREST OF JUDGMENT.

1. Where a motion in arrest of judgment, and one for a new trial, are filed at the same time, it makes no difference, in the Supreme Court, which is first decided in the court below. *Reed* vs. *Latham*, 99

ASSIGNMENT.

1. The law of assignments in the Territorial Digest, is not declaratory of the law, but introductory of a new rule. *Gamblin* vs. *Walker*, 220

2. It creates a privity of contract between the assignee and obligor or promissor. *id*

3. The assignor of a bond negotiable by Statute, is not competent to sue in his own name, to the use of the assignee; and in such suit, a plea alleging that the bond was assigned before the institution of the suit, is good; and this is the law, whether the bond be made payable to order or not. *id*

4. In action of debt or covenant against the assignor, upon a personal, collateral guarantee, on an assigned note or bond, it is indispensably necessary to allege in the declaration, that the plaintiff has used due diligence in prosecuting his suit against the original obligor, or that he is wholly insolvent and unable to pay. *Gaster* vs. *Ashley*, 325

5. An endorsement upon a bond for a Lovely claim, assigning and setting over the bond, and containing this further clause, "and I hereby guarantee that the said claim shall be confirmed at the land office at Helena, within a reasonable time, and that the said claim to a donation is a legal and valid claim;" is an original covenant, and not a collateral guarantee. *id*

6. A breach in such case, that the claim was, at the time of making such covenant, "a bad, illegal, and invalid claim," is good. *id*

ATTACHMENT.

See Affidavit I.

ATTESTING WITNESS.

1. It is error to permit a bill of sale of a slave to be read in evidence, upon proof of the handwriting of an attesting witness when it appeared that such witness resided in the county where the suit was brought, that he was at home a short time before the term at which the cause was decided, and that he was absent on necessary business, and expected to return in a few months; no subpœna having been issued or served upon him, nor any effort made to take his deposition, and no other facts being proven, to warrant the admission of proof of his handwriting. *Brown* vs. *Hicks*, 232

2. It is error to permit the reading in evidence of a copy of a record of a bill of sale for a slave, executed and recorded in Kentucky, upon the testimony of the subscribing witness to such bill of sale; who stated simply that he believed the copy to be substantially the same with the original; but that he had not seen the original for many years: and when it did not appear that he had ever compared the copy with the original, nor did he pretend to say that it was an exact or sworn copy. *id*

ATTORNEYS.

1. It is a general rule that the mere appearance of an attorney for the defendant, is always deemed sufficient for the opposite party and for the court, who will look no farther, but proceed as if he had sufficient authority; and leave any party who may be injured, to his action, unless there appear to be fraud or collusion in the case. *Tally* vs. *Reynolds*, 99

2. But a party may, before judgment, upon sufficient showing, to be adjudged of by the court, require the attorney representing his adversary, to show his authority. *id*

3. For this purpose, he must show to the court, by affidavit, facts sufficient to raise a reasonable presumption that the attorney is acting without authority. *id*

4. The mere possession of the transcript of a judgment, does not raise even a presumption that the possessor of it is legally or beneficially interested in it. *id*

5. The simple allegation that a party is informed and believes that the attorney has no authority, without stating the facts on which the belief is founded, is not sufficient to call for his authority. *id*

6. The license and admission of an attorney do not give him the right to appear for any particular person. To this end he must be employed. *id*

7. This employment may be proved by circumstances, as well as by warrant of attorney. *id*

AWARD.

1. Every award must be final, and so plainly expressed that there may be no uncertainty in what manner, and when, the parties are to put it in execution, but that they may certainly know what it is they are ordered to do. *Lee* vs. *Onstott*, 206

2. The award must be in accordance with the submission, and final and conclusive. *id*

3. One partner cannot bind another, by deed, even in commercial dealings. But this rule does not apply where one partner, by the authority of his co-partner, and in his presence, executes a deed for both of them, under one seal. *id*

4. A bond executed by one partner to bind his co-partner to comply with an award, will be binding on such co-partner, if the award be accepted or ratified by him. *id*

B

BAIL AND BAIL BONDS.

1. The securities of the defendant, in a bond taken of him on a capias in detinue under the Territorial Statute, are his *bail;* and are only personally responsible for the defendant, not answerable in all events for the delivery of the property sued for. *Chandler* vs. *Byrd*. 152

2. The liability of the defendant is wholly personal, and the bail are liable to no greater extent. By the condition of the bond, the defendant binds himself to deliver the property to the plaintiff, and pay the damage for the detention, and costs of suit; and the bail are bound with him. *id*

3. In an action upon such bond, an assignment of a breach, that judgment was rendered againt the *administrator* of the defendant for the property, and that such judgment remains in full force and effect, and unsatisfied, does not constitute a good breach. *id*

4. The sureties in a bail bond in detinue may surrender their principal in discharge of bail, in the same manner as in other actions; and, as in other actions, are only liable for the personal responsibility of their principal; and the death of the principal exonerates them from responsibility. *id*

5. Where the affidavit to hold to bail, in debt on bond, states that the action "is founded on a real, subsisting debt, and this affiant verily believes that the sum of six thousand dollars as bail, will not be more than will satisfy the debt and costs," it is sufficient, under the Territorial Statute. *Hughes* vs. *Martin*, 455

BANKS AND BANKING.

See Real Estate Bank.

BILLS OF EXCEPTIONS.

1. All bills of exceptions must be tendered at the trial—not that they need be drawn up in form; but the substance must be recorded to writing, while the thing is transacting. *Lyon* vs. *Evans*, 349

2. A bill of exceptions can only be considered part of the record, when it contains in itself intrinsic evidence that the exception was taken and reserved while the thing was transacting, or the matter excepted to was passing before the court; and that it was reduced to form and signed by the judge or judges, at some time during the term. *id*

3. Facts not excepted to when they are transacting in the court, or not properly before the court at the time the exception is taken, or over which the court has no control at the time, although incorporated into the bill of exceptions, cannot be regarded as legally comprising part thereof, or as composing any part of the record of the court, and consequently are not entitled by law to any credit, as facts appearing of record in the cause. *id*

4. The entries in the record kept by the court must always prevail over the statements contained in bills of exceptions, when they are inconsistent with one another. *id*

5. Where instructions upon abstract questions of law are given or refused by the court below, they will not be noticed in this court, unless by bill of exceptions, so much of the evidence in the case, as presented the question of law or testimony to which the instructions applied, is brought before the Supreme Court.—*Danley* vs. *Edwards*, 437

6. It is the duty of the party excepting, to set out so much of the testimony as raises the question of law or evidence contained in the bill of exceptions. *id*

7. No bill of exceptions to any opinion or judgment of the justices, can be taken in an action of forcible entry and detainer before them. *Thorn* vs. *Reed*, 480

8. No bill of exceptions can be taken before a justice; but either party may take them on the trial upon appeal in the Circuit Court; and will have the same advantage of them when improper testimony is admitted, or proper testimony is excluded, as though the pleadings had been drawn out in apt form. *Ruddell* vs. *Mozer*, 503

9. Where the action before the justice was founded upon a parol agreement, and a written agreement was permitted to go in evidence on the part of the plaintiff, in the Circuit Court, which would have been inadmissible as the foundation of the action, yet, if the record does not show that the agreement so offered in evidence was filed before the justice on or before the day of trial, nor in the clerk's office on the appeal being taken; in such case the record does not show it to be the foundation of the action. And the legal presumption is, that the suit

was not based upon it, but on some other agreement, by parol, as contradistinguished from a written agreement. *id*

10. And if such were not the fact, the defendant should have shown it by bill of exceptions. Not having done so, the legal presumption is, that sufficient legal proof was offered, to warrant the verdict and judgment in the Circuit Court. *id*

BILLS OF SALE.

1. A bill of sale for a slave is not of such a nature as is authorized or required by law to be recorded, or order to give validity or effect to the instrument, and to make it a part of the public documents and records of the country; and therefore the record of such a bill of sale is incompetent to prove the existence or execution of the original. *Brown* vs. *Phillips*, 232

See ATTESTING WITNESS 1, 2.

BONDS.

1. To prove that a sheriff's bond was not approved by the county court, does not support the affirmative allegation that the bond was delivered as an escrow till it should be approved; and such proof cannot be admitted. *Reed* vs. *Latham*, 66

2. A bond delivered to the obligee, cannot be an *escrow*. *id*

3. A sheriff's bond, delivered to the clerk of the county court, is the same as if delivered to the obligee, and cannot be an *escrow*. *id*

4. The assignor of a bond negotiable by Statute is not competent to sue in his own name, to the use of the assignee, and in such suit a plea alleging that the bond was assigned before the institution of the suit, is good; and this is the law, whether the bond be made payable to order or not. *Gamblin* vs. *Walker*, 220

See APPEAL BOND; BAIL BOND; DEED; BOND FOR COSTS.

BOND FOR COSTS.

1. By the laws of the Territory, if a non-resident plaintiff fails to file a bond for costs, when he institutes his suit, or if a resident plaintiff becomes non-resident after the institution of his suit, and fails to file a bond for costs, after the defendant or the officer of the court has taken the proper steps to compel him to do so, the defendant may take advantage of it, either by plea in abatement, or motion founded upon the affidavit and notice mentioned in the Statute: and the clerk or sheriff may move to dismiss on notice without affidavit. *Means* vs. *Cromwell*, 247

2. When the objection is taken by motion, the plaintiff may file his bond at any time before the motion is actually made in court, and proceed with his suit. *id*

3. The omission to file a bond for costs, is a matter in abatement only, where a non-resident sues. If the plaintiff becomes non-resident after the commencement of his suit, it may be pleaded in abatement, *puis darrein continuance*.—And when such plea in abatement is filed, the plaintiff cannot subsequently file his bond for costs, but must take issue on the plea. *id*

4. The want of a bond for costs, cannot be taken advantage of on motion, without affidavit or notice. *id*
S. P. *Palmer* vs. *Ashley*, 259

BOUNDARIES.

1. In trespass, it is not necessary to prove the boundaries and locality of the premises on which the trespass was committed, by a survey of the county surveyor or his deputy. The Territorial law which provides that no other survey shall be evidence, applies only to suits where the *title* to land is in dispute.—*Ledbetter* vs. *Fitzgerald*, 448

2. The identity of the close, and the possession, are capable of being established by any person who knows the lines and corners, or who can prove the plaintiff's possession. *id*

C

CASES OVERRULED.

Austin vs. *Whitlock*, 1 *Munf.* 457. 114

Lee vs. *Adkins*, *Ala. R.* 187. *id*

Langham vs. *Gentry*, 1 *Mo. R.* 474. 252

CERTIORARI.

1. When a motion has been made in the Supreme Court, at a previous term, to dismiss an appeal for want of a final judgment or decree in the court below, and on a subsequent suggestion at the same previous term by the appellants that there was a diminution of the record, a certiorari was awarded for a new transcript; if, then, the clerk below returns the writ, with a new transcript, certified by him to be a true copy, and which does not cure the defect; unless good cause be shown for a new writ, an alias certiorari will not be awarded, but the appellee will be entitled to the benefit of his renewed motion to dismiss. *Adams* vs. *Owens*, 135

2. Where there is an irregularity in the proceedings of the justices in forcible entry and detainer under the Territorial Statute, the case may be removed into the Circuit Court by certiorari, and there the proceedings set aside. *Thorn* vs. *Reed*, 480

3. Such writ of certiorari may be issued by the clerk upon the order of the judge. *id*

4. When the action of forcible entry and detainer is brought into the Circuit Court by certiorari, it cannot be remanded to the justices. The Justices' Court was dissolved after they had tried the cause. *id*

CIRCUIT COURT.

1. The Circuit Courts have a superintending control over the county courts in matters of allowance against Estates, and power to issue to the county courts, writs of *supersedeas*, *certiorari*, *habeas corpus*, *mandamus*, and *quo warranto*. *Webb* vs. *Hanger*, 121

2. The Circuit Court has no jurisdiction of a suit upon a writing obligatory for one hundred dollars; and jurisdiction is not given, though the plaintiff declares for *principal* and *interest*, and so claims more than a hundred dollars. *Fisher* vs. *Hall*, 275

3. Prior to the adoption of the constitution of this State, the jurisdiction of the Circuit Courts, in all criminal cases of which they had cognizance, was exclusive. *State* vs. *Graham*, 428

4. The constitution confirms in the Circuit Court a part of the powers, with which they were then invested by the Statute, without divesting them of any other power conferred upon them by law. *id*

5. There is no conflict between the provisions of the Statute conferring on the Circuit Courts exclusive jurisdiction in criminal cases, and the appellate jurisdiction conferred by the constitution on the Supreme Court. *id*

6. The provisions in the schedule of the constitution and the act of 1836, leave the jurisdiction and powers of the Circuit Court over criminal cases, precisely as they stood when the constitution was adopted. *id*

CITY COURT OF LITTLE ROCK.

1. On error from a judgment of the City Court of Little Rock, the City must be made a party, and a summons to hear errors must be served upon the corporate authorities of said City. *Graham* vs. *The State*, 79

2. The attorney of the State is not authorized to enter an appearance for the City. *id*

3 But the failure to make the City a party by such summons, is no ground for dismissal here. *id*

4. The act of 1838, which incorporated the City of Little Rock, and conferred jurisdiction upon the City Court thereof in criminal and penal cases, does not conflict with the organic law of the Territory, or the constitution of the State.—*Graham* vs. *State*. 171

5. The organic law expressly authorized the Legislature to institute and establish courts inferior to the Supreme Court, and to fix their respective jurisdictions, except in cases where the United States was a party. *id.*

6. By the constitution the City Court was not abrogated, or its jurisdiction taken away. *id*

7. The City Court being a court of limited and special jurisdiction, the allegation in the indictment that the offence was committed "*at* the City of Little Rock", is a sufficient allegation that it was committed within the jurisdiction of the court, at least in indictments for misdemeanors, when only a pecuniary fine is imposed. So much strictness is not required in these indictments, as in indictments for offences of a higher grade. *id*

8. An objection to an indictment for a misdemeanor, founded on a single Statute, that the conclusion thereof is in the plural, instead of the singular number, is not valid, and will not be allowed; and an indictment for a misdemeanor, in the City Court, concluding "contrary to the laws and Statutes of the Territory of Arkansas, and the ordinances of the City of Little Rock," is good. *id*

9. The statute and ordinance having fixed the fine at not less than one hundred, nor more than two hundred dollars, the City Court have no power to impose a fine of only thirty dollars. The court had no authority, either to mitigate, or increase the punishment. *id*

10. A judgment of the City Court in a civil case cannot be removed directly into this court for revision by writ of error, any more than the judgment of a justice, and is placed precisely on the same footing. *Hall* vs. *State*, 201

11. The jurisdiction of the City Court and Justices of the Peace is concurrent in such case, and the right of appeal being secured in like manner, and to the same tribunal, the parties are restricted to that remedy. *id*

12. But where the judgment in the City Court was for one hundred dollars, founded upon a sci. fa. in a recognizance in the sum of two hundred dollars; it was a civil cause, the amount in controversy exceeded one hundred dollars, the City Court had no jurisdiction, and a *supersedeas* granted by one of the judges of the Supreme Court in vacation, will be allowed to stand, though the writ of error is dismissed as *improvidently issued*. *id*

COLLECTORS AND HOLDERS OF PUBLIC MONEY.

1. A collector or holder of public moneys, who was in default for moneys collected, at the time of the adoption of the constitution, at the time of his election to another or the same office, and at the time of his application for his commission, is not entitled to his commission. *Taylor* vs. *Governor*. 21

2. A collector or holder of public moneys, who was in default to the Territory at the adoption of the constitution, became in law and by the schedule to the constitution, a defaulter to the State, and all his liability was transferred to the State. *id*

3. No person had any natural, legal or vested right to the office of sheriff till it was created by the constitution. *id*

4. The right to the office is given upon the express condition that the party demanding it, is neither a holder nor collector of public money which he has failed to account for and pay over, and for which he is liable. *id*

5. That condition not having been complied with, no legal, constitutional, or natural right to the office vests by an election to it. Therefore the clause in the constitution cannot be retrospective in such case. *id*

6. An *ex post facto* law declares an offence to be punishable in a manner in which it was not punishable at the time it was committed, and relates exclusively to criminal proceedings, *id*

7. The provision in the State Constitution that no holder or collector of public moneys, shall be eligible to any office of trust or profit till he has paid over and accounted, &c. is not repugnant to, or in violation of the constitution of the United States. *id*

CONFESSION.

See JUDGMENT.

CONSIDERATION.

1. A misrepresentation by the seller to the buyer of the advantages to result from the purchase, however contrary to good faith and sound morals, cannot form the basis of any suit, either at law or in equity. *Dugan* vs. *Cureton*, 31

2. It is not every misrepresentation that will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it. *id*

3. The common language of puffing and commendation of commodities, is not such a fraud as will avoid a contract. *id*

4. A failure to perform a contract which formed part of the consideration for the payment of money, and was to be performed several months after the making of the contract, cannot, without some concurring equity, constitute a ground of relief against the payment, in chancery. *id*

CONSIDERATION.

1. Where suit was brought on a promissory note, and the defendant pleaded want of *consideration and failure of consideration*, and the following evidence was offered by him in support of his pleas, to wit: that the consideration for which the note was executed, was the assignment of a patent for a tract of land; that the patent, at the time of the execution of the note was assigned by the plaintiff to the defendant by endorsement in writing, and received by the defendant; and that the plaintiff then represented to the defendant that the land granted by the patent was situated within five or six miles of Little Rock, and that, if it was not of the description set forth in the patent and endorsements, he would make it as good, and that he had a title to the land, and a right to sell it; further, that in conversation with another witness, the plaintiff had said that he had long known that the same land had been sold for taxes; and the patent being in evidence, with these endorsements: "For value received I assign the within deed to A. B. *Signed* C. D. agent for E. F." (the patentee;) and "for value received I assign the within deed to G. H: *Signed* A. B." *Held*, that this evidence expressly disproved the first plea, and failed to support the second. *Gage* vs. *Melton*, 224

2. So far as regards the questions presented on the plea, it is wholly immaterial whether a specific execution of the agreement proved by the evidence, could be enforced, or not. *id*

CONSTABLE.

1. A constable is not authorized to receive payment of a debt, by his official character, unless when he obtains that authority by a writ of execution; and a payment made to him before the issuance of an execution will not release the party making it; nor will the constable's receipt be any defence in the action. *Goings* vs. *Mills*, 11

CONSTITUTIONAL LAW.

See COLLECTORS AND HOLDERS OF PUBLIC MONEY, 1, 2, 3, 4, 5, 6, 7.

I. To charge a jury, that "from the law of the case the court is of the opinion that the plaintiffs have not made out such a case as will entitle them to recover, but that the facts are with the jury," is not such a charging as to matters of fact, as is prohibited by the constitution. In this respect, the constitution has not, in the slightest degree, altered the common law. *Hynson* vs. *Terry*, 83

2. The constitution has conferred upon the Supreme Court, as the final tribunal to interpret, pronounce and execute the law, to decide controversies and enforce rights, powers and jurisdiction of an appellate nature only. *State* vs. *Ashley*, 279

3. It leaves with the *inferior tribunals* the original cognizance of all cases and controversies between private parties, as well as all controversies in which the State may be a party, or otherwise interested, in which the sovereignty or sovereign rights, powers, and franchises of the State, are not involved. *id*

4. But in cases involving the civil rights of the sovereign power of the State, affecting vitally its character, and the proper administration of the government itself; in which the whole people, and every individual member of the community has a direct, immediate, and most sacred interest; where the exercise of a public right or public franchise is the object of controversy, the Supreme Court has original jurisdiction, and is vested with

power to issue, hear, and determine writs of *quo warranto.* *id*

5. The information in nature of a quo warranto being different from the *writ* of quo warranto, the Supreme Court has no jurisdiction in case of such information. under the clause of the constitution which authorizes it to issue *writs* of quo warranto. *id*

6. The power granted to the court by the constitution, to issue *other remedial writs*, embraces only such writs, other than those specifically enumerated, as may be properly used in the exercise of appellate powers or of the power of control over the inferior or other courts, expressly granted by the constitution. *id*

7. The Supreme Court has no original jurisdiction in any case where the proceeding is, or must necessarily be of a criminal nature. The proceeding by information in nature of a quo warranto, is of a criminal nature, and the Supreme Court has, therefore, no jurisdiction thereof. *id*

8. Prior to the adoption of the constitution of this State, the jurisdiction of the Circuit Courts, in all criminal cases of which they had cognizance, was exclusive.—*The State* vs. *Graham*, 428

9. The constitution confirms in the Circuit Court a part of the powers with which they were invested by the Statute, without divesting them of any other power conferred upon them by law. *id*

10. There is no conflict between the provisions of the Statute conferring on the Circuit Courts exclusive jurisdiction in criminal cases, and the appellate jurisdiction conferred by the constitution on the Supreme Court. *id*

11. The appellate jurisdiction of the Supreme Court, though co-extensive with the State, is no where defined in the constitution. It depends upon the law as it stood when the constitution was adopted; subject to such alterations as the Legislature prescribe by law. *id*

12. The Legislature, may, therefore, by law, at any time, change or modify the different subject matters to which the appellate power of the Supreme Court shall extend, making it cover more or less space, as they shall think proper.—*id*

13. The provisions in the schedule of the constitution, and the act of 1836, leave the jurisdiction and powers of the Circuit Courts, over criminal cases, precisely as they stood when the constitution was adopted. *id*

14. The Supreme Court has power to issue writs of quo warranto in a case in which the whole community is directly interested. *State* vs. *Ashley*, 513

15. There is a wide and striking difference between the constitution of the United States and of a State. *id*

16. The former is an enumeration and delegation of certain specified powers, granted by the States, or the people of the States, for national objects and purposes. *id*

17. A State Constitution is a bill of rights, declaratory of the great and essential principles of civil and political justice, imposed as so many duties, and enjoined as so many restrictions, both upon the departments of government and upon the people. *id*

18. A State Legislature can exercise all power that is not expressly or impliedly prohibited by the constitution; for whatever powers are not limited or restricted they inherently possess as a portion of the sovereignty of the State. *id*

19. A State Constitution, like all other deeds or charters, is to be construed according to the sense of the terms used, and the intention of its authors. *id*

29. It is to be construed as a frame of laws, established by the people according to their own free pleasure and sovereign will. *id*

21. It should receive a fair and liberal interpretation. *id*

22. The clause in the constitution of this State, which provides that the General Assembly may incorporate one State Bank and Branches, and that "they shall have further power to incorporate *one other* banking institution, &c." is to be construed as a limitation and a prohibition against the establishment of more than one other banking institution. *id*

23. The Legislature can no more establish two banking institutions in promotion of the agricultural interest of the country, than it can create two Supreme Courts, or make that tribunal consist of more than three judges, or establish and organize more than three departments of the government. *id*

24. But the Legislature has the power to establish one banking institution, with any number of agencies, or offices of discount and deposite to transact its business—and may locate these offices or agencies at as many points or places as they may deem advisable or proper. *id*

25. The Legislature contemplated, by the charter, the establishment of only one banking institution. *id*

26. The act of the Legislature incorporating the Real Estate Bank is constitutional. *id*

27. The case of *Taylor* vs. *The Governor*, does not decide that a mandamus can issue to the Governor. *Hawkins* vs. *The Governor*, 570

28. The Governor of the State is not amenable to the judiciary for the manner in which he performs, or for his failure to perform his legal or constitutional duties. *id*

29. His acts, being political, must of course be politically examined in the manner pointed out by the constitution. *id*

30. The constitution assigns to him no *ministerial* duties to be performed, nor can the law enjoin upon him any such duty. *id*

31. The principle, that, where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, the individual injured has a right to resort to the law for redress, applies only to such officers as have no legal or constitutional discretion left them.—All the officers of the government, except the President of the United States, and the Executives of the different States, are liable to have their acts examined in a court of justice. *id*

32. Whenever the heads or officers of a department are the political or confidential agents of the Executive appointed merely to execute his will, it is clear that in such cases their acts are his acts; and whatever opinion may be entertained of the manner in which their discretion may be used, there is no power in the courts to compel that discretion. *id*

33. But if the Governor had signed and sealed the commission of an officer, and delivered it to the Secretary of State to be attested and recorded, the duties of the Secretary being in that behalf purely ministerial, the court would, by mandamus, compel him to perform them. *id*

34. Each department of the government has the right to judge of the constitution for itself—but each is responsible for an abuse or usurpation of power, in the mode pointed out by the constitution. *id*

35. The Governor is placed under a double responsibility—that of the right of suffrage, and that of impeachment. He is answerable in no other way for his official conduct, while he continues in the exercise of his office. *id*

36. All the duties imposed upon the Executive by the constitution, including the issuing of commissions, are strictly and exclusively political. *id*

37. The Supreme Court therefore has no power to award a mandamus to the Governor to compel him to grant a commission. *id*

CONTEMPT.

1. A failure of the clerk of a Circuit Court to endorse upon, or attach to, the writ of error, his return, signed by him as clerk, and sealed with the seal of his office, is a contempt of the Supreme Court; and the clerk will not be excused, because he was ignorant of the law, or although he states in his response to the rule, that no contempt was intended. *In the matter of Simmons*, 265

CONTRACT.

See CONSIDERATION.

COPY.

See EVIDENCE.

CORONER.

1. The service by a Coroner of a writ directed to the sheriff, is not ground for dismissing the suit; though it is matter which will excuse the defendant from answering. *Hughes* vs. *Martin*, 386

2. A writ directed to an officer or person prohibited by law from executing it, may be abated; and perhaps it might be set aside on motion, if the fact appear on the face of the proceedings. *id*

3. But a writ regularly and legally issued, and directed to the proper officer, cannot be avoided or made void, by matter subsequent, or by having a return endorsed on it by an officer or person not authorized by law to serve it. *id*

4. Such an endorsement is a mere nullity, and imposes no obligation on the defendant to appear, nor does it subject him to any legal consequences, as for a default. *id*

COSTS.

1. Where a court has no jurisdiction of the case, there can be no judgment for costs. *McKee* vs. *Murphy*, 55

2. Where the court below, in process of the cause, rendered judgment for the costs of a motion to abate the writ, such judgment was not warranted by law; yet the rendering thereof cannot be assigned for error, when the case is brought into the Supreme Court, by writ of error to the final judgment. The validity of the final judgment on the merits, is not affected by such an incidental judgment. *Dyer* vs. *Hatch*, 339

See Bonds for Costs.

COURTS.

1. A change in the time of holding courts, made by act of the Legislature, without provision that cases pending shall have day and be tried, as though no change had been made, does not operate a discontinuance of such cases. *Bennett* vs. *Engles*, 29

S. P. *Halderman* vs. *Frisbie*, 48

See Supreme Court; Circuit Court; Justices of the Peace.

COVENANT.

1. The old covenants of warranty inserted in ancient deeds, and the action upon them, have long since become obsolete in England, and never had a legal existence under our form of government.—*Logan* vs. *Moulder*, 313

2. The covenants of seisin, of right to convey, and against incumbrances, are personal covenents, not running with the land nor passing to the assignee: they are mere *choses in action* not assignable at common law. *id*

3. The covenants of warranty, and for quiet enjoyment are in the nature of real covenants, and run with the land. *id*

4. When the grantor of a Lovely Claim, covenants that he has a good and valid claim, or free power and lawful authority to convey, he will be compelled to produce the evidence of his title whenever it is legally demanded. *id*

5. In such case if the vendee suspect the title to be defective, he is not bound to wait till he is legally evicted, but may commence suit at any time, and maintain his action, unless the vendor show that he has performed the condition of his bond. *id*

6. Where the plaintiff declares therefore, on a covenant of seisin, or of good right, full power and lawful authority to convey, it is unnecessary to allege an eviction; for the covenant is broken, if at all, at the very moment it is made. *id*

7. All covenants not prospective, and that do not pass with the land, are strictly personal, and if there is no right or authority in the person making them, they are broken as soon as made. *id*

8. But in order to charge a party on a covenant of warranty, or for quiet enjoyment, eviction must be alleged. *id*

9. When the breach in the declaration is, that the defendant had no title to the claim he conveyed, and the plea answers thereto that he had "*some title*," the

plea is no answer, and a demurrer thereto is properly sustained. *id*

10. The ultimate extent of the vendor's responsibility, under any and all of the usual covenants in a deed, is the purchase money, with interest; and the covenant or deed is evidence of that purchase money. *id*

11. An instruction therefore that the measure of damages was the value of a Lovely Claim at the date of the covenant, is erroneous. *id*

12. In an action of debt or covenant against the assignor, upon a personal, collateral guarantee, or an assigned note or bond, it is indispensably necessary to allege in the declaration, that the plaintiff has used due diligence in prosecuting his suit against the original obligor, or that he is wholly insolvent and unable to pay. *Gaster* vs. *Ashley*, 325

13. No particular form, or technical words are necessary to create a covenant; but any words which show the intention of the parties will be sufficient. It may be by any words, or any part of the agreement. The enquiry always is, what was the intention of the parties, and that is to be collected from the context of the instrument itself, which is to be construed according to the obvious meaning and reasonable sense of the words, and if there be any ambiguity in the words, such a construction is to be given as will militate most strongly against the covenantor. *id*

14. An endorsement upon a bond for a Lovely claim, assigning and setting over the bond, and containing the further clause, "and I hereby guarantee that the said claim shall be confirmed at the land office at Helena within a reasonable time, and that the said claim to a donation is a legal and valid claim," is an original covenant, and not a collateral guarantee. *id*

15. A breach in such case that the claim was, at the time of making such endorsement, a bad, illegal, and invalid claim, is good. *id*

16. One good breach in covenant is sufficient. *id*

17. Where, by a covenant between the parties, the defendant has bound himself to give up and surrender to the plaintiff the possession of the premises on a certain day, and he holds over, it is not competent for him, in an action of forcible entry and detainer under the Territorial Statute, to prove that the plaintiff had but an estate *pur autre vie*, which had expired before the commencement of the suit. *Thorn* vs. *Reed*, 480

D

DAMAGES.

1. The question of damages is purely legal, and the parties cannot come into chancery to have their damages assessed and set off against a judgment at law. *Dugan* vs. *Cureton*, 31

2. If the declaration be on a recognizance, conditioned "to pay the debt, damages, and costs, if the judgment be confirmed," and the breach assigned is, "that the appeal was dismissed for want of prosecution," it is a fatal variance. *Ashley* vs. *Brazil*, 144

3. In such an action, it is error to render judgment by *nil dicit* for the whole amount of the recognizance. A writ of inquiry should be awarded to assess the damages. *id*

4. The ultimate extent of the vendor's responsibility, under any and all of the usual covenants in a deed, is the purchase money with interest; and the covenant or deed is evidence of the purchase money. *Logan* vs. *Moulder*, 313

5. An instruction, therefore, that the measure of damages was the value of a Lovely claim at the date of the covenant, is erroneous. *id*

DEBT.

1. In an action of debt, or *Sire Facias*, on a recognizance of bail, by bill, and in debt on a judgment of record, the venue is *local*, and must be laid in the county where the record is. *Smith* vs. *Clark*, 63

2. Summoning a party to appear before a justice in an action of debt, does not

make it an action of debt. *Jeffrey* vs. *Underwood*, 108

3. It is not necessary to state in the summons the species of action, whether in *debt, covenant, &c.* and if inserted, it is surplusage. *id*

4. A note for fifty dollars *to be paid* in a horse, will not sustain an action of debt. *id*

5. In an action of debt on a recognizance, the breaches must be proved as laid in the declaration. If the plaintiff declare upon an absolute promise, and a conditional one be proved, the variance is fatal. *Ashley* vs. *Brazil*, 144

6. The party declaring must prove the allegations according to their legal effect. *id*

7. If the declaration be on a recognizance, conditioned "to pay the debt, damages, and costs if the judgment be confirmed," and the breach assigned is, "that the appeal was dismissed for want of prosecution," is a fatal variance. *id*

8. In such an action, it is error to render judgment by *nil dicit* for the whole amount of the recognizance. A writ of inquiry should be awarded to assess damages. *id*

9. Debt is the proper action on a promissory note. *Bentley* vs. *Dickson*, 165

10. In an action of debt or covenant against the assignor, upon a personal, collateral guarantee, on an assigned note or bond, it is indispensably necessary to allege in the declaration, that the plaintiff has used due diligence in prosecuting his suit against the original obligor, or that he is wholly insolvent and unable to pay. *Gaster* vs. *Ashley*. 325

11. In an action of debt on writing obligatory, evidence that the plaintiff had borrowed a wagon of the defendant, which was to have been returned in four or five days, is not admissible to sustain a plea of payment. *Hester* vs. *Murphy*, 338

12. The act of 1831, with regard to the actions on bonds, &c. for a penalty, is substantially the same in most respects with *St.* 8 & 9, *Wm.* 3 *Ch.* 11, *Sec.* 8. and the provisions thereof are compulsory on the plaintiff to assign or suggest breaches. If they are not assigned, in cases within the Statute, the plaintiff cannot recover; and unless the condition and the breach appear upon the record, the proceedings will be erroneous. *Lyon* vs. *Evans*, 349

15. Where statutory bonds are payable to the Governor in his official character, he holds the legal interest therein, merely as a naked trust; and in suits upon such bonds, the persons for whose use such suits are prosecuted, are regarded as the real plaintiffs in the case. *id*

14. The breaches assigned in such cases must, therefore, have all the essential requisites of so many different counts in the same declaration, whether they are assigned in the declaration, or in the replication, or appear on the record; and they are subject to the same rule as to the joinder of different and distinct rights and causes of action, as are applicable to such joinder in different counts, or in a single count of a declaration. *id*

15. A misjoinder of causes of action which cannot be joined, in different breaches in such suits, cannot be aided by entering a *nol. pros.* after demurrer, and is fatal on general demurrer, in arrest of judgment, or on error. *id*

DECREE.

1. A judgment or decree is final, when it concludes the whole matter in the cause, and when the term at which it was pronounced has expired, and must be so considered against the whole world.—*Keatts* vs. *Rector*, 391

2. But *as to the defendant* under the Territorial Statute a decree is not final or ready for execution, if he except to the decree, on or before the third day of the next term after it is rendered. The defendant is therefore entitled to appear after he has filed his exceptions, and they have been disallowed. *id*

3. But on such appeal, he will be confined to the exceptions which he took in the court below; for if there were other errors he waives them by not pointing them out in his exceptions. *id*

DEED.

1. The clause of "*in cujus rei, &c.* is not

essential to a deed or bond. Only three things are essentially necessary to make a good obligation, viz: writing, on parchment or paper, sealing, and delivery. *Jeffrey* vs. *Underwood*, 108

2. It is not necessary that the obligor should subscribe his name. *id*

3. There is no occasion to mention in the bond that it was sealed and delivered. And this rule applies with equal force, under our Statute, to writings where a scroll is affixed at the end of the name. *id*

4. One partner cannot bind another by deed, even in commercial dealings. But this rule does not apply where one partner, by the authority of his co-partner, and in his presence, executes a deed for both of them, under one seal. *Lee* vs. *Onslott*, 206

5. A bond executed by one partner to bind his co-partner to comply with an award, will be binding on such co-partner, if the award be accepted or ratified by him. *id*

DEFAULT.

1. On judgment by default, the defendant below is entitled to all legal exceptions to the writ and service thereof. *Gilbreath* vs. *Kuykendall*, 50

2. It is error to enter judgment by default, without service of process. And such error is not cured by the defendant filing pleas after entry of judgment by default, without obtaining leave to do so, or applying to the court to set aside the judgment. *Moore* vs. *Watkins*, 268

3 An order to set aside a final judgment by default, made at a term subsequent to the one at which such judgment is rendered, is wholly illegal; and no fact stated in such an order can be noticed in this court. *Smith* vs. *Stinnett*, 497

DEFAULTERS.

See Collectors and Holders of Public Money.

DEMURRER.

1. The plaintiff having, after his demurrer to a plea was overruled, replied to the plea, and tendered an issue thereon, is precluded in the Supreme Court from assigning the judgment on demurrer as error, as he waived his demurrer by replying.

See Pleas and Pleadings; Practice.

DETINUE.

1. The securities of the defendant in a bond taken of him on a capais in detinue under the Statute, are his bail; and are only *personally* responsible to the defendant, not answerable in all events for the delivery of the property sued for. *Chandler* vs. *Byrd*, 152

2. The liability of the defendant is wholly personal, and the bail are liable to no greater extent than he. By the condition of the bond, the defendant binds himself "to deliver the property to the plaintiff, and pay the damage for the detention, and costs of suit," and the bail are bound with him. *id*

3. In an action upon such bond, an assignment of a breach, that judgment was rendered against the administrator of the defendant for the property, and that such judgment remains in full force and effect, and unsatisfied, does not constitute a good breach. *id*

4. The sureties in a bail bond in detinue may surrender the principal in discharge of bail, in the same manner as in other actions, and, as in other actions, are only liable for the *personal* responsibility of their principal, and the death of the principal exonerates them from responsibility. *id*

DISCONTINUANCE.

See Courts.

DISTRIBUTEE.

1. In an action brought by an administrator to recover a slave of his intestate, a legal distributee of the estate of such intestate is not a competent witness. He is legally interested in the event of the suit, although upon his *voir dire* he *swears* that he has received his portion of the estate, and receipted to the administator therefor, the receipt not being produc-

ed, or its non-production accounted for. *Brown* vs. *Hicks*, 232

E

EJECTMENT.

1. Actual seisin is not necessary in this country to maintain trespass or ejectment. *Ledbetter* vs. *Fitzgerald*, 448

2. If a man enter into lands, having title, his seisin is not bounded by his occupancy, but is to be considered co-extensive with his title or grant. If he enter without title, his seisin is confined to his possession by metes and bounds. *id*

EQUITY.

1. A misrepresentation by the seller to the buyer of the advantages to result from the purchase, however contrary to good faith and sound morals, cannot form the basis of any suit, either at law or equity. *Dugan* vs. *Cureton* 31

2. It is not every misrepresentation that will avoid a contract upon the ground of fraud, if it be of such a nature that the other party has no right to place reliance on it, and it was his own folly to give credence to it. *id*

3. The common language of puffing and commendation of commodities, is not such a fraud as will avoid a contract. *id*

4. The question of damages is purely legal, and parties cannot come into chancery, to have their unliquidated damages assessed and set off against a judgment at law. *id*

5. When courts of chancery have once taken jurisdiction of a case for one purpose, they will generally retain the cause until the whole subject is disposed of, but the primary and original object of the suit must be one clearly within their jurisdiction: nor will they even then always retain the bill; as when the allegation which gives the jurisdiction not being sustained by the proof on the hearing, the remedy sought appears to be complete at law. *id*

6. A failure to perform a contract, which formed part of the consideration for the payment of money, and was to be performed several months after the making of the contract, cannot, without some concurring equity, constitute a ground of relief against the payment in chancery. *id*

7. A party will not be aided after a trial at law, unless he can impeach the justice of the verdict or report, by facts, or on grounds of which he could not have availed himself, or was prevented from doing it by fraud, accident, or the act of the opposite party, unmixed with negligence or fault on his own part. *id*

8. Although it is to be regretted that the Statute of Frauds has been virtually set aside by the doctrine of part performance, yet that doctrine is so well established, that this court is bound to be governed by the decisions. *Keatts* vs. *Rector*, 391

9. Nothing can be considered part performance, which does not put the party in such a situation that a fraud can be practised upon him by the other, unless the agreement is performed throughout. *id*

10. Acts, to constitute part performance, must clearly appear to have been done solely with a view to the contract being performed. *id*

11. Possession if delivered and obtained solely under the contract, and in reference exclusively to it, will take the case out of the Statute; and especially if the party has made repairs and improvements. *id*

12. So when the party seeking relief has been placed by the contract in such a situation that he cannot be put in *statu quo* without injury by reason of his having performed his part, then the case is taken out the Statute. *id*

13. Courts of Equity have regard to time, so far as respects good faith and diligence; but if circumstances of a remarkable nature have prevented a party from complying strictly with his contract; still if he acted only negligently and not culpably, his case will

be treated with indulgence; and even favor. *id*

14. The payment of purchase money is not such part performance as takes the case out of the Statute. *id*

15. When *A* bought lands at auction, and after they were struck off to him, agreed to permit B to become equally interested in the land, and that B should receive the deed in his own name, *upon the condition* that he should pay the purchase money, and re-convey to A an undivided moiety of the land, upon A's applying therefor in a reasonable time and paying half the purchase money and interest, and half the value of all the improvements—B will be compelled to re-convey though the whole contract rests *in parol*, and he pleads the Statute of Frauds. *id*

16. The Statute of Frauds can never be so used or construed as to be the means of fraud. *id*

ERROR.

1. If the parties named in the record sent up to the Supreme Court, are not the same as those named in the writ of error, the proceedings are irregular, and the case will be dismissed. *Hudspeth* vs. *The State*, 20

2. If the appellant fails to file in the office of the clerk of the Supreme Court a transcript of the record and proceedings below, ten days before the first day of the term to which the appeal is returnable, the appeal will be dismissed upon the appellee's motion, and his filing such transcript. *Hawkins* vs. *Carrington*, 46

3. A recognizance in appeal conditioned "for the prosecution of the appeal," is not sufficient. *Jeffrey* vs. *Marshall*, 47

4. On judgment by default, the defendant below is entitled to all legal exceptions to the writ and service thereof. *Gilbreath* vs. *Kuykendall*, 50

5. There is no difference, in the Supreme Court, between cases on appeal and writs of error. They stand upon the same footing, and must be governed by the same rules of proceeding. *Reed* vs. *Latham*, 66

6. In either, the whole record is open for examination and revision, and the party injured has the full benefit of all and every objection and exception that would have availed him in the court below, though not formally made or taken there; *provided* it be not waived by the pleadings, cured by the Statute of jeofails, or aided by verdict. *id*

7. On error from a judgment of the City Court of Little Rock, the City must be made a party, and a summons to hear errors must be served upon the corporate authorities of said City. *Graham* vs. *The State*, 79

8. The attorney for the State is not authorized to enter an appearance for the City. *id*

9. But a failure to make the City a party by such summons, is no ground for dismissal here. *id*

10. A writ of error not directed to any particular clerk cannot be amended. *Ellis* vs. *Brown*, 82

11. When the facts have been submitted to the court, without the intervention of a jury, it must be inferred, in the absence of any showing upon the record to the contrary, that the evidence introduced was sufficient to warrant the verdict. *Eason* vs. *Fisher*, 90

12. It is error to enter judgment by default, without the service of process.—And such error is not cured by the defendant filing pleas after the entry of judgment by default, without obtaining leave to do so, or applying to the court to set aside the judgment. *Moore* vs. *Watkins*, 268

See PRACTICE IN THE SUPREME COURT.

EVIDENCE.

1. When an action is commenced before a Justice of the Peace, the cause of action must be truly stated in the *summons*, with sufficient certainty to apprize the

defendant of the legal character of the suit he is called upon to answer; and the plaintiff's evidence must correspond with and support the summons. Evidence of a cause of action entirely variant from it will not be received. *Jeffrey* vs. *Underwood*, 108

2. The Statute which provides that the case "shall be tried in the Circuit Court *upon its merits*," cures only irregularities and formal defects. *id*

3. The admission of improper testimony, is not such an irregularity as is cured by the Statute. *id*

4. When the summons was to answer an action "*on a note of hand*," a writing obligatory cannot be given in evidence, to sustain the action in the Circuit Court. *id*

5. A note for fifty dollars *to be paid* in a horse will not sustain an action of debt. *id*

6. If evidence is offered by one party in the court below, and no objection appears from the record to have been there made to its admission by the other party, it is too late to assign, in the Supreme Court, its admission there for error.—*Gage* vs. *Mellon*, 224

7. In an action brought by an administration to recover a slave of his intestate, a legal distributee of the estate of such intestate is not a competent witness. He is legally interested in the event of the suit, although upon his *voir dire* he *swears* that he has received his portion of the estate, and receipted to the administrator therefor, the receipt not being produced, or its non-production accounted for. *Brown* vs. *Hicks*, 232

8. The evidence of a Lovely claim is the certificate of the Register and Receiver, usually endorsed on the back of the proof, showing that the conditions of the act of May 24, 1828, and the stipulations of the treaty of May 23, 1828, have been complied with. When the settler is able to adduce the certificate, his right of entry is complete. *Logan* vs. *Moulder*, 313

9 When the grantor of a Lovely claim covenants that he has a good and valid claim, or full power and lawful authority to convey, he will be compelled to produce the evidence of his title, whenever it is legally demanded. *id*

10. In action of debt on writing obligatory, evidence that the plaintiff had borrowed a wagon of the defendant, which was to have been returned in four or five days, is not admissible to sustain a plea of payment. *Hester* vs. *Murphy*, 338

11. In trespass, it is not necessary to prove the boundaries and locality of the premises on which the trespass was committed. The Territorial law which provides that no other survey shall be evidence, applies only to suits where the *title* to land is in dispute. *Ledbetter* vs. *Fitzgerald*, 448

12. The identity of the close and the possession are capable of being established, by any person who knows the corners, or who can prove the plaintiff's possession. *id*

13. The rule that the allegations and proof must correspond applies to cases commenced before a Justice of the Peace so far as the plaintiff is bound to state the ground of his action, but no farther. *Ruddell* vs. *Mozer*, 503

14. His evidence must in every case be of the same legal character and description, as that mentioned in the summons, which the defendant is called upon to answer. *id*

15. The rule that one co-defendant cannot be witness for his co-defendant, and that a party on the record cannot testify in the case, is subject to this exception—That if there is no evidence adduced against one of the defendants, where several are joined in an action of trespass, the court will direct the jury to find for the defendant, and then permit him to be introduced as a witness. *Gray* vs. *Nations*, 557

16. If several persons be proved to be co-trespassers, by competent evidence, the declarations of one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object. *id*

17. Where the record shows that one co-

defendant had possession of part of the goods taken, and that he was present when the pretended sale of the same goods was made, and when they were taken away, any admissions or statements made by him, showing a community of design to have existed among all the defendants, and that they were accomplices in the transaction, is legitimate proof. *id*

18. And if such admissions were admitted in the court below, and the record does not show their nature and character, this court will presume that they were made in the presence of the other defendants, and were coupled with other circumstances and testimony, showing a community of design and concord of action on the part of the person making them, and his co-defendants. *id*

19. In replevin, any evidence which shows that the defendants obtained possession of the goods, from any person not authorized to sell, is sufficient evidence of an unlawful taking. *id*

See CONSIDERATION, 1, 2; ATTESTING WITNESS; BILLS OF SALE, 1.

EXECUTORS AND ADMINISTRATORS.

1. Where a suit is revived in the name of an executor or administrator, the pleadings stand in the same atitude as before the abatement, and only the names of the parties are changed upon the record. It is a legal fiction by which the pleadings, &c. are considered as being in the name of the executor or administrator. *Bentley* vs. *Dickson*, 165

2. In a suit against a person in a particular capacity, for example, against him in the capacity of sheriff, guardian, executor, or administrator, it is necessary to be stated in the declaration that he is sued *as executor*, *as administrator*, *&c.* *Brown* vs. *Hicks*, 232

3. The expression in the declaration, "the plaintiff *being* the executor as aforesaid," is not a substantive averment of his suing *as such*, or in his representative capacity, and nothing by intendment can supply the allegation, "*as* executor as aforesaid." *id*

4. A declaration against "A B," executor as aforesaid," is not a declaration against him *as* such executor, nor will he be liable in such action in his representative capacity. *id*

5. The term, "Executor as aforesaid," or "*being* executor as aforesaid," are mere words of description; the term, "as executor aforesaid," has but one meaning, which is fixed by law, and is, that the party sued is sued in his representative capacity. *id*

6. Under the Territorial Statute, the privilege given to the husband, wife, or distributees of an intestate, to take out letters of administration, was limited to the term of sixty days, and that to the creditors, to ninety days, after the death of the intestate; and on the failure of either to appear and take out letters within the time allowed, their right or privilege was lost and extinguished, and all other persons were placed on an equal footing with them. *Grantham* vs. *Williams*, 270

7. It was not necessary for a citation to issue to the widow, but her right was lost, if not exercised within the sixty days. *id*

8. No one except a creditor was entitled to apply for a citation. It was a privilege given to the creditors for their protection against waste of the estate, and by exercising it, they could limit the time within which those first entitled might administer, to thirty days' service of the citation. *id*

6. The widow had no priority of right over a distributee. To elect between them was left to the sound discretion of the County Court; and the Supreme Court will presume, that in the exercise of that discretion the County Court acted correctly. *id*

10. The established rule in England now is, that a when a suit is brought by an executor or an administrator, as such, if the money when recovered would be assets, counts may be joined upon causes of action accruing to the testator or intestate in his lifetime, and to the executor or administrator after his death. *Lyon* vs. *Evans*, 349

11. But in such cases it must be stated

that the cause of action accrued to the plaintiff *as* executor, or *as* administrator. *id*

12. Where, in an action by an administrator on a Sheriff's bond, in the first breach a cause of action is assigned which accrued to the intestate in his lifetime; in the second breach the defendant is charged with an escape, after the death of the intestate, of a prisoner taken in execution on a judgment recovered by intestate in his lifetime; but in the third breach it is merely alleged that the plaintiff, administrator of P. H., recovered judgment, on which execution issued, and there was an escape; and this breach does not show that such judgment was recovered by the plaintiff *as* administrator, or that it was founded on any debt or duty to the intestate or any liability which had accrued to the plaintiff *as* administrator, this must be considered as setting forth a cause of action belonging to the plaintiff in his individual, private capacity; and there is therefore a misjoinder of breaches which is fatal. *id*

13. The plea of *ne unq. adm.* is therefore to answer to the said breach; and when pleaded to the whole declaration, is invalid as to any part thereof. *id*

EX POST FACTO LAWS.

1. An *ex post facto* law declares an offence to be punishable in a manner in which it was not punishable when committed, and relates exclusively to criminal proceedings. *Taylor* vs. *The Governor*, 21

2. The provision in the State Constitution that no holder or collector of public money shall be eligible to any office of trust or profit, until he has paid over and accounted for all moneys for which he may be liable, is not repugnant to, or in violation of the Constitution of the United States. *id*

F

FARO.

See INDICTMENT.

FORCIBLE ENTRY AND DETAINER.

1. Where there is irregularity in the proceedings of the justices in forcible entry and detainer under the Territorial Statute, the cause may be removed into the Circuit Court by certiorari, and there the proceedings set aside. *Thorn* vs. *Reed*, 480

2. Such writ of certiorari may be issued by the clerk, upon the order of the judge. *id*

3. No bill of exceptions to any opinion or judgment of the justices, can be taken in an action of forcible entry and detainer before them. *id*

4. The seventh section of the Territorial act concerning forcible entry and detainer, specifies two classes of detainer, wholly distinct and independent, and the remedy applied to which is essentially different. *id*

5. Where the defendant obtained possession "without force, by disseizin," he must have notice to quit; and the action of forcible detainer does not lie in such case, unless the plaintiff has a legal right to the possession. *id*

6. The defendant may in such case traverse the plaintiff's right of possession; and if he show that the plaintiff's term has expired, or that he never had a lawful right to the possession, the action is barred. *id*

7. The other class of cases is, where a tenant holds over, after the term for which the premises were let or demised to him has expired. In such a case the plaintiff is not required to show any title whatever, when, as landlord, he sues a tenant who holds over. *id*

8. In such case he will recover if he show the possession to be his, though the *right* of possession may be in one person, and the right of property in another. His title is not in issue. The tenant is estopped from denying it. *id*

9. Where, therefore, by a covenant between the parties, the defendant has bound himself to give up and surrender to the plaintiff the possession of the premises on a certain day, and he holds over, it is

not competent for him, in an action of forcible detainer under the Territorial Statute, to prove that the plaintiff had but an estate *pur autre vie*, which had expired before the commencement of the suit. *id*

10. Where an action of forcible entry and detainer is brought into the Circuit Court by certiorari, it cannot be remanded to the justices. The Justices' Court was dissolved after they had tried the cause. *id*

FRANCHISES.

1. The office of director of the Real Estate Bank is a public franchise. *The State* vs. *Ashley*, 513

See QUO WARRANTO.

FRAUD.

1. A misrepresentation by the seller to the buyer of the advantages to result from the purchase, however contrary to good faith and sound morals, cannot form the basis of any suit, either at law or in equity. *Dugan* vs. *Cureton*, 31

2. It is not every misrepresentation which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it. *id*

3. The common language of puffing and commendation of commodities, is not such a fraud as will avoid a contract. *id*

3. A party will not be aided after a trial at law, unless he can impeach the justice of the verdict or report, by facts or on grounds of which he could not have availed himself, or was prevented from doing it by fraud, accident, or the act of the opposite party, unmixed with negligence or fault on his part. *id*

G

GAMING.

See INDICTMENT.

GIFTS.

1. Gifts have no reference to the future, but go into immediate and actual effect. *Hynson* vs. *Terry*, 83

2. Delivery is essential, both at law and in equity, to the validity of a gift.—Without delivery the title does not pass. *id*

3. Actual delivery cannot be dispensed with, unless the gift be by deed, or other instrument of writing. *id*

4. In this country there is not the slightest difference between real and personal estate, except so far as such difference is created by particular Statutes. *id*

5. There can be no reservation, condition, or limitation to a gift, by parol, to take effect in future. *id*

6. A parol gift, without delivery, is ineffectual, even between donor and donee. *id*

GOVERNOR.

1. The case of *Taylor* vs. *The Governor*, (*ante*, *p.* 21,) does not decide that a mandamus can issue to the Governor. *Hawkins* vs *The Governor*, 570

2. The Governor of the State is not amenable to the judiciary for the manner in which he performs, or for his failure to perform his legal or constitutional duties. *id*

3. His acts, being political, must of course be politically examined in the manner pointed out by the Constitution. *id*

4. The Constitution assigns to him no *ministerial* duties to be performed, nor can the law enjoin upon him any such duty. *id*

5. The principle, that, where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, the individual injured has a right to resort to the law for redress; applies only to such officers as have no legal or constitutional discretion left them. All the officers of the government, except the President of the United States and the Executives of the different

States, are liable to have their acts examined in a court of justice. *id*

6. Whenever the heads or officers of a department are the political or confidental agents of the Executive, appointed merely to execute his will, it is clear that in such cases their acts are his acts—and whatever opinion may be entertained of the manner in which their discretion may be used, there is no power in the courts to compel that discretion. *id*

7. But if the Governor had signed and sealed the commission of an officer, and delivered it to the Secretary of State, to be attested and recorded, the duties of the Secretary being in that behalf purely ministerial, the court would, by mandamus, compel him to perform them. *id*

8. Each department of the government has the right to judge of the Constitution for itself—but each is responsible for an abuse or usurpation of power, in the mode pointed out by the Constitution. *id*

9. The Governor is placed under a double responsibility—that of the right of suffrage, and that of impeachment. He is answerable in no other way for his official conduct, while he continues in the exercise of his office. *id*

10. All the duties imposed upon the Executive by the Constitution, including the issuing of commissions, are strictly and exclusively political. *id*

12. The Supreme Court, therefore, has no power to award a mandamus to the Governor to compel him to grant a commission. *id*

GRANTOR AND GRANTEE.

See COVENANT.

I

INDICTMENT.

1. Under a law to punish any person "who shall be guilty of betting any money or other valuable thing," on certain games, among which faro is named, the allegation in the indictment that the defendant "did game, play, and bet with cards with certain persons, at a certain unlawful game commonly called faro;" and that the same defendant "did, then and there, by playing at the same unlawful game commonly called faro, with the said persons, at one time and sitting; win of the said persons a large sum of money, to wit, one dollar, &c.," is sufficient. No rational man can hear this charge read, without understanding from it that the defendant was guilty of betting money at a game commonly called faro. *Graham* vs. *The State*, 171

2. The City Court, being a court of limited and special jurisdiction, the allegation in the indictment, that the offence was committed "*at* the City of Little Rock," is a sufficient allegation that it was committed within the jurisdiction of the court, at least in indictments for misdemeanors, where only a pecuniary fine is imposed. So much strictness is not required in these indictments, as in indictments for offences of a higher grade.—*id*

3. The word "at" is often synonymous with the word "in," and may with propriety be so understood and regarded, in the venue of an indictment for a misdemeanor. *id*

4. An objection to an indictment for a misdemeanor, founded on a single statute, that the conclusion thereof is in the plural, instead of the singular number, is not valid, and will not be allowed; and an indictment for a misdemeanor in the City Court concluding "contrary to the laws and Statutes of the Territory of Arkansas, and the ordinances of the city of Little Rock," is good. *id*

INFORMATION.

See QUO WARRANTO.

INSTRUCTIONS.

1. Where instructions upon abstract questions of law are given or refused by the court below, they will not be noticed in the Supreme Court, unless by bill of exceptions so much of the evidence in the case as presented the questions of law or testimony to which the instructions applied, is brought before the court. *Danley* vs. *Edwards*, 437

2. It is the duty of the party excepting, to set out so much of the testimony as raises the question of law or evidence contained in the bill of exceptions. *id*

INTEREST.

1. In case of a judgment by confession, formally and properly entered up, if there be error in the computation of interest, it is too late, in the Supreme Court, to take advantage of it. *Jeffries* vs. *Morgan*, 169

2. The Circuit Court has no jurisdiction of a suit upon a money bond for one hundred dollars; and jurisdiction is not given, though the plaintiff declares for principal and *interest*, and so claims more than a hundred dollars. *Fisher* vs. *Hall and Childress*. 275

J

JUDGMENT.

1. In a suit against an administrator, upon issue upon a replication that there are goods unadministered, to the plea of *plene administravit*, the verdict ought to find the amount of assets unadministered; and if it do not, a judgment upon it is bad. *Jarrett* vs. *Wilson*, 137

2. And if in such case the judgment be, "that the plaintiff recover of the defendant his debt and damages, &c. to be levied of the goods, &c. of his intestate, if any he hath unadministered, and if none, of his own proper goods, &c.," it is equally bad, whether one part of the judgment might be affirmed, and the other reversed, or not. *id*

3. If one part could be affirmed and the other reversed, still the situation of the plaintiff could not be bettered. His own property would still be liable, if he has no assets unadministered. *id*

4. The Statute of jeofails does not extend to such a case. *id*

5. In an action of debt on recognizance in appeal, it is error to enter judgment by *nil dicit* for the whole amount of the recognizance. A writ of enquiry should be awarded, to assess the damages.—*Ashley* vs. *Brazil*, 144

6. If a judgment by confession is formally and properly entered up, the party confessing is estopped, by his own voluntary act, from questioning its correctness.—*Jeffries* vs. *Morgan*, 169

7. In such case, if there be error in the computation of interest, it is too late in the Supreme Court, to take advantage of it. *id*

8. It is error to enter judgment by default, without service of process. And such error is not cured by the defendant filing pleas, after entry of judgment by default, without obtaining leave to do so, or applying to the court to set aside the judgment. *Moore* vs. *Watkins*, 268

9. Where the court below, in the progress of the cause, rendered judgment for costs on a motion to abate the writ—such judgment was not warranted by law; yet it cannot be assigned for error, when the case is brought up by writ of error to the final judgment. The validity of the final judgment on the merits, is not affected by such an incidental judgment. *Dyer* vs. *Hatch*, 339

10. Where the verdict is for *one hundred and seventy-five dollars*, and the judgment is for "one hundred and seventy-five, the amount of his damages assessed as aforesaid," the judgment is good, and does not vary from the verdict. *id*

JURISDICTION.

1. Where Courts of Chancery have once taken jurisdiction of a case for one purpose, they will generally retain the cause until the whole subject is disposed of;—but the primary and original object of the suit must be one clearly within their jurisdiction; nor will they even then always retain the bill; as when the allegation which gives the jurisdiction, not being sustained on the hearing, the remedy sought appears to be complete at law. *Dugan* vs. *Curelon*, 31

2. Where a defendant does not appear before a Justice of the Peace, and make his objection to the illegal service of process, he admits the jurisdiction of the

Justice, and his right to try the cause. *McKee* vs. *Murphy*, 55

3. Where a court has no jurisdiction of the case, there can be no judgment for costs. *id*

4. The Circuit Courts have a supervising control over the County Courts, in matters of allowance against estates, and power to issue to the County Courts writs of *supersedeas*, *certiorari*, *habeas corpus*, *mandamus*, and *quo warranto*. *Webb* vs. *Hanger*, 121

5. The Supreme Court has the same power, and if the party aggrieved chooses to present his case at once to the Supreme Court, he is entitled to do so. *id*

6. The Supreme Court can take no jurisdiction of any case brought into it by appeal, where the sum in controversy is less than one hundred dollars. *McCamy* vs. *Smith*, 142

7. The Supreme Court of the Territory had appellate jurisdiction in cases only in which the amount in controversy was one hundred dollars or upwards. *Ashley* vs. *Brazil*, 144

8. An appeal taken to the Supreme Court, in a case in which that court has no jurisdiction, is a nullity; and the recognizance of the appellant in the court below, to prosecute his appeal, is void.—The appellees sustain no injury by a non-compliance with its conditions, and no action lies upon it. *id*

9. In order to give the Supreme Court jurisdiction on appeal, the amount in controversy must be one hundred dollars, or upwards. *Reynolds* vs. *Sneed*, 199

10. If the complainant, in chancery, claims more by his bill than one hundred dollars, and a decree for less is given in his favor, he may appeal, but the defendant cannot. *id*

11. A judgment of the City Court of Little cannot be removed directly into the Supreme Court for revision by writ of Error, any more than a judgment of a Justice, and is placed on precisely the same footing. *Hall* vs. *State*, 201

12. The jurisdiction of the City Court and Justices of the Peace, was concurrent in such case, and the right of appeal being secured in like manner, and to the same tribunal, the parties were restricted to that remedy. *id*

13. Where the judgment in the City Court was for one hundred dollars, founded upon a *sci. fa.* on a recognizance in a criminal case, in the sum of two hundred dollars, it was a civil cause, the amount in controversy exceeded one hundred dollars, and the City Court had no jurisdiction. *id*

14. In a case originally commenced before a Justice, if no appeal was prayed or granted, the Circuit Court has no authority to take or excuse jurisdiction. *Ellis* vs. *McHenry*, 205

15. Justices of the Peace having by law exclusive original jurisdiction in all matters of contract, except covenant, where the sum in controversy is one hundred dollars or under, two or more separate causes of action, each less than one hundred dollars, but amounting in all to more than one hundred, cannot be joined together in one declaration so as to give the Circuit Court jurisdiction. *Berry* vs. *Linton*, 252

16. This principle does not interfere with the settled rule, that the plaintiff may join distinct causes of action in several counts of the same declaration. *id*

17. The best criterion as to such joinder seems to be, that where the causes of action are of the same nature, and may properly be the subject of counts in the same species of action, they may be joined. *id*

18. The question of jurisdiction is not glanced at in the rules or decisions upon this subject. *id*

19. It is not the aggregate amount demanded in the declaration, but the amount of each separate demand or cause of action, which undermines the jurisdiction. *id*

20. The Circuit Court has no jurisdiction of a suit upon a money bond for one hundred dollars; and jurisdiction is not given though the plaintiff declares for principal and interest, and so claims more than one hundred dollars. *Fisher* vs. *Hall*, 275

21. The Legislature may change and mod-

ify the proceedings and practice of the courts, but cannot interfere with their constitutional powers or jurisdiction.— *id*

22. All the courts of this State are courts of limited, and prescribed jurisdiction. Therefore, if on the face, or from the construction, of the record and proceedings. it appears that a court has no jurisdiction, the case must be dismissed on motion. *id*

23. The Constitution has conferred upon the Supreme Court, as the final tribunal to interpret, pronounce and execute the law, to decide on controversies and enforce rights, powers and jurisdiction of an appellate nature only. *State* vs. *Ashley*, 279

24. It leaves with the inferior tribunals the original cognizance of all cases and controversies between private parties, as well as all controversies in which the State may be a party, or otherwise interested. in which the sovereignty, or sovereign rights, powers, and franchises of the State are not involved. *id*

25. But in cases involving the civil rights of the sovereign power of the State, affecting vitally its character, and the proper administration of the government itself, in which the whole people, and every individual member of the community has a direct, immediate, and most sacred interest; where the exercise of a public right or public franchise is the subject of controversy, the Supreme Court has original jurisdiction, and is vested with power to issue, hear and determine writs of quo warranto. *id*

26. The information in nature of quo warranto being a *criminal*, and the *writ* of quo warranto a *civil* proceeding, the Supreme Court has no jurisdiction in case of such information, under the clause of the Constitution which authorizes it to issue *writs* of quo warranto. *id*

27. The power granted to the Supreme Court, by the Constitution, to issue "other remedial writs," embraces only such writs, other than those specifically enumerated, as may be properly used in the exercise of appellate powers, or of the power of control over inferior or other courts, expressly granted by the Constitution. *id*

28. The Supreme Court has no original jurisdiction in any case where the proceeding is, or must necessarily be, of a criminal nature. The proceeding by information in nature of a quo warranto is of a criminal nature, and the Supreme Court has, therefore, no jurisdiction thereof. *id*

29. Prior to the adoption of the Constitution of the State, the jurisdiction of the Circuit Court, in all criminal cases of which they had cognizance, was exclusive. *State* vs. *Graham*, 428

34. The Constitution confirms in the Circuit Court a part of the powers with which they were then invested by the Statute, without divesting them of any power conferred upon them by law. *id*

31. There is no conflict between the provisions of the Statute, conferring on the Circuit Court exclusive jurisdiction in criminal cases, and the appellate jurisdiction conferred by the Constitution upon the Supreme Court. *id*

32. The appellate jurisdiction of the Supreme Court, though co-extensive with the State, is no where defined in the Constitution. It depends upon the law as it stood when the Constitution was adopted, subject to such alterations as the Legislature prescribe by law. *id*

33. The Legislature may, therefore, by law, at any time, change or modify the the different subject matters to which the appellate power of the Supreme Court shall extend, *making it cover more or less space, as they shall think proper.*— *id*

34. The provisions in the schedule of the Constitution, and the act of 1836, leave the jurisdiction and powers of the Circuit Courts over criminal cases, precisely as they stood when the constitution was adopted. *id*

35. When a suit is brought against persons residing in different counties, if one of the defendants resides in the county where the suit is brought, it is sufficient; and if not, it must be taken advantage

of by plea to the jurisdiction, and not by motion to dismiss. *Hughes* vs. *Martin*, 455

39. Under the Territotial law, the prayer and grant of an appeal from the decision of a Justice to the Circuit Court, conferred jurisdiction upon the Circuit Court; and the jurisdiction did not depend upon the giving of bail in appeal, or the sufficiency of the bail given. *Smith* vs. *Stinnett*, 497

36. When no special bail was given before the Justice, or when such bail, being insufficient, is not perfected in the Circuit Court, the appeal will be dismissed, but not on the ground of want of jurisdiction. *id*

38. This, however, is an objection which it rests upon the appellee to make, and if he goes to trial in the Circuit Court, or takes judgment by default without making it, he waives it as expressly as though he had placed his waiver upon the record. *id*

39. If he does so waive it, the appellant cannot assign for error that there was no special bail, and that the Circuit Court had no jurisdiction. He cannot take advantage of his own wrong. *id*

See MANDAMUS.

JURY.

1. To charge a jury, that "from the law of the case the court is of the opinion that the plaintiffs have not made out such a case as will entitle them to recover; but the facts are with the jury," is *not* such a charging as to matters of fact as is prohibited by the Constitution. In this respect the Constitution has not altered the common law in the slightest degree. *Hynson* vs. *Terry*. 83

JUSTICES OF THE PEACE.

1. An appeal granted from the judgment of a Justice after a lapse of thirty days from the rendition of the judgment, would be unauthorized and void, and would not warrant the Circuit Court in assuming jurisdiction. *Goings* vs. *Mills*, 11

2. If the original process before a Justice of the Peace is correct, it makes no difference on appeal whether it is regularly served or not. *McKee* vs. *Murphy*, 55

3. If the defendant does not appear before the Justice, and make his objection to the service, he admits the jurisdiction of the Justice and his right to try the cause. *id*

4. The defendant having appealed to the Circuit Court, the plaintiff must be permitted to sustain his action on a new trial, upon its merits. *id*

5. When a court has no jurisdiction of the case, there can be no judgment for costs. *id*

6. When an action is commenced before a Justice of the Peace, the cause of action must be truly stated in the *summons*, with sufficient certainty to apprize the defendant of the legal character of the suit he is called upon to answer, and the plaintiff's evidence must correspond with and support the summons. Evidence of a cause of action entirely variant from it, will not be received. *Jeffrey* vs. *Underwood*, 108

7. The Statute which provides that the case "shall be tried in the Circuit Court on its merits," cures only irregularities and formal defects. *id*

8. The admission of improper testimony is not such an irregularity as is cured by the Statute. *id*

9. When the summons was to answer an action "*on a note of hand*," a writing obligatory cannot be given in evidence to sustain the action in the Circuit Court. *id*

10. Summoning a party to appear before a Justice, in an action of debt, does not make it an action of debt. *id*

11. It is not necessary to state in the summons the species of action, whether in *debt, covenant, &c.*; and if inserted it is surplusage. *id*

12. In a case originally commenced before a Justice of the Peace, if no appeal was prayed or granted, the Circuit Court has no authority to take or exercise jurisdic-

tion thereof. *Ellis* vs. *McHenry*, 208

13. Justices of Peace having by law exclusive, original jurisdiction in all matters of contract, except covenant, when the sum in controversy is one hundred dollars and under, two or more separate causes of action, each less than one hundred dollars, but amounting in all to more than one hundred dollars, cannot be joined together in one declaration, so as to give the Circuit Court jurisdiction. *Berry* vs. *Linton*. 252

14. When there is irregularity in the proceedings of the Justices in forcible entry and detainer under the Territorial Statute, the cause may be removed into the Circuit Court by certiorari, and there the proceedings set aside. *Thorn* vs. *Reed*, 480

15. Such writ of certiorari may be issued by the clerk, upon the order of the judge. *id*

16. No Bill of exceptions, to any opinion or judgment of the Justices, can be taken in action of forcible entry and detainer before them. *id*

17. When an action of forcible entry and detainer is brought into the Circuit Court by certiorari, it cannot be remanded to the Justices. The Justices' Court was dissolved after they had tried the cause. *id*

18. The rule that the allegations and proof must correspond, applies to cases commenced before a Justice of the peace, so far as the plaintiff is bound to state the grounds of his action, but no farther. *Ruddell* vs. *Mozer*, 503

19. His evidence must in every case be of the same legal character and description, as that mentioned in the summons, which the defendant is called upon to answer. *id*

20. In every other respect the proceedings are *ore tenus*. *id*

21. No Bill of exceptions can be taken before a Justice; but either party may take them on the trial upon appeal in the Circuit Court, and will have the same advantage of them when improper testimony is admitted, or proper testimony is excluded, as though the pleading had been formally drawn out in form. *id*

L

LANDLORD AND TENANT.

See Forcible Entry and Detainer.

LIMITATIONS.

1. The plaintiffs were described as A B and C B, his wife, and D E and F G, infants, &c., all heirs and legal representatives of H L. It would be a good replication to the Statute of limitations, that D E, F G, and C B were infants within five years, and that A B claimed in right of his said wife. *Danley* vs. *Edwards*, 437

2. But if the replication is, that all were infants, the plaintiffs are bound to prove that the husband, as well as the wife, was an infant within five years next before the institution of the suit. And if the court below instructs the jury that they are not bound to prove it, it is error. *id*

LOVELY CLAIMS.

1. The evidence of a Lovely claim is the certificate of the Register and Receiver, usually endorsed upon the back of the proof, showing that the conditions of the act of May 24, 1828, and the stipulations of the treaty of May 23, 1828, have been complied with. When the settler is able to adduce this certificate, his right of entry is complete. *Logan* vs. *Moulder*, 313

2. When the grantor of a Lovely claim covenants that he has a good and valid claim, or full power and lawful authority to convey, he will be compelled to produce the evidence of his title, whenever it is legally demanded. *id*

3. In such case if the vendee suspect the title to be defective he is not bound to wait till he is legally evicted, but may commence suit at any time, and maintain his action, unless the vendor show

that he has complied with the condition of his bond. *id*

4. When the plaintiff declares, therefore, on a covenent of seisin, of good right, full power and lawful authority to convey, it is unnecessary to allege an eviction; for the covenant is broken, if at all, at the very moment it is made. *id*

5. When the breach in the declaration is, that the defendant had no title, to the claim he conveyed, and the plea answers thereto that he "*had some title*," the plea is no answer, and a demurrer to it is properly sustained. *id*

6. The ultimate extent of the vendor's responsibility under any and all of the usual covenants in a deed, is the purchase money with interest, and the covenant or deed is evidence of the purchase money. *id*

7. An instruction, therefore, that the measure of damages was the value of a Lovely claim at the date of the covenant, is erroneous. *id*

M

MANDAMUS.

1. A mandamus is not a writ of right, but within the discretion of the court, and the party applying for it must show a specific legal right, and the absence of any other specific legal remedy. *Goings* vs. *Mills*, 11

2. The prayer of an appeal within thirty days after the judgment rendered, the offer of special bail as required by law, and a refusal by the Justice to grant the appeal, if shown upon the application for the *mandamus*, might have been sufficient to authorize the court to grant the writ, and if such facts appeared upon the return to the writ, might furnish a sufficient ground for the court to take cognizance of and adjudicate the cause upon its merits. *id*

3. Unless these facts or others appear upon the record, a writ of mandamus will be held to have irregularly issued, and to have given no jurisdiction to the Circuit Court. *id*

4. The Supreme Court has the power to issue writs of *mandamus*. The party applying for this writ must show that he has a specific legal right, and no other adequate, specific legal remedy. *Taylor* vs. *The Governor*, 21

5. The Circuit Courts have a superintending control over the County Courts in matters of allowance against estates, and power to issue to the County Courts writs of *supersedeas, certiorari, habeas corpus, mandamus*, and *quo warranto*.—*Estill* vs. *Hanger and Winston*, 123

6. The Supreme Court has the same power, and if the party aggrieved chooses to present his case at once to this court, he is entitled to his writ. *id*

7. A party applying for a *mandamus* must show that he has a legal right to it, and no other adequate, specific legal remedy. *id*

8. The case of *Taylor* vs. *The Governor*, (*ante, p.* 21,) does not decide that a mandamus can issue to the Governor.—*Hawkins* vs. *The Governor*, 570

9. The Governor of the State is not amenable to the judiciary for the manner in which he performs, or for his failure to perform his legal or constitutional duties. *id*

10. His acts being political, must of course be politically examined in the manner pointed out by the Constitution. *id*

12. The Constitution assigns to him no *ministerial* duties to be performed, nor can the law enjoin upon him any such duty. *id*

13. The principle, that, where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, the individual injured has a right to resort to the law for redress, applies only to such officers as have no legal or constitutional discretion left them. All the officers of the government, except the President of the United States, and the Executives of the different states, are liable to have their acts examined in a court of justice. *id*

14. Whenever the heads or officers of a department are the political or confidential agents of the Executive, appointed merely to execute his will, it is clear

that in such cases their acts are his acts; and whatever opinion may be entertained of the manner in which their discretion may be used, there is no power in the courts to compel that discretion. *id*

15. But if the Governor had signed and sealed the commission of an officer, and delivered it to the Secretary of State, to be attested and recorded, the duties of the Secretary being in that behalf purely ministerial, the court would, by mandamus, compel him to perform them. *id*

16. Each department of the government has the right to judge of the Constitution for itself—but each is responsible for an abuse or usurpation of power, in the mode pointed out by the Constitution. *id*

17. The Governor is placed under a double responsibility—that of the right of suffrage, and that of impeachment. He is answerable in no other way for his official conduct, while he continues in the exercise of his office. *id*

18. All the duties imposed upon the Executive by the Constitution, including the issuing of commissions, are strictly and exclusively political. *id*

19. The Supreme Court, therefore, has no power to award a mandamus to the Governor to compel him to grant a commission. *id*

MORTGAGE.

1. A mortgage given for a bond debt, is but a collateral security to the bond. It is neither of a higher order, nor a payment of the debt; and a plea which states, not in direct terms that the defendant had paid the *debt*, but that he had paid all the claims for which the mortgage was given, is bad on general demurrer. *Eason* vs. *Fisher*, 90

MOTION.

See PRACTICE IN CIRCUIT COURT; PRACTICE IN ERROR.

N

NEW TRIAL.

1. Where a motion in arrest of judgment, and one for a new trial, are filed at the same time, it makes no difference which is first decided. *Reed* vs. *Latham*, 66

2. Where a defendant takes upon himself the burden of proof, and fails to prove the issue, if a verdict be rendered in his favor, a new trial will be granted, and if refused it is error. *id*

3. Where a motion for a new trial is made, "because the finding of the jury is contrary to law; and because the damages are excessive and unreasonable, and exceed the amount sworn to by the plaintiff in his affidavit to hold to bail;" if the evidence given on the trial is not brought before the Supreme Court; if it is not shown that illegal or incompetent testimony was admitted, or legal or competent testimony excluded; or the instructions given or refused by the court below do not appear, the Supreme Court is bound to presume that the decision of the court below, overruling the motion for a new trial was correct. *Dyer* vs. *Hatch*, 339

4. And the Supreme Court, in such case, will presume the decision of the court below to have been correct, although an insufficient reason was assigned for such decision. *id*

See EQUITY.

NON EST FACTUM.

See PLEAS AND PLEADINGS.

NON-RESIDENTS.

See BOND FOR COSTS.

O

OFFICIAL BONDS.

1. To prove that a Sheriff's bond was not approved by the County Court, does not support the affirmative allegation that the bond was delivered as an escrow till it should be approved; and such proof cannot be admitted. *Reed* vs. *Latham*, 66

2. A bond delivered to the *obligee* cannot

be an escrow; and a Sheriff's bond, delivered to the Clerk of the County Court, is the same as if delivered to the obligee, and cannot be an escrow. *id*

P

PARTIES TO ACTIONS.

1. It is a general rule that all actions upon contracts, whether expressed or implied, by parol, under seal, or of record, must be brought in the name of all the parties legally interested. *Phillips* vs. *Pennywit*, 59

2. Non-joinder of a party plaintiff who ought to be joined, is good cause of demurrer, or fatal on arrest of judgment or in error, may be pleaded in abatement or is ground of non-suit. The same principle applies to part owners of a ship: they are partners as to freight. *id*

3. Dormant partners need not join: nor infants, nor nominal partners. *id*

4. Where one partner represents himself as acting on his own account, and the firm sue, they will be non-suited. *id*

5. The party with whom the contract has been expressly made, may alone maintain the action, though others may be interested. *id*

6. Where all the contracts of a vessel and all its transactions are carried on in the name of one part owner, he may sue alone: the other part owner is merely a dormant partner. *id*

7. On error from a judgment of the City Court of Little Rock, the City must be made a party, and a summons to hear errors must be served upon the corporate authorities of said city. *Graham* vs. *The State*, 79

8. The Attorney for the State is not authorized to enter an appearance for the city. *id*

9. But a failure to make the city a party by such summons, is no ground for dismissal here. *id*

10. The assignor of a bond negotiable by Statute, is not competent to sue in his own name, to the use of the assignee;—and in such suit, a plea alleging that the bond was assigned before the institution of the suit, is good; and this is the law, whether the bond be payable to order or not. *Gamblin* vs. *Walker*, 220

11. Where Statutory bonds are payable to the Governor, in his official character, he holds the legal interest therein, merely as a naked trust; and in suits upon such bonds, the person for whose use such suit is prosecuted, is regarded as the real plaintiff in the case. *Lyon* vs. *Evans*, 349

PARTNERS.

1. One partner cannot bind another by deed, even in commercial dealings. But this rule does not apply, where one partner by the authority of his co-partner, and in his presence, executes a deed for both of them, under one seal. *Lee* vs. *Onslott*, 266

2. A bond executed by one partner, to bind his co-partner to comply with an award, will be binding on such co-partner, if the award be accepted or ratified by him. *id*

See PARTIES TO ACTIONS, 1, 2, 3, 4, 5, 6.

PART OWNERS.

See PARTIES TO ACTIONS, 1, 2, 3, 4, 5, 6.

PART PERFORMANCE.

1. Although it is to be regretted that the Statute of Frauds has been virtually set aside by the doctrine of part performance, yet that doctrine is so well established that this court is bound to be governed by the decisions. *Keatts* vs. *Rector*, 391

2. Nothing can be considered part perform-

ance, which does not put the party in such a situation that a fraud can be practised upon him by the other, unless the agreement is performed throughout. *id*

3. Acts, to constitute part performance, must clearly appear to have been done solely with a view to the contract being performed. *id*

4. Possession, if delivered and obtained solely under the contract, and in reference exclusively to it, will take the case out of the Statute; and especially if the party has made repairs and improvements. *id*

5. So where the party seeking relief has been placed by the contract in such a situation that he cannot put *in statu quo* without injury, by reason of his having performed his part: there the case is taken out of the Statute. *id.*

6. Courts of Equity have regard to time, so far as respects good faith and diligence; but if circumstances of a remarkable nature have prevented a party from complying strictly with his contract—still if he has acted only negligently and not culpably, his case will be treated with indulgence, and even favor. *id*

7. Payment of purchase money is not such part performance as takes a case out of the Statute. *id*

8. Where A bought lands at auction, and after they were struck off to him, agreed to permit B to become equally interested in the land, and that B should receive the deed in his own name, *upon the condition* that he should pay the purchase money, and should re-convey to A an undivided moiety of the land, upon A's applying therefor in a reasonable time, and paying half the purchase money and interest, and half the value of all improvements—B will be compelled to re-convey, though the whole contract rests in *parol*, and he pleads the Statute of Frauds. *id*

9. The Statute of Frauds can never be so construed as to be a means of fraud. *id*

PAYMENT.

1. If a party attempts to plead in bar a payment after suit commenced, he must show a full payment, not only of the debt and interest, but also of all costs accrued in the suit. *Goings* vs *Mills*, 11

2. A constable is not authorized to receive payment of a debt, by his official character, unless when he obtains that authority by a writ of execution; and a payment made to him before the issuance of an execution will not release the party making it: nor will the constable's receipt be any defence to the action. *id*

3. In an action of debt on a writing obligatory, evidence that the plaintiff had borrowed a wagon of the defendant which was to have been returned in four or five days, and was not returned, is not admissible to sustain a plea of payment. *Hester* vs. *Murphy*, 338

PLEAS AND PLEADING.

1. If a party attempts to plead in bar a payment made after suit commenced, he must show a full payment; not only of the debt and interest, but also of all costs accrued in the suit. *Goings* vs. *Mills*, 11

2. When the plea is *non est factum*, generally, the proof lies on the plaintiff; but when a special *non est factum* is pleaded, it devolves upon the defendant. *Reed* vs. *Latham*, 66

3. A plea denying the execution of the deed, and a plea admitting the execution, but averring that the conditions have not been broken, cannot be pleaded together. *id*

4. Where there are two issues, material, inconsistent, and contradictory, no valid judgment can be given upon them. *id*

5. In an action upon a bail bond given in detinue, an assignment of a breach, that judgment was rendered against the *administrator* of the defendant for the property; and that such judgment remains in full force and effect, and unsatisfied, does not constitute a good breach. *Chandler* vs. *Byrd*, 152

6. An amended declaration filed in the court below, without leave either asked or given to amend, is not part of the

record, and entitled to no attention; and it will be here presumed that upon demurrer to the declaration, the court below treated the amendment as a nullity, and considered the demurrer as applying to the original declaration. *Bentley* vs. *Dickson*, 165

7. When a suit is revived in the name of an executor or administrator, the pleadings stand in the same attitude as before the abatement, and only the names of the parties are changed upon the record. It is a legal fiction by which the pleadings, &c. are considered as being in the name of the executor or administrator. *id*

8. The assignor of a bond negotiable by Statute, is not competent to sue in his own name, to the use of the assignee, and in such a suit a plea alleging that the bond was assigned before the institution of the suit is good, and this is the law, whether the bond be payable to order or not. *Gamblin* vs. *Walker*, 220

9. In a suit against a person in a particular capacity, as for example, against him in the capacity of a sheriff, executor, or administrator, it is necessary to be stated in the declaration that he is sued, "*as* executor, *as* administrator, &c."—*Brown* vs. *Hicks*, 232

10. The expression in the declaration, "the plaintiff *being* the executor as aforesaid" is not a substantive averment of his suing AS *such*, or in his representative capacity, and nothing by intendment can supply the allegation "AS executor as aforesaid." *id*

11. A declaration against "A B, executor of C D," and referring to him afterwards solely by the expression, "A B, executor as aforesaid," is not a declaration against him *as* such executor, nor will he be liable in such action in his representative capacity. *id*

12. The term "executor as aforesaid" or "*being* executor as aforesaid," are mere words of description; the term "*as* executor aforesaid," has but one meaning, which is fixed by law, and is, that the party sued is sued in his representative capacity. *id*

13. Where a plaintiff declares, in covenant, on a covenant of seizin, or of good right, full power and lawful authority to convey, it is unnecessary to allege an eviction, for the covenant is broken, if at all, at the very moment it is made.—*Logan* vs. *Moulder*, 313

14. All covenants not prescriptive, and that do not pass with the land, are strictly personal, and if there is no right or authority in the person making them, they are broken as soon as made. *id*

15. But in order to charge a party on a covenant of warranty, or for quiet enjoyment, eviction must be alleged. *id*

16. Where the breach in the declaration is, that the defendant had no title to the claim he conveyed, and the plea answers thereto, that he "had *some* title;" the plea is no answer, and a demurrer to it is properly sustained. *id*

17. In an action of debt or covenant against the assignor, upon a personal, collateral guarantee, on an assigned note or bond, it is indispensably necessary to allege in the declaration, that the plaintiff has used due diligence in prosecuting his claim against the original obligor, or that he is wholly insolvent and unable to pay. *Gaster* vs. *Ashley*, 325

18. An endorsement upon a bond for a Lovely claim, assigning and setting over the bond, and containing the further clause, "and I hereby guarantee that the said claim shall be confirmed at the Land Office at Helena, within a reasonable time, and that the said claim to a donation is a legal and valid claim," is an original covenant, and not a collateral guarantee. *id*

19. A breach in such case, that the claim was, at the time of making such endorsement, a bad, illegal, and invalid claim, is good. *id*

20. One good breach in covenant is sufficient. *id*

21. In action of debt on a writing obligatory, evidence that the plaintiff had borrowed a wagon of the defendant, which was to have been returned in four or five days, and was not returned, is not admissible to sustain a plea of payment.—*Hester* vs. *Murphy*, 338

22. Where the defendant below moved to abate the writ, (which was a capias,) and dismiss the cause, for the several reasons—1st, that there was no order of the judge for a capias; 2nd, that there was no sufficient affidavit to hold bail; and 3rd, that the defendant was held to bail out of his own county: this was merely matter in abatement of the writ; and the defendant, by pleading generally, after his motion was overruled, waived all objections to the writ, and cannot in this court assign for error the overruling of his motion. *Dyer* vs. *Hatch*, 339

23. The rule would have been the same, if he had pleaded the same matters in abatement. *id*

24. The plaintiffs were described as A B and C B his wife, and D E and F G infants, &c., all heirs and legal representatives of H L. It would be a good replication to the Statute of limitations, that D E, F G, and C B, were infants within five years, and that A B claimed in right of his said wife. *Danley* vs. *Edwards*, 437

25. But if the replication is, that all were infants, the plaintiffs are bound to prove that the husband, as well as the wife, was an infant, within five years next before the institution of the suit. And if the court below instructs the jury that they are not bound to prove it, it is error. *id*

26. In such case, upon the return of the case to the court below, the parties will be permitted to amend their pleadings. *id*

27. Upon the writ of quo warranto, the State is bound to show nothing. *State* vs. *Ashley*, 513

28. The defendant must either disclaim or justify. If he disclaims, the State has judgment: if he justifies he must show his title specially, and all the particulars on which it is founded. *id*

29. The defendant, in his plea, should allege that he is a stockholder, and that the election under which he claims to have been chosen a director, was held under and in pursuance of an ordinance or direction of the central board of directors, fixing the time when, and the place where the same should be held, agreeably to the provisions and requirements of the charter. *id*

POSSESSION.

1. Actual seizin is not necessary in this country, to maintain trespass or ejectment. *Ledbetter* vs. *Fitzgerald*, 448

2. If a man enter into lands, having title, his seizin is not bounded by his occupancy, but is to be considered co-extensive with his title or grant. If he enter without title, his seizin is confined to his possession by metes and bounds. *id*

3. A party who has title to lands may maintain trespass, although not in actual possession, against another not in actual possession of the premises. Either actual or constructive possession is sufficient to maintain trespass. *id*

4. In trespass, it is not necessary to prove the boundaries and locality of the premises on which the trespass was committed by a survey of the county surveyor or his deputy. The Territorial law, which provides that no other survey shall be evidence, applies only to suits where the *title* to land is in dispute. *id*

5. The identity of the close, and the possession, are capable of being established by any person who knows the lines or corners, or who can prove the plaintiff's possession. *id*

6. It is not necessary to prove actual possession by the plaintiff of the premises, at the time the trespasses are alleged to have been committed, to maintain trespass *quare clausum fregit*. *Wilson* vs. *Bushnell*, 465

7. Where a purchaser at auditor's sale of land stricken off to the Territory of Arkansas for non payment of taxes, filed his petition for a confirmation of the title to the land so purchased, under the 149th chapter of the Revised Code, a person will not be permitted to defend, who claims by answer to do so merely as "tenant in possession:" and a demurrer to such answer is properly sustained.—*Black* vs. *Percifield*, 472

8. In such case the legal presumption is, that the person answering holds under the purchaser and is his tenant, or a mere tort feasor. *id*

9. Unless the possession of such respondent is adverse to the purchaser, she has no right to oppose the confirmation. *id*

See FORCIBLE ENTRY AND DETAINER.

PRACTICE IN CIRCUIT COURT.

1. If the original process before a Justice of the Peace is correct, it makes no difference on appeal whether it is regularly served or not. *McKee* vs. *Murphy*, 55

2. If the defendant does not appear before the Justice, and make his objection to the service, he admits the jurisdiction of the Justice and his right to try the cause. *id*

3. The defendant having appealed to the Circuit Court, the plaintiff must be permitted to sustain his action on a new trial upon the merits. *id*

4. Where the court has no jurisdiction of the case, there can be no judgment for costs, *id*

5. It is a general rule that all actions upon contracts, whether expressed or implied, by parol, under seal, or of record, must be brought in the name of all the parties legally interested. *Phillips* vs. *Pennywit*, 59

6. Nonjoinder of a party plaintiff who ought to be joined, is good cause of demurrer, or fatal on arrest of judgment or in error, may be pleaded in abatement, or is ground of non-suit. The same principle applies to part owners of a ship: they are partners as to freight. *id*

7. Dormant partners need not join. Nor infants, nor nominal partners. *id*

8. Where one partner represents himself as acting on his own account, and the firm sue, they will be non-suited. *id*

9. The party with whom the contract has been expressly made, may alone maintain the action, though others may be interested. *id*

10. Where all the contracts of a vessel and all its transactions are carried on in the name of one part owner, he may sue alone: the other part owner is merely a dormant partner. *id*

11. Where a motion in arrest of judgment, and for a new trial, are filed at the same time, it makes no difference which is first decided in the court below. *Reed* vs. *Latham*, 66

12. When the plea is *non est factum*, generally, the proof lies on the plaintiff;—but when a special *non est factum* is pleaded, it devolves upon the defendant. *id*

13. To prove that the sheriff's bond was not approved by the County Court, does not support the affirmative allegation that the bond was delivered as an escrow till it should be approved; and such proof cannot be admitted. *id*

14. Where the defendant, who takes upon himself the burden of proof, fails to prove the issue, a new trial will be granted; and if refused it is error. *id*

15. A plea denying the execution of the deed, and a plea admitting the execution, but averring that the conditions have not been broken, cannot be pleaded together. *id*

16. Where there are two issues, material, inconsistent, and contradictory, no valid judgment can be given upon them. *id*

17. To charge a jury, that "from the law of the case the court is of the opinion that the plaintiffs have not made out such a case as will entitle them to recover; but the facts are with the jury," is *not* such a charging as to matters of fact as is prohibited by the Constitution. In this respect the Constitution has not altered the common law in the slightest degree. *Hynson* vs. *Terry*. 83

18. Where profert of an instrument is made in the declaration, the defendant who has craved oyer, is entitled to it before he can be compelled to answer. *Eason* vs. *Fisher*, 90

19. But if he plead, he waives his right to oyer. *id*

20. After an issue of fact is made up, a

party is not bound to notice a demurrer filed to any previous pleading. *id*

21. A want of joinder in demurrer is cured by verdict. *id*

22. A party may add the similiter for his adversary, and if they go to trial without it, the objection is waived. *id*

23. It is a general rule, that the mere appearance of an attorney for the defendant is always deemed sufficient for the opposite party, and for the court, who will look no further, and will proceed as if he had sufficient authority, and leave any party who may be injured, to his action, unless there appear to be fraud or collusion in the case. *Tally* vs. *Reynolds*, 99

24. But a party may, before judgment, upon a sufficient showing, to be adjudged of by the court, require the attorney representing his adversary to show his authority. *id*

25. To this purpose he must show to the court, by affidavit, facts sufficient to raise a *reasonable presumption* that the attorney is acting without authority. *id*

26. The mere possession of the transcript of a judgment does not raise even a presumption, that the possessor of it is legally or beneficially interested in it. *id*

27. The simple allegation that a party is "informed and believes" that the attorney has no authority, without stating the facts upon which it is founded, is not sufficient to call for his authority. *id*

28. The license and admission of an attorney does not give him the right to appear for any particular person. To this end he must be *employed*. *id*

29. This employment may be proved by circumstances, as well as by warrant of attorney. *id*

30. Where an action is commenced before a Justice of the Peace, the cause of action must be truly stated in the *summons*, with sufficient certainty to apprize the defendant of the legal character of the suit he is called upon to answer, and the plaintiff's evidence must correspond with and support the summons. Evidence of a cause of action entirely variant from it, will not be received. *Jeffrey* vs. *Underwood*, 108

31. The Statute which provides that the case "shall be tried in the Circuit Court on its merits," cures only irregularities and formal defects. *id*

32. The admission of improper testimony is not such an irregularity as is cured by the Statute. *id*

33. Where the summons was to answer an action "*on a note of hand*," a writing obligatory cannot be given in evidence, to sustain the action in the Circuit Court. *id*

34. Summoning a party to appear before a Justice in an action of debt, does not make it an action of debt. *id*

35. It is not necessary to state in the summons the species of action, whether in *debt, covenant, &c.*: and if inserted, it is surplusage. *id*

36. A note of fifty dollars, *to be paid* in a horse, will not sustain an action of debt. *id*

37. In suits against several defendants, residing in different counties, where a counterpart of the writ is issued to a county other than that in which suit is commenced, the counterpart must correspond strictly and in every respect with the original, except in its direction to a different sheriff. *Womsley* vs. *Cummins*, 125

38. A party may be permitted to quash his own writ, where there is error in it, as he can proceed no further, and it works a discontinuance. *id*

39. If there be error in the counterpart, there must be error in the original, and the dismissal or quashal of one is a dismissal or quashal of the other. *id*

40. A summons in which the place of holding court is not named, is erroneous. *id*

41. If the defendant pleads, after demurrer to the declaration overruled, he can take no advantage in this court of insufficiency of the declaration. He should let judgment go upon the demurrer, and appeal. *Jarrett* vs. *Wilson*, 137

42. Upon issue on replication that there are goods unadministered, to the plea of

plene administravit, the verdict ought to find the amount of assets unadministered, and if it do not, the judgment is bad.— *id*

43. And if in such case the judgment be that "the plaintiff recover of the defendant his debt and damages, &c. to be levied of the goods, &c. of his intestate, if any he hath unadministered, and if none, of his own proper goods, &c." it is equally bad, whether one part of the judgment might be reversed and the other affirmed, or not. *id*

44. In an action of debt on recognizance, the breach must be proved as laid in the declaration. If the plaintiff declare upon an abstract promise, and a conditional one be proved, the variance is fatal.— *Ashley* vs. *Brazil*, 144

45. The party declaring must prove the allegations according to their legal effect. *id*

46. If the declaration be on a recognizance, conditioned "to pay the debt, damages, and costs if the judgment be confirmed," and the breach assigned is, "that the appeal was dismissed for want of prosecution," it is a fatal variance. *id*

47. In such an action, it is error to render judgment by *nil dicit* for the whole amount of the recognizance. A writ of enquiry should be awarded, to assess the damages. *id*

48. An amended declaration filed in the court below without leave either asked or given to amend, is not part of the record, and entitled to no attention; and it will be here presumed that upon the demurrer to the declaration, the court below treated the amendment as a nullity, and considered the demurrer as applying to the original declaration. *Bently* vs. *Dickson*, 165

49. Where a suit is revived in the name of an executor or administrator, the pleadings stand in the same attitude as before the abatement, and only the names of the parties are changed upon the record. It is a legal fiction by which the pleadings, &c. are considered as being in the name of the executor or administrator. *id*

50. Debt is the proper action on promissory note. *id*

51. A party cannot be permitted to avail himself of the advantages of an issue at law, and an issue of fact to the same pleading, at one and the same time, or to return to, and revive the questions decided on demurrer, after he has acquiesced in the decision thereof, and voluntarily proceeded to a trial of the issues of fact. *Gage* vs. *Melton*, 224

52. A party therefore, when he has amended his pleading demurred to, or pleaded over after his demurrer overruled, cannot again return to and revive the questions decided upon the demurrer, and in such cases, the demurrer and the decision thereon are as completely superseded as if the demurrer had never been filed. *id*

53. By the Territorial laws if a non-resident plaintiff fails to file a bond for costs when he institutes his suit, or if a resident plaintiff becomes non-resident after the institution of his suit, and fails to file a bond for costs, after the defendant or the officer of the court has taken the proper steps to compel him to do so, the defendant may take advantage of it, either by plea in abatement, or motion founded upon the affidavit and notice mentioned in the Statute. And the clerk or sheriff may move to dismiss on notice without affidavit. *Means* vs. *Cromwell*, 249

54. When the objection is taken by a motion, the plaintiff may file his bond at any time before the motion is actually made in court, and proceed with his suit. *id*

55. The omission to file a bond for costs, is matter in abatement only, where a non-resident sues. If the plaintiff becomes non-resident after the commencement of his suit, it may be pleaded in abatement *puis darrein continuance*. And when such plea in abatement is filed, the plaintiff cannot subsequently file his bond for costs, but must take issue on the plea. *id*

56. The want of a bond for costs cannot be taken advantage of by motion, without affidavit or notice. *id*

57. It is error to enter judgment by default, without service of process; and such error is not cured by the defendant's filing pleas after entry of judgment by default,

without obtaining leave to do so, or applying to the court to set aside the judgment. *Moore* vs. *Watkins*, 263

58. Where a defendant at the return term craved oyer and demurred, and after demurrer sustained filed his plea, to which a demurrer was sustained, and a writ of enquiry thereupon awarded; an entry of default, made at the next term, was idle and nugatory. *Logan* vs. *Moulder*, 313

59. Where the defendant below moved to abate the writ (which was a capias,) and dismiss the cause, for the several reasons: 1st, that there was no order of the judge for the capias; 2nd, that there was no sufficient affidavit to hold bail; and 3rd, that the defendant was held to bail out of his own county: this was merely matter in abatement of the writ; and the defendant, by pleading generally, after his motion was overruled, waived all objections to the writ, and cannot in this court assign for error the overruling of his motion; and the rule would have been the same, if he had pleaded the matters in abatement. *Dyer* vs. *Hatch*, 339

60. Where the court below, in the process of the cause, rendered judgment for costs on a motion to abate the writ—such judgment was not warranted by law; yet the rendering thereof cannot be assigned for error, when the case is brought here by writ of error to the final judgment. The validity of the final judgment on the merits, is not affected by such an incidental judgment. *id*

61. Where in trespass, upon the general issue of not guilty, the jury found "for the plaintiff," and assessed his damages, the verdict is good. *id*

62. Where the verdict is for *one hundred and seventy-five dollars*, and the judgment is for "one hundred and seventy-five, the amount of his damages assessed as aforesaid," the judgment is good, and does not vary from the verdict. *id*

63. All bills of exceptions must be tendered at the trial—not that they need be drawn up in form, but the substance must be reduced to writing, while the thing is transacting. *Lyon* vs. *Evans*, 349

64. A bill of exceptions can only be considered part of the record, when it contains in itself intrinsic evidence that the exception was taken and reserved while the thing was transacting, or the matter excepted to was passing before the court; and that it was reduced to form and signed by the judge or judges presiding, at some time during the term. *id*

65. Facts not excepted to when they are transacting in the court, or not properly before the court at the time the exception is taken, or over which the court has no control at the time, although incorporated into the bill of exceptions, cannot be regarded as legally comprising part thereof, or as composing any part of the record of the court, and consequently are not entitled by law to any credit, as facts appearing of record in the cause.—*id*

66. Where, therefore, in the first breach a cause of action is assigned which accrued to the plaintiff's intestate in his lifetime; in the second breach, the defendant is charged, as sheriff, with permitting a prisoner to escape, after the death of the intestate; but where, in the third breach, it is merely alleged that the plaintiff, administrator of P H, recovered judgment; and does not show that such judgment was recovered by him *as administrator*, or that it was founded on any debt or duty to the intestate, or any liability which had accrued to the plaintiff *as* administrator, this must be considered as setting forth a cause of action belonging to the plaintiff in his private, individual right; and there is, therefore, a misjoinder of breaches, which is fatal. *id*

67. The plea of *ne unques administrator* is therefore no answer to the third breach, and as it claims to answer the whole declaration, it is invalid as to any part thereof. *id*

68. But the plaintiff having, after his demurrer to the plea was overruled, replied to the plea, and tendered an issue thereon, he is now precluded from assigning the judgment on the demurrer as error, as he waived his demurrer by replying. *id*

69. But the issue upon the plea is immaterial—because a finding upon it would not determine the right to recover on the third breach—and therefore judgment on a verdict upon the issue to the plea of ne unques adm. is erroneous, and must be reversed. *id*

70. And although the plaintiff committed the first error, by the misjoinder of breaches in his declaration; yet, as no objection was made to the declaration by the defendants, and as the defendants were permitted to file an amended plea in abatement after pleas in bar had been filed, and demurer to one of them overruled, which plea in abatement the plaintiff might have treated as a nullity, but was precluded by the decision of the court below; and as all the pleas in law were permitted to be withdrawn, which left no valid defence in the case—for these reasons, and under the Statute of 1807, which authorizes a repleader after arrest of judgment, this judgment is not affirmed; but a repleader is awarded, to commence with the declaration. *id*

71. Where the affidavit to hold bail, in an action of debt or writing obligatory, states that the action "is founded on a real subsisting debt, and this affiant verily believes that the sum of six thousand dollars as bail, will not be more than will satisfy the debt and costs," it is sufficient under the Territorial statute. *Hughes* vs. *Martin*, 455

72. Where a writ is directed to the sheriff and served by the coroner, it is not a legal ground to dismiss the suit on motion. *id*

73. Where a suit is brought against persons residing in different counties, if one of the defendants resides in the county where the suit is brought, it is sufficient; and if not, it must be taken advantage of by plea to the jurisdiction, and not by motion to dismiss. *id*

74. It is not necessary to prove actual possession by the plaintiff of the premises at the time the trespasses were alleged to have been committed, to maintain trespass q. c. f. *Wilson* vs. *Bushnell*, 465

75. Upon the general issue in trespass, and a special plea, a general finding for the plaintiff covers both issues, and is good. *id*

76. A general verdict is good on two issues, where the finding necessarily shows that the subject matter of both issues was determined by the court. *id*

77. Where a purchaser at auditor's sale of land stricken off to the Territory of Arkansas for non payment of taxes, filed his petition for a confirmation of the title to the land so purchased, under the 149th chapter of the Revised Code, a person will not be permitted to defend, who claims by answer to do so merely as "tenant in possession:" and a demurrer to such answer is properly sustained.—*Black* vs. *Percifield*, 472

78. In such case the legal presumption is, that the person answering holds under the purchaser and is his tenant, or a mere tort feasor. *id*

79. Unless the possession of such respondent is adverse to the purchaser, she has no right to oppose the confirmation. *id*

80. Under the Territorial law, the prayer and grant of an appeal from the decision of a Justice to the Circuit Court, conferred jurisdiction on the Circuit Court; and the jurisdiction did not depend upon the giving of bail in appeal, or the sufficiency of the bail given. *Smith* vs. *Stinnett*, 497

81. Where no special bail was given before the Justice, or where such bail, being insufficient, is not perfected in the Circuit Court, the appeal will be dismissed, but not on the ground of want of jurisdiction. *id*

82. This however is an objection which it rests with the appellee to make, and if he goes to trial in the Circuit Court, or takes judgment by default without making, he waives it, as expressly as if he had placed his waiver on the record. *id*

83. If he does so waive it, the appellant cannot assign for error here that there was no special bail, and that the Circuit Court had no jurisdiction. He cannot take advantage of his own wrong. *id*

84. Where a party appeals from a judg-

ment of a Justice, and afterwards brings his writ of error, he cannot assign for error any defect in the Justice's writ, or the service thereof; or his non-appearance before the Justice. By appealing he makes himself a party to the proceedings, and must rest on such defence as he may lawfully make upon the merits. *id*

85. And if the appellant fails to file in the Circuit Court a transcript of the Justice's proceedings, or take steps to cause it to be filed, it is his own fault. *id*

86. An order to set aside a final judgment by default, made at a term subsequent to the one at which such judgment is rendered, is wholly illegal; and no fact stated in such an order can be noticed in this court. *id*

87. If it is stated in such an order, that no transcript of the Justice's proceedings was filed in the Circuit Court; and if a transcript comes up to this court, though not certified by any authorized officer, but which is referred to in the assignment of errors, and not denied to be a correct transcript, this court will presume that such transcript *was* on file in the court below. *id*

88. Where there were two defendants in the Justice's Court, and one only appealed, and judgment in the Circuit Court was rendered against "the said defendants," it will be considered as rendered against the appellant alone. *id*

89. Papers filed after an appeal prayed and taken, signed by the judge below, and purporting to contain statements of the testimony, will not be regarded in this court. *Gray* vs. *Nations*, 557

90. Where plaintiff takes judgment by default, and a writ of enquiry against some co-trespassers, and before his writ of enquiry is awarded, he takes a verdict and final judgment against the others, he will not be considered as having waived his remedy against those who are defaulted, and will be restrained from afterwards proceeding on the writ of enquiry. *id*

PRACTICE IN CHANCERY.

1. A judgment or decree is final, when it concludes the whole matters in the cause, and when the term at which it was pronounced has expired, and must be so considered as against the whole world. *Keatts* vs. *Rector*, 391

2. But *as to the defendant* under the Territorial Statute, a decree is not final, or ready for execution, if he except to the decree, on or before the third day of the next term after it is rendered. The defendant is therefore entitled to appeal after he has filed his exceptions, and they have been disallowed. *id*

3. But on such appeal, he will be confined to the exceptions which he took in the court below; for if there were other errors, he waives them by not pointing them out in his exceptions. *id*

4. These exceptions are like an argument for rehearing, and may go to the whole equity of the case; and are not restricted to errors on the face of the decree. *id*

5. The clause in the Territorial Statute, which required cases in chancery to be set down for final hearing at the term previous to the trial, is only directory to the parties themselves; and if they proceed to trial, and neither party objects that the causes have not been set for final hearing, the objection will be deemed to be waived, and cannot be insisted on in the court above. *id*

6. If the defendant elects to demur, plead and answer to the same bill, care must be taken that the plea does not cover the ground of the demurrer, nor the answer that of the plea. *id*

7. Where the defendant first pleaded the Statute of Frauds, and after his plea was overruled, presented the same plea in his answer, the court below properly sustained exceptions to so much of his answer as set up the Statute of Frauds as a defence, and ordered it to be stricken out. *id*

8. By this decision of the court below, the whole answer was not annulled, although the defendant did not ask leave to amend; but so much of the answer as was good, remained in the case, and should have been considered by the court in rendering the decree. *id.*

9. When a plea of the Statute of Frauds is overruled, if the defendant then files his answer, he waives and withdraws his plea; and has no longer any right to insist on the Statute as a defence. *id*

10. Upon appeal, in such case, the Statute is not, legitimately speaking, before the court of appeals, and it would be entirely proper to determine the case independent of it. *id*

PRACTICE IN ERROR.

1. Where the parties to the record returned with the writ of Error appear to be different from the parties named in the writ of Error, the case will be dismissed. *McKee* vs. *Murphy*, 19
S. P. *Hudspeth* vs. *State*, 20

2. If the appellant fails to file in the office of the clerk of the Supreme Court a transcript of the record and proceedings below, ten days before the first day of the term to which the appeal is returnable, the appeal will be dismissed upon the appellee's motion, and his filing such transcript. *Hawkins* vs. *Carrington*. 46

3. A recognizance in appeal, conditioned merely, "for the prosecution of the appeal," is insufficient; and if no other recognizance be given, the appeal will be dismissed. *Jeffery* vs. *Marshall*, 47

4. There is no difference, in this court, between cases on appeal, and on writ of error. They stand upon the same footing, and must be governed by the same rules of proceeding. *Reed* vs. *Latham*. 66

5. In either, the whole record is open for re-examination and revision, and the party injured has the full benefit of all and every objection and exceptions, that would have availed him in the court below, though not formally made or taken there; *provided*, it be not waived by the pleadings, cured by the Statute of jeofails or aided by verdict. *id*

6. When a motion has been made at a previous term to dismiss an appeal for want of a final judgment or decree in the court below, and on a subsequent suggestion at the same term by the appellants, that there was a diminution of the record, a certiorari has been awarded for a new record; if, then, the clerk below returns the writ, with a new transcript, certified by him to be a true copy, and which does not cure the defect, unless good cause be shown for a new writ, the appellees will be entitled to the benefit of their renewed motion to dismiss. *Adams* vs. *Owens*, 135

7. If the defendant pleads, after demurrer to the declaration overruled, he can take no advantage in this court of insufficiency of the declaration. He should let judgment go upon the demurrer, and appeal. *Jarrett* vs. *Wilson*, 137

8. Upon issue on replication that there are goods unadministered, to the plea of *plene administravit*, the verdict ought to find the amount of assets unadministered, and if it do not, the judgment is bad.— *id*

9. And if in such case the judgment be that "the plaintiff recover of the defendant his debt and damages, &c. to be levied of the goods, &c. of his intestate, if any he hath unadministered, and if none, of his own proper goods, &c." it is equally bad, whether one part of the judgment might be reversed and the other affirmed, or not. *id*

10. If one part could be affirmed and the other reversed, still the situation of the plaintiff in error would not be bettered. His own property would still be liable, if he has no assets unadministered. *id*

11. The Statute of the State curing informality, &c. does not extend to a case like the present. *id*

12. The Supreme Court can take no jurisdiction of any case brought into it by appeal, where the sum in controversy is less than one hundred dollars. *McCamy* vs. *Smith*, 142

13. An appeal taken to the Supreme Court in a case in which that court has no jurisdiction, is a nullity, and the recognizance of the appellant in the court below to prosecute his appeal is void. The appellees sustain no injury by a non-compliance with its conditions, and no action lies upon it. *Ashley* vs. *Brazil*, 144

14. A dismissal of an appeal "for want of prosecution," is not a confirmation of the judgment below. The appellant may still have his writ of error and supersedeas. The dismissal of the appeal merely places the parties in the same situation as if no appeal had been taken. *id*

15. Errors must be assigned on or before the third day of the term to which a case on error or in appeal is returnable; and, on failure so to assign errors, unless good cause is shown, the appeal or writ of error will be dismissed, or the judgment below affirmed. *Tucker* vs. *Ellis*, 273

16. Where the defendant below moved to abate the writ, (which was a capias,) and dismiss the cause, for the several reasons—1st, that there was no order of the judge for a capias; 2nd, that there was no sufficient affidavit to hold bail; and 3rd, that the defendant was held to bail out of his own county: this was merely matter in abatement of the writ; and the defendant, by pleading generally, after his motion was overruled, waived all objections to the writ, and cannot in this court assign for error the overruling of his motion. *Dyer* vs. *Hatch*, 359

17. The rule would have been the same, if he had pleaded the same matters in abatement. *id*

18. Where the court below, in process of the cause, rendered judgment for the costs of the motion to abate the writ, such judgment was not warranted by law; yet the rendering thereof cannot be assigned for error when the case is brought here by writ of error to the final judgment. The validity of the final judgment on the merits, is not affected by such incidental judgment. *id*

19. Where a motion for a new trial is made, "because the finding of the jury is contrary to law; and because the damages are excessive and unreasonable, and exceed the amount sworn to by the plaintiff in his affidavit to hold to bail;" if the evidence given on the trial is not before this court; if it is not shown that illegal or incompetent testimony was admitted, or legal or competent testimony excluded; or the instructions given or refused by the court below do not appear, this court will presume that the decision of the court below was correct. *id*

20. And this court, in such case, will presume the decision of the court below, in overruling the motion for a new trial, to have been correct, although an insufficient reason was assigned for such decision. *id*

21. Although the plaintiff committed the first error, by the misjoinder of breaches in his declaration; yet, as no objection was made to the declaration by the defendants, and as the defendants were permitted to file an amended plea in abatement after pleas in bar had been filed and demurrer to one of them overruled, which plea in abatement the plaintiff might have treated as a nullity, but was precluded by the decision of the court below; and as all the pleas in bar were permitted to be withdrawn, which left no valid defence in the case—for these reasons, and under the Statute of 1807, which authorizes a repleader after arrest of judgment, the judgment is not affirmed; but a repleader is awarded, to commence with the declaration.—*Lyon* vs. *Evans*, 349

22. This is not a case, in which the proceedings on the part of the plaintiff are so entirely defective and erroneous, that the judgment against him would not bar another action properly brought for the same cause. *id*

23. When a plea of the Statute of Frauds is overruled, if the defendant then files his answer, he waives and withdraws his plea; and has no longer any right to insist on the Statute as a defence. *Keatts* vs. *Rector*, 391

24. Upon appeal, in such case, the Statute is not, legitimately speaking, before the court of appeals, and it would be entirely proper to determine the case independent of it. *id*

25. Where instructions upon abstract questions of law, are given or refused by the court below, these instructions will not be noticed in this court, unless by bill of exceptions so much of the evidence in the case as presented the questions of law or testimony to which the instructions applied, is brought before this court. *Danley* vs. *Edwards*, 437

26. It is the duty of the party excepting, to set out so much of the testimony as raises the question of law or evidence contained in the bill of exceptions. *id*

27. An order to set aside a final judgment by default, made at a term subsequent to the one at which such judgment is rendered, is wholly illegal; and no fact stated in such an order can be noticed in this court. *Smith* vs. *Stinnett*, 497

28. If it is stated in such an order, that no transcript of the Justices' proceedings was filed in the Circuit Court; and if a transcript comes up to this court, though not certified by any authorized officer, but which is referred to in the assignment of errors, and not denied to be a correct transcript, this court will presume that such transcript *was* on file in the court below. *id*

29. Where there were two defendants in the Justice's court, and one only appealed, and judgment in the Circuit Court was rendered against "the said defendants," it will be considered as rendered against the appellant alone. *id*

30. Where the action before the Justice was founded on a parol agreement, and a written agreement was permitted to go in evidence on the part of the plaintiff, in the Circuit Court, which would have been inadmissible, as the foundation of the action, yet, if the record does not show that the agreement so offered in evidence was filed before the Justice on or before the day of trial, nor in the clerk's office on the appeal being taken; in such case the record does not show it to be the foundation of the action. And the legal presumption is, that the suit was not based upon it, but on some other agreement by parol, as contradistinguished from a written agreement. *Ruddell* vs. *Mozer*, 503

31. If such were not the fact, the defendant should have shown it by bill of exceptions. Not having done so, the legal presumption is, that sufficient legal proof was offered to warrant the verdict and judgment in the Circuit Court. *id*

32. If therefore the case could have occupied such an attitude as to justify the introduction of the written agreement for any purpose whatever, the legal presumption is, that it was in such situation when the writing was admitted. *id*

33. And it makes no difference, if the the names of the plaintiffs are differently spelled in the summons, and in the agreement. The identity must be presumed to have been proven, or in other words, that the plaintiffs, as well as the defendant, executed the agreement.— *id*

34. Where the record shows that one co-defendant had possession of part of the goods taken, and that he was present when the pretended sale of the same goods was made, and when they were taken away, any admissions or statements made by him, showing a community of design to have existed among all the defendants, and that they were accomplices in the transaction, is legitimate proof. *Gray* vs. *Nations*, 557

35. And if such admissions were admitted in the court below, and the record does not show their nature and character, this court will presume that they were made in the presence of the other defendants, and were coupled with other circumstances and testimony, showing a community of design and concord of action on the part of the person making them, and his co-defendants. *id*

36. Papers filed after an appeal prayed and taken, signed by the judge below, and purporting to contain statements of the testimony, will not be regarded in this court. *id*

PROCESS.

See SUMMONS, WRIT.

PROFERT AND OYER.

1. Where profert of an instrument is made in the declaration, a defendant who has craved oyer is entitled to it before he can be required to answer. *Eason* vs. *Fisher*, 90

2. But if he plead, he waives his right to oyer. *id*

Q

QUO WARRANTO.

1. The writ of quo warranto at common law, was a high prerogative writ, in the nature of a writ of right for the King, against him who claimed or usurped any office, franchise or liberty of the crown; and also lay in case of *non-user*, or long neglect, *mis-user*, or abuse of a franchise. *State* vs. *Ashley*. 279

2. It was a civil proceeding, prosecuted by the King's attorney general, at the suit of the King, without a *relation*, to try a civil right; and the judgment, if for the King, was of seizure into the King's hands. No fine was imposed, or punishment inflicted on the defendant. *id*

3. Informations, as the basis of criminal prosecutions, are said to have existed coeval with the common law itself; but, as a mode of determining civil rights between private parties, they seem to owe their origin to *St. 4th Anne*. Although informations in nature of quo warranto were exhibited by the attorney general long prior to the passage of that statute, yet the remedy given thereby, was never extended beyond the limits of the old writ. And that statute neither increased nor abridged the authority of the attorney general. *id*

4. Informations were not allowed at the instance of a private person, before the Statute of 4th Anne, nor after, except in the cases mentioned in that statute. *id*

5. The information was a criminal proceeding, although upon conviction or disclaimer there was also judgment of ouster, or seizure into the King's hands; and although it has long been applied to trying the mere civil right, the fine being nominal only. *id*

6. The writ of quo warranto, and the information in the nature of a quo warranto, had a cotemporaneous existence, yet their primary objects were essentially different; the mode of proceeding on them materially varied; they were, in some respects, attended with different results, and the form of judgment was the same. One was strictly a civil, the other a criminal proceeding. They were, therefore, so different at common law, that they cannot, with propriety, be classed together, or comprehended by one common name or description. *id*

7. The Constitution has conferred upon the Supreme Court, as the final tribunal to interpret, pronounce and execute the law, to decide on controversies and enforce rights, powers and jurisdiction of an appellate nature only. *id*

8. It leaves with the inferior tribunals the original cognizance of all cases and controversies between private parties, as well as all controversies in which the State may be a party, or otherwise interested, in which the sovereignty, or sovereign rights, powers, and franchises of the State are not involved. *id*

9. But in cases involving the civil rights of the sovereign power of the State, affecting vitally its character, and the proper administration of the government itself; in which the whole people, and every individual member of the community has a direct, immediate, and most sacred interest; when the exercise of a public right or public franchise is the subject of controversy, the Supreme Court has original jurisdiction, and is vested with power to issue, hear and determine writs of quo warranto. *id*

10. The information in nature of quo warranto, being different, as before stated, from the writ of quo warranto, the Supreme Court has no jurisdiction in case of such information, under the clause of the Constitution which authorizes it to issue *writs* of quo warranto. *id*

11. The power granted to this Court by the Constitution, to issue "other remedial writs," embraces only such writs, other than those specifically enumerated, as may be properly used in the exercise of appellate powers, or of the power of control over inferior or other courts, expressly granted by the Constitution. *id*

12. The Supreme Court has no original jurisdiction in any case where the proceeding is, or must necessarily be, of a criminal nature. The proceeding by information in nature of a quo warranto is of a criminal nature, and the Supreme Court has, therefore, no jurisdiction thereof. *id*

13. The Supreme Court has power to issue writs of quo warranto, in a case in which the whole community is directly interested. *State* vs. *Ashley*, 513

14. Upon the writ of quo warranto, the State is bound to show nothing. *id*

15. The plaintiff must either disclaim or justify. If he disclaims, the State has judgment. If he justifies, he must show his title specially, and all the particulars on which it is founded. *id*

R

REAL ESTATE BANK.

1. The office of a director of the Real Estate Bank is a public franchise. *State* vs. *Ashley*. 513

2. The clause in the Constitution of this State, which provides that the General Assembly may incorporate one State Bank and Branches, and that "they shall have further power to incorporate *one other* banking institution, &c.," is to be construed as a limitation and a prohibition against the establishment of more than one other banking institution. *id*

3. The Legislature can no more establish two banking institutions in promotion of the agricultural interest of the country, than it can create two Supreme Courts, or make that tribunal consist of more than three Judges, or establish and organize more than three departments of the government. *id*

4. But the Legislature has the power to establish one banking institution, with any number of agencies, or offices of discount and deposite, to transact its business; and may locate these offices or agencies at as many points or places as they may deem advisable or proper. *id*

5. The Legislature contemplated, by the charter, the establishment of only one banking institution. *id*

6. That part of the 21st section of the charter which declares that the Principal Bank and Branches may severally sue, &c. and have a common seal, is inoperate and void, as it is directly and positively opposed to the incorporating clause in the same section, and to the general objects and designs of the charter. *id*

7. A *stockholder cannot be deprived of the* right of voting for the entire directory of the whole institution. *id*

8. The respective boards must, by the election of directors, be made to conform to the number expressed in the charter. The stockholders, in organizing the corporation, had the right to vote for the whole directory of the Principal Bank and each of the Branches. But this this was a personal privilege, which might be waived at pleasure, according to the discretion of each individual stockholder. *id*

9. The central board represents the unity, sovereignty, and indivisibility of the corporation. The general interest of the Bank is committed to its custody, and it is invested with complete and plenary power for the well governing and ordering the affairs of the institution. It has complete and unlimited control over the acts and proceedings of the respective offices. *id*

10. The duties enumerated in the charter, and imposed on the central board, cannot be transferred by the central board to any other body, without a violation of the charter. *id*

11. The local boards are inferior, subordinate tribunals, possessing limited authority specially delegated to them by the charter. If they usurp powers conferred upon the central board, or if the central board attempts to delegate to them powers entrusted to itself, such act or acts are void, being repugnant to the charter. *id*

12. The local board cannot pass any by-law or ordinance affecting any other part of the corporation than that over which they respectively preside, and even then their authority is subjected to the control of the central board. *id*

13. The central board constitutes the revising and governing power of the corporation, and forms the bond of union

which makes it *one common whole and one Banking institution.* *id*

14. The act of the Legislature, incorporating the Real Estate Bank, is therefore constitutional. *id*

15. Upon the writ of quo warranto, the State is bound to show nothing. *id*

16. The defendant must either disclaim or justify. If he disclaims, the State has judgment. If he justifies, he must show his title specially, and all the particulars on which it is founded. *id*

17. The defendant, in his plea, should allege that he is a stockholder, and that the election under which he claims to have been chosen a director, was held under and in pursuance of an ordinance or direction of the central board of directors, fixing the time when, and the place where, the same should be held, agreeably to the provisions and requirements of the charter. As the plea in this case does not do so, the demurrer to it is sustained. *id*

18. The election for all the directors must be held at one and the same time, and at one and the same place; and the time and place must be ordained and appointed by the central board. The central board must also prescribe the rule by which directors shall be declared duly elected, and elections authenticated.—These duties devolve on the central board, *and cannot be delegated* to the local boards. *id*

RECOGNIZANCE.

1. A recognizance in appeal, conditioned "for the prosecution of the appeal," is insufficient. *Jeffery* vs. *Marshall,* 47

2. An appeal taken to the Supreme Court, in a case in which the court has no jurisdiction, is a nullity, and the recognizance of the appellant in the court below to prosecute his appeal, is void. The appellees sustain no injury by a non-compliance with its conditions, and no action lies upon it. *Ashley* vs. *Brazil.* 144

3. A recognizance in appeal being conditioned, "that in case the judgment be confirmed, the recognizor will pay the debt, damages and costs," no breach of the condition accrues on a dismissal for want of prosecution. *id*

4. In an action of debt on recognizance, the breaches must be proved as laid in the declaration. If the plaintiff declare upon an absolute promise, and a conditional one be proved, the variance is fatal.— *id*

5. If the declaration be on a recognizance, conditioned "to pay the debt, damages, and costs if the judgment be confirmed," and the breach assigned is, "that the appeal was dismissed for want of prosecution," it is a fatal variance. *id*

6. In such an action, it is error to render judgment by *nil dicit* for the whole amount of the recognizance. A writ of enquiry should be awarded, to assess the damages. *id*

7. Where the judgment in the City Court was for one hundred dollars, founded upon a sci. fa. on a recognizance in the sum of two hundred dollars, it was a civil cause, the amount in controversy exceeded one hundred dollars, the City Court had no jurisdiction, and a supersedeas granted by one of the judges of this court in vacation will be allowed to stand, though the writ of error is dismissed as improvidently issued. *Hall* vs. *State,* 201

RECORD.

1. An amended declaration filed in the court below, without leave either asked or given to amend, is not part of the record, and entitled to no attention; and it will be here presumed that upon demurrer to the declaration, the court below treated the amendment as a nullity, and considered the demurrer as applying to the original declaration. *Bentley* vs. *Dickson,* 165

2. It was error to permit the reading in evidence of a copy of a record of a bill of sale for a slave, executed and recorded in Kentucky, upon the testimony of the subscribing witness to such a bill of sale, who stated simply that he believed the copy to be substantially the same

with the original, but that he had not seen the original for many years, and when it did not appear that he had ever compared the copy with the original, nor did he pretend to say that it was an exact or sworn copy. *Brown* vs. *Hicks*, 222

3. A bill of sale for a slave, is not of such a nature as is authorized or required by law to be recorded, in order to give validity or effect to the instrument, and to make it a part of the public documents and records of the country, and therefore the record of such a bill of sale is incompetent to prove the existence or execution of the original. *id*

REPLEADER.

1. Although the plaintiff committed the first error, by the misjoinder of breaches in his declaration; yet, as no objection was made to the declaration by the defendants, and as the defendants were permitted to file an amended plea in abatement after pleas in bar had been filed and demurrer to one of them overruled, which plea in abatement the plaintiff might have treated as a nullity, but was precluded by the decision of the court below; and as all the pleas in bar were permitted to be withdrawn, which left no valid defence in the case—for these reasons, and under the Statute of 1807, which authorizes a repleader after arrest of judgment, the judgment is not affirmed; but a repleader is awarded, to commence with the declaration.—*Lyon* vs. *Evans*, 349

2. This is not a case, in which the proceedings on the part of the plaintiff are so entirely defective and erroneous, that the judgment against him would not bar another action properly brought for the same cause. *id*

REPLEVIN.

1. In replevin, any evidence which shows that the defendants obtained possession of the goods, from any person not authorized to sell, is sufficient evidence of an unlawful taking. *Gray* vs. *Nations*, 557

2. In replevin, under the Territorial Statute, the measure of damages for the plaintiff is all the damages sustained by the taking and detention of the goods.—*id*

3. At common law, the plaintiff could only recover damages for the wrongful detention of the goods, in replevin. *id*

4. A Statute is not to be taken to be in derogation of the common law, unless the act itself shows such to have been the intention and object of the Legislature. *id*

5. The Territorial Statute concerning replevin is an enlarging, and not a restraining Statute, and authorizes the recovery of damages, as well for the unlawful taking as the unlawful detention. *id*

RETURN OF PROCESS.

1. The return of the sheriff must show with reasonable certainty, the time, place, and manner of the service, and the name of the person upon whom it is made. *Gilbreath* vs. *Kuykendall*, 50

2. "Served this Summons right, by reading it to him," is not a sufficient service. *id*

3. Under the Statute of 1836, "to regulate the practice in the Supreme Court," it is necessary for the clerk of the Circuit Court to whom a writ of error is directed, either to endorse upon the writ of error, or to attach to it, his return, signed as clerk, and sealed with his seal of office. *State* vs. *Simmons*, 265

4. A failure to make return, is a contempt to this court; and the clerk is not excused because he was ignorant of the law, nor although he states in his answer, that no contempt was intended. *id*

RULES OF THE SUPREME COURT,

Adopted at January Term, A. D. 1837. 5

See APPEARANCE.

S

SEAL.

1. The clause of "*in cujus rei*," &c. is not essential to a deed or bond. Only three things are essentially necessary to making a good obligation, viz: writing, on paper or parchment, sealing, and delivery. *Jeffery* vs. *Underwood*, 108

2. It is not necessary that the obligor should subscribe his name. *id*

3. There is no occasion in the bond to mention that it was sealed and delivered.—and this rule applies with equal force, under our Statute, to writings where a *scrawl* is fixed at the end of the name. *id*

SECURITIES.

See Bail.

SEIZIN.

1. Actual seizin is not necessary in this country, to maintain trespass or ejectment. *Ledbetter* vs. *Fitzgerald*, 448

2. If a man enter into lands, having title, his seizin is not bounded by his occupancy, but is to be considered co-extensive with his title or grant. If he enter without title, his seizin is confined to his possession by metes and bounds. *id*

3. A party who has title to lands may maintain trespass, although not in actual possession, against another not in actual possession of the premises. Either actual or constructive possession is sufficient to maintain trespass. *id*

SERVICE.

1. On judgment by default, the defendant below is entitled to all legal exceptions to the writ and service thereof. *Gilbreath* vs. *Kuykendall*, 50

2. The return of Sheriff must show with reasonable certainty, the time, place, and manner of the service, and the name of the person upon whom it is made. *id*

3. "Served this Summons right, by reading it to him," is not a sufficient service. *id*

4. The service by a coroner of a writ directed to the Sheriff is not ground for dismissing the suit—though it is matter which will excuse the defendant from answering. *Hughes* vs. *Martin*, 336

5. A writ directed to an officer or person prohibited by law from executing it, may be abated; and perhaps it might be set aside on motion, if the fact appear on the face of the proceedings. *id*

6. But a writ regularly and legally issued, and directed to the proper officer, cannot be avoided, by matter subsequent, or by having a return endorsed on it by an officer or person not authorized by law to serve it. *id*

7. Such an endorsement is a mere nullity, and imposes no obligation on the defendant to appear, nor does it subject him to any legal consequences as for a default. *id*

8. Where a writ is directed to the Sheriff, and served by the coroner, it is not a legal ground for dismissing the suit on motion. *Hughes* vs. *Martin*, 455

SET OFF.

1. The question of damages is purely legal and parties cannot come into chancery to have their unliquidated damages assessed and set off against a judgment at law. *Dugan* vs. *Cureton*, 31

2. A failure to perform a contract which formed part of the consideration for the payment of money, and was to be performed several months after the making of the contract, cannot, without some concurring equity, constitute a ground of relief against the payment, in chancery. *id*

SHERIFFS.

See Collectors and Holders of Public Money.

SLAVES.

See Bill of Sale; Gift.

STATUTES.

1. A Statute is not to be taken to be in derogation of the common law, unless the act itself shows that such was the intention and object of the Legislature. *Gray* vs. *Nations*, 557

STATUTE OF FRAUDS.

See PART PERFORMANCE.

SUMMONS.

1. Where an action is commenced before a Justice of the Peace, the cause of action must be truly stated in the summons, with sufficient certainty to apprize the defendant of the legal character of the suit he is called upon to answer; and the plaintiff's evidence must correspond with and support the summons.—Evidence of a cause of action entirely variant from it, will not be received.—*Jeffery* vs. *Underwood*, 108

2. Where the summons was to answer an action "on a *note of hand*," a writing obligatory cannot be given in evidence to sustain the action in the Circuit Court. *id*

3. Summoning a party to appear before a Justice, in an action of debt, does not make it an action of debt. *id*

4. It is not necessary to state in the summons the species of action, whether in *debt*, *covenant*, &c.; and if inserted it is surplusage. *id*

5. A summons in which the place of holding court is not named, is erroneous.—*Womsley* vs. *Cummins*. 125

SUPREME COURT.

See ERROR; JURISDICTION; MANDAMUS; PRACTICE IN ERROR; QUO WARRANTO.

T

TAX SALES.

1. Where a purchaser at auditor's sale of land stricken off to the Territory of Arkansas for non payment of taxes, filed his petition for a confirmation of the title to the land so purchased, under the 149th chapter of the Revised Code, a person will not be permitted to defend, who claims by answer to do so merely as "tenant in possession:" and a demurrer to such answer is properly sustained.—*Black* vs. *Percifield*, 472

2. In such case the legal presumption is, that the person answering holds under the purchaser and is his tenant, or a mere tort feasor. *id*

3. Unless the possession of such respondent is adverse to the purchaser, he has no right to oppose the confirmation. *id*

TRESPASS.

1. Actual seizin is not necessary in this country to maintain trespass or ejectment. *Ledbetter* vs. *Fitzgerald*. 448

2. If a man enter into lands, having title, his seizin is not bounded by his occupancy, but is to be considered, co-extensive with his title or grant. If he enter without title, his seizin is confined to his possession by metes and bounds. *id*

3. A party who has title to lands may maintain trespass, although not in actual possession, against another not in actual possession of the premises. Either actual or constructive possession is sufficient to maintain trespass. *id*

4. In trespass, it is not necessary to prove the boundaries and locality of the premises on which the trespass was committed, by a survey of the county surveyor or his deputy. The Territorial law, which provides that no other survey shall be evidence, applies only to suits where the *title* to land is in dispute. *id*

5. The identity of the close, and the possession, are capable of being established by any person who knows the lines and corners, or who can prove the plaintiff's possession. *id*

6. It is not necessary to prove actual possession by the plaintiff of the premises at the time the trespasses were alleged to have been committed, to maintain trespass q. c. f. *Wilson* vs. *Bushnell*, 465

7. Upon the general issue in trespass, and a special plea, a general finding for the plaintiff covers both issues, and is good. *id*

8. A general verdict is good on two issues, where the finding necessarily shows that the subject matter of both issues was determined by the court. *id*

9. If several persons be proved to be co-trespassers, by competent evidence, the declarations of one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object. *Gray* vs. *Nations*, 557

10. Where the record shows that one co-defendant had possession of part of the goods taken, and that he was present when the pretended sale of the same goods was made, and when they were taken away, any admissions or statements made by him, showing a community of design to have existed among all the defendants, and that they were accomplices in the transaction, is legitimate proof. *id*

V

VARIANCE.

1. If the declaration be on a recognizance, conditioned "to pay the debt, damages, and costs, if the judgment be confirmed;" and the breach assigned is, that "the appeal was dismissed for want of prosecution," it is a fatal variance. *Ashley* vs. *Brazil*, 144

2. Where the defendants were named in the summons "John Mozer and Barnett Mozer;" and in the agreement offered in evidence, "John Mousuer and Barnett Mosuser," and their signatures to the agreement were "John Mouseuer and Barnett Mouseur," held that the names were *idem sonans*. *Ruddell* vs. *Mozer*, 503

VENDOR AND PURCHASER.

1. A misrepresentation by the seller to the buyer of the advantages to result from the purchase, however contrary to good faith and sound morals, cannot form the basis of any suit, either at law or in equity. *Dugan* vs. *Cureton*, 31

2. It is not every misrepresentation which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it. *id*

3. The common language of puffing and commendation of commodities, is not such a fraud as will avoid a contract.— *id*

VENUE.

1. In an action of debt, or on a *scire facias*, on a recognizance of bail by bill; and in action of debt on a judgment of record, the venue is local, and must be laid in the county where the record is. *Smith* vs. *Clark*, 63

See INDICTMENT, 2, 3.

VERDICT.

1. A want of joinder in demurrer is cured by verdict. *Eason* vs. *Fisher*, 90

2. Where the facts have been submitted to the court, without the intervention of a jury, it must be inferred, in the absence of any showing upon the record to the contrary, that the evidence introduced was sufficient to warrant the verdict.— *id*

3. Where in trespass, upon the general issue of not guilty, the jury found "for the plaintiff," and assessed his damages, the verdict is good. *Dyer* vs. *Hatch*, 339

4. Where the verdict is for one hundred and seventy-five dollars, and the judgment is for "one hundred and seventy-five, the amount of damages assessed as aforesaid," with costs, the judgment is good, and does not vary from the verdict. *id*

5. Upon the general issue in trespass, and

a special plea, a general finding for the plaintiff covers both issues, and is good. *Wilson* vs. *Bushnell*, 465

6. A general verdict is good on two issues, where the finding necessarily shows that the subject matter of both issues was determined by the court. *id*

WARRANTY.

1. The old covenants of warranty inserted in ancient deeds, and the action upon them, have long since become obsolete in England, and never had a legal existence under our form of government.—*Logan* vs. *Moulder*, 312

2. The covenants of seizin, of right to convey, and against incumbrances, are personal covenants, not running with the land, nor passing to the assignee. They are mere *choses in action*, not assignable at common law. *id*

3. The covenants of warranty, and for quiet enjoyment, are in the nature of real covenants, and run with the land.—*id*

5. All covenants not prospective, and that do not pass with the land, are strictly personal, and if there is no right or authority in the person making them, they are broken as soon as made. *id*

5. But in order to charge a party on a covenant of warranty, or for quiet enjoyment, eviction must be alleged. *id*

WITNESS.

1. In an action brought by an administrator to recover a slave of his intestate, a legal distributee of the estate of such intestate is not a competent witness.—He is legally interested in the event of the suit, although upon his *voir dire* he *swears* that he has received his portion of the estate, and receipted the administrator therefor, the receipt not being produced, or its non-production accounted for. *Brown* vs. *Hicks*, 232

2. The rule that one co-defendant cannot be witness for his co-defendant, and that a party on the record cannot testify in the case, is subject to this exception—That if there is no evidence adduced against one of the defendants, where several are joined in an action of trespass, the court will direct the jury to find for that defendant, and then permit him to be introduced as a witness. *Gray* vs. *Nations*, 557

3. If several persons be proved to be co-trespassers, by competent evidence, the *declarations of one*, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object. *id*

4. Where the record shows that one co-defendant had possession of part of the goods taken, and that he was present when the pretended sale of the same goods was made, and when they were taken away, any admissions or statements made by him, showing a community of design to have existed among all the defendants, and that they were accomplices in the transaction, is legitimate proof. 557

WRIT.

1. On judgment by default, the defendant below is entitled to all legal exceptions to the writ and service thereof. *Gilbreath* vs. *Kuykendall*, 50

2. A writ running in the name of the United States of America, issued after the 15th June, 1836, is void. *id*

3. In suits against several defendants, residing in different counties, where a counterpart of the writ is issued to a county other than that in which suit is commenced, the counterpart must correspond strictly and in every respect with the original, except in its direction to a different sheriff. *Womsley* vs. *Cummins*, 125

4. A party may be permitted to quash his own writ, where there is error in it, as he can proceed no further, and it works a discontinuance. *id*

5. If there be error in the counterpart, there must be error in the original, and the dismissal or quashal of one is a dismissal or quashal of the other. *id*

6. A summons in which the place of holding court is not named, is erroneous. *id*

7. A writ issued since the admission of Arkansas into the Union, is void, if it do not run in the name of the State. *Estill* vs. *Bailey*, 131

8. A writ which bears date Sept. 8, 1837, and is returnable to the *next* September term, is bad, and a judgment by default rendered upon it at September term, 1837, is erroneous. *Murphy* vs. *Williams*, 376

9. There is no provision of law by which a writ can be extended beyond the second term from its date. *id*

10. The service by a coroner of a writ directed to the sheriff is not ground for dismissing the suit—though it is matter which will excuse the defendant from answering. *Hughes* vs. *Martin*, 386

11. A writ directed to an officer or person prohibited by law from executing it, may be abated; and perhaps it might be set aside on motion, if the fact appear on the face of the proceedings. *id*

12. But a writ regularly and legally issued, and directed to the proper officer, cannot be avoided, or made void, by matter subsequent, or by having a return endorsed on it by an officer or person not authorized by law to serve it. *id*

13. Such an endorsement is a mere nullity, and imposes no obligation on the defendant to appear, nor does it subject him to any legal consequences as for a default. *id*

14. Where a writ is directed to the sheriff and served by the coroner, it is not legal ground to dismiss the suit on motion.—*Hughes* vs. *Martin*, 455

See MANDAMUS; QUO WARRANTO; SUMMONS.

WRIT OF ERROR.

2. A writ of error not directed to any particular clerk, cannot be amended. *Ellis* vs. *Brown*, 82

2. Under the statute of 1836, "to regulate the practice in the Supreme Court," it is necessary for the clerk of the Circuit Court to whom a writ of error is directed, either to endorse upon the writ of error, or attach to it, his return, signed as clerk, and sealed with his seal of office. *State* vs. *Simmons*, 265

3. A failure to make return, is a contempt of this court, and the clerk is not excused because he is ignorant of the law, nor although he states in his answer, that no contempt was intended. *id*

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